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A TREATISE

ON THE LAW OF

CARRIERS

BY THE

EDITORIAL STAFF OF THE MICHIE COMPANY

UNDER THE SUPERVISION OF

THOMAS JOHNSON MICHIE III

VOLUME I

THE MICHIE COMPANY, LAW PUBLISHERS
CHARLOTTESVILLE, VA.
1915

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Table of Contents

VOLUME I

PART I
CARRIERS GENERALLY

CHAPTER I.

WHO ARE CARRIERS.

I. Common Carriers Defined, § 1.
II. Common Carriers and Private Carriers Distinguished, § 2.
III. Persons and Corporations Who Are Common Carriers, §§ 3-18.
A. Railroad Companies, § 3.
B. Owners of Spur Lines or Switches, § 4.
C. Sleeping Car Companies, § 5.
D. Street Railways, § 6.
E. Express Companies, § 7.
F. Transportation and Forwarding Companies, § 8.
G. Proprietors of Stage Coaches, § 9.
H. Proprietors of Omnibuses and Baggage Wagons, § 10.
I. Draymen and Truckmen, § 11.
J. Telegraph and Messenger Companies, § 12.
K. Transfer and Storage Companies, § 13.
L. Livery Stable Keepers, § 14.
M. Mail Contractors, § 15.
N. Owners of Ships Carrying Goods for Hire, § 16.
O. Ferrymen, § 17.
P. Boats Engaged in Towing, § 18.

CHAPTER II.

CONTROL AND REGULATION.

I. Power to Control and Regulate in General, §§ 19-24.
A. Carriers in General, § 19.
B. Railroad Companies, § 20.
C. Express Companies, § 21.
D. Delegation of Power, §§ 22-24.
a. In General, § 22.
b. To Municipal Corporations, § 23.
c. To Commissions, § 24.
II. Companies, Persons, or Instrumentalities Affected by Regulations, §§ 25-28.
A. In General, § 25.

667611

B. Railroad Companies, § 26.
C. Street Railroad Companies, § 27.
D. Express Companies, § 28.
III. Licenses and Taxes, § 29.
IV. Reports and Statements, § 30.
V. Conduct of Business in General, §§ 31-34.
A. Common Carriers in General, § 31.
B. Railroad Companies, § 32.
C. Business of Transmitting Money to Foreign Countries, § 33.
D. Hackman and Draymen, § 34.
VI. Charges, §§ 35-95.
A. In General, §§ 35-84.
a. Power to Regulate, §§ 35-79.
(1) In General, § 35.
(2) Delegation of Power, §§ 36-37.
(a) To a Commission, § 36.
(b) To a Municipal Corporation, § 37.
(3) Classification of Railroads for Purposes of Regulations, §§ 38-39.
(a) Right to Classify, § 38.
(b) Mode of Classification, § 39.
(4) Limitation of Power, §§ 40-72.
(a) Reasonableness of Regulations, §§ 40-67.
aa. Regulations Must Be Reasonable, § 40.
bb. Mode of Determining Reasonableness, §§ 41-67.
(aa) That Carrier Has Performed Services for Rate Fixed Not Sole Criterion, § 41.
(bb) Carrier Entitled to Fair Return on Investment, §§ 42-49.
aaa. In General, § 42.
bbb. Mode of Determining Value of Property or Investment, §§ 43-49.
(aaa) In General, § 43.
(bbb) Fictitious Capitalization or Excessive Bonded Debt, § 44.
(ccc) Sworn Return of Value of Property Made for Purposes of Taxation, § 45.
(ddd) Value of Franchise, § 46.
(eee) Consolidated Corporation—Value of Assets of Constituent Corporations, § 47.
(fff) Part of Railroad within State to Be Regarded in Its Relation to Part without State, § 48.
(ggg) Road Purchased at Foreclosure Sale and Reorganized, § 49.
(cc) Carrier Entitled to Earn Interest upon a Valid Bonded Debt, § 50.
(dd) Ascertaining Cost of Doing Business or of Operating Road, § 51.
(ee) Consideration of Net Earnings in Determining Reasonableness of Rates Prescribed, §§ 52-54.
aaa. Net Earnings Must Be Sufficient to Pay Fair Return on Investment, § 52.
bbb. Mode of Computing Net Earnings and What They Include, § 53
ccc. Earnings of Entire Road to Be Regarded, § 54.
(ff) Interstate Business to Be Disregarded, § 55.
(gg) Economic Factors and Natural Advantages of Localities May Be Considered, § 56.
(hh) Equality of Rates for Like Service, § 57.
(ii) Adoption of Rates Given by Carrier to Certain Shippers, § 58.
(jj) Accessibility of a Place to High Seas as Affecting Rates, § 59.
(kk) Betterments and Replacements Should Be Considered, § 60.

(ll) Passenger Traffic Considered as Separate and Independent from Freight Traffic, § 61.
(mm) Revenue That Has Been Derived from Rate under Consideration, § 62.
(nn) Effect of Several Sovereignties Being Interested, § 63.
(oo) Apportioning Value of Property and Expenses, §§ 64-65.
aaa. Necessity for Apportionment, § 64.
bbb. Method of Apportionment, § 65.
(pp) Line of Railroad Operated in Connection with Other Lines, § 66.
(qq) Mode of Arriving at Effect of Statutes Reducing Rates, § 67.
(b) Due Process of Law, § 68.
(c) Equal Protection of Laws, § 69.
(d) Taking Private Property without Just Compensation, § 70.
(e) Discrimination against Carrier in Favor of Certain Individuals, § 71.
(f) Limitations upon Power of a Municipality to Reduce Street Railroad Fares, § 72.
(5) Exemption from Regulation by Charter or Statute, §§ 73-78.
(a) In General, § 73.
(b) Necessity for Positive and Clear Words of Exemption, §§ 74-75.
aa. Doctrine Stated, § 74.
bb. Doctrine Illustrated, § 75.
(c) Succession to Rights of Company Entitled to Exemption, §§ 76-78.
aa. Purchase, § 76.
bb. Lease, § 77.
cc. Consolidation, § 78.
(6) Loss of Power by Abandonment or Nonuser, § 79.
b. Scope and Effect of Regulations, §§ 80-84.
(1) To Whom or to What Business or Route Regulations Are Applicable, § 80.
(2) Obligations Imposed on Carriers, § 81.
(3) Measure of Compensation Allowed, § 82.
(4) Regulations Will Not Be Construed to Be Retroactive, § 83.
(5) When a Statute Will Be Construed as Impliedly Repealing a Prior Statute, § 84.
B. Posting Schedules at Stations, § 85.
C. Local and Through Rates, § 86.
D. Long and Short Hauls, § 87.
E. Joint Tariff between Two or More Roads, § 88.
F. Transfers to Connecting Lines of Same Company, § 89.
G. Conditions in Grant of Franchise and Agreements with Municipalities, §§ 90-95.
a. Authority to Impose Conditions or to Make Agreements, § 90.
b. Change of Rates of Fare Fixed by Franchise or Agreement, § 91.
c. Effect of Acceptance by Carrier of Location Granted by Municipality, § 92.
d. Conditions and Agreements Contrued, § 93.
e. Waiver of Right to Charge More than Amount Stipulated in Franchise, § 94.
f. Acquisition by Sale or Consolidation of a Railway Company Having a Contract with a Municipality, § 95.
VII. Preferences and Discriminations, §§ 96-108.
A. The Common-Law Doctrine, § 96.
B. Standard Measure of Uniformity in Rates, § 97.
C. Power to Prohibit Preferences and Discriminations, § 98.
D. Power of Legislature to Permit Discrimination, § 99.
E. Construction of Constitutional and Statutory Enactments and Commission Orders Forbidding Preferences or Discriminations, § 100.
F. Who Are Common Carriers within the Rule Prohibiting Discrimination, § 101.
G. What Constitutes an Unlawful Preference or Discrimination, § 102.
H. What Circumstances Will Justify Discrimination, §§ 103-108.

a. Business of Carrier Unusually or Unexpectedly Heavy, § 103.
b. Difference in Conditions under Which Shipment Is Made, § 104.
c. Through Rates and Local Rates, § 105.
d. Competition with Other Carriers, § 106.
e. Unusual Traffic Conditions Attending upon a General Coal Strike, § 107.
f. Cost of Mining Coal to Company in Whose Favor Discrimination Is Made, § 108.
VIII. Places of Stoppage, § 109.
IX. Receipt and Transportation of Freight and Passengers, § 110.
X. Exclusive Privileges, §§ 111-114.
A. To Express Companies, § 111.
B. To Corporations or Individuals Engaged in Transporting Passengers and Baggage to and from Railroad Depots, § 112.
C. To Ships Using a Wharf of Dock Constructed by a Railroad Company, § 113.
D. To the Use of a Switch Track, § 114.
XI. Connections with and Facilities to Other Carriers, §§ 115-129.
A. In General, § 115.
B. Joint Running Arrangements, § 116.
C. Connection between Roads or Trains, §§ 117-118.
a. Power to Require, § 117.
b. Character of Requirements, § 118.
D. Use of Terminals, § 119.
E. Reception, Transportation and Delivery of Cars, Passengers and Freight, §§ 120-123.
a. Rule at Common Law, § 120.
b. Power to Require, § 121.
c. Construction of Requirements, § 122.
d. Excuses for Refusal or Neglect to Perform Duty, § 123.
F. Moving or Switching Cars from a Connecting Line, § 124.
G. Facilities and Accommodations to be Furnished by Railroad Companies to Express Companies, § 125.
H. Discrimination in Favor of One of Several Connecting Carriers, §§ 126-128.
a. Duty to Give Like Through Rates to All Connecting Carriers, § 126.
b. Discrimination as to Interchange of Business, § 127.
c. Discrimination as to Prepayment of Freight Charges, § 128.
I. Transfers between Street Railroad Companies, § 129.
XII. Use of Carrier's Premises and of Street or Premises Adjacent Thereto, §§ 130-132.
A. Exclusion of Persons in General, § 130.
B. Regulations for Conduct of Persons, § 131.
C. Rights of and Restrictions upon Individuals or Corporations Engaged in Transporting Passengers or Baggage, § 132.
XIII. Free Transportation to Police Officers, § 133.
XIV. Combinations of Carriers, § 134.
XV. Proceedings to Enforce or to Prevent Enforcement of Regulations, §§ 135-173.
A. Right of State to Insist on Compliance with Regulations, § 135.
B. Judicial Supervision and Remedies in General, §§ 136-159.
a. Scope of Judicial Supervision, §§ 136-137.
(1) In General, § 136.
(2) As to Rates, § 137.
b. Right to and Mode of Obtaining Relief, §§ 138-141.
(1) In General, § 138.
(2) Relief against Unreasonable Rates, §§ 139-141.
(a) Relief to Carrier, §§ 139-140.
aa. Rates Fixed by Legislature, § 139.
bb. Rates Fixed by Commission, § 140.

(b) Relief to Public, § 141.
c. Scope of Inquiry, § 142.
d. What Commission Orders Will Be Enforced, § 143.
e. Revival of Causes of Action, § 144.
f. Procedure and Evidence, §§ 145-159.
(1) Procedure in General, § 145.
(2) Jurisdiction, § 146.
(3) Parties, §§ 147-148.
(a) By Whom Suit May Be Brought, § 147.
(b) Who Are Proper Parties, § 148.
(4) Intervention, § 149.
(5) Pleading, §§ 150-152.
(a) Petition, § 150.
(b) Demurrer, § 151.
(c) When Pleadings Make the Taking of Testimony Unnecessary, § 152.
(6) Evidence, § 153-157.
(a) Presumptions and Burden of Proof, §§ 153-156.
aa. In General, § 153.
bb. As to Rates, §§ 154-155.
(aa) Rule Stated, § 154.
(bb) How Presumption May Be Overcome, § 155.
cc. In Proceedings against a Carrier for Contempt, § 156.
(b) Admissibility, § 157.
(7) Judgment, § 158.
(8) Procedure upon Review of Orders or Decisions of a Commisssion, § 159.
C. Injunction, §§ 160-173.
a. When and against Whom Injunction Will Lie, §§ 160-166.
(1) Injunction against Action by a State Commission, § 160.
(2) Injunction to Restrain Wrongful and Discriminatory Acts by a Carrier, § 161.
(3) Injunction to Restrain a Carrier from Charging Unlawful Rates, § 162.
(4) Injunction to Compel Transportation at Rate Fixed by Law, § 163.
(5) Injunction to Compel Carrier to Furnish Impartial Service, § 164.
(6) Injunction to Compel Carrier to Stand Cars in Front of a Shipper's Property, § 165.
(7) Injunction to Restrain Persons from Soliciting Business in or Near a Railroad Station, § 166.
b. Procedure and Evidence, §§ 167-173.
(1) Jurisdiction, § 167.
(2) Parties, § 168.
(3) Pleading—Petition, Complaint, or Information, § 169.
(4) Evidence—Presumptions and Burden of Proof, § 170.
(5) Reference to a Master, § 171.
(6) Laches, § 172.
(7) Decree, § 173.
XVI. Damages for Violations of Regulations, §§ 174-180.
A. Power of Legislature, § 174.
B. When an Action Will Lie, §§ 175-177.
a. In General, § 175.
b. Failure to Stop at Station, § 176.
c. Overcharge or Discrimination, § 177.
C. Measure of Damages, § 178.
D. Limitation of Actions, § 179.
E. Petition or Complaint, § 180.
XVII. Penalties for Violations of Regulations, §§ 181-275.

A. In General, § 181.
B. Overcharge and Discrimination, §§ 182-196.
a. Power to Impose Penalty, § 182.
b. Construction of Statutes Imposing Penalties, § 183.
c. Repeal of Statutes Imposing Penalties, § 184.
d. Conditions Precedent to Right of Action for Penalty, § 185.
e. Who May Recover Penalty, § 186.
f. For What Acts Penalty Is Imposed, § 187.
g. Unit of Measurement in Determining What Is an Overcharge, § 188.
h. Number of Penalties Recoverable, § 189.
i. Amount of Penalty, § 190.
j. What Questions May Be Raised in Action for Penalty, § 191.
k. Defenses, §§ 192-195.
(1) Rates Charged No Higher than Those Fixed by Railroad Commission, § 192.
(2) Mistake, § 193.
(3) Facts Not Constituting a Defense, § 194.
(4) Estoppel to Set Up Defense, § 195.
l. Two Penalties—Effect of Enforcement of One, § 196.
C. Refusal to Transport Passengers, § 197.
D. Refusal to Sell Mileage Tickets at Reduced Rates, § 198.
E. Refusal to Furnish Passenger Tickets Granting Stop-Over Privileges, § 199.
F. Refusal to Give a Transfer, § 200.
G. Refusal to Sell Passenger Tickets of a Connecting Carrier, § 201.
H. Failure to Affix Check to Baggage and to Deliver Duplicate to Passenger, § 202.
I. Refusal to Redeem Unused Passenger Tickets, § 203.
J. Failure to Post Schedules of Rates, § 204.
K. Failure or Refusal to Receive or Transport Freight, §§ 205-210.
a. Statute Imposing Penalty Does Not Limit Carrier's Common-Law Liability, § 205.
b. Who May Recover Penalty, § 206.
c. When Penalty Will Be Imposed, § 207.
d. Number of Penalties Recoverable, § 208.
e. Tender and Refusal, § 209.
f. Defenses, § 210.
L. Refusal to Give Shipper a Proper Bill of Lading, § 211.
M. Delay in Shipment or Transportation of Freight, §§ 212-220.
a. Power to Impose Penalty, § 212.
b. Who May Recover Penalty, § 213.
c. In What Cases Penalty Is Imposed, § 214.
d. Time within Which Freight Must Be Transported, § 215.
e. When Transportation Terminates, § 216.
f. Defenses, § 217-220.
(1) Failure to Prepay Charges, § 217.
(2) Notice to Shippers of Conditions Causing Delay, § 218.
(3) Sunday Laws, § 219.
(4) Estoppel to Set Up Defense, § 220.
N. Failure to Give Notice of Arrival of Freight to Consignee, § 221.
O. Refusal to Deliver Freight or Express Matter to Consignee, §§ 222-226.
a. Constitutionality of Statute Imposing Penalty, § 222.
b. Statute Imposing Penalty Not Merely in Aid of Common Law, § 223.
c. Where Delivery Must Be Made, § 224.
d. Conditions Precedent to Recovery of Penalty, § 225.
e. Number of Penalties Recoverable, § 226.
P. Failure of Consignee to Unload Cars within a Prescribed Time, § 227.

Q. Failure to Stop at Station, § 228.
R. Failure to Furnish or Delay in Furnishing Cars, § 229-234.
a. Constitutionality of Statutes Imposing Penalties, § 229.
b. Statutes Imposing Penalties Strictly Construed, § 230.
c. Powers and Duties of Railroad Commissions, § 231.
d. Application for Cars, § 232.
e. Places at Which Cars Must Be Furnished, § 233.
f. Defenses, § 234.
S. Failure to Pay or Adjust Claims, §§ 235-247.
a. Power to Impose Penalty, § 235.
b. Existence of Statutory Conditions Essential to Imposition of Penalty, § 236.
c. Who May Recover Penalty, § 237.
d. Where and When Cause of Action Arises, § 238.
e. Necessity of Filing Claim, and with Whom It May Be Filed, § 239.
f. Sufficiency of Claim, § 240.
g. Place of Payment of Claim, § 241.
h. Who Is Liable for Penalty, § 242.
i. Immaterial in What Manner Loss Was Caused, § 243.
j. Amount of Penalty, § 244.
k. What One Claiming Penalty Must Show, § 245.
l. Defenses, §§ 246-247.
(1) Amount Recoverable by Claimant as Affecting Right to Penalty, § 246.
(2) Effect of Voluntary Payment of Claim after Time Limited, § 247.
T. Failure to Make Annual Reports, § 248.
U. Procedure and Evidence, §§ 249-275.
a. Venue, § 249.
b. Time within Which Action Must Be Brought, § 250.
c. Parties—By Whom Action May Be Brought, § 251.
d. Pleading, §§ 252-263.
(1) Declaration, Petition, or Complaint, §§ 252-259.
(a) In General, § 252.
(b) Necessary Allegations, §§ 253-258.
aa. In Actions for Penalty for Overcharge, §§ 253-254.
(aa) Overcharge in Passenger Rates, § 253.
(bb) Overcharge in Freight Rates, § 254.
bb. In actions for Penalty for Unjust Discrimination between Shippers, § 255.
cc. In Actions for Penalty for Refusal to Receive or Transport Freight, § 256.
dd. In Actions for Penalty for Delay in Transportation of Freight, § 257.
ee. In Actions for Penalty for Failure to Furnish Double Decked Cars for Sheep, § 258.
(c) Unnecessary Allegations May Be Rejected as Surplusage, § 259.
(2) Answer—Sufficiency, §§ 260-263.
(a) In Actions for Penalty for Overcharge, § 260.
(b) In Actions for Penalty for Unlawful Discrimination in Rates, § 261.
(c) In Actions for Penalty for Delay in Transportation of Freight, § 262.
(d) In Actions for Penalty for Failure to Furnish Cars, § 163.
e. Evidence, § 264-272.
(1) Presumptions and Burden of Proof, §§ 264-267.
(a) In Actions for Penalty for Overcharge, § 264.
(b) In Actions for Penalty for Discrimination in Rates, § 265.
(c) In Actions for Penalty for Failure to Receive and Transport Freight, § 266.
(d) In Actions for Penalty for Delay in Transportation of Freight, § 267.

(2) Admissibility, § 268-271.
(a) In Actions for Penalty for Overcharge, § 268.
(b) In Actions for Penalty for Discrimination in Rates, § 269.
(c) In Actions for Penalty for Delay in Transportation of Freight, § 270.
(d) In Actions for Penalty for Failure to Furnish Cars, § 271.
(3) Weight and Sufficiency, § 272.
f. Questions of Law and Fact, §§ 273-274.
(1) In Actions for Penalty for Discrimination in Freight Rates, § 273.
(2) In Actions for Penalty for Delay in Transportation of Freight, § 274.
g. Instructions, § 275.
XVIII. Offenses by Carriers or Their Agents, §§ 276-292.
A. In General, § 276.
B. Overcharge or Discrimination, § 277.
C. Carrying More than a Prescribed Number of Passengers, § 278.
D. Failure to Deliver Express Matter to Consignee, § 279.
E. Negligence Causing Death or Injury, §§ 280-282.
a. In General, § 280.
b. Who May Be Prosecuted, § 281.
c. Defenses, § 282.
F. Indictment, §§ 283-286.
a. Conditions Precedent to Indictment, § 283.
b. Necessary Allegations, § 284.
c. Effect of Unnecessary Allegations, § 285.
d. Offenses Covered by Indictment, § 286.
G. Trial, §§ 287-292.
a. Jurisdiction, § 287.
b. Evidence, §§ 288-290.
(1) Presumptions and Burden of Proof, § 288.
(2) Admissibility, § 289.
(3) Weight and Sufficiency, § 290.
c. Questions of Law and Fact, § 291.
d. Charge, § 292.
XIX. Offenses by Persons Dealing with Carriers or Using Their Conveyances, §§ 293-298.
A. In General, § 293.
B. Sale of Passenger Tickets by Brokers, § 294.
C. Acceptance and Use of a Pass, § 295.
D. Stealing or Attempting to Steal a Ride on Railroad Trains, § 296.
E. Obstructing Train and Endangering Safety of Passengers, § 297.
F. Indictment, Accusation, or Complaint, § 298.

CHAPTER III.

Rules and Regulations of Carriers.

I. Scope of Treatment, § 299.
II. Carriers of Goods, §§ 300-306.
A. General Statement, § 300.
B. Particular Rules and Regulations, § 301.
C. Changing or Modifying, § 302.
D. Operation and Effect as to Carrier, § 303.
E. Duty of Agents to Enforce, § 304.
F. Waiver of Regulations, § 305.
G. Proof of Regulations, § 306.

III. Carriers of Passengers, §§ 307-332.
A. Right to Make and Enforce Rules and Regulations, §§ 307-318.
a. In General, §§ 307-311.
(1) General Rule, § 307.
(2) Soliciting Business in Cars, § 308.
(3) Use of Station Premises by Local Carriers and Others, § 309.
(4) Tickets and Fares, § 310.
(5) Enforcement of Rules and Regulations, § 311.
b. Must Be Reasonable, § 312.
c. Must Not Be Contrary to Law, § 313.
d. Must Not Discriminate, § 314.
e. Their Reasonableness as Question of Law, § 315.
f. Their Reasonableness as Mixed Question of Law and Fact, § 316.
g. Their Reasonableness Question for Jury, § 317.
h. Their Sufficiency Is Question for Jury, § 318.
B. Notice of Rules and Regulations, §§ 319-323.
a. Passenger's Contract Rights Not Affected by Rules of Which He Was Not Chargeable with Notice, § 319.
b. Duty of Passenger to Inform Himself of Existence of Rules, § 320.
c. Sufficiency of Publication or Notice, § 321.
d. Bound by Rules of Which He Was in Ignorance, § 322.
e. Rules for Conduct of Carrier's Employees, § 323.
C. Enforcement of Rules and Regulations, §§ 324-326.
a. Enforcement Must Be Reasonable, § 324.
b. Ejection of Passengers, § 325.
c. Enforcement by Punishing Prior Breach, § 326.
D. Waiver of Rules and Regulations, §§ 327-328.
a. Habitual Failure to Enforce, § 327.
b. Passenger's Duty to Conform to Rules as Affected by Lack of Fidelity in Enforcing, § 328.
E. Contributory Negligence of Passenger in Note Conforming to Rules and Regulations, § 329.
F. Carrier Bound by Its Own Rules, §§ 330-332.
a. In General, § 330.
b. Rules Not Required by Law, § 331.
c. Rules Requiring More of Carrier than Law, § 332.

PART II

CARRIERS OF GOODS

CHAPTER IV.

Duty to Receive and Carry.

I. General Statement and Explanation of Rule, § 333.
II. Duty to Furnish Shipping Facilities and Means of Transportation, §§ 334-341.
A. In General, § 334.
B. Notice to Carrier, §§ 335-338.
a. Time of Notice, § 335.

b. Requisites and Sufficiency of Demand, § 336.
c. To Whom Given, § 337.
d. Specifying Condition and Danger of Goods, § 338.
C. Place of Furnishing Cars, § 339.
D. Goods Ready for Shipment, § 340.
E. Adequacy of Facilities, § 341.
III. Discrimination, §§ 342-355.
A. Right to Discriminate Generally, § 342.
B. Discrimination in Facilities and Cars, §§ 343-348.
a. In General, § 343.
b. Discrimination in Favor of One of Several Connecting Carriers, § 344.
c. Preference in Delivery and Distribution of Cars, § 345.
d. With Respect to Use of Tracks, §§ 346-347.
(1) In General, § 346.
(2) With Respect to Spur Tracks, Switches and Belt Lines, § 347.
e. Discrimination in Switch and Trackage Charges, § 348.
C. Preference to Shipper in Order of Forwarding Goods, §§ 349-350.
a. In General, § 349.
b. Booking Freight, § 350.
D. Remedies for Discrimination, §§ 351-355.
a. Form of Action, §§ 351-353.
(1) Injunction and Mandamus, § 351.
(2) Quo Warranto, § 352.
(3) Action at Law, § 353.
b. Evidence, § 354.
c. Damages, § 355.
IV. Tender and Refusal, §§ 356-359.
A. In General, § 356.
B. Authority to Tender, § 357.
C. Authority to Receive Freight and Make Contracts, § 358.
D. Place and Time of Offer for Transportation, § 359.
V. Payment or Tender of Charges, § 360.
VI. Time and Order of Shipment, § 361.
VII. Character of Goods Tendered for Shipment, § 362.
VIII. Condition and Prepartion of Goods Tendered, § 363.
IX. Private Owned Trains or Cars, § 364.
X. Shipment C. O. D., § 365.
XI. Exceptional Causes Justifying Failure or Refusal, §§ 366-374.
A. General Statement, § 366.
B. Absence of Requisite Conveniences or Capacity, § 367.
C. Unusual Press of Business, §§ 368-371.
a. In General, § 368.
b. Discrimination or Granting Privileges, § 369.
c. Duty to Advise Shipper of Delay, § 370.
d. Carriers "Embargo," § 371.
D. Causes beyond Carrier's Control, § 372.
E. Failure of Shipper to Insure, § 373.
F. Customs and Habits of Dealing, § 374.
XII. Right to Discontinue Service to Shipper, § 375.
XIII. Destination of Goods as Affecting Duty, § 376.
XIV. Duty as to Express Companies, § 377.
XV. Enforcement of Duty, §§ 378-379.
A. By Injunction, § 378.
B. By Mandamus, § 379.
XVI. Action for Refusal, §§ 380-382.

A. Right of Action, § 380.
B. Procedure, § 381.
C. Damages, § 382.
XVII. Penalties for Wrongful Refusal, § 383.

CHAPTER V.

When Liability Commences.

I. In General, § 384.
II. Necessity for and Effect of Delivery and Acceptance, § 385.
III. What Constitutes Delivery and Acceptance, §§ 386-407.
A. In General, § 386.
B. Ordinary Course of Business as Common Carrier, § 387.
C. Place and Time of Delivery, § 388.
D. Notice of Deposit and Acceptance, §§ 389-392.
a. In General, § 389.
b. Actual and Contructive Notice and Acceptance, §§ 390-392.
(1) In General, § 390.
(2) Constructive Notice and Acceptance—Custom or Agreement, § 391.
(3) Goods Loaded on Cars, § 392.
E. Authority of Agent to Receive Goods, §§ 393-398.
a. In General, § 393.
b. Officers and Agents in General, § 394.
c. Authority of Third Persons—Special Agents, §§ 395-397.
(1) In General, § 395.
(2) Delivery to Lighterman to Be Carried to Ship, § 396.
(3) Delivery of Cotton to Compress Company, § 397.
d. Proof of Authority, § 398.
F. Complete Delivery for Immediate Shipment, §§ 399-406.
a. In General, § 399.
b. Exclusive Possession and Control, § 400.
c. Delivery for Immediate Shipment or Storage, §§ 401-406.
(1) In General, § 401.
(2) Something to Be Done Prior to Transportation, §§ 402-406.
(a) In General, § 402.
(b) Absence of Directions as to Shipment, § 403.
(c) Payment of Charges, § 404.
(d) Deposit Subject to Shipper's Order, § 405.
(e) Necessity for Loading on Cars, § 406.
G. Necessity for and Effect of Bill of Lading, § 407.
IV. Evidence of Delivery, §§ 408-411.
A. Presumptions and Burden of Proof, § 408.
B. Admissibility of Evidence to Show Delivery, § 409.
C. Sufficiency of Evidence of Delivery, §§ 410-411.
a. In General, § 410.
b. Bill of Lading or Receipt as Evidence, § 411.
V. Question of Law or Fact, § 412.

CHAPTER VI.

Bills of Lading.

I. Definition and Nature Generally, § 413.
II. Form and Contents, §§ 414-424.
A. In General, § 414.
B. Writing, § 415.
C. Signature, § 416.
D. Name of Consignee, § 417.
E. Statement of Value of Goods, § 418.
F. Notations and Marginal Memoranda, § 419.
G. The Law, § 420.
H. Published Tariffs, § 421.
I. Expense Account of Carrier, § 422.
J. Recitals of Fact, § 423.
K. Special Conditions and Limitations, § 424.
III. Issuance and Acceptance, §§ 425-450.
A. Necessity for Issuance, § 425.
B. Authority to Issue, §§ 426-442.
a. Agents and Employees, §§ 426-428.
(1) Agents and Employees Who May Issue, §§ 426-427.
(a) Master of Vessel and Other Employees, § 426.
(b) Agents and Employees of Railroads, § 427.
(2) Proof or Estoppel to Deny Authority of Agent, § 428.
b. Receipt of Goods as Prerequisite to Issuance, §§ 429-442.
(1) Necessity, §§ 429-438.
(a) In General, § 429.
(b) Authority of Agents or Employees, § 430.
(c) As against Bona Fide Consignee or Transferee, §§ 431-437.
aa. Doctrine Prevailing in Most Jurisdictions, § 431.
bb. Doctrine in New York, Pennsylvania and Certain Other States, § 432.
cc. Conflict of Laws, § 433.
dd. Effect of Custom or Course of Business, § 434.
ee. Negligence of Carrier, § 435.
ff. Fraudulent Bills of Lading, § 436.
gg. Effect of State Statutes, § 437.
(d) Due Bills Promising to Issue a Bill of Lading, § 438.
(2) Subsequent Delivery to Carrier as Validating Bill, §§ 439-442.
(a) In General, § 439.
(b) Where Statute Prohibits Issuance before Receipt of Goods, § 440.
(3) Presumption as to Receipt of Goods, § 441.
(4) Proof of Nonreceipt of Goods, § 442.
C. Duty to Issue, § 443.
D. Issuance in Duplicate, § 444.
E. Acceptance and Assent to Provisions, §§ 445-450.
a. In General, § 445.
b. Assent to and Acceptance by Consignor, §§ 446-450.
(1) Effect of Acceptance, § 446.
(2) Presumptions of Absent from Acceptance, §§ 447-450.
(a) In General, § 447.
(b) Rebuttal of Presumption, §§ 448-450.
aa. Failure of Shipper to Sign Bill, § 448.
bb. Failure to Read or Examine Bill, §§ 449-450.
(aa) In General, § 449.
(bb) Bill Received after Goods Shipped, § 450.

IV. Validity, §§ 451-454.
A. Fraud or Mistake, § 451.
B. Forgery, § 452.
C. No Goods Delivered to Carrier, § 453.
D. Partial Invalidity, § 454.
V. Construction, Operation and Effect, §§ 455-513
A. General Rules of Construction, § 455.
B. Construction of Words and Phrases, § 456.
C. Notice of Contents, § 457.
D. Blanks and Unintelligible Characters, § 458.
E. Conditions on Back of Bill, § 459.
F. Usage and Custom, § 460.
G. Conflict of Laws, § 461.
H. Foreign Laws, § 462.
I. Fraudulent Bills of Lading, § 463.
J. Partial Invalidity, § 464.
K. When Bill of Lading Part of Contract, § 465.
L. Dual Character as Contract and as Receipt, §§ 466-479.
a. In General, § 466.
b. As Contract Generally, § 467.
c. As a Receipt in General, § 468.
d. Parol Evidence to Vary or Contradict Bill, §§ 469-479.
(1) As a Contract, §§ 469-470.
(a) Between the Parties, § 469.
(b) Between Consignor and Consignee, § 470.
(2) Merger of Oral Negotiations and Prior Verbal Agreements, § 471.
(3) To Explain Ambiguities and Technical Terms, § 472.
(4) Parol Evidence to Alter or Contradict Receipt Clauses of Bill, §§ 473-476.
(a) In General, § 473.
(b) Recital of Fact of Receipt and Quantity of Goods, § 474.
(c) Recital as to Quality or Condition of Goods, § 475.
(d) Recital as to Ownership of Goods, § 476.
(5) Recitals as to Rate and Receipt of Freight, § 477.
(6) Destination or Place of Delivery, § 478.
(7) Terminus of Road, § 479.
M. As Contract of Carriage, §§ 480-481.
a. As Imposing Liability of Common Carrier, § 480.
b. As Contracts to Carry Specified Thing, § 481.
N. As Evidence of Fact and Time of Receipt and Acceptance of Shipment, §§ 482-483.
A. As Evidence of Fact of Receipt and Acceptance of Shipment, § 482.
b. Time of Receipt of Shipment, § 483.
O. Destination or Place of Delivery, § 484.
P. Person to Whom Delivery Authorized, §§ 485-487.
a. In General, § 485.
b. Open and Closed Shipments, § 486.
c. Direction to Notify a Named Person, § 487.
Q. As Warranty or Evidence of Quantity, Quality or Condition of Goods, §§ 488-494.
a. Effect as Warranty of Quantity, etc., §§ 488-491.
(1) In General, § 488.
(2) Recital That Contents Unknown, § 489.
(3) Recital That Goods in "Good Order," etc., § 490.
(4) Recital That "Contents Unknown and in Apparent Good Order," § 491.
b. As Evidence of Quantity, Quality or Condition of Goods, §§ 492-494.

(1) As Evidence of Quality or Condition of Goods, § 492.
(2) As Evidence of Quantity or Weight of Goods, §§ 493-494.
(a) In General, § 493.
(b) Bill Made Exclusive Evidence of Quantity by Agreement, § 494.
R. Effect of Understanding Quantity, § 495.
S. As Evidence or Warranty of Title or Ownership, §§ 496-498.
a. In General, § 496.
b. As Warranty of Title of Shipper, § 497.
c. Shipment Fraudulently Procured by Person Not Owner of Goods, § 498.
T. Effect as Vesting Property in Consignee, §§ 499-510.
a. When Property Vests in Consignee, §§ 499-503.
(1) In General, § 499.
(2) Stoppage in Transitu, § 500.
(3) Consignment to Enemy or Neutral, § 501.
(4) Consignee Making Advances on Faith of Bill, § 502.
(5) Removal of Goods by Unauthorized Person, § 503.
b. When Property Does Not Vest in Consignee, §§ 504-510.
(1) In General, § 504.
(2) Bill Not Delivered to Consignee, § 505.
(3) Consignment to Be Sold on Commission, § 506.
(4) Goods Billed to Shipper's Order, §§ 507-508.
(a) In General, § 507.
(b) Bill with Draft Attached to Be Delivered to Purchaser of Goods, § 508.
(5) Bill to Another than Purchaser, § 509.
(6) Bill to A. for Use of B., § 510.
U. Stipulations as to Value, § 511.
V. Freight and Demurrage, § 512.
W. As Evidence of Carrier's Liability as Warehouseman, § 513.
VI. Transfer, §§ 514-589.
A. Negotiability, §§ 514-518.
a. General Rule, § 514.
b. Distinguished from Commercial Paper, § 515.
c. Effect of Statutes Making Bills of Lading Negotiable, § 516.
d. Bills Marked "Not Negotiable," § 517.
e. When Carrier Incurs Liability of Warehousemen, § 518.
B. Transferability or Assignability, § 519.
C. Mode of Transfer, §§ 520-536.
a. In General, § 520.
b. Delivery of Bill, §§ 521-531.
(1) In General, § 521.
(2) Intention to Pass Title, § 522.
(3) Necessity for Acceptance of Possession, § 523.
(4) Possession of Bill of Lading as Evidence of Title in Holder, §§ 524-525.
(a) In General, § 524.
(b) Rebuttal of Presumption, § 525.
(5) Exception in Favor of Stoppage in Transitu, § 526.
(6) Right of Disposal Retained by Consignor, §§ 527-528.
aa. In General, § 527.
bb. Consignor Indebted to Consignee, § 528.
(7) Necessity for Indorsement to Enable Holder to Sue, § 529.
(8) Necessity for Shipper's Order, § 530.
(9) Bill of Lading Signed in Blank, § 531.
c. Transfer by Indorsement and Delivery, §§ 532-534.
(1) In General, § 532.
(2) Necessity and Sufficiency of Indorsement or Assignment, § 533.

(3) Necessity for Delivery of Bill, § 534.
d. Sale or Payment of Draft with Bill of Lading Attached, § 535.
e. Attachment of Bill of Lading, § 536.
D. Persons Who Make Transfer, §§ 537-539.
a. In General, § 537.
b. Consignee, § 538.
c. Consignor or Agent, § 539.
E. Consideration, § 540.
F. Effect of Transfer, §§ 541-576.
a. In General, § 541.
b. As Transfer of Contract between Consignor and Consignee, § 542.
c. Operation as Constructive Delivery of Goods, § 543.
d. Rights and Title of Holder Generally, §§ 544-576.
(1) In General, § 544.
(2) No Goods Delivered to Carrier, §§ 545-546.
(a) In General, § 545.
(b) Title to Goods Not Shipped or Included in Bill, § 546.
(3) Goods Shipped Without Authority of Owner, § 547.
(4) Assignment Made After Arrival of Goods, § 548.
(5) Bona Fide Holders, §§ 549-552.
(a) General Rule, § 549.
(b) Effect of Statutes Making Bills of Lading Negotiable, § 550.
(c) Estoppel of Carrier to Deny Conditions and Representations in Bill, § 551.
(d) Duplicate or Triplicate Bill, § 552.
(6) Holder with Knowledge of Defects in Transferrer's Title, § 553.
(7) Holder of Lost or Stolen Bill of Lading, § 554.
(8) Holder of Forged Bill of Lading, § 555.
(9) Rights and Liabilities as to Carriers, §§ 556-565.
(a) As to Delivery of Goods, §§ 556-562.
aa. Duty to Deliver to Transferee, § 556.
bb. Production and Cancellation of Bill of Lading, § 557.
cc. Payment of Freight and Charges as Condition Precedent, § 558.
dd. Demand of Delivery, § 559.
ee. Liability for Misdelivery or Delay, § 560.
ff. Waiver or Rights to Indorsement of Bill, § 561.
gg. Duplicate and Triplicate Bills, § 562.
(b) Effect of Custom of Carrier, § 563.
(c) Explanation of Alteration in Bill, § 564.
(d) Liability for Freight and Demurrage, § 565.
(10) Rights and Liabilities as to Consignor, §§ 566-568.
(a) In General, § 566.
(b) As Defeating Stoppage in Transitu, § 567.
(c) Liability for Price of Goods, § 568.
(11) Rights and Liabilities as to Consignee, §§ 569-571.
(a) In General, § 569.
(b) Claim for Advances to Consignor, § 570.
(c) Liability to Consignee on Contract of Consignor, § 571.
(12) Rights and Liabilities as to Third Persons, §§ 572-576.
(a) Claims of Third Person against Transferrers, § 572.
(b) Against Vendor of Consignor, § 573.
(c) Against Subsequent Purchaser of Goods, § 574.
(d) Subsequent Liens, §§ 575-576.
aa. In General, § 575.
bb. Subsequent Attachments, § 576.
G. Pledge, Mortgage or Collateral Security, § 577.

H. Purchase or Discount of Draft with Bill of Lading Attached, §§ 578-587.
a. Recording Papers, § 578.
b. Rights and Title of Purchaser, §§ 579-584.
(1) As to Consignor and Consignee, §§ 579-582.
(a) In General, § 579.
(b) Notice That Payment to Drawer Unauthorized, § 580.
(c) Drawer Indebted to Drawee or Consignee, § 581.
(d) Right to Sue for Purchase Price or for Conversion of Goods, § 582.
(2) Rights against Carrier, § 583.
(3) Rights against Third Persons, § 584.
c. Liability of Purchaser for Shortage or Inferiority of Shipment, § 585.
d. Effect of Consignee's Accepting and Paying Draft, § 586.
e. Charging Unpaid Draft to Drawer's Account, § 587.
I. Deposit of Draft with Bill of Lading Attached for Collection, § 588.
J. Duplicate and Triplicate Bills, § 589.

VII. Effect As Binding Intermediate and Terminal Carrier, § 590.

VIII. Modification or Rescission, § 591.

IX. Surrender, Discharge or Release, § 592.

X. Actions, §§ 593-602.
A. Rights of Action and Defenses, § 593.
B. Parties, §§ 594-595.
a. Plaintiffs, § 594.
b. Defendants, § 595.
C. Pleading, §§ 596-597.
a. Bill, Petition, or Complaint, § 596.
b. Answer, § 597.
D. Production of Bill of Lading or Proof of Contents, § 598.
E. Proof of Execution of Bill, § 599.
F. Province of Court, § 600.
G. Instructions, § 601.
H. Directing Verdict, § 602.

CHAPTER VII.

Shipping Receipts.

I. Issuance, Form and Requisites, § 603.

II. Construction and Operation, §§ 604-617.
A. As Contract of Parties, §§ 604-607.
a. In General, § 604.
b. Effect of Acceptance, § 605.
c. Receipt Filled Out by Shipper, § 606.
d. Conditions on Back, § 607.
B. As Contract of Bailment or Mere Receipt for Goods, § 608.
C. As to Initial or Connecting Carrier, § 609.
D. As Agreement to Carry to Destination, § 610.
E. As to Rate of Freight, § 611.
F. Effect of Recitals as to Receipt, and Quantity of Goods, § 612.
G. Effect of Admission That Goods in "Good Order," § 613.
H. Reference to Bill of Lading to Be Thereafter Issued, § 614.
I. Effect Where Bill of Lading Subsequently Issued, § 615.
J. Receipt Accepted after Shipment Received, § 616.
K. Parol Evidence to Alter, Explain or Contradict, § 617.

CHAPTER VIII.

Special Contracts.

I. Contracts for Transportation of Goods, §§ 618-711.
A. Power to Contract, §§ 618-621.
a. Power to Contract as Private Carrier, § 618.
b. Power to Contract Jointly or Severally, § 619.
c. Power to Contract to Carry beyond Terminus, § 620.
d. Contracts with Connecting Carrier, § 621.
B. Authority to Make Contract, §§ 622-637.
a. Agents of Road, §§ 622-634.
(1) In General, § 622.
(2) Local or Station Agent, §§ 623-631.
(a) Business at His Own Station, §§ 623-624.
aa. In General, § 623.
bb. Presumption as to and Proof of Want of Authority, § 624.
(b) As to Station Other than His Own, § 625.
(c) Shipments to His Station from Another, § 626.
(d) Respecting Trains in Which Shipment to Be Made, § 627.
(e) Point Where Railroad Has No Office or Agent, § 628.
(f) Contract to Carry beyond Carrier's Own Line, § 629.
(g) Not to Deliver without Surrender of Bill of Lading, § 630.
(h) Notice of Special Damages, § 631.
(3) Traveling Freight Agent, 632.
(4) Live Stock Agent, § 633.
(5) Express Drivers, § 634.
b. Receiver of Road, § 635.
c. Power of Consignor to Bind Consignee, § 636.
d. Agent of Owner or Shipper, § 637.
C. Form, Requisites, and Validity, §§ 638-656.
a. In General, § 638.
b. Consideration, § 639.
c. Offer and Acceptance—What Constitutes Contract, § 640.
d. Mutuality and Meeting of Minds, § 641.
e. Writing—Validity of Verbal Contract, §§ 642-643.
(1) In General, § 642.
(2) Authority of Agent, § 643.
f. Failure or Inability of Shipper to Read Contract, § 644.
g. Signing, § 645.
h. Fraud, § 646.
i. Mistake, §§ 647-648.
(1) As to Rate, § 647.
(2) Misclassification of Goods, § 648.
j. Discrimination and Overcharge, § 649.
k. Necessity for Actual Receipt of Goods, § 650.
l. Effect of Partial Invalidity, § 651.
m. Conformity to Rates, Rules and Classification of State Corporation Commission, § 652.
n. Evidence as to Contract, § 653-656.
(1) Parol Evidence, § 653.
(2) Bill of Lading or Receipt, §§ 654-655.
(a) In General, § 654.
(b) Whole Document in Evidence, § 655.
(3) Freight Account or Bill, § 656.

D. Construction, Operation and Effect, §§ 657-689.
a. In General, § 657.
b. Rules of Construction, § 658-663.
(1) In General, § 658.
(2) Practical Construction Given by Parties, § 659.
(3) Separable or Entire Contract, § 660.
(4) Alternative Conditions, § 661.
(5) Contracts Partly Written and Partly Printed, § 662.
(6) Clerical Errors, § 663.
c. Laws Governing, § 664.
d. Course of Dealing, Usage and Custom, § 665.
e. Persons Bound, § 666.
f. Persons Entitled to Benefit, § 667.
g. When Liability Accrues, § 668.
h. Duties and Obligations of Carrier and Shipper, § 669-687.
(1) Obligation as Fixed by Law, § 669.
(2) Special Contract as Superseding Common-Law Liability, § 670.
(3) Effect of Acceptance of Rate Offered, § 671.
(4) Obligation of Carrier to Receive, Transport and Deliver, §§ 672-675.
(a) In General, § 672.
(b) Continuing Offer to Carry, § 673.
(c) Goods to Be Carried beyond Terminus of Carrier's Line, § 674.
(d) Transportation "at Owner's Risk," § 675.
(5) Obligation of Shipper to Furnish Freight, § 676.
(6) Point Where Goods to Be Received, § 677.
(7) Destination, § 678.
(8) Property Concerning Which Parties Negotiating, § 679.
(9) Quantity to Be Shipped or Carried, § 680.
(10) Option as to Mode of Shipment, § 681.
(11) Route, § 682.
(12) Stop-Over Privilege, § 683.
(13) Loading and Unloading, § 684.
(14) Time of Delivery to Carrier, § 685.
(15) Time to Be Consumed in Transportation, § 686.
(16) Agreements for Liquidated Damages, § 687.
i. Liability as Bailee, § 688.
j. Liability as Warehouseman, § 689.
E. Transfer or Assignment, § 690.
F. Performance or Breach, §§ 691-710.
a. What Constitutes a Breach, §§ 691-692.
(1) When Special Effort to Perform Required, § 691.
(2) Shipment of Bonded Goods on Unbonded Vessel, § 692.
b. Demand of Performance, § 693.
c. Tender of Property, § 694.
d. Excuses for Breach or Nonperformance, §§ 695-709.
(1) Act of God, § 695.
(2) "Perils of River," Navigation and Fire, § 696
(3) Mobs and Strikes, § 697.
(4) Military Occupation, § 698.
(5) Nonpayment of Freight, § 699.
(6) Merchandise Not Branded as Required by Statute, § 700.
(7) Nondelivery by Shipper, § 701.
(8) Change of Legal Rate, § 702.
(9) Particular Stipulations or Contracts, §§ 703-709.
(a) Time Contracts, § 703.
(b) Contracts to Carry by Particular Train or Vessel, § 704.

(c) Contract to Carry Perishables, § 705.
(d) Stipulation as to Destination at Which Carrier Has No Agency, § 706.
(e) Contract to Carry Beyond Terminus, § 707.
(f) Contract for Future Transportation, § 708.
(g) Contract to Carry Specific Quantity or Number, § 709.
e. Waiver of Breach, § 710.
G. Modification or Rescission, § 711.

II. Contracts for Cars or Other Means of Transportation, §§ 712-755.
A. Requisites and Validity, §§ 712-730.
a. Capacity to Contract, §§ 712-714.
(1) In General, § 712.
(2) Contract to Furnish Cars of Another Road, § 713.
(3) Contract to Furnish Cars on Line of Connecting Road, § 714
b. Authority of Agent, §§ 715-723.
(1) Necessity, § 715.
(2) Authority of Station Agent, §§ 716-720.
(a) In General, § 716.
(b) Proof of Authority, § 717.
(c) Time When Cars to Be Furnished, § 718.
(d) Station or Place Where Cars to Be Furnished, § 719.
(e) Verbal Contract, § 720.
(3) Traveling Agent, § 721.
(4) General Freight Agent, § 722.
(5) Conductor, § 723.
c. Certainty and Definiteness, § 724.
d. Consideration, § 725.
e. Date of Contract, § 726.
f. Mutuality, § 727.
g. Offer and Acceptance, § 728.
h. Writing, § 729.
i. Effect of Partial Invalidity, § 730.
B. Construction and Operation, §§ 731-736.
a. In General, § 731.
b. Persons Bound and Persons Entitled to Benefit, § 732.
c. Time When Cars to Be Furnished, § 733.
d. Contract with Owner of Private Railroad, § 734.
e. Contract for Track Facilities, § 735.
f. Agreement to Haul Defective Car, § 736.
C. Performance or Breach, §§ 737-755.
a. What Constitutes a Breach, §§ 737-740.
(1) Refusal to Permit Use of Cars, § 737.
(2) Failure to Tender Cars in Time, § 738.
(3) Furnishing Defective Cars, § 739.
(4) Requisition Essential Where Contract to Furnish as Ordered, § 740.
b. Liability of Carrier for Breach, §§ 741-753.
(1) In General, § 741.
(2) Effect of Statute Allowing Recovery of Penalty, § 742.
(3) Tender of Property for Transportation, § 743.
(4) Road Not Owning Cars, § 744.
(5) Road Not Equipped with Cars of Character to Be Furnished, § 745.
(6) Failure to Furnish Refrigerator Cars, § 746.
(7) Effort to Procure Foreign Cars, § 747.
(8) Excuses for Breach or Nonperformance, §§ 748-753.
(a) In General, § 748.
(b) Act of God, § 749.
(c) Unavoidable Accident or Casualties, § 750.
(d) Storms, § 751.

(e) Wrecks, § 752.
(f) Unprecedented Traffic, § 753.
c. Liability of Shipper for Breach, § 754.
d. Waiver of Cause of Action Against Carrier, § 755.

III. Merger, §§ 756-760.
A. General Rule, § 756.
B. Contract Executed after Carriage Begun, §§ 757-758.
a. In General, § 757.
b. Ratification or Adoption by Negotiation of Bill of Lading, § 758.
C. Written Contract Executed after Breach of Parol Contract, § 759.
D. Receipt for Freight Accepted after Shipment Received, § 760.

IV. Modification and Rescission, § 761.

V. Actions against Carrier for Breach of Contract, §§ 762-786.
A. Nature and Form of Remedy, § 762.
B. Limitation, in Contract, of Time for Bringing Action, § 763.
C. Demand, § 764.
D. Persons Who May Sue, §§ 765-767.
a. Shipper, § 765.
b. Forwarding Agent, § 766.
c. Consignee, § 767.
E. Pleading, §§ 768-773.
a. Complaint, Declaration or Petition, §§ 768-772.
(1) Where Contract Distributive as to Time, § 768.
(2) Necessary Allegations, § 769.
(3) Sufficiency of Allegation, § 770.
(4) Theories of Case, § 771.
(5) Aider by Subsequent Pleadings and Verdict, § 772.
b. Plea or Answer, § 773.
F. Issues, Proof and Variance, § 774.
G. Questions for Jury, § 775.
H. Evidence, §§ 776-784.
a. Presumptions and Burden of Proof, § 776.
b. Admissibility, §§ 777-782.
(1) Relevancy and Competency, § 777.
(2) Parol Evidence, § 778.
(3) Best and Secondary Evidence, § 779.
(4) Custom, § 780.
(5) Necessity for Production of Bill of Lading, § 781.
(6) Evidence as to Net Profits, § 782.
c. Reception of Evidence, § 783.
d. Sufficiency of Evidence, § 784.
I. Instructions, § 785.
J. Verdict, § 786.

VI. Damages, §§ 787-798.
A. Liability, §§ 787-788.
a. In General, § 787.
b. Breach of Contract Other than That Sued on, § 788.
B. Duty of Shipper to Mitigate Damages, § 789.
C. Elements of Damage, §§ 790-793.
a. Loss of Profits, § 790.
b. Expense of Renotifying and Reshipping, § 791.
c. Increased Freight and Extra Charges, § 792.
d. Breach of Particular Contracts, § 793.
D. Measure of Damages, §§ 794-795.

a. Breach by Carrier, § 794.
b. Breach by Shipper, § 795.
E. Special Damages, § 796.
F. Proof of Damages, § 797.
G. Release of Damages, § 798.
VII. Interference by One Carrier with Contract of Another, § 799.
VIII. Contracts to Furnish Freight, § 800.
IX. Contracts for Drayage or Hauling, § 801.
X. Contracts Enlarging Carrier's Liability, § 802.

CHAPTER IX.

Title, Custody and Control of Goods.

I. Title and Rights of Consignor in General, § 803.
II. Title and Rights of Consignee in General, § 804.
III. Title and Rights of Carrier in General, § 805.
IV. Change of Destination, § 806.
V. Seizure under Legal Process, § 807.
VI. Actions by and against Carriers, §§ 808-811.
A. Right of Carrier to Maintain Action, § 808.
B. Right to Maintain Action against Carrier, §§ 809-811.
a. In General, § 809.
b. Right of Consignor, § 810.
c. Right of Consignee, § 811.

CHAPTER X.

Transportation and Delivery by Carrier.

I. Duties as to Transportation in General, § 812.
II. Route and Deviation Therefrom, §§ 813-834.
A. Selection by Shipper, §§ 813-826.
a. Right to Select, § 813.
b. Requisites, Construction and Proof of Agreement, §§ 814-815.
(1) Requisites and Construction, § 814.
(2) Evidence, § 815.
c. Deviation by Carrier, §§ 816-821.
(1) In General, § 816.
(2) Losses for Which Carrier Is Liable, §§ 817-819.
(a) In General, § 817.
(b) Loss Caused by Inevitable Casualties, § 818.
(c) Transportation by Connecting Carriers, § 819.
(3) Necessity for and Justification of Deviation or Forwarding by Another Carrier, § 820.
(4) Damages, § 821.
d. Refusal to Route Cars as Directed by Shipper, § 822.
e. Shipment over Route Contrary to Express Direction of Shipper, § 823.
f. Forwarding by Different Boat or Conveyance than That Stipulated, § 824.
g. Carrier Fraudulently Inducing Shipment over Longer Route, § 825.
h. Diversion by Order of Shipper or Consignee, § 826.

B. Selection by Carrier, §§ 827-834.
a. Right to Select in General, § 827.
b. Regard for Rights of Shipper, § 828.
c. Degree of Care Required, § 829.
d. Duty to Select Safe and Direct Route, § 830.
e. Duty to Pursue Usual and Customary Route and Deviation Therefrom, §§ 831-834.
(1) In General, § 831.
(2) Deviation, §§ 832-834.
(a) What Constitutes, § 832.
(b) Necessity and Justification, § 833.
(c) Losses for Which Carrier Is Liable and Nature of Liability, § 834.

III. Duty and Necessity of Delivery, §§ 835-841.
A. Duty to Deliver, § 835.
B. Liability for Failure or Refusal to Deliver, § 836-841.
a. In General, § 836.
b. Excuse for Nondelivery in General, § 837.
c. Right to Require Receipt before Delivery, § 838
d. Requiring Proof of Right to Goods, § 839.
e. Requiring Production and Surrender of Bill of Lading, § 840.
f. Detention for Debt or Charges, § 841.

IV. Mode and Sufficiency of Delivery in General, §§ 842-846.
A. In General, § 842.
B. What Constitutes Delivery, § 843.
C. Carrier by Water, § 844.
D. Duties in Making Delivery, § 845.
E. Effect of Custom or Usage, § 846.

V. Time of Delivery, § 847.

VI. Necessity for Personal Delivery, § 848.

VII. Place of Delivery, §§ 849-853.
A. In General, § 849.
B. Usual Place at Destination, § 850.
C. Specified Place, § 851.
D. Intermediate Point, § 852.
E. Shipments in Carload Lots, § 853.

VIII. To Whom Delivery May Be Made, §§ 854-857.
A. Consignee or Agent, § 854.
B. Consignor or Agent, § 855.
C. Actual Owner, § 856.
D. Holder of Bill of Lading, § 857.

IX. Misdelivery, §§ 858-866.
A. Liability in General, § 858.
B. Fraudulent Consignee, § 859.
C. Delivery without Production of Bill of Lading, §§ 860-865.
a. In General, § 860.
b. Liability to Bona Fide Holder, § 861.
c. Laches of Holder of Bill, § 862.
d. Bill Attached to Draft, § 863.
e. Duplicate Bills, § 864.
f. Direction in Bill to Notify Third Person, § 865.
D. Defenses, § 866.

X. Duty of Consignee to Remove Goods, § 867.

XI. Failure or Refusal of Consignee to Receive Goods, § 868.

XII. Goods Shipped C. O. D., § 869.

XIII. Goods Seized under Legal Process, §§ 870-874.
A. Liability of Carrier, § 870.
B. Duties of Carrier, § 871.
C. Seizure under Police Regulations, § 872.
D. Garnishment of Carrier, § 873.
E. Rights of Attaching Officer, § 874.

XIV. Actions for Failure to Deliver or Misdelivery, §§ 875-903.
A. Conditions Precedent, § 875.
B. Form of Action, § 876.
C. Joinder of Actions, § 877.
D. Jurisdiction and Venue, § 878.
E. Parties, § 879.
F. Pleading, §§ 880-882.
a. Declaration, Complaint or Petition, §§ 880-881
(1) In General, § 880.
(2) Necessary Allegations, § 881.
b. Plea or Answer, § 882.
G. Issue, Proof, and Variance, § 883.
H. Evidence, §§ 884-887.
a. Presumptions and Burden of Proof, § 884.
b. Necessity of Producing Bill of Lading, § 885.
c. Admissibility of Evidence, § 886.
d. Weight and Sufficiency of Evidence, § 887.
I. Damages, §§ 888-900.
a. Nominal Damages, § 888.
b. Exemplary Damages, § 889.
c. Compensatory Damages, §§ 890-900.
(1) Failure or Refusal to Deliver, § 890-893.
(a) Actual Loss Proximately Resulting, § 890
(b) Measure and Elements in General, § 891
(c) Goods Having no Market Value, § 892.
(d) Computation of Damages, § 893.
(2) Misdelivery, § 894.
(3) Delaying Notice of Arrival of Goods, § 895.
(4) Delaying Notice of Refusal of Goods, § 896.
(5) Mitigation of Damages, § 897.
(6) Evidence, §§ 898-899.
(a) In General, § 898.
(b) Evidence as to Value, § 899.
(7) Inadequacy of Damages, § 900.
J. Trial and Judgment, §§ 901-903.
a. Questions for Jury, § 901.
b. Instructions, § 902.
c. Verdict and Judgment, § 903.

CHAPTER XI.

Delay in Transportation or Delivery.

I. In General, § 904.

II. Diligence Required of Carrier, § 905.

III. What Constitutes Reasonable Diligence, § 906.

IV. Perishable Goods, § 907.

V. Excuses for Delay, §§ 908-922.

A. In General, § 908.
B. Delay Caused by Act of God, Public Enemy, etc., § 909.
C. Delay Caused by Seizure under Judicial Process, § 910.
D. Delay Caused by Unusual Rush of Business, §§ 911-914.
a. In General, § 911.
b. Duty to Provide Proper Facilities, § 912.
c. Where Carrier Could Have Avoided Delay, § 913.
d. Notice to Shipper, § 914.
E. Delay Caused by Act of Consignor or Consignee, § 915.
F. Delay Caused by Rule of Carrier, § 916.
G. Delay Caused by Misdirection of Goods, § 917.
H. Delay Caused by Strikes and Riots, § 918.
I. Where Goods Are Perishable, § 919.
J. Delay under Time Contract, §§ 920-921.
a. In General, § 920.
b. Power of Agent to Make Contract, § 921.
K. Duty of Carrier after Excusing Cause Removed, § 922.

VI. Duty of Consignor and Consignee to Avert or Mitigate Injury, § 923.

VII. Duty of Consignee to Accept Goods, § 924.

VIII. Delay Caused by Connecting Carrier, § 925.

IX. Damages, §§ 926-954.

A. In General, § 926.
B. Arising Proximately from Delay, § 927.
C. Arising at Time of Delivery, § 928.
D. Nominal Damages, § 929.
E. Stipulated Damages, § 930.
F. Special Damages, §§ 931-939.
a. In General, § 931.
b. Within Contemplation of Parties, § 932.
c. Notice of Special Circumstances, §§ 933-938.
(1) Necessity of Notice, § 933.
(2) Sufficiency of Notice, § 934.
(3) Time Notice Given, § 935.
(4) Notice to Agent, § 936.
(5) Implied Notice, § 937.
(6) Evidence to Prove Notice, § 938.
d. Where Cause of Delay Known to Shipper, § 939.
G. Exemplary Damages, § 940.
H. Measure and Elements of Damages, §§ 941-947.
a. In General, § 941.
b. Decrease in Market Value, § 942.
c. Loss of Profits, § 943.
d. Expenses Occasioned by Delay, § 944.
e. Interest on Value of Goods, § 945.
f. Mental and Physical Suffering, § 946.
g. Liability as for Conversion, § 947.
I. Mitigation of Damages, § 948.
J. Goods Intended for Use of Consignee, §§ 949-951.
a. In General, § 949.
b. Measure and Elements of Damages, § 950.

c. Particular Goods, § 951.
K. Goods Intended for Sale, § 952.
L. Goods Intended to Be Repaired, § 953.
M. Time of Reporting Claim for Damages, § 954.

X. Actions for Delay, §§ 955-974.

A. Nature of Action, § 955.
B. Jurisdiction and Venue, § 956.
C. Joinder of Causes of Action, § 957.
D. Parties, § 958.
E. Limitation of Actions, § 959.
F. Prerequisites to Bringing Action, § 960.
G. Pleading, §§ 961-964.
a. Plaintiff's Pleadings, §§ 961-963.
(1) In General, § 961.
(2) Particular Allegations, § 962.
(3) Amendments, § 963.
b. Defendant's Pleading, § 964.
H. Issues, Proof and Variance, § 965.
I. Dismissal and Nonsuit, § 966.
J. Burden of Proof and Presumptions, § 967.
K. Evidence, §§ 968-969.
a. Admissibility of Evidence, § 968.
b. Weight and Sufficiency of Evidence, § 969.
L. Instructions, §§ 970-972.
a. Province of Court and Jury, § 970.
b. Necessity and Propriety of Instructions, § 971.
c. Form, Requisites and Sufficiency, § 972.
M. Verdict, § 973.
N. Judgment, § 974.

XI. Demurrage, and Liability of Consignee or Owner for Delay, §§ 975-985.

A. In General, § 975.
B. Right of Carrier to Charge, § 976.
C. Rules and Regulations of Carrier, §§ 977-979.
a. In General, § 977.
b. By Whom Promulgated, § 978.
c. Notice, § 979.
D. Time and Amount of Charge, § 980.
E. Arrival and Continuance at Destination and Nature Thereof, § 981
F. Persons Liable for Demurrage, § 982.
G. Lien for Demurrage, § 983.
H. Remedies and Defenses, §§ 984-985.
a. Of Carrier, § 984.
b. Of Consignee, § 985.

CHAPTER XII.

Loss or Injury to Goods.

I. What Law Governs, § 986.

II. Nature and Validity of Contract of Transportation, § 987.

III. Care Required of Carrier, §§ 988-1010.

A. In General, § 988.
B. Liability as Insurer, §§ 989-1010.
a. General Rule, § 989.

b. Exceptions and Excuses, §§ 990-1004.
(1) Act of God, §§ 990-994.
(a) In General, § 990.
(b) What Constitutes Act of God, § 991.
(c) Negligence Concurring with Act of God, § 992.
(d) Where Danger Should Have Been Anticipated, § 993.
(e) Duty to Prevent Act of God from Causing Injury, § 994.
(2) Act of Public Enemy, §§ 995-997.
(a) In General, § 995.
(b) Thieves and Robbers, § 996.
(c) Strikers, Rioters, Mobs and Insurrectionists, § 997.
(3) Fault of Shipper or Owner, §§ 998-1002.
(a) In General, § 998.
(b) Goods Improperly Marked, § 999.
(c) Goods Improperly Packed, § 1000.
(d) Goods Improperly Loaded, § 1001.
(e) Misrepresentation or Concealment of Nature or Value of Goods, § 1002.
(4) Inherent Infirmities of Goods, § 1003.
(5) Act or Mandate of Public Authority, § 1004.
c. Carriers to Which Rule Applicable, §§ 1005-1009.
(1) In General, § 1005.
(2) Carriers Not Owning Means of Transportation, § 1006.
(3) Carriers of Money, § 1007.
(4) Persons Occasionally Carrying, § 1008.
(5) Forwarders, § 1009.
d. Commencement and Termination of Liability, § 1010.

IV. Goods Shipped on Chartered or Private Cars, § 1011.

V. Acts or Omissions Rendering Carrier Liable in General, §§ 1012-1016.
A. In General, § 1012.
B. Proximate Cause of Loss or Injury, § 1013.
C. Negligence of Agents or Servants, § 1014.
D. Negligence or Misconduct of Third Person, § 1015.
E. Deviation or Delay, § 1016.

VI. Mode or Means of Transportation, §§ 1017-1021.
A. In General, § 1017.
B. Means of Transportation in General, § 1018.
C. Duty as to Perishable Goods, § 1019.
D. Carrying Goods on Open Cars, § 1020.
E. Means for Loading and Unloading, § 1021.

VII. Duties after Injury, § 1022.

VIII. Effect of Insurance, §§ 1023-1029.
A. In General, § 1023.
B. Contract for Benefit of Insurance, §§ 1024-1029.
a. Power to Stipulate and Validity, § 1024.
b. Operation and Effect, §§ 1025-1028.
(1) Right of Shipper to Recover from Carrier, § 1025.
(2) Right of Carrier to Recover from Insurer, § 1026.
(3) Effect as Defeating Insurer's Right of Subrogation, § 1027.
(4) Inconsistent Stipulations in Contract and Policy, § 1028.
c. Suits against Carrier, § 1029.

IX. Claims for Damages, § 1030.

X. Extent of Liability, § 1031.

XI. Actions for Loss or Injury, §§ 1032-1089.
A. Nature and Form, § 1032.
B. Right of Action and Defenses, §§ 1033-1035.
a. In General, § 1033.
b. Conditions Precedent, § 1034.
c. Defenses, § 1035.
C. Jurisdiction and Venue, § 1036.
D. Parties, § 1037.
E. Pleading, §§ 1038-1051.
a. Declaration, Complaint, Petition or Bill, §§ 1038-1049.
(1) In General, § 1038.
(2) Necessity and Sufficiency of Allegations, §§ 1039-1047.
(a) Plaintiff's Title or Interest, § 1039.
(b) That Defendant a Common Carrier, § 1040.
(c) As to Consideration, § 1041.
(d) Delivery to and Acceptance by Carrier, § 1042.
(e) As to Contract of Carriage, § 1043.
(f) Negligence of Defendant, § 1044.
(g) Description of Property, § 1045.
(h) Damage and Value of Goods, § 1046.
(i) Special Statutory Proceeding, § 1047.
(3) Amendments, § 1048.
(4) Aider by Answer, § 1049.
b. Plea or Answer, § 1050.
c. Admissions in Pleadings, § 1051.
F. Issues, Proof and Variance, §§ 1052-1055.
a. In General, § 1052.
b. Evidence Admissible under Pleadings, § 1053.
c. Matters to Be Proved, § 1054.
d. Variance, § 1055.
G. Evidence, §§ 1056-1067.
a. Presumptions and Burden of Proof, §§ 1056-1060.
(1) Plaintiff's Burden of Proof in General, § 1056.
(2) Defendant's Burden of Proof in General, § 1057.
(3) Condition of Goods When Received by Carrier, § 1058.
(4) Shipment Composed of Several Classes of Goods, § 1059.
(5) Where Transportation under Special Contract, § 1060.
b. Necessity of Producing Bill of Lading, § 1061.
c. Admissibility of Evidence, §§ 1062-1066.
(1) In General, § 1062.
(2) Declarations and Admissions, § 1063.
(3) Opinion Evidence, § 1064.
(4) Documentary Evidence, § 1065.
(5) Parol Evidence, § 1066.
d. Weight and Sufficiency of Evidence, § 1067.
H. Damages, §§ 1068-1085.
a. Extent of Liability, Measure and Elements of Damages, §§ 1068-1080.
(1) In General, § 1068.
(2) Loss of Goods, § 1069.
(3) Injury to Goods, §§ 1070-1072.
(a) In General, § 1070.
(b) Right to Abandon Goods, § 1071.
(c) When Damaged Goods Sold, § 1072.
(4) Freight, Allowance and Deduction, § 1073.
(5) Interest, § 1074.
(6) Expenses of Owner, § 1075.

(7) Goods Shipped under Contract of Sale, § 1076.
(8) Goods Having No Market Value, § 1077.
(9) Profits, § 1078.
(10) Special Damages, § 1079.
(11) Exemplary Damages, § 1080.
b. Duty of Owner to Mitigate or Avert, § 1081.
c. Evidence as to Value or Damage, §§ 1082-1084.
(1) In General, § 1082.
(2) Admissibility, § 1083.
(3) Weight and Sufficiency, § 1084.
d. Recovery as Affected by Allegation of Damages, § 1085.
I. Province of Court and Jury, §§ 1086-1087.
a. In General, § 1086.
b. Particular Questions of Law or Fact, § 1087.
J. Instructions, § 1088.
K. Verdict, § 1089.

CHAPTER XIII.

Carrier as Warehouseman.

I. When Liability Begins or Ends, §§ 1090-1097.
A. Goods Awaiting Transportation, § 1090.
B. Goods Being Transported, § 1091.
C. Goods Awaiting Delivery to Consignee, §§ 1092-1097.
a. In General, § 1092.
b. Express Companies and General Carriers by Water, § 1093.
c. Railroads and Carriers by Water Having Fixed Schedule, § 1094.
d. Necessity for Notice of Arrival of Goods, § 1095.
e. What Is Reasonable Time, § 1096.
f. How Long Liability Continues, § 1097.

II. Duties and Liabilities, §§ 1098-1100.
A. In General, § 1098.
B. Degree of Care, § 1099.
C. Acts or Omissions Rendering Carrier Liable, § 1100.

III. Actions against Carrier as Warehouseman, §§ 1101-1104.
A. In General—Pleading, § 1101.
B. Evidence, § 1102.
C. Instructions, § 1103.
D. Finding, § 1104.

VOLUME II.

CHAPTER XIV.

Limitation of Liability.

I. Power of Carrier and Nature of Right, §§ 1105-1121.
A. In General, § 1105.
B. Effect of Charter Provisions, § 1106.
C. Effect of Statutory and Constitutional Provisions of the States, §§ 1107-1111.
a. Georgia, § 1107.
b. Illinois, § 1108.

c. Nebraska, § 1109.
d. Texas, § 1110.
e. Virginia, § 1111.
D. Interstate Shipments, §§ 1112-1116.
a. In General, § 1112.
b. Effect of Interstate Commerce Act, § 1113.
c. Effect of State Statutes, §§ 1114-1116.
(1) In General, § 1114.
(2) Statutes of Texas, § 1115.
(3) Conflict of Laws, § 1116.
E. What Law Governs, §§ 1117-1120.
a. Validity and Enforcement, § 1117.
b. Construction, § 1118.
c. Right of Carrier Incorporated in a State to Contract under Laws of Another State, § 1119.
d. Stipulations as to What Law Governs, § 1120.
F. Property Carrier Not Required to Transport, § 1121.
II. Liabilities Subject to Limitation, §§ 1122-1153.
A. General Rule, § 1122.
B. Liability for Loss Arising from Carrier's Own Negligence, §§ 1123-1132.
a. Power to Limit in General, § 1123.
b. Effect of State Statutory and Constitutional Provisions, § 1124.
c. Effect of Interstate Commerce Act, § 1125.
d. Effect of Harter Act, § 1126.
e. Effect of Exemption from Special Causes, § 1127.
f. As to Interstate Commerce, § 1128.
g. Contracts for Transportation Over Connecting Roads, § 1129.
h. Property Placed on Right of Way by Owner for His Own Convenience, § 1130.
i. Carrier under No Legal Duty to Move Train as Agreed, § 1131.
j. Release of Damages from Prior Negligence, § 1132.
C. Loss by Act of God, § 1133.
D. Loss Due to Inevitable Accident or Casualty, § 1134.
E. Loss Due to Public Enemy, § 1135.
F. Loss Caused by Thieves or Robbers, § 1136.
G. Loss by Mistake or Accident, § 1137.
H. Regulations as to Delivery and Entry of Packages, § 1138.
I. Stipulations against Liability for Loss of Valuables unless Value Disclosed, § 1139.
J. Failure to Furnish Suitable Cars, § 1140.
K. Risk of Loading and Unloading, § 1141.
L. Loss by Breakage, § 1142.
M. Delay or Failure to Transport, §§ 1143-1145.
a. In General, § 1143.
b. Delay Caused by Mobs and Strikes, § 1144.
c. Loss of Market, § 1145.
N. Decay or Injury to Perishables, § 1146.
O. Loss by Rust, § 1147.
P. Loss by Fire, § 1148.
Q. Damages from Conduct or Running of Trains, § 1149.
R. Notice of Arrival, § 1150.
S. Safety of Goods after Arrival, § 1151.
T. Liability as Warehouseman, § 1152.
U. Release of Damages Accrued before Execution of Written Contract, § 1153.
III. Manner of Limiting Liability, §§ 1154-1247.
A. Special Contract, §§ 1154-1234.

a. In General, § 1154.
b. Express or Implied Contract, §§ 1155-1157.
(1) In General, § 1155.
(2) Necessity for Express Contract, § 1156.
(3) Implied Contract, § 1157.
c. Form of Limitation, §§ 1158-1183.
(1) Necessity for Written Contract, § 1158.
(2) Instruments in Which Stipulation Incorporated, §§ 1159-1163.
(a) Bill of Lading, § 1159.
(b) Freight Receipts, § 1160.
(c) Express Receipts, § 1161.
(d) Receipts of Compress Company, § 1162.
(e) Tickets, Entry of Notice on, § 1163.
(3) Requisites of Stipulation, §§ 1164-1183.
(a) Stipulation Must Be in Body of Instrument, §§ 1164-1169.
aa. In General, § 1164.
bb. Provisions Stamped or Written on Face of Receipt or Bill of Lading, § 1165.
cc. Stipulations on Margin of Contract, § 1166.
dd. Printing Appended to Contract, § 1167.
ee. Memorandum on Freight Card or Ticket, § 1168.
ff. Notice on Back of Receipt or Bill of Lading, § 1169.
(b) Stipulation Must Be Legible and Intelligible, §§ 1170-1171.
aa. In General, § 1170.
bb. Inconspicuous Conditions and Type, § 1171.
(c) Must Be in Express and Unequivocal Terms, §§ 1172-1183.
aa. In General, § 1172.
bb. Use of General Words, § 1173.
cc. What Constitutes an Express Contract under Georgia Statute, §§ 1174-1183.
(aa) In General, § 1174.
(bb) Parties Who May Make, § 1175.
(cc) Assent of Parties, §§ 1176-1183.
aaa. In General, § 1176.
bbb. Necessity for Shipper's Assent, § 1177.
ccc. What Constitutes Assent of Shipper, §§ 1178-1183.
(aaa) Acceptance of Bill of Lading, § 1178.
(bbb) Acceptance of Ticket or Pass, § 1179.
(ccc) Acceptance of Express or Freight Receipt, § 1180.
(ddd) Signing Bill of Lading, § 1181.
(eee) Contract Prepared by Shipper, § 1182.
(fff) Duress or Compulsion, § 1183.
d. Consideration, §§ 1184-1194.
(1) Necessity, §§ 1184-1185.
(a) In General, § 1184.
(b) Instances, § 1185.
(2) Sufficiency, §§ 1186-1194.
(a) In General, § 1186.
(b) Reduced Rates, §§ 1187-1192.
aa. In General, § 1187.
bb. Reasonableness of Rates, § 1188.
cc. Choice of Rates, § 1189.
dd. Recital That Reduced Rate Given, §§ 1190-1191.
(aa) Necessity, § 1190.
(bb) Falsity of Recitals, § 1191.
ee. Contracts Exacted after Carriage Commenced, § 1192.

(c) Shipper's and Employer's Passes, § 1193.
(d) Agreement to Transport Over Own and Connecting Lines, § 1194.
e. Reasonableness of Limitation, § 1195.
f. Fairness, Fraud or Duress, § 1196.
g. Choice between Full and Limited Liability, § 1197.
h. Meeting of Minds of Parties, § 1198.
i. Knowledge and Assent of Shipper, §§ 1199-1229.
(1) Necessity in General, § 1199.
(2) Doctrine Requiring Express Assent, §§ 1200-1201.
(a) In General, § 1200.
(b) Duty of Carrier to Call Shipper's Attention to Stipulation, § 1201.
(3) Doctrine of Implied Assent, §§ 1202-1219.
(a) In General, § 1202.
(b) Intention of Parties, § 1203.
(c) Constructive Notice Generally, § 1204.
(d) Duty of Shipper to Read Contract, § 1205.
(e) What Constitutes Acceptance or Assent, §§ 1206-1217.
aa. Acceptance of Freight Receipt or Bill of Lading, §§ 1206-1208.
(aa) In General, § 1206.
(bb) Necessity for Signature of Consignor, § 1207.
(cc) Effect of Consignor's Signing Bill of Lading, § 1208.
bb. Receipt Prepared by Shipper, § 1209.
cc. Receipt Referring to Bill of Lading Containing Limitations, §§ 1210-1211.
(aa) Receipt Prepared by Shipper, § 1210.
(bb) Receipt Prepared by Carrier, § 1211.
dd. Acceptance of Express Receipt, § 1212.
ee. Acceptance of Dray Ticket and Checks of Local Carrier, § 1213.
ff. Fact of Shipment under Limited Liability Rate, § 1214.
gg. Previous Shipments under Limited Liability Contract, § 1215.
hh. Customary Use of Printed Form of Receipt, § 1216.
ii. Failure to Dissent within Reasonable Time, § 1217.
(f) Proof of Non-Assent, § 1218.
(g) Question for Jury, § 1219.
(4) Persons Who May Give Assent, §§ 1220-1229.
(a) In General, § 1220.
(b) Possession of Goods, § 1221.
(c) Authority of Consignor to Bind Consignee, §§ 1222-1225.
aa. In General, § 1222.
bb. Effect of Interstate Commerce Act and Elkins Act, § 1223.
cc. Instances Where Consignee Bound, § 1224.
dd. Instances Where Consignee Not Bound, § 1225.
(d) Agent of Consignor, § 1226.
(e) Person Only Authorized to Deliver to Carrier, §§ 1227-1228.
aa. In General, § 1227.
bb. Cartmen or Truckmen, § 1228.
(f) Initial Carrier, § 1229.
j. Time of Agreement, §§ 1230-1232.
(1) In General, § 1230.
(2) Issuance of Bill of Lading or Receipt after Shipment, §§ 1231-1232.
(a) In General, § 1231.
(b) Issuance after Loss, § 1232.
k. Subsequent Written Agreement Contemplated by Parties, §§ 1233-1234.
(1) In General, § 1233.
(2) Knowledge of Rule Requiring Written Contract, § 1234.
B. Notice or Advertisements, §§ 1235-1242.

a. General Notice or Advertisements, §§ 1235-1236.
(1) In General, § 1235.
(2) Notice Brought to Attention of Shipper, § 1236.
b. Special Notice to Owner of Goods, § 1237.
c. Form and Sufficiency of Notice, § 1238.
d. Reasonableness of Regulations, § 1239.
e. Assent of Shipper, §§ 1240-1241.
(1) In General, § 1240.
(2) Express Assent Not Essential, § 1241.
f. Notice to Agent of Shipper, § 1242.
C. Custom and Usage, § 1243.
D. Ratification of Contract of Another Carrier, § 1244.
E. Instructions to Carrier's Agent, § 1245.
F. Arrangement between Express and Railroad Companies, § 1246.
G. Depositing Freight in Warehouse at End of Route, § 1247.

IV. Construction, Operation and Effect, §§ 1248-1278.
A. Construction Question for Court, § 1248.
B. Rules of Construction and Application Thereof, §§ 1249-1252.
a. Construed against Carrier, § 1249.
b. Specific as Prevailing over General Clauses, § 1250.
c. Conflicting Agreements, § 1251.
d. Construction of Words and Phrases, § 1252.
C. Written Instrument as Complete Contract, §§ 1253-1259.
a. Parol Evidence to Vary or Contradict Generally, § 1253.
b. Merger of Prior Parol Negotiations, §§ 1254-1255.
(1) In General, § 1254.
(2) Bill of Lading Issued Subsequent to Contract, § 1255.
c. Parol Evidence to Show Meaning of Words and Phrases, § 1256.
d. Only Part of Contract Contained in Written Agreement, § 1257.
e. Effect of Waybill, § 1258.
f. Parol Agreement Substituted for Written Contract, § 1259.
D. Effect as Measure of Liability Generally, § 1260.
E. Persons Bound and Carriers Benefited, § 1261.
F. Property to Which Applicable, § 1262.
G. Losses Covered, §§ 1263-1277.
a. Losses Arising from Negligence, § 1263.
b. Particular Limitations, §§ 1264-1277.
(1) Loss from Causes beyond Carrier's Control, § 1264.
(2) Unavoidable Dangers, § 1265.
(3) Dangers of Navigation, § 1266.
(4) Dangers of the River, § 1267.
(5) Shipment "Released" or at "Owner's Risk," § 1268.
(6) Stipulation as to Disclosure of Value of Property, § 1269.
(7) Loss from Delay, § 1270.
(8) Breakage or Leakage, § 1271.
(9) Loading and Unloading, § 1272.
(10) Defect in Cars, § 1273.
(11) Loss by "Fire and Floods," § 1274.
(12) Loss "in Transit" or "in Depot or Place of Transshipment," § 1275.
(13) Default of Subcarrier, § 1276.
(14) Release of Claim for Accrued Damages, § 1277.
H. Estoppel of Shipper, § 1278.

V. Performance, Discharge or Breach, § 1279.

VI. Enforcement, §§ 1280-1327.
A. Pleading, §§ 1280-1290.

a. Petition, Declaration or Complaint, §§ 1280-1281.
(1) Necessary Allegations, § 1280.
(2) Sufficiency of Allegations, § 1281.
b. Plea or Answer and Affidavit of Defense, §§ 1282-1289.
(1) Necessity for Special Plea, §§ 1282-1283.
(a) In General, § 1282.
(b) Demurrer, § 1283.
(2) Allegations, §§ 1284-1287.
(a) Allegation of Reasonableness, § 1284.
(b) Validity under Foreign Laws, § 1285.
(c) Negativing Carrier's Negligence, § 1286.
(d) Shipping Order, § 1287.
(3) Affidavit of Defense, § 1288.
(4) Demurrer to Plea, § 1289.
c. Reply, § 1290.
B. Presumption and Burden of Proof, §§ 1291-1307.
a. Existence and Validity of Contract, §§ 1291-1300.
(1) Presumptions Generally, § 1291.
(2) Burden of Proof Generally, § 1292.
(3) Requisites of Contract, §§ 1293-1298.
(a) Reasonableness, § 1293.
(b) Delivery, § 1294.
(c) Consideration, § 1295.
(d) Knowledge of Contract and Assent of Shipper, §§ 1296-1298.
aa. Jurisdictions Requiring Express Assent, §§ 1296-1297.
(aa) Presumption, § 1296.
(bb) Burden of Proof, § 1297.
bb. Jurisdictions in Which Assent Presumed from Acceptance, § 1298.
(4) Authority of Shipper's Agent, § 1299.
(5) Misrepresentation of Value or Contents of Package, § 1300.
b. Showing Loss within Exemption, §§ 1301-1306.
(1) In General, § 1301.
(2) Showing Negligence Vel Non, §§ 1302-1303.
(a) Rule Placing Burden on Shipper, § 1302.
(b) Rule Placing Burden on Carrier, § 1303.
(3) Particular Stipulations, §§ 1304-1306.
(a) Perils of Navigation, § 1304.
(b) Loss by Fire, § 1305.
(c) Mobs, Riots, Robbery and Strikes, § 1306.
c. Performance of Conditions Precedent to Recover, § 1307.
C. Admissibility of Evidence, §§ 1308-1313.
a. Existence and Terms of Contract, § 1308.
b. Signing, § 1309.
c. Consideration, § 1310.
d. Knowledge and Assent of Shipper, § 1311.
e. Fairness or Fraud, § 1312.
f. Merger of Parol and Subsequent Written Contract, § 1313.
D. Weight and Sufficiency of Evidence, §§ 1314-1321.
a. Fact of and Terms of Contract, § 1314.
b. Requisites and Validity of Contract, §§ 1315-1320.
(1) In General, § 1315.
(2) Reasonableness, § 1316.
(3) Consideration, § 1317.
(4) Delivery, § 1318.
(5) Knowledge of Contents and Assent of Shipper, §§ 1319-1320.
(a) Express Assent Required, § 1319.

(b) Proof of Express Assent Not Required, § 1320.
c. Proof of Negligence Vel Non, § 1321.
E. Variance, § 1322.
F. Questions for Court, § 1323.
G. Questions for Jury, §§ 1324-1325.
a. As to the Contract, § 1324.
b. As to the Loss, § 1325.
H. Instructions, § 1326.
I. Direction of Verdict, § 1327.

VII. Limitation of Amount of Liability, §§ 1328-1383.
A. Power to Limit and Validity, §§ 1328-1330.
a. Effect of State Statutes and Constitutional Provisions, § 1328
b. Under Interstate Commerce Act, § 1329.
c. What Law Governs, § 1330.
B. Methods of Limiting, §§ 1331-1344.
a. Agreed Valuation of Shipment, §§ 1331-1342.
(1) In General, § 1331.
(2) Public Policy, § 1332.
(3) Method of Valuation, §§ 1333-1339.
(a) In General, § 1333.
(b) Declaration of Shipper, § 1334.
(c) Arbitrary Preadjustment of Value, §§ 1335-1338.
aa. In General, § 1335.
bb. What Constitutes, § 1336.
cc. Burden of Proof, § 1337.
dd. Questions for Jury, § 1338.
(d) Misrepresentation of Value by Shipper, § 1339.
(4) Carriers of Baggage, § 1340.
(5) Carriers of Express, § 1341.
(6) Connecting Carriers, § 1342.
b. Stipulation Prescribing Measure of Damages, § 1343.
c. Requiring Declaration of Value by Shipper, § 1344.
C. Form and Requisites of Agreement, §§ 1345-1364.
a. In General, § 1345.
b. Express Contract, §§ 1346-1347.
(1) Necessity, § 1346.
(2) Signature of Shipper, § 1347.
c. Use of Printed Forms Containing Arbitrary Value, § 1348.
d. Certainty and Definiteness, § 1349.
e. Consideration, § 1350.
f. Fairness, Justness and Reasonableness, §§ 1351-1352.
(1) Necessity, § 1351.
(2) Fraud or Duress, § 1352.
g. Choice of Full or Limited Liability, § 1353.
h. Knowledge and Assent of Shipper, §§ 1354-1363.
(1) Necessity, §§ 1354-1355.
(a) In General, § 1354.
(b) Illegible, Unintelligible and Unexplained Terms, § 1355.
(2) What Constitutes, §§ 1356-1362.
(a) Acceptance of Bill of Lading, § 1356.
(b) Acceptance of Freight or Shipping Receipt, §§ 1357-1358.
aa. In General, § 1357.
bb. Express Receipts, § 1358.
(c) Acceptance of Coupon Receipts of Local Carriers, § 1359.
(d) Knowledge of Shipper That Rates Based on Value of Goods, § 1360.

(e) Misrepresentation of Value by Shipper, § 1361.
(f) Authority of Agent or Consignor, § 1362.
(3) Question for Jury, § 1363.
i. Notice to Carriers of Character of Goods, § 1364.
D. Operation and Effect, §§ 1365-1381.
a. As Dependent upon Form of Stipulation, §§ 1365-1367.
(1) Agreed Valuation Placed on Shipment, § 1365.
(2) Stipulation Fixing Measure of Damages, §§ 1366-1367.
(a) In General, § 1366.
(b) Value at Time and Place of Shipment, § 1367.
b. Losses Covered, §§ 1368-1377.
(1) Limitation of Liability for Negligence, §§ 1368-1371.
(a) In General, § 1368.
(b) Rule That Carrier Not Liable, § 1369.
(c) Rule That Carrier Liable, § 1370.
(d) Burden of Proof of Negligence, § 1371.
(2) Losses Not Involving Negligence, §§ 1372-1377.
(a) In General, § 1372.
(b) Delay in Transportation, § 1373.
(c) Change of Route, § 1374.
(d) Delivery to Wrong Person, § 1375.
(e) Embezzlement of Goods by Employee of Carrier, § 1376.
(f) Conversion by Carrier, § 1377.
c. Goods Included, § 1378.
d. Computing Amount of Recovery, § 1379.
e. Measure of Damages Where Stipulation Void, § 1380.
f. Partial Loss, § 1381.
E. Waiver of Stipulation, § 1382.
F. Pleading and Proof, § 1383.
VIII. Requirement of Notice of Loss and Presentation of Claim, §§ 1384-1470.
A. Power to Stipulate and Validity, §§ 1384-1387.
a. In General, § 1384.
b. Effect of Federal Statutes, § 1385.
c. Effect of State Statutes, § 1386.
d. Laws Governing and Foreign Laws, § 1387.
B. Reasonableness of Stipulations, §§ 1388-1403.
a. General Rule, § 1388.
b. Interstate and Foreign Shipments, § 1389.
c. Reasonableness of Time Allowed, §§ 1390-1393.
(1) Necessity, § 1390.
(2) What Constitutes, § 1391.
(3) Power of State Court to Determine, § 1392.
(4) Under Texas Statute, § 1393.
d. Notice before Removal from Destination, § 1394.
e. Amount of Damages, etc., on Reshipment, § 1395.
f. Statement of Full Amount of Claim, § 1396.
g. Notice to Delivering Carrier, § 1397.
h. Statement of Nature and Place of Injury, § 1398.
i. Respecting Officer or Agent to Be Notified, § 1399.
j. Pleading and Proof of Reasonableness, §§ 1400-1402.
(1) In General, § 1400.
(2) Admissibility of Evidence, § 1401.
(3) Weight and Sufficiency of Evidence, § 1402.
k. Questions for Jury, § 1403.
C. Losses Arising from Carrier's Negligence, § 1404.
D. Form and Requisites of Stipulation, §§ 1405-1410.

a. Instruments in Which Contained, § 1405.
b. Stipulation Placed on Margin, § 1406.
c. Certainty and Definiteness, § 1407.
d. Consideration, § 1408.
e. Assent of Shipper, § 1409.
f. Signature of Consignor or Consignee, § 1410.
E. Construction, §§ 1411-1412.
a. In General, § 1411.
b. "Removal," § 1412.
F. Operation and Effect, §§ 1413-1431.
a. In General, § 1413.
b. Strict Enforcement, § 1414.
c. Limiting Liability, § 1415.
d. Limiting Liability for Negligence, § 1416.
e. Limitation of Right to Sue, § 1417.
f. Limitation of Time within Which Action May Be Brought, § 1418.
g. Carriers Entitled to Benefit, § 1419.
h. Shipments to Which Applicable, § 1420.
i. Losses to Which Applicable, §§ 1421-1430.
(1) Claims Accruing before Execution of Contract, § 1421.
(2) Delay in Furnishing Cars, § 1422.
(3) Special Damages from Delay, §§ 1423-1424.
(a) In General, § 1423.
(b) Loss of Market or Decline in Value, § 1424.
(4) Loss by Misdelivery, § 1425.
(5) Nondelivery, § 1426.
(6) Unauthorized Diversion, § 1427.
(7) Carrier's Conduct as Warehouseman, § 1428.
(8) Failure to Return Freight Refused by Consignee, § 1429.
(9) Failure to Collect for C. O. D. Parcel or Return Same, § 1430.
j. Right to Require Carrier to Trace Shipment, § 1431.
G. What Constitutes and Sufficiency of Notice, §§ 1432-1439.
a. Necessity for Actual Notice, § 1432.
b. Writing, § 1433.
c. Verification or Affidavit, § 1434.
d. Complaint by Letter, § 1435.
e. Inquiry Requesting Property to Be Traced, § 1436.
f. Filing Suit and Service of Citation, § 1437.
g. Copy of Telegraph Message to Consignor, § 1438.
h. Officer to Whom Given, § 1439.
H. Effect of Failure to Give Notice, §§ 1440-1442.
a. In General, § 1440.
b. Failure without Fault or Negligence of Shipper, § 1441.
c. Where Extent of Damages Cannot Be Ascertained Until after Expiration of Time Limit, § 1442.
I. Computing Time within Which Notice Must Be Given, § 1443.
J. Duty to Present Claim within Reasonable Time Although Stipulation Unreasonable, § 1444.
K. Facts Excusing Failure to Give Notice, §§ 1445-1450.
a. Refusal of Consignee to Receive Goods, § 1445.
b. Carrier Having Knowledge of Loss or Injury and Opportunity to Investigate, § 1446.
c. Carrier Having Examined Goods at Destination, § 1447.
d. Shipment Burned in Yards with Carrier's Knowledge, § 1448.
e. Destruction of Shipment While in Carrier's Possession, § 1449.
f. Failure to Give Notice Induced by Conduct of Carrier or Its Agent, § 1450.

L. Waiver of Notice or Defects Therein, §§ 1451-1466.
a. Right to Waive, § 1451.
b. Effect of Waiver, § 1452.
c. What Constitutes a Waiver, §§ 1453-1465.
(1) Conduct Inconsistent with Intent to Enforce Stipulation, § 1453.
(2) Notice Received in Time without Objection to Sufficiency, § 1454.
(3) Custom to Accept Verbal Notice, § 1455.
(4) Request for Further Information, § 1456.
(5) Mere Denial of Liability, § 1457.
(6) Denial of Liability on Other Grounds than Defect of Notice, § 1458.
(7) Treating Unverified Claim as Pending for Adjustment, § 1459.
(8) Notice Received after Expiration of Time Limit, §§ 1460-1465.
(a) In General, § 1460.
(b) Returning Notice to Claimant for Correction, § 1461.
(c) Refusal to Pay on Other Grounds than Failure to Notify in Time, § 1462.
(d) Request for Information and Promise to Adjust Claim, § 1463.
(e) Attempt to Trace or Find Shipment, § 1464.
(f) Attempt to Lessen Shipper's Loss, § 1465.
d. Proof of Waiver, § 1466.
M. Pleading and Proof of Breach, §§ 1467-1469.
a. Burden, § 1467.
b. Sufficiency of Plea or Answer, § 1468.
c. Sufficiency of Evidence, § 1469.
N. Instructions, § 1470.

IX. Contracts for Benefit of Insurance, § 1471.

X. Limiting Liability to That of Forwarder or Warehouseman, § 1472.

XI. Stipulations Limiting Time within Which Suit Must Be Brought, §§ 1473-1497.
A. Power and Validity, §§ 1473-1479.
a. In General, § 1473.
b. Under State Statutes, §§ 1474-1479.
(1) Statutes Prohibiting Limitation of Common-Law Liability, § 1474.
(2) Statute Prohibiting Limitation of Time of Bringing Suit, §§ 1475-1478.
(a) In General, § 1475.
(b) Montana, § 1476.
(c) Oklahoma, § 1477.
(d) Texas, § 1478.
(3) Conflict of Laws, § 1479.
B. Form and Requisites, §§ 1480-1483.
a. Reasonableness, § 1480.
b. Assent of Shipper, § 1481.
c. Consideration, § 1482.
d. Stipulations on Back of Contract, § 1483.
C. Operation and Effect, §§ 1484-1496.
a. As Limiting Common-Law Liability of Carrier, § 1484.
b. As Bar to Action Brought after Expiration of Time, §§ 1485-1490.
(1) General Rule, § 1485.
(2) When Cause of Action Accrues, § 1486.
(3) Necessity for Knowledge of Loss, § 1487.
(4) Time Consumed in Correspondence, § 1488.
(5) What Constitutes Commencement of Action, § 1489.
(6) Removal of Bar, § 1490.
c. Losses or Injuries to Which Applicable, § 1491.
d. Waiver or Estoppel to Rely upon Stipulation, §§ 1492-1496.
(1) Authority of Agent, § 1492.

(2) Effect of Fraud or Misrepresentations of Carrier, § 1493.
(3) What Constitutes Waiver, § 1494.
(4) Pleading and Proof, § 1495.
(5) Proof of Waiver, § 1496.
D. Instructions, § 1497.

XII. Stipulations as to Time of Service of Process, § 1498.

XIII. Stipulations Abrogating Rules of Evidence, § 1499.

XIV. Stipulations Requiring Adjustment of Claims, § 1500.

CHAPTER XV.

Charges and Liens.

I. Definition, § 1501.

II. Rate or Amount of Freight, §§ 1502-1519.
A. Reasonableness of Charge, § 1502.
B. Right of Carrier to Fix Rate, §§ 1503-1504.
a. Charter Regulations, § 1503.
b. Duty to Consult Shippers and Consignees, § 1504.
C. Standards for Fixing Charge, §§ 1505-1506.
a. Measure or Weight, § 1505.
b. Value or Risk Assumed, § 1506.
D. Special Contracts as to Amount of Charge, §§ 1507-1515.
a. Capacity, § 1507.
b. Requisites, §§ 1508-1509.
(1) Meeting of Minds, § 1508.
(2) Consideration, § 1509.
c. Validity, §§ 1510-1511.
(1) Value as Basis of Charge, § 1510.
(2) Conformity to Published Tariffs, § 1511.
d. Construction, Operation and Effect, §§ 1512-1513.
(1) As to Rate, § 1512.
(2) As to Valuation and Weight, § 1513.
e. Duration, § 1514.
f. Breach, § 1515.
E. Undervaluation, § 1516.
F. Misclassification, § 1517.
G. Illegal Rate Charged, § 1518.
H. Misrepresentation of Rate, § 1519.

III. Right to and Payment of Freight, §§ 1520-1541.
A. Right to Demand Prepayment, § 1520.
B. Effect of Failure to Demand Prepayment, § 1521.
C. Time of Payment, § 1522.
D. Place of Payment, § 1523.
E. Tender of Payment, § 1524.
F. Demand, § 1525.
G. Accrual of Right to Payment, §§ 1526-1532.
a. Deliver Goods, §§ 1526-1527.
(1) In General, § 1526.
(2) Part Performance, § 1527.
b. Opportunity to Examine Goods, § 1528.
c. Where Consignee Can Not Be Found, § 1529.
d. Failure to Deliver Not Due to Fault of Either Party, § 1530.
e. Erroneous Recital in Bill of Lading as to Amount of Shipment, § 1531.

f. Conversion of Part of Goods by Carrier, § 1532.
H. Right of Carrier to Earn Freight for Entire Distance, § 1533.
I. Dead Freight, § 1534.
J. Partial or Pro Rata Freight, §§ 1535-1537.
a. In General, § 1535.
b. Part of Cargo Delivered, § 1536.
c. Cargo Accepted at Intermediate Point, § 1537.
K. Intent to Evade Blockade or Revenue Laws, § 1538.
L. Stranding, § 1539.
M. Vessel Condemned by Foreign Tribunal—Fraud of Owner, § 1540.
N. Bond to Secure Freight, § 1541.

IV. Rights of Connecting Carrier, §§ 1542-1546.
A. Power of Initial to Bind Succeeding Carrier, § 1542.
B. When Freight Due or Demandable, § 1543.
C. Right to Divide Through Freight, § 1544.
D. Combination as to Rates, § 1545.
E. Advances for Charges and Expenses, § 1546.

V. Persons Liable for Charges, §§ 1547-1548.
A. Consignor, § 1547.
B. Consignee, § 1548.

VI. Compensation for Stoppage in Transit for Inspection, etc., § 1549.

VII. Demurrage, § 1550.

VIII. Storage Charges, § 1551.

IX. Reshipment and Reconsignment Charges, § 1552.

X. Lien for Charges, §§ 1553-1595.
A. Right to Lien, §§ 1553-1555.
a. In General, § 1553.
b. Connecting Carriers, § 1554.
c. Transfer Companies, § 1555.
B. Operation and Effect, §§ 1556-1573.
a. In General, § 1556.
b. Property Covered, §§ 1557-1562.
(1) Property of the Government, § 1557.
(2) Property Carried without Authority, § 1558.
(3) Missent Goods, § 1559.
(4) Property Included by Mistake in Bill of Lading, § 1560.
(5) Agent Violating Instructions in Shipping Goods, § 1561.
(6) Shipment Obtained by Misrepresentation of Carrier, § 1562.
c. Extent of Lien, §§ 1563-1568.
(1) Amount Shown by Bill of Lading, § 1563.
(2) Charges Secured, §§ 1564-1568.
(a) Charges Not Connected with Carriage, § 1564.
(b) Charges for Continuous Transit on Successive Lines, §§ 1565-1568.
aa. In General, § 1565.
bb. Advances for Back Charges, § 1566.
cc. Feeding and Caring for Stock, § 1567.
dd. Duties Paid by Prior Carrier, § 1568.
d. Goods Missent, § 1569.
e. Priorities, §§ 1570-1572.
(1) Assignment for Benefit of Creditors, § 1570.
(2) Stoppage in Transitu, § 1571.
(3) Bona Fide Purchasers, § 1572.
f. Rights of Owner of Goods against Wrongdoer, § 1573.

C. Waiver or Discharge, §§ 1574-1582.
a. Express Waiver, § 1574.
b. Delivery of Goods by Carrier, § 1575.
c. Goods Taken from Carrier's Possession by Operation of Law, § 1576.
d. Delivery to Assignee for Creditors, § 1577.
e. Goods Wrongfully Taken from Carrier, § 1578.
f. Delivery of Part of Shipment, § 1579.
g. Refusal to Deliver on Other Grounds, § 1580.
h. Injury to Goods by Fault of Carrier, § 1581.
i. Damage to Consignee by Delay, § 1582.
D. Preservation of Lien, §§ 1583-1584.
a. Storing Goods in Warehouse, § 1583.
b. Delivery to Consignee as Agent of Carrier, § 1584.
E. Subrogation or Substitution, § 1585.
F. Enforcement, §§ 1586-1594.
a. Sale, §§ 1586-1593.
(1) At Common Law, § 1586.
(2) Under Statute, § 1587.
(3) Manner of Sale, § 1588.
(4) Notice, § 1589.
(5) Advertisement and Description of Goods, § 1590.
(6) Retention of Freight, § 1591.
(7) Right to Overplus, § 1592.
(8) Damages for Wrongful Sale, § 1593.
b. Suit, § 1594.
G. Remedy for Wrongful Assertion of Lien, § 1595.

XI. Actions for Charges, §§ 1596-1600.
A. Right of Action, § 1596.
B. Jurisdiction, § 1597.
C. Form of Action, § 1598.
D. Set-Off and Recoupment, § 1599.
E. Amount of Recovery or Damages, § 1600.

CHAPTER XVI.

Discrimination in Rates and Overcharge.

I. Discrimination in Rates, §§ 1601-1632.
A. Right to Discriminate, §§ 1601-1603.
a. At Common Law, § 1601.
b. Effect of Statutes Generally, § 1602.
c. Authority of Station Agent, § 1603.
B. Unjust or Unreasonable Discrimination, §§ 1604-1622.
a. General Rule, § 1604.
b. What Constitutes Unjust Discrimination, §§ 1605-1609.
(1) General Rule, § 1605.
(2) Questions of Law or Fact, § 1606.
(3) Conformity to Published Rates, § 1607.
(4) Grant of Exclusive Advantage or Monopoly, § 1608.
(5) Rebates and Drawbacks, § 1609.
c. Grounds for and Elements of Discriminations, §§ 1610-1622.
(1) In General, § 1610.
(2) Particular Grounds of Discrimination, §§ 1611-1622.
(a) Character of Shipment, § 1611.
(b) Condition or Character of Shipper, §§ 1612-1613
aa. In General, § 1612.

bb. Dealers and Manufacturers, § 1613.
(c) Place of Production and Ownership, § 1614.
(d) Time and Quantity, § 1615.
(e) Distance and Direction, §§ 1616-1618.
aa. In General, § 1616.
bb. Long and Short Hauls, § 1617.
cc. Difference as to Other Parts of Road, § 1618.
(f) Large and Small Shipments, § 1619.
(g) Rates Offered to Meet Competition or Secure Customers, § 1620.
(h) Shipper from Spur Track, § 1621.
(i) Carriage to Point on Belt Line, 1622.
C. Remedies for Discrimination in Rates, §§ 1623-1632.
a. Injunction and Mandamus, § 1623.
b. Quo Warranto, § 1624.
c. Action at Law, §§ 1625-1631.
(1) Right of Action, § 1625.
(2) Jurisdiction, § 1626.
(3) Limitations, § 1627.
(4) Petition or Complaint, § 1628.
(5) Evidence, §§ 1629-1631.
(a) Presumptions and Burden of Proof, § 1629.
(b) Admissibility, § 1630.
(c) Weight and Sufficiency, § 1631.
d. Damages, § 1632.

II. Excessive Charges, §§ 1633-1655.
A. Right to Make, § 1633.
B. What Constitutes an Overcharge and Effect, § 1634.
C. Recovery Back of Overcharge, §§ 1635-1655.
a. Right to Recover, §§ 1635-1636.
(1) In General, § 1635.
(2) Necessity for Protest—Voluntary Payment, § 1636.
b. Carriers and Persons Liable, §§ 1637-1638.
(1) Overcharge Exacted by Connecting Carrier, § 1637.
(2) Favored Shipper to Whom Excess Charges Paid, § 1638.
c. Form of Action, §§ 1639-1640.
(1) Action for Money Had and Received, § 1639.
(2) Statutory Redress as Abrogating Common-Law Remedy, § 1640.
d. Jurisdiction, § 1641.
e. Limitations and Lapse of Time, § 1642.
f. Demand of Repayment, § 1643.
g. Persons Entitled to Recover, § 1644.
h. Declaration or Complaint, § 1645.
i. Issues and Proof, § 1646.
j. Reference, § 1647.
k. Judicial Notice, § 1648.
l. Examination of Witnesses, § 1649.
m. Presumptions and Burden of Proof, § 1650.
n. Admissibility of Evidence, § 1651.
o. Weight and Sufficiency of Evidence, § 1652.
p. Questions for Jury, § 1653.
q. Charge of Court, § 1654.
r. Amount of Recovery, § 1655.

CHAPTER XVII.

Stoppage in Transitu.

I. Scope of Treatment, § 1656.

II. Nature of Right in General, §§ 1657-1660.
A. Definition of and Nature of Right in General, § 1657.
B. Origin and Status of Doctrine, § 1658.
C. Must Be in Transitu, § 1659.
D. Insolvency Essential to Existence of Right, § 1660.

III. Property Subject to Right, § 1661.

IV. Sale on Credit and Nonpayment of Price, §§ 1662-1668.
A. Nonpayment of Price, §§ 1662-1665.
a. In General, § 1662.
b. Goods Shipped in Payment of Antecedent Debt, § 1663.
c. Vendor Indebted to Vendee, § 1664.
d. Consignor Indebted to Consignee, § 1665.
B. Part Payment, § 1666.
C. Acceptance of Bills or Notes, § 1667.
D. Credit, § 1668.

V. Insolvency of Vendee, §§ 1669-1671.
A. Right Based on Insolvency of Vendee, § 1669.
B. Nature of and Existence of Insolvency, § 1670.
C. Time of Existence of and of Notice of Insolvency, § 1671.

VI. Persons Entitled to Exercise Right, §§ 1672-1683.
A. Privity of Contract, § 1672.
B. Vendor or Quasi Vendor, § 1673.
C. Transferee of Bill of Lading, § 1674.
D. Principal against Factor, § 1675.
E. Factor against Principal, § 1676.
F. Agent against Vendee of Principal, § 1677.
G. Part Owner, § 1678.
H. Holder of Lien, § 1679.
I. Surety, § 1680.
J. Consignee, § 1681.
K. May Be Exercised through Agent, § 1682.
L. General Power of Consignor to Stop Delivery to Consignee, § 1683.

VII. Effect of Attachment, Execution, or Other Lien against Vendee, § 1684.

VIII. Whether Right May Be Defeated by Transfer of Bill of Lading or by Attempted Transfer of Title to Goods, §§ 1685-1691.
A. Transfer of Bill of Lading, § 1685.
B. Transfer of Duplicate of Bill of Lading, § 1686.
C. Transfer for Antecedent Debt, § 1687.
D. Pledge of Bill of Lading, § 1688.
E. Subpurchasers of Goods, § 1689.
F. Pledge or Mortgage of Goods, § 1690.
G. Assignment for Benefit of Creditors, § 1691.

IX. Duration and Termination of Transit, §§ 1692-1710.
A. Beginning of Transit, § 1692.
B. Terminates with Delivery to Vendee, § 1693.
C. What Constitutes Delivery, § 1694.
D. Delivery of Part, § 1695.
E. Possession of Goods by Carrier after Arrival at Destination in General, § 1696.

F. Possession of Carrier as Agent of Consignee or as Warehouseman, § 1697.
G. Delivery by Carrier to Third Person in General, § 1698.
H. Delivery by Carrier to Agent, or Local Carrier for Transmission to Vendee, § 1699.
I. Delivery to Local Carrier Selected by Consignee, § 1700.
J. Deposited by Carrier at Intermediate Point, § 1701.
K. Agent, or Local Carrier, Converted into Special Agent for Vendee, 1702.
L. Seizure under Attachment or Execution, § 1703.
M. Intercepted at Intermediate Point by Vendee, or His Agent, § 1704.
N. Delivery to Ship Owned or Hired by Buyer, § 1705.
O. Delivery to Carrier for Shipment to Third Person, § 1706.
P. Refusal of Buyer to Receive Goods and Reconveyance to Seller, §§ 1707-1708.
a. Refusal of Consignee to Receive Goods, § 1707.
b. Reshipment to Vendee after Refusal of Consignor to Resume Possession. § 1708.
Q. Reshipment by Buyer, § 1709.
R. Entry of Goods in Custom House and Retention in Bonded Warehouse, § 1710.

X. Waiver or Loss of Right, § 1711.

XI. Manner of Exercise of Right, § 1712.

XII. Rights and Liability of Carrier, §§ 1713-1719.

A. Right of Carrier to Investigate and Require Indemnity, § 1713.
B. Right to Bring Goods into Court, § 1714.
C. Right of Carrier to Retain Goods for Charges Due by Consignee, § 1715.
D. Liability of Carrier for Refusal or Failure to Stop Goods in Transitu, § 1716.
E. Liability for Misdelivery, § 1717.
F. Liability of Carrier to Consignee or Purchase from Consignee, § 1718.
G. Actions against Carrier, § 1719.

CHAPTER XVIII.

Dead Bodies.

I. Rights, Duties and Liabilities of Carrier, § 1720.

II. Actions, §§ 1721-1732.

A. Form of Action, § 1721.
B. Who May Maintain Action, § 1722.
C. Pleading and Proof, § 1723.
D. Evidence, §§ 1724-1725.
a. Admissibility, § 1724.
b. Weight and Sufficiency, § 1725.
E. Damages, §§ 1726-1729.
a. Nominal Damages, § 1726.
b. Expenses, § 1727.
c. Mental Suffering, 1728.
d. Excessive Verdict, § 1729.
F. Recoupment of Damages in Action for Transportation Charges, § 1730.
G. Instructions, § 1731.
H. Questions for Jury, § 1732.

PART III

CARRIERS OF LIVE STOCK

CHAPTER XIX.

Rights, Duties and Liabilities.

I. Nature of Liability, § 1733.

II. Duty to Receive and Carry, § 1734.

III. Duties in Respect to Transportation, §§ 1735-1758.

A. Degree of Care Required, §§ 1735-1739.
a. In General, § 1735.
b. Management of Train, § 1736.
c. Sprinkling Hogs, § 1737.
d. Degree of Care Measurable by Character of Property, § 1738.
e. Care during Delay in Transportation, § 1739.
B. Duty as to Cars, §§ 1740-1746.
a. Duty to Furnish Cars in General, § 1740.
b. Sufficient Number of Cars, § 1741.
c. Cars Must Be Suitable, §§ 1742-1744.
(1) In General, § 1742.
(2) Bedding, § 1743.
(3) Using Cars the Property of Others than Carrier, § 1744.
d. Cars Must Be Furnished within Reasonable Time, § 1745.
e. Duty to Place in Particular Position in Train, § 1746.
C. Duty to Provide Stock Pens, §§ 1747-1749.
a. In General, § 1747.
b. Character of Yards or Pens Required, § 1748.
c. Extra Charge for Use of Stockyards, § 1749.
D. Duty as to Loading and Unloading, §§ 1750-1752.
a. In General, § 1750.
b. Duty to Designate Proper Cars for Loading, § 1751.
c. Duty to Furnish Safe and Suitable Facilities, § 1752.
E. Duty to Ship by Particular Route, § 1753.
F. Duty to Feed, Water and Rest, §§ 1754-1758.
a. In General, § 1754.
b. Where Shipper Has Assumed Duty, §§ 1755-1758.
(1) In General, § 1755.
(2) Notice of Desire to Feed and Water, § 1756.
(3) Duty to Provide Suitable Places and Facilities for Feeding and Watering, § 1757.
(4) Duty to Furnish Water, § 1758.

IV. Special Contracts for Transportation, §§ 1759-1770.

A. In General, § 1759.
B. Validity of Special Contracts, §§ 1760-1763.
a. In General, § 1760.
b. Fraud, § 1761.
c. Terms and Mode of Transportation, § 1762.
d. Partial Invalidity, § 1763.
C. Authority of Agents to Make Special Contracts, §§ 1764-1766.
a. In General, § 1764.
b. To Furnish Cars at Specified Time and Place, § 1765.

c. For Rates, § 1766.
D. Modification or Merger, §§ 1767-1769.
a. In General, § 1767.
b. Duress, § 1768.
c. Want of Time to Read Contract, § 1769.
E. Construction of Contract, § 1770.
V. When Liability Commences, § 1771.
VI. Delivery by Carrier, §§ 1772-1781.
A. In General, § 1772.
B. Time of Delivery, § 1773.
C. Necessity for Personal Delivery, § 1774.
D. Notice to Consignee, § 1775.
E. Place of Delivery, § 1776.
F. To Whom Delivery May Be Made, § 1777.
G. Care of Stock Where Consignee Is Absent, § 1778.
H. Misdelivery, § 1779.
I. Goods Shipped C. O. D., § 1780.
J. Damages for Wrongful Delivery, § 1781.
VII. Delay in Transportation or Delivery, §§ 1782-1826.
A. In General, § 1782.
B. Diligence Required of Carrier, § 1783.
C. What Constitutes Reasonable Diligence, § 1784.
D. Excuses for Delay, §§ 1785-1794.
a. In General, § 1785.
b. Delay Caused by Act of God, Public Enemy, etc., § 1786.
c. Delays Incident to Course of Business, § 1787.
d. Unusual Rush of Business or Want of Facilities, § 1788.
e. Inherent Vices, § 1789.
f. Stops for Food, Water and Rest, § 1790.
g. Delay Caused by Operation of Law, § 1791.
h. Acts of Owner, § 1792.
i. Delay Caused by Strikes, § 1793.
j. Duty of Carrier on Happening of Excusing Cause, § 1794.
E. Delay under Special Contract, § 1795.
F. Damages for Delay in Transportation and Delivery, §§ 1796-1826.
a. Liability for Damages, §§ 1796-1803.
(1) In General, § 1796.
(2) Failure to Furnish Cars for Shipment, § 1797.
(3) Loss Occurring after Cattle Out of Carrier's Hands, § 1798.
(4) Special Damages, §§ 1799-1801.
(a) Notice of Special Circumstances, §§ 1799-1800.
aa. Necessity for Notice of Circumstances, § 1799.
bb. What Constitutes Notice, § 1800.
(b) What Constitutes Special Damages, § 1801.
(5) Remote or Speculative Damages, § 1802.
(6) Waiver of Damages, § 1803.
b. Elements, §§ 1804-1810.
(1) In General, § 1804.
(2) Decline in Market, § 1805.
(3) Expenditures for Keep of Animals, § 1806.
(4) Expenses of Shipment to Another Market, § 1807.
(5) Shrinkage in Weight, § 1808.
(6) Loss of Services of Animals, § 1809.
(7) Death of Animals, § 1810.
c. Measure and Amount, §§ 1811-1818.
(1) In General, § 1811.
(2) Difference in Market Value at Destination as Measure, § 1812.

(3) Shipper under Contract to Deliver at Specified Time, § 1813.
(4) Refusal to Receive Shipment, § 1814.
(5) Breach of Agreement to Furnish Cars, § 1815.
(6) Shipment for Pasturage, § 1816.
(7) Subsequent Shipment to Another Market, § 1817.
(8) Interest, § 1818.
d. Mitigation and Discharge of Damage, § 1819.
e. Pleading, § 1820.
f. Issues and Proof, § 1821.
g. Evidence, §§ 1822-1823.
(1) Admissibility, § 1822.
(2) Weight and Sufficiency, § 1823.
h. Instructions, § 1824.
i. Judgment, §§ 1825-1826.
(1) Measured in United States Money on Shipment to Mexico, § 1825.
(2) Excessive Damages, § 1826.
VIII. Liability of Carrier for Loss or Injury, §§ 1827-1871.
A. In General, § 1827.
B. Liability as for Carriage of Goods, § 1828.
C. Liability as Insurer, § 1829.
D. Liability for Negligence, § 1830.
E. Proximate Cause, § 1831.
F. Time Liability Arises, § 1832.
G. Liability for Negligence of Agent, § 1833.
H. Liability in Particular Instances, §§ 1834-1843.
a. Furnishing and Repairing Cars, § 1834.
b. Careless Moving of Cars, § 1835.
c. Carriage beyond Destination, § 1836.
d. Exposing Stock to Fire, Weather or Disease, § 1837.
e. Negligent Delivery, § 1838.
f. Liability for Delay, § 1839.
g. Liability for Deviation, § 1840.
h. Liability for Injury to Cattle in Yards, § 1841.
i. Liability for Loss after Delivery to Consignee, § 1842.
j. Liability for Loss on Connecting Carrier, § 1843.
I. Circumstances Exempting from Liability as Insurer, §§ 1844-1852.
a. In General, § 1844.
b. Loss Arising from Act of God, §§ 1845-1846.
(1) In General, § 1845.
(2) Where Carrier's Negligence Concurs, § 1846.
c. Inherent Vice of Animals, §§ 1847-1848.
(1) In General, § 1847.
(2) Where Carrier's Negligence Concurs, § 1848.
d. Loss or Injury Caused by Shipper, § 1849.
e. Waiver of Liability by Shipper, § 1850.
f. Where Shipper Accompanies Live Stock, § 1851.
g. Duty of Carrier after Excusing Cause Ceases, § 1852.
J. Damages, §§ 1853-1871.
a. Elements of Damages, §§ 1853-1858.
(1) In General, § 1853.
(2) Interest, § 1854.
(3) Shrinkage in Weight, § 1855.
(4) Freight, § 1856.
(5) Expenses, § 1857.
(6) Feed for Cattle, § 1858.
b. Measure of Damages, §§ 1859-1860.
(1) Total Loss, § 1859.

(2) Partial Loss, § 1860.
c. Special Damages, § 1861.
d. Speculative or Remote Damages, § 1862.
e. Mitigation of Damages, § 1863.
f. Evidence of Damages, §§ 1864-1869.
(1) Admissibility, §§ 1864-1868.
(a) Evidence of Market Value, § 1864.
(b) Evidence of Actual Value, § 1865.
(c) Evidence of Cost and Selling Price, § 1866.
(d) Evidence of Nature and Pedigree, § 1867.
(e) Evidence as to Damages Per Head, § 1868.
(2) Weight and Sufficiency, § 1869.
g. Instructions as to Damages, § 1870.
h. Payment of Freight as Prerequisite to Recovery, § 1871.
IX. Limitation of Liability of Carriers of Live Stock, §§ 1872-2054.
A. Limitation of Common-Law Liability as Insurer, §§ 1872-1968.
a. Power to Limit and Validity, §§ 1872-1875.
(1) In General, § 1872.
(2) Effect of Statutory and Constitutional Provisions, §§ 1873-1874.
(a) Federal Statutes, § 1873.
(b) State Statutes, § 1874.
(3) Conflict of Laws, § 1875.
b. Extent of Limitation Generally, § 1876.
c. Duties and Losses Which May Be Limited or Restricted, §§ 1877-1905.
(1) In General, § 1877.
(2) Negligence of Carrier, §§ 1878-1881.
(a) In General, § 1878.
(b) Injury Caused by Fraud or Gross Negligence, §§ 1879-1881.
aa. In General, § 1879.
bb. Jurisdiction Allowing Exemption, § 1880.
cc. Conflict of Laws, § 1881.
(3) Requiring Shipper to Load and Unload Stock, §§ 1882-1886.
(a) In General, § 1882.
(b) Under Federal Statutes, §§ 1883-1885.
aa. Hepburn Act, § 1883.
bb. Liability for Overloading, § 1884.
cc. Unloading for Food, Rest and Water, § 1885.
(c) Loss by Negligence of Carrier, § 1886.
(4) Requiring Shipper to Accompany and Care for Stock, §§ 1887-1891.
(a) In General, § 1887.
(b) Under Constitutional and Statutory Provisions, § 1888.
(c) Loss by Negligence, § 1889.
(d) Watering and Feeding, § 1890.
(e) Estoppel of Shipper to Deny Validity, § 1891.
(5) Requiring Shipper to Select or Inspect Cars, § 1892.
(6) Loss from Size and Mode of Construction of Cars, § 1893.
(7) Loss Resulting from Defective Cars, § 1894.
(8) Loss from Failure to Provide Suitable Yards and Chutes, § 1895.
(9) Limitation to Loss Caused by Collision or Derailment, § 1896.
(10) Injury Resulting from Inherent Vice, Propensities or Defect of Animals, §§ 1897-1899.
(a) In General, § 1897.
(b) Injuries Caused by Freight, § 1898.
(c) Loss by Jumping from Cars, § 1899.
(11) Failure to Drench Hogs, § 1900.
(12) Loss by Suffocation, § 1901.

(13) Loss by Mobs and Strikers, § 1902.
(14) Stipulation against Loss by Delay, § 1903.
(15) Nondelivery, § 1904.
(16) Loss Occurring Prior to Execution of Contract, § 1905.
d. Mode, Form and Requisites, §§ 1906-1913.
(1) Express Contract, § 1906.
(2) Custom, § 1907.
(3) Fairness and Reasonableness, § 1908.
(4) Knowledge and Assent of Shipper, § 1909.
(5) Power of Agent to Bind Shipper, § 1910.
(6) Choice between Full and Limited Liability Contracts, § 1911.
(7) Consideration, § 1912.
(8) Fraud, Misrepresentation and Duress, § 1913.
e. Construction, Operation and Effect, §§ 1914-1942.
(1) Rules of Construction, § 1914.
(2) Duties Restricted and Losses and Injuries Covered, §§ 1915-1942.
(a) In General, § 1915.
(b) Loss from Negligence of Carrier Generally, § 1916.
(c) Injuries from Inherent Vice or Defect of Animals, § 1917.
(d) Requiring Shipper to Load and Unload Stock, §§ 1918-1921.
aa. In General, § 1918.
bb. Failure to Furnish Cars in Reasonable Time, § 1919.
cc. Failure to Furnish Proper Facilities for Unloading, § 1920.
dd. Carrier's Unloading without Notice to Shipper, § 1921.
(e) Requiring Shipper to Accompany and Care for Stock, §§ 1922-1930.
aa. Operation and Effect in General, § 1922.
bb. Injury by Negligence of Carrier, § 1923.
cc. Escape of Stock, § 1924.
dd. Watering and Feeding, § 1925.
ee. Failure to Drench Hogs, § 1926.
ff. Care of Stock While in Stockyards, § 1927.
gg. Duty to Care for Stock after Unloading, § 1928.
hh. Carriers Allowing Shipper to Ride on Passenger Train, § 1929.
ii. Failure to Deliver, § 1930.
(f) Loss While in Cars, § 1931.
(g) Requiring Shipper to Inspect Cars and Stockyards, § 1932.
(h) Injury from Use of Defective or Unsuitable Cars, § 1933.
(i) Arbitrary Deviation from Route, § 1934.
(j) Refusal to Allow Shipper to Feed and Water Stock, § 1935.
(k) Collisions, § 1936.
(l) Derailment, § 1937.
(m) "Breaking" and "Chafing," § 1938.
(n) Loss by Suffocation, § 1939.
(o) Loss by Strikers, § 1940.
(p) Stipulation against Loss by Delay, § 1941.
(q) Injuries Occurring Prior to Execution of Contract, § 1942.
f. Failure of Shipper to Comply with Contract, §§ 1943-1947.
(1) Shipper Required to Load and Unload Stock, § 1943.
(2) Failure of Shipper to Accompany and Care for Stock, §§ 1944-1947.
(a) In General, § 1944.
(b) Duty of Carrier, § 1945.
(c) Cars Stopped En Route by Carrier, § 1946.
(d) Injuries from Defect in Cars Unknown to Shipper, § 1947.
g. Breach or Refusal of Carrier to Perform Contract, §§ 1948-1949.
(1) In General, § 1948.
(2) Shipper Required to Load and Unload Stock, § 1949.
h. Waiver or Estoppel to Rely on Exemption, § 1950.

i. Enforcement, §§ 1951-1968.
(1) Pleading, §§ 1951-1952.
(a) Petition or Complaint, § 1951.
(b) Plea or Answer, § 1952.
(2) Issues, Proof and Variance, § 1953.
(3) Evidence, §§ 1953-1966.
(a) Presumptions and Burden of Proof, §§ 1954-1959.
aa. As to the Contract, § 1954.
bb. As to the Loss or Injury, §§ 1955-1959.
(aa) Cause of Loss, § 1955.
(bb) Showing Loss within Exception, § 1956.
(cc) Negligence of Carrier, § 1957.
(dd) Shipper Required to Inspect Car, § 1958.
(ee) Shipper Required to Care for Stock, § 1959.
(b) Admissibility and Competency, §§ 1960-1965.
aa. Contract Itself, § 1960.
bb. Custom, § 1961.
cc. Carrier's Course of Business, § 1962.
dd. Choice between Full and Limited Liability Contract, § 1963.
ee. Fraud, § 1964.
ff. Negligence, § 1965.
(c) Weight and Sufficiency, § 1966.
(4) Question for Jury, § 1967.
(5) Instructions, § 1968.
B. Limitation of Amount of Liability and Agreed Valuation, §§ 1969-1998.
a. Power to Limit, §§ 1969-1974.
(1) In General, § 1969.
(2) Effect of Statutory and Constitutional Provisions, §§ 1970-1972.
(a) Federal Statutes, § 1970.
(b) State Statutes, §§ 1971-1972.
aa. Application to Interstate Commerce, § 1971.
bb. Statutes of Particular States, § 1972.
(3) Loss by Negligence of Carrier, § 1973.
(4) Loss by Gross Negligence, § 1974.
b. Form, Requisites and Validity, §§ 1975-1987.
(1) Form and What Constitutes, § 1975.
(2) Consideration, § 1976.
(3) Reasonableness—Undervaluation, § 1977.
(4) Arbitrary Valuation, § 1978.
(5) Assent of Shipper, §§ 1979-1981.
(a) Necessity, § 1979.
(b) Acceptance of Bill of Lading, § 1980.
(c) Authority of Person Shipping to Bind Owner, § 1981.
(6) Choice of Full and Limited Liability Contracts, § 1982.
(7) Fraud or Duress, § 1983.
(8) Fairness and Good Faith, § 1984.
(9) Permission of Railroad Commissions, § 1985.
(10) Partial Invalidity, § 1986.
(11) Estoppel by Receiving Benefit of Reduced Rate, § 1987.
c. Construction, Operation and Effect, §§ 1988-1991.
(1) Construction of Terms, § 1988.
(2) As Measure of Rights and Obligations of Parties, §§ 1989-1990.
(a) In General, § 1989.
(b) As Determining Amount of Recovery, § 1990.
(3) Losses Covered, § 1991.
d. Modification and Rescission, § 1992.
e. Enforcement, §§ 1993-1997.

(1) Pleading, § 1993.
(2) Burden of Proof, § 1994.
(3) Admissibility and Competency of Evidence, § 1995.
(4) Weight and Sufficiency, § 1996.
(5) Questions for Jury, § 1997.
f. Damages, § 1998.
C. Stipulation for Notice of Loss, §§ 1999-2051.
a. Power and Validity, §§ 1999-2004.
(1) In General, § 1999.
(2) Public Policy, § 2000.
(3) Effect of Constitutional and Statutory Provisions, §§ 2001-2003.
(a) Provision Prohibiting Stipulation, § 2001.
(b) Under Texas Statute, §§ 2002-2003.
aa. In General, § 2002.
bb. Conflict of Laws, § 2003.
(4) Effect of Custom, § 2004.
b. Reasonableness, §§ 2005-2012.
(1) Necessity, § 2005.
(2) What Constitutes, §§ 2006-2008.
(a) In General, § 2006.
(b) Respecting Officer or Agent to Be Notified, § 2007.
(c) Particular Stipulations Considered, § 2008.
(3) Pleading and Proof of Reasonableness, §§ 2009-2011.
(a) Presumption and Burden, § 2009.
(b) Admissibility of Evidence, § 2010.
(c) Weight of Evidence, § 2011.
(4) Questions for Court or Jury, § 2012.
c. Form and Requisites, §§ 2013-2015.
(1) Certainty and Definiteness, § 2013.
(2) Name of Agent to Be Notified, § 2014.
(3) Consideration, § 2015.
d. Construction, Operation and Effect, §§ 2016-2031.
(1) Rules of Construction, § 2016.
(2) Construction of Phrase "Removal from Place of Destination," §§ 2017-2018.
(a) "Place of Destination," § 2017.
(b) What Constitutes a Removal, § 2018.
(3) Losses of Which Notice Must Be Given, §§ 2019-2031.
(a) In General, § 2019.
(b) Resulting from Negligence Generally, § 2020.
(c) Delay in Furnishing Cars, § 2021.
(d) Loss by Delay, § 2022.
(e) Death of Animals in Transit or before Removal, § 2023.
(f) Statutory Penalty for Failure to Feed and Water, § 2024.
(g) Nondelivery, § 2025.
(h) Stock Removed before Arrival at Destination, § 2026.
(i) Shrinkage from Shunting or Bumping Cars, § 2027.
(j) Injuries Accruing after Unloading, § 2028.
(k) Injuries Not Discoverable within Stipulated Time, §§ 2029-2030.
aa. In General, § 2029.
bb. Right to Give Additional Notice, § 2030.
(l) Claims Accruing Prior to Contract, § 2031.
e. Sufficiency of Notice, §§ 2032-2035.
(1) In General, § 2032.
(2) Time of Presentation, § 2033.
(3) Agent Notified, § 2034.
(4) Claims Covered by Notice, § 2035.
f. Effect of Failure to Give Notice, § 2036.

g Facts Relieving from Necessity for Notice, §§ 2037-2042.
(1) Carrier Having Notice and Opportunity to Investigate, § 2037.
(2) Waiver, §§ 2038-2042.
(a) Power to Waive, § 2038.
(b) Authority of Agent, § 2039.
(c) What Constitutes, §§ 2040-2042.
aa. Waiving Written by Acting on Verbal Notice, § 2040.
bb. Want of Verification, § 2041.
cc. Delay in Filing Notice, § 2042.
h. Enforcement, §§ 2043-2051.
(1) Form of Action, § 2043.
(2) Pleading, §§ 2044-2046.
(a) Petition or Declaration, § 2044.
(b) Plea or Answer, § 2045.
(c) Replication or Reply, § 2046.
(3) Burden of Proof, § 2047.
(4) Admissibility and Competency, § 2048.
(5) Weight and Sufficiency, § 2049.
(6) Question for Jury, § 2050.
(7) Appeal and Error, § 2051.
D. Time When Suit Must Be Brought, § 2052.
E. Limiting Loss to Carrier's Own Line, § 2053.
F. Limiting Liability to That of Forwarder, § 2054.

CHAPTER XX.

Actions.

I. Nature and Form of Action, §§ 2055-2058.
A. Right of Plaintiff to Sue Either Ex Contractu or Ex Delicto, § 2055.
B. Action for Conversion, § 2056.
C. Actions Ex Delicto, § 2057.
D. Actions Ex Contractu, § 2058.
II. Rights of Action, §§ 2059-2062.
A. In General, § 2059.
B. Right of Action of Owner, § 2060.
C. Right of Action of Party in Whose Name Stock Shipped, § 2061.
D. Right of Action in Consignee, § 2062.
III. Time to Sue and Limitations, § 2063.
IV. Parties Plaintiff, §§ 2064-2066.
A. Owner, § 2064.
B. Consignor, § 2065.
C. Consignee, § 2066.
V. Pleading, §§ 2067-2075.
A. Declaration, Petition, or Complaint, §§ 2067-2074.
a. Stating Cause of Action, § 2067.
b. Averments as to Damages Sustained, § 2068.
c. Matters More Properly Coming from Defense, § 2069.
d. Allegations as to Contracts, §§ 2070-2072.
(1) Necessity for Setting Out Terms of Contract, § 2070.
(2) Necessity for Alleging Authority of Carrier's Agent, § 2071.
(3) Allegations as to Consideration of Contract, § 2072.
e. Allegations as to Negligence, § 2073.
f. Amendments, § 2074.
B. Answer, § 2075.
VI. Issues Raised by Pleading, § 2076.
VII. Proof, § 2077.

VIII. Variance, § 2078.
IX. Evidence, §§ 2079-2103.
A. Presumptions and Burden of Proof, §§ 2079-2086.
a. In General, § 2079.
b. Contracts and Relation Created between Parties, § 2080.
c. Loss of or Injury to Live Stock and Cause Thereof, §§ 2081-2086.
(1) In General, § 2081.
(2) Time of Injury, § 2082.
(3) Negligence, §§ 2083-2086.
(a) In General, § 2083.
(b) Burden on Carrier to Prove That It Was Not Negligent, § 2084.
(c) Burden of Proving Negligence on Shipper Accompanying Stock, § 2085.
(d) Burden on Carrier to Excuse Delay, § 2086.
B. Admissibility of Evidence, §§ 2087-2094.
a. In General, § 2087.
b. Admissibility under Pleadings, § 2088.
c. Secondary Evidence, § 2089.
d. Opinion Evidence, § 2090.
e. Delay in Transportation, § 2091.
f. Evidence Admissible to Show Damages Sustained, § 2092.
g. Nature, Condition and Character of Animal Injured, § 2093.
h. Evidence as to Negligence, § 2094.
C. Weight and Sufficiency, §§ 2095-2103.
a. Degree of Proof Required, § 2095.
b. Contracts, § 2096.
c. Delay in Transportation, § 2097.
d. Damages Sustained, § 2098.
e. Negligence, §§ 2099-2101.
(1) Making Prima Facie Case against Carrier, § 2099.
(2) Sufficiency of Proof of Negligence, § 2100.
(3) Gross, Willful, or Wanton Negligence, § 2101.
f. Showing Proximate Cause of Injury, § 2102.
g. Failure to Unload, Feed, and Water Live Stock, § 2103.
X. Damages, § 2104.
XI. Questions for Jury, §§ 2105-2113.
A. General Rule, § 2105.
B. Contracts, § 2106.
C. Estoppel and Waiver, § 2107.
D. Cause of Injury, § 2108.
E. Negligence, §§ 2109-2111.
a. While Awaiting Transportation or Delivery, § 2109.
b. While in Transit, § 2110.
c. Contributory Negligence, § 2111.
F. Delay, § 2112.
G. Extent of Injury and Damages, § 2113.
XII. Instructions to the Jury, § 2114.
XIII. Verdict and Findings, § 2115.

PART IV

CARRIERS OF PASSENGERS

CHAPTER XXI.

Relation of Carrier and Passenger.

I. Who Are Carriers of Passengers, § 2116.
II. What Law Governs Relationship, § 2117.
III. Duty to Receive and Carry, §§ 2118-2121.
A. In General, § 2118.
B. Offer for Transportation, § 2119.
C. Grounds for Refusal Considered, § 2120.
D. Enforcement of Duty—Mandamus, § 2121.
IV. Creation of Relation, §§ 2122-2125.
A. Who May Become Passenger, § 2122.
B. Relation Created by Contract, § 2123.
C. Notice of Intention Essential, § 2124.
D. Acceptance by Carrier Essential, § 2125.
V. When Relation of Carrier and Passenger Commences, §§ 2126-2136.
A. In General, § 2126.
B. Before Reaching Carrier's Premises, § 2127.
C. While at Station in Waiting Room, etc., § 2128.
D. Approaching Train to Board, § 2129.
E. After Signalling Street Car, § 2130.
F. Before Entering Vehicle, § 2131.
G. Attempting to Board Train or Other Vehicle, § 2132.
H. Boarding Train at Improper Place, § 2133.
I. On Train or Car Before Its Departure, § 2134.
J. Before Taking Seat in Vehicle, § 2135.
K. Mail Clerks, § 2136.
VI. Termination of Relation, §§ 2137-2157.
A. In General, § 2137.
B. Leaving Premises Previous to Transportation, § 2138.
C. Leaving Train or Car Before Reaching Destination, §§ 2139-2143.
a. With Intention to Return, § 2139.
b. Without Intention to Return, § 2140.
c. For Purpose of Transfer, § 2141.
d. To Avoid Imminent Danger, § 2142.
e. To Assist with Vehicle, § 2143.
D. Violation of Rules—Assuming Dangerous Position, §§ 2144-2145.
a. In General, § 2144.
b. Leaving Moving Train or Car, § 2145.
E. Transferring Prior to Destination, § 2146.
F. Time and Opportunity to Leave Vehicle at Destination, §§ 2147-2148.
a. In General, § 2147.
b. Failure to Alight within a Reasonable Time, § 2148.
G. After Alighting at Destination, §§ 2149-2153.
a. In General, §§ 2149-2150.
(1) Rules as to Railroads, § 2149.
(2) Rules as to Street Cars, § 2150.
b. On Carrier's Premises after Alighting, § 2151.
c. After Leaving Carrier's Premises, §§ 2152-2153.
(1) In General, § 2152.
(2) Mail Clerks, § 2153.

H. Passenger Continuing Journey Beyond Destination, § 2154.
I. Carriage Beyond Destination, § 2155.
J. Ejection of Passenger, § 2156.
K. Regaining Status on Train or Car after Ejection, § 2157.
VII. Relation as Affected by Character of Vehicle or Position Occupied, §§ 2158-2166.
A. Vehicle Used for Transportation of Passengers, §§ 2158-2161.
a. Presumption Arising from Character of Vehicle, § 2158.
b. Boarding Wrong Train or Car, § 2159.
c. Persons Boarding Special Train, § 2160.
d. Boarding Train Not Stopping at Destination, § 2161.
B. Vehicle Not Designed for Passengers, §§ 2162-2165.
a. In General, § 2162.
b. Acceptance or Invitation by Trainmen, § 2163.
c. Presumption as to Status, § 2164.
d. Presumption as to Trainmen's Authority, § 2165.
C. Relation as Affected by Position Occupied, § 2166.
VIII. Relation as Affected by Possession of Ticket or Payment of Fare, §§ 2167-2178.
A. In General—Proper Ticket, § 2167.
B. Prior to Payment of Fare, § 2168.
C. Free Transportation, §§ 2169-2173.
a. In General, § 2169.
b. Free Transportation to Small Children, § 2170.
c. Persons Travelling on Pass, §§ 2171-2172.
(1) In General, § 2171.
(2) Drover's Pass or under Shipping Contract, § 2172.
d. Free Transportation by Permission or Invitation of Agent, § 2173.
D. Refusal to Pay Fare, § 2174.
E. Evasion of Payment of Fare, § 2175.
F. Nontransferrable Ticket, § 2176.
G. Payment of Fare under Collusive Agreement, § 2177.
H. Refusal to Accept Fare, Transfer or Ticket, § 2178.
IX. Particular Classes of Persons Considered, §§ 2179-2192.
A. Circus Company Employees, § 2179.
B. Postal Clerks, § 2180.
C. Express Messengers, § 2181.
D. Passengers in Sleeping Cars or Express Trains, § 2182.
E. Sleeping Car Employees—Employees on Private Cars, § 2183.
F. Carrier's Employees Riding upon Its Vehicle, §§ 2184-2186.
a. Riding to or from Work, § 2184.
b. Riding for Purposes Disconnected with Work, Custom to Give Free Transportation to Carrier's Employees, § 2185.
c. Right to Transportation Secured by Contract of Employment, § 2186.
G. Working Passage under Agreement with Trainmen, § 2187.
H. Newsboys on Street Cars, § 2188.
I. Persons Engaged in Private Business under Contract, § 2189.
J. Employees of Third Persons, § 2190.
K. Persons Travelling on Sunday, § 2191.
L. Person Forcibly Carried Aboard by Carrier's Agents, § 2192.
X. Union Depots, § 2193.

CHAPTER XXII.

Fares, Tickets, Special Contracts, Transfers, etc.

I. Right of Carrier to Compensation, § 2194.
II. Amount of Fare, §§ 2195-2201.
A. In General, § 2195.

B. Extra Fare, §§ 2196-2201.
a. In General, § 2196.
b. Failure to Procure Ticket, §§ 2197-2201.
(1) In General, § 2197.
(2) Reasonable Opportunity to Procure Ticket, §§ 2198-2199.
(a) In General, § 2198.
(b) Keeping Ticket Office Open, § 2199.
(3) Sufficiency of Attempt to Procure Ticket, § 2200.
(4) Waiver of Right to Demand Extra Fare, § 2201.
III. Payment of Fare, §§ 2202-2206.
A. Time, Place and Manner of Payment, § 2202.
B. Necessity for Tender of Exact Fare and Amount for Which Change Must Be Made, § 2203.
C. Medium of Payment, § 2204.
D. Tender of Fare to Unauthorized Employee, § 2205.
E. Rectifying Mistake, § 2206.
IV. Excessive and Unauthorized Charges, §§ 2207-2209.
A. Recovery Back of Fare, § 2207.
B. As Authorizing Recovery of Damages, § 2208.
C. As Authorizing Recovery of Penalty, § 2209.
V. Acts and Statements of Agents or Employees, §§ 2210-2211.
A. Of Ticket Agent, § 2210.
B. Of Conductor, § 2211.
VI. Sale of Tickets, § 2212.
VII. Nature and Effect of Ticket in General, §§ 2213-2217.
A. In General, § 2213.
B. Construction, § 2214.
C. Transferability, §§ 2215-2217.
a. In Absence of Restrictions, § 2215.
b. Stipulation against Transfer, §§ 2216-2217.
(1) In General, § 2216.
(2) Injunction against Sale of Nontransferable Tickets, § 2217.
VIII. Conditions and Limitations in Tickets, §§ 2218-2230.
A. In General, § 2218.
B. Stipulation as to Continuous Passage, § 2219.
C. Limitation as to Time for Which Valid, §§ 2220-2221.
a. In Absence of Limitation, § 2220.
b. Limitations as to Time, § 2221.
D. Limitation of Use of Ticket to Particular Train, § 2222.
E. Prohibition of Transfer, § 2223.
F. Prohibition as to Detachment of Coupons, § 2224.
G. Requirement of Identification, Signature and Stamping, § 2225.
H. Limitation of Liability, § 2226.
I. Notice and Acceptance of Conditions, § 2227.
J. Forfeiture of Tickets, § 2228.
K. Waiver of Conditions, §§ 2229-2230.
a. Authority of Agent, § 2229.
b. What Amounts to Waiver, § 2230.
IX. Exhibition and Surrender of Tickets, §§ 2231-2233.
A. Exhibition of Ticket, § 2231.
B. Surrender of Ticket, § 2232.
C. Where Ticket Lost or Wrongfully Taken Up, § 2233.
X. Redemption of Tickets and Repayment of Charges, § 2234.
XI. Special Contracts for Transportation, §§ 2235-2238.
A. In General, § 2235.
B. Contract for Free Carriage, § 2236.
C. Contracts Relating to Excursions, § 2237.
D. Ratification of Contract and Waiver of Conditions, § 2238.

XII. Transportation by Connecting Carriers, § 2239.
XIII. Passes, §§ 2240-2241.
A. In General, § 2240.
B. Revocation, § 2241.
XIV. Transfers, §§ 2242-2250.
A. Power of Municipality as to Transfers, § 2242.
B. Duty of Carrier to Give and Honor Transfers, § 2243.
C. Right of Carrier to Require Transfers, § 2244.
D. Rules of Carrier, § 2245.
E. Conditions in Transfers, § 2246.
F. Wrong or Defective Transfer, §§ 2247-2250.
a. Liability of Carrier, § 2247.
b. Examination of Transfer by Passenger, § 2248.
c. Care Required in Asking for and Using Transfer, § 2249.
d. Conductor's Duty with Respect to Explanation of Passenger, § 2250.

CHAPTER XXIII.

Rights, Duties and Liabilities as to Transportation.

I. Duties as to Transportation in General, §§ 2251-2255.
A. General Statement as to Nature of Undertaking, § 2251.
B. Duty to Inform, Direct and Escort Passengers, § 2252.
C. Liability of Carrier for Misinformation, § 2253.
D. Duty of Passenger to Inform Himself, § 2254.
E. Mistakes and Delays in Furnishing Tickets, § 2255.
II. Route, Time and Means of Transportation, §§ 2256-2275.
A. Right and Duty to Ride on Particular Train or Car, §§ 2256-2262.
a. In General, § 2256.
b. Round Trip Ticket, § 2257.
c. Ticket Calling for Particular Train, § 2258.
d. Ticket Requiring Change of Trains, § 2259.
e. Trains Not Stopping at Passenger's Destination, § 2260.
f. Vehicles Not Designated for Passengers, § 2261.
g. Several Carriers Using Same Road, § 2262.
B. Route, § 2263.
C. Failure or Delay in Transportation, §§ 2264-2275.
a. Failure to Fully Perform Contract, § 2264.
b. Delay in Transportation, §§ 2265-2275.
(1) In General, § 2265.
(2) Published Schedule and Connections, §§ 2266-2273.
(a) In General, § 2266.
(b) Duty to Conform to Timetable, § 2267.
(c) Right to Change Schedule, § 2268.
(d) Liability Based on Negligence, §§ 2269-2273.
aa. In General, § 2269.
bb. Willful Delay, § 2270.
cc. Fault or Neglect of Agents, § 2271.
dd. Interference by Third Persons, § 2272.
ee. Duty to Furnish Other Transportation, § 2273.
(3) Special Contracts as to Time, § 2274.
(4) Affect as to Limited Tickets, § 2275.
III. Nature of Liability and Degree of Care Required, §§ 2276-2350.
A. Nature of Liability in General, § 2276.
B. Liability of Act of God or Public Enemy, § 2277.

C. Liability as Insurer, §§ 2278-2279.
a. In General, § 2278.
b. Liability Based on Negligence, § 2279.
D. Liability for Negligence—Assumed Risk, §§ 2280-2288.
a. In General, § 2280.
b. Proximate and Remote Cause, §§ 2281-2288.
(1) General Statement of Rules, § 2281.
(2) Stations and Stopping Places, § 2282.
(3) Roadbed and Track, § 2283.
(4) Vehicles, § 2284.
(5) Receiving and Discharging Passengers, § 2285.
(6) Accommodations and Duties during Transportation, § 2286.
(7) Control and Management of Conveyance, § 2287.
(8) Protection of Passengers, § 2288.
E. What Constitutes Negligence, § 2289.
F. Degree of Care Required, §§ 2290-2342.
a. In General, § 2290.
b. Statements of the Rule, §§ 2291-2328.
(1) In General, § 2291.
(2) Statements Requiring "Extraordinary," "Great," "Extreme," or "Strict," Care, § 2292.
(3) Statements Requiring an Extremely High Degree of Care, §§ 2293-2310.
(a) In General, § 2293.
(b) Statements Requiring the "Utmost" Care, etc., § 2294.
(c) Statements Requiring the "Most Exact" Care, etc., § 2295.
(d) Statements Requiring the "Highest" or "Greatest" Care, etc., § 2296.
(e) Statements Requiring the "Highest Possible" or "Greatest Possible" Care, etc., § 2297.
(f) Statements Which, in Effect, Require the Greatest Human Care, etc., § 2298.
(g) The Correctness of the Statements, §§ 2299-2310.
aa. In General, § 2299.
bb. Cases Upholding the Statements, §§ 2300-2303.
(aa) In General, § 2300.
(bb) Instructions Exacting the Utmost Care Upheld, § 2301.
(cc) Instructions Exacting the Highest Care Upheld, § 2302.
(dd) Instructions in Effect Exacting the Greatest Human Care Upheld, § 2303.
cc. Cases Declaring the Statements Erroneous, §§ 2304-2308.
(aa) In General, § 2304.
(bb) Instructions Exacting the Utmost Care Declared Erroneous, § 2305.
(cc) Instructions Exacting the Highest Care Declared Erroneous, § 2306.
(dd) Instructions in Effect Exacting the Greatest Human Care Erroneous, § 2307.
(ee) Instructions in Effect, Exacting the Greatest Human Care Declared Erroneous, § 2308.
dd. Conflict of Authority in Texas, § 2309.
ee. Sufficiency of the Statements When Properly Limited or Explained, § 2310.
(4) Statement Requiring the Highest Care Consistent with the Possibility of Injury, § 2311.
(5) Statements Requiring the Care Exercised by Other Similar Carrier, § 2312.
(6) Statement Requiring the Care Usually Exercised by the Particular Carrier, § 2313.
(7) Statements Making the Care of Prudent Men the Standard, §§ 2314-2322.
(a) In General, § 2314.

(b) Statements Requiring the Highest Care of Prudent, or Very Prudent, Men, § 2315.
(c) Statements Limiting the Care by the Circumstances, §§ 2316-2319.
aa. In General, § 2316.
bb. Statements Requiring the Highest Care of Prudent Men under the Circumstances, § 2317.
cc. Statements Requiring the Care of Very Prudent Men under the Circumstances, § 2318.
dd. Statements Requiring the Utmost Care of Very Prudent Men under the Circumstances, § 2319.
(d) Statements Requiring the Utmost Caution, or the Caution Characteristic of Prudent Men, § 2320.
(e) Statements Requiring the Highest Care of Prudent and Skillful Railroad Men, § 2321.
(f) Statement Requiring the Highest Care of Prudent Men in the Same Business, § 2322.
(8) Statement Requiring the Highest or Utmost Practical Care, § 2323.
(9) Statements Requiring the Highest Practical Care of Capable and Faithful Railroad Men, § 2324.
(10) Statements Requiring the Highest Reasonable Care, § 2325.
(11) Approved Statements of the Rule, § 2326.
(12) Statutory Rule in California and Other States, § 2327.
(13) Statutory Rule in Georgia, § 2328.
c. Application of the Rule, §§ 2329-2342.
(1) Mode of Conveyance Immaterial, §§ 2329-2334.
(a) In General, § 2329.
(b) Stage and Hackney Coaches, § 2330.
(c) Railroad, § 2331.
(d) Street Railways, § 2332.
(e) Carriers by Water, § 2333.
(f) Elevators, § 2334.
(2) When Passengers Are Carried on Freight Trains, §§ 2335-2337.
(a) Assumption of Risk by Passengers, § 2335.
(b) Degree of Care Exacted of the Carrier, § 2336.
(c) Statutory Rule in Mississippi, § 2337.
(3) When Passengers Are Carried on Freight Elevators, § 2338.
(4) When Passengers Are Carried Free, §§ 2339-2342.
(a) General Rule, § 2339.
(b) Kansas Decisions, § 2340.
(c) Montana Statute, § 2341.
(d) Care Varying with Conditions and Circumstances, § 2342.
G. Liability as Affected by Statutes, §§ 2343-2349.
a. In General, § 2343.
b. Texas Statute Expressly Adopting the Common Law, § 2344.
c. Nebraska Statute Making Railroads Liable as Insurers, §§ 2345-2349.
(1) Provisions of the Statute, § 2345.
(2) Constitutionality of the Statute, § 2346.
(3) Effect of the Statute, § 2347.
(4) Application of the Statute, § 2348.
(5) Enforcement of the Statute by Other than Nebraska Courts, § 2349.
H. Exercise of Proper Care Question for Jury, § 2350.
IV. As to Stations and Stopping Places, §§ 2351-2385.
A. General Rule, § 2351.
B. Railroads, §§ 2352-2381.
a. General Rule, § 2352.
b. Duty to Provide Station Houses and Platforms, § 2353.

c. Duty as to Stopping Places Unprovided with Platforms and Station Houses, § 2354.
d. Duties as to Safety of Station Houses, Platforms, and Grounds, §§ 2355-2376.
(1) General Rule, § 2355.
(2) Approaches to Stations, §§ 2356-2357.
(a) General Rule, § 2356.
(b) More than One Way, § 2357.
(3) Station Houses, § 2358.
(4) Station Platforms and Alighting Places, §§ 2359-2369.
(a) General Rule, § 2359.
(b) Defects in Floor, § 2360.
(c) Length, Width and Elevation, § 2361.
(d) Proximity of Platform to Track, § 2362.
(e) Ingress to and Egress from Platform, § 2363.
(f) Obstructions on Platform, § 2364.
(g) Snow and Ice on Platform, § 2365.
(h) Injury by Objects Thrown on Platform, §§ 2366-2368.
aa. In General, § 2366.
bb. Sparks Flying from Passing Engine, § 2367.
cc. Mail Pouches Thrown on Platform, § 2368.
(i) Runaway Horse on Platform, § 2369.
(5) Platform Facilities on Only One Side of Track, § 2370.
(6) Safe Place to Board or Alight and Intervening Tracks, etc., §§ 2371-2372.
(a) In General, § 2371.
(b) Running Trains on Intervening Tracks, § 2372.
(7) Ways to and from Eating Houses, § 2373.
(8) Transfer Accommodations, § 2374.
(9) Premises Contiguous to, Though Not Strictly Part of, Station Grounds § 2375.
(10) Crowds at Stations, § 2376.
e. Box or Stool in Lieu of Platform, § 2377.
f. Lighting Station Houses, Platforms, and Grounds, § 2378.
g. When Passengers Are Carried on Freight Trains, § 2379.
h. Duty to Inform Passengers as to Movements of Trains, § 2380
i. Duty as to Opening Waiting Rooms, § 2381.
C. Street Railways, §§ 2382-2385.
a. In General, § 2382.
b. When Carrier Has No Control Over Street, § 2383.
c. When Carrier Responsible for Conditions, § 2384.
d. Transfer Accommodations, § 2385.
V. As to Roadbed and Track, §§ 2386-2402.
A. In General, § 2386.
B. Roadbed, §§ 2387-2388.
a. Railroad Companies, § 2387.
b. Street Railways, § 2388.
C. Tracks and Appliances, §§ 2389-2402.
a. Railroad Companies, §§ 2389-2397.
(1) In General, § 2389.
(2) Rails, Ties, etc., § 2390.
(3) Switches, § 2391.
(4) Obstructions, §§ 2392-2397.
(a) In General, § 2392.
(b) Cattle on Track, § 2393.
(c) Cars on Side Tracks, § 2394.
(d) Structures Alongside the Track, § 2395.
(e) Overhead Structures, § 2396.
(f) Obstructions Caused by Third Persons, § 2397.

b. Street Railways, §§ 2398-2401.
(1) In General, § 2398.
(2) Obstructions, §§ 2399-2401.
(a) In General, § 2399.
(b) Structures Alongside the Track, § 2400.
(c) Adjustment of Parallel Tracks, § 2401.
c. Liability of Carrier Using Track of Another Company, § 2402
VI. As to Vehicles, §§ 2403-2425.
A. General Rule, § 2403.
B. Railroads and Street Railways, §§ 2403-2422.
a. Safe Means of Ingress or Egress, § 2404.
b. Cars, Engines, Couplings, Bell-Ropes, etc., § 2405.
c. Brakes, § 2406.
d. Interior of Railroad Coaches, § 2407.
e Light, Heat and Water, § 2408.
f. Window Guards, § 2409.
g. Platform Guards and Entrance Doors, § 2410.
h. Platforms and Steps of Cars, § 2411.
i. Projecting Bolts, etc., Catching Clothing of Passengers, § 2412.
j. Projection of Wheel Guard from Floor of Street Car, § 2413.
k. Construction of Steps of Street Cars, § 2414.
l. Wheel Guards, § 2415.
m. Motive Power of Street and Cable Cars, § 2416.
n. Formation of Train, § 2417.
o. Attaching Improperly Loaded Car, or Car of Wrong Gauge, to Train, § 2418.
p. Precautions against Fires and Explosions, § 2419.
q. Mixed Trains, § 2420.
r. Vestibule Trains, § 2421.
s. Palace or Sleeping Cars Forming Part of Train, § 2422.
C. Stage and Hackney Coaches, § 2423.
D. Carriers by Water, § 2424.
E. Elevators, § 2425.
VII. As to Means of Conveyance, §§ 2426-2434.
A. Scope Note, § 2426.
B. Inspection and Repair, §§ 2427-2432.
a. General Rule, § 2427.
b. Sufficiency of the Inspection, §§ 2428-2431.
(1) In General, § 2428.
(2) Inspection by Employees in Charge of Train or Car, § 2429.
(3) Inspection of Road after Extraordinary Floods or Storms, § 2430.
(4) Sufficiency of Inspection a Question of Fact, § 2431.
c. Excuses for Failure to Repair, § 2432.
C. Liability for Latent Defects, § 2433.
D. Liability for Negligence of Manufacturer or Builder, § 2434.
VIII. Receiving and Discharging Passengers, §§ 2435-2489.
A. Regulations as to Time and Place of Receiving, § 2435.
B. Rules and Regulations as to Entering Trains, § 2436.
C. Duty to Stop and Take Up, §§ 2437-2438.
a. In General, § 2437.
b. Flag Stations, § 2438.
D. Duty to Carry to and Stop at Destination, §§ 2439-2449.
a. In General, § 2439.
b. Putting Passenger Off at Wrong Station, § 2440.
c. Failure to Stop at Destination, §§ 2441-2449.
(1) In General, § 2441.
(2) Flag Stations, § 2442.
(3) Station at Which Train Does Not Stop, §§ 2443-2448.

(a) In General, § 2443.
(b) Statutory Regulations, § 2444.
(c) Contract with Reference to Usage, § 2445.
(d) Misrepresentation or Inducement, § 2446.
(e) Acceptance of Ticket or Fare as Contract, § 2447.
(f) Promises of Conductor, § 2448.
(4) Excuses for Failure to Stop at Destination, § 2449.
E. Duties and Liabilities in Taking on and Letting Off Passengers, §§ 2450-2489.
a. Scope of Treatment, § 2450.
b. General Rule—Reasonable Opportunity, § 2451.
c. Duty to Receive and Discharge Passengers at Usual Place, §§ 2452-2457.
(1) General Rule, § 2452.
(2) Failure to Stop Train at Station, § 2453.
(3) Failure to Stop Train Alongside Station Platform, § 2454.
(4) When Passengers Are Carried on Freight or Mixed Trains, § 2455.
(5) Street Railways, § 2456.
(6) Waiver by Passenger of Right to Be Set Down at Usual Place, § 2457.
d. Duties When Passengers Are Received at Other than Usual Place, § 2458.
e. Management of Train in Drawing Up to Platform or Stopping Place, § 2459.
f. Duty to Stop Train or Street Car, § 2460.
g. Allowing Reasonable Time to Get on or Off, §§ 2461-2471.
(1) General Rule, § 2461.
(2) When the Train or Street Car Is Merely Slowed Up, § 2462.
(3) When the Train or Street Car Is Stopped, §§ 2463-2469.
(a) General Rule, § 2463.
(b) Allowing Time to Board Railroad Train, § 2464.
(c) Allowing Time to Alight from Railroad Train, § 2465.
(d) Allowing Time to Board Street Car, § 2466.
(e) Allowing Time to Alight from Street Car, § 2467.
(f) Allowing Time to Reach Place of Safety, §§ 2468-2469.
aa. In General, § 2468.
bb. Time to Secure Seat, § 2469.
(4) What Constitutes a Reasonable Time, § 2470.
(5) Starting of Vehicle at Signal of Unauthorized Person, § 2471.
h. Duty to See Whether Passengers Have Gotten on or Off, §§ 2472-2474.
(1) Difference between Obligation of Railroad and Street Railway Companies, § 2472.
(2) Duty of Railroad Companies, § 2473.
(3) Duty of Street Railway Companies, § 2474.
i. Announcement of Stations or Stopping Places, § 2475.
j. Awaking Sleeping Passengers, § 2476.
k. Assisting Passengers to Board or Alight, § 2477.
l. Notifying Passengers of Starting of Train, § 2478.
m. Directions as to Boarding Trains, § 2479.
n. Liability for Act of Fellow Passenger, § 2480.
o. Misleading Invitations to Alight, §§ 2481-2487.
(1) In General, § 2481.
(2) Announcing Name of Station, § 2482.
(3) Stopping Train, § 2483.
(4) Announcing Station and Stopping Train, §§ 2484-2486.
(a) General Rule, § 2484.
(b) Injury to Passenger in Consequence of Dangerous Character of Stopping Place, § 2485.
(c) Injury to Passenger by Movement of Train, § 2486.
(5) Announcing Station and Stopping Train, as Required by Law, at Crossing, § 2487.
p. Duty to Warn Passengers of Danger, § 2488.
q. Misdirection as to Arrival or Departure of Train, § 2489.

VOLUME III.

CHAPTER XXIII—(*Continued.*)

Rights, Duties, and Liabilities, as to Transportation.

IX. Accommodations and Duties during Transit, §§ 2490-2524.
A. Scope Note, § 2490.
B. Rules and Regulations, § 2491.
C. Accommodations in General, § 2492.
D. Particular Accommodations, §§ 2493-2497.
a. In General, § 2493.
b. Railroads and Street Railway Companies, §§ 2494-2496.
(1) In General, § 2494.
(2) Chair Cars, § 2495.
(3) When Passengers Are Carried on Freight Trains, § 2496.
c. Carriers by Water, § 2497.
E. Providing Accommodation Inferior to Those Agreed Upon, § 2498.
F. Classification and Separation of Passengers, §§ 2499-2508.
a. In General, § 2499.
b. Separation of Male and Female Passengers, § 2500.
c. Separation of White and Colored Passengers, §§ 2501-2506.
(1) In General, § 2501.
(2) By Regulations of the Carrier, § 2502.
(3) Statutes Requiring the Separation, § 2503.
(4) Statutes Prohibiting the Separation, §§ 2504-2505.
(a) State Laws, § 2504.
(b) Acts of Congress, § 2505.
(5) Degree of Care and Liability Incurred, § 2506.
d. Exclusion of Passenger from Car because of Bad Moral Character, § 2507.
e. Equality of Accommodations, § 2508.
G. Particular Rights and Duties in Transit, §§ 2509-2522.
a. Overloading Conveyance, § 2509.
b. Rights and Duties as to Providing Seats, § 2510.
c. Allowing or Compelling Passengers to Expose Themselves to Danger, §§ 2511-2514.
(1) In General, § 2511.
(2) Warning Passengers of Danger, § 2512.
(3) Removal of Passenger from Place of Danger by Force, § 2513.
(4) Preventing Passenger Leaving Moving Train, § 2514.
d. Allowing Passenger to Alight Temporarily at Intermediate Station, § 2515.
e. Duties to Drover Alighting at Intermediate Stations to Care for Stock, § 2516.
f. Announcement of Station and Change of Cars, § 2517.
g. Transfer of Passengers, § 2518.
h. Opening and Closing of Car Doors, § 2519.
i. Rescue of Passenger Falling from Train, § 2520.
j. Duty to Care for Sick or Injured Passengers, § 2521.
k. Opportunity to Procure Food, § 2522.
H. Stopping Over at Intermediate Stations, § 2523.
I. Duty as to Passenger Boarding Wrong Train, § 2524.
X. Management of Conveyance, §§ 2525-2552.
A. General Rule, § 2525.
B. Crowded Trains or Cars, § 2526.
C. Running Trains or Cars in a Manner Calculated to Alarm Passengers, § 2527.
D. Avoiding Dangers Encountered during the Journey, § 2528.
E. In Passing through Tunnels, § 2529.

F. In Running Trains or Cars on Wrong Track, § 2530.
G. In Approaching Switch Apparently Misplaced, § 2531.
H. Omission of Signals Required by Statute, § 2532.
I. Moving Disabled Trolley Car, § 2533.
J. Absence of Driver or Motorman from Post of Duty, § 2534.
K. Speed of Trains or Cars, § 2535.
L. Jerks and Jolts of Trains or Cars, §§ 2536-2539.
a. Management of Train in General, § 2536.
b. In Making Up Trains, § 2537.
c. In Starting, Stopping, and Running Trains, § 2538.
d. In Recoupling Trains Which Break Apart, § 2539.
M. Negligent Handling of Engine, § 2540.
N. Collisions, §§ 2541-2550.
a. In General, § 2541.
b. Collisions between Trains or Cars Operated on the Same Track, § 2542.
c. Collisions of Trains with Cattle and Other Obstructions, § 2543.
d. Collisions of Street Cars with Road Vehicles, § 2544.
e. Collisions with Structures Alongside the Track, § 2545.
f. Collisions with Cars on Parallel or Side Tracks, § 2546.
g. Collisions between Vehicles of Different Carriers, §§ 2547-2549.
(1) In General, § 2547.
(2) Collisions between Trains of Intersecting Railroads, § 2548.
(3) Collisions between Street Cars and Trains or Cars of Intersecting Railroad, or Street Railway, Companies, § 2549.
h. Collision between Automobile Carrier and Other Vehicle, § 2550.
O. Upsetting Coach, § 2551.
P. Care Required as to Telegraph Lines, Operators, etc., § 2552.
XI. Duty to Protect Passengers, §§ 2553-2566.
A. General Rule, § 2553.
B. Knowledge of the Commission of the Wrong, § 2554.
C. Knowledge, or Duty to Know, of Passenger's Peril, § 2555.
D. Reason to Apprehend Passenger's Peril, §§ 2556-2562.
a. In General, § 2556.
b. Presence of Dangerous Persons on Vehicle or Vessel, § 2557.
c. Disorder among Passengers, § 2558.
d. Intermingling of White and Colored Passengers, § 2559.
e. Negligence of Passengers in Getting on or Off the Vehicle, § 2560.
f. Scuffling of Hackmen Near Station, § 2561.
g. Servants of Express Companies, etc., at Station, § 2562.
E. Limitation of Carrier's Liability, §§ 2563-2566.
a. In General, § 2563.
b. Absence of Knowledge, etc., of Passenger's Peril, § 2564
c. Performance of Duty, or Inability, to Protect, § 2565.
d. Acts for Which Carrier Liable, § 2566.
XII. Liability for Acts and Omissions of Servants, §§ 2567-2629.
A. In General, § 2567.
B. Negligence of Servants, § 2568.
C. Wilful Acts of Servants, §§ 2569-2601.
a. In General, § 2569.
b. Assaults upon Passengers, §§ 2570-2592.
(1) In General, § 2570.
(2) Assaults within the Scope of the Employment, § 2571.
(3) Assault Outside the Scope of the Employment, §§ 2572-2584.
(a) In General, § 2572.
(b) Minority Rule, § 2573.
(c) Prevailing Rule, §§ 2574-2576.
aa. In General, § 2574.

bb. Limitation of the Rule, § 2575.
cc. Application of the Rule, § 2576.
(d) Acts Which Are or Are Not within Scope of Employment, §§ 2577-2583.
aa. In General, § 2577.
bb. Acts Done in Connection with Collection of Tickets and Fares, § 2578.
cc. Assaults by Steward and Waiters on Steamboat, § 2579.
dd. Assault by Baggage Master, § 2580.
ee. Assaults Committed after the Relation of Carrier and Passenger Is Determined, § 2581.
ff. Assault by Conductor upon Passenger Who Has Alighted from Street Car, § 2582.
gg. Accidental Blow by Servants Engaged in Playful Scuffle, § 2583.
(e) Presumption as to Scope of Duty, § 2584.
(4) Justifiable Assaults, §§ 2585-2590.
(a) In General, § 2585.
(b) Acts Done in Self-Defense, §§ 2585-2589.
aa. In General, § 2586.
bb. What Constitutes Self-Defense, §§ 2587-2589.
(aa) In General, § 2587.
(bb) Circumstances Justifying the Act, § 2588.
(cc) Degree of Force Permissible, § 2589.
(c) Forcible Expulsion of Passengers, § 2590.
(5) Assaults Provoked by the Passenger, § 2591.
(6) Failure of Agent to Comply with Law as to Uniform, § 2592.
c. Insult to Passenger, § 2593.
d. False Imprisonment and Arrest, §§ 2594-2600.
(1) General Rule, § 2594.
(2) What Constitutes False Imprisonment, §§ 2595-2600.
(a) In General, § 2595.
(b) The Detention or Restraint, § 2596.
(c) The Unlawfulness of the Detention or Restraint, §§ 2597-2600.
aa. In General, § 2597.
bb. Detention to Enforce Payment of Fare, § 2598.
cc. Arrest without Warrant, § 2599.
dd. What Constitutes Probable Cause, § 2600.
e. Communication of Disease by Employee to Passenger, § 2601.
D. Scope of Employment, §§ 2602-2616.
a. In General, § 2602.
b. Inviting or Directing Passenger to Alight at Dangerous Place, § 2603.
c. Assisting Passenger on or Off Train or Car, § 2604.
d. Pushing or Pulling Passenger Off Train or Car, § 2605.
e. Directing or Permitting Passenger to Alight from Moving Train, § 2606.
f. Giving Information to, or Instructing, Passengers, § 2607.
g. Acts Calculated, or Intended, to Alarm Passengers, § 2608.
h. Unintentional Assaults upon Passengers, § 2609.
i. Falling against, or Jostling, Passengers, § 2610.
j. Directing Passenger to Render Assistance, § 2611.
k. Refusing Passenger Entrance to Car, § 2612.
l. Causing Unnecessary Delay in Transportation, § 2613.
m. Making Overcharge for Ticket, § 2614.
n. Assaults upon Passengers, § 2615.
o. False Imprisonment of Passengers, § 2616.
E. Who Are Servants, §§ 2617-2629.
a. In General, § 2617.
b. Independent Contractors, § 2618.
c. Construction Companies, § 2619.
d. Persons in Charge of Sleeping, or Palace, Cars, § 2620.

e. Servants Invested with Authority of Peace Officers, § 2621.
f. Assistants Engaged by Servants, § 2622.
g. Servants Employed Jointly by Several Masters, § 2623.
h. Servants of Lessors or Lessees, § 2624.
i. Servants of Receivers, § 2625.
j. Pilots, § 2626.
k. Postal Agents, § 2627.
l. Surgeon Employed by Carrier, § 2628.
m. Employees Off Duty, § 2629.
XIII. Companies and Persons Liable, §§ 2630-2667.
A. In General, §§ 2630-2636.
a. Delegation of Duties by Carrier, § 2630.
b. Liability for Negligence in Operation of Trains of Another Carrier, § 2631
c. Liability of Carrier for Injury to Passengers of Another Carrier, § 2632.
d. Liability of Employee of Carrier, § 2633.
e. Liability of Electric Company Furnishing Power, § 2634.
f. Carrier Transporting Soldiers for Government, § 2635.
g. Liability of Seller of Ticket, § 2636.
B. Injury Due to Concurrent Negligence, §§ 2637-2641.
a. In General, §§ 2637-2638.
(1) Negligent Carriers Liable, § 2637.
(2) Negligence of Other Carrier No Defense, § 2638.
b. Collision Resulting from Concurrent Negligence of Two Carriers, §§ 2639-2641.
(1) Negligent Carriers Liable, § 2639.
(2) Negligence of Other Carrier No Defense, § 2640.
(3) Presumption of Negligence, § 2641.
C. Stations and Approaches, §§ 2642-2646.
a. In General, § 2642.
b. Stations Used by Several Carriers, §§ 2643-2646.
(1) In General, § 2643.
(2) Duties as to Passengers of Other Carrier, § 2644.
(3) Duty to Protect Passengers from Negligence of Other Carrier, § 2645.
(4) Station Owned by Independent Company, § 2646.
D. Liability of Carrier Operating Trains Over Another's Lines, §§ 2647-2651.
a. In General, § 2647.
b. Liability for Negligence of Owner of Road, § 2648.
c. Liability for Injury to Passengers of Another Lessee of Tracks, § 2649.
d. Effect of Illegality of Contract between Companies, § 2650.
e. As Affected by Compensation Received, § 2651.
E. Liability of Lessor, §§ 2652-2658.
a. In General, § 2652.
b. Lessor Liable for Negligence of Lessee, § 2653.
c. Liability for Indignities of Fellow Passengers, § 2654.
d. Lessor's Liability to Its Own Passengers, § 2655.
e. Lease Illegal or Ultra Vires, § 2656.
f. Leases under Statutory Authority, § 2657.
g. Liability of Lessor of Steamboat, § 2658.
F. Liability When Railroad Operated by Trustee, §§ 2659-2660.
a. Liability of Trustee, § 2659.
b. Liability of Railroad Operated by Trustee, § 2660.
G. Railroads in Hands of Receiver, §§ 2661-2665.
a. Liability of Receiver, §§ 2661-2662.
(1) In Official Capacity, § 2661.
(2) Personal Liability of Receiver, §. 2662.
b. Liability of Railroad, §§ 2663-2664.
(1) In General, § 2663.

(2) After Discharge of Receiver, § 2664.
c. Liability of Profits and Income, § 2665.
H. Who Liable for Injuries Occurring on Chartered Conveyances, § 2666.
I. Liability for Injuries on Consolidated Lines, § 2667.
XIV. Limitation of Liability, §§ 2668-2693.
A. Power to Limit Liability as to Passengers for Hire, §§ 2668-2671.
a. General Rule, § 2668.
b. Contractual Exemption from Statutory Penalty, § 2669.
c. Statutory Power to Limit Liability, § 2670.
d. Passengers Received on Freight Trains, § 2671.
B. Power to Limit Liability as to Persons Carried Free or at Reduced Rates, §§ 2672-2677.
a. Limitation of Liability in Pass Given as Mere Gratuity, §§ 2672-2676.
1. In General, § 2672.
2. Degrees of Negligence, § 2673.
3. Pass Issued in Violation of Law, § 2674.
4. Under Statutory Provisions, § 2675.
5. Using Nontransferable Pass of Another, § 2676.
b. Reduced Rates or Passes Based upon Some Consideration, § 2677.
C. Power to Limit Liability in Drover's Pass, §§ 2678-2683.
a. Drover as Passenger for Hire, § 2678.
b. Carrier Cannot Limit Liability in Drover's Pass, §§ 2679-2681.
(1) In General, § 2679.
(2) Drover's Return Pass, § 2680.
(3) Degrees of Negligence, § 2681.
c. Stipulation That Drover Is Employee of Carrier, § 2682.
d. Reasonable Regulations Binding, § 2683.
D. Power to Limit Liability as to Persons Engaged in Certain Employments, §§ 2684-2689.
a. Limitation of Liability in Pass Given Employee, § 2684.
b. Express Messengers, § 2685.
c. Mail Clerks, § 2686.
d. News Agents, § 2687.
e. Circus Employees, § 2688.
f. Employees of Pullman Car Companies, § 2689.
E. Sufficiency of Assent of Passenger to Limitation of Carrier's Liability, §§ 2690-2691.
a. Passenger for Hire, § 2690.
b. Persons Carried Gratuitously, § 2691.
F. Authority of Master to Limit Liability of Carrier for Injury to Servant, § 2692.
G. Construction of Contracts Limiting Liability of Carrier, § 2693.

CHAPTER XXIV.

Contributory Negligence

I. Substantive Law, §§ 2694-2828.
A. In General, §§ 2694-2704.
a. Application of the Doctrine to Carriers, § 2694.
b. Care Required of Passengers in General, § 2695.
c. Care Required of Children and Others under Disability, §§ 2696-2699.
(1) Children, § 2696.
(2) Intoxicated Persons, § 2697.
(3) Blind Persons, § 2698.
(4) Persons in Feeble Health, § 2699.
d. Disobedience of Rules or Regulations of Carrier, § 2700.

e. Violation of Conditions in Contract of Carriage, § 2701.
f. Disregarding Directions or Warning of Carrier's Employees, § 2702.
g. Acts by Permission or Direction of Carrier's Employees, § 2703.
h. Acts in Emergencies, § 2704.
B. Awaiting and Seeking Transportation, §§ 2705-2716.
a. In General, § 2705.
b. Seeking Entrance to Depot Which Is Obstructed by Train, § 2706.
c. Passing Down Steps Leading to Station, § 2707.
d. Awaiting Train at Station, §§ 2708-2711.
(1) In General, § 2708.
(2) On Platform, § 2709.
(3) Walking on Track, § 2710.
(4) Standing Near Track, § 2711.
e. Using Passageway to Train Shed at Station, § 2712.
f. Crossing Tracks to Reach Station, Train, or Car, § 2713.
g. Passing Along Track or Right of Way to Reach Train or Car, § 2714
h. Flagging or Signaling Train, § 2715.
i. Standing within Reach of Street Car, § 2716.
C. Entering Conveyance, §§ 2717-2738.
a. In General, § 2717.
b. Time of Entering Car, § 2718.
c. Place of Entering Car, § 2719.
d. Manner of Entering Car, § 2720.
e. Entering Particular Car, § 2721.
f. Entering Elevator, § 2722.
g. Negligence of Particular Passengers, § 2723.
h. Boarding Moving Conveyance, §§ 2724-2738.
(1) In General, § 2724.
(2) Speed Car Moving, §§ 2725-2726.
(a) In General, § 2725.
(b) Speed Suddenly Accelerated, § 2726.
(3) Before and after Stopping and Starting, § 2727.
(4) Length of Time Car Stops, § 2728.
(5) Signaling Car to Stop, § 2729.
(6) By Invitation of Carrier, § 2730.
(7) Injured by Act of Operative, § 2731.
(8) Injured by Defective Platform, § 2732.
(9) Injured by Objects Passed, § 2733.
(10) Injury to Person Carrying Bundles, § 2734.
(11) Injury to Children, Women and Invalids, § 2735.
(12) Transferring from One Car to Another, § 2736.
(13) Where Carrier Could Have Avoided Injury, § 2737.
(14) Entering Moving Elevator, § 2738.
D. In Transit, §§ 2739-2784.
a. Conduct in General, § 2739.
b. Dangerous Position, §§ 2740-2781.
(1) In General, § 2740.
(2) Sitting Negligently in Seat, § 2741.
(3) Standing in Car, § 2742.
(4) Riding on Platform, §§ 2743-2756.
(a) In General, § 2743.
(b) Rules and Regulations of Carrier, § 2744.
(c) Direction or Request of Employee, § 2745.
(d) Custom and Usage, § 2746.
(e) Causes Justifying Riding on Platform, §§ 2747-2750.
aa. Interior Crowded, § 2747.

bb. Interior Uncomfortable, § 2748.
cc. Door to Interior Closed, § 2749.
dd. Escaping Danger, § 2750.
(f) Injury from Particular Causes, § 2751.
(g) Particular Acts of Negligence, § 2752.
(h) Platform of Particular Car, § 2753.
(i) Where Riding in Interior Would Have Avoided Injury, § 2754.
(j) Where Carrier Could Have Avoided Injury, § 2755.
(k) Children and Intoxicated Persons, § 2756.
(5) Riding on Step or Footboard, §§ 2757-2763.
(a) In General, § 2757.
(b) Where Car Crowded, § 2758.
(c) Where Running Board Crowded, § 2759.
(d) Injury from Particular Causes, § 2760.
(e) Injury from Particular Acts of Negligence, § 2761.
(f) Step of Particular Car, § 2762.
(g) Children, § 2763.
(6) Limb or Other Part of Person Protruding from Car, §§ 2764-2771.
(a) In General, § 2764.
(b) Hand or Arm on Window Sill, § 2765.
(c) Hand or Arm Out of Window, § 2766.
(d) Hand on Railing of Platform, § 2767.
(e) Arm Around Post, § 2768.
(f) Head Out of Window or Door, § 2769.
(g) Body Protruding from Train, § 2770.
(h) Feet and Legs Protruding, § 2771.
(7) Riding in Car Not Intended for Passengers, §§ 2772-2781.
(a) In General, § 2772.
(b) Riding on Engine, § 2773.
(c) Riding in Car in Front of Engine, § 2774.
(d) Riding in Freight Car, § 2775.
(e) Riding in Baggage, Express or Mail Car, § 2776.
(f) Riding in Car Intended for Colored Persons, § 2777.
(g) Riding on Hand Car, § 2778.
(h) Riding on Top of Car, § 2779.
(i) Passenger Accompanying Live Stock, § 2780.
(j) Passenger Accompanying Property, § 2781.
c. Changing Position, §§ 2782-2784.
(1) In General, § 2782.
(2) Going on Platform, § 2783.
(3) Passing from One Car to Another, § 2784.
E. Leaving Conveyance, §§ 2785-2828.
a. In General, §§ 2785-2799.
(1) Care Required of Passengers in General, § 2785.
(2) Due Diligence in Leaving Car, § 2786.
(3) On Invitation or Direction of Carrier's Employees, §§ 2787-2789.
(a) In General, § 2787.
(b) Facts Justifying Assumption of Invitation to Alight, §§ 2788-2789.
aa. Stopping Cars, § 2788.
bb. Announcing Station, § 2789.
(4) Using Means Afforded for Alighting, § 2790.
(5) Unnecessary Exposure to Danger, § 2791.
(6) Place of Alighting, §§ 2792-2795.
(a) Right to Assume Place Safe, § 2792.
(b) Duty to Look before Alighting, § 2793.
(c) Knowledge of Character of Place, § 2794.

(d) Customary Stopping Place, § 2795.
(7) Children and Others under Disability, §§ 2796-2797.
(a) In General, § 2796.
(b) Intoxicated Passengers, § 2797.
(8) Alighting from Train in Emergency, § 2798.
(9) Negligence as to Incidental Dangers, § 2799.
b. Preparing to Leave Conveyance before It Stops, §§ 2800-2801.
(1) Standing in Aisle or Seat, § 2800.
(2) Going on Platform or Steps before Train Stops, § 2801.
c. Alighting at Place Other than Station or Platform, §§ 2802-2806.
(1) In General, § 2802.
(2) By Direction, Invitation or Acquiescence of Carrier, § 2803-2805.
(a) In General, § 2803.
(b) Stop after Calling Station as Invitation, § 2804.
(c) Slowing Up for Railroad Crossing—Custom, § 2805.
(d) On Advice of Fellow Passenger, § 2805½.
(3) Running Past or Stopping Short of Destination, § 2806.
d. Alighting at Wrong End or Part of Car or on Wrong Side of Train, §§ 2807-2810.
(1) Wrong End of Car, § 2807.
(2) Wrong Side of Car, §§ 2808-2809.
(a) In General, § 2808.
(b) On Invitation or Acquiescence of Carrier, § 2809.
(3) Side Door of Baggage Car, § 2810.
e. Alighting from Moving Train or Car in General, §§ 2811-2819.
(1) General Rule, § 2811.
(2) Where Danger Obvious, § 2812.
(3) Manner of Alighting, § 2813.
(4) Children and Others under Disability, § 2814.
(5) Justification or Excuse, §§ 2815-2819.
(a) Direction or Invitation of Carrier, §§ 2815-2818.
aa. In General, § 2815.
bb. Slowing Up for Station as Invitation to Alight, § 2816.
cc. Announcing Station as Invitation, § 2817.
dd. After Boarding Wrong Train, § 2818.
(b) Acts in Emergencies, § 2819.
f. Alighting from Moving Car on Failure to Stop at Station, §§ 2820-2821.
(1) In General, § 2820.
(2) By Direction or Invitation of Carrier, § 2821.
g. Alighting from Moving Car on Failure to Stop for Sufficient Time, § 2822.
h. Defective or Unlighted Platform and Obstructions Thereon, § 2823.
i. Leaving Premises by Improper Course, § 2824.
j. Crossing Other Tracks, §§ 2825-2828.
(1) In General, § 2825.
(2) Application to Passengers of Requirement to Stop, Look, and Listen, § 2826.
(3) Passenger Alighting from Train or Car before It Stops, § 2827.
(4) Attempting to Crawl between Cars of Freight Train, § 2828.
II. Procedure, §§ 2829-2968.
A. Pleading, §§ 2829-2835.
a. Petition or Complaint, § 2829.
b. Plea or Answer, §§ 2830-2834.
(1) Proof under General Denial, § 2830.
(2) Special Plea of Contributory Negligence, §§ 2831-2832.
(a) Necessity, § 2831.
(b) Sufficiency of Plea of Contributory Negligence, § 2832.

(3) Plea of Assumption of Risk, § 2833.
(4) Construction, Operation and Effect, § 2834.
c. Reply, § 2835.
B. Issues, Proof and Variance, § 2836.
C. Presumption and Burden of Proof, §§ 2837-2853.
a. Doctrine Placing Burden on Plaintiff, § 2837.
b. Doctrine Placing Burden on Carrier, §§ 2838-2853.
(1) In General, § 2838.
(2) Boarding and Alighting from Train or Street Car, §§ 2839-2842.
(a) In General, § 2839.
(b) Train or Car Prematurely Started, § 2840.
(c) Jumping from Train, Car or Coach, § 2841.
(d) Obeying Order or Direction of Conductor, § 2842.
(3) Riding in Wrong Car or Place Not Intended for Passengers, §§ 2843-2844.
(a) Railway Trains, § 2843.
(b) Riding on Platform of Street Car, § 2844.
(4) Standing in Car, § 2845.
(5) Elbow Resting on Rail at Side of Street Car, § 2846.
(6) Violation of Carrier's Rules, § 2847.
(7) Resisting Ejection, § 2848.
(8) Incapacity to Appreciate Danger, § 2849.
(9) Assumption of Risk, § 2850.
(10) Waiver of Provision in Stock Pass, § 2851.
(11) Imputed Negligence, § 2852.
(12) Last Clear Chance, § 2853.
D. Admissibility of Evidence, §§ 2854-2880.
a. In General, § 2854.
b. Surroundings of Place of Injury, § 2855.
c. Res Gestæ, § 2856.
d. Opinion Evidence, § 2857.
e. General Custom or Usage, § 2858.
f. Habits or Customs of Injured Passenger, § 2859.
g. Character for Negligence or Prudence, § 2860.
h. Previous Experience in Traveling on Trains or Cars, § 2861.
i. Injuries to Other Passengers, § 2862.
j. Rules of Carrier and Violation Thereof, § 2863.
k. Ordinances, § 2864.
l. Evidence as to Specific Acts of Negligence, §§ 2865-2872.
(1) Acts Unconnected with Injury, § 2865.
(2) Drunkenness, § 2866.
(3) Boarding Moving Train, § 2867.
(4) Standing in Train, § 2868.
(5) Riding on Platform, § 2869.
(6) Riding on Running Board, § 2870.
(7) Putting Head or Arms Out of Car, § 2871.
(8) Alighting from Moving Train or Car, § 2872.
m. Evidence Disproving or Excusing Contributory Negligence, §§ 2873-2880.
(1) Evidence of Absence of Negligence, § 2873.
(2) Reason for Injured Person's Actions, § 2874.
(3) Following Directions of Conductor or Trainmen, § 2875.
(4) Failure to Warn Passenger of Danger, § 2876.
(5) Construction and Equipment of Car, § 2877.
(6) Absence of Conductor, § 2878.
(7) Mode of Handling Trains at Point in Question, § 2879.
(8) Similar Negligence of Other Persons, § 2880.
E. Sufficiency of Evidence, §§ 2881-2904.

a. In General, § 2881.
b. Entering Car or Conveyance, §§ 2882-2886.
(1) Disregarding Carrier's Provisions for Safety, § 2882.
(2) Injury on or Near Station Platform, § 2883.
(3) Boarding Moving Train or Car, § 2884.
(4) Injury by Automatic Car Doors, § 2885.
(5) Elevators, § 2886.
c. In Transit, §§ 2887-2895.
(1) Knowledge of Dangerous Position, § 2887.
(2) Riding on Freight Train, § 2888.
(3) Riding on Crowded Street Car, § 2889.
(4) Riding on Platform of Train, § 2890.
(5) Riding on Platform Steps or Running Board of Street Car, § 2891.
(6) Putting Head or Arms Out of Car, § 2892.
(7) Burning Out of Fuse, § 2893.
(8) Passenger Driving Stage Coach, § 2894.
(9) Crossing in Front of Moving Train to Reboard Train on Side Track, § 2895.
d. Leaving Conveyance, §§ 2896-2901.
(1) In General, § 2896.
(2) Falling, § 2897.
(3) Alighting from Moving Train or Car, § 2898.
(4) Injury Caused by Sudden Movement of Train or Car, § 2899.
(5) Alighting from Car between Stations, § 2900.
(6) Passenger Struck by Car on Parallel Track, § 2901.
e. Leaving Depot or Station, § 2902.
f. Willfulness or Wantonness of Carrier's Servants, § 2903.
g. Last Clear Chance, § 2904.
F. Questions for Jury, §§ 2905-2921.
a. In General, § 2905.
b. Care Required of or in Respect to Children and Others under Disability, § 2906.
c. Awaiting and Seeking Transportation, § 2907.
d. Entering Conveyance in General, § 2908.
e. Boarding Moving Conveyance, § 2909.
f. Conduct While in Transit in General, § 2910.
g. Riding on Platform, § 2911.
h. Riding on Steps, Footboard or Projection from Vestibule, § 2912.
i. Leaving Conveyance in General, § 2913.
j. Preparing to Leave Conveyance before It Stops, § 2914.
k. Alighting from Moving Conveyance, § 2915.
l. Alighting from Conveyance at Place Other Than Station or Platform, § 2916.
m. Crossing or Walking on Track after Alighting from Car, § 2917.
n. Acts by Permission or Direction of Carrier's Employees, § 2918.
o. Acts in Emergencies, § 2919.
p. Question of Last Clear Chance, § 2920.
q. Wanton Conduct Excusing Contributory Negligence, § 2921.
G. Instructions, §§ 2922-2967.
a. General Consideration, §§ 2922-2953.
(1) Duty of Court Generally, § 2922.
(2) Necessity for Requests, § 2923.
(3) Correct Declaration of Law, § 2924.
(4) Terminology—Technical Language, § 2925.
(5) Clearness and Definiteness, § 2926.
(6) Conformity to Pleadings and Issues, §§ 2927-2934.
(a) In General, § 2927.

(b) Must Be Germane to Issue, § 2928.
(c) Applicability to Evidence, § 2929.
(d) Assuming Facts or Matters in Issue, § 2930.
(e) Sufficiency of Evidence, § 2931.
(f) Party by Whom Contributory Negligence Proved, § 2932.
(g) Pretermitting or Ignoring Proof, § 2933.
(h) Sufficiency of Pleadings, § 2934.
(7) Explanation or Definition of Contributory Negligence, § 2935.
(8) Degree of Care Required of Passenger, § 2936.
(9) Must Postulate Negligence of Passenger's Act, § 2937.
(10) Must Hypothesize State of Facts Authorizing Conclusion of Contributory Negligence, § 2938.
(11) Proximate and Contributory Cause of Injury, §§ 2939-2944.
(a) In General, § 2939.
(b) Must Hypothesize Negligent Act of Passenger as Proximate Cause, § 2940.
(c) Requiring Plaintiff's Negligence to Be Sole Cause, § 2941.
(d) Requiring Plaintiff's Negligence Alone to Be Proximate Cause, § 2942.
(e) Requiring Passenger's Negligence to Contribute to Injury, § 2943.
(f) Concurring Negligence of Plaintiff and Defendant, § 2944.
(12) Omitting One of Two Acts of Contributory Negligence, § 2945.
(13) Ignoring Negligence of Defendant, § 2946.
(14) Enunciating Theories of Case, § 2947.
(15) Conflicting and Inconsistent Instructions, § 2948.
(16) Misleading Instructions, § 2949.
(17) Instruction Invading Province of Jury, § 2950.
(18) Repetition of Instructions, § 2951.
(19) Objections Obviated by Other Instructions, § 2952
(20) Harmless Error, § 2953.
b. Law of State Where Injury Occurred, § 2954.
c. Assumption of Risk, § 2955.
d. Care Required of Children and Others under Disability, § 2956.
e. Awaiting and Seeking Transportation, § 2957.
f. Entering Conveyance, § 2958.
g. Conduct in Transit, § 2959.
h. Leaving Conveyance in General, § 2960.
i. Alighting from Moving Conveyance, § 2961.
i. Disobedience of Rules of Carrier, § 2962.
k. Acts by Permission or Direction of Carrier's Employees, § 2963.
l. Acts in Emergencies, § 2964.
m. Injury Avoidable by Care of Carrier, § 2965.
n. Presumptions and Burden of Proof, § 2966.
o. Comparative Negligence Rule Under Georgia Statute, § 2967.
H. Verdict and Findings, § 2968.

CHAPTER XXV.

Ejection of Passengers.

I. Rights and Liabilities of Carrier in General, §§ 2969-2973.
A. In General, § 2969.
B. Liability for Acts of Employees, §§ 2970-2972.
a. In General, § 2970.
b. Unauthorized Ejection, § 2971.
c. Wrongful Acts During Ejection, § 2972.
C. Proximate Cause of Injury, § 2973.

II. Grounds for Ejection, §§ 2974-3012.
A. In General, § 2974.
B. Persons Objectionable as Passengers and Disorderly Conduct, §§ 2975-2976.
a. In General, § 2975.
b. Disorderly Conduct—Drunkenness, § 2976.
C. Disobedience of Carrier's Rules, §§ 2977-2978.
a. In General, § 2977.
b. Particular Rules, § 2978.
D. Failure to Procure Ticket or Pay Fare, §§ 2979-3012.
a. Rights and Liabilities of Carrier in General, §§ 2979-2986.
(1) In General, § 2979.
(2) Allowing Time to Procure Fare or Produce Ticket, § 2980.
(3) Duty to Ascertain as to Purchase of Ticket, § 2981.
(4) Where Ticket Lost, § 2982.
(5) Failure of Carrier to Furnish Evidence of Right to Continue Journey, § 2983.
(6) Refusal to Pay Excessive or Second Fare, § 2984.
(7) Nonpayment of Fare of Child, § 2985.
(8) Nonpayment of Past Fare, § 2986.
b. Requiring Ticket as Condition Precedent to Right of Carriage, §§ 2987-2988.
(1) In General, § 2987.
(2) Carriage on Freight Trains, § 2988.
c. Defective or Invalid Ticket, §§ 2989-3005.
(1) In General, § 2989.
(2) Failure to Comply with Conditions of Ticket, §§ 2990-2994.
(a) In General, § 2990.
(b) Conditions against Transfer, § 2991.
(c) Conditions as to Detachment of Coupons, § 2992.
(d) Conditions as to Identification, Signature and Stamping, § 2993.
(e) Conditions as to Use of Mileage Book, § 2994.
(3) Time Limit of Ticket Expired, § 2995.
(4) Passenger on Wrong Train, or Route, or Carried Past Destination, §§ 2996-3001.
(a) Passenger on Wrong Train, §§ 2996-2997.
aa. In General, § 2996.
bb. Train Not Stopping at Passenger's Destination, § 2997.
(b) Passenger on Wrong Route, § 2998.
(c) Passenger on Wrong Road, § 2999.
(d) Passenger on Wrong Part of Road, § 3000.
(e) Passenger Carried Past Destination, § 3001.
(5) Effect of Mistake of Employee Issuing Ticket, § 3002.
(6) Effect of Mistake of First Conductor, § 3003.
(7) Effect of Collateral Agreement with Ticket Agent, § 3004.
(8) Conclusiveness of Ticket or Transfer as between Passenger and Conductor, § 3005.
d. Ejection through Mistake of Holder of Valid Ticket, § 3006.
e. Extra Fares or Charges, §§ 3007-3008.
(1) In General, § 3007.
(2) Failure to Procure Ticket, § 3008.
f. Tender or Payment of Fare to Avoid Ejection, §§ 3009-3012.
(1) Duty to Pay Fare to Avoid Ejection, § 3009.
(2) Effect of Tender of Fare, §§ 3010-3012.
(a) Before Ejection, § 3010.
(b) After Ejection Commenced, § 3011.
(c) Effect as Waiver of Rights under Ticket, § 3012.
III. What Constitutes Ejection, § 3013.

IV. Place of Ejection, §§ 3014-3015.
A. In General, § 3014.
B. Statutory Regulation, § 3015.
V. Manner of Ejection, §§ 3016-3018.
A. In General, § 3016.
B. Use of Force, § 3017.
C. Ejection from Moving Train or Car, § 3018.
VI. Right of Passenger to Resist Ejection, § 3019.
VII. Ejection of Passenger under Disability, §§ 3020-3021.
A. In General, § 3020.
B. Drunken Passenger, § 3021.
VIII. Repayment of Fare or Return of Ticket, § 3022.
IX. Readmission after Ejection, §§ 3023-3024.
A. Right to Readmission, § 3023.
B. Effect of Readmission, § 3024.
X. Companies and Persons Liable, §§ 3025-3027.
A. In General, § 3025.
B. Connecting and Co-Operating Carriers, § 3026.
C. Carrier's Employees, § 3027.

CHAPTER XXVI.

Licensees, Trespassers, Intruders, Etc.

I. Duties as to Safety of Station Houses, Platforms and Grounds, §§ 3028-3041.
A. In General, § 3028.
B. Approaches, Passageways and Platforms, § 3029.
C. Operation of Trains, § 3030.
D. Duty Owed to Particular Classes of Persons, §§ 3031-3041.
a. Duty Owed to Public at Large, § 3031.
b. Duty Owed to Trespassers, Spectators, Loiterers and Bare Licensees, § 3032.
c. Persons Having Business with Express Company or Other Carrier, § 3033.
d. Persons Posting Mail or Receiving Mail, § 3034.
e. Persons Having Business with Passengers, § 3035.
f. Hackman, § 3036.
g. Person Patronizing Restaurant on Premises of Railroad Company, § 3037.
h. Policeman, § 3038.
i. Person Crossing Station Grounds, § 3039.
j. Persons Deviating from Passageways, § 3040.
k. Persons Meeting Incoming or Speeding Departing Passengers, § 3041.
II. Persons at Station to Assist or Take Leave of Departing Passengers, or to Meet Incoming Passengers, §§ 3042-3056.
A. Right to Enter Premises, § 3042.
B. Degree of Care Required, §§ 3043-3047.
a. In General, § 3043.
b. As to Station, Approaches, Platforms, etc., §§ 3044-3047.
(1) Duty in General, § 3044.
(2) Defects in Platform, § 3045.
(3) Failure to Sufficiently Light Premises, § 3046.
(4) Negligence in Handling Baggage, § 3047.
C. Entering Train or Cars, § 3048.
D. Affording Opportunity to Leave Train or Cars, §§ 3049-3056.
a. In General, § 3049.
b. Duty to Give Notice of Starting, § 3050.
c. Assumption That Persons Boarding Train Are Passengers, § 3051.
d. Duty as Affected by Knowledge of Intention of Person Boarding Train, § 3052.

e. Right to Assume That Train Will Stop for Usual Length of Time, § 3053.
f. Notice of Purpose in Boarding Train, §§ 3054-3055.
(1) Necessity, § 3054.
(2) Sufficiency of Notice, § 3055.
g. Right to Rely on Information by Employee as to Time of Stop, § 3056.
III. Duties and Liabilities as to Persons on Trains, Cars, etc., §§ 3057-3063.
A. Trespassers, §§ 3057-3058.
a. Duty Owed in General, § 3057.
b. Trespassing Children, § 3058.
B. Invitees and Licensees, §§ 3059-3063.
a. In General, § 3059.
b. Persons on Train in Violation of Rules of Carrier, § 3060.
c. Children Entering Trains, Cars, etc., § 3061.
d. Traffic Policeman, § 3062.
e. Volunteer, § 3063.
IV. Acts and Omissions of Servants and Third Persons for Which Carriers Liable, §§ 3064-3068.
A. Acts of Employees, §§ 3064-3066.
a. Lessee of Privilege as Servant, § 3064.
b. Proximate Cause of Injury, § 3065.
c. Scope of Employment, § 3066.
B. Acts of Third Persons, §§ 3067-3068.
a. In General, § 3067.
b. Acts of Postal Employees in Throwing Mail Bags from Train, § 3068.
V. Ejection, §§ 3069-3072.
A. In General, § 3069.
B. From Railroad Stations, § 3070.
C. From Railroad Trains, § 3071.
D. From Street Cars, § 3072.
VI. Contributory Negligence of Person Injured, §§ 3073-3082.
A. In General, § 3073.
B. Of Postal Clerks, § 3074.
C. Of Carrier's Employees, § 3075.
D. Of Former Passenger Boarding Train to Secure Return of Money Due Him, § 3076.
E. Of Persons Going to Station or Train to Assist or Meet Passengers, § 3077.
F. Of Persons Boarding Train, Car, or Boat to See or Assist Passengers, § 3078.
G. Of Persons on Train or Car by Invitation or Permission of Carrier's Employees, § 3079.
H. Of Persons Going to Railroad Depot on Business, § 3080.
I. Of Persons on Station Platform Who Have No Business There, § 3081.
J. Of Trespassers, § 3082.
VII. Actions, §§ 3083-3091.
A. Pleading, §§ 3083-3085.
a. Petition, § 3083.
b. Answer or Plea, § 3084.
c. Variance, § 3085.
B. Evidence, §§ 3086-3088.
a. Presumptions and Burden of Proof, § 3086.
b. Admissibility, § 3087.
c. Weight and Sufficiency, § 3088.
C. Questions for Jury, § 3089.
D. Instructions, § 3090.
E. Verdict, § 3091.

CHAPTER XXVII.

Actions.

I. Scope of Chapter, § 3092.
II. Right of Action, § 3093.
III. Nature and Form of Action, § 3094.
VI. Parties, § 3095.
V. Pleading, §§ 3096-3143.
A. Declaration or Complaint, §§ 3096-3138.
a. In General, § 3096.
b. Actions for Failure to Perform Contract or Duty in General, §§ 3097-3103.
(1) Refusal to Receive and Carry, § 3097.
(2) Fraud, Mistake, or Negligence as to Ticket or Transfers, § 3098.
(3) Misinformation or Incorrect Informations, § 3099.
(4) Failure to Stop and Receive, § 3100.
(5) Putting Passenger on Wrong Train, § 3101.
(6) Separation of Passengers, § 3102.
(7) Failure to Set Down at Destination, § 3103.
c. Actions for Personal Injuries, §§ 3104-3129.
(1) Pleading in General, § 3104.
(2) Allegations as to Contract or Relation, § 3105.
(3) Allegations as to Time, Place and Vehicle, § 3106.
(4) Allegations as to Negligence and Cause of Injury, §§ 3107-3125.
(a) In General, § 3107.
(b) Specific Averment of Negligence, § 3108.
(c) General Averment of Negligence, § 3109.
(d) Restriction of General Averment by Other Averment, § 3110.
(e) Averment of Basis or Bases for Negligence, §§ 3111-3122.
aa. In General, § 3111.
bb. As to Stations and Stopping Places, § 3112.
cc. As to Roadbed and Track, § 3113.
dd. As to Vehicle, § 3114.
ee. Receiving and Discharging Passengers, § 3115.
ff. Accommodations and Duties in Transit, § 3116.
gg. Assisting Passenger, § 3117.
hh. Carriage beyond Destination, § 3118.
ii. Alighting at Intermediate Station, § 3119.
jj. Management of Conveyance, § 3120.
kk. Protection of Passenger, § 3121.
ll. Assaults and Insults by Servants, § 3122.
(f) Alleging Act to Be That of Carrier, § 3123.
(g) Allegations as to Agent or Servant at Fault, § 3124.
(h) Violation of Statute or Ordinance, § 3125.
(5) Connection between Negligence and Cause of Injury, § 3126.
(6) Allegations as to Injury Sustained, § 3127.
(7) Negativing Assumed Risks, § 3128.
(8) Negativing Contributory Negligence, § 3129.
d. Actions for Ejectment, §§ 3130-3136.
(1) In General, § 3130.
(2) Allegations as to Breach of Duty, §§ 3131-3133.
(a) Unauthorized and Wrongful Ejectment, § 3131.
(b) Use of Unnecessary Force, § 3132.
(c) Ejection at Improper Place, § 3133.
(3) Allegations as to Servant at Fault, § 3134.
(4) Connection between Ejection and Injury, § 3135.
(5) Negativing Contributory Negligence, § 3136.

e. Pleading Damages, §§ 3137-3138.
(1) In General, § 3137.
(2) Punitive Damages, § 3138.
B. Plea or Answer, § 3139.
C. Replication, § 3140.
D. Special Demurrer, Exceptions or Motion, § 3141.
E. Amendment, § 3142.
F. Aider by Subsequent Pleadings and Cure of Error, § 3143.
VI. Issues, Proof and Variance, §§ 3144-3162.
A. Issues, §§ 3144-3148.
a. In General, § 3144.
b. Issues as Affected by Plea or Answer, § 3145.
c. Additional Issues by Subsequent Pleadings, § 3146.
d. Under Amended Petition, § 3147.
e. Elimination of Issues by Dismissal, § 3148.
B. Proof, §§ 3149-3151.
a. Matters to Be Proven, § 3149.
b. Failure of Proof, § 3150.
c. Sufficiency of Proof, § 3151.
C. Variance, §§ 3152-3162.
a. In General, § 3152.
b. Tort and Contract, § 3153.
c. As to Contract of Carriage, § 3154.
d. As to Status of Plaintiff, § 3155.
e. As to Negligence or Cause of Injury, §§ 3156-3159.
(1) In General, § 3156.
(2) Negligence Averred Generally or Specifically, § 3157.
(3) Active or Passive Negligence, § 3158.
(4) Wilful or Wanton Negligence or Delay, § 3159.
f. As to Persons Liable, § 3160.
g. As to Injury or Damages, § 3161.
h. Amendment to Conform to Proof, § 3162.
VII. Presumptions and Burden of Proof, §§ 3163-3193.
A. In Action for Failure to Perform Contract, § 3163.
B. In Actions for Ejection, § 3164.
C. In Actions for Personal Injury, §§ 3165-3193.
a. As to Relation of Carrier and Passenger, § 3165.
b. As to Injury, § 3166.
c. As to Negligence or Cause of Injury, §§ 3167-3193.
(1) In General, § 3167.
(2) Connection between Negligence and Injury, § 3168.
(3) Presumption Arising from Evidence, §§ 3169-3174.
(a) General Rule—Prima Facie Case, §§ 3169-3173.
aa. Negligence Generally Pleaded, § 3169.
bb. Both General and Specific Negligence Alleged, § 3170.
cc. Specific Negligence Alleged, § 3171.
dd. Assumption of Unnecessary Burden by Plaintiff, § 3172.
ee. Effect of Attempted Explanation, § 3173.
(b) Operation and Effect of Presumption, § 3174.
(4) Rules Applied in Particular Cases, §§ 3175-3189.
(a) Stations and Stopping Places, § 3175.
(b) As to Roadbed and Track, § 3176.
(c) As to Vehicle, § 3177.
(d) Receiving and Discharging Passengers, §§ 3178-3181.
aa. In General, § 3178.
bb. Carriage beyond Destination, § 3179.

cc. Putting Off at Wrong Destination, § 3180.
(e) Duties and Accommodation in Transit, § 3181.
(f) Management of Vehicle, §§ 3182-3189.
aa. Jerks and Jolts, § 3182.
bb. Breaking Down or Overturning of Coach, § 3183.
cc. Injury from Animals Drawing Coach, § 3184.
dd. Derailment, § 3185.
ee. Collision, § 3186.
ff. Assaults, Insults, etc., by Carrier's Servants, § 3187.
gg. Duty to Protect Passengers from Third Persons, § 3188.
hh. Injury Resulting from Effort to Escape Danger, § 3189.
(5) Willfulness or Wantonness, § 3190.
(6) Passengers on Freight Trains, § 3191.
(7) Passengers without Reward, § 3192.
(8) Contract Assuming Risk or Releasing Liability, § 3193.
VIII. Admissibility of Evidence, §§ 3194-3237.
A. Failure to Perform Contract or Duty in General, §§ 3194-3199.
a. Evidence to Establish Contract, § 3194.
b. Failure or Refusal to Receive and Carry, § 3195.
c. Failure or Refusal to Honor Ticket, Mileage, etc., § 3196.
d. Failure or Refusal to Put Off at Destination, § 3197.
e. Protection and Accommodations, § 3198.
f. Delay, Failure to Make Schedule, Connections, etc., § 3199.
B. In Actions for Ejectment, §§ 3200-3208.
a. Relevancy and Materiality in General, § 3200.
b. As to Contract or Relation, § 3201.
c. Ejection for Failure to Produce Ticket, § 3202.
d. Ejection for Refusal to Pay Fare, § 3203.
e. Violation of Statutes, Rules, and Regulations, § 3204.
f. Time, Place, etc., of Ejection, § 3205.
g. General Character and Disposition of Employee, § 3206.
h. Evidence as to Authority to Eject, § 3207.
i. Ratification of Conductor's Act, § 3208.
C. In Suits for Personal Injury, §§ 3209-3237.
a. Relation of Carrier and Passenger, § 3209.
b. As to Negligence or Cause of Injury, §§ 3210-3231.
(1) In General, §§ 3210-3218.
(a) Relevancy and Materiality, § 3210.
(b) Degree of Care, § 3211.
(c) Facts Constituting Transaction, § 3212.
(d) Statements and Declarations, § 3213.
(e) Matter to Show Notice to Carrier, § 3214.
(f) Rules of Carrier, § 3215.
(g) Habit or Custom, § 3216.
(h) Evidence of Other Accidents, Transactions, etc., § 3217
(i) Character of Parties, § 3218.
(2) Stations and Stopping Places, § 3219.
(3) Condition of Track or Roadbed, § 3220.
(4) Condition of Vehicle and Appliances, § 3221.
(5) Receiving and Discharging Passengers, §§ 3222-3223
(a) In General, § 3222.
(b) Time to Board or Alight—Sudden Starting, § 3223
(6) Carriage beyond Destination, § 3224.
(7) Accommodation and Duties in Transit, § 3225.
(8) Management of Conveyance, §§ 3226-3229.
(a) In General, § 3226.

(b) Under Allegation of Derailment, § 3227.
(c) Under Allegation of Collision, § 3228.
(d) Effort to Escape Danger, § 3229.
(9) Competency of Employees or Care in Selecting Them, § 3229½.
(10) Failure to Protect from Third Persons, § 3230.
(11) Assaults, Insults, etc., by Servants, § 3231.
c. As to Injury, §§ 3232-3233.
(1) Evidence as to Existence of Injury, § 3232
(2) Nature and Extent of Injury, § 3233.
d. As to Damages, §§ 3234-3237.
(1) Damages for Breach of Contract, § 3234.
(2) In Actions for Ejectment, § 3235.
(3) In Action for Personal Injury, § 3236.
(4) Punitive Damages, § 3237.
IX. Weight and Sufficiency of Evidence, §§ 3238-3287.
A. In General, § 3238.
B. As to Negligent Acts of Employees, §§ 3239-3248.
a. In General, § 3239.
b. Ejecting Passenger, § 3240.
c. Assaulting Passenger, § 3241.
d. Escorting Passenger Across Track, § 3242.
e. Controlling Conduct of Other Passengers, § 3243.
f. Aiding in Making Arrests, § 3244.
g. Negligently Closing Door, § 3245.
h. Inviting Passenger on Engine, § 3246.
i. Putting up Berth, § 3247.
j. Injury to Passenger in Custody of Employee, § 3248.
C. As to Negligence in Respect to Condition of Carrier's Premises, § 3249.
D. As to Negligence in Respect to Condition of Means of Transportation, § 3250.
E. As to Negligence in Management of Conveyances in General, § 3251.
F. As to Negligence Causing Passenger to Fall from Vehicle, §§ 3252-3256.
a. In General, § 3252.
b. Defective Means and Instrumentalities, § 3253.
c. Negligent Management of Conveyance, § 3254.
d. Negligent Pushing Passenger from Car, § 3255.
e. Negligence after Passenger Has Fallen, § 3256.
G. As to Cause of Derailment, § 3257.
H. As to Negligence Causing Collision, § 3258.
I. As to Negligence in Taking up Passengers in General, §§ 3259-3269.
a. In General, § 3259.
b. Place of Taking up Passengers, § 3260.
c. Passenger Boarding Moving Train, § 3261.
d. Passenger Boarding Car on Wrong Side, § 3262.
e. Negligent Starting Car, § 3263.
f. Negligent Backing Car, § 3264.
g. Negligent Coupling Cars, § 3265.
h. Negligent Pushing of Passenger from Train, § 3266.
i. Negligent Shutting of Gate on Passenger, § 3267.
j. Passenger Injured by Brake Handle, § 3268.
k. Failure to Control Conduct of Other Passengers, § 3269.
J. As to Negligence in Setting Down Passengers, §§ 3270-3277.
a. In General, § 3270.
b. Defective Instrumentalities or Premises, § 3271.
c. Passenger Alighting from Moving Train, § 3272.
d. Negligent Stopping of Car, § 3273.

e. Negligent Starting of Car, § 3274.
f. Negligent Backing of Car, § 3275.
g. Carrying Passenger Past Station, § 3276.
h. Passenger Injured after Alighting, § 3277.
K. As to Companies or Persons Liable for Injuries, § 3278.
L. Limitation of Liability, § 3279.
M. Passenger in Elevators, § 3280.
N. Evidence to Rebut Presumption of Negligence Arising from Injury, §§ 3281-3287.
a. In General, § 3281.
b. Injury Caused by Defective Means of Transportation, § 3282.
c. Injury Caused by Negligent Management of Conveyance, § 3283.
d. Injury Caused by Negligent Setting Down Passengers, § 3284.
e. Injury Caused by Derailment, § 3285.
f. Injury Caused by Collision, § 3286.
g. Injury Caused by Another Passenger, § 3287.
X. Questions for Court or Jury, §§ 3288-3320.
A. Actions for Breach of Contract in General, § 3288.
B. Actions for Wrongful Ejection, §§ 3289-3292.
a. In General, § 3289.
b. Whether Plaintiff Was Passenger, § 3290.
c. Questions as to Carrier's Regulations, § 3291.
d. Place and Manner of Ejection, § 3292.
C. Actions for Personal Injuries, §§ 3293-3320.
a. In General, § 3293.
b. Existence of Relation of Carrier and Passenger, § 3294.
c. Care as to Passengers under Disability, § 3295.
d. Acts of Carrier's Employees, § 3296.
e. Number and Efficiency of Employees, § 3297.
f. Acts of Fellow Passengers or Other Third Persons, § 3298.
g. Condition and Use of Carrier's Premises, § 3299.
h. Taking Up Passengers, §§ 3300-3301.
(1) In General, § 3300.
(2) Starting or Moving Car While Passenger Is Boarding Same, § 3301.
i. Operation of Trains at Places Where Passengers Are Being Received or Discharged, § 3302.
j. Railroad Cars, § 3303.
k. Cars and Equipment of Street Railroads, § 3304.
l. Tracks and Roadbeds, § 3305.
m. Condition of Elevators, § 3306.
n. Management of Conveyances, §§ 3307-3314.
(1) In General, § 3307.
(2) Overloading or Crowding Cars, § 3308.
(3) Rate of Speed, § 3309.
(4) Sudden Lurches, Jerks, or Jolts, § 3310.
(5) Passing Other Vehicle or Objects, § 3311.
(6) Collision, § 3312.
(7) Derailment of Cars, § 3313.
(8) Management of Elevators, § 3314.
o. Protection of Passengers from Incidental Dangers, § 3315.
p. Setting Down Passengers, §§ 3316-3318.
(1) In General, § 3316.
(2) Starting or Moving Car While Passenger Is Alighting, § 3317.
(3) Providing Safe Place or Means for Alighting, § 3318.
q. Proximate Cause of Injury, § 3319.
r. Companies Liable, § 3320.

XI. Instructions, §§ 3321-3368.
A. Actions for Personal Injuries, §§ 3321-3362.
a. General Consideration, §§ 3321-3336.
(1) Right to and Propriety of Instructions Generally, § 3321.
(2) Form and Requisites, §§ 3322-3326.
(a) Correct, Full and Fair Statement of Law, § 3322.
(b) Language and Terminology, § 3323.
(c) Clearness and Definiteness, § 3324.
(d) Argumentativeness, § 3325.
(e) Misleading Instructions, § 3326.
(3) Requests for Instructions, § 3327.
(4) Duty to Explain Issues, § 3328.
(5) Conformity to Pleadings and Issues, § 3329.
(6) Applicability to Evidence, §§ 3330-3332.
(a) In General, § 3330.
(b) Ignoring Evidence or Facts in Case, § 3331.
(c) Assuming Facts, § 3332.
(7) Invading Province of Jury, § 3333.
(8) Harmless Error, § 3334.
(9) Curing Error, §§ 3335-3336.
(a) Obviating Error by Other Instructions, § 3335.
(b) Subsequent Explanation of Charge, § 3336.
b. Existence of Relation of Carrier and Passenger, § 3337.
c. Definition or Explanation of What Constitutes Negligence, § 3338.
d. Degree of Care Required, § 3339.
e. Acts of Carrier's Servants, Fellow-Passengers, or Third Persons, § 3340.
f. Condition of Carrier's Premises, § 3341.
g. Taking Up Passengers, § 3342.
h. Starting or Moving Car While Passenger Boarding Same, § 3343.
i. Sufficiency and Safety of Means of Transportation, § 3344.
j. Management of Conveyances, § 3345.
k. Causing Passengers to Fall from Train or Car, § 3346.
l. Sudden Jerks, Lurches or Jolts, § 3347.
m. Collisions, § 3348.
n. Derailment, § 3349.
o. Elevators, §§ 3350-3351.
(1) Safety and Sufficiency, § 3350.
(2) Management, § 3351.
p. Setting Down Passengers in General, § 3352.
q. Starting or Moving Train While Passenger Alighting, § 3353.
r. Providing Safe Place or Means for Alighting, § 3354.
s. Care as to Persons Accompanying Passengers, § 3355.
t. Liability to Persons Accompanying Stock, § 3356.
u. Proximate Cause, § 3357.
v. Companies or Persons Liable, § 3358.
w. Presumptions and Burden of Proof, § 3359.
x. Weight and Sufficiency of Evidence, § 3360.
y. Credibility of Witnesses, § 3361.
z. Damages, § 3362.
B. Actions for Breach of Contract of Carriage, §§ 3363-3365.
a. Form, Requisites and Sufficiency in General, § 3363.
b. Acts Constituting Breach and Excuses Therefor, § 3364.
c. Damages, § 3365.
C. Actions for Ejectment, §§ 3366-3368.
a. Form, Requisites and Sufficiency in General, § 3366.

b. Right to Eject, § 3367.
c. Damages, § 3368.
XII. Verdict and Finding, § 3369.
XIII. Appeal and Error, § 3370.
XIV. Costs, § 3371.

CHAPTER XXVIII.

Damages.

I. For Breach of Contract of Transportation, §§ 3372-3399.
A. Elements and Measure of Damages in General, §§ 3372-3389.
a. In General, § 3372.
b. Breach of Contract to Furnish Cars for an Excursion, § 3373.
c. Breach of Contract to Carry to a Certain Place and Return, § 3374.
d. Breach of Contract to Issue Annual Passes, § 3375.
e. Breach of Contract Contained in Mileage Book to Issue an Exchange Ticket, § 3376.
f. Breach of Contract to Reserve Drawing Room in Sleeping Car, § 3377.
g. Breach of Contract to Hold Train, § 3378.
h. Change of Schedule of Trains, § 3379.
i. Refusal to Sell Ticket to One Applying for Transportation, § 3380.
j. Refusal of Transportation, § 3381.
k. Failure to Stop for Person Desiring to Take Passage, § 3382.
l. Failure to Stop According to Previous Notice at a Particular Place at a Time Specified, § 3383.
m. Failure to Stop a Sufficient Time to Allow Passenger to Get on or Off Train, § 3384.
n. Failure to Return to Passenger That Part of His Ticket Entitling Him to Transportation by a Connecting Carrier, § 3385.
o. Delay in Transportation, § 3386.
p. Getting Off at Wrong Station or Place by Direction of Carrier's Employees, § 3387.
q. Failure to Carry to Destination, § 3388.
r. Carrying beyond Destination, § 3389.
B. Mental Suffering, § 3390.
C. Special Damage Dependent on Knowledge of Circumstances, § 3391.
D. Exemplary or Punitive Damages, §§ 3392-3399.
a. In General, § 3392.
b. Failure to Stop Train or Car at Station or Where Proper Signal Is Given, § 3393.
c. Refusal of Transportation, § 3394.
d. Delay in Transportation, § 3395.
e. Failure to Carry to Destination, § 3396.
f. Carrying beyond Destination, §§ 3397-3398.
(1) When Exemplary or Punitive Damages Are Recoverable, § 3397.
(2) What May Be Considered in Assessing Damages, § 3398.
E. Excessive Damages, § 3399.
II. For Personal Injuries, §§ 3400-3407.
A. Elements and Measure of Damages in General, § 3400.
B. Elements and Measure of Damages for Assault, Threats, Insult or Abuse, § 3401.
C. Damages Recoverable for Humiliation Suffered as Result of an Unlawful Arrest, § 3402.
D. Exemplary or Punitive Damages, §§ 3403-3405.
a. In General, § 3403.

b. For Assault, Threats, Insult or Abuse, § 3404.
c. For Wrongful Arrest, § 3405.
E. Aggravation and Mitigation of Damages, § 3406.
F. Excessive Damages, § 3407.
III. For Ejection, §§ 3408-3423.
A. Elements and Measure of Damages in General, § 3408.
B. Mental Suffering, §§ 3409-3410.
a. Ejection from a Railroad Train or Street Car, § 3409.
b. Ejection from a Ferryboat, § 3410.
C. Exemplary or Punitive Damages, §§ 3411-3421.
a. In Actions against Carriers, §§ 3411-3420.
(1) In General, § 3411.
(2) Ejection for Refusal to Pay Fare, § 3412.
(3) Ejection of Passenger Presenting Ticket Not Good on the Railroad or on the Particular Train, § 3413.
(4) Ejection of Passenger Who Has a Ticket to a Station at Which the Train Does Not Stop, § 3414.
(5) Ejection under Mistaken Belief That Passenger's Ticket Is Not Good, § 3415.
(6) Ejection of Passenger Presenting Ticket the Time Limit of Which Has Expired, § 3416.
(7) Ejection of Passenger Presenting an Improper Ticket or One Wrongly Made Out, § 3417.
(8) Ejection from a Moving Train or Street Car, § 3418.
(9) Ejection of Passenger in Consequence of Repudiation of Tickets by General Passenger Agent, § 3419.
(10) Passenger Entering Train or Violating Rule of Carrier for Purpose of Being Ejected and Suing Therefor, § 3420.
b. In an Action against the Conductor of a Railroad Train, § 3421.
D. Aggravation and Mitigation of Damages, § 3422.
E. Excessive Damages, § 3423.

VOLUME IV

CHAPTER XXIX.

Passengers' Effects.

I. Duty of Carrier to Transport, §§ 3424-3425.
A. In General, § 3424.
B. Effects in Custody of Passenger, § 3425.
II. Rules of Carrier, §§ 3426-3428.
A. In General, § 3426.
B. Rules as to Carrying Particular Property into Passenger Cars, § 3427.
C. Rule as to Place for Delivery of Baggage, § 3428.
III. What Constitutes Baggage, §§ 3429-3445.
A. In General, § 3429.
B. Effects of Immigrants, § 3430.
C. Property of Others, §§ 3431-3432.
a. In General, § 3431.
b. Property of Members of Family, § 3432.
D. Particular Kinds of Property, §§ 3433-3444.
a. Commercial Travelers' Samples, § 3433.
b. Dogs, § 3434.

c. Household Goods, § 3435.
d. Jewelry for Personal Use, § 3436.
e. Merchandise, § 3437.
f. Money, § 3438.
g. Perishable Property, § 3439.
h. Property to Be Used for Recreation, § 3440.
i. Tools, and Professional Instruments and Documents, § 3441.
j. Watches, § 3442.
k. Wearing Apparel, § 3443.
l. Weapons, § 3444.
E. Questions for Court or Jury, § 3445.
IV. Extra Baggage and Special Contracts, §§ 3446-3447.
A. In General, § 3446.
B. Authority of Carrier's Agents, § 3447.
V. Delivery to Carrier and Commencement of Liability, §§ 3448-3457.
A. In General, § 3448.
B. Necessity of Delivery, § 3449.
C. Time of Delivery, § 3450.
D. Liability before Purchase of Ticket or Demand for Check, § 3451.
E. Place of Delivery, § 3452.
F. Notice to Carrier, § 3453.
G. What Constitutes Delivery in General, § 3454.
H. To Whom Delivery May Be Made, § 3455.
I. Carrier's Duty to Take Charge of Baggage, § 3456.
J. Goods Awaiting Transportation, § 3457.
VI. Checks and Receipts, and Checking Baggage, §§ 3458-3461.
A. Nature and Functions of Checks and Receipts, § 3458.
B. Duties and Liabilities of Carrier, § 3459.
C. Baggage Company Receiving Railroad Check, § 3460.
D. Surrender of Check, § 3461.
VII. Loss or Injury, §§ 3462-3482.
A. Personal Baggage in General, §§ 3462-3473.
a. What Law Governs, § 3462.
b. Liability as Insurer, §§ 3463-3469.
(1) In General, § 3463.
(2) Exceptions and Excuses, §§ 3464-3469.
(a) Act of God, § 3464.
(b) Act of Public Enemy, § 3465.
(c) Act of Civil Authorities, § 3466.
(d) Spontaneous Combustion of Other Baggage, § 3467.
(e) Contributory Negligence of Passenger, § 3468.
(f) Loss by Theft, § 3469.
c. Liability for Negligence, § 3470.
d. Effect of Nonpayment of Compensation, § 3471.
e. Where Passenger Does Not Accompany Baggage, § 3472.
f. Baggage Not Carried as Incident to Transportation of Passenger, § 3473.
B. Property under Control of Passenger, § 3474.
C. Property Other than Personal Baggage, §§ 3475-3481.
a. Effect of Acceptance with Knowledge of Nature of Property, § 3475.
b. Effect of Acceptance without Knowledge of Nature of Property, § 3476.
c. Duty to Disclose Nature and Value and Effect of Concealment, § 3477.
d. Right and Duty of Carrier to Investigate, § 3478.
e. Sufficiency of Notice to Carrier of Nature of Property, § 3479.
f. Money Intrusted for Safe-Keeping to Carrier or Its Servants, § 3480.
g. Effect of Regulations Known to Passenger, § 3481.
D. Contributory Negligence of Passenger, § 3482.

VIII. Baggage of Ejected Passenger, § 3483.
IX. Transportation and Delivery to Passenger and Termination of Liability, §§ 3484-3492.
A. When Baggage Must Be Carried, § 3484.
B. Packing and Conveyance, § 3485.
C. Notice of Arrival at Destination, § 3486.
D. Time, Place and Manner of Delivery, § 3487.
E. Delivery to Wrong Person, § 3488.
F. Time for Removal of Baggage by Passenger, § 3489.
G. Duty to Care for Baggage until Reasonable Time for Removal, § 3490.
H. Termination of Liability, § 3491.
I. Carriers' Agents, § 3492.
X. Limitation of Liability, §§ 3493-3496.
A. Power to Limit Liability, § 3493.
B. Manner of Limiting Liability, § 3494.
C. Necessity for Consideration, § 3495.
D. Construction and Operation of Limitation, § 3496.
XI. Charges and Liens, §§ 3497-3498.
A. Charges, § 3497.
B. Liens, § 3498.
XII. Carrier as Warehouseman, §§ 3499-3505.
A. Baggage Awaiting Transportation, § 3499.
B. Baggage Awaiting Delivery to Passenger, §§ 3500-3502.
a. In General, § 3500.
b. What Constitutes Reasonable Time for Removal of Baggage, § 3501.
c. Special Contract for Storage, § 3502.
C. Baggage Awaiting Delivery to or by Connecting Carrier, § 3503.
D. Duties and Liabilities, §§ 3504-3505.
a. In General, § 3504.
b. Liability Dependent upon Existence of Negligence, § 3505.
XIII. Connecting Carriers, §§ 3506-3514.
A. Liability of Initial Carrier, §§ 3506-3511.
a. In General, § 3506.
b. Sale of Through Ticket or Collection of Fare for Entire Route, §§ 3507-3508.
(1) Holding That Initial Carrier Liable for Losses on Other Lines, § 3507.
(2) Holding That Initial Carrier Not Liable for Losses on Other Lines, § 3508.
c. Power to Limit Liability to Own Line, § 3509.
d. Effect of Release of Connecting Carrier, § 3510.
e. Liability as Warehouseman, § 3511.
B. Liability of Intermediate or Last Carrier, § 3512.
C. Effect of Agreements between Connecting Lines and Joint Liability, § 3513.
D. Presumptions and Burden of Proof, § 3514.
XIV. Palace and Sleeping Car Companies, § 3515.
XV. Actions, §§ 3516-3530.
A. In General, § 3516.
B. Right of Action and Parties, § 3517.
C. Pleading and Proof, §§ 3518-3519.
a. Necessity and Sufficiency of Allegations, § 3518.
b. Evidence Admissible under Pleadings, § 3519.
D. Presumptions and Burden of Proof, §§ 3520-3522.
a. In General, § 3520.
b. Plaintiff's Burden of Proof, § 3521.
c. Defendant's Burden of Proof, § 3522.
E. Witnesses, § 3523.
F. Admissibility of Evidence, § 3524.
G. Weight and Sufficiency of Evidence, § 3525.

H. Questions for Court or Jury, § 3526.
I. Instructions, § 3527.
J. Damages, §§ 3528-3530.
a. Nominal Damages, § 3528.
b. Punitive or Exemplary Damages, § 3529.
c. Compensatory Damages, § 3530.

CHAPTER XXX.

Palace Cars and Sleeping Car Companies.

I. Nature of Liability in General, § 3531.
II. Statutory Regulations as to Empty Berths, § 3532.
III. Duty to Receive Passengers, §§ 3533-3535.
A. In General, § 3533.
B. Right to Demand Compensation, § 3534.
C. Regulations as to Tickets, § 3535.
IV. Contracts for Accommodations, §§ 3536-3544.
A. In General, § 3536.
B. Operation and Effect in General, § 3537.
C. Breach of Contract to Reserve Berth, § 3538.
D. Contract for Use of Berth in Daytime, § 3539.
E. Failure of Railroad Company to Haul Sleeper, § 3540.
F. Voluntary Abandonment of Contract Rights, § 3541.
G. Right of Husband and Wife to Occupy Same Berth, § 3542.
H. Condition Precedent to Rescission of Contract, § 3543.
I. Implied Agreement of Passenger, § 3544.
V. Duties and Liabilities as to Person of Passenger, §§ 3545-3548.
A. In General, § 3545.
B. Assaults, Insults, etc., § 3546.
C. Duty as to Discharging Passengers, § 3547.
D. Contributory Negligence of Passenger, § 3548.
VI. Ejection of Passengers, §§ 3549-3557.
A. Right to Eject, § 3549.
B. Liability for Wrongful Ejection, §§ 3550-3551.
a. In General, § 3550.
b. Ejection by Railway Company, § 3551.
C. Grounds for Ejection, §§ 3552-3555.
a. Failure to Pay Fare, § 3552.
b. Failure to Procure Proper Railroad Ticket, § 3553.
c. Loss of Ticket, § 3554.
d. Bringing Improper Articles into Car, § 3555.
D. What Constitutes Ejection, § 3556.
E. Manner of Ejection, § 3557.
VII. Duties and Liabilities as to Property of Passengers, §§ 3558-3573.
A. Nature of Liability, § 3558.
B. Duty to Protect Property, §§ 3559-3564.
a. In General, § 3559.
b. While Passengers Are Asleep, § 3560.
c. While Passengers Are in Toilet Room, § 3561.
d. Passenger Sleeping in Smoker, § 3562.
e. Duty to Anticipate Presence of Thief, § 3563.
f. Duty of Ticket Agent to Remove Thief, § 3564.
C. Property Left in Car, § 3565.
D. Thefts by Fellow Passengers, § 3566.

E. Thefts by employees, § 3567.
F. Nature and Amount of Property as Affecting Liability, § 3568.
G. Custody of Property as Affecting Liability, § 3569.
H. Limitation of Liability, § 3570.
I. Contributory Negligence, §§ 3571-3573.
a. In General, § 3571.
b. What Constitutes Contributory Negligence, § 3572.
c. Where Property Stolen by Employees, § 3573.
VIII. Liability of Railway Company, § 3574.
IX. Joint Liability of Sleeping Car and Railway Companies, § 3575.
X. Actions, §§ 3576-3587.
A. Nature of Action, § 3576.
B. Parties, § 3577.
C. Pleading, §§ 3578-3579.
a. Declaration or Complaint, § 3578.
b. Necessity for Pleading Contributory Negligence, § 3579.
D. Issues, Proof and Variance, § 3580.
E. Presumptions and Burden of Proof, § 3581.
F. Admissibility of Evidence, §§ 3582-3584.
a. In General, § 3582.
b. In Actions for Wrongful Ejection, § 3583.
c. In Actions for Loss of Property, § 3584.
G. Weight and Sufficiency of Evidence, § 3585.
H. Instructions, § 3586.
I. Questions for Court or Jury, § 3587.
XI. Damages, §§ 3588-3595.
A. Nominal Damages, § 3588.
B. Punitive Damages, § 3589.
C. Compensatory Damages, §§ 3590-3594.
a. In General, § 3590.
b. Mental Suffering, § 3591.
c. Physical Suffering, § 3592.
d. Remote Damages, § 3593.
e. Damages in Contemplation of Parties, § 3594.
D. Excessiveness of Damages, § 3595.

PART V.

CONNECTING CARRIERS

CHAPTER XXXI.

Rights, Duties and Liabilities.

I. Who Are Connecting Carriers, § 3596.
II. Rights, Duties and Liabilities in General, § 3597.
III. Carriers of Goods and Live Stock, §§ 3598-3672.
A. Who Is the Initial Carrier, § 3598.
B. Traffic Arrangements between Carriers, §§ 3599-3600.
a. Validity, § 3599.
b. Construction, § 3600.
C. Transportation beyond Carrier's Line, §§ 3601-3613.
a. Duty to Receive and Transport, § 3601.

b. Contracts for Through Transportation, §§ 3602-3605.
(1) In General, § 3602.
(2) Power to Contract, § 3603.
(3) What Constitutes a Contract for Through Transportation, § 3604.
(4) Effect of Contract and Liability for Breach Thereof, § 3605.
c. Delivery to Succeeding Carrier, §§ 3606-3612.
(1) Duty to Deliver to or Notify Succeeding Carrier, § 3606.
(2) Mode and Sufficiency of Delivery, § 3607.
(3) Time of Delivery, § 3608.
(4) Capacity in Which Carrier Acts in Making Delivery, § 3609.
(5) Right to Determine to What Connecting Line Delivery Shall Be Made, § 3610.
(6) Duty of Initial Carrier Where Succeeding Carrier Refuses to Receive Goods, or Delivery to It Is Impracticable, § 3611.
(7) Waiver of Delivery by Succeeding Carrier, § 3612.
d. Transmission to Succeeding Carrier of Consignor's Instructions, § 3613.
D. Duty to Receive and Transport Cars and Freight Delivered by a Connecting Carrier, § 3614.
E. Duty of a Forwarding Consignee, § 3615.
F. Capacity in Which Connecting Carrier Acts and How It Is Affected by Initial Carrier's Contract with Shipper, § 3616.
G. Delivery to Consignee, § 3617.
H. Use by Carrier of Connecting Carrier's Cars, § 3618.
I. Delay in Transportation or Delivery, §§ 3619-3633.
a. Liability in General, § 3619.
b. Liability of Initial Carrier, §§ 3620-3628.
(1) In General, § 3620.
(2) Delay Resulting from Failure to Conform to Shipper's Directions or to Give Proper Notice to Succeeding Carrier, § 3621.
(3) Delay Caused by Carrier's Failure to Feed and Water Stock, § 3622.
(4) Delay of the Succeeding, or of a Subsequent, Carrier, §§ 3623-3628.
(a) Liability in Absence of Statute, Contract, or Traffic Agreement, § 3623.
(b) Liability Imposed by Statute, § 3624.
(c) Liability under Contract, § 3625.
(5) Delay Resulting from Succeeding Carrier's Inability to Receive or Forward Goods, § 3626.
(6) Liability Where Connecting Carrier Refuses to Receive Goods, § 3627.
(7) Defenses in Actions for Delay, § 3628.
c. Liability of Intermediate or Last Carrier, §§ 3629-3632.
(1) In General, § 3629.
(2) Delay Caused by Preceding or Subsequent Carrier, § 3630.
(3) Liability of Second Carrier to First Carrier for Delay in Receiving Goods, § 3631.
(4) Insufficient Excuses for Delay, § 3632.
d. Effect of Traffic Arrangements between Carriers, § 3633.
J. Loss of or Injury to Cars, Goods, or Live Stock, §§ 3634-3672.
a. Loss of or Injury to Cars, § 3634.
b. Loss of or Injury to Goods or Live Stock, §§ 3635-3672.
(1) In General, § 3635.
(2) Liability of Initial Carrier, §§ 3636-3645.
(a) For Loss or Injury on Its Own Line or before Delivery to Succeeding Carrier, § 3636.
(b) Liability of a Forwarder, § 3637.
(c) Liability for Loss Occasioned by Failure to Transmit Consignor's Instructions to Succeeding Carrier, § 3638.

(d) Effect of Failure to Give Name of Consignor to Connecting Carrier, § 3639.
(e) Liability for Loss Caused by Delay in Furnishing Cars, § 3640.
(f) Liability for Loss or Injury by the Succeeding or by a Subsequent Carrier, §§ 3641-3645.
aa. In General, § 3641.
bb. Statutory Exemption from Liability, § 3642.
cc. Liability Imposed by Statute, § 3643.
dd. Liability under Contract, § 3644.
ee. Diversion of Freight from Route Stipulated, § 3645.
(3) Liability of Intermediate or Last Carrier, §§ 3646-3659.
(a) In General, § 3646.
(b) Where Initial Carrier Contracts for Through Transportation, § 3647.
(c) When Liability Commences and Terminates, § 3648.
(d) Liability for Injury Occurring after Delivery by Intermediate Carrier to Shipper, § 3649.
(e) Liability for Loss of or Injury to Property Transported in Cars of a Preceding Carrier, § 3650.
(f) Liability for Failure to Give Live Stock Rest, Water, and Food, § 3651.
(g) Liability of a Carrier Diverting Shipment from Route Stipulated, § 3652.
(h) Liability for Loss or Injury by a Preceding or Subsequent Carrier, §§ 3653-3657.
aa. In General, § 3653.
bb. Liability Imposed by Statute, § 3654.
cc. Liability under Contract, § 3655.
dd. Effect of Failure to Examine Goods or to Inspect Manner of Loading, § 3656.
ee. Effect of Refusal to Deliver Goods until the Whole Freight Is Paid, § 3657.
(i) Recovery Over by Initial Carrier from a Subsequent Carrier, § 3658.
(j) Facts Not Relieving Carrier from Liability, § 3659.
(4) Effect of Agreements between Connecting Carriers and Joint Liability, §§ 3660-3672.
(a) In General, § 3660.
(b) Agreement by Carriers, under a Certain Name, to Carry between Distant Points, § 3661.
(c) Carriers under One Management or Holding Themselves Out as a Line for Through Transportation, § 3662.
(d) Joint Association for Transmission of Through Freight, § 3663.
(e) Establishment of Joint or Through Tariffs of Rates, § 3664.
(f) Arrangement as to Payment and Collection of Freight Charges, § 3665.
(g) Contracts of Shipment Made with Joint Agent of Carriers, § 3666.
(h) Liability for Negligence of Joint Agent, § 3667.
(i) Damages to Freight Resulting from Violation of Traffic Agreement, § 3668.
(j) Agreements Not Exempting Carrier from Liability to Owner of Goods, § 3669.
(k) Contract Making Payment of Freight Charges or Indorsement of Guarantee on Waybill Essential to Delivery, § 3670.
(l) Diversion by First Two Carriers and Receipt by Third without Sufficient Shipping Instructions, § 3671.
(m) Injuries to Live Stock from Failure to Properly Feed Them, § 3672.
IV. Carriers of Passengers, §§ 3673-3690.
A. Traffic Arrangements between Carriers, § 3673.
B. System of Dominant and Subordinate Carriers, § 3674.
C. Transportation beyond Carrier's Line, §§ 3675-3678.

a. Duty to Transport, § 3675.
b. Contracts for Through Transportation, §§ 3676-3678.
(1) Power to Contract, § 3676.
(2) What Constitutes a Contract for Through Transportation—Effect of Contract, § 3677.
(3) Liability for Acts of Agent Making the Contract, § 3678.
D. Obligation of Carrier to Honor Tickets Issued by Another Carrier, § 3679.
E. On What Trains Passengers Received from a Connecting Carrier Must Be Transported, § 3680.
F. Through Tickets Limited as to Time, § 3681.
G. Injuries to Passengers, §§ 3682-3690.
a. In General, § 3682.
b. Liability of Initial Carrier, §§ 3683-3689.
(1) Injury on Wharf Connecting Carrier's Line with Steamboat, § 3683.
(2) Injuries on the Line of the Succeeding or a Subsequent Carrier, §§ 3684-3689.
(a) Injuries Resulting from Misrepresentation of Initial Carrier's Agent as to the Best Route, § 3684.
(b) Injuries Resulting from Negligence of a Subordinate Carrier, § 3685.
(c) Liability under Contract, §§ 3686-3689.
aa. In General, § 3686.
bb. Effect of Sale of Coupon Ticket, § 3687.
cc. Liability for Accident Happening on a Special Excursion Train, § 3688.
dd. Liability for Assault by Employee of a Connecting Carrier, § 3689.
c. Effect of Agreements between Connecting Carriers and Joint Liability, § 3690.

CHAPTER XXXII.

Limitation of Liability.

I. Carriers of Goods and Live Stock, §§ 3691-3767.
A. Limitations to Carrier's Own Line or to Carrier Having Custody of Property, §§ 3691-3755.
a. Power to Limit and Validity, §§ 3691-3720.
(1) Carrier Receiving Consignment to Point Beyond Its Own Line, §§ 3691-3693.
(a) Power to Limit in General, § 3691.
(b) American Rule as to Effect of Receipt of Goods, § 3692.
(c) English Rule as to Effect of Receipt of Goods, § 3693.
(2) Carrier Contracting to Carry Beyond Its Own Line, §§ 3694-3711.
(a) In General, § 3694.
(b) Effect of Federal Statutes, §§ 3695-3696.
aa. Prior to Hepburn Act, § 3695.
bb. Under Hepburn Act, § 3696.
(c) Effect of State Statutes, §§ 3697-3705.
aa. In General, § 3697.
bb. Georgia, § 3698.
cc. Illinois, § 3699.
dd. Iowa, § 3700.
ee. Missouri, § 3701.
ff. Nebraska, § 3702.
gg. South Carolina, § 3703.
hh. Texas, § 3704.
ii. Virginia, § 3705.
(d) What Amounts to Contract to Carry Beyond Carrier's Own Line, §§ 3706-3711.

aa. In General, § 3706.
bb. Collection of Charge for Entire Distance, §§ 3707-3708.
(aa) By Initial Carrier, § 3707.
(bb) By Succeeding Carrier, § 3708.
cc. Agreement to Forward Car to Destination, § 3709.
dd. Car Forwarded Over Connecting Line by Order of Consignee, § 3710.
ee. Effect of Through Waybill, § 3711.
(3) Losses Which May Be Limited, § 3712.
(4) Carriers Which May Contract, §§ 3713-3720.
(a) Connecting Carriers Which Are Partners, § 3713.
(b) Initial Carrier Lessee of Connecting Road, § 3714.
(c) Right of Initial Carrier to Stipulate on Behalf of Succeeding Carrier, § 3715.
(d) Power of Initial Carrier to Make Contract Limiting Liability of Succeeding Carrier, §§ 3716-3717.
aa. In General, § 3716.
bb. Driver of Local Transfer Company, § 3717.
(e) Intermediate or Terminal Carrier, § 3718.
(f) Power of Intermediate Forwarder to Bind Initial Carrier, § 3719.
(g) Express Company, § 3720.
b. Manner of Limiting, §§ 3721-3724.
(1) General Notice, § 3721.
(2) Usage or Custom, § 3722.
(3) Stipulation in Bill of Lading or Receipt, § 3723.
(4) Express Contract, § 3724.
c. Form and Requisites, Contents and Legibility, §§ 3725-3730.
(1) Legibility, § 3725.
(2) Reasonableness, § 3726.
(3) Consideration, § 3727.
(4) Time of Contract, § 3728.
(5) Choice between Full and Limited Liability Contract, § 3729.
(6) Knowledge and Assent of Shipper, § 3730.
d. Construction, Operation and Effect, §§ 3731-3743.
(1) Construction of Words and Phrases, § 3731.
(2) What Law Governs, § 3732.
(3) Effect of Stipulation as to Character of Train Service, § 3733.
(4) Carriers Entitled to Benefit, §§ 3734-3736.
(a) Liability Limited to Carrier's Own Line, § 3734.
(b) Liability Limited to Line Having Custody of Goods, § 3735.
(c) Enurement to Benefit of Subsequent Carrier, § 3736.
(5) Losses Covered, § 3737.
(6) Effect of Specific Exceptions to General Exemptions, § 3738.
(7) Liability of Succeeding Carrier, § 3739.
(8) Termination of Liability of Initial or Prior Carrier, §§ 3740-3743.
(a) Delivery to Succeeding Carrier, § 3740.
(b) Refusal of Succeeding Carrier to Receive Shipment, § 3741.
(c) Delivering Stock to Stockyard Company, § 3742.
(d) Duty to Notify Shipper of Inability to Deliver, § 3743.
e. Breach of Contract by Initial Carrier, § 3744.
f. Modification or Rescission, § 3745.
g. Merger of Verbal Contract by Subsequent Written Agreement, § 3746.
h. Parol Evidence to Explain Ambiguity, § 3747.
i. Waiver and Estoppel, § 3748.
j. Enforcement, §§ 3749-3754.
(1) Plea or Answer, § 3749.
(2) Nonsuit, § 3750.

(3) Presumption and Burden of Proof, § 3751.
(4) Weight and Sufficiency, § 3752.
(5) Questions for Jury, § 3753.
(6) Instructions, § 3754.
k. Damages, § 3755.
B. Limiting Liability to That of Forwarder or Warehouseman, §§ 3756-3760.
a. Power to Limit and Validity, §§ 3756-3757.
(1) In General, § 3756.
(2) Carriers Which May Limit, § 3757.
b. What Constitutes an Agreement "to Forward," § 3758.
c. Nature and Extent of Liability as Forwarder, § 3759
d. Termination of Liability, § 3760.
C. Goods Carried at Owner's Risk, § 3761.
D. Exemption from Loss by Delay, § 3762.
E. Exemption from Liability for Insufficient or Defective Car, § 3763.
F. Stipulation against Loss by Suffocation, § 3764.
G. Limiting Amount of Liability, § 3765.
H. Condition as to Filing Claims or Giving Notice of Loss, § 3766.
I. Conditions as to Time of Bringing Suit, § 3767.
II. Carriers of Passengers, §§ 3768-3777.
A. Power to Limit, §§ 3768-3770.
a. In General, § 3768.
b. Lines under One Management, § 3769.
c. Ticket Agent Acting as Agent for Connecting Carrier, § 3770.
B. Mode, Form and Requisites, § 3771.
C. Operation and Effect, §§ 3772-3775.
a. In General, § 3772.
b. Injuries Covered, §§ 3773-3774.
(1) Injuries to Persons, § 3773.
(2) Injuries to Baggage, § 3774.
c. Termination of Liability, § 3775.
D. Modification or Rescission, § 3776.
E. Enforcement, § 3777.
III. Right of Subsequent Carrier to Benefit of Limitations by First Carrier, §§ 3778-3786.
A. Contract for Through Shipment, §§ 3778-3785.
a. General Rule, § 3778.
b. What Law Governs, § 3779.
c. Contract on Behalf of Connecting Line, § 3780.
d. Invalidity of Condition Apparent on Its Face, § 3781.
e. What Constitutes a Through Contract, Form and Requisites, § 3782.
f. Instances of Particular Limitations, § 3783.
g. Refusal of Subsequent Carrier to Perform Contract, § 3784.
h. Pleading and Proof, § 3785.
B. Contract Not for Through Shipment, § 3786.

CHAPTER XXXIII.

ACTION.

I. Rights of Action, § 3787.
II. Jurisdiction and Venue, § 3788.
III. Parties, §§ 3789-3791.
A. By Whom or in Whose Name Action May Be Brought, § 3789.
B. Against Whom Action May Be Brought—Joinder, § 3790.
C. Necessary Parties, § 3791.

IV. Pleading, §§ 3792-3797.
A. Declaration, Petition, or Complaint, §§ 3792-3795.
a. Essential Averments, § 3792.
b. Alternative Averments, § 3793.
c. Correspondence between Allegations and Proof, § 3794.
d. Amendment, § 3795.
B. Plea or Answer, §§ 3796-3797.
a. Sufficiency, § 3796.
b. Effect of Failure to Deny a Partnership Alleged in Petition, § 3797.
V. Evidence, §§ 3798-3805.
A. Presumptions and Burden of Proof, §§ 3798-3801.
a. In General, § 3798.
b. As to Line on Which Delay Occurred, § 3799.
c. As to Notification of Connecting Carriers by Initial Carrier as to Conditions of Shipping Contract, § 3800.
d. As to Line on Which Injury or Loss Occurred and the Responsibility Therefor, § 3801.
B. Admissibility of Evidence, §§ 3802-3804.
a. In Action against Initial Carrier, § 3802.
b. In Action against Intermediate or Last Carrier, § 3803.
c. In Action against Initial and Connecting Carriers, § 3804.
C. Weight and Sufficiency of Evidence, § 3805.
VI. Measure of Damages, §§ 3806-3807.
A. In Action against Initial Carrier, § 3806.
B. In Action against Intermediate or Last Carrier, § 3807.
VII. Instructions, § 3808.
VIII. Province of Court and Jury, § 3809.
IX. Verdict, § 3810.
X. Judgment, § 3811.

PART VI

INTERSTATE AND FOREIGN COMMERCE

CHAPTER XXXIV.

Interstate Commerce in General.

I. In General, § 3812.
II. Statutory Provisions, § 3813.
III. Articles of Commerce, § 3814.
IV. Means and Instruments of Commerce, §§ 3815-3828.
A. In General, § 3815.
B. Railroads, § 3816.
C. Express Companies, § 3817.
D. Dining Cars, § 3818.
E. Terminal Companies and Stockyards, § 3819.
F. Warehouses and Elevators, § 3820.
G. Pipe Lines, § 3821.
H. Bridges, § 3822.
I. Ferries, § 3823.
J. Ports, Harbors and Wharves, § 3824.
K. Connecting Carriers, § 3825.
L. Soliciting Agents, § 3826.
M. Steamboats, § 3827.
N. Determining Whether Commerce Is Intrastate or Interstate, § 3828.

CHAPTER XXXV.

Regulation and Control.

I. Power of Congress, §§ 3829-3859.
A. In General, § 3829.
B. As to Charges, § 3830.
C. As to Transportation of Live Stock, § 3831.
D. As to Transportation of Goods Manufactured by Carrier, § 3832.
E. As to Limitation of Liability by Carrier, § 3833.
F. Subjects of Regulation, §§ 3834-3859.
a. In General, § 3834.
b. Corporations in General, § 3835.
c. Railroads, §§ 3836-3851.
(1) In General, § 3836.
(2) Power of Congress to Construct Railroad, § 3837.
(3) Safety of Persons and Property, §§ 3838-3846.
(a) In General, § 3838.
(b) Rolling Stock and Equipment, §§ 3839-3846.
aa. In General, § 3839.
bb. Safety Appliance Act, §§ 3840-3844.
(aa) In General, § 3840.
(bb) Construction of Act, § 3841.
(cc) Carriers Subject to Act, § 3842.
(dd) Appliances Required by Act, § 3843.
(ee) Enforcement of Act, § 3844.
cc. Train Crew, § 3845.
dd. Hours of Labor, § 3846.
(4) Protection of Lives and Limbs of Employees, §§ 3847-3848.
(a) In General, § 3847.
(b) Employers' Liability Act, § 3848.
(5) Qualifications, Duties and Liabilities of Employees, § 3849
(6) Arbitration between Railroad and Employees, § 3850.
(7) Conspiracy to Obstruct Transportation, § 3851.
d. Express Companies, § 3852.
e. Ships, § 3853.
f. Wharves, § 3854.
g. Bridges, § 3855.
h. Navigable Waters, § 3856.
i. Packing Houses, § 3857.
j. Terminals and Stockyards, § 3858.
k. Connecting Carriers, § 3859.
II. Power of State, §§ 3860-3937.
A. In General, § 3860.
B. Corporations, § 3861.
C. Bridges, § 3862.
D. Ferries, §§ 3863-3864.
a. In General, § 3863.
b. Granting of Franchises and Control, § 3864.
E. Ships, § 3865.
F. Railroads, §§ 3866-3879.
a. In General, § 3866.
b. Location and Plan of Construction of Railroad, § 3867.
c. Purchase of or Consolidation with Competing Lines, § 3868.
d. Requiring Recordation of Lease, § 3869.
e. Requiring Railroad to Afford Transportation, § 3870.
f. Regulation of Charges for Transportation, §§ 3871-3880.

(1) In General, § 3871.
(2) Prohibiting Discriminations, § 3872.
(3) Prohibiting Greater Charge for Shorter than Longer Haul, § 3873.
(4) Posting Schedule of Rates, § 3874.
(5) Sale and Redemption of Tickets, § 3875.
(6) Commutation Tickets, § 3876.
(7) Mileage Tickets, § 3877.
(8) Limitation of Charges to Amount Specified in Bill of Lading, § 3878.
(9) Ferriage Charges, § 3879.
(10) Demurrage Charges, § 3880.
g. Regulations to Prevent Injuries to Passengers, § 3881.
h. Regulating Relation of Master and Servant, §§ 3882-3887.
(1) In General, § 3882.
(2) Number and Character of Employees, § 3883.
(3) Safety Appliance Acts, § 3884.
(4) Employers' Liability Act, § 3885.
(5) Hours of Service, § 3886.
(6) Fellow Servant Doctrine, § 3887.
i. Regulating Rights and Privileges of Passengers, § 3888.
j. Regulating Speed of Running Trains, § 3889.
k. Running Trains on Sunday, § 3890.
l. Heating of Passenger Cars, § 3891.
m. Requiring Trains to Stop at Certain Stations, § 3892
n. Regulating Duty to Accept Goods, § 3893.
o. Regulating Time, Place and Manner of Delivery, § 3894.
p. Care for Live Stock, § 3895.
q. Routing Goods, § 3896.
r. Cartage and Drayage, § 3897.
s. Compelling Railroad to Elevate Bridge, § 3898.
t. Collection of Purchase Price for Consignor, § 3899.
u. Regulations with Respect to Limitation of Liability of Carriers, § 3900.
v. Regulating Liability for Delay, § 3901.
w. System of Bookkeeping, § 3902.
x. Reports, § 3903.
y. Regulations as to Crossing, § 3904.
z. As to Liability of Officers and Agents, § 3905.
G. Street and Electric Railways, § 3906.
H. Express Companies, § 3907.
I. Sleeping Cars, § 3908.
J. Warehouses and Elevators, § 3909.
K. Packing Houses, § 3910.
L. Wharves, § 3911.
M. Pipe Lines, § 3912.
N. Levees, § 3913.
O. Terminals and Stockyards, § 3914.
P. Navigable Waters, § 3915.
Q. Connecting Carriers, § 3916.
R. Particular Articles of Commerce, § 3917.
S. Particular Regulations, §§ 3918-3923.
a. Charges, § 3918.
b. Discrimination, § 3919.
c. Bills of Lading, § 3920.
d. Description of Goods, § 3921.
e. Disposal of Freight Refused by Consignee, § 3922.
f. Reshipment of Goods, § 3923.

T. Regulation of Relation of Consignor and Consignee, § 3924.
U. As to Remedies, §§ 3925-3937.
a. Prerequisites to Bringing Suit, § 3925.
b. Jurisdiction and Venue of Suits, § 3926.
c. Parties to Suits, § 3927.
d. Summons and Process, § 3928.
e. Evidence, § 3929.
f. Proceeding by Attachment and Garnishment, § 3930.
g. Removal of Cause to Federal Court, § 3931.
h. Equitable Remedies, § 3932.
i. Requiring Claim for Damages to Be Made in Prescribed Time, § 3933.
j. Requiring Payment of Damages in Prescribed Time, § 3934.
k. Lien on Vessel for Services and Material, § 3935.
l. Seizure for Taxes, § 3936.
m. Entry of Satisfaction of Mortgage.

CHAPTER XXXVI.

Taxation.

A. Power to Tax, § 3938.
B. Taxation Amounting to Regulation of Commerce, §§ 3939-3981.
a. In General, § 3939.
b. Tax on Corporations Engaged in Interstate Commerce, §§ 3940-3947.
(1) In General, § 3940.
(2) Tax on Gross Receipts, § 3941.
(3) Tax on Franchise or Privilege, § 3942.
(4) Tax on Capital Stock, § 3943.
(5) Tax on Transfer of Corporate Stock, § 3944.
(6) Tax on Right of Corporations to Consolidate, § 3945.
(7) Tax on Property Outside of State, § 3946.
(8) Tax on Property of Foreign Corporation, § 3947.
c. Tax on Gross Receipts, § 3948.
d. Tax on Passengers and Freight, §§ 3949-3950.
(1) Passengers, § 3949.
(2) Freight, § 3950.
e. Tax on Privilege and Occupation, § 3951.
f. Tax on Tolls, § 3952.
g. Tax on Means and Instruments of Commerce, §§ 3953-3979
(1) In General, § 3953.
(2) Tax on Railroads, §§ 3954-3959.
(a) In General, § 3954.
(b) Tax on Franchise, Privilege and Occupation, § 3955.
(c) Tax on Capital Stock, § 3956.
(d) Tax on Rolling Stock, § 3957.
(e) Tax on Gross Earnings, § 3958.
(f) Payment of Bonus to State, § 3959.
(3) Tax on Street Railroads, § 3960.
(4) Tax on Express Companies, § 3961.
(5) Tax on Sleeping Cars, § 3962.
(6) Tax on Refrigerator Cars, § 3963.
(7) Tax on Ships, §§ 3964-3972.
(a) In General, § 3964.
(b) Tax on Gross Receipts, § 3965.
(c) Tax on Interest of Citizen in Vessel, § 3966.
(d) Tax on Persons Residing on Ships, § 3967.

(e) Tax on Agents, Pilots, etc., § 3968.
(f) Registered under Laws of United States, § 3969.
(g) Registered in Another State, § 3970.
(h) Tax on Particular Ships, § 3971.
(i) Wharfage Fees, § 3972.
(8) Tax on Ferries, § 3973.
(9) Tax on Bridges, § 3974.
(10) Tax on Automobiles, § 3975.
(11) Tax on Draymen, § 3976.
(12) Tax on Pipe Lines, § 3977.
(13) Tax on Warehouses and Elevators, § 3978.
(14) Tax on Packing Houses, § 3979.
h. The Unit Rule, § 3980.
i. Stamp Duty on Bills of Lading, § 3981.

CHAPTER XXXVII.

Interstate Commerce Act.

I. Statutory Provisions, §§ 3982-3989.
A. Purpose and Object, § 3982.
B. History of Act, § 3983.
C. Constitutionality of Act, § 3984.
D. Construction of Act, § 3985.
E. Operation and Effect, § 3986.
F. Time of Taking Effect, § 3987.
G. Repeal, § 3988.
II. Definitions, § 3989.
III. Carriers Subject to Act, §§ 3990-3991.
A. In General, § 3990.
B. Particular Carriers, § 3991.
IV. Duties Imposed upon Carrier, §§ 3992-4015.
A. Transportation, § 3992.
B. To Establish Through Routes, § 3993.
C. Continuous Carriage, § 3994.
D. Facilities, §§ 3995-3997.
a. In General, § 3995.
b. Switches, § 3996.
c. As to Connecting Carriers, § 3997.
E. Just and Reasonable Rates, § 3998.
F. Printing and Publishing Schedules of Rates, § 3999.
G. Reports to Commission, § 4000.
H. Unloading, Feeding and Watering Stock, §§ 4001-4014.
a. Statutory Provision, § 4001.
b. Carriers Liable for Penalty, § 4002.
c. Knowingly and Willfully, § 4003.
d. Separate Offenses, § 4004.
e. Negligence of Servant, § 4005.
f. Preparation and Facilities, § 4006.
g. Shipment Through Foreign Country, § 4007.
h. Shipment under Agreement, § 4008.
i. Where Stock Confined by Another Carrier, § 4009.
j. Where Penalty Exacted from Another Carrier, § 4010.
k. Excuses for Failure to Unload, etc., § 4011.
l. Cars Provided for Food, Water and Rest, § 4012.

m. Damages, § 4013.
n. Proceedings, § 4014.
I. Icing Perishable Goods, § 4015.
V. Prohibitions upon Carriers, §§ 4016-4049.
A. Discrimination and Preferences, §§ 4016-4044.
a. In General, § 4016.
b. Undue and Unreasonable, § 4017.
c. Similar Service and Circumstances, § 4018.
d. Persons Discriminated against, § 4019.
e. Determining Discrimination or Preference, § 4020.
f. In Charges, § 4021.
g. In Facilities, § 4022.
h. In Distribution of Cars, §§ 4023-4035.
(1) In General, § 4023.
(2) Between Mining Companies, §§ 4024-4033.
(a) In General, § 4024.
(b) Ownership of Cars, § 4025.
(c) Fuel Cars, § 4026.
(d) Cars Used in Intrastate Commerce Only, § 4027.
(e) Determining Mining Company's Share of Cars, §§ 4028-4033.
aa. In General, § 4028.
bb. Facts Considered, §§ 4029-4033.
(aa) Agreement of Parties, § 4029.
(bb) Rule of Carrier, § 4030.
(cc) Capacity and Output of Mine, § 4031.
(dd) Unfulfilled Contract of Mining Company, § 4032.
(ee) Prompt Return of Cars by Mining Company, § 4033.
(3) Between Mining Companies on Main and Branch Lines, § 4034.
(4) Between Warehousemen, § 4035.
i. In Acceptance and Delivery of Freight, § 4036.
j. In Taking on and Letting Off Passengers, § 4037.
k. In Manner of Shipment, § 4038.
l. In Time of Transportation, § 4039.
m. In Reshipping Privileges, § 4040.
n. In Allowances to Shipper, § 4041.
o. Remedies, §§ 4042-4044.
(1) Burden of Proof, § 4042.
(2) Mandamus, § 4043.
(3) Summary Remedy, § 4044.
B. Combinations and Monopolies, § 4045.
C. Pooling Agreements, § 4046.
D. Transportation of Goods Manufactured by Carrier, §§ 4047 4048.
a. In General, § 4047.
b. Manufactured from Wood, § 4048.
E. Limiting Liability, § 4049.
VI. Connecting Carriers, §§ 4050-4057.
A. Discriminations, § 4050.
B. Facilities, §§ 4051-4052.
a. In General, § 4051.
b. Use of Tracks, § 4052.
C. Joint Through Routes, § 4053.
D. Rates, § 4054.
E. Liability of Initial Carrier, §§ 4055-4057.
a. In General, § 4055.
b. Limiting Liability, § 4056.
c. Recovery over against Other Carrier, § 4057.

VII. Rates and Charges, §§ 4058-4149.
A. In General, § 4058.
B. Just and Reasonable, § 4059.
C. Established by Carrier, § 4060.
D. Established by Commission, §§ 4061-4065.
a. Under Original Act, § 4061.
b. Under Amendment of 1906, § 4062.
c. Prerequisites to Establishing, § 4063.
d. Form and Requisites of Order, § 4064.
e. Review of Courts, § 4065.
E. Established by Court, § 4066.
F. Determination of Reasonableness of Rate, §§ 4067-4074.
a. In General, § 4067.
b. Judicial Act, § 4068.
c. Question of Fact, § 4069.
d. Facts Considered, § 4070.
e. Mode of Determination, § 4071.
f. Burden of Proof, § 4072.
g. Evidence, § 4073.
h. Review of Determination, § 4074.
G. Discrimination and Preference, §§ 4075-4096.
a. In General, § 4075.
b. Like and Contemporaneous Service, § 4076.
c. Persons Discriminated against, § 4077.
d. Determining Discrimination and Preference, §§ 4078-4083.
(1) Competition, § 4078.
(2) Quantity of Goods Shipped, § 4079.
(3) Long and Short Haul, § 4080.
(4) Disparity between Through and Local Rates, § 4081.
(5) Disparity in Rates between Different Localities, § 4082.
(6) Division of Freight by Connecting Carriers, § 4083.
e. Special Rates, § 4084.
f. Free Transportation, § 4085.
g. Reduced Rates, § 4086.
h. Rebates, §§ 4087-4090.
(1) In General, § 4087.
(2) What Amounts to Rebate, § 4088.
(3) Effect of Granting Rebate, § 4089.
(4) Criminal Liability, § 4090.
i. Payment of Charges, § 4091.
j. Demurrage Charges, § 4092.
k. Purchase and Sale of Goods, § 4093.
l. Justified Discrimination, § 4094.
m. Effect of Discrimination, § 4095.
n. Remedies, § 4096.
H. Long and Short Haul, §§ 4097-4110.
a. Statutory Provision, § 4097.
b. Similar Circumstances and Conditions, § 4098
c. Competition, § 4099.
d. Shipments Over Same Line, § 4100.
e. Through and Local Rates, § 4101.
f. Group Rates, § 4102.
g. Cartage Charges, § 4103.
h. Shipment Through Foreign Country, § 4104.
i. Interest of General Public, § 4105.
j. Destination of Shipment, § 4106.

k. Consent of Commission to Charge, § 4107.
l. Determining Right to Different Charge, § 4108.
m. Establishing Zones, § 4109.
n. Remedies, § 4110.
I. Pooling Freights, § 4111.
J. Mileage Tickets, § 4112.
K. Party-Rate Tickets, § 4113.
L. Excursion Tickets, § 4114.
M. Terminal Charges, § 4115.
N. Industrial Track Service, § 4116.
O. Demurrage Charges, § 4117.
P. Charges for Reconsignment of Goods, § 4118.
Q. Through Rates, § 4119.
R. Allowance for Service of Shipper, §§ 4120-4124.
a. In General, § 4120.
b. For Elevation of Grain, § 4121.
c. For Construction of Grain Doors for Cars, § 4122.
d. For Cartage, § 4123.
e. For Lighterage, § 4124.
S. Printing and Publishing Schedules, §§ 4125-4145.
a. In General, § 4125.
b. Statutory Provision, § 4126.
c. Shipment Over Connecting Carrier, § 4127.
d. Shipment Through Foreign Country, § 4128.
e. Form, Requisites and Validity, §§ 4129-4131.
(1) In General, § 4129.
(2) Printed, § 4130.
(3) Validity, § 4131.
f. Contents, § 4132.
g. Publishing, § 4133.
h. Posting, § 4134.
i. Filing with Commission, § 4135.
j. Distributing in Offices of Agents, § 4136.
k. Construction of Schedule, § 4137.
l. Operation and Effect of Schedules, §§ 4138-4145.
(1) In General, § 4138.
(2) As Standard Charge, §§ 4139-4141.
(a) In General, § 4139.
(b) Contractual Rate, § 4140.
(c) Presumed Legal Rate, § 4141.
(3) As Constructive Notice to Shipper, § 4142.
(4) As to Joint Rates, § 4143.
(5) As to Privileges and Facilities, § 4144.
(6) As to Contract for Exemption from Liability, § 4145.
T. Change of Rates, § 4146.
U. Payment of Charges for Transportation, § 4147.
V. Enjoining Enforcement of Rates, § 4148.
W. Charges of Connecting Carriers, § 4149.
VIII. Interstate Commerce Commission, §§ 4150-4154.
A. In General, § 4150.
B. Salaries and Expenses, § 4151.
C. Rules, § 4152.
D. Powers and Duties, §§ 4153-4154.
a. In General, § 4153.
b. Particular Powers, § 4154.

IX. Civil Proceedings against Carrier, §§ 4155-4219.
A. Proceedings before Commission, §§ 4155-4190.
a. In General, § 4155.
b. Exclusive Jurisdiction, § 4156.
c. Summons and Process, § 4157.
d. Parties, § 4158.
e. Limitation and Laches, § 4159.
f. Pleadings, § 4160.
g. Burden of Proof and Presumptions, § 4161.
h. Evidence, §§ 4162-4165.
(1) In General, § 4162.
(2) Incriminating Testimony, § 4163.
(3) Power to Compel Witnesses to Attend, § 4164.
(4) Production of Books and Papers, § 4165.
i. Hearing and Determination, §§ 4166-4181.
(1) Necessity, § 4166.
(2) Extent of Hearing, § 4167.
(3) Judgment or Order, §§ 4168-4181.
(a) Contents, § 4168.
(b) Service on Carrier, § 4169.
(c) Operation and Effect, § 4170.
(d) Enforcing, Enjoining and Annulling, §§ 4171-4181.
aa. In General, § 4171.
bb. Necessity for Lawful Order, § 4172.
cc. Nature of Proceeding, § 4173.
dd. Jurisdiction and Venue, § 4174.
ee. Parties, § 4175.
ff. Pleadings, § 4176.
gg. Evidence, §§ 4177-4178.
(aa) Admissibility, § 4177.
(bb) Weight and Sufficiency, § 4178.
hh. Hearing and Determination, §§ 4179-4180.
(aa) In General, § 4179.
(bb) Particular Orders of Commission, § 4180.
ii. Injunction, § 4181.
j. Rehearing, § 4182.
k. Review, §§ 4183-4189.
(1) Right of Review, § 4183.
(2) Presumptions on Appeal, § 4184.
(3) Harmless Error, § 4185.
(4) Scope of Review, § 4186.
(5) Modification of Decree of Court, § 4187.
(6) Remand to Commission, § 4188.
(7) Supersedeas Pending Appeal, § 4189.
l. Effect of Repeal of Statute on Pending Proceedings, § 4190.
B. Proceedings in Federal Courts, §§ 4191-4211.
a. In General, § 4191.
b. Statutory Provision, § 4192.
c. Jurisdiction and Venue, §§ 4193-4200.
(1) In General, § 4193.
(2) Before Hearing by Commission, § 4194.
(3) After Hearing by Commission, § 4195.
(4) Offenses Arising in Several Districts, § 4196.
(5) Mandamus, § 4197.
(6) Injunction, § 4198.
(7) In Particular Instances, § 4199.

(8) Equity Jurisdiction, § 4200.
d. Proceedings at Law or in Equity, § 4201.
e. Parties, § 4202.
f. Limitation and Laches, § 4203.
g. Pleadings, § 4204.
h. Issues, Proof and Variance, § 4205.
i. Presumptions and Burden of Proof, § 4206.
j. Evidence, § 4207.
k. Reference, § 4208.
l. Judgment and Orders, § 4209.
m. Costs, § 4210.
n. Stipulation of Parties, § 4211.
C. Proceedings in Commerce Court, §§ 4212-4217.
a. Statutory Provision, § 4212.
b. Jurisdiction in General, § 4213.
c. Power to Enforce or Enjoin Orders of Commission, § 4214.
d. Power to Enforce or Enjoin Particular Orders of Commission, § 4215.
e. Power to Review Order of Commission, § 4216.
f. Procedure, § 4217.
D. Proceedings in State Courts, § 4218.
E. Election of Remedies, § 4219.
X. Criminal Liability of Carrier, §§ 4220-4237.
A. In General, § 4220.
B. Discrimination and Undue Preference, § 4221.
C. Rebates, § 4222.
D. Failure to File and Publish Rates, § 4223.
E. Departure from Publishing Rates, § 4224.
F. False Billing of Goods, § 4225.
G. Liability for Act of Agent, § 4226.
H. Criminal Proceedings against Carrier, §§ 4227-4237.
a. Jurisdiction and Venue, § 4227.
b. Initiation of Proceedings, § 4228.
c. Parties, § 4229.
d. Indictment, §§ 4230-4234.
(1) For Failure to File Rates, § 4230.
(2) For Departure from Published Rate, § 4231.
(3) For Discrimination and Preference, § 4232.
(4) For Granting Rebate or Concession, § 4233.
(5) Indictment against Express Company, § 4234.
e. Burden of Proof, § 4235.
f. Evidence, § 4236.
g. Instructions, § 4237.
XI. Criminal Liability of Officers and Agents, § 4238.
XII. Criminal Liability of Shipper, §§ 4239-4244.
A. Inducing Carrier to Discriminate, § 4239.
B. Receiving Rebates, § 4240.
C. False Billing of Goods, § 4241.
D. Indictment, § 4242.
E. Issues, Proof and Variance, § 4243.
F. Evidence, § 4244.

PART VII.

CARRIERS BY WATER.

CHAPTER XXXVIII.

Carriage of Property.

I. General Considerations, § 4245.
II. Contracts of Affreightment, §§ 4246-4265.
A. Defined, Classified and Distinguished, § 4246.
B. Persons Who May Make, § 4247.
C. Contents, Form and Requisites, §§ 4248-4249.
a. In General, § 4248.
b. Requisites of Contract, § 4249.
D. Interpretation, Operation and Effect, §§ 4250-4260.
a. Rules of Construction, §§ 4250-4256.
(1) General Rules, § 4250.
(2) What Law Governs, § 4251.
(3) Qualifications Imposed by Law, § 4252.
(4) Knowledge of Course of Trade, § 4253.
(5) Aids to Construction, §§ 4254-4255.
(a) Admissibility of Parol Evidence, § 4254.
(b) Opinion Evidence, § 4255.
(6) Construction of Particular Words, Phrases, etc., § 4256.
b. Conditions Precedent and Independent Covenants, Representations and Warranties, §§ 4257-4260.
(1) In General, § 4257.
(2) Stipulations as to Time and Place of Shipment, § 4258.
(3) Stipulations as to Tonnage or Measurement, § 4259.
(4) Warranty of Seaworthiness, § 4260.
E. Cancellation, Modification and Release, § 4261.
F. Performance, Discharge or Breach, §§ 4262-4263.
a. In General, § 4262.
b. Who Liable on Contract, § 4263.
G. Abandonment of Contract, § 4264.
H. Assignment of Contract, § 4265.
III. Bill of Lading, §§ 4266-4275.
A. Definition, § 4266.
B. Form and Contents, § 4267.
C. Issuance and Acceptance, § 4268.
D. Validity of Bills of Lading, § 4269.
E. Construction, Operation and Effect, § 4270.
F. Transfer, § 4271.
G. Effect on Connecting Carrier, § 4272.
H. Modification or Rescission, § 4273.
I. Surrender, Discharge or Release, § 4274.
J. Actions on Bills of Lading, § 4275.
IV. Transportation and Delivery, §§ 4276-4337.
A. General Consideration, §§ 4276-4277.
a. Title, Custody and Control of Goods, § 4276.
b. Liability as Warehouseman, § 4277.

B. Duties and Liabilities as to Transportation and Delivery, §§ 4278-4288.
a. In General, § 4278.
b. Loading Goods, § 4279.
c. Deviation and Delay, §§ 4280-4281.
(1) Deviation, § 4280.
(2) Delay, § 4281.
d. Failure or Refusal to Deliver, §§ 4282-4283.
(1) In General, § 4282.
(2) Short Delivery, § 4283.
e. Notice of Arrival of Goods, § 4284.
f. Mode and Sufficiency of Delivery, § 4285.
g. To Whom Delivery May Be Made—Misdelivery, § 4286.
h. Failure or Refusal of Consignee to Receive Goods, § 4287.
i. Transshipping and Forwarding, § 4288.
C. Loss or Injury, §§ 4289-4311.
a. Liability as Insurer, §§ 4289-4296.
(1) In General, § 4289.
(2) Exceptions and Excuses, §§ 4290-4296.
(a) Act of God or Public Enemy, § 4290.
(b) Jettison, § 4291.
(c) Humidity and Dampness of Ship, § 4292.
(d) Seizure under Legal Process, § 4293.
(e) Fault of Shipper or Owner, § 4294.
(f) Inherent Infirmities of Property, § 4295.
(3) Commencement and Termination of Liability, § 4296.
b. Losses during Deviation or Delay, § 4297.
c. Losses during Loading of Goods, § 4298.
d. Stowage of Goods, §§ 4299-4301.
(1) In General, § 4299.
(2) Stowage on Deck, § 4300.
(3) Dunnage, § 4301.
e. Unseaworthiness or Unfitness of Vessel, §§ 4302-4304.
(1) In General, § 4302.
(2) Improper Stowage or Overloading, § 4303.
(3) Incompetency or Insufficiency of Crew, § 4304.
f. Navigation of Vessel, § 4305.
g. Negligence in Discharging or in Caring for Goods after Discharge, § 4306.
h. Acts of Employees or Third Persons, § 4307.
i. Duties after Injury or Disaster, § 4308.
j. Effect of Insurance, § 4309.
k. Estoppel to Deny Liability to Deliver in Good Order, § 4310.
l. Persons and Vessels Liable, § 4311.
D. Actions, §§ 4312-4327.
a. By Carrier, § 4312.
b. Against Carrier, §§ 4313-4327.
(1) In General, § 4313.
(2) Pleading, § 4314.
(3) Issues, Proof and Variance, § 4315.
(4) Evidence, §§ 4316-4326.
(a) Presumptions and Burden of Proof, §§ 4316-4319.
aa. In General, § 4316.
bb. Cause of Loss or Injury to Goods, § 4317.
cc. Stowage of Goods, § 4318.
dd. Seaworthiness or Fitness of Vessel, § 4319.
(b) Necessity of Producing Bill of Lading, § 4320.
(c) Admissibility of Evidence, § 4321.

(d) Weight and Sufficiency of Evidence, §§ 4322-4326.
aa. In General, § 4322.
bb. Delivery to Carrier, § 4323.
cc. Condition of Vessel, § 4324.
dd. Evidence as to Sea Perils, § 4325.
ee. Short Delivery, § 4326.
(5) Trial, § 4327.
E. Damages, §§ 4328-4336.
a. Failure to Receive and Carry According to Contract, § 4328.
b. Failure to Deliver or Misdelivery, § 4329.
c. Delay in Transportation or Delivery, § 4330.
d. Loss or Injury, §§ 4331-4336.
(1) In General, § 4331.
(2) Measure and Elements of Damage, § 4332.
(3) Determination of Damages, § 4333.
(4) Apportionment of Damages, § 4334.
(5) Deductions, § 4335.
(6) Evidence as to Value or Damage, § 4336.
F. Lien of Shipper against Vessel, § 4337.
V. Freight, Lighterage and Demurrage, §§ 4338-4378.
A. Freight, §§ 4338-4354.
a. In General, § 4338.
b. Persons Entitled to Collect Freight, § 4339.
c. Persons Liable for Payment of Freight, § 4340.
d. When Freight Earned, §§ 4341-4343.
(1) In General, § 4341.
(2) Freight Pro Rata Itineris, § 4342.
(3) Goods Lost or Abandoned, § 4343.
e. Amount Recoverable, § 4344.
f. Deductions and Offsets, § 4345.
g. Change of Rates, § 4346.
h. Lien for Freight, §§ 4347-4352.
(1) In General, § 4347.
(2) Time Lien Attaches, § 4348.
(3) Property Subject to Lien, § 4349.
(4) Displacement and Waiver of Lien, § 4350.
(5) Preserving and Enforcing Lien, § 4351.
(6) Subrogation to Lien, § 4352.
i. Actions to Recover Freight, § 4353.
j. Recovery Back of Freight, § 4354.
B. Lighterage, § 4355.
C. Demurrage, §§ 4356-4378.
a. In General, § 4356.
b. Charter Party Provisions, § 4357.
c. Right of Vessel to Charge in General, § 4358.
d. Delay Fault of Vessel or Owner, § 4359.
e. Delay Caused by Act of God, § 4360.
f. Negligence or Wrongful Acts of Third Persons, § 4361.
g. Liability of Charterer of Ship, § 4362.
h. Liability of Consignee, § 4363.
i. Liability of Purchaser of Cargo, § 4364.
j. Delay in Loading or Sailing, § 4365.
k. Delay during Voyage, § 4366.
l. Delay in Unloading, § 4367.
m. Effect of Custom and Usage, § 4368.
n. Demand for Demurrage, § 4369.

o. Rate and Amount, § 4370.
p. Lay Days, § 4371.
q. Indemnity, § 4372.
r. Waiver and Release of Demurrage, § 4373.
s. Lien, § 4374.
t. Actions, §§ 4375-4378.
(1) Libel, § 4375.
(2) Defenses, § 4376.
(3) Presumptions and Burden of Proof, § 4377.
(4) Limitations and Laches, § 4378.

CHAPTER XXXIX.

Carriage of Passengers.

I. Nature of Liability of Vessel, § 4379.
II. What Law Governs, § 4380.
III. Statutory Regulation in General, § 4381.
IV. Regulation as to Steam Vessels, § 4382.
V. Regulations as to Dangerous Articles, § 4383.
VI. Regulations as to Immigrants and Other Passengers from Foreign Ports, § 4384.
VII. Contracts, Fares, Passage and Tickets, §§ 4385-4390.
A. In General, § 4385.
B. What Constitutes Contract and Consideration, § 4386.
C. Operation and Effect, § 4387.
D. Performance or Breach of Contract, § 4388.
E. Rescission, § 4389.
F. Actions, § 4390.
VIII. Accommodations on Vessel, §§ 4391-4398.
A. In General, § 4391.
B. Stateroom, Berth and Bedding, § 4392.
C. Food and Water, § 4393.
D. Effect of Quarantine, § 4394.
E. Delivery of Telegram, § 4395.
F. Liability for Personal Injuries, § 4396.
G. Actions, § 4397.
H. Damages, § 4398.
IX. Voyage and Discharge at Destination, §§ 4399-4401.
A. Duties and Liabilities, § 4399.
B. Actions, § 4400.
C. Damages and Recovery of Passage Money, § 4401.
X. Personal Injuries, §§ 4402-4428.
A. Care Required and Liability, §§ 4402-4416.
a. In General, § 4402.
b. Consequences Not Reasonably Anticipated from Act, § 4403.
c. With Respect to Machinery, Appurtenances and Crew, § 4404.
d. Care of Docks and Passage Ways, § 4405.
e. Personal Injuries from Want of Proper Accommodations, § 4406.
f. Acts of Other Passengers, § 4407.
g. Negligence or Misconduct of Third Party Contributing Cause, § 4408.
h. Persons to Whom Duty to Use Care Owed, § 4409.
i. Officers and Employees for Whose Negligence Liability Attaches, § 4410.
j. Intoxicated Passenger, § 4411.
k. Medical Attention, § 4412.
l. Acts in Emergency, § 4413.

m. Election to Continue Voyage against Advice of Pilot, § 4414.
n. Landing or Discharge of Passengers, § 4415.
o. Care Required of Tenant of Wharf, § 4416.
B. Release of Right of Action, § 4417.
C. Limitation of Liability, § 4418.
D. Contributory Negligence and Assumption of Risk, § 4419.
E. Procedure, §§ 4420-4426.
a. Pleading, § 4420.
b. Evidence, §§ 4421-4423.
(1) Presumption and Burden of Proof, § 4421.
(2) Admissibility and Competency, § 4422.
(3) Weight and Sufficiency, § 4423.
c. Questions of Fact, § 4424.
d. Instructions, § 4425.
e. Special Verdict, § 4426.
F. Liens, § 4427.
G. Damages, § 4428.
XI. Ejection of Passengers, § 4429.
XII. Passenger's Effects, §§ 4430-4442.
A. Liability as Inn Keeper or Insurer, § 4430.
B. Delivery to and Acceptance by Carrier, § 4431.
C. Duty to Provide Watchman, § 4432.
D. Duty to Provide State Room Door with Bolts and Locks, § 4433.
E. Particular Losses for Which Vessel Liable, § 4434.
F. Passengers Entitled to Recover, § 4435.
G. Effects for Which Recovery Allowed, § 4436.
H. Contributory Negligence of Person Complaining, § 4437.
I. Baggage Detained by Customs' Officers, § 4438.
J. Evidence, § 4439.
K. Liens, § 4440.
L. Damages, § 4441.
M. Limitation of Liability, § 4442.
XIII. Penalties and Forfeitures for Violations of Regulations, § 4443.
XIV. Offenses Incident to Carriage of Passengers, §§ 4444-4447.
A. What Constitutes and Elements, § 4444.
B. Defenses, § 4445.
C. Indictment, § 4446.
D. Evidence, § 4447.

CHAPTER XL.

Limitations of Liability.

I. Limitation by Exceptions in Contract, §§ 4448-4493.
A. Implied Exceptions, § 4448.
B. Express Exceptions in Bill of Lading or Shipping Contract, §§ 4449-4480.
a. Power and Validity Generally, §§ 4449-4450.
(1) In General, § 4449.
(2) What Law Governs, § 4450.
b. Construction Generally, § 4451.
c. Operation and Effect Generally, §§ 4452-4455.
(1) General Rule, § 4452.
(2) Partial Invalidity, § 4453.
(3) Right of Assignees, § 4454.
(4) Loss from Negligence of Carrier or Servants, § 4455.
d. Particular Exceptions, §§ 4456-4479.

(1) Perils of Sea, Navigation, Lakes, Rivers, etc., §§ 4456-4463.
(a) In General, § 4456.
(b) Damage by Sea Water—Leakage, § 4457.
(c) Collisions, Stranding, Obstructions of Navigation, § 4458.
(d) Explosions, § 4459.
(e) Fire, § 4460.
(f) Jettison, § 4461.
(g) Storms, § 4462.
(h) Negligence of Carrier or Servants, § 4463.
(2) Exceptions as to Warranty of Seaworthiness, § 4464.
(3) Exceptions of Loss or Damage Resulting from Negligence of Carrier, § 4465.
(4) Fire, § 4466.
(5) Stowage on Deck, § 4467.
(6) Loss Through Leakage, § 4468.
(7) Risk of Due Refrigeration, § 4469.
(8) Risk of Mortality or Accident, § 4470.
(9) Loss from "Sweating, Natural Decay or Sea Water," § 4471.
(10) Loss from Heat or Heating, § 4472.
(11) Theft, § 4473.
(12) Delay in Delivery, § 4474.
(13) Strikes or Stoppage of Labor, § 4475.
(14) Limitation of Amount of Damages, § 4476.
(15) Benefit of Insurance Clause, § 4477.
(16) Exception of Restraints of Princes, Rulers, or People, § 4478.
(17) Requirements as to Notice of Loss and Time to Sue, § 4479.
e. Presumptions and Burden of Proof, § 4480.
C. Provisions in Passenger Tickets, §§ 4481-4493.
a. Liability for Personal Injuries to Passenger, § 4481.
b. Liability for Passenger's Effects, §§ 4482-4493.
(1) Validity, Form and Requisites, §§ 4482-4487.
(a) Stipulation That Landing Not Part of Voyage, § 4482.
(b) Stipulation Limiting Liability to Stated Sum, §§ 4483-4487.
aa. Validity Generally, § 4483.
bb. Form and Requisites, §§ 4484-4487.
(aa) Meeting of Minds of Parties Generally, § 4484.
(bb) Knowledge and Acceptance, § 4485.
(cc) Type or Printing, § 4486.
(dd) Conditions Printed on Margin on Back of Ticket, § 4487.
(2) Interpretation, § 4488.
(3) Operation and Effect, §§ 4489-4492.
(a) Stipulation That Landing Not Part of Voyage, § 4489.
(b) Stipulation Limiting Liability to Stated Sum, §§ 4490-4492.
aa. Losses Covered, § 4490.
bb. Baggage to Which Applicable, § 4491.
cc. Tickets as Evidence, § 4492.
(4) Compliance with Stipulation for Notice of Loss, § 4493.
II. Limitation of Vessel Owner's Liability by Acts of Congress, §§ 4494-4576.
A. Limited Liability Act, §§ 4494-4530.
a. General Consideration, §§ 4494-4497.
(1) History and Object, § 4494.
(2) Constitutionality, § 4495.
(3) Part of Maritime Law, § 4496.
(4) Effect of Subsequent Acts, § 4497.
b. Construction, § 4498.
c. Losses Covered, §§ 4499-4505.

(1) Loss or Damage to Jewelry, Precious Metals, Moneys, etc., § 4499.
(2) Loss or Damage by Fire, § 4500.
(3) Loss or Damage for Which Liability Limited to Value of Vessel and Pending Freight, §§ 4501-4505.
(a) Maritime and Nonmaritime Torts Generally, § 4501.
(b) Obligations Ex Contractu, § 4502.
(c) Collision, § 4503.
(d) Personal Injuries and Death by Wrongful Act, § 4504.
(e) Salvage Claim, § 4505.
d. Condition Precedent to Right to Limit Liability, §§ 4506-4514.
(1) Seaworthiness and Sufficiency of Equipment, § 4506.
(2) Want of Privity or Knowledge of Owner of Negligence or Defect, § 4507.
(3) Surrender of Vessel and Pending Freight or Interest Therein, §§ 4508-4514.
(a) In General, § 4508.
(b) Particular Vessels and Parts Thereof Which Must Be Surrendered, § 4509.
(c) Transfer of Interest to Trustee or Appraisement and Payment into Court of Value, § 4510.
(d) Bond for Payment into Court, § 4511.
(e) Abandonment to Underwriters, § 4512.
(f) Total Loss of Vessel, § 4513.
(g) Effect of Failure to Surrender Pending Freight, § 4514.
e. What Constitutes Value of Ship and Freight, §§ 4515-4524.
(1) Point of Time at Which Value Taken, § 4515.
(2) Freight and Passenger Money Estimated, § 4516.
(3) What Constitutes Earnings of Voyage, § 4517.
(4) Ship Subsidy Money, § 4518.
(5) Freight Earned by Other Vessels on Through Shipment, § 4519.
(6) Damages for Loss of Vessel in Collision, § 4520.
(7) Insurance, § 4521.
(8) Deduction for Expenses of Voyage, § 4522.
(9) Expenses of Salvage and Allowance for Risk of Undertaking, § 4523.
(10) Substitution of Another Vessel, § 4524.
f. Waters, Vessels and Interests to Which Applicable, § 4525.
g. Proceedings against Which Available, § 4526.
h. Freighters Entitled to Participate, § 4527.
i. Effect of Stipulation in Bill of Lading, § 4528.
j. Remedies Reserved, § 4529.
k. Waiver of Right, § 4530.
B. Harter Act, §§ 4531-4547.
a. Purpose, § 4531.
b. Construction, § 4532.
c. Effect of Clauses in Bills of Lading Relieving from Liability, § 4533.
d. Effect on Stipulations in Passenger Tickets, § 4534.
e. Loss or Damage to Which Applicable, §§ 4535-4547.
(1) Losses for Which Carriers Liable Generally, § 4535.
(2) Loss from Latent Defects, Fault or Error in Navigation or Management of Ship, §§ 4536-4539.
(a) In General, § 4536.
(b) Seaworthiness as Condition Precedent, § 4537.
(c) Instances of Fault or Error in Navigation or Management of Vessel, § 4538.
(d) Loss before Commencement of Voyage, § 4539.
(3) Loss from Negligent Loading and Stowage or Unloading, § 4540.
(4) Loss of Tow and Cargo by Tug, § 4541.
(5) Collision, § 4542.

(6) Personal Injuries and Death by Wrongful Act, § 4543.
(7) Liability for Passengers' Effects, § 4544.
(8) Right to General Average Contribution, § 4545.
(9) Duty of Master of Stranded Vessel, § 4546.
(10) Application to Foreign Vessels, § 4547.
C. Proceedings to Limit Liability, §§ 4548-4576.
a. Nature of Proceedings, § 4548.
b. Forms and Rules of Procedure, § 4549.
c. Jurisdiction, Venue and Courts, § 4550.
d. Time of Taking Proceedings and Laches, § 4551.
e. Time for Filing Claims, § 4552.
f. Modes in Which Limited Liability May Be Claimed, § 4553.
g. Scope of Remedy, §§ 4554-4556.
(1) Ascertainment of Co-Existing Claims, § 4554.
(2) Contesting All Liability, § 4555.
(3) Claims Provable in Proceedings to Limit, § 4556.
h. Process to Bring Vessel into Court, § 4557.
i. Power of Court to Shape Course of Proceedings, § 4558.
j. Consolidation of Suits, § 4559.
k. Effect of Institution of Proceedings, §§ 4560-4565.
(1) Superseding Other Actions, § 4560.
(2) Duty of Other Courts to Suspend Proceedings, § 4561.
(3) Staying or Restraining Proceedings in Other Courts, § 4562.
(4) Bar to Subsequent Suit, § 4563.
(5) Application of Doctrine of Res Adjudicata, § 4564.
(6) Effect on Course of Appeal, § 4565.
l. Pleading, § 4566.
m. Evidence, §§ 4567-4570.
(1) Presumptions and Burden of Proof, § 4567.
(2) Admissibility of Evidence, § 4568.
(3) Weight and Sufficiency, § 4569.
(4) Cross Examination of Petitioner, § 4570.
n. Decree, §§ 4571-4574.
(1) In General, § 4571.
(2) Reopening Decree to Permit Other Claimants to Come in, § 4572.
(3) Allowing Interest on Appraised Value, § 4573.
(4) Res Adjudicata, § 4574.
o. Apportionment or Distribution of Proceeds, § 4575.
p. Costs and Expenses of Administration, § 4576.

Table of Cases

A

Aaron v. Adams Exp. Co., p. 571.
—— v. Jackson, pp. 211, 771.
—— v. Southern Railway, pp. 2623, 2660.
Aaronson v. Pennsylvania R. Co., pp. 917, 918.
Abbazia, The.
Abbe v. Eaton, pp. 338, 339, 347, 3884.
Abbey v. New York Cent., etc., R. Co., pp. 2126, 2265.
Abbot, Blodgett v.
—— Tolman v.
Abbott v. Bradstreet, pp. 3145, 3148.
—— v. Hicks, p. 1946.
—— v. Johnson R. Co., p. 1500.
—— v. Oregon R. Co., pp. 2132. 2873.
—— Western, etc., Railroad v.
Abbott Gin Co. v. Missouri, etc., R. Co., pp. 729, 734, 750.
Abeel, Fisher v.
Abel v. Northampton Tract. Co., pp. 2347, 2766.
Abell, Memphis, etc., Packet Co. v.
—— v. Western Maryland R. Co., pp. 1538, 1564, 1565, 1582, 1760.
Abels, Chicago, etc., R. Co. v.
Abeles & Co., Long v.
Abelson v. St. Louis, etc., R. Co., p. 2235.
Abercrombie v. Stillman, p. 1028.
Aberdeen Coal, etc., Co., Bassett v.
Aberdeen, etc., R. Co., Ray v.
—— Strother v.
Abilene Cotton Oil Co., Texas, etc., R. Co. v.
—— v. Texas, etc., R. Co., pp. 1134, 3812.
Able, Illinois Cent. R. Co. v.
Abney v. Louisiana, etc., R. Co., pp. 1773, 1798, 1800.
Abrahams v. Columbia, etc., R. Co., p. 165.
Abram v. Gulf, etc., R. Co., pp. 1614, 1627, 1628, 1632, 2443.
Abrams v. Milwaukee, etc., R. Co., pp. 1076, 1364, 1381, 1400.
—— v. Platt, pp. 280, 283, 816.
Acheson v. New York Cent., etc., R. Co., p. 222.
Ackerland, Schoies v.
Ackerson v. Erie R. Co., p. 3067.
Ackerstadt v. Chicago City R. Co., p. 2887.
Ackley, Chicago, etc., R. Co. v.
—— v. Kellogg, p. 3290.
Acme Paper Box Factory v. Atlantic, etc., R. Co., p. 696.
Acres, Lake Erie, etc., R. Co. v.
Actieselskabet Barfod v. Hilton, etc., Lumber Co., p. 3954.
Adairs, United States v.
—— v. United States, p. 3450.
Adams, Adams Exp. Co. v.
—— Birmingham R., etc., Co. v.
—— v. Bissell, p. 494.
—— v. Blankenstein, pp. 547, 553.
—— v. Brig Pilgrim, pp. 305, 318, 339, 355, 370.
—— Brown v.
—— Chicago, etc., R. Co. v.
—— v. Chicago, etc., R. Co., pp. 2023, 2419, 2425, 2528, 2849.
—— v. Clark, pp. 520, 581, 582, 1142, 1160, 1171.
—— v. Colorado, etc., R. Co., pp. 1123, 1129, 1364, 1368, 1375.
—— Detroit, etc., R. Co. v.
—— Georgia R., etc., Co. v.
—— Grace v.
—— Gulf, etc., R. Co. v.
—— Hernsfield v.
—— Hersfield v.
—— v. Homeyer, pp. 3864, 3938.
Adams, Houston, etc., R. Co. v.
—— Illinois Cent. R. Co. v.
—— v. Louisville, etc., R. Co., 82 Ky. 603, 6 Ky. L. Rep. 686—p. 2406.
—— v. Louisville, etc., R. Co., 134 Ky. 620, 121 S. W. 419, 21 Am. & Eng. Ann. Cas. 321—pp. 2028, 2339, 2885.
—— v. Missouri Pac. R. Co., pp. 1703, 1872, 1873, 2065, 2364.
—— v. New Jersey Steamboat Co., 9 Misc. Rep. 25, 29 N. Y. S. 56, 59 N. Y. St. Rep. 720—p. 3146.
—— v. New Jersey Steamboat Co., 151 N. Y. 163, 45 N. E. 369, 34 L. R. A. 682, 56 Am. St. Rep. 616—pp. 728, 733, 749, 3125, 4008.
—— Newstadt v.
—— v. New York City R. Co., p. 2823.
—— Noble v.
—— Norfolk, etc., R. Co. v.
—— Northern Pac. R. Co. v.
—— v. O'Connor, p. 404.
—— Orient Mut. Ins. Co. v.
—— Postal Telegraph-Cable Co. v.
—— Pullman Palace Car Co. v.
—— St. Louis, etc., R. Co. v.
—— v. St. Louis, etc., R. Co. (Mo.), 130 S. W. 48—pp. 2642, 2643.
—— v. St. Louis, etc., R. Co. (Tex. Civ. App.), 137 S. W. 437—p. 1714.
—— San Antonio, etc., R. Co. v.
—— v. Scott, pp. 573, 579.
—— Southern R. Co. v.
—— Texas, etc., R. Co. v.
—— v. The Pilgrim, p. 487.
—— v. Union R. Co., 80 N. Y. S. 264, 80 App. Div. 136, 12 N. Y. Ann. Cas. 386—p. 2694.
—— v. Union R. Co., 21 R. I. 134, 42 Atl. 515, 44 L. R. A. 273—pp. 78, 82, 2563.
—— v. Washington, etc., R. Co., pp. 2181, 2343, 2884.
—— Waydell v.
Adams & Co. v. Haught, pp. 1143, 1144, 1145, 3894, 3941.
Adams Exp. Co., Aaron v.
—— v. Adams, pp. 961, 1029.
—— Alcorn v.
—— Allison v.
—— Bank v.
—— Bernard v.
—— v. Berry, etc., Co., p. 1080.
—— Blackburn v.
—— Bland v.
—— v. Bleich, p. 489.
—— Boscouritz v.
—— v. Bratton, pp. 1045, 1457.
—— Brown v.
—— Buckland v.
—— Burlingame v.
—— Burr v.
—— v. Byers, pp. 1058, 1062, 1063, 3377.
—— v. Carnahan, pp. 409, 978, 986, 989, 992, 994, 1012, 1013, 1064, 1070.
—— v. Chamberlin-Johnson-Du Bose Co., pp. 800, 1053, 1057, 1068.
—— v. Charlottesville Woolen Mills, p. 3525.
—— Chicago, etc., R. Co. v.
—— Cohn v.
—— v. Commonwealth, 92 S. W. 935, 29 Ky. L. Rep. 230, 5 L. R. A., N. S., 630—p. 245.
Adams Exp. Co. v. Commonwealth, 33 Ky. L. Rep. 967, 112 S. W. 577, 18 L. R. A., N. S., 1182—p. 30.
—— v. Commonwealth, 206 U. S. 129, 51 L. Ed. 987, 27 S. Ct. 606—p. 3538.
—— v. Commonwealth, 214 U. S. 218, 53 L. Ed. 972, 29 S. Ct. 633—p. 3427.
—— Crawford v.
—— v. Crawford, p. 815.
—— v. Cressap, p. 529.
—— v. Croninger, pp. 731, 3521, 3762.
—— D'Aray v.
—— v. Darnell, pp. 535, 727, 890, 911.
—— Davidson v.
—— De Wolff v.
—— Elzy v.
—— Farr v.
—— Ferris v.
—— Fielder v.
—— Fitzgerald v.
—— Frank v.
—— Galt v.
—— Ginsburg v.
—— v. Gordon, pp. 589, 602, 795.
—— Graves v.
—— v. Green, pp. 303, 722, 724, 760, 761, 762, 936, 940, 1051, 1054, 1059.
—— Grogan v.
—— Gulliver v.
—— Harlan v.
—— v. Harris, pp. 1075, 1166, 3383.
—— Hayes v.
—— v. Haynes, pp. 981, 988, 1049.
—— v. Hibbard, pp. 613, 698, 1253, 1258.
—— High Co. v.
—— Hill v.
—— Historical Pub. Co. v.
—— Hoeing v.
—— v. Hoeing, 88 Ky. 373, 11 S. W. 205, 10 Ky. L. Rep. 999—p. 1075.
—— v. Hoeing, 9 Ky. L. Rep. 814—pp. 857, 858.
—— v. Holmes, pp. 588, 815, 822, 828, 1074.
—— v. Hundley, pp. 1455, 1456, 1470, 1479.
—— Illinois Custom Tailoring Co. v.
—— Ingalls v.
—— v. Jackson, pp. 506, 734, 745, 750, 1268, 1334.
—— Jacobson v.
—— Jacobson & Co. v.
—— v. Jones, p. 604.
—— Kelly v.
—— v. Kentucky, pp. 3556, 3592.
—— v. King, p. 1033.
—— Kirby v.
—— Lachner Bros. v.
—— v. Lexington, p. 28.
—— v. McConnell, p. 567.
—— v. McDonald, pp. 512, 848.
—— v. McDonough, p. 492.
—— v. Mellichamp, pp. 937, 1068.
—— Micheals v.
—— v. Nock, pp. 209, 212, 320, 323, 978, 979, 986, 1070.
—— Nonotuck v.
—— Nonotuck Silk Co. v.
—— Norton v.
—— v. Ohio State Auditor, pp. 3552, 3556, 3571, 3591, 3592, 3594.
—— Orndorff & Co. v.
—— Ornduff & Co. v.
—— Pendergast v.
—— Porteous v.

Adams Express Co., Railroad Comm. v.
—— v. Reagan, pp. 1087, 1088.
—— Regan v.
—— Saunders v.
—— Schutter v.
—— v. Scott, pp. 1313, 1349, 1369.
—— v. Sharpless & Sons, pp. 776, 958.
—— Snider v.
—— Soloman v.
—— State v.
—— v. State, pp. 143, 168, 170, 3526.
—— v. State, p. 28.
—— v. Stattaners, pp. 818, 821, 827, 1033, 1038, 1049, 1075.
—— Stone v.
—— v. Ten Winkel, pp. 569, 570.
—— v. Tingle, 7 Ky. L. Rep. 441—pp. 564, 899, 904, 907.
—— v. Tingle, 10 Ky. L. Rep. 358—pp. 493, 802, 896, 910, 916, 919.
—— Vermilye v.
—— v. Walker, pp. 821, 823, 939, 1028, 1119, 1361, 1362, 1396, 1454, 1456.
—— Walker-Edmond Co. v.
—— Walsh v.
—— v. Wentworth, pp. 551, 1212, 1214, 1245, 1249, 1250.
—— v. Williams, p. 617.
—— Wilson v.
—— v. Wilson, p. 3291.
—— Windolph v.
—— Wright v.
—— Zahloot v.
Adams Mach. Co., Southern R. Co. v.
Adamson v. 4,300 Tons Pyrites Ore, p. 3958.
—— v. Norfolk, etc., Tract. Co., pp. 2314, 2400.
Adcock, St. Louis, etc., R. Co. v.
Adcox, St. Louis, etc., R. Co. v.
Addison, International, etc., R. Co. v.
—— San Antonio, etc., R. Co. v.
Addizoat, Chicago, etc., R. Co. v.
Addoms v. Weir, pp. 428, 995.
Addyston Pipe, etc., Co. v. United States, pp. 3418, 3419, 3420, 3421, 3424, 3441, 3467.
Adel Lumber Co., Self v.
Aden, Yazoo, etc., R. Co. v.
Adger v. Blue Ridge R. Co., pp. 3142, 3144, 3145, 3157.
Adirondack Co., Catlin v.
Adix v. Chicago, etc., R. Co., pp. 908, 909, 910, 916.
Adkins, Midland Valley R. Co. v.
Adler v. Galbraith, etc., Co., p. 3869.
—— v. Weir, pp. 565, 889, 909.
Adoue, Moritz v.
—— v. Seeligson & Co., pp. 307, 309, 356, 357, 365, 371, 384, 386, 387, 389.
Adrian Knitting Co. v. Wabash R. Co., p. 548.
Aetna Ins. Co., Ripley v.
—— v. Wheeler (N. Y.), 5 Lans 480—pp. 3341, 3342.
—— v. Wheeler, 49 N. Y. 616, 3 Am. R. Rep. 390—pp. 3265, 3286, 3302, 3341, 3384.
—— Wilson v.
Aetna Life Ins. Co. v. Middleport, p. 1161.
Aetna Nat. Bank v. Union, etc., R. Co., p. 1222.
—— v. Water Power Co., p. 294.
Agee & Co. v. Louisville, etc., R. Co., pp. 4, 89.
Aggi, The.
Agnew v. Steamer Contra Costa, pp. 726, 727, 730, 732, 748, 820.
Aguirre v. Parmelee, pp. 1219, 1237.
Agulino v. New York, etc., R. Co., p. 2729.
Ahern v. Boston Elev. R. Co., pp. 2525, 2549, 2943.
Ahern v. Minneapolis St. R. Co., pp. 1557, 2750, 2777.
Ahlbeck v. St. Paul, etc., R. Co., pp. 3139, 3140.
Ahnapee, etc., R. Co., Goldberg v.
Aigen v. Boston, etc., Railroad, pp. 869, 3311.
Aiken v. Chicago, etc., R. Co., pp. 273, 292, 3329.
—— Leathers, v.
—— Ouachita, etc., Packet Co. v.
—— Ragan v.
—— v. Southern R. Co., pp. 1612, 1615, 1640, 2562.
Aikin v. Frankford, etc., R. Co., p. 2182.
Ainis v. Ayers, p. 1211.
Airey v. Pullman Palace Car Co., pp. 2074, 3047, 3227.
Akers, North Missouri R. Co. v.
Akersloot v. Second Ave. R. Co., pp. 1892, 2818.
Alabama, Nashville, etc., R. Co. v.
—— Smith v.
Alabama & T. R. R. Co. v. Kidd, p. 589.
Alabama Cent. R. Co. v. Humphries, p. 2582.
Alabama City, Nashville, etc., R. Co. v.
Alabama City, etc., R. Co. v. Brady, pp. 639, 663, 695.
Alabama Great Southern R. Co. v. McCleskey, p. 1051.
Alabama Mid. R. Co. v. Darby, pp. 292, 303, 587, 900.
—— v. Guilford, p. 1491.
—— v. Hatcher, p. 2940.
—— Interstate Commerce Comm. v.
—— McLaren v.
—— Scarbrough v.
—— v. Thompson, p. 590.
Alabama Nat. Bank v. Mobile, etc., R. Co., p. 558.
Alabama State Board, Western Union Tel. Co. v.
Alabama Steel, etc., Co., Osborne v.
Alabama, etc., R. Co. v. Arnold, 80 Ala. 600, 2 So. 337—pp. 2148, 2873, 2913.
—— v. Arnold, 84 Ala. 159, 4 So. 359, 35 Am. & Eng. R. Cas. 466, 5 Am. St. Rep. 354—pp. 1797, 1799, 2548.
—— v. Bates, 149 Ala. 487, 43 So. 98—pp. 2400, 2665, 2947.
—— v. Bates, 155 Ala. 347, 46 So. 776—pp. 2864, 2949.
—— v. Beardsley, p. 2002.
—— v. Bell, pp. 2782, 3106.
—— v. Bessemer, p. 3574.
—— Blackburn v.
—— v. Brady, pp. 1256, 1257, 1259, 2652, 2847.
—— v. Bullard, pp. 2922, 2924.
—— Burnham v.
—— Burns v.
—— v. Carmichael, pp. 1863, 1968.
—— v. Cassell Drug Co., p. 3398.
—— v. Coggins, pp. 1526, 1792, 1964, 2863.
—— v. Collier, p. 2577.
—— Collins v.
—— v. Commonwealth Cotton Mfg. Co., p. 343.
—— v. Cox, pp. 1524, 1868, 2580, 2601, 2904.
—— v. Davis, p. 3037.
—— v. Dear, pp. 2947, 2948.
—— v. Drummond, p. 1942.
—— Easley v.
—— v. Eichofer, p. 601.
—— v. Elliott & Son, pp. 741, 743.
—— Faison v.
—— Fore v.
—— Forsee v.
—— v. Frazier, pp. 2484, 2530, 2711.
—— v. Gewin & Son, p. 1461.
—— v. Gibbs, p. 3100.
—— v. Gilbert, pp. 2602, 2606, 2690.
Alabama, etc., R. Co. v. Godfrey, pp. 1773, 1793, 1794, 1795, 2068, 2592.
—— v. Goforth, p. 842.
—— v. Grabfelder, pp. 663, 814, 895.
—— v. Guilford, pp. 1689, 1692.
—— Gulf Compress Co. v.
—— v. Hanes, p. 2625.
—— v. Hawk, pp. 1983, 2122, 2176, 2177.
—— v. Heddleston, pp. 2573, 2622, 3046.
—— v. Hill, 90 Ala. 71, 8 So. 90, 44 Am. & Eng. R. Cas. 441, 9 L. R. A. 442, 24 Am. St. Rep. 764—p. 1812.
—— v. Hill, 93 Ala. 514, 9 So. 722, 30 Am. St. Rep. 65, 47 Am. & Eng. R. Cas. 501—pp. 1717, 1718, 1721, 2693, 2734, 2930, 3069.
—— v. Holmes, pp. 2463, 2464, 2495.
—— Hooks v.
—— Jackson v.
—— Johnson v.
—— v. Jones, p. 2254.
—— v. Kidd, 29 Ala. 221—p. 531.
—— v. Kidd, 35 Ala. 209—pp. 550, 895, 898, 914, 960.
—— v. Kuhn, p. 2061.
—— v. Lamkin, p. 3311.
—— v. Little, pp 820, 823, 1035, 1038, 1073.
—— v. McKenna, p. 644.
—— v. McKenzie, pp. 508, 567, 588, 691.
—— v. Mississippi R. Comm., pp. 55, 56, 72.
—— v. Morris, p. 424.
—— Mt. Vernon v.
—— v. Mount Vernon Co., pp. 3300, 3302, 3338, 3391.
—— Mt. Vernon Co. v.
—— Newman v.
—— Neyman v.
—— v. Norris, p. 331.
—— v. Organ Power Co., pp. 559, 561.
—— v. Pouncey, pp. 2608, 2769.
—— v. Purnell, pp. 1676, 3053.
—— v. Quarles, pp. 619, 741, 743.
—— v. Railroad Comm., pp. 82, 83, 84, 91.
—— v. Sampley, pp. 1742, 2016, 2040, 2047, 2578, 2769, 2922.
—— Searles v.
—— v. Searles, p. 782.
—— v. Sellers, pp. 1867, 1869, 1872, 2650, 3015, 3058.
—— v. Siniard, pp. 2036, 2816.
—— v. Sparks, p. 1382.
—— v. Stacey, p. 1772.
—— v. Tapia, p. 2711.
—— v. Thomas, 83 Ala. 343, 3 So. 802—pp. 1364, 1434, 3359, 3391.
—— v. Thomas, 89 Ala. 294, 7 So. 762, 18 Am. St. Rep. 119—pp. 326, 819, 3359, 3360, 3361.
—— v. Tirelli, pp. 516, 620.
—— v. Ventress, pp. 2288, 2292, 2385.
—— Walter v.
—— Wells v.
—— v. Wilkinson, p. 3062
—— v. Yarbrough, p. 1550.
Alair v. Northern Pac. R. Co., pp. 1074, 1396, 1397.
Alaska Steamship Co., Marks v.
Alaska, etc., Steamship Co., Guffey v.
Albany Railway, Dowd v.
Albany, etc., R. Co., Fink v.
—— v. Merchants', etc., Bank, pp. 328, 366, 378, 407, 582, 595, 596.
—— People v.
Albatross v. Wayne, p. 538.
Albemarle, etc., R. Co., Weinberg v.
Alber, Chicago, etc., R. Co. v.
Albers Comm. Co., Kansas, etc., R. Co. v.

Albert Dumois, The.
Alberti, Galveston, etc., R. Co. v.
Albin v. Chicago, etc., R. Co., pp. 1512, 1517, 1561.
—— v. Gulf, etc., R. Co., pp. 1859, 2454.
Albion Lumber Co. v. DeNobra, p. 1487.
Albrecht v. New York, etc., R. Co., p. 2137.
Albright v. Penn, pp. 11, 730, 750, 753, 757, 765, 768, 782, 1685, 1689, 1691.
Albritton & Co. v. Atlantic, etc., R. Co., p. 165.
Albuquerque Tract. Co., Corcoran v.
Alcorn v. Adams Exp. Co., pp. 1253, 1255, 1257, 3403, 3411.
Alden v. New York Cent. R. Co., pp. 1682, 1687, 1845.
—— v. Pearson, pp. 456, 491, 797, 798, 821, 1036.
Alden & Co. v. Carver, p. 1167.
Alderete, El Paso Elect. R. Co. v.
Alderman v. Eastern R. Co., pp. 364, 560.
Alderson v. Gulf, etc., R. Co., pp. 594, 595, 847.
Aldredge, Southern R. Co. v.
Aldrich v. Cargo of 246 5/20 Tons of Egg Coal, p. 3943.
—— v. Southern R. Co., p. 3750.
Aldrich, etc., Mfg. Co. v. American Exp. Co., p. 545.
Alexander v. Atlantic, etc., R. Co., pp. 153, 172, 176, 252.
—— Ft. Worth, etc., R. Co. v.
—— House v.
—— Illinois Cent. R. Co. v.
—— v. McGaffey, p. 2613.
—— v. New Orleans R., etc., Co., p. 2035.
—— Paris Trans. Co. v.
—— v. Pennsylvania R. Co., pp. 1476, 1479.
—— Pensacola Elect. Co. v.
—— v. Rochester, etc., R. Co., 59 Hun 616, 12 N. Y. S. 685, 35 N. Y. St. Rep. 701—p. 2894.
—— v. Rochester, etc., R. Co., 128 N. Y. 13, 27 N. E. 950, 48 Am. & Eng. R. Cas. 46—p. 2006.
—— Texas, etc., R. Co. v.
Alexandria, etc., R. Co. v. Herndon, pp. 1767, 1773, 1798, 1911, 1912, 1913, 2747.
Alfalfa Products Co., Hawkins v.
Alford, Campbell v.
—— v. Chicago, etc., R. Co., p. 2267.
—— McHenry v.
Alger v. Lowell, p. 2300.
Aline, The.
Allam v. Pennsylvania R. Co., 183 Pa. 174, 38 Atl. 709, 39 L. R. A., N. S., 535—p. 534.
—— v. Pennsylvania R. Co., 5 Pa. Dist. R. 54—pp. 899, 903.
—— v. Pennsylvania R. Co., 3 Pa. Super. Ct. 325—p. 910.
Allan v. Pennsylvania R. Co., p. 899.
—— v. State Steamship Co., p. 2078.
Allan Line Steamship Co., Larsen v.
Allard, Wynn v.
Allardt v. People, p. 184.
Allbritton, New Orleans, etc., R. Co. v.
Allcorn, Gulf, etc., R. Co. v.
Allegheny R. Co., O'Donnell v.
Allegheny Tract. Co., Goorin v.
—— Holmes v.
Allegheny Valley R. Co., Duff v.
—— v. McLain, p. 2411.
—— O'Donnell v.
—— Ruppel v.
—— Scott v.
Allen, Atchison, etc., R. Co. v.
Allen, Atchison, etc., R. Co. v. Camden, etc., Ferry Co., p. 3086.
—— v. Cape Fear, etc., R. Co., pp. 230, 233, 234.
—— v. Chicago, etc., R. Co., 116 Minn. 119, 133 N. W. 462—pp. 1598, 1601.
—— v. Chicago, etc., R. Co., 82 Neb. 726, 118 N. W. 655, 23 L. R. A., N. S., 278—pp. 1275, 1479.
—— Coleman v.
—— Colorado Springs, etc., R. Co. v.
—— Crooks v.
—— v. Dry Dock, etc., R. Co., pp. 1843, 2724, 2739.
—— Fordyce v.
—— v. Galveston City R. Co., pp. 1730, 1731, 1732, 2069, 2937.
—— Harding Paper Co. v.
—— Hart v.
—— Illinois Cent. R. Co. v.
—— Indianapolis, etc., R. Co. v.
—— v. Lake Shore, etc., R. Co., p. 1494.
—— Louisville, etc., R. Co. v.
—— McDongal v.
—— v. Maine, etc., R. Co., pp. 1246, 1248, 1249.
—— v. Mercier, p. 1220.
—— Missouri, etc., R. Co. v.
—— v. Northern Pac. R. Co., pp. 2669, 2689, 2857.
—— v. Oregon R., etc., Co., 98 Fed. 16—pp. 3637, 3661, 3680, 3691, 3693, 3718, 3719, 3826, 3828.
—— v. Oregon R., etc., Co., 106 Fed. 265—p. 3693.
—— Philadelphia, etc., R. Co. v.
—— v. Pullman's Palace Car Co., pp. 3550, 3570, 3579, 3580.
—— Richmond Passenger, etc., Co. v.
—— v. Sackrider, p. 771.
—— v. St. Louis Nat. Bank, pp. 358, 359, 369.
—— v. St. Louis Transit Co., pp. 2279, 2280, 2284, 2285, 2346, 2893.
—— St. Louis, etc., R. Co. v.
—— Sewall v.
—— v. Sewall (N. Y.), 2 Wend. 327—pp. 10, 722, 728, 749, 762.
—— v. Sewall (N. Y.), 6 Wend. 327—p. 236.
—— v. Sewall (N. Y.), 6 Wend. 335—p. 239.
—— Texas, etc., R. Co. v.
—— v. Texas, etc., R. Co., 100 Tex. 525, 101 S. W. 792, 11 L. R. A., N. S., 981, 15 Am. & Eng. Ann. Cas. 618—pp. 158, 171, 174, 230, 261.
—— v. Texas, etc., R. Co. (Tex. Civ. App.), 27 S. W. 943—p. 2120.
—— United States Exp. Co. v.
—— v. United Tract. Co., p. 2684.
—— Vose v.
—— v. Williams, pp. 350, 351, 362, 363, 364.
—— v. Wilmington, etc., R. Co., p. 3093.
Allen Co. v. Mobile, etc., R. Co., p. 1474.
Allen-Fleming Co. v. Southern R. Co., p. 3393.
Allen, etc., Co. v. Canadian Pac. R. Co., pp. 966, 3294, 3347, 3348.
—— v. Farmers', etc., Nat. Bank, pp. 353, 356, 366, 370, 376, 403, 404.
Allender v. Chicago, etc., R. Co., 37 Iowa 264, 8 Am. R. Rep. 115—pp. 1510, 1512, 1513, 1517, 1571.
—— v. Chicago, etc., R. Co., 43 Iowa 276—pp. 1875, 1913, 2066.
—— Ohio, etc., R. Co. v.
Allenza v. Erie R. Co., p. 2878.
Aller, Cincinnati, etc., R. Co. v.
Allerton v. Boston, etc., R. Co., p. 1539.
Alley v. Gulf, etc., R. Co., p. 2465.
Allgood, Louisville, etc., R. Co. v.
Alliance Co., Chase v.
Alliance Ins. Co., Fay v.
Allin v. Gulf, etc., R. Co., pp. 2650, 2654.
Alling v. Boston, etc., R. Co., pp. 3121, 3122, 3124, 3151, 3153, 3192.
—— Sherlock v.
Allis v. Voight, p. 771.
Allison v. Georgia R., etc., Co., pp. 2425, 2621.
—— G. H. & H. R. Co. v.
—— Galveston, etc., R. Co. v.
—— v. St. Louis, etc., R. Co., pp. 1752, 1755, 1757, 2677.
—— Southern R. Co. v.
Allowance for Lining and Heating Cars, In re.
Allowances to Elevators, In re.
Allyn & Co., Halff, etc., Co. v.
—— v. Willis & Bro., pp. 1212, 1219, 1220, 1244, 1245.
Almand, Central, etc., R. Co. v.
—— v. Georgia R., etc., Co., pp. 894, 898, 900, 917, 3406.
Almy v. California, p. 3594.
Alnwick, The.
Alpin, The.
Alsberg, etc., Co. v. Latta, pp. 1228, 1232, 1233.
Alsop v. Southern Exp. Co., pp. 213, 214, 233.
Alston, Campbell v.
Altland v. Atchison, etc., R. Co., p. 939.
Altemeier v. Cincinnati, etc., R. Co., pp. 1501, 1503, 1504, 1515.
Alten v. Metropolitan St. R. Co., p. 1903.
Alton R., etc., Co. v. Webb, p. 2343.
Alton, etc., Tract. Co. v. Oliver, pp. 2365, 2757, 2887.
—— v. Oller, pp. 2365, 2671, 2757, 2887.
—— Redin v.
Altoona, etc., Elect. Co., Thomas v.
Altschuler v. Atchison, etc., R. Co., p. 3830.
Altwein v. Metropolitan St. R. Co., pp. 2288, 2351, 2649, 2654, 2640.
Alumbaugh, Louisville, etc., R. Co. v.
Alvah, The.
Alvena, The.
Alvin, Brulard v.
Alvord, Philadelphia, etc., R. Co. v.
Ambach v. B. & O. R. Co., p. 1076.
—— v. Baltimore, etc., R. Co., pp. 947, 949, 953, 1363.
—— T. & O. C. R. Co. v.
—— Toledo, etc., R. Co. v.
Ambrosini v. United States, p. 3539.
America, The.
American Agricultural Chemical Co., Farrow v.
American Baggage, etc., Co., Atlanta Terminal Co. v.
American Banana Co. v. United Fruit Co., p. 3636.
American Book Co. v. Kansas, p. 3557.
—— State v.
American Brewing Ass'n v. Talbot, p. 619.
American Contract Co. v. Cross, pp. 3114, 3123, 3129.
American Cotton Oil Co. v. Kirk, p. 3867.
American Exch. Bank, Chesapeake, etc., R. Co. v.
American Exp. Co., Bagley Elevator Co. v.
—— Baldwin v.

American Exp. Co. v. Baldwin, pp. 511, 890, 911, 916.
—— Bank v.
—— Bardwell v.
—— Bennett v.
—— Boorman v.
—— Brockway v.
—— Brooks v.
—— Bullard v.
—— v. Burke, p. 651.
—— Christenson v.
—— Clark v.
—— Conti v.
—— Conway Bank v.
—— Cox v.
—— v. Crawley, p. 136.
—— Durgin v.
—— Edwards v.
—— v. Epply, p. 571.
—— v. Fletcher, pp. 554, 555.
—— Gerry v.
—— Gowling v.
—— v. Greenhalgh, pp. 543, 572.
—— v. Haggard, p. 525.
—— Hardy v.
—— Hasse v.
—— Hendricks v.
—— v. Hockett, pp. 529, 767, 770, 773, 890, 908.
—— Howard v.
—— Indiana v.
—— v. Indiana, pp. 3591, 3594.
—— v. Iowa, p. 3539.
—— James v.
—— v. Jennings, pp. 637, 651, 653, 666, 681, 859.
—— Jordan v.
—— Kimball v.
—— Klauber v,
—— Leavens v.
—— Lefebure v.
—— v. Lesem, pp. 412, 570.
—— McKahan v.
—— McMillan v.
—— Marshall v.
—— Martin v.
—— Mather v.
—— Merrill v.
—— v. Miller, p. 3434.
—— v. Mullins, p. 577.
—— v. Ogles, pp. 1567, 1568, 1579, 2091.
—— Pastore v.
—— Perkins v.
—— v. Perkins, p. 764.
—— Perkins Co. v.
—— v. Risley, p. 875.
—— v. Sands, pp. 822, 828, 946, 1074.
—— v. Second Nat. Bank, pp. 728, 771, 3257, 3289.
—— Smith v.
—— v. Smith, pp. 608, 619, 620, 738, 753, 765, 766.
—— v. Southern Indiana Exp. Co., p. 3526.
—— v. Spellman, pp. 996, 997, 998.
—— v. Stack, p. 549.
—— v. State, p. 3526.
—— v. State Board, p. 3578.
—— Swiney v.
—— Taft Co. v.
—— United States v.
—— v. United States, pp. 3420, 3614, 3684, 3686, 3695, 3696.
—— Wells v.
—— v. Wettstein, p. 572.
—— Winn v.
—— Wolf v.
American Fire Ins., Karnes v.
American Forwarding Co., Bare v.
American Grocery Co. v. Staten Island, etc., R. Co., p. 1087.
American Hay Co. v. Bath, etc., R. Co., p. 3358.
American Lead Pencil Co. v. Nashville, etc., Railway, pp. 277, 286, 289, 753, 754, 885.
American Merchants' Union Exp. Co., Gibson v.
—— Ketchum v.
—— v. Milk, pp. 545, 553.
—— v. Phillips, pp. 210, 243, 1286.
American Merchants' Union Express Co. v. Scheir, p. 1049.
—— v. Wolf, pp. 535, 565, 567, 570, 572.
American Nat. Bank v. Georgia R. Co., pp. 311, 374.
—— v. Henderson, pp. 391, 398.
—— v. Lee, p. 366.
American Oil Works, Pennsylvania R. Co. v.
American R. Co., Aldrich, etc., Mfg. Co. v.
American Refrigerator Trans. Co., Hall v.
—— v. Hall, pp. 3549, 3552, 3556, 3557, 3572, 3591, 3593, 3594.
American Roofing Co. v. Memphis, etc., Packet Co., pp. 490, 491, 956, 964, 981, 997, 999, 1013, 1015, 1032.
American Silk Dyeing, etc., Co. v. Fuller's Exp. Co., p. 990.
American Silver Mfg. Co. v. Wabash R. Co., p. 3521.
American Standard Jewelry Co v. Witherington, pp. 890, 902.
American Steamship Co. v. Bryan, pp. 3146, 3147, 3156, 3195.
American Steel, etc., Co. v. Speed, p. 3517.
American Storage, etc., Co. v. Wabash R. Co., pp. 331, 549.
American Sugar Refin. Co. v. Delaware, etc., R. Co., pp. 3608, 3734, 3769, 3787.
—— v. Delaware, etc., R. Co., pp. 3673, 3700, 3750, 3768.
—— v. McGhee, pp. 546, 565, 567, 889.
—— v. Maddock, pp. 306, 308, 339, 3879, 3893.
—— v. Rickinson, pp. 4062, 4083.
American Thresherman v. De Tamble Motors Co., p. 384.
American Tobacco Co., Pittsburg, etc., R. Co. v.
American Trading Co., Northern Pac. R. Co. v.
American Transp. Co., Moore v.
—— v. Moore, pp. 869, 1007, 3161.
American Union Coal Co. v. Pennsylvania R. Co., pp. 3674, 3828.
American Union Exp. Co. v. Robinson, p. 535.
—— v. St. Joseph, p. 3578.
American, etc., Exp. Co., Cramer v.
—— Ela v.
—— v. Phillips, p. 467.
American, etc., Ins. Co. v. Landreth, p. 1838.
American, etc., Lumber Co., Harrington v.
American, etc., Marine Ins. Co., Duplan Silk Co. v.
American, etc., Timber Co. v. Kansas, etc., R. Co., pp. 3639, 3687, 3749.
—— Texas, etc., R. Co. v.
Americus, etc., R. Co. v. Luckie, pp. 2118, 2404.
Ames v. Astor, p. 728.
—— Champion v.
—— Chicago, etc., R. Co. v.
—— v. Fargo, pp. 1270, 1292, 1348.
—— v. First Div., etc., R. Co., pp. 485, 803, 831.
—— v. New York Union Ins. Co., p. 1118.
—— v. Palmer, pp. 481, 520, 1153, 1157, 1164.
—— v. Reed, p. 595.
—— Smyth v.
—— v. Southern Pac. Co., p. 2441.
—— v. Union Pac. R. Co., pp. 52, 3607.
—— United States v.
Ames Mercantile Co. v. Kimball Steamship Co., p. 3913.
Ammon v. Illinois Cent. R. Co., pp. 477, 479, 480, 821, 824.
Ammons v. Southern R. Co., pp. 2420, 2435, 2467, 2468, 2469.
—— v. Southern R. Co., pp. 3077, 3078, 3079, 3083, 3086, 3091.
Amory v. Wabash R. Co., pp. 3124, 3149, 3152, 3154, 3193.
Amory Mfg. Co. v. Gulf, etc., R. Co., pp. 282, 1013, 1024, 1025.
Amos, Ann Arbor R. Co. v.
Amos D. Carver, The.
Amoskeag Mfg. Co., Donnell v.
Amsden v. Dubuque, etc., R. Co., p. 460.
Anacostia, etc., R. Co. v. Klein, p. 2876.
Anaheim Lighter Co., Mendelsohn v.
Anchor Line v. Dater, pp. 989, 1049, 3182.
—— Ganguzza v.
—— v. Knowles, pp. 1032, 1033.
—— Lancer v.
Anchoria, The.
Anderson v. Atchison, etc., R. Co., pp. 821, 1037.
—— Atlantic, etc., R. Co. v.
—— v. Atlantic, etc., R. Co., p. 2904.
—— Birmingham R. Co. v.
—— Birmingham R., etc., Co. v.
—— Boyce v.
—— v. Canadian Pac. R. Co., p. 3164.
—— Carolina Portland Cement Co. v.
—— Central R., etc., Co. v.
—— Chesapeake, etc., R. Co. v.
—— Chicago, etc., R. Co. v.
—— v. Chicago, etc., R. Co., 131 Mo. App. 580, 110 S. W. 650—p. 2658.
—— v. Chicago, etc., R. Co., 88 Neb. 430, 129 N. W. 1008—p. 85.
—— v. Citizens' St. R. Co., pp. 1899, 1901.
—— v. City, etc., R. Co., pp. 1819, 2193, 2200, 2894, 2972.
—— Hammond v.
—— Houston, etc., R. Co. v.
—— Illinois Cent. R. Co. v.
—— International, etc., R. Co. v.
—— Lake Shore, etc., R. Co. v.
—— v. Lake Shore, etc., R. Co., p. 1087.
—— v. Louisville, etc., R. Co., 62 Fed. 46—pp. 1945, 1946.
—— v. Louisville, etc., R. Co., 134 Ky. 343, 120 S. W. 298, 34 R. R. R. 220, 57 Am. & Eng. R. Cas., N. S., 220, 20 Am. & Eng. Ann. Cas. 920—pp. 2425, 2429, 2472.
—— v. Louisville, etc., R. Co. (Ky.), 120 S. W. 301—p. 2717.
—— v. Louisville, etc., R. Co. (Miss.), 15 So. 795—p. 637.
—— Macon, etc., R. Co. v.
—— v. Metropolitan St. R. Co., pp. 2235, 2638.
—— v. Missouri Pac. R. Co., pp. 1540, 1541, 1542, 1543, 2865, 2946.
—— v. Mobile, etc., R. Co., pp. 267, 271, 284.
—— v. Moore & Co., p. 3950.
—— Norfolk, etc., R. Co. v.
—— v. North Eastern R. Co., p. 849.
—— Palmer Transfer Co. v.
—— Philadelphia, etc., R. Co. v.
—— Railroad Co. v.
—— St. Louis, etc., R. Co. v.
—— v. Scholey, pp. 1711, 1837, 1838, 2161, 2692, 2757.
—— v. Seattle-Tacoma, etc., R. Co., p. 2849.
—— v. South Carolina, etc., R. Co., 77 S. C. 434, 58 S. E. 149—p. 2669.
—— v. South Carolina, etc., R. Co., 61 S. E. 1096, 81 S. C. 1

—pp. 1935, 1937, 2022, 2028, 2916, 2944.
Anderson, Southern Pac. Co. v.
—— v. Southern Pac. R. Co. v.
—— Texarkana, etc., R. Co. v.
—— v. United States, pp. 3418, 3504.
—— v. Wabash, etc., R. Co., p. 3197.
—— Whitehead v.
—— Wilson v.
—— Yazoo, etc., R. Co. v.
Anderson Art Co. v. Greenburg, p. 1488.
Anderson Steamboat Co., McKay v.
Andis, Indianapolis, etc., Co. v.
Andrews v. Capitol, etc., R. Co., p. 2182.
—— v. Chicago, etc., R. Co., pp. 1981, 1986, 1987, 2888, 2889, 2945.
—— Delaware v.
—— Denver, etc., R. Co. v.
—— v. Fort Worth, etc., R. Co., p. 3120.
—— v. Metropolitan St. R. Co., p. 2829.
—— Pittsburg, etc., R. Co. v.
—— Texas, etc., R. Co. v.
—— v. Wall, p. 4076.
—— v. Yazoo, etc., R. Co., p. 1513.
Andrist v. Union Pac. R. Co., pp. 1707, 1964, 1965.
Androscoggin Mills, Evansville, etc., R. Co. v.
—— Railroad Co. v.
Andrus v. Columbia, etc., Steamboat Co., p. 3270.
Angl, La Matte v.
Angle v. Mississippi, etc., R. Co., pp. 550, 815, 821, 895.
Angle & Co. v. Mississippi, etc., R. Co., pp. 531, 546, 591, 773, 3176, 3329.
Anglo-American Oil Co., Jay Wai Nam v.
Anglo-California Bank v. Tolerton, etc., Co. v.
Anglo-Egyptian Nav. Co., Dracachi v.
Anjou v. Boston Elev. R. Co., p. 2789.
Ann Arbor R. Co. v. Amos, pp. 1615, 2412, 2460, 2559, 3088.
—— v. Michigan R. Comm., p. 41.
—— Nelson Grain Co. v.
—— Railroad Comm. v.
—— Serviss v.
—— Stolze v.
—— Weaver v.
Ann Arbor, etc., R. Co., Wallace v.
Annas v. Milwaukee, etc., R. Co., pp. 2002, 2095, 2096.
Annie Faxon, The.
Annie L. Vansciver, The.
Anniston, Douglass v.
—— v. Southern R. Co., p. 3574.
Anniston Foundry, etc., Co., Southern R. Co. v.
Anniston Transfer Co. v. Gurley, pp. 526, 3135.
Anniston, etc., R. Co. v. Ledbetter, pp. 895, 905.
Anoka Nat. Bank, Pennsylvania R. Co. v.
Ansell v. Waterhouse, p. 2565.
Anshen v. Boston Elevated R. Co., pp. 1784, 2733.
Ansteth v. Buffalo K. Co., p. 2519.
Anthony, Dillingham v.
—— Hanover Junction, etc., R. Co. v.
—— International, etc., R. Co. v.
—— v. Louisville, etc., R. Co., pp. 1812, 1846.
Antonia, Hammond, etc., R. Co. v.
Antoon, Illinois, etc., R. Co. v.
Aplington v. Pullman Co., pp. 1631, 3232, 3240.
Apollon, The.
Appeal, Cumberland Valley R. Co's.
Appeal, Pennsylvania R. Co's.
Appeal of Cumberland Val. R. Co., p. 67.
Appeal of Great Northern R. Co., pp. 122, 127.
Appleby v. St. Paul City R. Co., pp. 1638, 1647, 2432.
—— v. South Carolina, etc., R. Co., pp. 1865, 1884, 2831, 3066.
Applewhite, Ohio, etc., K. Co. v.
Appomattox R. Co., Powhatan Steamboat Co. v.
Arayo v. Currel, p. 1489.
Arbuckle, Dowgate Steamship Co. v.
—— v. Thompson, pp. 493, 541, 682.
Archer v. Ft. Wayne, etc., R. Co., pp. 1829, 2180.
—— Galt v.
—— v. New York, etc., R. Co., 106 N. Y. 589, 13 N. E. 318—p. 1783.
—— v. New York, etc., R. Co. (N. Y.), 19 Wkly. Dig. 10—p. 2550.
Arctic Bird, The.
Ardison v. Illinois Cent. R. Co., 249 Ill. 300, 94 N. E. 501—p. 2359.
—— v. Illinois Cent. R. Co., 155 Ill. App. 274, 277—pp. 1770, 2357.
Arend v. Liverpool, etc., Steamship Co., p. 1036.
Arents, Pullman Palace Car Co. v.
Arey, Houston, etc., R. Co. v.
Argo Steamship Co. v. Seago, pp. 820, 3921.
Arjona, United States v.
Arkadelphia Mill. Co. v. Smoker Merchandise Co., pp. 3, 8, 267, 525, 602, 768, 772, 779, 846, 896, 3286.
Arkansas, Chicago, etc., R. Co. v.
—— St. Louis, etc., R. Co. v.
Arkansas Cent. R. Co. v. Bennett, pp. 1525, 2816, 2966.
—— v. Janson, pp. 1682, 1742, 1752, 1755, 1808, 1821, 2779, 2807.
—— Wallace v.
Arkansas Fertilizer Co. v. United States, pp. 3776, 3836.
Arkansas Mid. R. Co. v. Canman, pp. 1716, 1723.
—— v. Griffith, p. 2695.
—— v. Rambo, p. 2693.
—— v. Robinson, pp. 2305, 2874.
Arkansas Rate Cases, In re.
Arkansas River Packet Co. v. Hobbs, p. 4004.
Arkansas Southern R. Co. v. German Nat. Bank, p. 512.
—— v. Murphy, p. 1023.
Arkansas, etc., Grain Co., St. Louis, etc., R. Co. v.
Arkansas, etc., R. Co. v. Canman, pp. 1745, 1812, 1834, 1835.
—— v. German Nat. Bank, pp. 355, 356, 365, 370, 376, 377, 519, 548, 566, 3540.
—— v. Griffith, pp. 1548, 1549.
—— v. Harris, p. 148.
—— Loewenberg v.
—— v. Robinson, pp. 1773, 1779, 1795.
—— v. Sain, pp. 2507, 2509, 2510, 2544.
—— v. Wingfield, p. 1756.
Arlington Heights Fruit Co. v. Southern Pac. Co., pp. 3674, 3820, 3821.
Armentrout v. St. Louis, etc., R. Co., pp. 378, 379, 744, 1228, 3274.
Armes, Chicago, etc., R. Co. v.
Armijo, Seligman v.
Armistead v. Shreveport, etc., R. Co., p. 860.
Armistead Lumber Co. v. Louisville, etc., R. Co., p. 524.
Armour v. Michigan Cent. R. Co., pp. 310, 350 3879
Armour Car Lines, Williams v.
Armour Packing Co., Lacy v.
—— v. United States, 82 C. C. A. 135, 153 Fed. 1, 14 L. R. A., N. S., 400—pp. 3700, 3705, 3740, 3753, 3757, 3843, 3845, 3847, 3850.
—— v. United States, 209 U. S. 56, 52 L. Ed. 681, 28 S. Ct. 428—pp. 3443, 3603, 3613, 3631, 3665, 3684, 3736, 3737, 3750, 3753, 3842, 3847, 3848, 3851, 3852, 3853, 3854, 3855, 3857.
Armour & Co. v. City Council, p. 3528.
Arms, Burlington, etc., R. Co. v.
—— Milwaukee, etc., R. Co. v.
Armsby Co., Commercial Bank v.
Armstead, Southern Exp. Co. v.
Armstrong, Baltimore Consol. R. Co. v.
—— Chicago, etc., R. Co. v.
—— v. Chicago, etc., R. Co., 45 Minn. 85, 47 N. W. 459, 45 Am. & Eng. R. Cas. 422—p. 896.
—— v. Chicago, etc., R. Co., 53 Minn. 183, 54 N. W. 1059—pp. 1087, 1103.
—— Die Elbinger v.
—— v. Fargo, p. 408.
—— Galveston, etc., R. Co. v.
—— v. Galveston, etc., R. Co., pp. 937, 938, 1093.
—— v. Grand Trunk R. Co., p. 959.
—— International, etc., R. Co. v.
—— v. Metropolitan St. R. Co., 48 N. Y. S. 597, 23 App. Div. 137—p. 2804.
—— v. Metropolitan St. R. Co., 55 N. Y. S. 498, 36 App. Div. 525—p. 2687.
—— v. Missouri Pac. R. Co., p. 1321.
—— v. Montgomery St. R. Co., pp. 197, 198, 2123, 2356, 2602, 2608, 2629, 2641, 2869.
—— v. Portland R. Co., pp. 1963, 2248, 2822, 2825.
—— Receivers v.
—— Texas, etc., R. Co. v.
—— v. United States Exp. Co., p. 870.
Armstrong, etc., Co. v. Illinois Cent. R. Co., pp. 777, 825, 842.
Arnett, Southern Pac. R. Co. v.
—— Texas, etc., R. Co. v.
Arnol, Chicago, etc., R. Co. v.
Arnold, Alabama, etc., R. Co. v.
—— v. Atchison, etc., R. Co., 81 Kan. 400, 105 Pac. 541—pp. 2447, 2471, 3078, 3079.
—— v. Atchison, etc., R. Co., 106 Pac. 42, 81 Kan. 530—p. 2117.
—— v. Delano, p. 1227.
—— v. Halenbake, p. 11.
—— v. Illinois Cent. R. Co., pp. 1595, 2094.
—— v. Jores, pp. 322, 333, 335, 336, 729, 731, 733, 750, 933.
—— Lake Erie, etc., R. Co. v.
—— Louisville, etc., R. Co. v.
—— v. Louisville, etc., R. Co., pp. 1412, 1427
—— v. Pennsylvania R. Co., pp. 1544, 1560, 2448, 2853, 2855.
—— v. Rhode Island Co., pp. 205, 1044, 2465, 2471, 3101.
—— Texas, etc., R. Co. v.
Arnott v. Redfern, p. 1490.
Aronson v. Cleveland, etc., R. Co., p. 814.
Arpin v. Owens, p. 396.
Arrington v. Texas, etc., R. Co., p. 1712.
—— v. Wilmington, etc., R. Co., pp. 564, 598.
Arrowsmith v. Nashville, etc., R. Co., p. 1575.
Arthur v. Pullman Co., p. 3238.
—— v. St. Paul, etc., R. Co., pp. 520, 896.

Arthur *v.* Texas, etc., R. Co., pp. 281, 282, 307, 739, 780, 869, 958, 970, 980.
Arthur B., The.
Artisans' Bank, Hotchkiss *v.*
Asbell, Columbus R. Co. *v.*
—— *v.* Kansas, p. 3560.
Asbury *v.* Charlotte Elect. R., etc., Co., pp. 1890, 2164, 2659.
Ascher *v.* Grand Trunk R. Co., pp. 1246, 1247.
Ashby, Richmond, etc., R. Co. *v.*
Ashcraft, Mobile, etc., R. Co. *v.*
Ashden *v.* London B. & S. C. R. Co., p. 790.
Asheboro, etc., Mfg. Co. *v.* Southern R. Co., pp. 476, 478, 486, 488, 495, 642, 674.
Asher *v.* East St. Louis, etc., R. Co., p. 1743.
—— *v.* Texas, pp. 3472, 3550.
Asheville, Southern R. Co. *v.*
Asheville St. R. Co., Cawfield *v.*
Ashford, Southern Exp. Co. *v.*
Ashley, Black *v.*
—— Central, etc., R. Co. *v.*
—— *v.* Central, etc., R. Co., p. 955.
—— Delaware, etc., R. Co. *v.*
—— *v.* Ryan, pp. 3472, 3484, 3556.
Ashmead, Illinois Cent. R. Co. *v.*
Ashmore *v.* Pennsylvania Steam-Towing, etc., Co., pp. 946, 948.
Ashtabula Rapid Transit Co., Holmes *v.*
—— *v.* Holmes, pp. 1679, 1714, 1891, 1962.
Ashton *v.* Detroit City R. Co., p. 2368.
Ashville St. R. Co., Cawfield *v.*
Asiatic Prince, The.
Ask, The.
Askew *v.* Gulf, etc., R. Co., pp. 1039, 3344, 3374, 3375.
Askew & Co. *v.* Southern R. Co., pp. 369, 374, 403.
Asmore, Georgia, etc., R. Co. *v.*
Aspasia, The.
Aspell, Pennsylvania R. Co. *v.*
Ass'n, St. Louis, etc., R. Co. *v.*
Assyria, The.
Aston *v.* St. Louis Trans. Co., p. 2686.
Astor, Ames *v.*
—— Aymar *v.*
Astoria Veneer Mills, Gass *v.*
Astsrup *v.* Lewy, pp. 3896, 3910.
Atchinson, etc., R. Co., Bibb Broom Corn Co. *v.*
—— Blevins *v.*
—— *v.* Ditmars, p. 1270.
—— Fentiman *v.*
—— Henry *v.*
—— *v.* Washburn, p. 740.
—— Weyand *v.*
Atchison *v.* Chicago, etc., R. Co., pp. 490, 815.
—— De Baun *v.*
—— St. Louis, etc., R. Co. *v.*
—— Texas, etc., R. Co. *v.*
Atch., Topeka & Santa Fe, Duncan *v.*
Atchison, etc., R. Co. *v.* Allen, pp. 1289, 1290, 1781.
—— Altland *v.*
—— Altschuler *v.*
—— Anderson *v.*
—— Arnold *v.*
—— Avey *v.*
—— *v.* Baldwin, pp. 1123, 1412, 1431, 1432, 1445, 1449, 1468.
—— *v.* Bell, p. 3756.
—— Berg *v.*
—— Bibb Broom Corn Co. *v.*
—— *v.* Bilinsky, p. 1034.
—— Blevins *v.*
—— *v.* Brewer, pp. 3139, 3180, 3186.
—— *v.* Bryan (Tex. Civ. App.), 28 S. W. 98—pp. 943, 1027, 1315.
—— *v.* Bryan (Tex. Civ. App.), 37 S. W. 234—pp. 822, 1295, 1440.
Atchison, Burgess *v.*
—— *v.* Calhoun, 89 Pac. 207, 18 Okla. 75, 11 Am. & Eng. Ann. Cas. 681—pp. 1697, 1720, 1785, 1798, 1821, 1881, 1884, 1906, 2777.
—— *v.* Calhoun, 29 S. Ct. 321, 213 U. S. 1—p. 1700.
—— *v.* Cameron, pp. 1608, 3316.
—— *v.* Campbell, p. 3496.
—— Carder *v.*
—— *v.* Chamberlain, p. 3068.
—— Chase *v.*
—— Church *v.*
—— Clark *v.*
—— *v.* Cochran, p. 2085.
—— *v.* Coffin, pp. 1410, 1430.
—— *v.* Cogswell, pp. 2505, 2507.
—— *v.* Collins, p. 1423.
—— *v.* Consolidated Cattle Co., p. 391.
—— Coon *v.*
—— Cornelius *v.*
—— Craycroft *v.*
—— *v.* Crittenden, pp. 427, 1087, 1117.
—— Crow *v.*
—— Dangerfield *v.*
—— Darling *v.*
—— Davis *v.*
—— *v.* Dawson, p. 841.
—— Decker *v.*
—— Denver, etc., R. Co. *v.*
—— *v.* Denver, etc., R. Co., pp. 82, 85, 102, 109, 110, 208, 222, 240, 1134, 3258, 3267, 3268, 3648, 3729.
—— *v.* Dickerson, pp. 195, 2468, 2470.
—— *v.* Dill, pp. 973, 974, 978, 979, 986.
—— Dorsey *v.*
—— *v.* Dwelle, pp. 1598, 1600, 2468, 2473.
—— *v.* Elder, 149 Ill. 173, 36 N. E. 565—p. 1815.
—— *v.* Elder, 50 Ill. App. 276—p. 2673.
—— *v.* Elder, 57 Kan. 312, 46 Pac. 310—p. 2694.
—— Empire State Cattle Co. *v.*
—— *v.* Flinn, p. 1687.
—— *v.* Foster Lumber Co., pp. 522, 3811.
—— Frazier *v.*
—— Freeman *v.*
—— *v.* Frier, pp. 1730, 1884.
—— *v.* Gants, pp. 198, 1545, 1663, 1666, 1860, 2453, 2454, 2471, 2486, 2533.
—— Gault Lumber Co. *v.*
—— Glover *v.*
—— *v.* Grant, pp. 325, 451, 452, 453, 950, 971, 998, 1104, 1106, 1110, 1352, 1468, 3366, 3392.
—— Hanson *v.*
—— *v.* Headland, pp. 1542, 1551, 1553, 1554.
—— *v.* Henry, 55 Kan. 715, 41 Pac. 952, 2 Am. & Eng. R. Cas. N. S. 418, 29 L. R. A. 465—pp. 2043, 2059, 2070, 3074.
—— *v.* Henry, 78 Kan. 490; 97 Pac. 465, 18 L. R. A., N. S., 177—p. 744.
—— *v.* Hinsdell, p. 1164.
—— *v.* Hogue, pp. 1598, 2468, 3100.
—— *v.* Holloway, pp. 1509, 1512, 1518, 2151, 2152.
—— *v.* Holmes, p. 3760.
—— *v.* Hughes, pp. 1878, 2115, 2249.
—— Interstate Commerce Comm. *v.*
—— *v.* Interstate Commerce Comm., 182 Fed. 189—pp. 3820, 3821.
—— *v.* Interstate Commerce Comm., 188 Fed. 229—pp. 536, 3728, 3744, 3793.
—— *v.* Interstate Commerce Comm., 190 Fed. 591—pp. 3670, 3672.
Atchison, Joerg *v.*
—— *v.* Johns, p. 2539.
—— *v.* Johnson, pp. 1548, 1551, 2209, 2354.
—— *v.* Jordon Stock Food Co., p. 480.
—— Justis *v.*
—— Kiff *v.*
—— *v.* Lambert, pp. 1387, 1460.
—— *v.* Lawler, p. 848.
—— Leslie *v.*
—— *v.* Lindley, p. 2525.
—— *v.* Loewe, pp. 2361, 2820.
—— Love *v.*
—— *v.* Love, 174 Fed. 59—p. 130.
—— *v.* Love, 23 Okla. 192, 99 Pac. 1081—p. 128.
—— Lusby *v.*
—— McCabe *v.*
—— McCahe *v.*
—— *v.* MacVeagh *v.*
—— *v.* Madden, etc., Co., pp. 746, 834, 843.
—— *v.* Mason, p. 973.
—— Mathews *v.*
—— *v.* Means, pp. 1483, 1484.
—— Mendenhall *v.*
—— Merritt Creamery Co. *v.*
—— *v.* Miller, p. 1007.
—— Moore *v.*
—— *v.* Moore, p. 3761.
—— Moorman *v.*
—— *v.* Morris, pp. 1087, 1098.
—— *v.* Nation, pp. 1338, 1339.
—— Noble *v.*
—— *v.* O'Connor, p. 3555.
—— Oklahoma *v.*
—— Paddock *v.*
—— Palmer *v.*
—— *v.* Parry, p. 2866.
—— Peck *v.*
—— *v.* People, p. 215.
—— *v.* Poole, pp. 1097, 1102, 1419.
—— Prescott, etc., R. Co. *v.*
—— *v.* Richardson, p. 819.
—— Roach *v.*
—— *v.* Roach, pp. 3175, 3176, 3180, 3181, 3182, 3315, 3316, 3323.
—— *v.* Roberts, p. 303.
—— *v.* Robinson, pp. 3761, 3762, 3840.
—— *v.* Rodgers, pp. 1051, 1368, 1388, 3333.
—— Rolfs *v.*
—— Rutherford, p. 3394.
—— Sachrowitz *v.*
—— Sauter *v.*
—— Schloss *v.*
—— *v.* Schriver, pp. 477, 482, 514, 517, 580.
—— Sewell *v.*
—— *v.* Shean, pp. 1740, 1792, 1793, 1964, 2272, 2273, 2275.
—— Smith *v.*
—— *v.* Smythe, pp. 858, 1025, 1059, 3520.
—— Star Grain, etc., R. Co. *v.*
—— State *v.*
—— *v.* State, 23 Okla. 210, 100 Pac. 11—pp. 24, 125.
—— *v.* State, 26 Okla. 166, 109 Pac. 218—pp. 127, 141.
—— *v.* State, 28 Okla. 12, 115 Pac. 1101—p. 118.
—— *v.* State, 31 Okla. 767, 123 Pac. 1065—p. 3502.
—— *v.* State, 33 Okla. 371, 125 Pac. 721—p. 182.
—— Stevens *v.*
—— *v.* Stewart, p. 3068.
—— *v.* Superior Refin. Co., p. 3774.
—— *v.* Temple, pp. 1107, 1423, 1426.
—— United States *v.*
—— *v.* United States, 101 C. C. A. 140, 718 Fed. 12—pp. 3623, 3624, 3629, 3630.
—— *v.* United States, 191 Fed. 856—pp. 3675, 3699, 3722.
—— *v.* United States, 203 Fed. 56—pp. 3665, 3677.

Atchison v. United States, 232 U. S. 199, 34 S. Ct. 291—pp. 3630, 3631, 3666, 3670, 3764.
—— v. Veale & Co., p. 1354.
—— Vosburg v.
—— v. Washburn, pp. 945, 1361, 1448, 1449, 1466.
—— v. Weber, pp. 1497, 1498, 2419, 2420.
—— Wichita Sav. Bank v.
—— v. Wilkinson, p. 3184.
—— Wills v.
—— v. Wood, p. 2417.
—— v. Worley, pp. 1730, 1885, 1967.
—— v. Wright, pp. 1419, 1426.
Aten, International, etc., R. Co. v.
Athanasaw v. United States, p. 3441.
Athon, Evansville, etc., R. Co. v.
Atkeson v. Jackson, p. 1488.
Atkins v. Colby, pp. 1210, 1211, 1212, 1228, 1229, 1232.
—— Little Rock, etc., R. Co. v.
Atkins & Co., Steamboat Co. v.
Atkins Grocery, etc., Co., Veitch v.
Atkinson v. Mercer, p. 2846.
—— v. New York Transfer Co., pp. 948, 950, 1054, 1065, 1069.
—— Northern Pac. R. Co. v.
—— v. Northern Pac. R. Co., pp. 3458, 3510.
—— v. Southern R. Co., pp. 1626, 2455.
—— v. Wabash R. Co., p. 1357.
Atkinson Improv. Co., Sweeden v.
Atkisson v. Steamboat Castle Garden, pp. 563, 595, 596.
Atlanta, Old Colony Trust Co. v.
—— v. Old Colony Trust Co., p. 76.
Atlanta Baggage, etc., Co., Kates v.
—— v. Mizo, pp. 512, 3139, 3140, 3141.
Atlanta Consol. St. R. Co. v. Bates, pp. 1524, 2277, 2297, 2389, 2638, 2732.
—— v. Hardage, pp. 2775, 3083, 3097.
—— v. Keeny, pp. 1604, 2428, 3025, 3030, 3088.
—— White v.
Atlanta Nat. Bank, Southern R. Co. v.
Atlanta Sand, etc., Co., Southern R. Co. v.
Atlanta Stove Works, Southern R. Co. v.
Atlanta St. Railroad, Holly v.
Atlanta Terminal Co. v. American Baggage, etc., Co., p. 100.
Atlanta, etc., Railroad, Stiles v.
Atlanta, etc., R. Co., Branan v.
—— Brannon v.
—— Britton v.
—— v. Broome, pp. 431, 721, 808, 839, 948, 950, 1036, 1038.
—— v. Bryant, p. 2940.
—— Brown v.
—— Cole v.
—— v. Condor, pp. 2040, 2057, 3070, 3076.
—— v. Crosby, p. 2392.
—— Davis v.
—— v. Dickerson, pp. 1883, 1917.
—— Evans v.
—— Franklin v.
—— v. Gardner, pp. 2369, 2370.
—— Gasway v.
—— Haralson, pp. 2065, 2076, 2125, 2227.
—— v. Holcombe, pp. 1797, 2725.
—— v. Holcombe & Co., pp. 220, 222.
—— v. Horne, pp. 1139, 3744.
—— v. Jacobs' Pharmacy Co., pp. 724, 739, 741, 752, 805, 825, 826, 876, 952, 1365.
—— v. Jarrett v.
—— Jenkins v.
Atlanta, etc., R. Co., Kenny v.
—— Kenny Co. v.
—— McCord v.
—— McKerall v.
—— Miller v.
—— Morrow v.
—— Murphy v.
—— National Bank v.
—— Ohlen v.
—— Parris v.
—— v. Potts, p. 3095.
—— Purvis v.
—— Sappington v.
—— Sumrell v.
—— Tenhet v.
—— v. Texas Grate Co., pp. 485, 653, 865, 3253, 3279.
—— Turley v.
—— Wilson v.
—— v. Wyly, p. 2940.
Atlanta, etc., Railway v. Wheeler, pp. 2285, 2349, 2374, 2380, 2911.
Atlantic, Westphalen, etc., R. Co. v.
Atlantic & N. Car. R. Co., Foard v.
Atlantic Ave. R. Co., Cassidy v.
—— Morris v.
—— Walker v.
—— Watkins v.
—— Whitbeck v.
Atlantic City v. Brown, 71 N. J. L. 81, 58 Atl. 110—p. 1518.
—— v. Brown, 72 N. J. L. 207, 62 Atl. 428—pp. 46, 84.
—— v. Fonsler, pp. 43, 85.
Atlantic City R. Co. v. Clegg, pp. 1525, 2135, 2326, 2878, 2879.
—— v. Goodin, pp. 2246, 2275, 2276.
—— v. Kiefer, p. 2864.
—— Laughlin v.
—— Rogers v.
Atlantic Coast Line, National Lumber Dealers v.
Atlantic Coast Line Co., Prentis v.
Atlantic Coast Line Railroad, Richardson v.
Atlantic Coast Line R. Co., Bainbridge Grocery Co. v.
—— Boss v.
—— Bowden v.
—— Charles v.
—— Jenkins v.
—— Lowry v.
—— Mazursky v.
—— Parnell v.
—— Penny v.
—— v. Rice, p. 1269.
—— State v.
—— Von Lehe v.
—— Watson v.
—— Winslow Bros. & Co. v.
Atlantic Compress Co. v. Central, etc., R. Co., p. 963.
Atlantic Consol. St. R. Co. v. Keeny, p. 2481.
Atlantic Exp. Co., Seaboard, etc., Railway v.
—— v. Wilmington, etc., R. Co., p. 108.
Atlantic Ins. Co., Conard v.
Atlantic Mut. Ins. Co. v. McLoon, p. 211.
Atlantic Nav. Co. v. Johnson, pp. 528, 531, 538, 539, 561, 903.
Atlantic Railway, Berry v.
Atlantic, etc., Elect. R. Co., Oakerson v.
Atlantic, etc., Railroad, Caldwell v.
—— Hopkins v.
—— King v.
—— Moore v.
—— Stiles v.
—— Wall v.
—— Wesner, etc., Mfg. Co. v.
Atlantic, etc., R. Co., Acme Paper Box Factory v.
—— Abritton & Co. v.
—— Alexander v.
—— Anderson v.
—— v. Anderson, p. 2148.
—— Attorney General v.
Atlantic, etc., R. Co., Baker v.
—— Basnight v.
—— Bedsole v.
—— Bing v.
—— Black v.
—— Bowden v.
—— Bowdon v.
—— Box v.
—— Brick v.
—— Brown v.
—— Brunson v.
—— v. Bryan, pp. 1090, 1105, 1106, 1114, 1115.
—— v. Bryant, p. 2857.
—— Bullock v.
—— Burckhalter v.
—— Burress v.
—— California Powder Works v.
—— Charles v.
—— v. Coachman, pp. 161, 1029, 1292, 1350, 1400, 1402, 1452, 1456, 1460.
—— Coffey v.
—— v. Cohn & Co., pp. 333, 337, 338, 339, 341, 346.
—— Colleton Mercantile, etc., Co. v.
—— Commins v.
—— Commonwealth v.
—— v. Commonwealth, pp. 23, 118, 3501.
—— Cooper v.
—— Cox v.
—— v. Crosby, pp. 2173, 2176, 2338, 2386, 2616, 2629, 2640, 2676, 2722.
—— Cummins v.
—— v. Dahlberg Brokerage Co., pp. 343, 555, 570, 571, 586, 588.
—— Darden v.
—— Davis v.
—— Deans v.
—— DeLorme v.
—— Deschamps v.
—— De Vane v.
—— v. Dexter, pp. 341, 986, 1397, 1457.
—— v. Dickinson, p. 2267.
—— Dorsett v.
—— v. Dothan Mule Co., pp. 1362, 1376.
—— Drawdy v.
—— DuBose v.
—— Dunie v.
—— Elliott v.
—— Ellis v.
—— v. Ellis, pp. 116, 124.
—— Farmers' etc., Cotton Co. v.
—— Farrell v.
—— Florida R. Comm'rs v.
—— Foard v.
—— Ford v.
—— Fulghum v.
—— Fuller v.
—— Fullerton v.
—— Garrett v.
—— Geraty v.
—— v. Geraty, pp. 219, 220.
—— Gibson v.
—— v. Goodwin, pp. 95, 551, 583, 595, 597.
—— Green Co. v.
—— Griffin v.
—— Grimsley v.
—— Guthrie v.
—— Harvey v.
—— v. Henderson, pp. 968, 3253, 3284, 3350, 3403.
—— Herring v.
—— Hiers v.
—— Huggins v.
—— v. Howard Supply Co., pp. 319, 553, 595, 596, 600.
—— Hunter v.
—— v. Interstate Commerce Comm., pp. 3791, 3792.
—— v. Jacobs' Pharmacy Co., pp. 757, 759.
—— Jenkins v.
—— Johnson v.
—— v. Johnson, pp. 2118, 2385.
—— Jones v.
—— Jones-Lane Co. v.

Atlantic, etc., R. Co., Kahn v.
—— King Lumber, etc., Co. v.
—— Knowles v.
—— Floridienne, etc., Co., Societe Anonyme v.
—— v. Laird, 58 Fed. 760, 7 C. C. A. 489—p. 2570.
—— v. Laird, 17 S. Ct. 120, 164 U. S. 393, 41 L. Ed. 485—p. 2571.
—— Levan v.
—— Lipman v.
—— Lupe v.
—— McCord v.
—— McCullom v.
—— McCutchen v.
—— McKerall v.
—— McLarin v.
—— McLean v.
—— McNeill v.
—— Macon Grocery Co. v.
—— v. Macon Grocery Co., pp. 3766, 3822, 3840.
—— McRackan v.
—— Mazursky v.
—— v. Mazursky, pp. 3523, 3545.
—— Meeks v.
—— v. Meinhard, etc., Co., p. 491.
—— Meyer v.
—— Milhous v.
—— Mills v.
—— Moore v.
—— Nelson v.
—— North Carolina Corp. Comm. v.
—— v. North Carolina Corp. Comm., pp. 34, 38, 58, 103, 104.
—— Owens v.
—— v. Owens, p. 2509.
—— Parker v.
—— Parker Buggy Corp. v.
—— Parrott v.
—— v. Partridge, p. 489.
—— Peele v.
—— Pelot v.
—— Penny v.
—— Perry v.
—— Philips v.
—— Phillips v.
—— Pincus v.
—— v. Pipkin, p. 2673.
—— Post v.
—— v. Potts, p. 3010.
—— v. Powell, pp. 1828, 1938, 1939, 2020, 2160, 2600, 2601, 2632, 2633.
—— Rahon v.
—— Railroad Comm'rs v.
—— v. Rice, pp. 208, 244, 757, 820, 826, 1345.
—— v. Richardson, p. 3364.
—— Riverside Mills v.
—— v. Riverside Mills, pp. 731, 3444, 3464, 3469, 3470, 3603, 3604.
—— Roberts v.
—— Robertson v.
—— Roundtree v.
—— Rountree v.
—— Ruffin v.
—— Sanders v.
—— v. Schirmer & Sons, p. 3286.
—— Scull & Co. v.
—— Sellers v.
—— Smith v.
—— Southerland v.
—— Spires v.
—— v. Spires, pp. 348, 349, 552, 588.
—— State v.
—— v. State, p. 3506.
—— Stone & Co. v.
—— Strange v.
—— Stuckey v.
—— Sumrell v.
—— Sumter Pine, etc., Co. v.
—— Taylor v.
—— Thomas v.
—— Towles v.
—— Tuten v.
—— United States v.
—— Vassor v.
—— Venning v.
Atlantic, etc., R. Co., Virginia-Carolina Peanut Co. v.
—— Von Lehe v.
—— Wagner v.
—— v. Ward, pp. 1083, 1092, 3469.
—— Watson v.
—— Webb v.
—— Weinberg v.
Atlantic, etc., R. Co. v. Wells, pp. 437, 632.
—— Westphalen v.
—— Whaley v.
—— v. Wharton, pp. 3514, 3516.
—— Wilkins v.
—— Williams v.
—— Wilson v.
—— Winslow Bros. & Co. v.
—— Wright v.
Atlantic, etc., Steamship Co. v. Guggenheim, 123 Fed. 330—pp. 3953, 3973.
—— v. Guggenheim, 147 Fed. 103, 77 C. C. A. 329—pp. 3957, 3973.
Atlantic, etc., Supply Co., Southern R. Co. v.
Atlantic, etc., Tel. Co. v. Philadelphia, pp. 3552, 3553, 3559, 3572.
—— Western Union Tel. Co. v.
Atlas, The.
Atlas Portland Cement Co. v. Dougherty, p. 3908.
Atlas Steamship Co., Calderon v.
—— Wamsley v.
Attorney General v. Atlantic, etc., R. Co., pp. 59, 61.
—— v. Chicago, etc., R. Co., pp. 66, 131, 134, 1197.
—— v. Delaware, etc., Co., pp. 3651, 3652, 3653, 3654.
—— v. Electric Storage Battery Co., p. 3558.
—— v. Hobart, p. 3342.
—— v. Louisville, etc., R. Co., p. 3817.
—— v. Missouri Pac. R. Co., p. 3539.
—— v. Old Colony R. Co., pp. 22, 61, 3500.
—— v. St. Louis, etc., R. Co., p. 3539.
—— v. The Mid-Kent Railway Co., p. 3658.
—— v. Union Stock Yard, etc., Co., pp. 3469, 3612, 3613, 3616, 3690, 3817, 3827, 3835.
Atwater v. Delaware, etc., R. Co., pp. 211, 1492, 1500.
Atwell v. Miller, p. 337.
Atwood v. Mohler, pp. 3114, 3115, 3127, 3130.
—— v. Reliance Transp. Co., pp. 3161, 3166.
—— v. Washington Water Power Co., p. 2329.
Auburn, etc., Elect. R. Co., Dwyer v.
—— Weeks v.
Auburn, etc., R. Co., Dwyer v.
Auchincloss, Gans v.
Audenried v. Philadelphia, etc., R. Co., pp. 220, 1179.
Auditor General, Fargo v.
Auerbach v. New York, etc., R. Co., p. 1624.
—— v. New York, etc., R. Co., p. 1625.
Aufdenberg v. St. Louis, etc., R. Co., pp. 1961, 2125, 2127.
Augusta, Cosgrove v.
Augusta-Aiken R. Co., Ussery v.
Augusta Brokerage Co., Central, etc., R. Co. v.
—— v. Central, etc., R. Co., pp. 84, 136, 138.
—— v. Central, etc., R. Co., p. 3541.
Augusta R. Co. v. Glover, pp. 1803, 1804, 1829, 2298.
Augusta R., etc., Co. v. Lyle, p. 1993.
—— v. Smith, p. 2857.
Augusta, etc., R. Co., Christian v.
—— City Council v.
—— Funderburg v.
Augusta, etc., R. Co., Funerburg v.
—— McIntosh v.
—— Mitchell v.
—— Patterson v.
—— v. Randall, 79 Ga. 304, 4 S. E. 674—pp. 2676,
—— v. Randall, 85 Ga. 297, 11 S. E. 706—p. 2766.
—— v. Renz, p. 2173.
—— Richardson v.
—— Seals v.
—— v. Snider, pp. 2173, 2174, 2175, 2218, 2249, 2250, 2252, 2342, 2357.
—— Tompkins v.
—— Vlasserviteh v.
—— v. Wrightsville, etc., R. Co., pp. 3613, 3707.
Augustus v. Chicago, etc., R. Co., pp. 1721, 2011, 2012, 2013, 2072, 2659.
Auld v. Southern R. Co., pp. 2220, 2221, 2296, 2339.
Ault v. Cowan, p. 2674.
Aultman Engine, etc., Co. v. Chicago, etc., R. Co., pp. 640, 3278.
Aultman, etc., Machinery Co., Standefer v.
Aurora, E. & C. R. Co., Ruch v.
Aurora, etc., R. Co., Moore v.
—— Ruch v.
—— v. Ruch, pp. 1562, 1745, 1986.
Ausk v. Great Northern R. Co., pp. 1449, 1460.
Austin, Chesapeake, etc., R. Co. v.
—— v. Great Western R. Co., pp. 211, 1566, 1577.
—— Griggs v.
—— Low v.
—— Parmelee v.
—— Robinson v.
—— v. St. Louis, etc., Packet Co., pp. 749, 770, 783.
—— v. St. Louis, etc., R. Co., pp. 1526, 1530, 1689, 1735, 1789, 1870, 2609, 2613.
—— Savannah, etc., R. Co. v.
—— v. State, p. 3428.
—— v. Talk, pp. 344, 1173.
—— v. Tennessee, pp. 3427, 3428, 3528, 3539.
—— Travelers' Ins. Co. v.
—— v. Washington Water Power Co., pp. 1743, 2912.
Austin-Stephenson Co. v. Southern R. Co., pp. 1083, 1087, 1100, 1101, 1412.
Austin, etc., R. Co. v. Slator, pp. 442, 448, 1273, 1276.
Austro-Americana Line, Haaga v.
Austro-American Steamship Co., Ramjak v.
—— Smith v.
Authur v. Texas, etc., R. Co., pp. 952, 953.
Automatic Merchandising Co. v. Delaware, etc., Co., 46 Pa. Super. Ct. 648—p. 574.
—— v. Delaware, etc., Co., 233 Pa. 581, 82 Atl. 939—pp. 573, 574.
Autrey v. Georgia, etc., Co., p. 865.
Avant, Central R., etc., Co. v.
Averill v. McCook, pp. 2089, 2090.
Avery v. New York Cent. R. Co., pp. 191, 196, 1636, 1637.
—— Texas, etc., R. Co. v.
Avey v. Atchison, etc., R. Co., p. 2621.
Avey v. Galveston, etc., R. Co., pp. 2287, 2619.
Avinger v. South Carolina R. Co., pp. 211, 221, 237, 265, 868, 1175, 1180, 1188.
Avis, Missouri, etc., R. Co. v.
Avon, etc., R. Co., Curtis v.
Axtell, Reed v.
Aydlett, etc., Co., Treadwell v.
Ayers, Ainis v.
—— Kansas, etc., R. Co. v.

Ayers v. Rochester R. Co., pp. 1688, 2893.
Aylward v. Smith, p. 709.
Aymar v. Astor, p. 768.
Ayres, Beebe v.
—— v. Chicago, etc., R. Co., 71 Wis 372, 37 N. W. 432, 5 Am. St. Rep. 226—pp. 211, 741, 1271, 1307, 1322, 1451.
—— v. Chicago, etc., R. Co., 75 Wis. 215, 43 N. W. 1122—pp. 1322, 1480.
—— v. Delaware, etc., R. Co., p. 2790.
—— Mississippi, etc., R. Co. v.
—— Morris, etc., R. Co. v.
—— Texas Trunk R. Co. v.
—— v. Western R. Corp., pp. 965, 1007, 3161.
Ayres, etc., Co. v. Dorsey Produce Co., pp. 366, 369.

B

Babcock, Calahan v.
—— v. Herbert, pp. 11, 768.
—— v. Lake Shore, etc., R. Co. (N. Y.), 43 How. Prac. 317—p. 3383.
—— v. Lake Shore, etc., R. Co., 49 N. Y. 491—pp. 429, 3252, 3345, 3383, 3384.
—— v. Los Angeles Tract. Co., pp. 2176, 2193, 2355.
—— May v.
—— v. May, pp. 328, 331, 333.
—— v. Orbison, p. 302.
—— People v.
—— Ulman, etc., Co. v.
Bachant v. Boston, etc., Railroad, pp. 530, 537.
Bacharach v. Chester Freight Line, pp. 516, 636.
Bachman v. Clyde Steamship Co., pp. 4032, 4033.
Backer v. Flagg, p. 511.
Backhaus v. Chicago, etc., R. Co., pp. 529, 531, 897, 905.
Backhouse v. Sneed, p. 728.
Backman v. Charlestown, p. 634.
—— United States Exp. Co. v.
Backus, Cleveland, etc., R. Co. v.
—— Indianapolis, etc., R. Co. v.
—— Pittsburgh, etc., R. Co. v.
Bacon v. Casco Bay Steamboat Co., p. 3994.
—— v. Cleveland, etc., R. Co., pp. 607, 608, 618, 690, 1049.
—— v. Delaware, etc., R. Co., p. 2150.
—— v. Ennis, p. 3968.
—— v. Pullman Co., pp. 3221, 3222, 3228, 3242.
Badcock v. Los Angeles Tract. Co., p. 2234.
Baddeley, Toledo, etc., R. Co. v.
—— T. W. & W. R. Co. v.
Baden, Missouri Pac. R. Co. v.
Badenhoop, Savannah Elect Co. v.
Bader v. Southern Pac. Co., p. 3104.
Bading v. Milwaukee Elect. R., etc., Co., p. 2908.
Badovinac v. Northern Pac. R. Co., p. 2616.
Baer, Baltimore City Pass. R. Co. v.
Baer Bros. Mercantile Co., Denver, etc., R. Co. v.
—— v. Denver, etc., R. Co., 200 Fed. 614—p. 3671.
—— v. Denver, etc., R. Co., 233 U. S. 479, 34 S. Ct. 641—pp. 3660, 3785.
Baer & Co., New York, etc., Transp. Line v.
Baermann v. Chicago, etc., R. Co., pp. 2825, 2835.
Bagard, Illinois Cent. R. Co. v.
Bagby, Gulf, etc., R. Co. v.
Baggage Transp. Co., Garrison v.
Baggett v. Baltimore, etc., R. Co., pp. 2431, 2450, 2459, 2462.
Bagley, Central, etc., R. Co. v.
Bagley Elevator Co. v. American Exp. Co., p. 916.
Bagwell, Texas, etc., R. Co. v.
Bahn Diamond, etc., Co., Mallory Steamship Co. v.
Bahn, etc., Optical Co., Mallory Steamship Co. v.
Bahr, Vogel v.
Baier, Missouri Pac. R. Co. v.
Bailey v. Cincinnati, etc., R. Co., p. 2151.
—— v. Hudson River R. Co., p. 547.
—— v. Louisville, etc., R. Co., p. 2031.
—— Midland Valley R. Co. v.
—— San Antonio, etc., R. Co. v.
—— v. Seattle, etc., R. Co., p. 2280.
—— v. Shaw, pp. 480, 481.
—— Southern Exp. Co. v.
—— Southern Pac. Co. v.
—— v. Tacoma Tract. Co., pp. 2000, 2343.
—— v. The Sonora, p. 1940.
Bainbridge v. Union Tract. Co., pp. 2192, 2195.
Bainbridge Grocery Co. v. Atlantic Coast Line R. Co., p. 277.
Baines, Darby v.
Baird, Birmingham R., etc., Co. v.
—— v. Erie R. Co., p. 1203.
—— Gulf, etc., R. Co. v.
—— Interstate Commerce Comm. v.
Baker v. Atlantic, etc., R. Co., p. 989.
—— v. Boston, etc., R. Co., pp. 5, 219, 2092, 2093, 2104.
—— v. Brinson, pp. 1036, 1039.
—— v. Brooklyn Union Elev. R. Co., p. 2054.
—— v. Chicago, etc., R. Co., 95 Iowa 163, 63 N. W. 667—p. 2615.
—— v. Chicago, etc., R. Co., 98 Iowa 438, 67 N. W. 376—p. 600.
—— v. Chicago, etc., R. Co., 97 N. W. 650, 91 Minn. 118—p. 1475.
—— v. Clark, pp. 1785, 2872.
—— Georgia R., etc., Co. v.
—— Gittings v.
—— v. Interurban St. R. Co., p. 2904.
—— Houston, etc., R. Co. v.
—— v. Louisville, etc., R. Co., pp. 7, 729, 1267, 1269.
—— v. Maher, p. 7.
—— v. Manhattan R. Co., pp. 1890, 2219.
—— v. Michigan, etc., R. Co., pp. 324, 997, 1049.
—— v. Missouri Pac. R. Co., pp. 1100, 3343.
—— Munn v.
—— v. New York, etc., R. Co., p. 2790.
—— Omaha St. R. Co. v.
—— Paducah Tract. Co. v.
—— Robinson v.
—— St. Louis, etc., R. Co. v.
—— v. St. Louis, etc., R. Co., pp. 215, 621, 622.
—— Wabash River Tract Co. v.
—— Wait v.
Baker Co. v. Brown, pp. 329, 3540.
Baker & Co. v. New York, etc., R. Co., 162 Fed. 496—p. 3915.
—— v. New York, etc., R. Co., 168 Fed. 248—p. 3920.
Baker Wire Co. v. Chicago, etc., R. Co., p. 137.
Baldauf, Camden, etc., R. Co. v.
Baldoni, Georgia, R. Co. v.
Baldosta St. R. Co. v. Fenn, p. 2885.
Baldraff v. Camden, etc., Railroad, p. 3129.
Baldwin, American Exp. Co. v.
—— v. American Exp. Co., pp. 523, 534.
—— Atchison, etc., R. Co. v.
—— v. Collins, pp. 759, 763, 1003, 1005, 1007, 1008.
Baldwin Dixon v.
—— v. Fair Haven, etc., R. Co., p. 2026.
Baldwin v. Grand Trunk R. Co., 87 N. W. 380, 128 Mich. 417—p. 2825.
—— v. Grand Trunk R. Co., 64 N. H. 596, 15 Atl. 411—p. 2479.
—— v. Great Northern R. Co., pp. 620, 3278.
—— v. Liverpool, etc., Steamship Co., pp. 1137, 1140, 1142.
—— v. New York, etc., Co., p. 630.
—— People's R. Co. v.
—— v. People's R. Co., pp. 1694, 1736, 1741, 1981, 2034, 2772.
—— v. Seaboard, etc., Railway, pp. 2060, 2061, 2494.
—— v. Sullivan Timber Co., p. 612.
—— Vinton v.
—— Yazoo, etc., R. Co. v.
Baldwin, etc., Land Co. v. Columbia, etc., R. Co., pp. 1200, 3751.
Bales, Pullman Palace Car Co. v.
Balfour, Oregon R., etc., Co. v.
Balfour, etc., Co. v. Portland, etc., Steamship Co., pp. 3869, 3873, 3874.
Balk, Harris v.
Ball, Galveston, etc., R. Co. v.
—— Illinois Cent. R. Co. v.
—— v. Mabry, pp. 1749, 1752, 1755, 1756, 1757, 1989.
—— Mills v.
—— Missouri, etc., R. Co. v.
—— v. Mobile, etc., R. Co., pp. 1566, 2892.
—— v. New Jersey Steamboat Co., pp. 267, 273, 277, 280, 285.
—— New York, etc., R. Co. v.
—— v. Grand Trunk R. Co., p. 1546.
—— St. Louis, etc., R. Co. v.
—— v. Wabash, etc., R. Co., pp. 1381, 1468.
Ballantine, Daniels v.
Ballard v. Cincinnati, etc., R. Co., pp. 1851, 2846.
—— Louisville, etc., R. Co. v.
Ballentine v. North Missouri R. Co., pp. 211, 236, 242, 246, 252, 621, 733, 738, 1320, 1321.
Ballou v. Earle, pp. 987, 1074.
Baltimore, Gunther v.
—— Guy v.
—— P. C. St. L. R. Co. v.
—— The.
Baltimore City Pass. R. Co. v. Baer, pp. 2876, 2877.
—— v. Kemp, p. 2563.
—— v. Nugent, pp. 1740, 2922, 2937.
—— v. Wilkinson, pp. 197, 199, 203, 2122, 2123, 2147, 2245.
Baltimore Consol. R. Co. v. Armstrong, p. 2373.
—— v. Rifcowitz, pp. 2333, 2334.
Baltimore Ins. Co., Caze v.
Baltimore R. Co., Stewart v.
Baltimore Steam Packet Co. v. Patterson, p. 3877.
—— v. Smith, pp. 3120, 3121, 3129, 3183, 3184.
—— Tall v.
Baltimore Tract Co., Cooke v.
—— v. Helms, p. 2277.
—— v. State, pp. 1520, 2158.
Baltimore, etc., Barge Co. v. Eastern Coal Co., pp. 4046, 4070.
Baltimore, etc., Co. v. O'Donnell, p. 654.
—— v. Rathbone, p. 814.
Baltimore, etc., Exp. Co. v. Cooper, pp. 1097, 1102.
Baltimore, etc., R. Co., Ambach v.
—— Baggett v.
—— v. Bambrey, pp. 2461, 3078, 3080, 3084.
—— Bankard v.
—— v. Barger, pp. 2048, 2055, 2064, 2770, 3071.

Baltimore, etc., R. Co., Barlick v.
—— Barnum v.
—— Beasley v.
—— Bevis v.
—— v. Blocher, p. 2122.
—— Boggett v.
—— Boseley v.
—— Bosley v.
—— Bostwick v.
—— Bowie v.
—— v. Brady, pp. 945, 982, 1003, 1006, 1007, 1036.
—— v. Breinig, pp. 1501, 1711.
—— Burch v.
—— v. Burris, p. 2090.
—— v. Cain, p. 2063.
—— v. Campbell, pp. 326, 1612, 3162, 3163, 3164, 3175, 3176, 3177, 3178, 3181, 3192.
—— Canfield v.
—— Carpenter v.
—— v. Carr, pp. 190, 200, 1636, 1851.
—— v. Chambers, p. 1792.
—— v. Christie, p. 836.
—— v. Clift, pp. 1286, 1330, 1451, 3273, 3284, 3301, 3400, 3408.
—— Cornette v.
—— v. Cox, p. 2521.
—— Coyle v.
—— Croft v.
—— Cully v.
—— v. Davis, 44 Ind. App. 375, 89 N. E. 403—pp. 1662, 2035, 2046, 2054.
—— v. Davis (Pa.), 9 Sad. 147, 12 Atl. 335—p. 1251.
—— v. Dever, pp. 1330, 1333, 1477.
—— v. Diamond Coal Co., pp. 89, 1184, 1188.
—— Doyle v.
—— v. Doyle, pp. 960, 965, 966, 982, 1004, 1007, 1049.
—— Duggan v.
—— v. Duke, pp. 2101, 2104, 2105.
—— v. Evans, pp. 1616, 1618, 1632, 1633, 2442.
—— Fadley v.
—— Farmers' Loan, etc., Co. v.
—— Farris v.
—— v. Fisher, pp. 700, 701, 704, 706, 707, 708, 709, 711, 717, 782.
—— Flanagan v.
—— Flannery v.
—— v. Fox, pp. 821, 828, 1329, 1365, 1456, 1457.
—— Gledhill-Wall Paper Co. v.
—— Goodwin v.
—— Green v.
—— v. Green, pp. 536, 896, 900, 903.
—— v. Hamburger, p. 3763.
—— v. Harbin, p. 2603.
—— Hart v.
—— v. Hauer, pp. 1794, 1969.
—— v. Hausman, p. 2975.
—— Hess v.
—— Hostetter v.
—— v. Hubbard, 1 O. C. C., N. S., 611, 12-25 O. C. D. 477—pp. 947, 949, 1076, 1090.
—— v. Hubbard, 72 O. St. 302, 74 N. E. 214, 16 R. R. R. 71, 39 Am. & Eng. R. Cas., N. S., 71—pp. 1054, 1107, 1422.
—— v. Hudson, 117 Ky. 995, 25 Ky. L. Rep. 2154, 80 S. W. 454—pp. 1628, 1629, 1630, 3013.
—— v. Hudson, 29 Ky. L. Rep. 298, 92 S. W. 947—p. 3059.
—— Interstate Commerce Comm. v.
—— v. Interstate Commerce Comm., pp. 3450, 3457, 3458, 3459, 3460, 3461, 3464.
—— v. Jean, pp. 2362, 2905.
—— Jones v.
—— v. Kane, 69 Md. 11, 13 Atl. 387, 9 Am. St. Rep. 387—pp. 2150, 2152.
Baltimore, etc., R. Co. v. Kane (Md.), 17 Atl. 1032—p. 2375.
—— Kean v.
—— v. Keedy, pp. 844, 871.
—— Keller v.
—— Kent v.
—— v. Kent, p. 2441.
—— v. Kirby, 88 Md. 409, 41 Atl. 777—pp. 2851, 3027.
—— v. Kirby, 46 Atl. 975, 91 Md. 313—p. 2713.
—— v. Kleespies, p. 2083.
—— v. La Due, 112 N. Y. S. 964, 128 App. Div. 594—pp. 3753, 3811.
—— v. La Due, 108 N. Y. S. 659, 57 Misc. Rep. 614—pp. 3752, 3761, 3777.
—— v. Leapley, p. 1870.
—— v. Lee, p. 2187.
—— McCann v.
—— v. McDonald, pp. 2417, 2426.
—— McGraw v.
—— McKain v.
—— v. McKenzie, pp. 1577, 2128, 2261, 2289.
—— v. McLaughlin, pp. 2092, 2098.
—— v. Mahone, p. 1514.
—— Marye v.
—— v. Maryland, p. 3575.
—— Maslin v.
—— Mills v.
—— Modern Match Co. v.
—— v. Moon, p. 4003.
—— Moore v.
—— v. Morehead, pp. 499, 500, 512, 529, 533, 593, 729, 734, 745, 750, 765, 804, 822, 825, 826, 887, 889, 897, 899, 910, 912, 1039.
—— v. Mullen, 217 Ill. 203, 75 N. E. 474, 2 L. R. A., N. S., 115, 3 Am. & Eng. Ann. Cas. 1015—pp. 2126, 2256.
—— v. Mullen, 120 Ill. App. 88—p. 1919
—— National Bank v.
—— National Tube Works Co. v.
—— v. New Albany Box, etc., Co., pp. 3753, 3759.
—— v. Noell, pp. 1718, 1721, 1726, 1810, 1821, 2673, 2694.
—— v. Norris, pp. 1544, 1546, 2429, 2473.
—— v. Nugent, pp. 1684, 1687, 1712, 1722, 1846.
—— v. O'Donnell, pp. 500, 514, 517, 533, 573, 574, 577, 578, 579, 580, 584, 596, 626, 630, 634, 650, 660, 782.
—— O'Neil v.
—— v. Oriental Oil Co., pp. 836, 861, 1040, 1059.
—— People v.
—— Pitcairn Coal Co. v.
—— v. Pitcairn Coal Co., pp. 3764, 3769, 3804, 3805, 3810, 3817.
—— v. Pixley, pp. 1854, 3060, 3103.
—— v. Pumphrey, pp. 518, 519, 594, 595, 848.
—— Quarrier v.
—— v. Ragsdale, pp. 814, 1087, 1405, 1443.
—— v. Rambo, pp. 2085, 2087.
—— v. Rathbone, pp. 327, 337, 434, 723, 805, 806, 812, 987, 949, 1054, 1075.
—— Ricketts v.
—— Robinson v.
—— Roderick v.
—— v. Rose, p. 2504.
—— v. Ross, pp. 1084, 1087.
—— Ruddell v.
—— v. Rudy, pp. 2583, 2584, 2606, 2767, 2961.
—— v. Samuels, p. 712.
—— Sandusky-Portland Cement Co. v.
Baltimore, etc., R. Co., v. Schumacher, pp. 816, 841, 842, 910, 911, 3286, 3289, 3300, 3360.
—— v. Schwinding, p. 2503.
—— v. Sheridan, p. 1696.
—— Shore & Bro. v.
—— v. Skeels, pp. 814, 946, 1054.
—— Smith v.
—— v. Sperber & Co., p. 659.
—— State v.
—— v. State, 60 Md. 449, 12 Am. & Eng. R. Cas. 149—pp. 1531, 1746, 1792, 2273, 2275.
—— v. State, 63 Md. 135—pp. 2136, 2673.
—— v. State, 72 Md. 36, 18 Atl. 1107, 6 L. R. A. 706, 20 Am. St. Rep. 454—pp. 1953, 2212.
—— v. State, 81 Md. 371, 32 Atl. 201—pp. 2275, 2732.
—— Stewart v.
—— v. Swann, pp. 1746, 1755, 1826, 2673.
—— v. Thornton, pp. 194, 195, 2411, 2412, 2464, 2565.
—— v. Trader, pp. 2348, 2375, 2376, 2378, 2383, 2384, 2969.
—— Trexler v.
—— United States v.
—— v. United States, p. 3735.
—— Voight v.
—— v. Voight, pp. 214, 930, 947, 977, 1575, 1578, 1579, 2105.
—— Waring & Co. v.
—— Warner v.
—— Washington v.
—— v. White, p. 2899.
—— v. Whitehill, pp. 217, 228, 243, 1303, 1321, 1406, 1458, 1459, 1462, 1463, 1468, 1471, 1480, 1481, 1482.
—— v. Whittington, p. 2569.
—— v. Wightman, pp. 1715, 1721, 1722, 1726, 1821, 2673.
—— v. Wilkens, pp. 294, 301, 302, 305, 306, 307, 308, 310, 315, 331, 338, 339, 356, 370, 3312.
—— Williams v.
—— Williamsport, etc., Lumber Co. v.
—— Wilson v.
—— Winters v.
—— Wood v.
—— v. Wood & Co., pp. 1450, 3314.
—— Woodford v.
—— v. Worthington, pp. 1687, 1711, 1726, 1813, 2695.
Baltimore, etc., Railway, Bank v.
Baltimore, etc., Steamboat Co. v. Brown, pp. 337, 417, 3255.
—— Merchants' Nat. Bank v.
—— Scott v.
Baltimore, etc., Turnpike Road v. Boone, pp. 69, 1598, 3090, 3091.
—— v. Cason, pp. 2122, 2123, 2177, 2801.
—— v. Leonhardt, pp. 1722, 1817, 1819, 2218, 2353, 2673.
B. & B. Turnpike, People v.
B. & O. R. Co., Ambach v.
—— v. Dougherty, p. 2334.
—— Johnson v.
—— Maslin v.
—— v. Reed, pp. 2417, 2418.
Bamberg v. International R. Co., p. 2700.
—— v. South Carolina R. Co., pp. 854, 1329.
Bambrey, Baltimore, etc., R. Co. v.
Bancroft v. Boston, etc., R. Corp., p. 2273.
—— v. Peters, p. 1166.
Bancroft & Co. v. Merchants' Despatch Transp., Co., pp. 3264, 3301, 3377.
Bancroft-Whitney Co., Pacific Coast Steamship Co. v.
—— Pacific Coast, etc., Co. v.

Bandy, Southern R. Co. v.
Bangor, etc., R. Co., Colbath v.
—— Pomroy v.
Bangs, Lake Shore, etc., R. Co. v.
—— Lowber v.
—— v. Lowler, p. 3865.
—— Merchant's Nat. Bank v.
Bank v. Adams Exp. Co., pp. 3, 7, 499, 726, 731, 739, 769, 779, 781, 930, 931, 947, 952, 953, 954, 958, 959, 962, 977, 1011, 1024, 3880, 3448.
—— v. American Exp. Co., pp. 477, 492, 590, 591, 592.
—— v. Baltimore, etc., Railway, p. 555.
—— Bast v.
—— v. Brown, p. 10.
—— v. Cooper, p. 3872.
—— v. Doyle, p. 914.
—— Freeman v.
—— Goetz v.
—— v. Jones, pp. 350, 353, 363, 369.
—— v. Jones Cotton Co., pp. 394, 395, 396.
—— Means v.
—— New York Cent., etc., R. Co. v.
—— v. New York, etc., R. Co., p. 310, 313, 343, 360, 3879.
—— Phillips v.
—— Second Nat. Bank v.
—— Southern Exp. Co. v.
—— v. Southern Exp. Co., p. 867.
Bankard v. Baltimore, etc., R. Co., pp. 1037, 1389.
Banker, Field v.
Banks v. Chicago, etc., R. Co., p. 1285.
—— v. Pennsylvania R. Co., pp. 839, 1115.
Banner, Ex parte.
Banner Grain Co. v. Great Northern R. Co., pp. 220, 541.
Bannerman, Chicago, etc., R. Co. v.
Banning, Wingard v.
Bansemer v. Toledo, etc., R. Co., pp. 534, 536, 727, 732, 748, 894, 899, 3170.
Bante v. Metropolitan St. R. Co., p. 2820.
Baralong, The.
Barber v. Brace, pp. 333, 3905, 3906.
—— v. Chicago, etc., R. Co., p. 2100.
—— Meyerstein v.
—— Lazarus v.
—— Minnesota v.
—— Mobile, etc., R. Co. v.
—— Texas, etc., R. Co. v.
—— v. Vlasto, p. 3888.
—— Western Transp. Co. v.
Barber & Co. v. Wheeler, p. 3312.
Barbour, Jensen v.
—— Melendy v.
—— v. South Eastern R. Co., pp. 753, 757.
Barclay v. Clyde, p. 892.
—— Coosa River Steamboat Co. v.
—— Hammonds v.
—— Southern R. Co. v.
Bard v. Pennsylvania Tract. Co., p. 2173.
Barden v. Boston, etc., R. Co., p. 2353.
—— Houston, etc., R. Co. v.
Bardwell v. American Exp. Co., pp. 1087, 1103.
—— v. Mobile, etc., R. Co., p. 2256.
Bare v. American Forwarding Co., p. 7.
Barfield, Georgia, etc., R. Co. v.
—— Southern R. Co. v.
Barger, Baltimore, etc., R. Co. v.
—— Chesapeake, etc., R. Co. v.
Baring v. Clark, p. 633.
Bark Edwin, The.
Barker v. Brown, p. 714.
—— v. Central Park, etc., R. Co., pp. 196, 199, 1603, 2428.
—— v. Chicago, etc., R. Co., 243 Ill. 482, 35 R. R. 470, 58 Am. & Eng. R. Cas., N. S., 470, 90 N. E. 1057, 26 L. R. A., N. S., 1058—p. 1576.
—— v. Chicago, etc., R. Co., 149 Ill. App. 520—pp. 1575, 2697.
—— v. Coffin, pp. 1620, 1622, 1624, 1973, 2447.
—— v. Havens, pp. 1148, 1149, 1150.
—— v. New York Cent. R. Co., pp. 1968, 1969, 2351.
—— v. Ohio River R. Co., p. 2132.
—— Pullman Palace Car Co. v.
—— Rex v.
—— Smith v.
—— v. The Swallow, p. 3910.
Barker & Co. v. Glascow, pp. 633, 682.
Barker-Bond Lumber Co. v. Pennsylvania R. Co., pp. 3892, 3973.
Barkhouse, Louisville, etc., R. Co. v.
Barkley, Cincinnati, etc., R. Co. v.
Barkman v. Pennsylvania R. Co., pp. 2080, 2081.
Barksdale, Virginia Mid. R. Co. v.
Barlett v. The Philadelphia, pp. 533, 534.
Barlick v. Baltimore, etc., R. Co., pp. 1687, 2016, 2027, 2029, 2034, 2666, 2675, 2786.
Barlow v. Jersey City, etc., R. Co., pp. 1521, 1556, 2147.
—— Southern R. Co. v.
Barnaby, Brittan v.
—— v. State, p. 3583.
Barnard v. Campbell, p. 1225.
—— Goddard v.
—— v. Kobbe, p. 573.
—— Philadelphia, etc., R. Co. v.
—— Popham v.
Barnes, Brown v.
—— v. Danville St. R., etc., Co., pp. 1682, 1742, 2166, 2340, 2671, 2674, 2764, 2885.
—— Evansville, etc., R. Co. v.
—— v. Hewitt, p. 1695.
—— Indianapolis, etc., R. Co. v.
—— v. Long Island R. Co., 84 N. E. 1108, 191 N. Y. 528—p. 1051.
—— v. Long Island R. Co., 93 N. Y. S. 616, 47 Misc. Rep. 318—p. 3349.
—— Louisville, etc., Mail Co. v.
—— Macon Consol. St. R. Co. v.
—— Macon, etc., R. Co. v.
—— v. Marshall, p. 233.
—— M. P. R. Co. v.
—— v. New York, etc., R. Co., p. 2680.
—— Norfolk Southern R. Co. v.
—— Norfolk, etc., R. Co. v.
—— Northern Pac. R. Co. v.
—— St. Louis, etc., R. Co. v.
—— Southern Exp. Co. v.
—— Wiltse v.
Barnes & Co., M. P. R. Co. v.
Barnet, Gaither v.
Barnett, Bush v.
—— v. Central Line of Boats, p. 474.
—— Chicago, etc., R. Co. v.
—— v. East Tennessee, etc., R. Co., pp. 2249, 2262, 2263.
—— Galveston, etc., R. Co. v.
—— Gulf, etc., R. Co. v.
—— Kansas, etc., R. Co. v.
—— St. Louis, etc., R. Co. v.
—— San Antonio, etc., R. Co. v.
Barney, Cardot v.
—— v. D. R. Martin, p. 2423.
—— v. Oyster Bay, etc., Steamboat Co., pp. 192, 1499, 1500.
Barney v. Prentiss, p. 1007.
—— Sweet v.
—— Weed v.
Barnum v. Baltimore, etc., R. Co., pp. 2563, 2564, 2621, 2622.
—— Pettigrew v.
Barnum Grain Co. v. Great Northern R. Co., pp. 360, 556.
Barnwell, Clark v.
Baron v. New York City R. Co., p. 1853.
Baron, etc., Co., Cincinnati Tract. Co. v.
Barr, South Covington, etc., St. R. Co. v.
Barracouta, Cumming v.
Barre v. Reading City Pass. R. Co., pp. 2534, 2535.
Barre, etc., Power Co., Montpelier v.
Barreda, Masters v.
—— v. Silsbee, p. 326.
Barrett, Birmingham R., etc., Co. v.
—— Chicago, etc., R. Co. v.
—— Greenwald v.
—— Hale v.
—— v. Market St. R. Co., pp. 193, 1603, 2428.
—— v. New York, 183 Fed. 793—pp. 3468, 3526.
—— v. New York, 189 Fed. 268—pp. 3526, 3576, 3579.
—— Pittsburg, etc., R. Co. v.
—— v. Rogers, pp. 345, 3884.
—— v. Third Ave. R. Co., pp. 1719, 1999, 2013.
Barringer, Maine Bank of Buffalo v.
—— Maine Nat. Bank v.
—— v. St. Louis, etc., R. Co., pp. 2315, 2676, 2993, 2994.
Barris v. Chicago, etc., R. Co., pp. 135, 1192.
Barron v. Eldredge, pp. 285, 882, 884, 894, 899, 913.
—— v. Mobile, etc., R. Co., pp. 816, 820, 946.
Barron-Boyle Co., Cleveland, etc., Railway v.
Barron, etc., Co. v. C. C., & St. L. Co., p. 724.
Barrons, Starbird v.
Barrott v. Pullman's Palace Car Co., pp. 3217, 3221, 3222, 3223.
Barrow, Ex parte.
—— v. Philleo, pp. 801, 817, 838.
—— Texas, etc., R. Co. v.
Barrow Steamship Co. v. Kane, pp. 2073, 2079, 3992.
Barry, Biggs v.
—— v. Boston, etc., R. Co., pp. 2399, 2988.
—— Tweedie Trading Co. v.
—— v. Union R. Co., p. 2548.
—— v. Union Tract. Co., p. 1995.
Bartelt v. Oregon R., etc., Co., p. 1458.
Bartemeyer v. Iowa, p. 3539.
Barter & Co. v. Wheeler, pp. 289, 884, 1012, 1023, 3180, 3269, 3286, 3299, 3302, 3382.
Barth v. Kansas, etc., R. Co., pp. 1518, 2874, 2877.
Bartholomaus v. Milwaukee Elect. R., etc., Co., p. 2812.
Bartholomew v. New York, etc., R. Co., pp. 1884, 1921, 2259.
—— v. St. Louis, etc., R. Co., pp. 3160, 3168, 3169.
Bartine, Southern Pac. Co. v.
Bartle v. Houghton County St. R. Co., pp. 2830, 2831.
—— v. New York, etc., R. Co., 193 N. Y. 362, 85 N. E. 1091—pp. 2360, 2904.
—— v. New York, etc., R. Co., 105 N. Y. S. 522, 121 App. Div. 72—p. 2260.

Bartlet v. Oregon K., etc., Co., pp. 1363, 1365, 1367, 1375, 1379, 1387.
Bartlett, Blodgett v.
—— Boston, etc., R. Co. v.
—— London, etc., R. Co. v.
—— v. New York, etc., Transp. Co., p. 1563.
—— v. Pittsburgh, etc., R. Co., pp. 586, 945, 1383, 1386.
—— v. The Philadelphia, p. 527.
Bartley v. Metropolitan St. R. Co., pp. 1992, 2637, 2688, 2893.
Bartnik v. Erie R. Co., pp. 2674, 2841.
Barton, Beardmore v.
—— v. St. Louis, etc., R. Co., p. 2203.
—— Third Ave. R. Co. v.
Bartow v. Erie R. Co., p. 659.
Bartram, Cleveland, etc., R. Co. v.
Baruth v. Poughkeepsie, etc., R. Co., pp. 2723, 2738.
Basing, Butler v.
Baskett v. Metropolitan St. R. Co., pp. 2328, 2342.
Basler v. Sacramento, etc., Elect. Co., pp. 1999, 2234.
Basnight v. Atlantic, etc., R. Co., pp. 286, 289, 290, 884, 914.
—— v. Norfolk, etc., R. Co., p. 3981.
Bason, Charleston, etc., Steamboat Co. v.
Bass v. Chicago, etc., R. Co., pp. 197, 200, 201, 1943, 1944, 1955, 2123, 2421, 2422, 2423, 2485, 2607.
—— v. Chicago, etc., R. Co., 39 Wis. 636—p. 3104.
—— v. Chicago, etc., R. Co., 42 Wis. 654, 24 Am. Rep. 437—pp. 1943, 1955, 3066, 3104.
—— v. Cleveland, etc., R. Co., p. 1533.
—— v. Concord St. Railway, pp. 1928, 2231, 2239, 2821.
—— v. Glover, pp. 302, 367, 378, 518, 519, 542, 3274.
Bassett v. Aberdeen Coal, etc., Co., pp. 222, 3862, 3931.
—— v. Connecticut River R. Co., p. 894.
—— v. Los Angeles Tract. Co., p. 2671.
—— v. Spofford, p. 480.
Bast v. Bank, p. 3871.
Bastard v. Bastard, p. 233.
Basting v. Brooklyn Heights R. Co., p. 2825.
Batavia Bank v. New York, etc., R. Co., p. 356.
Batchis, Jacksonville Elect. Co. v.
Batchler, Houston, etc., R. Co. v.
Bates, Alabama, etc., R. Co. v.
—— Atlanta Consol. St. R. Co. v.
—— v. Bigby, p. 581.
—— v. Chicago, etc., R. Co., 60 Wis. 296, 19 N. W. 72, 50 Am. Rep. 369, 14 Am. & Eng. R. Cas. 700—pp. 576, 579.
—— v. Chicago, etc., R. Co., 140 Wis. 235, 122 N. W. 745—pp. 908, 918, 1771, 2292, 2872, 2873.
—— Nashville, etc., R. Co. v.
—— v. New Orleans, etc., R. Co., p. 576.
—— v. Old Colony R. Co., pp. 1577, 1578, 2100, 2101.
—— O'Rouke v.
—— Pittsburg, etc., Coal Co. v.
—— v. Stanton, pp. 516, 573.
—— v. Todd, pp. 337, 338, 339.
—— v. Weir, pp. 480, 992, 1071.
Bates Mach. Co., Elgin, etc., R. Co. v.
Bath, Houston, etc., R. Co. v.
—— v. Houston, etc., R. Co., pp. 344, 345, 817.
—— Jessel v.
—— Uessel v.
Bath, etc., R. Co., American Hay Co. v.
Batson v. Donovan, p. 233.
Batte, Gulf, etc., R. Co. v.
Battis v. Chicago, etc., R. Co., p. 2973.
—— Ex parte.
Battle v. Columbia, etc., Railroad, pp. 278, 3123, 3125, 3137, 3138, 3189, 3190.
—— v. Georgia R., etc., Co., 48 S. E. 337, 120 Ga. 992—p. 2573.
—— v. Georgia R., etc., Co., 48 S. E. 338, 120 Ga. 994—p. 2573.
—— v. Mobile, p. 3582.
—— St. Louis, etc., R. Co. v.
—— Wells, Fargo & Co. v.
Batton v. South, etc., R. Co., pp. 2029, 2033.
Baty, St. Louis, etc., R. Co. v.
Bauer, Illinois Cent. R. Co. v.
—— North Chicago St. R. Co. v.
Baugh, Chicago, etc., R. Co. v.
—— Gulf, etc., R. Co. v.
—— v. McDaniel, pp. 3285, 3291.
Baughman v. Louisville, etc., R. Co., p. 1075.
Baum, Evansville, etc., R. Co. v.
—— v. Long Island R. Co., p. 1058.
—— v. New York, etc., R. Co., p. 2683.
Baumann v. New York, etc., R. Co., p. 636.
Baumback v. Gulf, etc., R. Co., pp. 515, 636, 663, 664, 700, 702, 703, 706, 708, 852, 1152.
Baumstein v. New York City R. Co., pp. 2042, 2661.
Baunwall, etc., Co. v. Furness, p. 3864.
Baur, North Chicago St. R. Co. v.
Bausch, Camden, etc., R. Co. v.
Baxendale, Black v.
—— v. Bristol, etc., R. Co., p. 221.
—— Hadley v.
—— Hart v.
—— v. Railway Co., p. 1181.
Baxley v. Tallahassee, etc., R. Co., pp. 444, 445, 449, 460, 472
Baxter, Edminson v.
—— v. Louisville, etc., R. Co., pp. 1087, 1410.
—— v. New York, etc., R. Co., p. 3035.
—— Norton v.
Bay, Cincinnati, etc., Packet Co. v.
Bay Cities Consol. R. Co., Tunnicliffe v.
Bay City Tract., etc., Co., Burke v.
—— Niedzinski v.
Bay City Tract., etc., Elect Co., Fortin v.
Bay City, etc., Elect. Co., Niedzinski v.
Bay Shore Lumber Co., Mobile, etc., R. Co. v.
Bay State Steamboat Co., Mudgett v.
—— Nevins v.
Bayer, Central R., etc., Co. v.
Bayles, Kansas Pac. R. Co. v.
—— v. Kansas Pac. R. Co., pp. 221, 1180.
Bayley, Pickard v.
Baylor, Birmingham R., etc., Co. v.
—— Haynie v.
Baylor County v. Craig, pp. 3392, 3417.
Baynes, Hand v.
Bayonne Knife Co. v. Umbenhauer, pp. 1209, 1211, 1214, 1219.
Bays, Louisville, etc., R. Co. v.
Beach, St. Louis, etc., R. Co. v.
Beaconsfield, The.
Beadell v. Eastern Counties R. Co., p. 192.
Beadle v. Kansas, etc., R. Co., 48 Kan. 379, 29 Pac. 696—p. 1198.
—— v. Kansas, etc., R. Co., 51 Kan. 248, 32 Pac. 910—p. 1198.
Beal v. Lowell, etc., St. R. Co., pp. 2174, 2185, 2767.
—— v. South Devon R. Co., p. 3067.
Beall, Cobb v.
Beals, Lake Erie, etc., R. Co. v.
—— The Galena v.
Beam v. Cleveland, etc., R. Co., pp. 1254, 1258.
Bean, Galveston, etc., R. Co. v.
—— v. Green, 12 Me. 199—p. 3163.
—— v. Green, 12 Me. 422—pp. 1011, 3165.
—— Louisville, etc., R. Co. v.
—— v. Sturtevant, p. 277.
Bear, Webster v.
Beard v. Connecticut, etc., R. Co., pp. 1785, 2500.
—— Cross v.
—— v. Illinois Cent. R. Co., pp. 724, 765, 782, 786, 812, 3309, 3394, 3395.
—— Missouri, etc., R. Co. v.
—— v. St. Louis, etc., R. Co., pp. 786, 3258, 3307.
Bearden v. Madison, p. 22.
Beardmore v. Barton, p. 3076.
Beardsley, Alabama, etc., R. Co. v.
—— v. New York, etc., R. Co., 162 N. Y. 230, 56 N. E 488—pp 38, 146.
—— v. New York, etc., R. Co., 44 N. Y. S. 75, 15 App. Div. 251—p. 3500.
Beardwell, Union Pac. R. Co. v.
Bearns, In re.
Bearse, Hodges v.
—— v. Ropes, p. 4030.
Beasley v. Baltimore, etc., R. Co., pp. 611, 691, 695, 1153, 1154, 1159.
Beasley, etc., Co., Chesapeake, etc., R. Co. v.
Beatie, Georgia R. Co. v.
Beattie v. Boston Elevated R. Co., pp. 1682, 1719, 2313, 2684.
—— v. Citizens', etc., R. Co., p. 2253.
—— v. Detroit United Railway, pp. 1737, 1892.
—— Gulf, etc., R. Co. v.
—— Yazoo, etc., R. Co. v.
Beatty, Chicago, etc., R. Co. v.
—— v. Metropolitan, etc., R. Co., pp. 2671, 2672.
—— South Covington, etc., R. Co. v.
Beauchamp, Ft. Worth, etc., R. Co. v.
—— v. International, etc., R. Co., pp. 1614, 1858, 1860, 2453, 2707.
Beaulieu v. Great Northern R. Co., pp. 1256, 1257.
Beaumont v. Philadelphia, etc., R. Co., pp. 529, 530.
Beaumont Land, etc., Co., Walker v.
Beave v. St. Louis Trans. Co., pp. 2653, 2659, 2881, 2883, 2934.
Beaver, Indianapolis, etc., R. Co. v.
Beaver Valley Tract. Co., Goehring v.
Beck v. Johnson, p. 3977.
—— Philadelphia, etc., R. Co. v.
—— v. Quincy, etc., R. Co., pp. 2472, 2474.
Becker v. Buffalo, etc., Tract. Co., p. 2725.
—— Chicago, etc., R. Co. v.
—— Equi Valley Marble Co. v.
—— v. Great Eastern R. Co., p. 3120.
—— v. Hallgarten, pp. 1222, 1243.

Becker v. Lincoln Real Estate, etc., Co., 174 Mo. 246, 73 S. W. 581—pp. 2117, 2648.
—— v. Lincoln Real Estate, etc., Co., 118 Mo. App. 74, 93 S. W. 291—p. 1704.
—— v. Pennsylvania R. Co., pp. 753, 901, 909, 911.
—— Tuttle v.
Beckett, Cleveland, etc., R. Co. v.
Beckford, Whitney v.
Beckham v. Shouse, pp. 728, 733, 749, 769.
Beckman v. Meadville, etc., St. R. Co., pp. 2073, 2080, 2088.
—— v. Southern Pac. Co., p. 3619.
Beckwith v. Cheshire R. Co., pp. 1571, 2434.
—— Locklin v.
—— Minneapolis, etc., R. Co. v.
Beckworth, Texas, etc., R. Co. v.
Bedell, Denver, etc., R. Co. v.
—— Richmond, etc., R. Co. v.
—— v. Richmond, etc., R. Co., pp. 320, 323, 451, 464.
Bedford v. Terhune, p. 3877.
Bedford Belt R. Co., Menaugh v.
Bedford-Bowling Green Stone Co. v. Owman, p. 232.
Bedford, etc., R. Co. v. Rainbolt, pp. 1712, 1740, 1810, 2681.
Bedsole v. Atlantic, etc., R. Co., pp. 2768, 3011.
Bee Bldg. Co., Quimby v.
Beebe v. Ayres, pp. 1620, 1973, 1977, 2439.
—— Illinois Cent. R. Co. v.
Beech Creek R. Co., Olanta Coal Min. Co. v.
—— v. Olanta Coal Min. Co., p. 239.
Beecher, Fordyce v.
—— v. Long Island R. Co., 161 N. Y. 222, 55 N. E. 899, 12 Am. & Eng. R. Cas., N. S., 295—pp. 1792, 2138.
—— v. Long Island R. Co., 55 N. Y. S. 23, 35 App. Div. 292—p. 2327.
—— St. Louis, etc., R. Co. v.
Beede v. Wisconsin Cent. R. Co., pp. 3396, 3409.
Beedy v. Pacey, pp. 565, 3932.
Beekman v. Saratoga, etc., R. Co., pp. 211, 213, 1492.
Beer v. Massachusetts, p. 3539.
Beers v. Boston, etc., R. Co., pp. 3110, 3144
—— Dalton v.
—— v. Wabash, etc., R. Co., pp. 6, 213, 251, 760, 3823.
Beery v. Chicago, etc., R. Co., pp. 1987, 2778, 2934.
—— Toledo, etc., R. Co. v.
Beeson v. Chicago, etc., R. Co., pp. 1499, 3082.
—— Missouri Pac. R. Co. v.
Beets, St. Louis, etc., R. Co. v.
Beezley, Texas, etc., R. Co. v.
Beggs, Toledo, etc., R. Co. v.
Begley v. Pennsylvania R. Co., p. 2330.
Behen v. Metropolitan St. R. Co., p. 2377.
—— v. St. Louis Trans. Co., p. 2921.
Behlmer, Louisville, etc., R. Co. v.
—— v. Louisville, etc., R. Co., 71 Fed. 835—pp. 3714, 3718, 3774.
—— v. Louisville, etc., R. Co., 28 C. C. A. 229, 83 Fed. 898—pp. 3775, 3793.
Behm v. Cincinnati, etc., Tract. Co., p. 2385.
Behr v. Erie R. Co., p. 2473.
Behrens, Franklin Printing, etc., Co. v.
—— Franklin, etc., Publishing Co. v.
Behrens v. The Furnessia, p. 1959.
Beidelman, Dow v.
—— Union R., etc., Co. v.
—— United R., etc., Co. v.
Beidler v. Branshaw, p. 2165.
Beiser v. Cincinnati, etc., R. Co., pp. 2339, 2884.
Bekins, Gates v.
Bekins Household Shipping Co., v. Grand Trunk R. System, p. 1033.
Belcher, Missouri, etc., R. Co. v.
—— v. Missouri, etc., R. Co., 92 Tex. 593, 598, 50 S. W. 559—pp. 625, 636, 637, 647, 696, 698, 755, 826.
—— v. Missouri, etc., R. Co. (Tex. Civ. App.), 47 S. W. 1020—p. 696.
Belden, Chandler v.
—— v. Pullman Palace Car Co., pp. 3201, 3202, 3215, 3233.
Belfast, Boon & Co. v.
—— The.
Belfast, etc., R. Co. v. Keys, pp. 3125, 3149.
Belgenland, The.
Belger v. Dinsmore, pp. 321, 767, 946, 987, 4032.
Belknap, Camden, etc., R. Co. v.
—— Camden, etc., Transp. Co. v.
—— Kansas, etc., R. Co. v.
Bell, Alabama, etc., R. Co. v.
—— Atchison etc., R. Co. v.
—— v. Central Elect. R. Co., pp. 1874, 1878, 1891, 1902, 2688.
—— Chicago, etc., R. Co. v.
—— v. Drew, pp. 3123, 3124.
—— Galveston, etc., R. Co. v.
—— Gulf, etc., R. Co. v.
—— Louisville, etc., R. Co. v.
—— Mobile, etc., R. Co. v.
—— Morgan v.
—— v. Moss, pp. 1207, 1211, 1218, 1227, 1246, 1247.
—— Pennsylvania R. Co. v.
—— Railroad v.
—— v. Reed, pp. 743, 815, 822, 3907, 3908, 3911.
—— v. Reynolds, p. 659.
—— v. St. Louis, etc., R. Co., pp. 894, 899.
—— Schofield v.
—— v. Southern R. Co., p. 1785.
—— v. Southern Railway, p. 795.
—— Texas, etc., R. Co. v.
—— Webster v.
—— Wells Fargo & Co. v.
—— v. Wood, pp. 3914, 3917.
Bell Bros. v. Western, etc., R. Co., pp. 432, 3359, 3367.
Bellaire, etc., R. Co., Interstate Commerce Comm. v.
Bellefontaine R. Co., Burns v.
Belleville, East St. Louis, etc., R. Co. v.
Bellman v. New York, etc., R. Co., p. 1530.
Bellows Falls, etc., St. R. Co., Kutland R. Co. v.
Bellsdyke, etc., Co. v. North British R. Co., p. 1181.
Belt Elect. Line Co. v. Tomlin, pp. 2228, 2657.
Belton Oil Co., Gulf, etc., R. Co. v.
—— v. Gulf, etc., R. Co., p. 1140.
Belvidere, The.
Belvidere Bldg. Co. v. Bryan, pp. 2868, 2869.
Bemis, Worden v.
—— Wordin v.
Bemiss v. New Orleans, etc., R. Co., p. 2223.
Benadum, Indiana Union Tract. Co. v.
Benbow v. North Carolina R. Co., p. 537.
Bendekovich v. Omaha, etc., St. R. Co., p. 2356.
Bender, Southern Pac. Co. v.
Bender & Co. v. Bowman, pp. 1213, 1215, 1220, 1229, 1233.
Bendon v. Union Tract. Co., p. 2235.
Benedict v. Chicago, etc., R. Co., pp. 858, 862, 868.
—— Kelly v.
—— v. Minneapolis, etc., R. Co., pp. 1953, 2200, 2205, 2206.
—— v. Schaettle, pp. 1206, 1207, 1208, 1209, 1210, 1211, 1212, 1213, 1214, 1215, 1220.
—— Scheu v.
Benefactor, The.
Benhan, Liverpool, etc., Co. v.
Benjamin, Chicago, etc., R. Co. v.
—— v. Levy, p. 477.
—— v. Metropolitan St. R. Co., 151 S. W. 91, 245 Mo. 598—pp. 1518, 1744, 1894, 2586, 2878, 2951.
—— v. Metropolitan St. R. Co., 84 N. Y. S. 458—pp. 2328, 2875.
—— The E.
Benner v. Equitable Safety Ins. Co., p. 3949.
—— Lambert v.
Benner Livery, etc., Co. v. Busson, p. 2260.
Bennett v. American Exp. Co., pp. 573, 574, 578, 815, 821.
—— Arkansas Cent. R. Co. v.
—— Birmingham R., etc., Co. v.
—— Brien v.
—— v. Byram & Co., pp. 509, 511, 540, 634, 728.
—— Cantu v.
—— v. Central, etc., R. Co., pp. 1747, 1971, 2038, 2045.
—— Chicago City R. Co. v.
—— v. Chicago etc., R. Co., pp. 488, 490.
—— v. Drew, p. 858.
—— v. Dutton, pp. 211, 222, 1007, 1492.
—— v. Filyaw, pp. 804, 3176.
—— Lake Shore, etc., R. Co. v.
—— Louisville, etc., R. Co. v.
—— v. Louisville, etc., R. Co., pp. 1767, 1776.
—— New York, etc., R. Co. v.
—— v. New York, etc., R. Co., 57 Conn. 422, 18 Atl. 668—p. 2272.
—— v. New York, etc., R. Co. (N. Y.), 5 Hun. 599—p. 3456.
—— v. New York, etc., R. Co., 69 N. Y. 594, 35 Am. Rep. 250—p. 1668.
—— v. Northern Pac. Exp. Co., pp. 731, 835, 1111, 1113.
—— v. Railroad Co., p. 1637.
—— Savannah Elect. Co. v.
—— v. Seattle Elect. Co., pp. 2784, 3028.
—— Vallette v.
—— v. United States, 194 Fed. 630, 114 C. C. A. 402—p. 3441.
—— v. United States, 227 U. S. 333, 33 S. Ct. 288—p. 3441.
Bennington, etc., R. Co., Byars v.
Bennitt v. Missouri Pac. R. Co., pp. 3341, 3342.
Bensley, Chicago, etc., R. Co. v.
Benson, Decuir v.
—— Ex parte.
—— v. Gray, pp. 1280, 3882.
—— v. Manhattan R. Co., p. 2788.
—— Memphis, etc., R. Co. v.
—— v. Oregon, etc., R. Co., pp. 8, 832, 931, 961, 977, 982.
—— Richmond, etc., R. Co. v.
—— v. Tacoma R., etc., Co., pp. 2866, 2867.
—— v. Wilmington City R. Co., pp. 1682, 1687, 1718, 1888, 1889, 1895, 2231, 2778, 2825, 2903.
Benson & Co., Ex parte.
—— Richmond etc., R. Co. v.
Bent, Fergusson v.
—— Yazoo, etc., R. Co. v.
Bent & Co., Yazoo, etc., R. Co. v.

Bente v. Metropolitan St. R. Co., p. 2993.
Bentley v. Bustard, pp. 3899, 3900.
—— Jacobs v.
—— Southwestern R. Co. v.
Bentson v. Boston Elev. R. Co., p. 2307.
Benvega v. United States Surety Co., p. 33.
Berchfield, Texas, etc., R. Co. v.
Berdan & Co., Cincinnati, etc., R. Co. v.
Berden & Co., Cincinnati, etc., R. Co. v.
Berea College v. Commonwealth, p. 3847.
Berengere, The.
Berg v. Atchison, etc., R. Co., p. 3327.
—— v. Chicago, etc., R. Co., p. 2769.
—— Louisville, etc., R. Co. v.
—— v. Narragansett Steamship Co., pp. 3252, 3289, 3294.
—— v. St. Paul City R. Co., p. 3071.
Bergan v. Central Vermont R. Co., pp. 1549, 1554, 1555, 2780.
Bergeman v. Indianapolis, etc., R. Co., p. 352.
Bergen v. Chicago, etc., R. Co., p. 1049.
Bergen County Tract. Co. v. Demarest, p. 2694.
—— Scott v.
Berger v. Chicago, etc., R. Co., pp. 2726, 2770.
—— St. Louis, etc., R. Co. v.
—— v. State, p. 352.
Bergin v. Missouri, etc., R. Co., pp. 499, 3763.
Bergman v. Indianapolis, etc., R. Co., pp. 1207, 1226, 1231.
—— International, etc., R. Co. v.
Bergner v. Chicago, etc., R. Co., pp. 492, 894, 899.
Bergstrom v. Chicago, etc., R. Co., pp. 3132, 3133.
Berje v. Texas, etc., R. Co., pp. 516, 727.
Berkelhamer v. Jolune, p. 2437.
Berkley v. Watling, p. 337.
—— v. Whitling, p. 294.
Berkley St. R. Co. v. Simpson, p. 2827.
Berkowit, Chicago Terminal Transfer R. Co. v.
—— v. Chicago, etc., R. Co., p. 1589.
Berkshire St. R. Co., Liversidge v.
—— Vine v.
Berley v. Columbia, etc., R. Co., pp. 164, 846.
—— v. Newton, p. 873.
—— v. Seaboard, etc., Railway, pp. 3049, 3052.
Bermuda, The.
Bernadon v. Nolte, p. 798.
Bernard v. Adams Exp. Co., p. 1051.
—— Coggs v.
Bernston v. Strang, pp. 1209, 1210.
Bernhardt v. West Pennsylvania R. Co., pp. 1786, 2686.
Bernheim, Louisville, etc., R. Co. v.
Bernheimer, Rosenbush v.
Bernstein v. Dry Docks, etc., R. Co., p. 2314.
—— v. Weir, p. 987.
Bernstine v. Express Co., p. 495.
Berry v. Atlantic Railway, pp. 2806, 2865.
—— v. Carolina, etc., Railway, pp. 2417, 2419.
—— v. Chicago, etc., R. Co., pp. 1272, 1321, 1365, 1368, 1399, 1432, 1478, 1481.
—— Cooper v.
Berry v. Cooper, pp. 948, 961, 1038, 1040.
—— De Witt v.
—— Florida Cent., etc., R. Co. v.
—— Florida, etc., R. Co. v.
—— Galveston, etc., R. Co. v.
—— Houston, etc., R. Co. v.
—— Kansas, etc., R. Co. v.
—— Louisville, etc., R. Co. v.
—— v. Louisville, etc., R. Co., pp. 2509, 2511, 2512, 2514.
—— v. Missouri Pac. R. Co., pp. 1953, 2209, 2520, 2523, 2808.
—— Pennsylvania R. Co. v.
—— v. St. Louis Trans. Co., p. 2876.
—— St. Louis, etc., R. Co. v.
—— v. Southern R. Co., pp. 286, 287, 289, 292, 295, 304, 882.
—— Texas, etc., R. Co. v.
—— v. Utica, etc., St. R. Co., 73 N. E. 970, 181 N. Y. 198—p. 2157.
—— v. Utica, etc., St. R. Co., 78 N. Y. S. 542, 76 App. Div. 490—pp. 2321, 2860.
—— v. West Virginia, etc., R. Co., pp. 529, 564, 872, 890, 897, 899, 904, 907, 910, 946, 949, 970.
Berry, etc., Co., Adams Exp. Co. v.
Berryhill, St. Louis, etc., R. Co. v.
Berryman, Pittsburgh, etc., R. Co. v.
Bertellote v. Part of Cargo of Brimstone, p. 532.
Bertonneau v. Southern Pac. Co., p. 721.
Bertram v. People's R. Co., pp. 1888, 1894, 1896.
—— Western Union Tel. Co. v.
Berwind-White Coal Min. Co. v. Metropolitan Steamship Co., p. 3346.
Berwind, etc., Min. Co., Chicago, etc., R. Co. v.
Besecker v. Delaware, etc., R. Co., pp. 1793, 2833.
Bessemer, Alabama, etc., R. Co. v.
Bessemer, etc., R. Co., Hall v.
Bessenger v. Metropolitan St. R. Co., p. 2906.
Bessling & Co. v. Houston, etc., R. Co., pp. 326, 335, 454, 502, 508, 509, 979, 1016.
Best, Cleveland, etc., R. Co. v.
—— International, etc., R. Co. v.
—— v. Seaboard, etc., Railway, p. 166.
—— Texas, etc., R. Co. v.
Bethea v. Northeastern R. Co., pp. 984, 1629, 1632.
Bethmann v. Old Colony R. Co., pp. 1785, 2349.
Bettis v. Chicago, etc., R. Co., p. 2480.
—— Moss v.
Betts v. Chicago, etc., R. Co., 92 Iowa 343, 60 N. W. 623, 26 L. R. A. 248, 54 Am. St. Rep. 558—p. 1273.
—— v. Chicago, etc., R. Co., 150 Iowa 252, 129 N. W. 962—pp. 1395, 1441.
—— v. Farmers' Loan, etc., Co., pp. 1343, 1370.
—— v. Lehigh Valley R. Co., p. 2138.
—— v. Wilmington City R. Co., p. 2357.
Betz, Louisville, etc., R. Co. v.
—— v. Rhode Island Co., p. 2345.
Beuris, Ohio, etc., R. Co. v.
Bevard v. Lincoln Tract. Co., p. 1707.
Beverley v. Boston Elev. R. Co., pp. 2727, 2875, 2914.
Bevis v. Baltimore, etc., R. Co., pp. 3230, 3232, 3233.
Beyer v. Louisville, etc., R. Co., p. 2213.
Bibb v. Missouri, etc., R. Co., pp. 724, 822, 881.
Bibb Brown Corn Co. v. Atchinson, etc., R. Co., pp. 606, 619, 742, 743.
Bibolet, International, etc., R. Co. v.
Bickford v. Metropolitan Steamship Co., pp. 564, 565, 3902.
Bickley, Seddon v.
Bickley, etc., Co., Southern R. Co. v.
Biddle, Hestonville, etc., R. Co. v.
—— v. Hestonville, etc., R. Co., pp. 2524, 2531.
—— Kentucky Cent. R. Co. v.
Bidgood, Northern Alabama R. Co. v.
Bienville Water Supply Co. v. Mobile, p. 2641.
Bierce v. Red Bluff Hotel Co., pp. 1246, 1249.
Biessel, Mephams v.
Bigbee, etc., Packet Co. v. Mobile, etc., R. Co., p. 3752.
Bigby, Bates v.
Bigelow v. Chicago, etc., R. Co., pp. 423, 437, 468.
—— Georgia, etc., R. Co. v.
—— v. Heaton, p. 1164.
—— Rowley v.
—— v. West End, etc., R. Co., p. 1804.
Bigger, Louisville, etc., R. Co. v.
Biggie v. Chicago, etc., R. Co., p. 1781.
Biggs v. Barry, p. 1236.
Bigham, Texas, etc., R. Co. v.
Bigley, Varble v.
Big Sandy, etc., R. Co. v. Blankenship (Ky.), 118 S. W. 315—p. 2261.
—— v. Blankenship, 133 Ky. 438, 118 S. W. 316, 23 L. R. A., N. S., 345, 19 Am. & Eng. Ann. Cas. 264—pp. 2083, 2088, 2127.
—— Hurley v.
—— Jennings v.
Bigwood v. Boston, etc., St. R. Co., pp. 2675, 2780, 2885.
Bilby, St. Louis, etc., R. Co. v.
Bilinsky, Atchison, etc., R. Co. v.
Bill, Cooper v.
Billinger v. Clyde Steamship Co., pp. 1942, 1943, 1955.
Billings, Sherley v.
Billingsley, St. Louis, etc., R. Co. v.
Billington, Illinois Cent. R. Co. v.
Bills, Chicago, etc., R. Co. v.
—— Ingalls v.
—— v. New York Cent. R. Co., pp. 1290, 1358, 1383, 1477.
Bilotta v. Media, etc., R. Co., p. 1706.
Binder, West Chicago St. R. Co. v.
Bing v. Atlantic, etc., R. Co., p. 2704.
Bingemann v. International R. Co., p. 1647.
Bingenheimer, Chicago, etc., R. Co. v.
Bingham, Harmony v.
—— v. Lamping, pp. 575, 576.
—— Pittsburg, etc., R. Co. v.
—— Pittsburgh, etc., R. Co. v.
—— v. Rogers, pp. 3161, 3166.
—— v. San Pedro, etc., R. Co., pp. 1372, 1399, 1401, 1402.
Binghamton R. Co., Townsend v.
Birchard, Mann v.
—— Sargent v.
Birchfield, Norfolk, etc., R. Co. v.
—— Texas, etc., R. Co. v.
Birckhead v. Chesapeake, etc., R. Co., pp. 2588, 2605.
Bird v. Brown, p. 1218.
—— v. Cromwell, p. 788.
—— v. Georgia Railroad, pp. 513, 582, 3414.

Bird v. Railroads, pp. 949, 1147, 3261, 3330, 3331, 3352, 3363, 3377, 3378, 3381.
Bird of Paradise, The.
Birdwell, St. Louis, etc., R. Co. v.
Birge-Forbes Co., St. Louis, etc., R. Co. v.
Birley v. Gladstone, p. 714.
Birmingham v. Rochester City, etc., R. Co., p. 1811.
—— v. Rochester, etc., R. Co., p. 1850.
Birmingham Elect. R. Co. v. Clay, pp. 2151, 2815.
Birmingham Ore, etc., Co. v. Grover, p. 2589.
Birmingham R. Co. v. Anderson, p. 1850.
Birmingham R., etc., Co. v. Adams, p. 2585.
—— v. Anderson, 163 Ala. 72, 50 So. 1021—p. 2238.
—— v. Anderson, 3 Ala. App. 424, 57 So. 103—pp. 1491, 2571.
—— v. Baird, pp. 2058, 2059, 3075.
—— v. Barrett, 4 Ala. App. 347, 58 So. 760—pp. 1728, 2582, 2602.
—— v. Barrett (Ala.), 60 So. 262—p. 2235.
—— v. Baylor, p. 2641.
—— v. Bennett, p. 2582.
—— Bowie v.
—— v. Brannon, pp. 2148, 2333, 2655.
—— v. Butler, pp. 1709, 2620.
—— v. Bynum, pp. 1558, 2347, 2743, 2881.
—— v. Chastain, p. 2609.
—— v. Clay, p. 2648.
—— v. Coleman, pp. 2771, 3008, 3071.
—— Cutcliff v.
—— v. Dickerson, p. 2282.
—— v. Ellard, pp. 2750, 2929.
—— v. Enslen, p. 2751.
—— v. Fisher, pp. 2582, 2583, 2613, 2862, 3000.
—— v. Girod, pp. 2283, 2344, 2358, 2938.
—— v. Glenn, pp. 2017, 2058, 2599, 2649, 2862, 2868, 3064, 3065.
—— v. Glover, pp. 2585, 2597.
—— v. Goldstein, p. 2608.
—— v. Gonzalez, pp. 2281, 2590.
—— v. Haggard, pp. 2585, 2647.
—— v. Handy, pp. 2348, 2596.
—— v. Harden, pp. 2351, 2357, 2361, 2395, 2609.
—— v. Hawkins, pp. 1894, 2968.
—— v. Hunnicutt, pp. 2578, 2583, 2602, 2757.
—— v. James, pp. 2114, 2175, 2235, 2255, 2380, 2989, 2991.
—— Jefferson v.
—— Johnson v.
—— v. Jordan, pp. 2583, 2589, 2636.
—— v. Jung, pp. 1898, 1899, 1903, 1904, 2064, 2306, 2318, 2333, 2369, 2584, 2939.
—— Kennedy v.
—— v. King, pp. 2597, 2920.
—— v. Landrum, pp. 1805, 2273, 2275, 2364, 2732, 2998, 2999.
—— v. Lee, 153 Ala. 79, 45 So. 292—pp. 1899, 1904, 2281, 2332, 2581, 2745, 2967.
—— v. Lee, 153 Ala. 386, 45 So. 164—pp. 2475, 3031.
—— v. Lide, pp. 2319, 2395, 2649, 2912.
—— v. McCurdy, pp. 2585, 2598, 2664.
—— v. McDaniel, p. 2574.
—— v. McDonough, pp. 190, 196, 200, 1595, 2466, 2630, 2854.
—— v. McGinty, pp. 1889, 1901, 2596, 2658, 2906.
Birmingham R., etc., Co. v. Mason, 54 So. 207, 137 Ala. 342—pp. 2526, 2610.
—— v. Mason, 144 Ala. 387, 39 So. 590—p. 2916.
—— v. Mayo, p. 2974.
—— Melton v.
—— v. Mindler, pp. 2281, 2282.
—— v. Moore, 148 Ala. 115, 42 So. 1024—pp. 2578, 2579, 2584, 2636, 2697, 3001.
—— v. Moore, 151 Ala. 327, 43 So. 841—pp. 2575, 2583, 2721.
—— v. Moore, 163 Ala. 43, 50 So. 115—pp. 2862, 2989.
—— v. Nolan, pp. 3057, 3058.
—— v. Norris, pp. 1518, 1899, 2635.
—— v. Oden, p. 2584.
—— v. Oldham, pp. 2277, 2278.
—— v. Parker, 156 Ala. 251, 47 So. 138—pp. 2589, 2599.
—— v. Parker, 161 Ala. 248, 50 So. 55—pp. 2017, 2047, 2606, 2607.
—— v. Pritchett, p. 2903.
—— v. Rutledge, p. 2763.
—— v. Sawyer, pp. 1580, 1720, 2521, 2642.
—— v. Seaborn, pp. 1532, 1541, 1853, 1868, 2754.
—— v. Selhorst, pp. 2743, 2862.
—— Smith v.
—— v. Stallings, pp. 1595, 2122, 2420, 2466.
—— v. Stanfield, p. 2652.
—— Sweet v.
—— Tannehill v.
—— v. Tate, pp. 2620, 2623, 2624.
—— v. Taylor, 152 Ala. 105, 14 So. 580—p. 2751.
—— v. Taylor, 60 So. 979, 6 Ala. App. 661—pp. 2608, 2862.
—— v. Turner, pp. 1650, 2622, 2663, 3078, 3079, 3080, 3106.
—— Watkins v.
—— v. Weathers, pp. 2580, 2589.
—— v. Wilcox, pp. 2580, 2589, 2590.
—— v. Willis, p. 2357.
—— v. Wise, pp. 1516, 2582.
—— v. Wright, pp. 2581, 2584, 2611, 2631.
—— v. Yates, pp. 1988, 2220, 2281, 2583, 2608, 2653, 2890.
—— v. Yielding, pp. 190, 1595, 2122, 2466, 2483, 2622, 2625, 2630.
Birmingham, St. R. Co., Ricketts v.
Birmingham Union R. Co. v. Hale, pp. 2688, 3004.
—— Hill v.
—— v. Smith, pp. 1899, 1901, 1903, 2936.
Birmingham, etc., R. Co., Holmes v.
—— Jemison v.
Birney, Indianapolis, etc., R. Co. v.
—— v. Wabash, etc., R. Co., pp. 211, 471.
Bisch, Louisville, etc., R. Co. v.
Bischoff v. People's R. Co., pp. 1737, 2128, 2261.
Bishop v. Bishop, p. 2785.
—— Central Pass. R. Co. v.
—— v. Empire Transp. Co., 33 N. Y. Super. Ct. 99—p. 723.
—— v. Empire Transporting Co. (N. Y.), 48 How. Prac. 119—p. 321.
—— v. Illinois Cent. R. Co., pp. 2361, 2512, 2513, 2515, 2547, 2890.
—— P. & L. E. R. Co. v.
—— v. St. Paul City R. Co., pp. 1697, 1708, 1823, 1986.
—— Stockton v.
—— v. Stockton, p. 2036.
—— v. Union R. Co., p. 2518.
Bishopp, People v.
Bissel v. Campbell, p. 347.
—— v. Price, pp. 337, 1161, 3285, 3286, 3294, 3304.
Bissell, Adams v.
—— v. Michigan, etc., R. Co., pp. 417, 1509, 2091.
—— v. New York Cent. R. Co. (N. Y.), 29 Barb. 602—p. 2099.
—— v. New York Cent. R. Co., 25 N. Y. 442, 82 Am. Dec. 369—pp. 1368, 1850, 3161.
—— Sturgess v.
Bissett, Pensacola Elect. Co. v.
Bitterman, Louisville, etc., R. Co. v.
—— v. Louisville, etc., R. Co., pp. 1616, 1617, 1618, 3726.
Bivens, Michigan, etc., R. Co. v.
Bivings, Southern R. Co. v.
Bixby v. Deemar, p. 3915.
Bizzell, Louisville, etc., R. Co. v.
B. J. Williard, The.
Black v. Ashley, pp. 526, 728, 733, 749, 753, 765, 896, 3327, 3328, 3330, 4038.
—— v. Atlantic, etc., R. Co., pp. 191, 949, 1075, 1857, 1858, 3049, 3050, 3164, 3166, 3197
—— v. Baxendale, p. 660.
—— v. Boston Elev. R. Co., p. 2799.
—— v. Brooklyn City R. Co., pp. 1888, 2143, 2817.
—— v. Camden, etc., Transp. Co., pp. 833, 855.
—— v. Carrollton R. Co., p. 2036.
—— v. Charleston, etc., R. Co., pp. 3056, 1681.
—— v. Chicago, etc., R. Co., pp. 728, 733, 738, 746, 747.
—— Dallas, etc., St. R. Co. v.
—— v. Goodrich Transp. Co., pp. 815, 822, 823, 949, 1076, 3166.
—— Illinois Cent. R. Co. v.
—— v. Metropolitan St. R. Co., 117 S. W. 1142, 217 Mo. 672—p. 2924.
—— v. Metropolitan St. R. Co., 162 Mo. App. 90, 144 S. W. 131—p. 2583.
—— v. New York, etc., R. Co., pp. 2121, 2860.
—— Pacific Exp. Co. v.
—— v. Second Ave. R. Co., p. 2826.
—— Texas, etc., R. Co. v.
—— Wabash, etc., R. Co. v.
—— v. Wabash, etc., R. Co., pp. 945, 1084, 1085, 1392, 1408, 1413.
—— v. Wilmington, etc., R. Co., pp. 305, 306, 309, 337, 338.
Black Diamond Coal, etc., Co. v. Railroad Comm., p. 227.
Black Warrior, Turner v.
Blackburn v. Adams Exp. Co., p. 3521.
—— v. Alabama, etc., R. Co., p. 3047.
—— St. Louis, etc., R. Co. v.
Blackman v. Pierce, pp. 1162, 1219, 1237.
—— United States Exp. Co. v.
Blackmer, etc., Pipe Co. v. Mobile, etc., R. Co., pp. 796, 1099, 1110, 1113, 3331, 3334, 3335, 3342.
Blackmon, Nashville, etc., Railway v.
Blackmore v. Missouri Pac. R. Co., p. 3169.
—— v. Toronto St. R. Co., p. 1588.
—— v. Toronto, etc., R. Co., p. 1577.
Blackstock v. New York, etc., R. Co., pp. 246, 608, 627, 628.
Blackwell v. Metropolitan, etc., R. Co., p. 1830.
—— v. O'Gorman Co., pp. 2160, 2333, 2901, 2902.
—— v. Southern Pac. Co., p. 1055.

Blades v. Des Moines City R. Co. (Iowa), 113 N. W. 922—pp. 2332, 2875.
—— v. Des Moines City R. Co., 146 Iowa 580, 123 N. W. 1057—p. 2386.
Blaidsell Co. v. Citizens' Nat. Bank, pp. 374, 377, 395, 396, 397, 404.
Blaikston v. Davies, Turner & Co., p. 3369.
Blair v. Brooklyn, etc., R. Co., p. 1898.
—— v. Erie R. Co., pp. 1577, 1578, 2105.
—— Evans v.
—— v. Jeffries, pp. 514, 520, 581.
—— v. Lewiston, etc., St. Railway, pp. 2175, 2321, 2342.
—— Louisville, etc., R. Co. v.
—— v. Milwaukee, etc., R. Co., p. 2682.
—— v. Philadelphia, etc., Co., pp. 1502, 1889.
—— v. Sioux, etc., R. Co. (Iowa), 73 N. W. 1053—pp. 83, 86, 91.
—— v. Sioux, etc., R. Co., 109 Iowa 369, 80 N. W. 673—pp. 26, 130, 167.
—— v. Wells Fargo & Co., pp. 856, 948, 950, 1272, 1345, 1348, 1400, 1475, 1478, 3303, 3415, 3763.
Blaisdell v. Connecticut River R. Co., p. 895.
—— v. Long Island R. Co. (Sup.), 131 N. Y. S. 14—p. 2527.
—— v. Long Island R. Co., 136 N. Y. S. 768, 152 App. Div. 218—pp. 2527, 2701.
Blaisdell & Co. v. White & Co., pp. 395, 396, 404.
Blake v. Burlington, etc., R. Co., 78 Iowa 57, 42 N. W. 580—p. 2218.
—— v. Burlington, etc., R. Co., 89 Iowa 8, 56 N. W. 405, 21 L. R. A. 559—pp. 1953, 2218.
—— v. Camden Interstate R. Co., p. 3003.
—— v. Kansas, etc., R. Co., pp. 2039, 2497.
—— Mahon v.
—— Winona, etc., R. Co. v.
Blakely, Mobile, etc., R. Co. v.
—— Walsh v.
Blakemore, P. C. & St. L. R. Co. v.
—— Pittsburgh, etc., R. Co. v.
Blakiston v. Davies, Turner & Co., pp. 3, 479.
Blakney v. Seattle Elect. Co., p. 2251.
Blalack, Missouri, etc., R. Co. v.
Blanchard v. Isaacs, pp. 268, 269, 277, 285.
—— v. Page, pp. 333, 337, 354, 370, 411, 490, 1148, 1149, 1150, 1151.
Blanchette v. Holyoke St. R. Co., pp. 1708, 2003, 2762, 3034.
Bland v. Adams Exp. Co., pp. 727, 750.
—— St. Louis, etc., R. Co. v.
—— v. Southern Pac. R. Co., 55 Cal. 570, 36 Am. Rep. 50—p. 2492.
—— v. Southern Pac. R. Co., 65 Cal. 626, 4 Pac. 672—p. 3080.
Blank v. Illinois Cent. R. Co., 182 Ill. 332, 55 N. E. 332—pp. 1578, 2100, 2105.
—— v. Illinois Cent. R. Co., 80 Ill. App. 475—p. 99.
Blankenship, Big Sandy, etc., R. Co. v.
Blankenstein, Adams v.
Blanton, etc., Co., I & G. N. R. Co. v.
—— International, etc., R. Co. v.
Blatcher v. Philadelphia, etc., R. Co., pp. 1367, 1368, 2880, 3290.
Bleecker v. Colorado, etc., R. Co., pp. 2040, 3064, 3065.
Bleich, Adams Exp. Co. v.
Bleier v. Bushwick R. Co., p. 2349.
Bleiwise v. Pennsylvania R. Co., p. 1842.
Blevins v. Atchison, etc., R. Co., pp. 2113, 2243.
Blew v. Philadelphia Rapid Trans. Co., p. 2700.
Bliss, The A. M.
Blitch v. Central Railroad, pp. 2188, 2220, 2237.
Blitz v. Union Steamboat Co., pp. 436, 3871.
Bliven v. Hudson River R. Co. (N. Y.), 35 Barb. 188—pp. 573, 574.
—— v. Hudson River R. Co., 36 N. Y. 403—pp. 547, 574, 576, 577, 579.
Bloch, Merchants' Despatch Transp. Co. v.
—— Merchants', etc., Co. v.
—— Merchants', etc., Transp. Co. v.
Bloch Bros., Merchants' Transp. Co. v.
Blocher, Baltimore, etc., R. Co. v.
Block v. Fitchburg R. Co., p. 3311.
—— Merchants' Despatch Transp. Co., p. 1268.
—— v. Third Ave. R. Co., p. 2723.
—— v. Trent, p. 3190.
—— v. United States Exp. Co., p. 580.
Blocker v. Whittenburg, pp. 745, 747.
Blodgett v. Abbot, pp. 616, 617, 633, 634, 681, 3415.
—— v. Bartlett, pp. 1876, 2172.
Blomsness v. Puget Sound Elect. Railway, pp. 1529, 2044.
Blondel v. St. Paul City R. Co., p. 2223.
Blood, Schmidt v.
Bloom v. Richards, p. 1861.
—— v. Sioux City Tract. Co., pp. 1701, 1805, 2274.
—— Texas, etc., R. Co. v.
Bloomer, Graff v.
—— Pittsburgh R. Co. v.
Bloomingdale v. Durell, p. 843.
—— v. Wilsons, etc., Line, pp. 3875, 3933.
Bloomingdale, etc., Co. v. Memphis, etc., R. Co., pp. 1212, 1213, 1222, 1229, 1246, 1247, 1249, 1250.
Bloomington, P. & J. Electric R. Co., Cleary v.
Bloomington, etc., Railway v. Zimmerman, p. 2357.
Blossom v. Champion, pp. 480, 532.
—— v. Dodd, pp. 324, 931, 946, 965, 966, 991, 1003, 1004, 1007, 1018, 3163, 3164.
—— v. Griffin, pp. 285, 286, 287, 772, 882, 3369, 3370.
Blount v. Pennsylvania R. Co., p. 3353.
Blowers & Co. v. Canadian Pac. R. Co., pp. 551, 563, 581.
Blue v. Pennsylvania R. Co., p. 2354.
Blue Grass Tract. Co. v. Skillman, p. 1963.
Blue Hill St. R. Co., Dugan v.
Blue Ridge Collection Agency v. Southern R. Co., p. 155.
Blue Ridge Light, etc., Co. v. Price, p. 2876.
Blue Ridge R., Co., Adger v.
—— Davis Bros. v.
Blumenthal & Co., Mullin v.
Blum, Bonner v.
—— Louisville R. Co. v.
—— v. Monahan, p. 821.
Blum v. Southern Pullman Palace Car Co., pp. 3201, 3202, 3215, 3217, 3218, 3221.
—— v. The Caddo, pp. 477, 488, 494.
—— Yazoo, etc., R. Co. v.
Blum & Co. v. Marks, pp. 1214, 1215, 1219.
Blum Co., Yazoo, etc., R. Co. v.
Blumantle v. Fitchburg R. Co., pp. 3133, 3150.
Blumenthal v. Brainerd, pp. 6, 355, 488, 729, 850, 855, 897, 901, 905, 1003, 1004, 1005, 1007, 1008, 1009.
—— v. Maine Cent. R. Co., pp. 3124, 3151, 3152, 3193.
—— New York, etc., R. Co. v.
—— v. Union Elect. Co., p. 2766.
Blunt, Sarjeant v.
Blumenthal v. Southern R. Co., p. 239.
Blyth, Oregon, etc., R. Co. v.
Blythe v. Denver, etc., R. Co., pp. 732, 738.
Boal, Cincinnati, etc., Mail Line Co. v.
Board v. Christie Grain, etc., Co., p. 1617.
—— v. Cralle, pp. 1696, 2076.
—— Kansas, etc., R. Co. v.
—— Louisville, etc., R. Co. v.
—— New York, etc., R. Co. v.
—— Pennsylvania R. Co. v.
—— Pittsburgh, etc., R. Co. v.
—— Public Service R. Co. v.
—— Southern Pac. Co. v.
—— v. Spalding, p. 3586.
—— United States Fidelity, etc., Co. v.
Board of Corp. Comm'rs, Matthews v.
Boardman, Marshall v.
Boatmen's Sav. Bank v. Western, etc., R. Co., pp. 378, 387, 555, 558, 3274.
Boatmen's Sav. Inst., Fontaine v.
Boaz v. Central R., etc., Co., pp. 797, 1287, 1365, 1367, 1378, 1284, 1430.
—— Toledo, etc., R. Co. v.
Bobbink v. Erie R. Co., pp. 896, 1021.
Bobbitt v. United R. Co., p. 2595.
Bobolink, The.
Bock, Hauterman v.
Bockelcamp v. Lackawanna, etc., R. Co., pp. 1884, 1900.
Boddy, Street Railroad v.
Boden v. Boston Elevated R. Co., pp. 1515, 2305.
Bodley, Ottawa v.
Boehl v. Chicago, etc., R. Co., pp. 816, 818, 821, 828, 1074, 1362, 1363, 1388, 1389, 1457.
Boehm v. Duluth, etc., R. Co., pp. 1544, 1547, 1858, 2454, 2480, 3021, 3079.
Boer, El Paso Elect. R. Co. v.
Boering v. Chesapeake Beach R. Co., 20 App. D. C. 500—pp. 2094, 2103, 2837.
—— v. Chesapeake Beach R. Co., 24 S. Ct. 515, 193 U. S. 442, 48 L. Ed. 742—pp. 2103, 2105.
Boesen, Omaha St. R. Co. v.
—— v. Omaha St. R. Co., p. 2164.
—— Boetgen v. New York, etc., R. Co., p. 2324.
Bogard, Illinois Cent. R. Co. v.
—— v. Illinois Cent. R. Co., pp. 1491, 1492, 1495, 1497, 2018, 2030
Bogardus v. Metropolitan St. R. Co., p. 2631.
Bogart v. State, p. 3569.
Boger, Chicago, etc., R. Co. v.
Boggess v. Chesapeake, etc., R. Co., pp. 1544, 1548, 2314, 2486, 2619, 2625.
Boggett v. Baltimore, etc., R. Co., p. 1638.
Boggs, Chicago, etc., R. Co. v.

Bogg v. Martin (Ky.), 13 B. Mon. 239—p. 1164.
—— v. Martin (Ky.), 13 B. Mon. 243—p. 1153.
—— Texas, etc., R. Co. v.
Bogle, Mobile, etc., R. Co. v.
Bohannan v. Hammond, pp. 727, 732, 748, 752.
Bohannon, International, etc., R. Co. v.
—— v. Southern R. Co., pp. 2490, 3018.
Bohn, East Saginaw City R. Co. v.
Boice v. Des Moines City R. Co., pp. 1893, 2816.
—— v. Hudson River R. Co., pp. 1624, 1625, 1634.
—— v. Ulster, etc., R. Co., p. 2880.
Boies v. Hartford, etc., R. Co., pp. 820, 917.
Boikens v. New Orleans, etc., R. Co., p. 1889.
Boland, Hastings v.
Boleman, Texas, etc., R. Co. v.
Bolen v. Seaboard, etc., Railway, p. 163.
Boles, Illinois Cent. R. Co. v.
—— Oklahoma R. Co. v.
Bolgiano, El Paso Elect. R. Co. v.
Bolin v. Huffnagle, p. 1241.
Boling v. St. Louis, etc., R. Co., pp. 1612, 1613, 1622, 1623, 1632, 3085.
Bollam, State v.
Bolles v. Kansas, etc., R. Co., p. 2425.
—— v. Lehigh Valley R. Co., pp. 773, 962, 1022.
—— Merchants' Despatch Transp. Co. v.
Bolling, Houston, etc., R. Co. v.
—— Missouri Pac. R. Co. v.
—— v. St. Louis, etc., R. Co., pp. 2475, 2476, 3319.
Bolling & Bro., Pine Bluff Iron Works v.
Bollman, Skilling v.
Bolster, Wilkie v.
Bolton, Chicago, etc., R. Co. v.
—— Gulf, etc., R. Co. v.
—— v. Lancashire, etc., R. Co., pp. 1228, 1232, 1234, 1242.
—— McIntire R. Co. v.
—— v. Missouri Pac. R. Co., pp. 2105, 2217, 2640, 2999.
Bolton Steam Shipping Co. v. Crossman, p. 3893.
Bomar v. Maxwell, pp. 3109, 3114, 3115, 3116, 3118, 3124, 3125, 3126, 3129, 3131, 3142, 3167.
Bommarius v. New Orleans R., etc., Co., p. 1902.
Bonar v. Merchants' Co., p. 608.
Bonasera v. Buffalo, etc., Tract. Co., p. 1974.
Bonaud, Savannah, etc., R. Co. v.
Bonce v. Dubuque St. R. Co., pp. 1716, 1737, 1749.
Bond v. Chicago, etc., R. Co., 110 Mo. App. 131, 84 S. W. 124—p. 2655.
—— v. Chicago, etc., R. Co., 122 Mo. App. 207, 99 S. W. 30—p. 2359.
—— Cowan v.
—— Reber v.
—— Texas, etc., R. Co. v.
—— v. Wabash, etc., R. Co., p. 91.
Bonds-Foster Lumber Co. v. Northern Pac. R. Co., pp. 361, 367, 542.
Bone, St. L., I. M. & S. R. Co. v.
—— St. Louis, etc., R. Co. v.
Boner v. Merchants' Steamboat Co., p. 728.
Bontiglio v. Lake Shore, etc., R. Co., pp. 816, 1036, 1457.
Bonified, Chicago, etc., R. Co. v.
Bonneau v. North Shore R. Co., pp. 1720, 2696, 2980, 2981.
Bonner v. Blum, pp. 3115, 3132, 3153.
—— v. De Mendoza, p. 3156.
—— v. Glenn, pp. 1953, 2172, 2174.
—— v. Grumbach, pp. 753, 2287, 2694, 3146, 3147, 3155, 3156.
—— Hale v.
—— v. Wingate, pp. 1701, 1811.
Bonney v. Buchwicke R. Co., p. 2833.
Bonstead, Morgan Envelope Co. v.
Borsteel v. Vanderbilt, p. 2651.
Book v. Chicago, etc., R. Co., p. 2457.
Booker, Van Casteel v.
Books, Pennsylvania R. Co. v.
Boon & Co. v. Belfast, pp. 751, 1017.
—— The Belfast v.
Boone, Baltimore, etc., Turnpike Road v.
—— v. Oakland Transit Co., pp. 2288, 2743.
Boone Suburban R. Co., Cotant v.
Boorman v. American Exp. Co., pp. 987, 1007, 1030, 1034, 1044, 1076, 1118.
Booth, Gulf, etc., R. Co. v.
—— v. Lloyd, p. 3585.
—— Lowe v.
—— v. Missouri, etc., R. Co., p. 505.
—— Pullman Palace Car Co. v.
—— Smith v.
—— Southern Pac. Co. v.
—— v. Spuyten, etc., Mill Co., p. 3052.
—— The G. R.
Boothe, Galveston, etc., R. Co. v.
Booton, Gulf, etc., R. Co. v.
Boozer, Houston, etc., R. Co. v.
Borches, Radel Co. v.
Borda v. Philadelphia, etc., R. Co., pp. 1176, 1177, 1183.
Bordeaux v. Erie R. Co., pp. 1599, 1601, 2468.
Borden, Galveston, etc., R. Co. v.
—— Gilbert Transp. Co. v.
Borders, Chesapeake, etc., R. Co. v.
Boren, Texas, etc., R. Co. v.
—— The G. B.
Boring, Montgomery, etc., R. Co. v.
Bork, New York, etc., R. Co. v.
Born, Texas, etc., R. Co. v.
Born Steel Range Co., Southern R. Co. v.
Bornstein v. Lans, p. 1140.
Borough, Simpson-Crawford Co. v.
Borough of Norwood v. Western Union Tel. Co., p. 3550.
Boscowitz v. Adams Exp. Co., pp. 779, 834, 981, 996, 1033, 1046, 1049.
Boshear, St. Louis, etc., R. Co. v.
Bosley v. Baltimore, etc., R. Co., pp. 822, 1075, 1363, 1459, 1479.
Bosqui v. Sutro R. Co., pp. 1737, 2675, 2761, 2868, 2954.
Boss v. Atlantic Coast Line R. Co., pp. 3396, 3408.
—— v. Providence, etc., R. Co., pp. 1736, 1924.
Boster v. Chesapeake, etc., R. Co., pp. 191, 194, 195, 200, 2123, 2468, 2503, 2564, 3099.
Bostock, Seaboard, etc., Railway v.
Boston, Coast Line R. Co. v.
—— Peverly v.
—— Rosen v.
—— Townsend v.
Boston & A. R. Co. v. Boston & L. R. Co., p. 3610.
Boston & L. R. Co., Boston & A. R. Co. v.
Boston & Maine R. R., McLoon v.
Boston Dist. Messenger Co., Haskell v.
Boston Elev. R. Co., Ahern v.
—— Anjou v.
—— Anshen v.
—— Beattie v.
—— Bentson v.
—— Beverley v.
—— Black v.
—— Boden v.
—— Brisbin v.
—— Burns v.
—— Bursteen v.
—— Burus v.
—— Carroll v.
—— Cohen v.
—— Conroy v.
—— Coy v.
—— Craft v.
—— Craig v.
—— Crowley v.
—— Cutts v.
—— Donahoe v.
—— Duchemin v.
—— Eldredge v.
—— Eldridge v.
—— Farrington v.
—— Gagnon v.
—— Gardner v.
—— Garland v.
—— Glennen v.
—— Hamilton v.
—— Hannon v.
—— Heshion v.
—— Hillman v.
—— Hines v.
—— Hogner v.
—— Holliday v.
—— Horgan v.
—— Hotenbrink v.
—— Hunt v.
—— James v.
—— Jameson v.
—— Kelley v.
—— Kilduff v.
—— Krock v.
—— Lanci v.
—— Larson v.
—— Lauchtamacher v.
—— Lockwood v.
—— Lyons v.
—— McClinchy v.
—— McCumber v.
—— McDermott v.
—— McDonough v.
—— McGann v.
—— McGarry v.
—— McLaren v.
—— Marshall v.
—— Martin v.
—— Meade v.
—— Millmore v.
—— Minihan v.
—— Mullin v.
—— Niland v.
—— Pickford v.
—— Pike v.
—— Plummer v.
—— Rand v.
—— Sanderson v.
—— Seale v.
—— v. Smith, pp. 1893, 1993.
—— Stevens v.
—— Steverman v.
—— McCarthy v.
—— Sullivan v.
—— Thomas v.
—— Tompkins v.
—— Tupper v.
—— Twiss v.
—— Weeks v.
—— Welch v.
—— Work v.
—— Yancey v.
—— Yancy v.
—— Zamore v.
Boston Marine Ins. Co. v. Metropolitan Redwood Lumber Co., pp. 4084, 4085.
—— Richelieu, etc., Nav. Co. v.
Boston Railroad, State v.
Boston Steamship Co., Scott v.
Boston, etc., Corp., Watts v.
Boston, etc., Railroad, Aigen v.
—— Bachant v.

Boston, etc., Railroad, Boucher *v.*
—— Bradford *v.*
—— Brooks *v.*
—— Bullard *v.*
—— Clement *v.*
—— Collins *v.*
—— Commonwealth *v.*
—— Converse *v.*
—— Duntley *v.*
—— Eaton *v.*
—— Elkins *v.*
—— Emerson *v.*
—— Emery *v.*
—— Faulkner *v.*
—— Fisher *v.*
—— Flaherty *v.*
—— Fletcher *v.*
—— Flint *v.*
—— Floytrup *v.*
—— Gilman *v.*
—— Goodwin *v.*
—— Gray *v.*
—— Hackett *v.*
—— Hett *v.*
—— Hooker *v.*
—— *v.* Hooker, pp. 3607, 3617, 3743, 3750, 3762, 3763.
—— Hull *v.*
—— Kambour *v.*
—— Keefe *v.*
—— Kellogg *v.*
—— Lessard *v.*
—— Little *v.*
—— McDonald *v.*
—— Marr *v.*
—— Mayall *v.*
—— Mayo *v.*
—— Moriarty *v.*
—— Moses *v.*
—— Nealand *v.*
—— Norway Plains Co. *v.*
—— Nugent *v.*
—— Nute *v.*
—— O'Laughlin *v.*
—— *v.* Ordway, p. 3182.
—— Parker *v.*
—— Piper *v.*
—— Pudor *v.*
—— Savageau *v.*
—— Shapiro *v.*
—— Silva *v.*
—— Smith *v.*
—— Spofford *v.*
—— Spotford *v.*
—— State *v.*
—— Stevens *v.*
—— Washburn-Crosby Co. *v.*
—— Wells *v.*
—— Weston *v.*
—— Whittemore *v.*
Boston, etc., R. Co., Allerton *v.*
—— Alling *v.*
—— Baker *v.*
—— Barden *v.*
—— Barry *v.*
—— *v.* Bartlett, pp. 1670, 1672.
—— Beers *v.*
—— Bigwood *v.*
—— Brewer Lumber Co. *v.*
—— Briggs *v.*
—— Brooks *v.*
—— *v.* Brown (Mass.), 15 Gray 223—p. 1167.
—— *v.* Brown, 177 Mass. 65, 58 N. E. 189, 52 L. R. A. 418—p. 100.
—— Carpenter *v.*
—— Carroll *v.*
—— Carter *v.*
—— Cass *v.*
—— Cheney *v.*
—— *v.* Chipman, p. 1627.
—— Claflin *v.*
—— Commonwealth *v.*
—— Dawson *v.*
—— Dewire *v.*
—— Doherty *v.*
—— Doyle *v.*
—— Dunham *v.*
—— Duntley *v.*
—— Eaton *v.*
—— Elkins *v.*
—— England *v.*
Boston, etc., R. Co., Farnon *v.*
—— Files *v.*
—— Fisher *v.*
—— Forbes *v.*
—— Forsyth *v.*
—— Foss *v.*
—— Fox *v.*
—— Fuller *v.*
—— Gaffman *v.*
—— Gould *v.*
—— Green *v.*
—— Heinlien *v.*
—— Hendrick *v.*
—— Heyward *v.*
—— Hickey *v.*
—— Hill *v.*
—— Inness *v.*
—— Johnson *v.*
—— Jones *v.*
—— June *v.*
—— Keefe *v.*
—— Keeley *v.*
—— Kuhlen *v.*
—— Lane *v.*
—— Latham *v.*
—— Lichtenhein *v.*
—— McDonough *v.*
—— McNamara *v.*
—— Marshall *v.*
—— Massell *v.*
—— Merrill *v.*
—— *v.* Miller, pp. 2642, 2921.
—— Mohr *v.*
—— Moreland *v.*
—— Moses *v.*
—— Murdock *v.*
—— Najac *v.*
—— O'Brien *v.*
—— O'Dougherty *v.*
—— Peebles *v.*
—— People *v.*
—— Planz *v.*
—— Pomeroy *v.*
—— Powers *v.*
—— *v.* Proctor, pp. 1624, 1858.
—— Quimby *v.*
—— Ramsden *v.*
—— Redigan *v.*
—— Reynolds *v.*
—— Robertson *v.*
—— Sargent *v.*
—— School Dist. *v.*
—— *v.* Shanly, pp. 222, 236, 238.
—— Shannon *v.*
—— Snowden *v.*
—— Somer *v.*
—— Sonier *v.*
—— Stewart *v.*
—— *v.* Stockwell, pp. 2338, 2880, 2884.
—— *v.* Sullivan, p. 100.
—— Swetland *v.*
—— Thompkins *v.*
—— Torrey *v.*
—— *v.* Trafton, p. 1625.
—— Twiss *v.*
—— United States *v.*
—— Wadsworth *v.*
—— *v.* Warrior Mower Co., pp. 495, 681.
—— Washburn-Crosby Co. *v.*
—— Welch *v.*
—— Wheelwright *v.*
—— Whicher *v.*
—— *v.* Whitcher, p. 1151.
—— White *v.*
—— Wiggin *v.*
—— Winslow *v.*
—— Wright *v.*
—— Young *v.*
Boston, etc., R. Corp., Bancroft *v.*
—— Caswell *v.*
—— Chaffee *v.*
—— Commonwealth *v.*
—— Darling *v.*
—— Dunbar *v.*
—— Hall *v.*
—— Hill Mfg. Co. *v.*
—— Malone *v.*
—— Newcomb *v.*
—— Rice *v.*
—— Sargent *v.*
Boston, etc., R. Corp., Schopman *v.*
—— Stevens *v.*
—— Thomas *v.*
—— Treat *v.*
—— Watts *v.*
—— Western R. Corp., p. 114.
Boston, etc., Railway, Foley *v.*
Boston, etc., Steamship Co., Butler *v.*
—— Crozier *v.*
—— Dodge *v.*
Boston, etc., St. R. Co., Bigwood *v.*
—— *v.* Carter *v.*
—— Cunningham *v.*
—— Foley *v.*
—— Hamilton *v.*
—— Jones *v.*
—— Kuhlen *v.*
—— Marshall *v.*
—— Martin *v.*
—— Mason *v.*
—— Rose *v.*
Bostwick *v.* Baltimore, etc., R. Co. (N. Y.) 55 Barb. 137—pp. 321, 323, 451.
—— *v.* Baltimore, etc., R. Co., 45 N. Y. 712—pp. 325, 743, 997, 3881.
—— Brunswick, etc., R. Co. *v.*
Boswell *v.* Hudson River R. Co., p. 946.
Bosworth *v.* Carr, etc., R. Co., pp. 522, 523, 888, 3259.
—— Chicago, etc., R. Co. *v.*
—— *v.* Chicago, etc., R. Co., p. 3286.
—— Huntting Elevator Co. *v.*
—— Rau *v.*
—— *v.* Walker, p. 2486.
Botany Worsted Mills, Knott *v.*
—— *v.* Knott, 76 Fed. 582—p. 4059.
—— *v.* Knott, 82 Fed. 471, 27 C. C. A. 326—pp. 4018, 4058, 4069.
—— *v.* Knott, 21 S. Ct. 30, 179 U. S. 69, 45 L. Ed. 90—pp. 4069, 4071.
Bothlingk *v.* Inglis, p. 1246.
Botsford, Law *v.*
—— Union Pac. R. Co. *v.*
Bottorff, Louisville, etc., Packet Co. *v.*
Botts, Galveston, etc., R. Co. *v.*
—— San Antonio, etc., R. Co. *v.*
Bottum *v.* Charleston, etc., R. Co., pp. 760, 761, 763, 832.
Boucher *v.* Boston, etc., Railroad, pp. 1683, 2682, 2792.
Boudrou, Thirteenth, etc., R. Co. *v.*
Bough *v.* Metropolitan St. R. Co., p. 2631.
Boughman *v.* Louisville, etc., R. Co., p. 485.
Boughton, Wright *v.*
Bouker *v.* Long Island R. Co., pp. 246, 621.
Bouknight, Washington-Virginia R. Co. *v.*
Boulfrois *v.* United Tract. Co., pp. 2116, 2153, 2249.
Boulton, White *v.*
Bourgo *v.* White, p. 1840.
Bourgogne, La *v.*
Bourland *v.* Choctaw, etc., R. Co., pp. 639, 643, 644, 645, 646, 647, 648.
Bourne *v.* Catliff, p. 892.
—— Louisville, etc., R. Co. *v.*
Bowden *v.* Atlantic, etc., R. Co., pp. 2019, 2786.
—— *v.* Fargo, pp. 821, 823.
Bowdle *v.* Detroit, etc., R. Co., pp. 1832, 2961.
Bowdon *v.* Atlantic, etc., R. Co., pp. 517, 833, 895.
Bowen, Lee *v.*
—— *v.* New York Cent. R. Co., p. 1725.
—— *v.* Sizer, pp. 3955, 3966, 3968.
—— *v.* Southern R. Co., p. 2280.

Bowers v. Kansas, etc., R. Co., p. 3095.
—— v. Pittsburgh, etc., Railroad, pp. 1627, 1636.
—— v. Richmond, etc., R. Co., p. 2568.
Bowers Dredging Co., McRae v.
Bowie v. Baltimore, etc., R. Co., 1 MacArthur (8 D. C.) 94—pp. 273, 274, 276, 288, 1281.
—— v. Baltimore, etc., R. Co., 1 MacArthur (8 D. C.), 609—pp. 1332, 1377.
—— v. Birmingham R., etc., Co., pp. 1944, 1945, 2650.
—— v. Buffalo, etc., R. Co., p. 898.
—— Gallagher v.
—— v. Greenville St. R. Co., p. 2617.
Bowker, Kelley v.
—— Wilmshurst v.
Bowlby, Brandt v.
Bowlds, Louisville, etc., R., Co. v.
Bowler, etc., Co., Toledo, etc., R. Co. v.
—— v. Toledo, etc., R. Co., pp. 3125, 3141, 3149.
Bowles, Missouri, etc., R. Co. v.
—— Richmond K., etc., Co. v.
—— v. Rome, etc., R. Co., p. 2813.
Bowlin v. Nye, pp. 456, 796, 875.
—— Texas, etc., R. Co. v.
—— v. Union Pac. R. Co., p. 2694.
Bowling Green R. Co., Lewis v.
Bowman, Bender & Co. v.
—— v. Chicago, etc., R. Co., pp. 3418, 3419, 3420, 3421, 3427, 3429, 3439, 3440, 3448, 3450, 3480, 3494, 3538, 3539, 3549, 3566, 3568.
—— v. Hilton, pp. 733, 749, 772, 773, 822, 1154, 1157, 1161, 3901, 3914.
—— Kirkland v.
—— Kirkman v.
—— v. Teall, pp. 634, 635, 798.
—— Whitmore v.
Bowne, Continental Coal Co. v.
—— McIntyre v.
Bowring v. Wabash R. Co., pp. 1050, 1407.
Bowring & Co., National Board v.
Bowsher v. Chicago, etc., R. Co., p. 2470.
Box v. Atlantic, etc., R. Co., p. 2655.
Boyce v. Anderson, pp. 730, 1501, 1684, 1714.
—— v. California Stage Co., p. 2692.
—— Chicago, etc., R. Co. v.
—— Gulf, etc., R. Co. v.
—— v. Manhattan K. Co., p. 1783.
Boyd, Charleston, etc., R. Co. v.
—— Grand Rapids, etc., R. Co. v.
—— Hopkins v.
—— Michigan Cent. R. Co. v.
—— Michigan K. Co. v.
—— v. Mosely, pp. 1221, 1227.
—— v. Moses, pp. 243, 244.
—— North Chicago St. R. Co. v.
—— Rock Creek Steamboat Co. v.
—— v. Spencer, pp. 1612, 1613, 1622, 1626, 1631, 2092, 2093, 2446.
—— Texas, etc., R. Co. v.
Boyer, Ex parte.
—— Philadelphia, etc., R. Co. v.
—— St. Louis, etc., R. Co. v.
—— United States v.
Boylan v. Hot Springs R. Co., pp. 1627, 1632, 1634, 1635, 2444.
Boyle v. Bush Terminal R. Co., pp. 321, 1074.
—— v. McLaughlin, pp. 728, 733, 734, 741, 749.
—— v. Philadelphia, etc., R. Co., p. 67.
—— v. Reeder, p. 654.
—— Savannah, etc., R. Co. v.
Boyles, Chicago, etc., R. Co. v.
Boyles v. Texas, etc., R. Co., pp. 1687, 1730, 1956.
Bozarth, Chicago, etc., R. Co. v.
Brabbzson, St. Louis, etc., R. Co. v.
Brabley v. Dunipace, p. 333.
Bracco v. Merchants' Despatch Transp. Co., pp. 654, 658.
Brace, Barber v.
Bracket v. McNair, pp. 470, 653.
Brackett v. Southern Railway, pp. 1770, 1939, 2328.
Brackney v. Public Service Corp., pp. 1714, 2165, 2896.
Bradburn v. Whatcom County R., etc., Co., p. 1565.
Bradford v. Boston, etc., Railroad, p. 2503.
—— Chesapeake, etc., R. Co. v.
—— v. Cunard Steamship Co., p. 865.
—— v. St. Louis, etc., R. Co., pp. 1945, 2420, 2421.
—— South Carolina R. Co. v.
—— v. South Carolina R. Co., pp. 3176, 3310, 3313, 3413.
—— v. Taylor, p. 2642.
Bradley v. Chicago, etc., R. Co., 147 Ill. App. 397—p. 3174.
—— v. Chicago, etc., R. Co., 94 Wis. 44, 68 N. W. 410—p. 647.
—— v. Denton, p. 473.
—— v. Fort Wayne, etc., R. Co., pp. 1992, 2354.
—— Fuller v.
—— v. Lake Shore, etc., R. Co., p. 755.
—— v. Lehigh Valley R. Co., 145 Fed. 569—p. 3911.
—— v. Lehigh Valley R. Co., 153 Fed. 350, 82 C. C. A. 426—pp. 790, 792, 4065, 4066.
—— v. Northwestern R. Co., p. 816.
—— Seaboard Air Line Railway v.
—— Seaboard Air Line R. Co. v.
—— Seaboard, etc., R. Co. v.
—— Seaver v.
—— v. Second Ave. R. Co., 54 N. Y. S. 256, 34 App. Div. 284—pp. 2343, 2692, 2893.
—— v. Second Ave. R. Co., 90 Hun 419, 35 N. Y. S. 918, 70 N. Y. St. Rep. 622—p. 2185.
Bradney v. Philadelphia Rapid Transit Co., p. 2150.
Bradshaw v. Irish North-Western R. Co., p. 898.
—— v. South Boston R. Co., pp. 1650, 1977, 2431, 2459, 2572.
—— Trinity, etc., R. Co. v.
Bradstreet, Abbott v.
—— v. Heran, p. 530.
Brady, Alabama City, etc., R. Co. v.
—— Alabama, etc., R. Co. v.
—— Baltimore, etc., R. Co. v.
—— v. Chicago, etc., R. Co., pp. 2077, 2085, 2086.
—— Lang v.
—— v. Manhattan R. Co., p. 2730.
—— v. Old Colony R. Co., p. 2834.
—— v. Springfield Tract. Co., pp. 1734, 1738, 1888, 1892, 1894, 2585, 2595, 2598.
—— v. State, p. 178.
Braffett v. Brooklyn, etc., R. Co., pp. 26, 27.
Bragg v. Metropolitan St. R. Co., pp. 2640, 2764.
—— v. Norfolk, etc., R. Co., pp. 1533, 1585, 1763, 2457, 2488, 2491, 2624.
—— St. Louis, etc., K. Co. v.
Brainard, Cutts v.
—— Merrick v.
—— v. Nassau Elect. R. Co., pp. 2193, 2194, 2691.
Brainerd, Blumenthal v.
—— Converse v.
—— Morse v.
Braker v. Jarvis Co., p. 3908.
Brame, Norfolk, etc., R. Co. v.
Bramley v. Ulster, etc., R. Co., pp. 373, 378.
Branan v. Atlanta, etc., R. Co., pp. 370, 1206, 1207, 1208, 1209, 1210, 1221, 1222, 1223, 1225, 1228, 1229.
—— v. Southern R. Co., pp. 2339, 2617.
Branch, St. Louis, etc., R. Co. v.
—— v. Wilmington, etc., R. Co., 77 N. C. 347 p. 612.
—— v. Wilmington, etc., R. Co., 88 N. C. 570—p. 154.
Brancroft-Whitney Co., Pacific Coast, etc., Co. v.
Brand v. Illinois Cent. R. Co., pp. 667, 668, 670, 3411.
—— v. New Jersey Steamboat Co., pp. 905, 911.
—— v. Weir, p. 853.
Brandenburg, Cincinnati, etc., R. Co. v.
Brandon, Chicago, etc., R. Co. v.
—— Mobile, etc., R. Co. v.
Brandstetter Co., Felix v.
Brandt v. Bowlby, p. 849.
Branner, Dunn v.
Brannon v. Atlanta, etc., R. Co., pp. 948, 960, 1282, 1283.
—— Birmingham R., etc., Co. v.
Branshaw, Beidler v.
Branson, Williams v.
Brantford City, The.
Brantley Co. v. Ocean Steamship Co., p. 3840.
Bras v. McConnell, p. 103.
Brashaw v. Denver, etc., R. Co., p. 544.
Brashear v. Houston, etc., R. Co., p. 1879.
Brasher, Tennessee Cent. R. Co. v.
Brass, St. Louis, etc., R. Co. v.
—— v. Stoeser, pp. 3432, 3527, 3528.
Brassell v. New York Cent., etc., R. Co., pp. 1792, 2134, 2137, 2138.
Bratcher, Texas, etc., R. Co. v.
Bratton, Adams Exp. Co. v.
Brauer, Compania De Navigacion La Flecha v.
—— Compania, etc., La Flecha v.
—— v. Oceanic Steam Nav. Co., pp. 1317, 1474, 3932.
Braun v. Northern Pac. R. Co., pp. 2434, 2492.
—— v. Union R. Co., p. 2694.
—— v. Webb, p. 3206.
Braunstein v. People's R. Co., 1 Boyce's (24 Del.) 310, 77 Atl. 738—pp. 2576, 2593, 2594, 2595, 2602.
—— v. People's Co., 2 Boyce's (25 Del.) 55, 78 Atl. 609—pp. 1682, 1741, 1978, 2653, 2667, 2668, 2671, 2693.
Braunton v. Southern Pac. Co., p. 871.
Braus v. Manhattan Delivery Co., p. 1067.
Brauss, City, etc., R. Co. v.
Bravard, Cincinnati, etc., R. Co. v.
Brawley v. United States, p. 3873.
Bray, Pennsylvania Co. v.
—— v. State, p. 43.
Braymer v. Seattle, etc., R. Co., pp. 1640, 1853, 1854, 1855, 2425, 2717.
Brazil, Missouri Pac. R. Co. v.
Brazzell v. State, p. 185.
Breakwater Co., Commonwealth v.
Breckinridge, Louisville, etc., R. Co. v.
Breed v. Mitchell, pp. 568, 581, 788.
Breeden v. Seattle, etc., R. Co., pp. 2348, 2649, 2906.
Breeding, Missouri Pac. R. Co. v.
Breen v. New York, etc., R. Co., p. 2682.
—— v. St. Louis Trans. Co., pp. 2710, 2726.
—— Stumore v.

Breen v. Texas, etc., R. Co., pp. 1621, 1976, 2425, 2426, 2482, 2483.
Breese v. Trenton Horse R. Co., pp. 2584, 2596.
Breese-Trenton Mining Co. v. Wabash R. Co., p. 3008.
Brehm v. Great Western R. Co., p. 2681.
Brehme v. Dinsmore, pp. 588, 984, 986, 1006, 1060, 1067.
Brehony v. Pottsville Union Tract. Co., p. 2786.
Breinig, Baltimore, etc., R. Co. v.
Breithaupt, McLean v.
B. K. Elect. Co., Southern Exp. Co. v.
Brelsford, Illinois Cent. R. Co. v.
Bremer v. Pleiss, pp. 2149, 2150.
—— Stewart v.
Bremner v. Williams, pp. 1681, 1845.
Brenan v. Shelton, p. 806.
Breniman, Colorado, etc., R. Co. v.
Brennan v. Brooklyn Heights R. Co., pp. 2167, 2803.
—— v. Fairhaven, etc., R. Co., pp. 1879, 2519, 2635.
—— v. Shelton, p. 800.
—— v. Titusville, pp. 3440, 3570.
Brenner v. Jonesboro, etc., R. Co., p. 3086.
Brennisen v. Pennsylvania R. Co., 100 Minn. 102, 110 N. W. 362, 363, 10 Am. & Eng. Ann. Cas. 169—pp. 786, 839.
—— v. Pennsylvania R. Co., 101 Minn. 120, 111 N. W. 945—pp. 821, 824, 843.
Brent, Fergusson v.
Bresky v. Minneapolis, etc., R. Co., pp. 3454, 3455, 3456.
Brethauer, Chicago Union Tract. Co. v.
Bretherton v. Wood, p. 211.
Brett, Wilson v.
Brettner v. Westchester Elect. R. Co., pp. 2321, 2860.
Brevig v. Chicago, etc., R. Co., p. 1551.
Brewer, Atchison, etc., R. Co. v.
—— Central R. Co. v.
—— v. Central, etc., R. Co., pp. 3713, 3715, 3716, 3723.
—— Edwards v.
—— Louisville, etc., R. Co. v.
—— v. New York, etc., R. Co., pp. 1577, 1578, 2104, 2105.
—— Northern Pac. R. Co. v.
—— v. St. Louis Transit Co., p. 2188.
—— Southern R. Co. v.
Brewer Lumber Co. v. Boston, etc., R. Co., pp. 1211, 1229, 1232, 1233, 1234, 1245.
Brewers', etc., Mach. Co., Seitz v.
Brewster, Dwight v.
—— v. Interborough Rapid Transit Co., pp. 2039, 2046, 2075, 2771.
—— Miller v.
—— v. New York, etc., R. Co., p. 967.
Brezwitz v. St. Louis, etc., R. Co., p. 1938.
Brian v. Oregon, etc, R. Co., pp. 1623, 2661, 2711, 2784, 3100, 3317, 3318, 3319.
Briant v. Louisville, etc., R. Co., pp. 531, 537, 896, 904.
Bribble, Ft. Worth, etc., R. Co. v.
Brice v. South Covington, etc., St. R. Co., p. 2814.
—— v. Southern Railway, pp. 1972, 2177, 2342, 2806, 2866, 3007.
Brick v. Atlantic, etc., R. Co., pp. 3120, 3123, 3125, 3141, 3151, 3184.
Bricker v. Philadelphia, etc., R. Co., pp. 1502, 1537.
Bridge, James Music Co. v.
Bridger, Central R., etc., Co. v.
Bridges v. Jackson Elect. R., etc., Co., pp. 2194, 2198, 2311.
—— v. North London R. Co., p. 1926.
—— v. North London, etc., R. Co., p. 1924.
—— Walpole v.
Bridgeton, Green v.
Bridgeton, etc., Tract. Co., Paynter v.
Bridgman v. The Emily, p. 471.
Bried v. Mitchell, p. 828.
Brien v. Bennett, pp. 1515, 1517.
—— Grove v.
Brierly v. Union R. Co., p. 2974.
Brig Collenber, The.
Brig James Gray v. Ship John Fraser, p. 3478.
Brig Pilgrim, Adams v.
Briggs v. Boston, etc., R. Co., pp. 1154, 1155, 1156, 1161, 1168, 1170, 3269.
—— Camden, etc., R. Co. v.
—— Camden, etc., Transp. Co. v.
—— v. Durham Tract. Co., pp. 1680, 1683, 1744, 1827, 2001, 2678, 2698, 2860.
—— v. New York Cent. R. Co., pp. 636, 663.
—— St. Louis, etc., R. Co. v.
—— Southern Exp. Co. v.
—— v. Union St. R. Co., pp. 2151, 2152, 2159.
Brigham, Pittsburgh, etc., R. Co. v.
—— v. Southern Pac. Co., p. 2714.
—— Taylor v.
Brigham & Co. v. Carlisle, p. 659.
Brigham, etc., Co., Phillips v.
Bright, Houston, etc., R. Co. v.
Brightman v. Reeves, p. 400.
—— Terry v.
—— v. Union St. R. Co., pp. 2518, 2541.
Brightwood R. Co. v. Carter, pp. 2172, 2196.
—— Harten v.
Brigman, Hinote v.
Brignoli v. Chicago, etc., R. Co., p. 2695.
Brill v. Eddy, p. 2075.
Brilliant, The.
Brimmer v. Illinois Cent. R. Co., p. 2671.
Brimson, Interstate Commerce Comm. v.
Brinck v. North German Lloyd Steamship Co., pp. 4033, 4035.
Brineger v. Louisville, etc., R. Co., p. 2172.
Brinkmeier v. Missouri Pac. R. Co., p. 3457.
Brinley, Louisville, etc., R. Co. v.
Brinson, Baker v.
—— Central Railroad v.
—— Central R. Co. v.
Brintnall v. Saratoga, etc., R. Co., pp. 3183, 3407.
Brisbane, Chicago, etc., R. Co. v.
Brisbin v. Boston Elevated R. Co., pp. 2142, 2330, 2910.
Briscoe v. Metropolitan St. R. Co, pp. 2671, 2691, 2975.
Bristoe v. Rensselaer, etc., R. Co., pp. 546, 583.
Bristol, etc., R. Co., Baxendale v.
—— Garton v.
Britain Steamship Co., Smith v.
Britannia, The.
British King, The.
British, etc., Ins. Co. v. Gulf, etc., R. Co., pp. 729, 775, 790, 791, 792, 793, 794, 934, 935.
British, etc., Marine Ins. Co. v. Gulf, etc., R. Co., p. 790.
—— v. Portland Flouring Mills Co., pp. 3939, 3940, 3942.
British, etc., Packet Co., Smith v.
British, etc., Steam Packet Co., Caruana v.
Brittan v. Barnaby, pp. 511, 542, 566, 1134, 1135, 1143, 1144, 1167, 3939, 3940, 3941, 3947.
Britton v. Atlanta, etc., R. Co., p. 2019.
—— Cooper Grocer Co. v.
—— Lexington R. Co. v.
—— Louisville, etc., R. Co. v.
—— St. Louis, etc., R. Co. v.
—— v. Street R. Co., pp. 1890, 1901, 2226, 2936.
Broadhurst, Dallas, etc., St. R. Co. v.
Broadie v. Howard, p. 3866.
Broadway v. San Antonio Gas. Co., p. 2679.
Broadway R. Co., Vail v.
Broadway, etc., R. Co., McSwyny v.
—— Morrison v.
—— New York v.
—— Poulin v.
—— Putnam v.
—— Valentine v.
—— Weymouth v.
—— Wilson v.
Broadwell v. Butler, p. 907.
Broadwood v. Southern Exp. Co., pp. 585, 756, 757.
Brock v. Gale, pp. 637, 3127, 3130, 3131.
—— McCall v.
—— v. St. Louis Trans. Co., pp. 2521, 2546.
Brockett v. Fair Haven, etc., R. Co., p. 2812.
—— New Jersey Steamboat Co. v.
Brockton St. R. Co., Commonwealth v.
Brockton Transp. Co., Clifford v.
Brockway v. American Exp. Co., 168 Mass. 257, 47 N. E. 87—p. 1284.
—— v. American Exp. Co., 171 Mass. 158, 50 N. E. 626—pp. 939, 944, 1294, 1640.
Brocton Transp. Co., Clifford v.
Brod v. St. Louis Trans. Co., pp. 2595, 2684.
Brodhead, Randall v.
Brodie v. Carolina, etc., R. Co., pp. 1767, 1913, 2229, 2394, 2936.
Broeck v. The Barge John M. Welch, p. 3586.
Brogden, People's Nat. Bank v.
Bromberg, Mobile, etc., R. Co. v.
Bromley, Midland R. Co. v.
—— v. New York, etc., R. Co., pp. 2211, 2212, 2223.
Bromschwig Tailors' Trimming Co. v. Missouri, etc., R. Co., pp. 490, 493.
Bronson v. Oakes, pp. 1835, 1836, 2339, 2884.
—— Richmond v.
Brooke v. Grand Trunk R. Co., p. 1622.
—— v. Louisville, etc., R. Co., pp. 800, 801.
—— v. Nashville, etc., R. Co., p. 800.
—— v. New York, etc., R. Co., pp. 311, 3879.
—— v. Pickwick, pp. 3123, 3129.
Brooke Iron Co. v. O'Brien, pp. 1221, 1236, 1243.
Brookfield, Jonesboro, etc., R. Co. v.
—— Thorp v.
Brookhaven Mach. Co., Illinois Cent. R. Co. v.
Brooklyn City R. Co., Black v.
—— Bruno v.
—— Davenport v.
—— Day v.
—— Fleming v.
—— Gaffney v.
—— Ganley v.
—— Hitchcock v.
—— Hourney v.
—— Mulhado v.
—— Paulson v.
—— Saltzman v.
—— Seidlinger v.
—— Spooner v.
—— Van Winkle v.
—— Wood v.

Brooklyn City, etc., R. Co., Dale v.
—— Dixon v.
—— Faris v.
Brooklyn Crosstown R. Co., Coddington v.
—— McGlynn v.
Brooklyn Heights R. Co., Basting v.
—— Brennan v.
—— Bruce v.
—— Cassio v.
—— Catterson v.
—— Christensen v.
—— Clinton v.
—— Coady v.
—— Cohen v.
—— Colvin v.
—— Cramer v.
—— Daniel v.
—— Dittmar v.
—— Dochtermann v.
—— Dorff v.
—— East v.
—— Elliott v.
—— Ericius v.
—— Foden v.
—— Friedel v.
—— German v.
—— Gillespie v.
—— Gilmore v.
—— Giltman v.
—— Grogan v.
—— Grunfelder v.
—— Jenkins v.
—— Johnson v.
—— Hanley v.
—— Hunt v.
—— Kiefer v.
—— Koch v.
—— Kramer v.
—— Leonard v.
—— Link v.
—— Maereker v.
—— Maurer v.
—— Miller v.
—— Morrow v.
—— Moskowitz v.
—— Nicholson v.
—— Nies v.
—— O'Brien v.
—— O'Connor v.
—— O'Reilly v.
—— People v.
—— Rosenblum v.
—— Rothstein v.
—— Rowe v.
—— Schneier v.
—— Sheppard v.
—— Sickles v.
—— Stutsky v.
—— Sullivan v.
—— Taft v.
—— Tooker v.
—— Tucker v.
—— Wise v.
—— Woolsey v.
Brooklyn Lumber Co., Conkling v.
Brooklyn St. R. Co. v. Kelley, pp. 1714, 1715.
Brooklyn Union Elev. R. Co., Baker v.
Brooklyn, etc., Ferry Co., Hamel v.
Brooklyn, etc., R. Co., Blair v.
—— Braffett v.
—— Brown v.
—— Clyde v.
—— Cohen v.
—— Connaughton v.
—— Craighead v.
—— Dixon v.
—— Eppendorf v.
—— Faris v.
—— Feldheim v.
—— Hirschberg v.
—— Levine v.
—— McGrath v.
—— McVay v.
—— Meschneck v.
—— Mulhado v.
—— Nolan v.
—— Pollock v.
—— Reidman v.
Brooklyn, etc., R. Co., Sheridan v.
—— Stewart v.
—— Strutt v.
—— Waldman v.
—— Weber v.
Brookover, Lincoln Tract Co. v.
Brooks v. American Exp. Co., p. 571.
—— v. Boston, etc., R. Co., pp. 1923, 2259.
—— v. Delaware, etc., R. Co., p. 585.
—— v. Dinsmore, 3 N. Y. St. Rep. 587—pp. 821, 828.
—— v. Dinsmore, 6 N. Y. St. Rep. 281—pp. 817, 828.
—— Elmore v.
—— v. Friend Paper Co., p. 478.
—— Ingalls v.
—— Levi v.
—— v. Minturn, pp. 708, 718.
—— v. New York, etc., R. Co., pp. 2134, 2733.
—— v. Northern Pac. R. Co., pp. 3157, 3198.
—— v. Old Colony R. Co., p. 1788.
—— People v.
—— v. Philadelphia, etc., R. Co., pp. 1906, 2860.
—— Southern R. Co. v.
—— v. Southern Pac. Co., pp. 3439, 3441, 3461, 3462.
—— The John.
—— Toledo, etc., R. Co. v.
Brooks Mfg. Co. v. Southern R. Co., pp. 153, 154, 537, 541.
Brookstone v. Wescott Exp. Co., p. 603.
Broom, Slark v.
Broome, Atlanta, etc., R. Co. v.
Broomhead, Donath v.
Brophy, Germantown Pass. R. Co. v.
Brosius, St. Louis, etc., R. Co. v.
Brosseau & Co. v. The Hudson, pp. 735, 736.
Brouty v. Five Thousand Two Hundred and Fifty-Six Bundles of Elm Staves, p. 338.
Browarsky, Miller v.
Brower v. Peabody, p. 372.
—— v. Public Service Corp., p. 2860.
—— v. Water Witch, p. 292.
Brown v. Adams, pp. 658, 662, 663, 672, 674, 686, 964, 1086, 1093, 1095, 1099.
—— v. Adams Exp. Co., pp. 946, 1003, 1004, 1008, 1038, 1039.
—— v. Atlanta, etc., R. Co., pp. 272, 284.
—— Atlantic City v.
—— v. Atlantic, etc., R. Co., 161 N. C. 573, 77 S. E. 777—p. 2867.
—— v. Atlantic, etc., R. Co., 64 S. E. 1012, 83 S. C. 53—p. 2669.
—— v. Atlantic, etc., R. Co., 87 S. C. 314, 69 S. E. 510—p. 2994.
—— v. Atlantic, etc., R. Co., 91 S. C. 377, 74 S. E. 754—pp. 162, 376.
—— Baker Co. v.
—— Baltimore Steamboat Co. v.
—— Baltimore, etc., Steamboat Co. v.
—— Bank v.
—— Barker v.
—— v. Barnes, p. 2258.
—— Bird v.
—— Boston, etc., R. Co. v.
—— v. Brooklyn, etc., R. Co., p. 2565.
—— v. Camden, etc., R. Co., p. 1490.
—— v. Canadian Pac. R. Co., pp. 3169, 3172.
—— Capital Tract. Co. v.
—— Central, etc., R. Co. v.
—— v. Central, etc., R. Co., p. 2469.
—— v. Chester Tract. Co., p. 2889.
Brown v. Chicago, etc., R. Co., 51 Iowa 235, 1 N. W. 487—pp. 2476, 2477, 2480.
—— v. Chicago, etc., R. Co., 54 Wis. 342, 11 N. W. 356, 41 Am. Rep. 41—pp. 2563, 3045.
—— v. Chicago, etc., R. Co., 80 Wis. 162, 49 N. W. 807—p. 2264.
—— Cincinnati, etc., R. Co. v.
—— v. Cleveland, etc., R. Co., p. 549.
—— Cobb v.
—— v. Congress, etc., R. Co., p. 1992.
—— Danville, etc., R. Co. v.
—— Dibble v.
—— v. Eastern R. Co., pp. 324, 1673, 3166, 3187, 3196.
—— v. Elvira Harbeck, p. 3144.
—— Ex parte.
—— v. Floersheim Mercantile Co., pp. 370, 377.
—— Georgia, etc., R. Co. v.
—— v. Georgia, etc., R. Co., pp. 2573, 3042, 3043, 3047.
—— v. Grand Trunk Railway, pp. 910, 912.
—— Gulf, etc., R. Co. v.
—— v. Hannibal, etc., R. Co., pp. 2485, 3097.
—— Hardee v.
—— v. Harris, pp. 1605, 3949.
—— v. Houston, p. 3549.
—— Houston, etc., R. Co. v.
—— Illinois Cent. R. Co. v.
—— v. Illinois Cent. R. Co., pp. 1085, 1361, 1408.
—— v. Interborough Rapid Transit Co., p. 2050.
—— Jenkyns v.
—— v. Kansas, etc., R. Co., pp. 190, 196, 2436, 2716.
—— Lake Shore, etc., R. Co. v.
—— v. Louisville R. Co., pp. 1716, 2371.
—— Louisville, etc., R. Co. v.
—— v. Louisville, etc., R. Co., 36 Ill. App. 140—pp. 958, 1023.
—— v. Louisville, etc., R. Co., 44 S. W. 648, 19 Ky. L. Rep 1873, 103 Ky. 211—pp. 2488, 2491.
—— Manchester, S. & L. R. Co. v.
—— v. Manhattan R. Co., p. 2677.
—— v. Maryland, pp. 3418, 3439, 3440, 3549, 3568.
—— v. Memphis, etc., R. Co., 4 Fed. 37—pp. 197, 2572.
—— v. Memphis, etc., R. Co., 5 Fed. 499—pp. 1499, 1943.
—— v. Memphis, etc., R. Co., 7 Fed. 51, 1 Am. & Eng. R. Cas. 247—pp. 197, 1499, 1949, 2487.
—— v. Minneapolis, etc., R. Co., pp. 2483, 3101.
—— Missouri, etc., R. Co. v.
—— v. Missouri, etc., R. Co., 83 Kan. 574, 112 Pac. 147—pp. 346, 842.
—— v. Missouri, etc., R. Co., 64 Mo. 536—p. 3092.
—— v. New York Cent. R. Co. (N. Y.), 31 Barb. 385—p. 2895.
—— v. New York Cent. R. Co., 32 N. Y. 597, 88 Am. Dec. 353—p. 2128.
—— v. New York Cent. R. Co., 34 N. Y. 404—pp. 1722, 1814, 1986, 2004.
—— v. New York, etc., R. Co., pp. 2248, 2286.
—— North Chicago St. R. Co. v.
—— v. Northwestern Railroad, pp. 849, 855.
—— Ohio, etc., R. Co. v.
—— Orange County Bank v.
—— v. Oregon, etc., R. Nav. Co., pp. 273, 1267.
—— Ostrander v.
—— v. Philadelphia, etc., R. Co., p. 3274.

Brown, Pittsburg, etc., R. Co. v.
—— v. Pontiac, etc., R. Co., p. 1300.
—— v. Powell Coal Co., p. 308.
—— Railroad Co. v.
—— v. Ralston, 25 Va. (4 Rand.) 504—pp. 1143, 1144, 3971.
—— v. Ralston, 35 Va. (9 Leigh) 532—pp. 703, 1143, 3963.
—— v. Rapid R. Co., 120 Mich. 483, 90 N. W. 290—p. 2462.
—— v. Rapid R. Co., 134 Mich. 591, 96 N. W. 925—pp. 2462, 3078, 3079.
—— Richmond R., etc., Co. v.
—— Richmond, etc., R. Co. v.
—— Roland, etc., Co. v.
—— Rudolf v.
—— St. Louis, etc., R. Co. v.
—— v. Savannah Mut. Ins. Co., 70 Ga. 1118, 1119.
—— v. Scarboro, pp. 1502, 1507, 1522, 1527, 1558, 2208.
—— v. Seattle City R. Co., pp. 1718, 1725, 1730, 2361, 2402.
—— Southern R. Co. v.
—— v. Southern Railway, p. 162.
—— v. Springfield Tract. Co., p. 2598.
—— v. Sullivan, p. 465.
—— Texas Mid. Railroad v.
—— Texas Mid. R. Co. v.
—— Texas, etc., R. Co. v.
—— The J. W.
—— Tuckerman v.
—— v. Union Pac. R. Co., p. 2778.
—— v. Vandalia R. Co., p. 564.
—— Wabash R. Co. v.
—— v. Wabash, etc., R. Co., pp. 209, 249.
—— v. Walker, pp. 3779, 3780.
—— Washington, etc., R. Co. v.
—— v. Washington, etc., R. Co., p. 2152.
—— v. Yazoo, etc., R. Co., p. 2694.
Brown & Co. v. Mott & Bros., pp. 540, 772, 3304.
Brown, etc., Coal Co. v. Grand Trunk R. System, pp. 89, 91.
Brown, etc., Co. v. Clayton, pp. 10, 765.
—— v. Pennsylvania Co., pp. 504, 525, 3298.
Browne, Gulf, etc., R. Co. v.
—— Hare v.
—— v. Raleigh, etc., R. Co., pp. 1872, 1873, 1899, 1900, 2155.
Brownell, Swift v.
Brownfield, Louisville St. R. Co. v.
Browning v. Goodrich Transp. Co., pp. 822, 1036, 3365.
—— v. Long Island R. Co., pp. 529, 901.
Brownlee, Louisville, etc., R. Co. v.
Brownsville Livery, etc., Co., Mobile, etc., R. Co. v.
Brownsville, etc., Live Stock Co., Mobile, etc., R. Co. v.
Broyles v. Central, etc., R. Co., pp. 2516, 1562, 1574, 2542, 2577, 2581, 2718, 2719.
Bruce v. Brooklyn Heights R. Co., p. 2802.
—— Little Rock, etc., R. Co. v.
Bauce & Co., Cox, Patterson & Co. v.
Bruff v. Illinois Cent. R. Co., pp. 2141, 2675.
Bruhl v. Coleman, pp. 551, 552.
—— v. Southern Exp. Co., pp. 540, 542, 544.
Brulard v. Alvin, p. 1855.
Brumberger v. Joline, p. 2842.
Brumley, East Tennessee, etc., R. Co. v.
Brundred v. Rice, pp. 1184, 1197.
Bruning v. Long Island R. Co., p. 1087.
Brunk v. Ohio, etc., R. Co., pp. 801, 3347, 3351.
Brunnchow v. Rhode Island Co., p. 2619.
Bruno v. Brooklyn City R. Co., p. 2193.
Brunson v. Atlantic, etc., R. Co., pp. 897, 908, 910, 912.
—— Central R. Co. v.
Brunswick & Co. v. United States Exp. Co., pp. 547, 555.
Brunswick Grocery Co. v. Brunswick, etc., R. Co., p. 912.
Brunswick Tract Co., Foley v.
—— Hayter v.
Brunswick, etc., R. Co. v. Bostwick, pp. 2414, 2485, 2528.
—— Brunswick Grocery Co. v.
—— v. Gale, pp. 1747, 2839.
—— v. Moore, pp. 1524, 1537, 2038, 2040, 2045.
—— Peeples v.
—— v. Rothchild & Co., p. 544.
—— v. Smith, pp. 732, 741, 748.
Brusch v. St. Paul, etc., R. Co., p. 1951.
Bruswitz v. Netherlands, etc., Nav. Co., p. 2858.
Bruty v. Grand Trunk R. Co., pp. 3128, 3130.
Bruyere, Great Northern R. Co. v.
Bryan, American Steamship Co. v.
—— Atchison, etc., R. Co. v.
—— Atlantic, etc., R. Co. v.
—— Belvidere Bldg. Co. v.
—— Chicago, etc., R. Co. v.
—— v. Chicago, etc., R. Co., pp. 894, 910.
—— v. Memphis, etc., R. Co., pp. 3255, 3294, 3295.
—— v. Missouri Pac. R. Co., p. 2095.
—— Savannah St., etc., R. Co. v.
Bryan Fruit Co., St. Louis, etc., R. Co. v.
Bryant, Atlanta, etc., R. Co. v.
—— Atlantic, etc., R. Co. v.
—— Central R. Co. v.
—— Central R., etc., Co. v.
—— Chicago, etc., R. Co. v.
—— v. Chicago, etc., R. Co., pp. 1542, 1543.
—— Houston, etc., R. Co. v.
—— v. Louisville, etc., R. Co., p. 903.
—— v. Rich, pp. 2035, 2049.
—— St. Louis, etc., R. Co. v.
—— San Antonio Tract. Co. v.
—— San Antonio, etc., Co. v.
—— Southern R. Co. v.
—— Southwestern Railroad v.
—— v. Southwestern R. Co., pp. 1286, 1365, 1367, 1377, 1378, 1384, 3309.
—— Texas, etc., R. Co. v.
Bryant Lumber Co., Fourche River Lumber Co. v.
Bryce, St. Louis, etc., R. Co. v.
—— v. Southern R. Co., 125 Fed. 958—pp. 2080, 2569.
—— v. Southern R. Co., 129 Fed. 966—p. 2604.
B'Shears, Railway Co. v.
Buccola v. Shreveport Tract. Co., p. 2316.
Buchanan, Gordon v.
—— Houston, etc., R. Co. v.
—— Missouri, etc., Co. v.
—— Missouri, etc., R. Co. v.
Bucher v. Cheshire R. Co., p. 2162.
—— v. Fitchburg R. Co., p. 2162.
—— v. New York, etc., R. Co., pp. 1878, 2066, 2265.
Buchwicke R. Co. Bonney v.
Buck, Dunbar v.
—— Kahnweiler v.
—— v. Manhattan R. Co., 2 N. Y. S. 718, 9 N. Y. St. Rep. 908, 15 Daly 48—p. 2871.
—— v. Manhattan R. Co., 10 N. Y. S. 107, 32 N. Y. St. Rep. 51, 15 Daly 550—p. 2745.
—— v. Oregon, R., etc., Co., pp. 1380, 1476, 1477.
—— v. Pennsylvania R. Co., pp. 822, 828, 946, 1037.
Buck v. People's St. R., etc., Co., 108 Mo. 179, 18 S. W. 1090—pp. 1697, 1760, 2524, 2658.
—— v. People's St. R., etc., Co., 46 Mo. App. 555—pp. 1559, 1564, 2255, 2956.
—— Terre Haute, etc., R. Co. v.
—— v. Webb, p. 3213.
Buck Mountain Coal Co., Hazelton Coal Co. v.
Buckalew, Texas, etc., R. Co. v.
Buckbee v. Third Ave. R. Co., p. 2881.
Buckclew, Texas, etc., R. Co. v.
Buckeye, Louis v.
Buckeye Nat. Bank v. Huff, p. 385.
Buckingham, Lamphear v.
—— Scooner Freeman v.
Buckland v. Adams Exp. Co., pp. 767, 768, 770, 945, 995.
—— v. New York, etc., R. Co., p. 1847.
Buckler, Kennedy, etc., R. Co. v.
Buckley, Devereaux v.
—— v. Furniss, pp. 1210, 1219, 1220, 1227, 1231, 1232, 1237, 1238.
—— v. Great Western R. Co., pp. 896, 900.
—— v. New York, etc., R. Co., p. 2320.
—— v. Old Colony R. Co., p. 1529.
Buckman v. Levi, p. 3136.
Buckmaster v. Great Eastern R. Co., pp. 1670, 1671, 1673.
Buckner, Mellroy v.
—— Memphis, etc., Packet Co. v.
Bucksport, etc., R. Co. v. Edinburgh, etc., Redwood Co., p. 26.
Buckworth, Texas, etc., R. Co. v.
Budd v. New York, pp. 1136, 3432, 3527, 3528.
—— v. United Carriage Co., pp. 2161, 2368, 2693.
Buddenberg v. Chouteau Transp. Co., p. 3985.
Buddy v. Wabash, etc., R. Co., pp. 536, 828, 894, 899.
Budner v. Public Service Corp., p. 2877.
Buehler v. Union Tract. Co., p. 2008.
Buel v. New York Cent. R., Co., pp. 2184, 2261.
Buenemann v. St. Paul, etc., R. Co., pp. 1773, 1798, 2305.
Buffalo, The.
Buffalo Office Bldg. Co., McGrell v.
Buffalo R. Co., Ansteth v.
—— Montgomery v.
—— Pfeffer v.
—— Tucker v.
Buffalo, etc., R. Co., Bowie v.
—— Burtis v.
—— Cattaraugus Cutlery Co. v.
—— Fenner v.
—— French v.
—— Inman v.
—— Lafflin v.
—— Metz v.
—— v. O'Hara, p. 2095.
—— Penn v.
—— Roth v.
—— Schlemmer v.
—— Wilkes v.
—— Willetts v.
Buffalo, etc., Tract. Co., Becker v.
—— Bonasera v.
—— Donnelly v.
Buffett v. Troy, etc., R. Co., pp. 417, 1509.
Buffington v. Curtis, pp. 351, 363, 366.
Buffum, Moniter Mut. Fire Ins. Co. v.
Buford, Gulf, etc., R. Co. v.
Bugge v. Seattle Elect. Co., pp. 1532, 1970, 2367, 2863.
Buic, Chicago, etc., R. Co. v.
—— v. Chicago, etc., R. Co., p. 3416.
Building, etc., Ass'n v. Griffin, pp. 940, 949, 977, 1063, 1077.

Bulah Shaft Coal Co., Pennsylvania R. Co. v.
Bulkley v. Naumkeag Steam Cotton Co., pp. 281, 286, 291, 3879, 3936, 3937, 3945.
Bull, Fretz v.
—— v. New York City R. Co., pp. 146, 1645.
Bullard, Alabama, etc., R. Co. v.
—— v. American Exp. Co., pp. 270, 536.
—— v. Boston, etc., Railroad, pp. 1871, 2730.
—— v. Northern Pac. R. Co., p. 3606.
—— v. Young, pp. 581, 582.
Bullen, North German Lloyd Steamship Co. v.
Bullitt, Lobdell v.
—— v. Louisville R. Co., pp. 1884, 1912, 2768.
Bullitt & Co., Marsden Co. v.
Bullock v. Atlantic, etc., R. Co., pp. 1532, 2452, 2479.
—— v. Butler Exch. Co., 46 Atl. 273, 22 R. I. 105—pp. 2251, 2596.
—— v. Butler Exch. Co., 24 R. I. 50, 52 Atl. 122—pp. 2307, 2838, 2931, 2982, 2984.
—— v. Charleston, etc., R. Co., pp. 165, 636, 654, 837.
—— Delaware, etc., R. Co. v.
—— v. Delaware, etc., R. Co., 60 N. J. L. 24, 36 Atl. 773, 37 L. R. A. 417—pp. 3110, 3114.
—— v. Delaware, etc., R. Co., 61 N. J. L. 550, 40 Atl. 650—p. 3072.
—— v. Delaware, etc., R. Co., 21 Super. Ct. 583—pp. 3114, 3120, 3121, 3124.
—— v. Haverhill, etc., Dispatch Co., pp. 3394, 3397, 3409.
—— v. Houston, etc., R. Co., pp. 1527, 1532, 2511, 2545.
—— v. White Star Steamship Co., pp. 3046, 3985, 3986.
Bulte Mining Co. v. Chicago, etc., R. R., p. 3679.
Bumhear v. United Tract. Co., pp. 2193, 2894.
Bumford, Hoffbert v.
Bump, Texas, etc., R. Co. v.
Bunch v. Charleston, etc., R. Co., pp. 1721, 2671, 2881.
—— v. Great Western R. Co., p. 3146.
—— United States v.
—— Western R. Co. v.
Bundick, Savannah, etc., R. Co. v.
Bundy, Chicago City R. Co. v.
—— Illinois Cent. R. Co. v.
Bunker v. Pacific Mail Steamship Co., p. 3566.
Bunn, Gulf, etc., R. Co. v.
Bunnell, Potter v.
—— Southern R. Co. v.
Burbank v. Illinois Cent. R. Co., p. 2503.
—— McLean v.
Burch v. Baltimore, etc., R. Co., p. 2477.
Burchard, Thayer v.
Burckhalter v. Atlantic, etc., R. Co., p. 2704.
Burdette v. Chicago Auditorium Ass'n, p. 2674.
Burdge, Indiana, etc., R. Co. v.
Burdick, Sewell v.
Burge v. Georgia R., etc., Co., pp. 1603, 1604, 2428, 2854.
—— Norfolk, etc., R. Co. v.
Burger v. Omaha, etc., St. R. Co., pp. 2319, 2329, 2401, 2619, 2876, 2912.
Burgess v. Atchison, etc., R. Co., p. 2471.
—— Choctaw, etc., R. Co. v.
—— Lake St., etc., R. Co. v.
—— Lake, etc., R. Co. v.
—— Lee v.
—— Southern Kan. R. Co. v.
Burgess, Southern R. Co. v.
—— v. Stowe, pp. 2149, 2330, 2902, 2983.
—— v. Western Union Tel. Co., p. 1028.
Burgess Co., Southern Kansas R. Co. v.
Burgevin v. New York, etc., R. Co., pp. 3160, 3169, 3172.
Burgher v. Chicago, etc., R. Co., pp. 1016, 1367.
—— v. Wabash R. Co., pp. 971, 973, 976, 1099.
Burgin v. Richmond, etc., R. Co., p. 2263.
—— St. Louis, etc., R. Co. v.
Burgoine v. Chicago, etc., Co., p. 2696.
Burgoyne v. Chicago City R. Co., 167 Ill. App. 59—pp. 1743, 2809.
—— v. Chicago City R. Co., 187 Ill. App. 59—p. 1679.
Burke, American Exp. Co. v.
—— v. Bay City Tract., etc., Co., pp. 1890, 2268, 2359.
—— Camden, etc., Transp. Co. v.
—— Chesapeake, etc., R. Co. v.
—— v. Chicago, etc., R. Co., p. 2619.
—— v. Clarke, pp. 595, 848, 858.
—— v. Erie R. Co., pp. 319, 1019, 1021, 1028, 1041.
—— Houston, R. Co. v.
—— Houston, etc., R. Co. v.
—— Loveland v.
—— v. Missouri Pac. R. Co., pp. 198, 202, 1544, 1547, 2292, 2423.
—— New Orleans, etc., R. Co. v.
—— St. Louis, etc., R. Co. v.
—— v. State, pp. 2673, 2682.
—— v. United States Exp. Co., pp. 740, 821, 1339, 1456, 1457, 1470.
Burke & Co., In re
Burkett v. New York, etc., R. Co., p. 3155.
Burkhardt, Cincinnati, etc., Railway v.
—— National Bank v.
Burlingame v. Adams Exp. Co., p. 608.
Burlington, Cramer v.
—— v. Unterkircher, pp. 28, 29.
Burlington Lumber Co., Southern R. Co. v.
—— v. Southern R. Co., pp. 148, 151, 172, 3517.
Burlington Tract. Co., Strong v.
Burlington, etc., R. Co. v. Arms, pp. 515, 896.
—— Blake v.
—— v. Chicago Lumber Co., p. 714.
—— Chicago, etc., R. Co. v.
—— Clements v.
—— v. Dey, 82 Iowa 312, 48 N. W. 98, 31 Am. St. Rep. 477, 12 L. R. A. 436—pp. 75, 105, 124, 125, 133, 143, 144, 1192.
—— v. Dey, 89 Iowa 13, 56 N. W. 267—p. 133.
—— Dooley v.
—— Garvik v.
—— Gregory v.
—— Heiserman v.
—— Herriman v.
—— Higley v.
—— Independence Mills Co. v.
—— Lucas v.
—— Lucus v.
—— McCune v.
—— Matthieson v.
—— Neimeyer Lumber Co. v.
—— Northwestern Fuel Co. v.
—— v. Northwestern Fuel Co., pp. 427, 1179, 3691.
—— Player v.
—— Ratzer v.
—— Raymond v.
—— v. Rose, pp. 2435, 2436.
—— Ryder v.
—— Warner v.
—— Whittlesey v.
Burnell v. New York Cent. R. Co., pp. 773, 3160, 3169, 3171, 3174, 3175, 3179, 3186, 3189.
Burnett, Marine Fire Ins. Co. v.
—— v. Pennsylvania R. Co., pp. 1489, 1490.
—— Quarman v.
—— Texas Cent. R. Co. v.
Burnham v. Alabama, etc., R. Co., pp. 635, 821, 867, 1040.
—— v. Detroit, etc., R. Co., pp. 2433, 3101.
—— v. Grand Trunk R. Co., pp. 1614, 2492, 2713.
—— v. Wabash, etc., R. Co., pp. 1537, 1767, 1790.
—— Western, etc., R. Co. v.
—— v. Winsor, pp. 1210, 1243.
Burn Line v. United States, etc., Steamship Co., 150 Fed. 423—p. 3949.
—— v. United States, etc., Steamship Co., 162 Fed. 298—pp. 3939, 3949.
Burns v. Alabama, etc., R. Co., pp. 2848, 3059.
—— v. Bellefontaine R. Co., p. 2174.
—— v. Boston Elev. R. Co., pp. 2177, 2178.
—— v. Burns, p. 3966.
—— v. Chicago, B. & Q. Ry. Co., pp. 1622, 1623, 1639.
—— Chicago, etc., R. Co. v.
—— v. Chicago, etc., R. Co. (Mo. App.) 132 S. W. 1—p. 969.
—— v. Chicago, etc., R. Co., 80 N. W. 927, 104 Wis. 646—pp. 1310, 1346, 1378, 3629.
—— Clark v.
—— Collins v.
—— v. Cork, etc., R. Co., p. 1850.
—— Great Western R. Co. v.
—— Houston, etc., R. Co. v.
—— v. Johnstown Pass. R. Co., pp. 2192, 2197.
—— v. Louisville, etc., R. Co., pp. 582, 801.
—— McClelland v.
—— New York, etc., R. Co. v.
—— v. Pennsylvania R. Co., pp. 1824, 2339, 2674, 2885.
—— St. Louis, etc., R. Co. v.
—— South Covington, etc., St. R. Co. v.
Burnsed, Richmond, etc., R. Co. v.
Burnside v. Grand Trunk R. Co., p. 634.
—— v. Minneapolis, etc., R. Co., p. 2363.
—— v. Union Steamboat Co., p. 789.
Burnside, etc., R. Co. v. Tupman, pp. 1440, 1460, 3297, 3402.
Burr v. Adams Exp. Co., pp. 512, 531, 535, 602.
—— Pennsylvania R. Co. v.
—— v. Pennsylvania R. Co., pp. 1957, 1991, 1992, 2218, 2691.
Burrell, Hewlett v.
Burress v. Atlantic, etc., R. Co., pp. 873, 3307.
Burrett, Mallory v.
Burrill, Crossman v.
—— v. Crossman, 65 Fed. 104—p. 713.
—— v. Crossman, 91 Fed. 543, 33 C. C. A. 663—pp. 3954, 3963.
—— v. Crossman, 130 Fed. 763, 65 C. C. A. 189—p. 3954.
—— v. North, pp. 278, 279.
Burris, Baltimore, etc., R. Co. v.
—— v. Missouri Pac. R. Co., pp. 493, 495.
Burritt v. Rench, pp. 494, 725.
Burritt Co. v. New York, etc., R. Co., p. 562.
Burroughs v. Grand Trunk R. Co., pp. 909, 3378.
—— v. Norwich, etc., R. Co., pp. 3259, 3327, 3339.
—— Shepard, etc., Lumber Co. v.

Burrow & Co., St. Louis, etc., R. Co. v.
Burrowes v. Chicago, etc., R. Co., 85 Neb. 497, 35 R. R. R. 373, 58 Am. & Eng. R. Cas., N. S., 373, 123 N. W. 1028—pp. 284, 285, 288, 289.
—— v. Chicago, etc., R. Co., 87 Neb. 142, 37 R. R. R. 450, 60 Am. & Eng. R. Cas., N. S., 450, 126 N. W. 1084—p. 285.
Burrows, Clyde Steamship Co. v.
—— v. Lownsdale, p. 3994.
—— Michigan Cent. R. Co. v.
—— St. Louis, etc., R. Co. v.
Burrton State Bank v. Peasemoore Mill. Co., pp. 392, 393.
Bursley v. The Marlborough, pp. 3899, 3900.
Bursteen v. Boston Elev. R. Co., pp. 3145, 3147, 3148.
Burt v. Douglas County, etc., R. Co., pp. 1833, 2222.
—— Highland Ave., etc., R. Co. v.
Burtis v. Buffalo, etc., R. Co., pp. 417, 418, 3295.
Burton, Central, etc., R. Co. v.
—— v. Galveston, etc., R. Co., p. 2074.
—— v. Larkin, p. 2560.
—— v. New York, etc., R. Co., p. 2019.
—— v. Strachan, p. 3939.
—— v. West Jersey Ferry Co., pp. 1951, 1955, 1956.
—— v. Wichita R., etc., Co., p. 2251.
—— v. Wilkinson, pp. 573, 576.
Burus v. Boston Elev. R. Co., p. 2122.
Burwell v. Raleigh, etc., R. Co., pp. 788, 829, 830.
Busch v. Interborough Rapid Trans. Co., pp. 2562, 2567, 2568.
Bush v. Barnett, p. 2692.
—— v. Campbell, p. 2569.
—— Houston, etc., R. Co. v.
—— v. Romer, p. 553.
Bush v. St. Louis, etc., R. Co., pp. 555, 940.
Bush Co. v. Central R. Co., pp. 3908, 3909.
Bush Terminal R. Co., Boyle v.
Bushnell v. Wabash R. Co., pp. 1037, 1479, 3335.
Bushwick R. Co., Bleier v.
Bussell v. Quincy, etc., R. Co., pp. 1752, 1755, 2691.
Bussey v. Charleston, etc., Railway, pp. 2621, 2705, 3318.
—— v. Memphis, etc., R. Co., pp. 246, 622, 623.
Busson, Benner Livery, etc., Co. v.
Bustard, Bentley v.
Buston v. Pennsylvania R. Co., 116 Fed. 235—p. 3411.
—— v. Pennsylvania R. Co., 119 Fed. 808, 56 C. C. A. 320—pp. 3264, 3269.
Buswell v. Southern Pac. Co., p. 32.
Butcher, Gulf, etc., R. Co. v.
—— v. London, etc., R. Co., pp. 3126, 3194.
Butchers', etc., Stock Yards Co. v. Louisville, etc., R. Co., pp. 92, 145, 212, 221.
Butler v. Basing, pp. 269, 284.
—— Birmingham R. etc., Co. v.
—— v. Boston, etc., Steamship Co., pp. 4036, 4037, 4039, 4040, 4042, 4053, 4054, 4071, 4072, 4077, 4078, 4079, 4080.
—— Broadwell v.
—— v. Detroit, etc., R. Co., p. 3032.
—— v. East Tennessee, etc., R. Co., pp. 542, 543, 544, 894, 901, 902.
—— v. Glens Falls, etc., St. R. Co., 121 N. Y. 112, 24 N. E. 187—p. 2153.
Butler v. Glens Falls, etc., St. R. Co., 49 Hun 610, 2 N. Y. S. 72, 17 N. Y. St. Rep. 565—p. 2307.
—— Gulf, etc., R. Co. v.
—— v. Hudson River R. Co., pp. 3141, 3149.
—— Kansas, etc., R. Co. v.
—— Merwin v.
—— v. New York City R. Co., p. 2336.
—— v. Pittsburgh, etc., R. Co., 18 Ind. App. 656, 46 N. E. 92—p. 477.
—— v. Pittsburgh, etc., R. Co., 139 Pa. 195, 21 Atl. 500—pp. 1818, 2206.
—— St. Louis, etc., R. Co. v.
—— v. St. Paul, etc., R. Co., p. 2263.
—— v. Smith, pp. 477, 480.
—— Southern Kansas R. Co. v.
—— v. Steinway R. Co., p. 2422.
—— v. The Arrow, p. 428.
—— v. The Steamboat Arrow, p. 333.
—— White Water R. Co. v.
—— v. Wilmington City R. Co., pp. 1682, 1739, 1866, 1888, 1889, 2561, 2667, 2686, 2779.
Butler County R. Co., United States v.
Butler Exch. Co., Bullock v.
Butler Marble, etc., Co., Central, etc., R. Co. v.
Butler, etc., Granite Co., Central, etc., R. Co. v.
Butte Elect. R. Co., Emerson v.
—— Knuckey v.
—— Lehane v.
—— Previsich v.
—— Rand v.
—— Shane v.
Butterick Pub. Co. v. Gulf, etc., R. Co., p. 3355.
Buttfield v. Stranahan, p. 3441.
Button, Davis v.
Butts v. Cleveland, etc., R. Co., p. 2187.
—— Selma, etc., R. Co. v.
Buzby v. Philadelphia Tract. Co., p. 2278.
Byars v. Bennington, etc., R. Co., p. 79.
Byers, Adams Exp. Co. v.
—— St. Louis, etc., R. Co. v.
—— Tiis v.
Byers Bros., Texas, etc., R. Co. v.
Byington v. Simpson, p. 1150.
Bynum, Birmingham R., etc., Co. v.
Byram & Co., Bennett v.
Byrant, Central R. Co. v.
Byrd, Missouri, etc., R. Co. v.
—— v. New Orleans, etc., R. Co., p. 2148.
—— Yazoo, etc., R. Co. v.
Byrley, Louisville, etc., R. Co. v.
Byrne v. Fargo, pp. 889, 911.
—— Illinois Cent. R. Co. v.
—— Missouri, etc., R. Co. v.
—— St. Louis, etc., R. Co. v.
—— v. Weeks, p. 310.
Byrnes v. Fuller, p. 1246.
—— Parker v.
Byron v. Lynn, etc., R. Co., pp. 1829, 1994, 1995, 2310, 2804.
Byrum, Chicago, etc., R. Co. v.

C

Cabeen v. Campbell, pp. 1219, 1220, 1237, 1239, 1240.
Cable v. Southern R. Co., pp. 2904, 3046.
Cahot, Denny v.
Cadmus, Earle v.
Cadwallder v. Grand Trunk R. Co., pp. 3116, 3125, 3127, 3128.
Cafiero v. Welsh, pp. 337, 832.
Cage Cattle Co., Ft. Worth, etc., R. Co. v.
Cahawba, Edwards v.
Caher v. Grand Trunk R. Co., pp. 2479, 3081.
Cahill, Denver, etc., R. Co. v.
—— v. London, etc., R. Co. (Eng.), 10 C. B. N. S. 154, 7 Jur. N. S. 1164, 30 L. J. C. P. 289, 9 W. R. 653, 4 L. T. N. S. 246—pp. 3125, 3149, 3152, 3153.
—— v. London, etc., R. Co., (Eng.), 13 C. B. N. S. 818, 8 Jur. N. S. 1063, 31 L. J. C. P. 271, 10 W. R. 321—p. 3117.
Cahn v. Manhattan R. Co., p. 2793.
—— v. Michigan Cent. R. Co., pp. 531, 532, 536, 538, 894.
—— v. Pockett's Bristol Channel S. P. Co., p. 1222.
Cain, Baltimore, etc., R. Co. v.
—— Chicago, etc., R. Co. v.
—— v. Louisville, etc., R. Co., p. 1854.
—— v. Minneapolis, etc., R. Co., p. 2414.
—— Pullman Palace Car Co. v.
Calahan v. Babcock, pp. 525, 1208, 1219, 1220, 1228, 1229, 1232, 1233, 1234, 1236, 1244.
Calais Steamboat Co. v. Scudder, p. 3886.
Calder v. Southern R. Co., pp. 2088, 3209, 3217, 3218, 3225, 3228, 3240, 3241.
Calderon v. Atlas Steamship Co., pp. 986, 1081.
—— v. Atlas Steamship Co., pp. 947, 952, 1073, 4057, 4058, 4059, 4060.
Calderwood, North Birmingham St. R. Co. v.
Caldwell v. Atlantic, etc., Railroad, p. 3043.
—— v. Erie Transfer Co., p. 828.
—— Express Co. v.
—— v. Felton, p. 1297.
—— Fleischman v.
—— International, etc., R. Co., v.
—— v. Lake Shore, etc., R. Co., pp. 1858, 1859, 2454.
—— v. New Jersey Steamboat Co. (N. Y.), 56 Barb. 425—p. 2684.
—— v. New Jersey Steamboat Co., 47 N. Y. 282—pp. 1041, 1722, 1839, 1843, 1850, 2671, 2684, 2841.
—— v. North Carolina, p. 3551.
—— v. Northern Pac. R. Co., 105 Pac. 625, 56 Wash. 223—pp. 2868, 2961, 3063, 3077.
—— v. Northern Pac. R. Co., 113 Pac. 1099, 62 Wash. 420—p. 2934.
—— Pittsburgh, etc., R. Co. v.
—— v. Richmond, etc., R. Co., pp. 4, 5, 1855, 1884, 2562, 2570, 2578.
—— St. Louis, etc., R. Co. v.
—— Southern Exp. Co. v.
—— v. Southern Exp. Co., p. 750.
—— v. United States Exp. Co., p. 763.
—— Wright v.
Calebs, Mercantile Mut. Ins. Co. v.
Caledonai, The.
Caledonia, The.
Caledonian R. Co., Hozier v.
Calender-Vanderhoof Co. v. Chicago, etc., R. Co., pp. 574, 724.
Calhoun, Atchison, etc., R. Co. v.
—— v. Pullman Co., pp. 3202, 3225.
—— v. Pullman Palace Car Co., pp. 3201, 3203, 3212, 3213, 3229.
California, Almy v.
—— v. Central Pac. R. Co., pp. 3449, 3552, 3554, 3574.
—— Hooper v.
—— McCall v.
—— The.
California Cent. R. Co., Wilson v.
—— Wright v.
California Ins. Co. v. Union Compress Co., pp. 283, 947, 953.

California Nav., etc., Co., Doherty v.
—— In re.
—— Stockton Lumber Co. v.
—— Stockton Milling Co. v.
—— v. Stockton Mill. Co., pp. 3905, 3914, 4025.
—— Trabing v.
California Pac. R. Co., Dresbach v.
California Powder Works v. Atlantic, etc., R. Co., pp. 214, 238, 944, 945.
California R. Co., Procter v.
—— Wardlaw v.
California Stage Co., Boyce v.
—— Fairchild v.
—— Thorne v.
California St. Cable R. Co., Samuels v.
California St. Co., Spearman v.
California St. R. Co., Spearman v.
California, etc., R. Co., Fraser v.
—— German Fruit Co. v.
—— Metz v.
—— Nagle v.
Call, Joliet St. R. Co. v.
—— v. Portsmouth, etc., Railway, p. 2145.
Call Pub. Ct., Western Union Tel. Co. v.
Callahan, Missouri Pac. R. Co. v.
—— New York, etc., R. Co. v.
Callaway v. Southern R. Co., 55 S. E. 22, 126 Ga. 192—p. 563.
—— v. Southern R. Co., 126 Ga. 55 S. E. 23—pp. 835, 861.
Callendar, Texas, etc., R. Co. v.
Callender, Texas, etc., R. Co. v.
Callender, etc., Co. v. Short, p. 342.
Calloway v. Mellett, pp. 1613, 2449, 2458.
Calumet Elect. R. Co., South Chicago, etc., R. Co. v.
Calumet Stock Farm, Chicago, etc., R. Co. v.
Calumet, etc., R. Co., Keck v.
Calvert, Chicago, etc., R. Co. v.
Cambols v. Phila., etc., R. Co., p. 417.
Camden Interstate R. Co., Blake v.
—— De Board v.
—— v. Frazier, pp. 3079, 3083, 3084.
—— Mannor v.
—— Nichols v.
Camden Iron Works, United States v.
Camden, etc., Ferry Co., Allen v.
—— Dudley v.
Camden, etc., Railroad, Baldraff v.
Camden, etc., R. Co. v. Baldauf, pp. 1008, 3152, 3153, 3165, 3186, 3189.
—— v. Bausch, p. 2097.
—— v. Briggs, pp. 66, 1136.
—— Brown v.
—— Chapman v.
—— Davis v.
—— Deery v.
—— Farnham v.
—— v. Forsyth Bros., & Co., pp. 3372, 3380.
—— v. Hoosey, pp. 1954, 1955.
—— Lamb v.
—— Morgan v.
—— v. Rice, pp. 2348, 2635.
—— Shay v.
—— Williams v.
Camden, etc., Transp. Co. v. Belknap, pp. 733, 749, 1007, 3136, 3163.
—— Black v.
—— v. Briggs, p. 66.
—— v. Burke, pp. 211, 1003, 1687, 3142.
—— Edsall v.
—— Jenneson v.
—— Lamb v.
—— Maghee v.
—— Manhattan Oil Co. v.
Cameron, Atchison, etc., R. Co. v.
Cameron v. Citizens' Tract. Co., p. 2650.
—— v. Lewiston, etc., St. R. Co., pp. 1818, 1819, 1820, 2339, 2894.
—— v. Rich, p. 1036.
—— Texas Cent. R. Co. v.
—— v. Union Trunk Line, pp. 1888, 1969, 2140.
—— Wall v.
Camors, Watts v.
Camp v. Hartford, etc., Steamboat Co., pp. 805, 814, 930, 945.
—— Kentucky Hotel Co. v.
—— Western, etc., Railroad v.
Campbell v. Alford, pp. 349, 356, 362, 371, 383, 386, 387, 388, 389.
—— v. Alston, pp. 1766, 1913, 2744.
—— Atchison, etc., R. Co. v.
—— Baltimore, etc., R. Co. v.
—— Barnard v.
—— Bissel v.
—— Bush v.
—— Cabeen v.
—— Cape Girardeau v.
—— v. Chicago, etc., R. Co., 149 Ill. App. 120—p. 3455.
—— v. Chicago, etc., R. Co., 86 Iowa 587, 53 N. W. 351, 17 L. R. A. 443—p. 120.
—— v. Cornelius, p. 1731.
—— v. Duluth, etc., R. Co., pp. 1743, 1745, 1755, 2722.
—— Dunkirk, etc., R. Co. v.
—— v. Fisher, p. 2627.
—— Green v.
—— Gulf, etc., R. Co. v.
—— Houston, etc., R. Co. v.
—— International, etc, R. Co. v.
—— v. Jones, p. 1249.
—— Levy v.
—— v. Los Angeles R. Co., pp. 2124, 2257.
—— Louisville, etc., R. Co. v.
—— v. Marietta, etc., R. Co., pp. 26, 73, 1135, 1136.
—— v. Missouri Pac. R. Co., pp. 3161, 3168, 3171, 3186.
—— Moore v.
—— v. Morse, pp. 729, 733, 743, 749.
—— Nebraska City v.
—— New Albany, etc., R. Co. v.
—— New Haven, etc., Co. v.
—— Oregon R., etc., Co. v.
—— v. Pullman Palace Car Co., pp. 3208, 3210, 3241, 3242.
—— Rio Grande, etc., R. Co. v.
—— St. Louis, etc., R. Co. v.
—— Seaboard, etc., Railway, pp. 3056, 3226, 3227.
—— Selma, etc., R. Co. v.
Serraino v.
—— Southern Pac. Co. v.
—— State v.
—— Wabash R. Co. v.
—— v. Yazoo, etc., R. Co., p. 2324.
Campe v. Weir, pp. 821, 823.
Campion v. Canadian Pac. R. Co., p. 775.
Canaday v. United R. Co., pp. 1501, 1662, 1682, 1688, 2563, 2651.
Canadian Northern R. Co., Shelton v.
Canadian Pac. R. Co., Allen, etc., Co. v.
—— Anderson v.
—— Blowers v.
—— Blowers & Co. v.
—— Brown v.
—— Campion v.
—— Dionne v.
—— Donnell v.
—— Dresser v.
—— Morse v.
—— Pennsylvania Co. v.
—— v. North Chicago St. R. Co., p. 2357.
—— Poulin v.
—— Poulin v.
Canadian Pac. R. Co., Richardson v.
—— Waldron v.
—— White v.
—— Worden v.
Canadian, etc., R. Co., Hayman v.
Canal Boat Montgomery v. Kent, pp. 257, 269, 500, 728, 733, 749, 765.
Canal Co., Clarke v.
Canal, etc., R. Co., Jones v.
Canandaigua Nat. Bank v. Southern R. Co., p. 393.
Candee v. Hayward, p. 1198.
—— v. New York, etc., R. Co., pp. 752, 1349, 1365.
—— v. Pennsylvania R. Co., pp. 3176, 3180, 3316, 3321.
Canduff v. Louisville, etc., R. Co., pp. 1548, 1552.
Cane Belt R. Co. v. Peden, Iron & Steel Co., p. 548.
Cane Hill, etc., Co. v. San Antonio, etc., R. Co., pp. 812, 813, 833, 881, 3337.
Canfield v. Baltimore, etc., R. Co., 46 N. Y. Super. Ct. Rep. 238—p. 816.
—— v. Baltimore, etc, R. Co., 75 N. Y. 144—p. 842.
—— v. Baltimore, etc., R. Co., 93 N. Y. 532, 16 Am. & Eng. R. Cas. 152, 45 Am. Rep. 268—pp. 821, 823, 1037.
—— North Chicago St. R. Co. v.
—— Walcott v.
Canham v. Rhode Island Co., pp. 2731, 2732.
Canman, Arkansas Mid. R. Co. v.
—— Arkansas, etc., R. Co. v.
Cannington, St. Louis, etc., R. Co. v.
Cannon, Central, etc., R. Co. v.
—— Louisville, etc., R. Co. v.
—— v. Mid-Gt. W. Ky. Co., p. 1796.
—— v. New Orleans, pp. 3528, 3529, 3530, 3531.
—— St. Louis, etc., R. Co. v.
Cannon & Son, St. Louis, etc., R. Co. v.
Cantling v. Hannibal, etc., R. Co., pp. 3111, 3122.
Canton, etc., R. Co., Fast v.
Cantrell, St. Louis, etc., R. Co. v.
—— v. St. Louis, etc., R. Co., p. 255.
Cantu v. Bennett, pp. 516, 721, 723, 751, 943.
Cantwell, Choctaw, etc., R. Co. v.
—— v. Pacific Exp. Co., p. 490.
Cape Charles, The.
Cape Fear, etc., R. Co., Allen v.
—— Mt. Peasant Mfg. Co. v.
Cape Girardeau v. Campbell, p. 3586.
Capehart v. Granite Mills, pp. 591, 592, 595, 596.
—— v. Seaboard, etc., R. Co., pp. 1087, 1089, 1091.
Caperton, Southern Exp. Co. v.
Capital Compress Co., Missouri, etc., R. Co. v.
Capital Tract. Co. v. Brown, 29 App. D. C. 473, 12 L. R. A., N. S., 831—pp. 2174, 2176, 2343.
—— Chapman v.
—— Hart v.
—— Hutchinson v.
—— Jaquette v.
—— Kohner v.
—— Shortsleeves v.
—— Sullivan v.
—— v. Wathen, p. 2911.
Capitol, etc., R. Co., Andrews v.
Caples v. Louisville, etc., R. Co., p. 862.
Capeau, Ferguson v.
Capel, Erie R. Co. v.
Capper, Texas, etc., R. Co. v.
Capps v. Leachman, pp. 1121, 1122.
—— Texas, etc., R. Co. v.
Capt. Jack, The.
Caracas, The.

Carbon Slate Co. v. Ennis, p. 3968.
Carder v. Atchison, etc., R. Co., p. 1212.
Cardot v. Barney, p. 2090.
Cardwell v. Southern R. Co., pp. 151, 152, 173.
Careb Prince, The.
Carew v. Rutherford, p. 1195.
Carey, Commonwealth v.
Cargill Co. v. Minnesota, pp. 3432, 3527, 3528, 3590.
—— Railroad, etc., Comm. v.
Cargo, The.
—— Watt v.
Cargo of Brimstone, In re.
Cargo of Cyrenian, Williscroft v.
Cargo of Java Sugar, Mencke v.
Cargo of Lumber, Eaton v.
—— Hagan v.
—— Watt v.
Cargo of 3,408 Tons of Pocahontas Coal, In re.
—— Ross v.
Cargo of 246 5/20 Tons of Egg Coal, Aldrich v.
Carhick, Chicago City R. Co. v.
Carib Prince, The.
Carl, Kansas, etc., R. Co. v.
Carleton, Central, etc., R. Co. v.
—— v. Central, etc., R. Co., pp. 1948, 2859.
—— v. New York, etc., R. Co., p. 1012, 1062, 1081, 1082.
—— v. Rockland, etc., St. Railway, p. 2733.
—— v. Three Hundred Sixty-Seven Tons of Coal, p. 3958.
—— v. Union Transfer, etc., Co., pp. 823, 1012, 1082.
—— v. Yadkin R. Co., pp. 2087, 2568.
Carlile, St. Louis, etc., R. Co. v.
Carlinville, Chicago, etc., R. Co. v.
Carlisle, Brigham & Co. v.
—— Central, etc., R. Co. v.
—— v. Koekuk, etc., Packet Co., p. 1442.
—— St. Louis, etc., R. Co. v.
Carlos F. Roses, The.
Carlson v. Oceanic Steam Nav. Co., p. 3123.
Carlton, Texas, etc., R. Co. v.
—— Western, etc., R. Co. v.
Carlton Hall, The.
Carlton Produce Co. v. Velasco, etc., R. Co., pp. 3662, 3663.
Carman, Gilmore v.
Carmanty v. Mexican Gulf R. Co., pp. 2583, 2590.
Carmichael, Alabama, etc., R. Co. v.
Carmody v. St. Louis Transit Co., p. 1739.
Carnahan, Adams Exp. Co. v.
—— v. Chesapeake, etc., R. Co., p. 3198.
Carnegie v. Morrison, p. 1489.
Carney v. Cincinnati St. R. Co., p. 1515.
—— Emily v.
Carolina Cent. R. Co., Gwyn Harper Mfg. Co. v.
—— Holmes v.
—— Means v.
—— Mitchell v.
—— Nance v.
—— Phifer v.
—— Roseman v.
—— Seawell v.
—— Sloan v.
Carolina Mid. R. Co., Brodie v.
Carolina Portland Cement Co. v. Anderson, pp. 3923, 3943.
Carolina, etc., Co., General Fire Extinguisher Co. v.
Carolina, etc., R. Co., Brodie v.
—— Cottrell v.
—— General Fire Extinguisher Co. v.
—— Wampum Cotton Mills v.
—— Williams v.
Carolina, etc., Railway, Berry v.
Carolina, etc., Railway v. Clinch Valley Lumber Co., p. 86.
Caroline, Whitmore v.
Carothers, Louisville, etc., R. Co. v.
—— v. Pittsburg R. Co., p. 1683.
Carpenter v. Baltimore, etc., R. Co., pp. 724, 727, 735, 736, 752, 757, 765, 766, 851, 960, 961, 966.
—— v. Boston, etc., R. Co., pp. 1720, 1787, 2078.
—— Chicago, etc., R. Co. v.
—— v. Eastern R. Co., pp. 1087, 1410.
—— v. Grand Trunk R. Co., p. 1976.
—— Missouri, etc., R. Co. v.
—— v. New York, etc., R. Co. (N. Y.), 14 Daly 457—p. 3239.
—— v. New York, etc., R. Co., 124 N. Y. 53, 26 N. E. 277, 11 L. R. A. 759, 21 Am. St. Rep. 644, 47 Am. & Eng. R. Cas. 421—pp. 3125, 3145, 3208, 3215, 3217, 3218, 3219, 3223, 3230, 3238.
—— v. New York, etc., R. Co., 10 N. Y. St. Rep. 712—pp. 3201, 3214, 3216, 3230, 3232.
—— v. New York, etc., R. Co., 13 N. Y. St. Rep. 718—pp. 3218, 3234.
—— v. New York, etc., R. Co., 15 N. Y. St. Rep. 345—pp. 3217, 3230, 3239.
—— v. Trinity, etc., R. Co., p. 2058.
—— v. United States Exp. Co., pp. 944, 1051, 1063, 1067.
—— v. Washington, etc., R. Co., 3 Mackey (14 D. C.) 225—pp. 2457, 2458.
—— v. Washington, etc., R. Co., 121 U. S. 474, 30 L. Ed. 1015, 7 S. Ct. 1002—pp. 2034, 2054, 2409.
Carper, Cincinnati, etc., R. Co. v.
Carr, Baltimore, etc., R. Co. v.
—— v. Delaware, etc., R. Co., pp. 695, 696.
—— v. Eel River, etc., R. Co., pp. 1880, 1883, 2263.
—— Hrebrik v.
—— Manheim v.
—— v. Pennsylvania R. Co., p. 482.
—— v. Schafer, p. 784.
—— v. Toledo Tract. Co., p. 1650.
Carr, etc., Co., Bosworth v.
Carrick, Chicago City R. Co. v.
Carrico v. West Virginia Cent., etc., R. Co., pp. 1814, 1816, 2073, 2115.
—— v. West Virginia, etc., R. Co., pp. 1712, 1715, 1816, 2116, 2200, 2201, 2541, 2673, 2682, 2941.
Carrier v. Chicago, etc., R. Co., p. 1190.
Carrier Cos., Insurance Cos. v.
Carrizzo v. New York, etc., R. Co., pp. 567, 709, 710.
Carroll v. Boston Elev. R. Co., pp. 2678, 2679, 2980.
—— v. Boston, etc., R. Co., pp. 2172, 2787.
—— v. Central Railroad, p. 2903.
—— v. Charleston, etc., R. Co., pp. 2117, 2118, 2857.
—— Chicago City R. Co. v.
—— Chicago, etc., R. Co. v.
—— v. Holway, pp. 3961, 3963.
—— v. Interstate Rapid Transit Co., pp. 1958, 2199, 2206.
—— Knoxville Tract. Co. v.
—— v. Missouri Pac. R. Co., pp. 1567, 1580, 2097, 2098.
—— v. Southern Exp. Co., p. 525.
—— v. Staten Island R. Co., pp. 211, 1538, 1589, 1682, 1684, 1720, 1839, 1846.
Carrollton Furniture Mfg. Co., Mail Line Co. v.
Carrollton Furniture Mfg. Co., United States Mail Line Co. v.
Carrollton R. Co., Black v.
Carrow, Michigan Cent. R. Co. v.
Carruth, Snow v.
Carson, Cincinnati, etc., R. Co. v.
—— Electric R. Co. v.
—— v. Harris, p. 3305.
—— v. Leathers, p. 1854.
—— Schuster v.
Carsten v. Northern Pac. R. Co., pp. 1616, 3079, 3083, 3084.
Carstens Packing Co. v. Southern Pac. Co., pp. 1424, 1426, 1464, 1467, 1470.
—— v. Northern Pac. R. Co., pp. 1361, 1364, 1365, 1396.
Carswell v. Macon, etc., R. Co., pp. 1582, 2898.
Carter v. Boston, etc., St. R. Co., pp. 1515, 1516, 2142, 2329, 2863, 2881, 2885.
—— Brightwood R. Co. v.
—— v. Charleston, etc., R. Co., p. 2517.
—— v. Chicago, etc., R. Co., pp. 3276, 3277, 3278, 3405.
—— Denison, etc., R. Co. v.
—— Diamond Joe Line v.
—— v. Graves, pp. 488, 490, 796, 804.
—— Illinois Cent. R. Co. v.
—— v. Illinois Cent. R. Co., p. 2627.
—— v. International, etc., R. Co., pp. 569, 596, 600, 855, 865.
—— v. Kansas City, etc., R. Co., pp. 1846, 2673, 2743.
—— v. McDermott, p. 1694.
—— Missouri, etc., R. Co. v.
—— v. New Orleans, etc., R. Co., p. 3827.
—— v. Peck, pp. 3176, 3316, 3321.
—— v. Pennsylvania R. Co., p. 1476.
—— v. Rockford, etc., R. Co., pp. 1536, 1776, 1806.
—— v. Southern R. Co., pp. 481, 482, 490.
—— v. Southern Railway, p. 3048.
—— v. Wilmington, etc., R. Co., 126 N. C. 437, 36 S. E. 14—p. 149.
—— v. Wilmington, etc., R. Co., 129 N. C. 213, 39 S. E. 827—p. 149.
Carter & Co. v. Southern R. Co., pp. 431, 721, 977, 1036, 1038, 1112.
Cartledge, Georgia, etc., R. Co. v.
Cartwright v. Chicago, etc., R. Co., pp. 1871, 2244, 2348.
—— v. Wilmerding, p. 1244.
Caruana v. British, etc., Steam Packet Co., p. 528.
Caruth v. Texas, etc., R. Co., p. 2227.
Caruthers, Ft. Worth, etc., R. Co. v.
Carver, Alden & Co. v.
—— v. Minneapolis, etc., R. Co., p. 2527.
Carvey v. Detroit, etc., R. Co., p. 2712.
Cary v. Cleveland, etc., R. Co., pp. 3158, 3160, 3168, 3174, 3175.
—— v. Los Angeles R. Co., pp. 1706, 1897, 2995.
—— Arnstine v.
Caryl, People v.
Casazza, Chicago, etc., R. Co. v.
Casco Bay Steamboat Co., Bacon v.
Case, Cincinnati, etc., R. Co. v.
—— v. Cleveland, etc., R. Co., p. 1087.
—— v. Delaware, etc., R. Co., pp. 1869, 1906, 2905.
—— Petersen v.
Case of the State Freight Tax, pp. 3418, 3419, 3420, 3421, 3427, 3447, 3480, 3549, 3550, 3553, 3563, 3564, 3566, 3567, 3568, 3594.

Caseday, St. Louis, etc., R. Co. v.
Casey, Chicago City R. Co. v.
—— Chicago, etc., R. Co. v.
—— Nashville, etc., R. Co. v.
—— Nashville, etc., Railway v.
—— v. New York, etc., R. Co., p. 2791.
—— v. St. Louis, etc., R. Co., p. 1279.
—— Texas, etc., R. Co. v.
Cash v. Wabash R. Co., pp. 462, 1268, 1456.
Cash Grain Co., St. Louis, etc., R. Co. v.
Cashin, McGhee v.
Cashman v. New York, etc., R. Co., p. 1971.
Cason, Baltimore, etc., Turnpike Road v.
Casper v. New Orleans R., etc., Co., p. 2666.
Casper & Co. v. Dry Dock, etc., R. Co., p. 2196.
Cass v. Boston, etc., R. Co., pp. 815, 821, 867, 910, 917, 918.
—— v. New York, etc., R. Co., pp. 3184, 3185.
Cassady v. Old Colony St. R. Co., pp. 2672, 2796, 3005.
—— v. Texas, etc., R. Co., pp. 1776, 2132.
Cassally, McNaughter v.
Cassasa v. New York, etc., R. Co., p. 3238.
Cassaway, Walker v.
Casseday, St. Louis, etc., R. Co. v.
Cassedy v. Pullman Palace Car Co., p. 3210.
Cassell, Southern R. Co. v.
Cassell Drug Co., Alabama, etc., R. Co. v.
Cassiano v. Galveston, etc., R. Co., p. 1622.
Cassidy v. Atlantic Ave. R. Co., p. 2185.
—— Texas, etc., R. Co. v.
Cassidy, etc., Comm. Co., St. Louis, etc., R. Co. v.
Cassilay v. Young & Co., pp. 511, 619, 734, 743, 853, 3902.
Cassio v. Brooklyn Heights R. Co., p. 2158.
Castanola v. Missouri Pac. R. Co., p. 1223.
Castelano v. Chicago, etc., R. Co., p. 2671.
Castelli v. Jereissati, p. 477.
Castello, Louisville, etc., R. Co. v.
Castellucci v. Lehigh Valley R. Co., p. 828.
Caster, Michigan, etc., R. Co. v.
Castle, Missouri Pac. R. Co. v.
Castopulon, Macon R., etc., Co. v.
Caswell v. Boston, etc., R. Corp., pp. 1813, 2127, 2131.
—— Sumner v.
Catalanotto v. Coney Island, etc., R. Co., p. 2889.
Catanzaro v. Pennsylvania R. Co., p. 3414.
Catawissa, etc., R. Co., Sandford v.
Cate, Sommer v.
Caterham R. Co. v. London R., p. 1780.
Cates, Evansville, etc., R. Co. v.
—— St. Louis, etc., R. Co. v.
Cathey v. St. Louis, etc., R. Co., pp. 2424, 2771.
Catlett v. Charleston, etc., Railway, p. 512.
—— Columbian Ins. Co. v.
Catlettsburg, Packet Co. v.
Catliff, Bourne v.
Catlin v. Adirondack Co., p. 796.
—— Chicago City R. Co. v.
Catron, Louisville, etc., R. Co. v.
Catskill Mountain R. Co., Lucas v.
—— Root v.
Cattano v. Metropolitan St. R. Co., pp. 2186, 2887, 2888.
Cattaraugus Cutlery Co. v. Buffalo, etc., R. Co., pp. 3120, 3121.
Catterlin, Padley v.
Catterson v. Brooklyn Heights R. Co., p. 2592.
Cau v. Texas, etc., R. Co., p. 1040.
—— v. Texas, etc., R. Co., pp. 930, 947, 958, 959, 970, 972, 974, 977, 980, 986, 1035, 1036.
Cauble, Waco, etc., Water Co. v.
Caughell v. Indianapolis Tract., etc., Co., p. 1901.
Causler, Gadsden, etc., R. Co. v.
—— International, etc., R. Co. v.
Cauthen, Seaboard, etc., R. Co. v.
Cavallaro v. Texas, etc., R. Co., pp. 529, 896, 914, 3274.
Cavanaugh v. Chicago, etc., R. Co., p. 3543.
Cavender, St. Louis, etc., R. Co. v.
Cavenesse, Little Rock, etc., R. Co. v.
Caveny v. Neely, p. 1837.
Cavit, Southern Pac. Co. v.
Cawfield v. Asheville St. R. Co., pp. 1890, 1891, 1901, 2116, 2230, 2394.
Cayce, Louisville, etc., R. Co. v.
Caye v. Pool, pp. 8, 1153, 1157, 1164, 1165.
Caylor, Southern Kansas R. Co. v.
Cayuga, The.
Cayuga, etc., R. Co., Davis v.
Caywood v. Seattle Elect. Co., p. 1830.
Caze v. Baltimore Ins. Co., pp. 3939, 3941.
Cazneau v. Fitchburg R. Co., p. 1773.
C., C., & St. L. Co., Barron, etc., Co. v.
C. C. C. & St. L. R. Co. v. Simon, p. 949.
C. D. & M. R. Co., Walter v.
Ceballos v. Warren Adams, pp. 820, 828, 1037.
Cecil Erie, etc., Despatch v.
—— Louisville, etc., R. Co. v.
Cedar Rapids, etc., Light Co. v. Chicago, etc., R. Co., p. 3639.
Cedar Rapids, etc, R. Co., Hoffman v.
—— Huber v.
—— Hutcheis v.
—— Johnson v.
—— Johnston v.
Centennial, The.
Central American Steamship Co. v. Mobile, etc., R. Co., pp. 488, 490, 3341, 3342.
Central Branch, etc., R. Co., McQueen v.
Central City Railway, Mowrey v.
Central Crosstown R. Co., Hastings v.
—— McGill v.
—— Schaefer v.
—— Vogler v.
Central Elect. R. Co., Bell v.
—— Kattan v.
Central Iowa R. Co., Raben v.
—— Winter v.
Central Kentucky Tract. Co. v. Chapman, pp. 1904, 1905, 2752, 2992.
—— v. Combs, pp. 1901, 2371.
—— v. May, p. 2860.
Central Line of Boats, Barnett v.
Central Mercantile Co. v. Oklahoma State Bank, pp. 394, 396, 397, 398.
Central Nat. Bank, Wilson Grain Co. v.
Central Pac. Co., McQuilken v.
Central Pac. R. Co., California v.
—— Cody v.
—— Craven v.
—— Drew v.
—— Hirshfield v.
—— Kline v.
—— Lundy v.
—— McQuilken v.
Central Pac. R. Co., Newhall v.
—— v. People, pp. 3553, 3591.
—— Pereira v.
—— Phster v.
—— Quigley v.
—— Tarbell v.
Central Park R. Co., Flynn v.
Central Park, etc., Co., Solomon v.
Central Park, etc., R. Co., Barker v.
—— Maher v.
—— Murphy v.
—— Solomon v.
—— Twomley v.
—— Ward v.
—— Wynn v.
Central Pass. R. Co. v. Bishop, pp. 2071, 2699.
—— v. Kuhn, pp. 2009, 2013, 2699.
—— v. Rose, 14 Ky. L. Rep. 264—p. 2333.
—— v. Rose, 15 Ky. L. Rep. 209, 22 S. W. 745—pp. 2152, 2154.
—— v. Stevens, p. 2381.
—— Winnegar v.
Central Railroad, Blitch v.
—— v. Brinson, p. 2670.
—— Carroll v.
—— v. Combs, pp. 3045, 3046.
—— Davis v.
—— Harris v.
—— Hite v.
—— Logan & Co. v.
—— Perry v.
—— v. Rogers & Sons, p. 863.
—— v. Smith, p. 1800.
—— Sorrell v.
—— v. Thompson, pp. 1768, 1774, 1789, 1791, 1920.
—— York Co. v.
Central R. Co. v. Brewer, pp. 2063, 2071.
—— v. Brinson, 64 Ga. 475—p. 2840.
—— v. Brinson, 70 Ga. 207—p. 2840.
—— v. Brunson, pp. 831, 832.
—— v. Bryant, pp. 961, 962, 1005, 1267, 1269, 1365, 1367, 1378, 1384, 3377.
—— Bush Co. v.
—— v. Combs, pp. 3316, 3318, 3374.
—— Daly v.
—— Dobson v.
—— v. Dwight Mfg. Co., pp. 962, 967, 968, 996, 999, 3278, 3350.
—— Exton v.
—— Frank Bros. & Co. v.
—— v. Freeman, pp. 1848, 2673.
—— v. Glass, p. 2488.
—— v. Gleason, p. 2045.
—— Hanlon v.
—— v. Hasselkus, pp. 962, 968, 981.
—— Haver v.
—— v. Hearne, pp. 1137, 1202.
—— v. Henderson, pp. 1582, 1584.
—— v. Hite, pp. 708, 3814.
—— Jacobs v.
—— Kinney v.
—— Kuttner v.
—— Larned v.
—— Lehman, etc., Co. v.
—— v. Logan & Co., pp. 3272, 3389, 3404.
—— v. McCartney, pp. 1148, 1151, 1193.
—— McDonald v.
—— v. Mackey, p. 2490.
—— v. Mauser, p. 3754.
—— Means v.
—— Mearns v.
—— v. Peacock, pp. 2043, 2049.
—— v. Pickett, p. 813.
—— Redhing v.
—— v. Rogers & Sons, pp. 3307, 3395, 3396, 3397.
—— Runyan v.
—— Saleeby v.
—— v. Sanders, pp. 2693, 2807, 2840.

Central R. Co. v. Senn, p. 2775.
—— v. Smith, 69 Ga. 268—p. 2256.
—— v. Smith, 76 Ga. 209, 2 Am. St. Rep. 31—pp. 1752, 1755, 1757, 1872, 1940, 1989, 2404.
—— v. Smith, 74 Md. 212, 21 Atl. 706, 48 Am. & Eng. R. Cas. 60—pp. 1888, 2113, 2116, 2118, 2667.
—— Staines v.
—— v. State Board, p. 3573.
—— v. Thompson, pp. 1689, 2118, 2239, 2942, 2951, 2985.
—— Uptegrove v.
—— v. Van Horn, pp. 1877, 1925, 2114, 2587.
—— v. Whitehead, pp. 1524, 1679, 1885, 1910, 1912, 2085, 2990.
—— Wiegand v.
—— Williams v.
—— Wolff v.
—— v. Wolff, pp. 2712, 3191, 3192.
—— Wright v.
—— York Co. v.
Central R., etc., Co. v. Anderson, pp. 276, 532, 774, 894, 898, 1019.
—— v. Avant, pp. 603, 697, 877, 3330, 3347, 3354.
—— v. Bayer, pp. 3394, 3397, 3409.
—— Boaz v.
—— v. Bridger, pp. 3379, 3380, 3383, 3385.
—— v. Bryant, p. 1361.
—— Coles v.
—— v. Cooper, p. 877.
—— v. Gamble, p. 2807.
—— v. Georgia Fruit, etc., Exch., pp. 336, 533, 607, 627, 629, 766, 3250, 3255, 3257, 3260, 3278, 3291, 3401.
—— Harris v.
—— v. Hasselkus, pp. 320, 322, 323, 336, 533, 607, 689, 820, 821, 824, 825, 1099, 3255, 3350, 3380.
—— Henry v.
—— v. Hines, etc., Co., p. 727.
—— v. Lampley, pp. 581, 582, 796.
—— Lehman, etc., Co. v.
—— v. Letcher, p. 2540.
—— v. Logan, pp. 210, 438.
—— Lotspeich v.
—— v. Miles, p. 1883.
—— Paterson v.
—— v. Perry, pp. 1517, 1518, 1767, 1768, 1791, 1916, 1917, 1918, 1936, 2085, 3319.
—— v. Phillips, pp. 2120, 2254.
—— v. Phinazee, pp. 2087, 2121.
—— v. Pickett, pp. 1364, 1421.
—— v. Roberts, pp. 1626, 1665, 2455, 2475, 2564, 3077.
—— v. Rogers' Sons, pp. 3397.
—— Skellie v.
—— v. Skellie, pp. 502, 533, 607, 659, 693, 3257, 3263, 3276, 3277, 3280, 3291, 3413.
—— Smith v.
—— v. Smith, 78 Ga. 694, 3 S. E. 397—p. 2940.
—— v. Smith, 80 Ga. 526, 5 S. E. 772—pp. 1494, 1801.
—— v. Smitha, pp. 819, 1379.
—— Stevens v.
—— v. Strickland, pp. 190, 193, 1597, 1599, 1600, 1601, 2469, 3079, 3086, 3098.
Central Railway, Curtis v.
Central Stock Yard, etc., Co., Delaware, etc., R. Co. v.
Central Stock Yards Co., Louisville, etc., R. Co. v.
—— v. Louisville, etc., R. Co., 118 Fed. 113, 55 C. C. A. 63, 63 L. R. A. 213—pp. 3263, 3536, 3655.
Central Stock Yards Co. v. Louisville, etc., R. Co., 192 U. S. 568, 48 L. Ed. 565, 24 S. Ct. 339—pp. 107, 1300, 3617, 3631, 3647, 3648, 3656.
Central Transp. Co. v. Pullmans' Palace Car Co., pp. 10, 2092.
Central Trust Co. v. Chicago, etc., R. Co., pp. 90, 166, 172, 175.
—— v. Denver, etc., R. Co., p. 2077.
—— v. East Tennessee, etc., R. Co., pp. 515, 796, 948.
—— v. Georgia Pac. R. Co., p. 3410.
—— Malott v.
—— v. Pittsburg, etc., R. Co., p. 3616.
—— v. Savannah, etc., R. Co., p. 641.
—— Townsend Brick, etc., Co. v.
—— v. Wabash, etc., R. Co., p. 3148.
Central Vermont R. Co., Bergan v.
—— Cox v.
—— Hyman v.
—— Johnson & Co. v.
—— Newton v.
—— North British, etc., Ins. Co. v.
—— Rosenfeld v.
—— Rutland R. Co. v.
—— v. Soper, pp. 1087, 1088, 1118, 1123, 1125.
—— State v.
—— Worthington v.
Central Yellow Pine Ass'n v. V. & P. R. Co., p. 3704.
Central, etc., Co., Pickett v.
Central, etc., R. Co. v. Almand, pp. 2441, 2775, 3031.
—— Ashley v.
—— v. Ashley, pp. 1967, 1968, 2569, 3060.
—— Atlantic Compress Co. v.
—— Augusta Brokerage Co. v.
—— v. Augusta Brokerage Co., pp. 88, 93.
—— v. Bagley, pp. 1560, 2443, 2477, 2487, 2624, 2717, 2852, 2855, 3026.
—— Bennett v.
—— Brewer v.
—— Brown v.
—— v. Brown, 165 Ala. 493, 51 So. 565—pp. 2064, 2342, 2638, 2659, 2670, 2692, 2880.
—— v. Brown, 113 Ga. 414, 38 S. E. 989, 84 Am. St. Rep. 250—pp. 2040, 2042, 2045.
—— v. Brown, 138 Ga. 107, 74 S. E. 839—pp. 2722, 2915, 2917.
—— Broyles v.
—— v. Burton, pp. 867, 900, 903, 906, 1019, 1021, 1038.
—— v. Butler Marble, etc., Co., pp. 271, 800, 1020, 1055, 1056, 1057.
—— Cannon, pp. 1628, 1629, 2443, 2444, 2663.
—— Carleton v.
—— v. Carleton, pp. 1948, 2221, 2576.
—— v. Carlisle, pp. 1906, 1911, 1915.
—— v. Chicago Portrait Co., pp. 583, 595, 597, 1081.
—— v. Chicago Varnish Co., pp. 782, 783, 784, 3284, 3352, 3394.
—— v. City Mills Co., pp. 961, 962, 963, 968, 990, 1005, 1048.
—— v. Cook, pp. 244, 305, 317, 333, 337, 338.
—— Coweta County v.
—— Davis v.
—— Devino v.
—— Dixon v.
—— Dorsey v.
—— v. Dorsey, 32 S. E. 873, 106 Ga. 826—pp. 1637, 1857.
Central, etc., R. Co. v. Dorsey, 116 Ga. 719, 42 S. E. 1024—pp. 3047, 3049, 3052, 3053.
—— v. Dothan Mule Co., pp. 3395, 3412.
—— Eichberg v.
—— Ethridge v.
—— Felton v.
—— v. Felton, pp. 466, 3393.
—— Findley v.
—— v. Floyd, p. 1798.
—— v. Forehand, pp. 2174, 2338.
—— v. Gaston, p. 3554.
—— v. Geopp, pp. 2646, 2696.
—— v. Goodman, p. 2875.
—— v. Gortatowsky, pp. 426, 427.
—— v. Groesbeck, pp. 3471, 3487.
—— v. Hall, pp. 3, 741, 825, 962, 963, 1005, 1055, 1057, 1268, 1468, 1477.
—— v. Hasselkus, pp. 1016, 1017, 1038.
—— v. Henderson, p. 1431.
—— v. Hines, etc., Co., pp. 270, 271.
—— v. Hoard, pp. 1906, 1907.
—— v. Holloway, pp. 1881, 1894, 1896.
—— v. Holmes, pp. 2676, 2840.
—— v. Hunter, pp. 2499, 2543.
—— v. Hurst, pp. 1018, 1434.
—— v. James, pp. 1460, 1461.
—— v. Johnston, pp. 1895, 2915, 2943, 2971.
—— v. Jones, 150 Ala. 379, 43 So. 575, 9 L. R. A., N. S., 1240—pp. 3160, 3168, 3169, 3186.
—— v. Jones, 7 Ga. App. 165, 66 S. E. 492—pp. 760, 797, 845.
—— v. Joseph, p. 3132.
—— v. Kavanaugh, pp. 939, 942, 969, 3351.
—— Kellow v.
—— King v.
—— Kiser Co. v.
—— v. Knight, pp. 3979, 3981, 3984.
—— v. Kuhn, p. 1742.
—— v. Lippman, pp. 3, 727, 732, 748, 754, 765, 981, 1003, 1684, 1748, 1752, 1755, 1756, 1757, 1989, 2092, 2093, 2094, 2098, 2892, 3141.
—— McCall v.
—— McElvane v.
—— v. McKinney, pp. 1896, 2113, 2638, 2750, 2857, 2940.
—— v. McNab, pp. 1899, 2654, 2749, 2750, 2753.
—— v. Madden, pp. 1747, 1911, 1913, 1966.
—— v. Manchester Mfg. Co., pp. 724, 842, 875.
—— v. Mercantile Claim Co., pp. 819, 828, 839.
—— v. Merrill & Co., pp. 895, 904, 906, 907, 948, 3351.
—— v. Milledgeville R. Co., p. 3284.
—— v. Montmollen, pp. 540, 585, 663, 664, 852.
—— Moore v.
—— v. Morgan, pp. 3047, 3062.
—— v. Morris, pp. 228, 234, 260, 264.
—— v. Motes, pp. 190, 194, 196.
—— v. Murphey, 113 Ga. 514, 38 S. E. 970, 53 L. R. A. 720—pp. 947, 948, 952, 953 958, 1055, 1065, 1073, 3293.
—— v. Murphey, 116 Ga. 863, 43 S. E. 265, 60 L. R. A. 817—pp. 36, 501, 3250, 3257, 3291, 3330, 3347, 3388, 3535.
—— v. Murphey, 196 U. S. 194, 49 L. Ed. 444, 25 S. Ct. 218—pp. 3523, 3537.
—— Pilcher v.
—— v. Price, pp. 2077, 3047.
—— Raben v.
—— Railroad Comm. v.
—— v. Railroad Comm., p. 130.
—— v. Ricks, pp. 2092, 2093, 2446.

Central, etc., R. Co. v. Rogers, pp. 1018, 1365, 1367, 1384.
—— v. Rose, p. 1880.
—— Rushin v.
—— Shellnut v.
—— v. Sigma Lumber Co., pp. 258, 285, 439, 722, 741, 778.
—— v. Sims, pp. 3332, 3654.
—— v. Smitha, p. 1073.
—— Stephens v.
—— Stewart v.
—— v. Storrs, pp. 1526, 1527, 2743, 2880.
—— Tucker v.
—— Waldrup v.
—— v. White, p. 2328.
—— Wilensky v.
—— Williams v.
—— Williamson v.
—— Winnegar v.
—— v. Wood, p. 3061.
—— Young v.
Century Bldg. Co., Luckel v.
—— Orcutt v.
Century Realty Co., Cooper v.
—— Copper v.
Century Throwing Co. v. Muller, p. 351.
Cerre, Valle v.
Certain Logs of Mahogany, p. 3864.
Chadbourne v. Illinois Cent. R. Co., p. 2873.
Chadwick v. Five Hundred and Seventy-Six Granite Blocks, pp. 3938, 3944.
—— Lane v.
—— v. St. Louis Trans. Co., p. 2971.
Chaffe v. Mississippi, etc., R. Co., p. 482.
Chaffee v. Boston, etc., R. Corp., pp. 2136, 2326.
—— v. Consolidated R. Co., pp. 1743, 2083, 2088, 2696, 2834, 2895.
—— Dickson v.
—— v. Old Colony R. Co., p. 2135.
Chaffin, Union Steamboat Co. v.
Chalk & Co. v. Charlotte, etc., R. Co., pp. 779, 901, 904.
Chalmers v. United R. Co., p. 1996.
Chamberlain, Atchison, etc., R. Co. v.
—— v. Chandler, p. 1940.
—— Edward Hines Lumber Co. v.
—— Hines Lumber Co. v.
—— v. Lake Shore, etc., R. Co., pp. 69, 3098.
—— v. Milwaukee, etc., R. Co., p. 2127.
—— v. Pierson, pp. 1760, 2095, 2104, 2105.
—— v. Pullman Palace Car Co., p. 3224.
—— Smith v.
—— v. Torgorm, p. 484.
—— v. West, p. 681.
Chamberlin-Johnson-Du Bose Co., Adams Exp. Co. v.
Chamber of Commerce v. United States, p. 3836.
Chambers, Baltimore, etc., R. Co. v.
—— Illinois Cent. R. Co. v.
—— v. Kupper-Benson Hotel Co., pp. 1509, 1719, 1750, 2838.
Champane v. La Crosse City R. Co., pp. 2397, 2825.
Champion v. Ames, p. 3468.
—— Blossom v.
—— Louisville, etc., R. Co. v.
Champlain Transp. Co., Dougan v.
—— Farmers', etc., Bank v.
Chancellor, Chicago, etc., R. Co. v.
Chancy, Fordyce v.
Chandler v. Belden, pp. 373, 521.
—— Chamberlain v.
—— v. Fulton, pp. 369, 371, 375, 380, 381, 580, 1208, 1212, 1213, 1218, 1219, 1220, 1222, 1224, 1225, 1227, 1229, 1230, 1232, 1233, 1234, 1235, 1238, 1239, 1240, 1246.
Chandler v. Sanger, p. 1195.
—— v. Sprague, pp. 337, 342, 364, 365, 369, 391.
Chandler Cotton Oil Co., Ft. Smith, etc., R. Co. v.
Chaney v. Louisiana, etc., R. Co., pp. 1953, 2213.
Chanslor, Lemon v.
Chapin v. Chicago, etc., R. Co., pp. 332, 337, 338, 1456, 1480.
—— Gould v.
—— Trowbridge v.
Chaplain Transp. Co., Farmer's, etc., Bank v.
Chapman v. Camden, etc., R. Co., p. 799.
—— v. Capital Tract. Co., 37 App. D. C. 470—p. 2739.
—— v. Capital Tract. Co., 37 App. D. C. 479—pp. 2202, 2894.
—— Central Kentucky Tract. Co. v.
—— Chicago, etc., R. Co. v.
—— v. Chicago, etc., R. Co., pp. 849, 855.
—— v. Erie R. Co., p. 2731.
—— Fish v.
—— v. Great Western R. Co., p. 898.
—— Irish v.
—— Minnesota Min. Co. v.
—— v. New Orleans, etc., R. Co., pp. 588, 818, 821.
—— Sultana v.
—— Washington, etc., R. Co. v.
Chapman, etc., Lumber Co. v. Jonesboro, etc., R. Co., pp. 39, 44, 1194, 3488, 3489, 3495.
Chappel v. Comfort, pp. 701, 713.
Chappell, Jacksonville St. R. Co. v.
—— v. Western Railway, pp. 774, 1640.
Charavay v. York Silk Mfg. Co., p. 351.
Charbonneau v. Nassau Elect. R. Co., pp. 1646, 2411, 2560.
Charge to Grand Jury, In re.
Charles v. Atlantic Coast Line R. Co., pp. 3396, 3404, 3523, 3545, 3546.
—— v. United R., etc., Co., p. 2068.
Charles Nelson, The.
Charles River Bridge Co. v. Warren Bridge, p. 1501.
Charles Schlesinger & Sons v. New York, etc., R. Co., p. 545.
Charleston, Clyde Steamship Co. v.
—— Postal Telegraph Cable Co. v.
Charleston, etc., Co., Price v.
Charleston, etc., R. Co., Black v.
—— Bottum v.
—— v. Boyd, pp. 2575, 2579, 2632.
—— Bullock v.
—— Bunch v.
—— Carroll v.
—— Carter v.
—— Creech v.
—— Dilleshaw v.
—— v. Duckworth, pp. 805, 808.
—— Dunbar v.
—— Frasier v.
—— Glover v.
—— Harter v.
—— Jarrell v.
—— Layton & Sons v.
—— v. Moore, p. 760.
—— Muckenfuss Mfg. Co. v.
—— Netherland v.
—— Porter v.
—— Sullivan v.
—— Talbert v.
—— v. Thompson, p. 3697.
—— Trakas v.
—— Traynham v.
—— Trowbridge v.
—— White Laundry Co. v.
—— Wilson v.
Charleston, etc., Railway, Bussey v.
—— Catlett v.
—— Kirkland v.
—— McGrath Bros. v.
Charleston, etc., Steamboat Co. v. Bason, pp. 729, 745, 746, 747, 749, 3915.
Charleston, etc., Transp. Co., Ross v.
Charlestown, Backman v.
Charlotte, C. & A. R. Co., Palmer v.
Charlotte Elect. R., etc., Co., Asbury v.
—— Morrison v.
—— Overcash v.
Charlotte Trouser Co. v. Seaboard, etc., R. Co., pp. 3149, 3159, 3151, 3160, 3169, 3173, 3174.
Charlotte, etc., R. Co., Chalk v.
—— Chalk & Co. v.
—— v. Gibbes, pp. 35, 39, 58, 60, 3591.
—— Griffith v.
—— Johns v.
—— Lipford v.
—— McLean v.
—— Palmer v.
—— Pinnix v.
—— Sumner v.
—— Thomas v.
—— v. Wooten, pp. 820, 823, 848.
Charlottesville Woolen Mills, Adams Exp. Co. v.
Charnock v. Texas, etc., R. Co., 51 C. C. A. 78, 113 Fed. 92—pp. 983, 1040.
—— v. Texas, etc., R. Co., 194 U. S. 432, 48 L. Ed. 1057, 24 S. Ct. 671—pp. 777, 930, 958, 959, 970, 980, 986, 1035, 1036, 1037.
Chartrand v. Southern Railway, pp. 508, 511, 3336, 3400.
Chase v. Alliance Co., p. 3949.
—— v. Atchison, etc., R. Co., 70 Kan. 546, 79 Pac. 153—p. 2623.
—— v. Atchison, etc., R. Co., 134 Mo. App. 655, 114 S. W. 1141—pp. 1769, 2499, 2506.
—— Gardner v.
—— v. Jamestown St. R. Co., pp. 2233, 2742, 2881.
—— Larson v.
—— Mercantile Mut. Ins. Co. v.
—— v. New York Cent. R. Co., pp. 1599, 1605, 2468.
—— The Mercantile, etc., Co. v.
Chase, etc., Co., Hammett v.
—— Roney v.
Chastain, Birmingham R., etc., Co. v.
Chastine, Memphis, etc., R. Co. v.
Chatfield, Snow v.
Chattahoochee, The.
Chattanooga Board of Trade v. Southern R. Co., p. 3679.
Chattanooga Rapid Transit Co. v. Venable, pp. 1569, 1570, 1582, 1583.
Chattanooga Southern R. Co. v. Thompson, pp. 215, 444, 449, 470, 471, 848.
Chattanooga, etc., R. Co. v. Huggins, pp. 1508, 1561, 1563, 1748, 1758, 1990, 2129, 2320, 2335, 2401, 2603, 2618.
—— v. Liddell, pp. 2073, 2079.
—— v. Lyon, pp. 1859, 3001.
Chautauqua Tract. Co., Perkins v.
Chave v. New York, etc., R. Co., p. 2518.
Cheatham, Houston, etc., R. Co. v.
Check v. Little Miami R. Co., pp. 3139, 3181.
Cheek, Illinois Cent. R. Co. v.
—— v. Merchants' Nat. Bank, p. 3830.
Cheetham v. Union R. Co., pp. 2694, 2844.
Chenewith, Lackawanna, etc., R. Co. v.

Cheney v. Boston, etc., R. Co., pp. 1858, 1974, 1975.
—— Hall v.
—— Samuel v.
Chenie, Hemphill v.
Cheny, Hall v.
Cherokee Nation v. Southern Kansas R. Co., pp. 36, 3445, 3447, 3449.
Cherokee Packet Co. v. Hilson, p. 2507.
Cherokee R. Co., Higgins v.
Cheronea Steamship Co., Niver Coal Co. v.
Cherow, etc., R. Co., Edwards v.
Cherry v. Chicago, etc., R. Co., pp. 1618, 1621, 1639, 3319.
—— v. Kansas City, etc., R. Co., pp. 1526, 1975.
—— v. Kansas, etc., R. Co., p. 2496.
Chesapeake & O. Ry. Co. v. Lavin, p. 545.
Chesapeake Beach R. Co., Boering v.
Chesapeake Ins. Co., Marcardier v.
Chesapeake Steamship Co. v. Merchants' Nat. Bank, p. 556.
Chesapeake, etc., Canal Co. v. Hill, p. 326.
Chesapeake, etc., R. Co. v. American Exch. Bank, pp. 949, 1346, 1471, 3618, 3628.
—— v. Anderson, p. 2531.
—— v. Austin, pp. 1881, 1948, 1949, 1955, 1956, 2768.
—— v. Barger, pp. 2656, 2727, 2859.
—— v. Beasley, etc., Co., pp. 729, 734, 750, 1051, 1057, 1078, 3161, 3169, 3170, 3172.
—— Birckhead v.
—— Boggess v.
—— v. Borders, p. 1882.
—— Boster v.
—— Boston v.
—— v. Bradford, pp. 452, 461.
—— v. Burke, pp. 1682, 1689, 1721, 2860.
—— Carnahan v.
—— Claiborne v.
—— v. Clowes, pp. 1985, 1986, 2221.
—— Cole v.
—— v. Collinsworth, p. 2652.
—— Commonwealth v.
—— v. Commonwealth, p. 3511.
—— Connell v.
—— v. Crank, pp. 2417, 2418, 2419, 3030.
—— Davis v.
—— Downey v.
—— Duty v.
—— Felbin v.
—— Flood v.
—— v. Fortune, pp. 2510, 2545.
—— v. Friel, p. 2241.
—— v. Gregston, pp. 2127, 2257.
—— Grogan v.
—— Hale v.
—— v. Hall, pp. 239, 727, 732, 749, 751, 760, 764, 3125, 3126.
—— v. Hanmer, p. 2566.
—— Harden v.
—— v. Harlan, p. 3074.
—— v. Harris, pp. 2126, 2239, 2246, 2821.
—— Herring v.
—— Howard v.
—— v. Howard, 14 App. D. C. 262—pp. 2085, 2086, 2088, 2900, 2913.
—— v. Howard, 178 U. S. 153, 156, 44 L. Ed. 1015, 20 S. Ct. 880—pp. 1821, 1837, 2085, 2086, 2087, 2088.
—— Howard Supply Co. v.
—— v. Hunter, p. 2587.
—— Interstate Commerce Comm. v.
—— Jenkins v.
—— v. Jordan, pp. 1953, 2212, 2892.
Chesapeake, etc., R. Co., Kennedy v.
—— v. Kentucky, p. 3511.
—— v. King, pp. 1534, 1537, 1792, 2273, 2864, 2878, 2879.
—— Korn v.
—— v. Lang, pp. 1953, 2183, 2392.
—— v. Lavin, p. 853.
—— Layne v.
—— Lewis v.
—— v. Lynch, pp. 2706, 2846, 3048, 3062.
—— Magowan, pp. 1268, 1356, 1468, 1470.
—— v. Mathews, pp. 1774, 2963, 3000.
—— v. Maysville Brick Co., p. 94.
—— v. Meyer, pp. 1774, 2508, 2999.
—— v. Miller, pp. 63, 64.
—— v. Morgan v.
—— v. Morgan, pp. 1842, 1846, 1850, 2642, 2777.
—— v. Morton, p. 1204.
—— v. O'Gara, etc., Co., pp. 249, 3247, 3258, 3267, 3279, 3280.
—— v. Paris, 107 Va. 408, 59 S. E. 398—pp. 2508, 2509, 2510, 2514, 2540.
—— v. Paris, 111 Va. 41, 68 S. E. 398—pp. 2511, 2512, 2540.
—— v. Pew, pp. 729, 936, 1396.
—— Plummer v.
—— Price v.
—— v. Radbourne, pp. 815, 821, 824, 828.
—— Raines v.
—— v. Reeves, pp. 2268, 2753.
—— Kicketts v.
—— v. Robinett, pp. 2417, 2425, 2784.
—— v. Robinson, 135 Ky. 850, 123 S. W. 308—pp. 1798, 1799, 1884, 1908, 2119, 2226, 2357, 2359.
—— v. Robinson, 149 Ky. 258, 147 S. W. 886—p. 2357.
—— Roy v.
—— Ryland v.
—— v. Saulsberry, 112 Ky. 915, 66 S. W. 1051, 23 Ky. L. Rep. 2341, 56 L. R. A. 580—pp. 2411, 2417.
—— v. Saulsberry, 126 Ky. 179, 31 Ky. L. Rep. 624, 103 S. W. 254, 12 L. R. A., N. S., 431—pp. 566, 568, 569, 607, 614, 636.
—— Selsor v.
—— v. Selsor, pp. 1493, 1497, 2419.
—— Shannon v.
—— v. Smith, p. 2244.
—— v. Standard Lumber Co., p. 3698.
—— Starbuck v.
—— v. Stock & Sons, pp. 802, 805, 849, 853, 855, 1082, 3285, 3313, 3390.
—— Styles v.
—— v. Topping, p. 2234.
—— Trice v.
—— v. Webb, pp. 595, 596, 598.
—— v. Wells, pp. 1944, 1945.
—— White v.
—— v. Wills, p. 2260.
—— Wilson v.
—— Woolwine v.
—— Zouch v.
Chesapeake, etc., Railway v. Robinett, pp. 2425, 2482, 2484, 2486, 3064, 3070.
Chesapeake, etc., Steamship Co., Morris v.
Cheshire Railroad v. Foster, p. 483.
Cheshire R. Co., Beckwith v.
—— Bucher v.
—— Harris v.
Chester, Cincinnati, etc., R. Co. v.
Chester Freight Line, Bacharach v.
Chester Tract. Co., Brown v.
—— Gaines v.
—— Mullen v.
—— Wood v.
Chester, etc., R. Co., Grote v.
Chestnut Bros., Chicago, etc., R. Co. v.
Chestnut & Bro, Louisville, etc., R. Co. v.
Chevaillier v. Patton, pp. 782, 788.
Chevallier v. Straham, pp. 9, 729, 730, 731, 736, 739, 740, 742, 750, 751, 752, 753, 768, 771, 933.
Cheyenne v. O'Connell, p. 28.
Chicago, Ayres, etc., R. Co., v.
—— Chicago Union Tract. Co. v.
—— Chicago, etc., R. Co. v.
—— Escanaba, etc., Transp. Co. v.
—— Harman v.
—— Harmon v.
—— Pennsylvania Co. v.
—— Pittsburg, etc., R. Co. v.
—— v. Powers, p. 2737.
Chicago & A. R. Co., Gilchrist v.
—— v. Noble, pp. 1789, 2232.
—— v. Walker, p. 1802.
Chicago, & J. E. Ry. Co. v. Lloyd, p. 2249.
Chicago Auditorium Ass'n, Burdette v.
Chicago, B. & Q. Ry. Co., Burns v.
Chicago City R. Co., Ackerstadt v.
—— v. Bennett, p. 2895.
—— v. Bundy, p. 2751.
—— Burgoyne v.
—— v. Carhick, pp. 2655, 2658.
—— v. Carroll, pp. 1517, 2645, 2681, 2836, 3004.
—— v. Casey, p. 2015.
—— v. Catlin, p. 2686.
—— v. Cooper, p. 2050.
—— Crauf v.
—— v. Crauf, pp. 1742, 1890, 1901.
—— v. Delcourt, p. 2306.
—— Devine v.
—— v. Dinsmore, 162 Ill. 658, 44 N. E. 887—pp. 2119, 2226, 2688.
—— v. Dinsmore, 62 Ill. App. 473—p. 2821.
—— Donnelly v.
—— Ebsery v.
—— Elwood v.
—— v. Engel, p. 2699.
—— Feitl v.
—— v. Flynn, p. 1744.
—— v. Foster, 80 N. E. 762, 226 Ill. 288—p. 2649.
—— v. Foster, 128 Ill. App. 571—p. 2954.
—— Fuhry v.
—— v. Gates, p. 2654.
—— v. Gregg, p. 2251.
—— Greinke v.
—— v. Greinke, pp. 2697, 2698.
—— Healy v.
—— v. Henry, 62 Ill. 142—p. 3104.
—— v. Henry, 75 N. E. 758, 218 Ill. 92—p. 2859.
—— Hickey v.
—— Hill v.
—— Jones v.
—— Kiley v.
—— Lazer v.
—— v. Lowitz, 119 Ill. App. 360—pp. 2232, 2752.
—— v. Lowitz, 75 N. E. 755, 218 Ill. 24—pp. 2752, 2753.
—— v. Lundberg, p. 2357.
—— v. McCaughna, 117 Ill. App. 538—p. 2126.
—— v. McCaughna, 216 Ill. 202, 74 N. E. 819—pp. 2344, 2365.
—— v. McClain, pp. 2656, 2895.
—— McMahon v.
—— Math v.
—— v. Mead, p. 2695.
—— v. Morse, 197 Ill. 327, 64 N. E. 304, 4 R. R. R. 215, 27 Am.

& Eng. R. Cas., N. S., 215—pp. 1978, 2892.
Chicago City R. Co. v. Morse, 98 Ill. App. 662—p. 2671.
—— v. Mumford, p. 2249.
—— v. O'Donnell, p. 2548.
—— v. Pelletier, 134 Ill. 120, 24 N. E. 770—pp. 2419, 3024.
—— v. Pelletier, 33 Ill. App. 455—p. 2485.
—— Pope v.
—— Potts v.
—— v. Pural, 79 N. E. 686, 224 Ill. 324—pp. 1740, 2605, 2811, 2861.
—— v. Pural, 127 Ill. App. 652—pp. 2606, 2697, 2975.
—— Ratner v.
—— v. Robinson, p. 2277.
—— v. Rood, 45 N. E. 238, 163 Ill. 477, 54 Am. St. Rep. 478—p. 2670.
—— v. Rood, 62 Ill. App. 550—p. 2204.
—— Schmidt v.
—— v. Schmidt, 75 N. E. 383, 217 Ill. 396—p. 2174.
—— v. Schmidt, 117 Ill. App. 213—pp. 2116, 2206.
—— Sedoff v.
—— v. Shaw, pp. 1709, 2764.
—— v. Shreve, 226 Ill. 530, 80 N. E. 1049—pp. 1742, 2895.
—— v. Shreve, 128 Ill. App. 462—pp. 1720, 1999.
—— Smaoska v.
—— Smith v.
—— v. Smith, 80 N. E. 716, 226 Ill. 178—pp. 2952, 2976.
—— v. Smith, 124 Ill. App. 627—p. 2340.
—— Szczech v.
—— Van Deventer v.
—— Ward v.
—— Wendling v.
—— Wilson v.
—— Wyckoff v.
—— v. Wyckoff, p. 2796.
—— v. Young, p. 2806.
Chicago Consol. Tract. Co. v. Mahoney, pp. 3025, 3030, 3031.
—— Peterson v.
—— v. Schritter, 78 N. E. 820, 222 Ill. 364—pp. 1750, 2113, 2347, 2915, 2916.
—— v. Schritter, 124 Ill. App. 578—pp. 1742, 2342.
—— Wojczynska v.
Chicago Deposit Vault Co. v. McNulta, p. 3252.
Chicago Elect. Vehicle Co., Michigan Cent. R. Co. v.
Chicago Exch. Bldg. Co. v. Nelson, 64 N. E. 369, 197 Ill. 334—pp. 1488, 2232, 2353, 2902.
—— v. Nelson, 98 Ill. App. 189—pp. 2149, 2227.
Chicago General R. Co., Dean v.
Chicago Junction R. Co., United States v.
Chicago Junction R., etc., Co., Willoughby v.
Chicago Junction, etc., Stock Yards Co., Willoughby v.
Chicago Lumber Co., Burlington, etc., R. Co. v.
Chicago Packing, etc., Co., Hobbs v.
—— v. Savannah, etc., R. Co., pp. 557, 558.
Chicago Portrait Co., Central, etc., R. Co. v.
Chicago R. Co., Commercial Club of Omaha v.
—— McDonnell v.
—— v. Scurr, pp. 3053, 3054, 3057.
Chicago Terminal R. Co. v. Schmelling, p. 1532.
Chicago Terminal Transfer R. Co. v. Berkswitz, p. 1689.
—— v. Young, p. 2608.
Chicago Union Tract. Co. v. Brethauer, 223 Ill. 521, 79 N. E. 287—pp. 2646, 2713, 2714, 2849.
Chicago Union Tract. Co. v. Brethauer, 125 Ill. App. 204—pp. 2408, 2487, 2564, 3106.
—— v. Chicago, 199 Ill. 484, 65 N. E. 451, 59 L. R. A. 631—pp. 27, 35, 43, 76, 77, 79, 126.
—— v. Chicago, 199 Ill. 579, 65 N. E. 470—pp. 59, 125, 175, 1643.
—— v. Duckstein, p. 2804.
—— v. Hampe, p. 2653.
—— v. Hanthorn, pp. 2394, 2925.
—— v. Kallberg, p. 2297.
—— v. Lawrence, p. 2173.
—— v. Leonard, p. 2671.
—— v. Lowenrosen, 78 N. E. 813, 222 Ill. 506—p. 2928.
—— v. Lowenrosen, 125 Ill. App. 194—p. 2647.
—— v. Lundahl, pp. 2151, 2152, 2719, 2814.
—— v. McClevy, pp. 2411, 2428.
—— v. May, p. 2860.
—— v. Mee, 75 N. E. 800, 218 Ill. 9, 2 L. R. A., N. S., 725, 4 Am. & Eng. Ann. Cas. 71—pp. 2678, 2978.
—— v. Mee, 136 Ill. App. 98—pp. 1742, 2605.
—— v. Mommsen, pp. 2671, 2692.
—— v. Newmiller, 74 N. E. 410, 215 Ill. 383—pp. 2386, 2684.
—— v. Newmiller, 116 Ill. App. 625—pp. 2130, 2684.
—— v. O'Brien, pp. 1520, 1537, 2932, 2933.
—— v. Olsen, pp. 2332, 2357.
—— v. Roberts, p. 2649.
—— v. Rosenthal, pp. 1536, 2864.
—— v. Straud, p. 2690.
Chicago Varnish Co., Central, etc., R. Co. v.
Chicago, etc., Coal Co., Chicago, etc., R. Co. v.
Chicago, etc., Co. v. Clements, p. 3840.
—— Eckerd v.
—— German v.
—— Holland v.
—— Murray v.
—— Peniston v.
—— Walsh v.
Chicago, etc., R. Co. v. Abels, pp. 765, 821, 1075, 1397, 1418, 1427, 1456.
—— v. Ackley, pp. 34, 36, 46, 116, 3493.
—— Adams v.
—— v. Adams, p. 2434.
—— v. Adams Exp. Co., p. 236.
—— v. Addizoat, pp. 3159, 3168, 3170.
—— Adix v.
—— Aiken v.
—— v. Alber, p. 948.
—— Albin v.
—— Alford v.
—— Allen v.
—— Allender v.
—— v. Ames, pp. 553, 854.
—— Anderson v.
—— v. Anderson, p. 74.
—— Andrews v.
—— v. Arkansas, pp. 3447, 3450, 3457, 3503, 3508.
—— v. Armes, pp. 1883, 1886, 2232.
—— Armstrong v.
—— v. Armstrong, p. 111.
—— v. Arnol, pp. 1723, 1744, 1755, 1877, 1920, 1992, 2618.
—— Atchison v.
—— Attorney General v.
—— Augustus v.
—— Aultman Engine, etc., Co. v.
—— Ayers v.
—— Ayres v.
—— Backhaus v.
—— Baermann v.
—— Baker v.
—— Baker Wire Co. v.
—— Banks v.
—— v. Bannerman, pp. 1573, 2442.
—— Barber v.
Chicago, etc., R. Co., Barker v.
—— v. Barnett, p. 514.
—— v. Barrett, 16 Ill. App. 1—p. 1533.
—— v. Barrett, 16 Ill. App. 17—p. 2485.
—— v. Barrett, 35 Tex. Civ. App. 366, 80 S. W. 660—pp. 1770, 1779, 1821, 2874.
—— Barris v.
—— Bass v.
—— Bates v.
—— Battis v.
—— v. Baugh, pp. 188, 1282.
—— v. Beatty, 27 Okla. 844, 116 Pac. 171—pp. 753, 871.
—— v. Beatty, 34 Okla. 321, 118 Pac. 367, 126 Pac. 736, 42 L. R. A., N. S., 984—p. 3487.
—— v. Becker, 32 Fed. 849—p. 3616.
—— v. Becker, 35 Fed. 883—p. 45.
—— Beery v.
—— Beeson v.
—— v. Bell, 70 Ill. 102—p. 2121.
—— v. Bell, 1 Kan. App. 71, 41 Pac. 209—pp. 1705, 2923, 2927.
—— Benedict v.
—— v. Benjamin, pp. 402, 817.
—— Bennett v.
—— v. Bensley, pp. 529, 895.
—— Berg v.
—— Bergen v.
—— Berger v.
—— Bergner v.
—— Bergstrom v.
—— Berkowitz v.
—— Berry v.
—— v. Berwind, etc., Min. Co., p. 3747.
—— Bettis v.
—— Betts v.
—— Bigelow v.
—— Biggie v.
—— v. Bills, 104 Ind. 13, 3 N. E. 611—pp. 1545, 2453, 2454, 2483, 2484, 2623.
—— v. Bills, 118 Ind. 221, 20 N. E. 775—pp. 1862, 1863, 2484, 2768.
—— v. Bingenheimer, p. 2686.
—— Black v.
—— Boehl v.
—— v. Boger, pp. 1636, 1850, 2494.
—— v. Boggs, p. 492.
—— v. Bolton, p. 2247.
—— Bond v.
—— v. Bonified, p. 2249.
—— Book v.
—— Bosworth v.
—— v. Bosworth, pp. 522, 523, 888, 3259.
—— Bowman v.
—— Bowsher v.
—— v. Boyce, pp. 3114, 3115, 3116, 3118, 3119, 3168, 3170, 3171.
—— v. Boyles, pp. 1532, 1762, 1908.
—— v. Bozarth, 91 Ill. App. 68—p. 1087.
—— v. Bozarth, 94 Ill. App. 69—p. 978.
—— Bradley v.
—— Brady v.
—— v. Brandon, pp. 2694, 2842.
—— Brevig v.
—— Brignoli v.
—— v. Brisbane, pp. 1597, 1599, 1600, 2467, 2482.
—— Brown v.
—— Bryan v.
—— v. Bryan, pp. 210, 2472, 3022, 3088.
—— Bryant v.
—— v. Bryant, p. 1569.
—— Buie v.
—— v. Buie, pp. 1749, 1755, 1991, 2170.
—— Bulte Milling Co. v.
—— Burgher v.
—— Burgoine v.

Chicago, etc., R. Co., Burke v.
—— v. Burlington, etc., R. Co., pp. 254, 255, 3658, 3823.
—— Burns v.
—— v. Burns, p. 1641.
—— Burrowes v.
—— v. Byrum, 153 Ill. 131, 38 N. E. 578—pp. 1684, 1745, 1884, 2249.
—— v. Byrum, 48 Ill. App. 41—p. 2361.
—— v. Cain, pp. 1981, 2734, 2806.
—— Calender-Vanderhoof Co. v.
—— v. Calumet Stock Farm, 194 Ill. 9, 1 R. R. R. 162, 24 Am. & Eng. R. Cas., N. S., 162, 61 N. E. 1095—pp. 981, 1032, 1033, 1049, 1351, 1353, 1466, 1472.
—— v. Calumet Stock Farm, 96 Ill. App. 337, pp. 1331, 1364, 1371.
—— v. Calvert, pp. 851, 859, 862.
—— Campbell v.
—— v. Carlinville, p. 3512.
—— v. Carpenter, pp. 1733, 1757, 1816, 2214, 2295, 2296, 3000.
—— Carrier v.
—— v. Carroll, 36 Tex. Civ. App. 359, 81 S. W. 1020—p. 3366.
—— v. Carroll (Tex. Civ. App.), 151 S. W. 1116—pp. 2495, 2851.
—— Carter v.
—— Cartwright v.
—— v. Casazza, p. 2564.
—— v. Casey, p. 1569.
—— Castelano v.
—— Cavanaugh v.
—— Cedar Rapids, etc., Light Co. v.
—— Central Trust Co. v.
—— v. Chancellor, p. 1514.
—— Chapin v.
—— Chapman v.
—— v. Chapman, pp. 945, 951, 958, 1075, 3330.
—— Cherry v.
—— v. Chestnut Bros., pp. 1436, 1437, 1438, 3273, 3300.
—— v. Chicago, p. 58.
—— v. Chicago, etc., Coal Co., pp. 85, 1180, 1195.
—— Childers v.
—— Chinn v.
—— v. Chisholm, pp. 1574, 1615, 2712, 3020, 3084, 3085, 3098.
—— Christie v.
—— Church v.
—— v. Church, p. 3333.
—— Churchill v.
—— Clark v.
—— v. Claunts, pp. 1858, 2266.
—— v. Clayton, pp. 3139, 3140.
—— v. Clements, p. 1275.
—— Cleve v.
—— Clute v.
—— Coates v.
—— Coats v.
—— Coine v.
—— v. Colby, pp. 187, 188, 189.
—— v. Collier, pp. 2092, 2093.
—— v. Collins, pp. 3116, 3150.
—— Colsch v.
—— Commerce Comm. v.
—— Commercial Bank v.
—— Condran v.
—— Congar v.
—— Conheim v.
—— v. Conklin, pp. 3133, 3144, 3149, 3150, 3185.
—— v. Conley, p. 2465.
—— Conroy v.
—— v. Conway, pp. 1408, 1425, 1432.
—— Cook v.
—— Corbett v.
—— Cornell v.
—— v. Cotton, pp. 3257, 3258, 3291, 3348, 3349.
—— Craker v.
—— Cram v.
—— v. Cram, p. 135.
—— Cramblet v.
—— Cramer v.
Chicago, etc., R. Co. v. Cramer, p. 3762.
—— Cream City R. Co. v.
—— Croaker v.
—— Croom v.
—— Crow v.
—— Curl v.
—— Curtis v.
—— v. Curtis, pp. 241, 3270.
—— Daley v.
—— v. Dane, pp. 423, 3868.
—— Daoust v.
—— Daube v.
—— Daugherty v.
—— Davis v.
—— v. Davis, 159 Ill. 53, 42 N. E. 382, 50 Am. St. Rep. 143—pp. 784, 981, 1033.
—— v. Davis, 54 Ill. App. 130—pp. 784, 854.
—— Dawson v.
—— Dean v.
—— Decker v.
—— DeKay v.
—— Denman v.
—— Denny v.
—— Denton v.
—— Deskins v.
—— Devine v.
—— v. Dewey, p. 2137.
—— v. Dey, p. 41.
—— v. Dickinson, pp. 816, 817, 848.
—— v. Dickson, pp. 2215, 2933.
—— Dieckmann v.
—— Dillman v.
—— v. Dingman, p. 2244.
—— v. Dinsmore, p. 1895.
—— v. Doan, p. 2876.
—— Dobney v.
—— Dodge v.
—— v. Dodson, pp. 429, 1201.
—— Dorn v.
—— Dorr Cattle Co. v.
—— Dougherty v.
—— Dowd v.
—— v. Drainage Comm'rs p. 58.
—— v. Drake, p. 2817.
—— Dudley v.
—— Duell v.
—— v. Dumser, pp. 1951, 2180, 3322.
—— Dunlap v.
—— v. Durand, p. 1936.
—— Dye v.
—— v. Eaton, p. 1686.
—— Eckerd v.
—— Ecton v.
—— Edgerton v.
—— Eickhof v.
—— Eidem v.
—— Ellsworth v.
—— Emery v.
—— v. Erickson, pp. 239, 1313, 1323.
—— Everett v.
—— Faber v.
—— v. Fahey, pp. 3179, 3180.
—— v. Fairclough, pp. 3160, 3168, 3169.
—— Farmington Mercantile Co. v.
—— Faust v.
—— v. Feintuch, pp. 3749, 3752, 3788 3794.
—— Feldschneider v.
—— Felton v.
—— v. Felton, p. 1981.
—— v. Ferguson, p. 2166.
—— Fick v.
—— Field v.
—— v. Field, pp. 1548, 1549, 1556, 1557, 1936, 2651.
—— v. Fifth Nat. Bank, p. 1102.
—— v. Filson, p. 24.
—— Finnegan v.
—— v. Fisher, 66 Ill. 152—pp. 1852, 1854, 1855, 3044.
—— v. Fisher, 141 Ill. 614, 31 N. E. 406—pp. 1953, 2175, 2180, 2345, 2940.
—— v. Fisher, 31 Ill. App. 36—pp. 1937, 2755.
Chicago, etc., R. Co., Fitzgerald v.
—— Fitzgibbon v.
—— v. Flagg, pp. 190, 1599, 2468, 2479, 3083, 3084, 3085.
—— v. Flaherty, 66 N. E. 1083, 202 Ill. 151—p. 2746.
—— v. Flaherty, 96 Ill. App. 563—p. 2331.
—— Flavin v.
—— Flexman, pp. 1540, 2042, 2055.
—— v. Flynn, p. 1682.
—— Forbes v.
—— Ford v.
—— Fowler Comm. Co. v.
—— Fox v.,
—— Foy v.
—— v. Frazer, pp. 1532, 1533, 1552, 1755, 1772.
—— Fuller v.
—— Furman v.
—— Galliers v.
—— Galloway v.
—— Gamble-Robinson Comm. Co. v.
—— Gann v.
—— Gannon v.
—— v. Gardiner, pp. 932, 940.
—— v. Gardner, pp. 3746, 3751.
—— v. Gasaway, pp. 210, 238.
—— Gates v.
—— v. Gates, p. 2085.
—— Gatton v.
—— George v.
—— v. George, pp. 1684, 1715, 2002.
—— German v.
—— Gilbert v.
—— Gilbert Bros. v.
—— v. Gillett, pp. 608, 609, 690.
—— Glass v.
—— v. Gore, pp. 2126, 2302, 2303, 2746.
—— Gould v.
—— Gradert v.
—— v. Gragg, p. 1706.
—— Graham v.
—— v. Graham, pp. 1596, 1597, 1599, 1601, 2467, 2468.
—— Graham Ice Co. v.
—— Green v.
—— Green Bay Lumber Co. v.
—— Green-Wheeler Shoe Co. v.
—— Gregory v.
—— v. Griffin, pp. 2431, 2462, 2475, 3106.
—— v. Grimes, pp. 1111, 1112.
—— v. Grimm, pp. 1702, 1732, 1740, 1834, 2693, 2813, 2897.
—— Griswold v.
—— v. Groner, p. 1777.
—— v. Gruss, p. 2864.
—— v. Gustin, p. 521.
—— Habeck v.
—— Hague v.
—— v. Hague, pp. 1764, 2240, 2673.
—— Haines v.
—— v. Hale, 83 Ill. 360, 25 Am. Rep. 403—pp. 1356, 1357.
—— v. Hale, 2 Ill. App. 150—p. 1012.
—— Haley v.
—— v. Halsell, 98 Tex. 244, 83 S. W. 15—pp. 1462, 1463.
—— v. Halsell, 80 S. W. 140, 35 Tex. Civ. App. 126—pp. 1463, 3248, 3310, 3404.
—— v. Halsell (Tex. Civ. App.), 81 S. W. 1241—pp. 1322, 1323.
—— v. Halsell, 36 Tex. Civ. App. 522, 81 S. W. 1243—pp. 1002, 1003, 3337, 3365.
—— v. Hambel, p. 2092.
—— Hamilton v.
—— v. Hamler, pp. 2102, 2103.
—— Hancock v.
—— Hanley v.
—— Hannestead v.
—— Hanson v.
—— Harden v.
—— v. Hardie, p. 2764.

Chicago, etc., R. Co., Hardin v.
—— Harding v.
—— Hardwick Farmers' Elev. Co. v.
—— v. Hardwick Farmers' Elev. Co., p. 3488.
—— Harkless v.
—— v. Harmon, pp. 1007, 1075, 1341.
—— v. Harrison, p. 1534.
—— Hart v.
—— Hartford Fire Ins. Co. v.
—— Hartwig v.
—— Harvey v.
—— Hawrigan v.
—— Haverlund v.
—— Hawk v.
—— v. Hawk, 36 Ill. App. 327—pp. 2096, 2216.
—— v. Hawk, 42 Ill. App. 322—pp. 2215.
—— Hazard v.
—— Hazel v.
—— Hazzard v.
—— v. Hazzard, p. 2113.
—— Hecker v.
—— Heitman v.
—— Heller v.
—— Hemmingway v.
—— Hempstead v.
—— v. Henderson, p. 1196.
—— Hendrick v.
—— Herman v.
—— Herndon v.
—— v. Herring, pp. 2425, 2437, 2483.
—— Hewes v.
—— Hewett v.
—— Hillis v.
—— Hinckley v.
—— Hoeger v.
—— Hoehn v.
—— v. Holdridge, pp. 2424, 3083.
—— Holland v.
—— v. Hollis, p. 3002.
—— Hooper v.
—— v. Hoover, p. 2337.
—— Hopkins v.
—— Hospes v.
—— v. Hostetter, pp. 1269, 1568.
—— House v.
—— Howard v.
—— Howe v.
—— Hoyt v.
—— v. Hubbell, p. 3752.
—— Hughes v.
—— Hull v.
—— Hutchinson v.
—— v. Hyatt, pp. 1764, 2269.
—— v. Igo, pp. 1033, 1044.
—— Illinois Match Co. v.
—— Imhoff v.
—— Interstate Commerce Comm. v.
—— v. Interstate Commerce Comm., 171 Fed. 680—pp. 3671, 3682, 3801.
—— v. Interstate Commerce Comm., 173 Fed. 930—pp. 3643, 3644, 3804.
—— Iowa v.
—— v. Iowa, pp. 34, 36, 37, 43, 44, 60, 64, 65, 1134, 1136, 1179, 3492, 3493, 3497.
—— v. Jaber, p. 800.
—— v. James (Kan.), 100 Pac. 641—p. 1994.
—— v. James, 81 Kan. 180, 105 Pac. 40—pp. 1124, 1956, 2857.
—— Jeffries v.
—— Jenkins v.
—— v. Jenkins, pp. 714, 715, 894, 1160.
—— v. Jennings, pp. 1504, 1505, 1509, 2647.
—— Jerolman v.
—— Johnson v.
—— Johnston v.
—— v. Johnston, pp. 295, 296, 341.
—— Jolley v.
—— Jones v.
Chicago, etc., R. Co. v. Jones, pp. 35, 1134, 1135, 1136, 1192.
——Junod v.
—— v. Kansas City, etc., R. Co., p. 483.
—— v. Kapp, pp. 608, 609, 693, 695.
—— v. Katzenbach, p. 795.
—— Kelly v.
—— v. Kelly, p. 2501.
—— v. Kelm, p. 772.
—— v. Kendall, pp. 899, 916.
—— v. King, pp. 499, 511, 645, 646, 648.
—— Kinnick v.
—— Kirby v.
—— v. Kirby, pp. 499, 502, 511, 533, 1315, 3631, 3648.
—— Kirk v.
—— Kiser v.
—— Kleszewski v.
—— Knowlton v.
—— Knudsen-Ferguson Fruit Co. v.
—— v. Koehler, p. 2150.
—— v. Koerner, pp. 1180, 1183, 1189.
—— Kreuziger v.
—— Kronshage v.
—— Krueger v.
—— Krug v.
—— Kyle v.
—— v. Kyle, p. 135.
—— Lackland v.
—— v. Lagerkrans, pp. 2134, 2325.
—— Lamb v.
—— Lammert v.
—— v. Lampman, pp. 195, 205, 1885, 1899, 1911, 2226, 2248, 2313, 2351, 2724, 2743, 2749.
—— v. Landauer, 36 Neb. 642, 54 N. W. 976, 54 Am. & Eng. R. Cas. 640—pp. 1884, 2119, 2252, 2824.
—— v. Landauer, 39 Neb. 803, 58 N. W. 434—pp. 2259, 2673.
—— Larkin v.
—— Larson v.
—— Latta v.
—— v. Latta, 184 Fed. 987, 106 C. C. A. 664—p. 731.
—— v. Latta, 33 S. Ct. 155, 226 U. S. 519, 57 L. Ed. 328—pp. 731, 3521.
—— Laub v.
—— Laughlin v.
—— Lawson v.
—— Lay v.
—— Leavenworth County Commissioners v.
—— v. Ledbetter, p. 20.
—— v. Lee, pp. 1561, 2104, 2217.
—— Leland v.
—— Lemke v.
—— v. Lena Lumber Co., p. 1198.
—— Lennon v.
—— Lenord v.
—— Leonard v.
—— v. Lewis, pp. 1745, 1812, 1813, 1840, 1985, 2843, 2951.
—— Leyser v.
—— Lincoln Grain Co. v.
—— v. Lindahl, pp. 1951, 2342.
—— Lindsay v.
—— Lindsley v.
—— Loeser v.
—— v. Logan, etc., Co., pp. 825, 839.
—— Long v.
—— v. Lowell, pp. 201, 1791, 1792, 2124, 2134, 2246, 2273, 2274, 2746.
—— Lucy v.
—— McAlister v.
—— McCarthy v.
—— McComb v.
—— McCorkle v.
—— McDaniel v.
—— McDermott v.
—— v. McDermott, p. 144.
—— McDonald v.
Chicago, etc., R. Co. v. McDonough, p. 2722.
—— v. McElroy, p. 139.
—— McFadden v.
—— McGee v.
—— McGrew v.
—— McGuire v.
—— v. McGuire, pp. 3457, 3464, 3465.
—— McKeon v.
—— McKinley v.
—— McKinstrey v.
—— v. McLallen, pp. 190, 196, 197.
—— McLean v.
—— McManus v.
—— McMillan v.
—— Madl v.
—— Manhattan Rubber Shoe Co. v.
—— v. Mann, pp. 1548, 2094.
—— v. Manning, pp. 728, 742, 743, 745, 746, 747.
—— Marion v.
—— Marquette v.
—— Marshall Medicine Co. v.
—— v. Martelle, p. 2264.
—— v. Martin, 53 Pac. 461, 59 Kan. 437, 12 Am. & Eng. R. Cas., N. S., 4—pp. 1708, 2078, 2098, 2099.
—— v. Martin, 178 U. S. 245, 44 L. Ed. 1055, 20 S. Ct. 854—p. 2098.
—— Masterson v.
—— Mayne v.
—— v. Means, p. 2354.
—— v. Mehlsack, 131 Ill. 61, 41 Am. & Eng. R. Cas. 60, 22 N. E. 812, 19 Am. St. Rep. 17—pp. 1572, 1722, 2516, 2929.
—— v. Mehlsack, 44 Ill. App. 124—pp. 2516, 2929.
—— Meloche v.
—— Menzell v.
—— Merchants' Despatch Transp. Co. v.
—— v. Merrill, pp. 569, 570.
—— Merryman v.
—— Merz v.
—— Meuer v.
—— Meyer v.
—— v. Meyer, p. 1908.
—— v. Michie, pp. 1501, 1572, 2207.
—— Michigan Cent. R. Co. v.
—— v. Miles, pp. 1309, 1316, 1321, 1322, 3333.
—— v. Mill Elevator, etc., Co., pp. 647, 654.
—— Miller v.
—— v. Miller, p. 3521.
—— v. Mills, pp. 1889, 1891.
—— Milne v.
—— Milroy v.
—— Miltimore v.
—— Milwaukee Malt Extract Co. v.
—— Milwaukee Mirror, etc., Works v.
—— v. Minnesota, pp. 34, 36, 39, 40, 58, 60, 61, 62, 64, 115, 116, 119, 3668.
—— Minor v.
—— Minter v.
—— Mitchell v.
—— v. Mitchell, pp. 1291, 1483.
—— v. Mock, p. 2801.
—— v. Mohaupt, p. 2166.
—— Mohr v.
—— v. Montfort, pp. 988, 1049, 3291, 3326.
—— Moore v.
—— v. Moran, pp. 1503, 2782.
—— Morey v.
—— v. Morris, pp. 1304, 1305, 1333, 1341, 1344, 1466, 1467, 1473, 1475.
—— v. Moss, pp. 788, 1039, 1040, 1075.
—— Mote v.
—— Mueller v.
—— v. Mulford, pp. 3314, 3317.

Chicago, etc., R. Co. v. Mumford, pp. 1889, 1901.
—— v. Murphy, pp. 2894, 2954.
—— Murray v.
—— Muster v.
—— Myers v.
—— v. Myers, pp. 2122, 2218.
—— Mykleby v.
—— National Bank v.
—— National Elevator, etc., Co. v.
—— v. National Elevator, etc., Co., p. 541.
—— National Pole Co. v.
—— Nebraska Transfer Co. v.
—— Neice v.
—— v. Neimann, p. 779.
—— Nelson v.
—— Nevius v.
—— v. Newburn, pp. 2441, 3079.
—— Newby v.
—— v. Newell, 212 Ill. 332, 72 N. E. 416—pp. 1953, 2087, 2343, 2757, 2888.
—— v. Newell, 113 Ill. App. 263—p. 2342.
—— Newman v.
—— v. Newhouse Mill, etc., Co., pp. 642, 653, 675.
—— Nichols v.
—— v. Noble, p. 1866.
—— v. Northern Line Packet Co., pp. 3182, 3308, 3346.
—— v. Nuesch, p. 663.
—— O'Brien v.
—— v. O'Brien, p. 1578.
—— O'Donnell v.
—— v. Oglesby, p. 3485.
—— Oklahoma v.
—— Oliver & Son v.
—— v. Olsen, p. 2494.
—— Olson v.
—— O'Rourke v.
—— Orr v.
—— Osborne v.
—— v. Osborne, pp. 3610, 3681, 3717, 3718, 3719, 3766, 3767.
—— Otto v.
—— v. Otto, p. 2937.
—— v. Owen, p. 1279.
—— Owens Bros. v.
—— Page v.
—— Paine v.
—— Painter v.
—— v. Painter, pp. 1219, 1220.
—— Palmer v.
—— v. Parkinson, pp. 2504, 2525, 2549.
—— v. Parks, pp. 1187, 1596, 1597, 1598, 1599, 2467, 2468, 2479.
—— Parsons v.
—— Patee v.
—— Paterson v.
—— Patry v.
—— Pattee v.
—— Patten v.
—— v. Peacock, pp. 2479, 2564.
—— Peat v.
—— Peck v.
—— Peet v.
—— Peik v.
—— v. Pendergast, p. 1633.
—— People v.
—— v. People, 56 Ill. 365, 8 Am. Rep. 690—pp. 221, 255, 541, 542, 727, 732, 748.
—— v. People, 69 Ill. 11, 16 Am. Rep. 599—pp. 83, 97, 222.
—— v. People, 77 Ill. 443—p. 439.
—— Peoria, etc., R. Co. v.
—— v. Peoria, etc., R. Co., p. 3303.
—— Perkins v.
—— Pershing v.
—— Peterson v.
—— Petuson v.
—— v. Pfeifer & Bro., pp. 549, 566, 636, 663, 682, 3407.
—— Pike v.
—— v. Pillsbury (Ill.), 8 N. E. 803—p. 1499.
—— v. Pillsbury, 123 Ill. 9, 14 N. E. 22, 26 Am. & Eng. R. Cas. 241, 31 Am. & Eng. R. Cas. 24, 5 Am. St. Rep. 483—pp. 1492, 1499, 1684, 1724, 2021, 2032.
—— Pine Bros. v.
—— Pioria, etc., R. Co. v.
—— v. Planters' Gin, etc., Co., pp. 421, 610, 635, 641, 642, 646, 650, 653, 662, 663, 669, 670, 672, 673.
—— Pledger v.
—— Plott v.
—— v. Pollock, pp. 433, 1281, 1475, 1479.
—— v. Pondrom, p. 2200.
—— v. Poore, p. 2001.
—— Porter v.
—— Post v.
—— v. Posten, pp. 2080, 2085, 2098.
—— Potter v.
—— Powers v.
—— v. Powers, pp. 284, 285, 1336.
—— Pratt v.
—— v. Pratt, pp. 1300, 1313.
—— v. Provine, pp. 587, 816, 817.
—— v. Pullman, etc., Car Co., pp. 1837, 1936, 3447.
—— Quackenbush v.
—— Quaife v.
—— v. Radford, p. 2479.
—— v. Railroad Comm., 173 Ind. 469, 87 N. E. 1030, 90 N. E. 1011—pp. 119, 3489.
—— v. Railroad Comm., 175 Ind. 630, 95 N. E. 364—pp. 65, 108, 117, 118, 133.
—— v. Railroad Comm., 152 Wis. 654, 140 N. W. 296—pp. 3485, 3515.
—— Ralph v.
—— v. Ralston, p. 1756.
—— Randell v.
—— v. Randolph, pp. 1858, 1859.
—— v. Ransom, pp. 1999, 2011.
—— Ray v.
—— v. Rayburn, p. 2365.
—— Reading v.
—— Redmon v.
—— Reed v.
—— Reeves v.
—— v. Reyman, pp. 787, 895, 899.
—— Reynolds v.
—— v. Rhodes, p. 2081.
—— Rice v.
—— Richardson v.
—— v. Rielly, pp. 2122, 2190.
—— Riley v.
—— v. Riley, pp. 3081, 3098.
—— Robert v.
—— v. Roberts, pp. 2479, 3082.
—— Robinson v.
—— v. Robinson, p. 1805.
—— Rohrig v.
—— Rosenbaum Grain Co. v.
—— Ross v.
—— v. Ross, pp. 2034, 2607.
—— v. Rowell, pp. 2085, 2086, 2087, 2088, 2658, 2722, 2759, 3067.
—— Rudiger v.
—— Russell v.
—— v. Ryan, 165 Ill. 88, 46 N. E. 208—p. 1792.
—— v. Ryan, 62 Ill. App. 264—p. 2501.
—— St. Clair v.
—— Sanders v.
—— Sattler v.
—— v. Sattler, pp. 1526, 1528, 2240.
—— Saunders v.
—— Sawyer v.
—— v. Sawyer, pp. 727, 894, 899.
—— v. Scates, pp. 2155, 2158.
—— Schaller v.
—— Scheiber v.
—— Schlag v.
—— Schlichting v.
—— v. Schmelling, pp. 1537, 1701, 2272, 2275.
—— Schmidt v.
Chicago, etc., R. Co., Schroeder Lumber Co. v.
—— v. Schuldt, p. 1367.
—— Schumacher v.
—— v. Scott, 42 Ill. 132—pp. 894, 899, 910, 911.
—— v. Scott (Tex. Civ. App.), 156 S. W. 294—p. 825.
—— Scott Bros. v.
—— Seigfried v.
—— Seymour v.
—— Shanahan v.
—— v. Shannon, p. 1785.
—— Shaw v.
—— Shea v.
—— v. Shea, pp. 727, 760, 761.
—— Shepard v.
—— Sherlock v.
—— Sherman v.
—— Sherwood v.
—— Siemonsma v.
—— v. Simms, p. 1087.
—— v. Simon, pp. 981, 1004, 1033, 1049, 3257.
—— Simpson v.
—— v. Simpson, pp. 1835, 1836.
—— Skinner v.
—— Sleepy Eye Milling Co. v.
—— v. Slattery, pp. 1329, 1331, 1384, 1454, 1470, 3629.
—— v. Slaughter, pp. 3362, 3405.
—— Smith v.
—— v. Smith, 110 Fed. 473—p. 52.
—— v. Smith, 59 Ill. App. 242—p. 1786.
—— v. Smith, 81 Ill. App. 364—p. 3326.
—— v. Smith, 124 Ill. App. 627—pp. 2011, 2340.
—— Snider v.
—— Solan v.
—— v. Solan, pp. 937, 947, 950, 955, 1073, 2092, 2098, 3480, 3481, 3502, 3504, 3505, 3507, 3513, 3519, 3522, 4058.
—— Spalding v.
—— Spannagle v.
—— v. Spears, pp. 1417, 1420, 1421, 1422.
—— Spencer v.
—— Spicer v.
—— Spirk v.
—— v. Spirk, pp. 2415, 2455, 2621, 2852.
—— v. Stanbro, pp. 541, 598.
—— Starr v.
—— State v.
—— v. State, 86 Ark. 412, 111 S. W. 456—pp. 3425, 3503, 3508.
—— v. State, 51 N. E. 924, 153 Ind. 134—p. 3557.
—— v. State, 23 Okla. 94, 99 Pac. 901—pp. 31, 92.
—— v. State (Okla.), 128 Pac. 908—p. 125.
—— State Nat. Bank v.
—— v. Steamboat W. G. Woodsides, p. 1148.
—— v. Steear, p. 3139.
—— v. Stepp, pp. 1511, 1514, 2084, 2325, 2363.
—— v. Stewart, p. 2150.
—— v. Stibbs, p. 1719.
—— Stone v.
—— v. Stonecipher, p. 1873.
—— Stoner v.
—— v. Storment, p. 2268.
—— Strand v.
—— v. Stratton, p. 2834.
—— v. Streeter v.
—— Stutz v.
—— v. Suffern, pp. 210, 212.
—— Sunderland Bros. Co. v.
—— Sutton v.
—— v. Swanger, p. 3514.
—— Swedish-American Nat. Bank v.
—— v. Swindlehurst, p. 3554.
—— v. Sykes, p. 1773.
—— Szczepanski v.

Chicago, etc., R. Co., Taenzer & Co. v.
—— Tallman v.
—— Terre Haute, etc., R. Co. v.
—— v. Territory, p. 35.
—— Thomas v.
—— v. Thompkins, pp. 34, 39, 52, 58, 115, 124, 129, 134.
—— Thompson v.
—— v. Thompson, 19 Ill. 578—pp. 5, 210, 236, 239, 240, 760, 767, 770, 3151.
—— v. Thompson, 100 Tex. 185, 97 S. W. 459—p. 940.
—— v. Thompson, 41 Tex. Civ. App. 459, 93 S. W. 702—pp. 943, 1120.
—— v. Thurlow, pp. 1501, 1524, 1536, 1539, 1558, 2292.
—— Tiller v.
—— v. Todd, p. 1323.
—— v. Tracey, p. 1537.
—— Tracy v.
—— Tradewell v.
—— Traffic Bureau Merchants' Exch. v.
—— Trezona v.
—— v. Trotter, 60 Miss. 442—p. 2681.
—— v. Trotter, 61 Miss. 417—p. 2966.
—— v. Troyer, 70 Neb. 287, 97 N. W. 308—p. 1568.
—— v. Troyer, 70 Neb. 293, 103 N. W. 680—pp. 1548, 2308, 2777, 2860.
—— Trust Co. v.
—— Tuley v.
—— Tuttle v.
—— Uber v.
—— Ullman v.
—— Unionville Produce Co. v.
—— United States v.
—— v. United States, 156 Fed. 558, 84 C. C. A. 324, 26 L. R. A., N. S., 551—p. 3731.
—— v. United States, 157 Fed. 830—pp. 3738, 3744, 3850.
—— v. United States, 162 Fed. 835—p. 3845.
—— v. United States, 91 C. C. A. 373, 165 Fed. 423, 20 L. R. A., N. S., 473—p. 3455.
—— v. United States, 194 Fed. 342—pp. 3621, 3626, 3627.
—— v. United States, 195 Fed. 241—p. 3621.
—— v. United States, 209 U. S. 90, 52 L. Ed. 698, 28 S. Ct. 439—pp. 3443, 3613, 3736, 3737, 3842, 3848, 3852, 3853, 3854, 3855, 3857.
—— v. United States, 212 U. S. 563, 53 L. Ed. 653, 29 S. Ct. 689—p. 3731.
—— v. United States, 219 U. S. 486, 55 L. Ed. 305, 31 S. Ct. 272—pp. 3495, 3605, 3765.
—— v. United States, 220 U. S. 559, 55 L. Ed. 582, 31 S. Ct. 612—pp. 3450, 3452, 3456.
—— Usher v.
—— v. Van Dresar, p. 1387.
—— Van Gilder v.
—— Van Patten v.
—— Vimont v.
—— Vincent v.
—— Voelker v.
—— Voorhees v.
—— Wakefield v.
—— Waldron v.
—— v. Walker, 18 R. R. R. 596, 41 Am. & Eng. R. Cas., N. S., 596, 217 Ill. 605, 75 N. E. 520—pp. 1509, 1511, 2503.
—— v. Walker, 29 Okla. 856, 119 Pac. 993—p. 3291.
—— v. Wallace, pp. 214, 236, 244.
—— Walter v.
—— Walters v.
—— Walthers v.
—— Ward v.
—— Wardwell v.
—— v. Warren, pp. 511, 526, 916.
Chicago, etc., R. Co., Washburn v.
—— Waterbury v.
—— Way v.
—— Weber v.
—— Weber Co v.
—— Weeks v.
—— v. Weeks, p. 3038.
—— v. Wehrman, pp. 946, 961, 969, 977, 978, 1348, 1397, 1398.
—— Weida v.
—— Wellman v.
—— v. Wellman, pp. 34, 46, 58, 60, 115, 116.
—— Wente v.
—— Wentz v.
—— Werner v.
—— Western Sash, etc., Co. v.
—— v. Western, etc., Grain Co., p. 3340.
—— Wetzell v.
—— Whitaker v.
—— White Live Stock Comm. Co. v.
—— Whitham v.
—— Whitnack v.
—— Whitney v.
—— v. Whitten, pp. 3113, 3115, 3116, 3117, 3119, 3130, 3131, 3197, 3199.
—— Wiggins Ferry Co. v.
—— Wightman v.
—— Wilcox v.
—— v. Wilcox, p. 2655.
—— Willard v.
—— v. Willard, p. 2429.
—— Williams v.
—— v. Williams, 101 Ark. 436, 142 S. W. 826—p. 1084.
—— v. Williams, 200 Fed. 207, 118 C. C. A. 393—pp. 1567, 2098.
—— v. Williams, 55 Ill. 185, 8 Am. Rep. 641—pp. 190, 191, 193, 196, 1943, 1944, 1950, 3050.
—— v. Williams, 85 N. W. 832, 61 Neb. 608, 55 L. R. A. 289—pp. 1272, 1344, 1384.
—— v. Wilson, 63 Ill. 167—p. 3074.
—— v. Wilson, 23 Ill. App. 63—p. 2486.
—— v. Wimmer, pp. 2909, 3035.
—— v. Winfrey, pp. 2119, 2249, 2267, 2319, 2671, 2777.
—— Winscott v.
—— Winsor Coal Co. v.
—— v. Winters, pp. 1531, 1537, 1567, 1793, 2125, 2911.
—— Wisecarver v.
—— v. Witty, pp. 1075, 1362, 1363.
—— v. Wolcott, pp. 210, 222, 224, 234, 235, 253, 254, 258, 260, 1142, 1194, 1195, 1196.
—— Wolf v.
—— v. Wolfe, pp. 659, 1764, 1765, 2671.
—— Wood v.
—— v. Wood, pp. 1536, 1537.
—— v. Woodward, pp. 727, 1292, 1329, 1351, 1454, 1456, 1473, 1474, 3251, 3258, 3268.
—— Wooley v.
—— v. Woolner Distilling Co., p. 711.
—— v. Woolridge, p. 2131.
—— Woolsey v.
—— Wright v.
—— York v.
—— Young v.
—— v. Young, 102 Ark. 599, 145 S. W. 203—pp. 143, 144, 174.
—— v. Young, 58 Neb. 678, 79 N. W. 556, 14 Am. & Eng. R. Cas., N. S., 343—pp. 1764, 1766, 2604.
—— v. Young (Tex. Civ. App.), 107 S. W. 127—pp. 1299, 1322, 1336.
—— v. Zernecke, 59 Neb. 689, 82 N. W. 26, 17 Am. & Eng. R. Cas., N. S., 76, 55 L. R. A. 610—pp. 1764, 1766, 2676.
Chicago, etc., R. Co. v. Zernecke, 183 U. S. 582, 46 L. Ed. 339, 22 S. Ct. 229—pp. 730, 731, 1680.
Chicago, etc., Steamship Co. v. Lynch, pp. 4000, 4002.
Chicago, etc., Tract. Co., Garner v.
—— Schlauder v.
Chicago, etc., Transfer Co. v. Kotoski, p. 2864.
Chickering v. Fowler, pp. 536, 540, 566.
Chiert v. Interurban St. R. Co., p. 2465.
Childers v. Chicago, etc., R. Co., p. 1033.
—— Missouri Pac. R. Co. v.
Childress, Craig v.
—— Richmond, etc., R. Co. v.
Childs v. Little Miami R. Co., p. 818.
Chiles v. Southern R. Co., p. 2848.
Chillicothe v. Raynard, p. 3161.
Chilton v. London, etc., R. Co., p. 2062.
—— Missouri, etc., R. Co. v.
—— v. St. Louis, etc., R. Co., pp. 196, 1944, 1945, 2854.
Chilvers v. People, p. 3587.
China Mfg. Co., Missouri Pac. R. Co. v.
Chinn v. Chicago, etc., R. Co., p. 1479.
Chinski, Gulf, etc., R. Co. v.
Chipman, Boston, etc., R. Co. v.
Chippewa Valley Elect. R. Co., Wanzer v.
Chippewa, etc., Elect. R. Co., Wanzer v.
Chisholm, Chicago, etc., R. Co. v.
Chittenden, Roberts v.
—— Robinson v.
Chittim, Missouri, etc., R. Co. v.
Chitty v. St. Louis, etc., R. Co., pp. 2128, 2129, 2130, 2262, 2656.
Chlanda v. St. Louis Trans. Co., pp. 2666, 2697.
Choate v. Crowninshield, pp. 752, 765, 820, 828.
—— v. Missouri Pac. R. Co., pp. 1558, 1953, 2342.
—— San Antonio, etc., R. Co. v.
—— v. San Antonio, etc., R. Co., pp. 1766, 1990, 1992, 2220, 2222, 2892.
Choctaw, etc., R. Co., Bourland v.
—— v. Burgess, p. 1880.
—— v. Cantwell, p. 3053.
—— Crutcher v.
—— Harp v.
—— v. Hickey, pp. 2916, 2944, 2966.
—— v. Hill, pp. 2493, 3017, 3032, 3079, 3080, 3084, 3088, 3102.
—— Lane v.
—— Rodgers v.
—— v. Rolfe, pp. 259, 458, 459, 474.
—— v. Stanford, p. 2728.
—— v. State, pp. 92, 142.
—— v. Walker, p. 645.
—— v. Zwirtz, pp. 3110, 3114, 3115, 3124.
Chollette, Omaha, etc., R. Co. v.
—— v. Omaha, etc., R. Co., 26 Neb. 159, 41 N. W. 1105, 3 L. R. A. 135—pp. 1764, 3315, 3317, 3321.
—— v. Omaha, etc., R. Co., 33 Neb. 143, 49 N. W. 1114—p. 1764.
Chorn v. Missouri, etc., R. Co., p. 2157.
Chouteau v. St. Anthony, p. 770.
—— v. Steamboat St. Anthony, pp. 239, 277.
—— v. The St. Anthony, pp. 770, 771.
—— v. Union R., etc., Co., pp. 116, 422.
Chouteau Transp. Co., Buddenberg v.

Chouteaux v. Leech, p. 770.
—— v. Leech & Co., pp. 788, 1008.
Chovin, State v.
Chowning, Willis v.
Chretien v. New Orleans R. Co., pp. 2127, 2129, 2262.
Christall, Flint v.
Christensen v. Brooklyn Heights R. Co., p. 2149.
—— v. Metropolitan St. R. Co., p. 2205.
—— v. Oregon, etc., R. Co., pp. 1683, 1690, 1719, 2171, 2669, 2673, 2841.
Christenson v. American Exp. Co., pp. 320, 323, 728, 733, 749, 768, 986, 3369, 3371, 3911.
Christian v. Augusta, etc., R. Co., pp. 2814, 2848.
—— v. First Division, etc., R. Co., p. 518.
—— Jones v.
—— Lombard, etc., Pass. R. Co. v.
—— Southern R. Co. v.
Christie, Baltimore, etc., R. Co. v.
—— v. Chicago, etc., R. Co., p. 2500.
—— v. Davis Coal, etc., Co., p. 3940.
—— v. Galveston City R. Co., pp. 1767, 1880, 2637, 2656.
—— v. Missouri Pac. R. Co., p. 1180.
Christie Grain, etc., Co., Board v.
Christl v. Missouri Pac. R. Co., pp. 3750, 3761.
Christmas, Yazoo, etc., R. Co. v.
Christopher, etc., R. Co., Kummer v.
Chudnovski v. Eckels, p. 1502.
Chunn v. City, etc., Railway, 23 App. D. C. 551—pp. 2878, 2879.
—— v. City, etc., Railway, 207 U. S. 302, 52 L. Ed. 219, 28 S. Ct. 63, 12 Am. & Eng. Ann. Cas. 595—p. 2116.
Church v. Atchison, etc., R. Co., p. 3305.
—— Chicago, etc., R. Co. v.
—— v. Chicago, etc., R. Co., 81 Neb. 615, 116 N. W. 520—pp. 1268, 1454, 1456.
—— v. Chicago, etc., R. Co., 6 S. Dak. 235, 60 N. W. 854, 26 L. R. A. 616, 2 Am. & Eng. R. Cas., N. S., 1—pp. 1668, 1968, 2456.
—— Denver, etc., R. Co. v.
—— Louisville, etc. R. Co. v.
—— v. Minneapolis, etc., R. Co., p. 3753.
Churchill v. Chicago, etc., R. Co., p. 1973.
—— Dantzler Lumber Co. v.
—— In re.
Churchman, Wilson v.
Chy Lung v. Freeman, p. 3564.
C. H. & D. R. Co., Ferrell v.
—— Howe v.
—— Shaffer & Co. v.
—— Smith v.
—— Wittman v.
Cicero, etc., R. Co., Kane v.
—— v. Meixner, p. 2151.
Cincinnati Chronicle Co. v. White Line Cent. Transit Co., pp. 847, 856.
Cincinanti Grain Co. v. Louisville, etc., R. Co., p. 288.
Cincinnati Northern R. Co., Mercer v.
Cincinnati Northern Tract. Co. v. Rosnagle, p. 3085.
Cincinnati St. R. Co., Carney v.
—— v. Fullbright, pp. 1714, 2615, 2618.
—— Hollingsworth v.
—— v. Kelsey, pp. 1714, 2694, 2697, 2844.
—— McBee v.
—— v. Snell, pp. 2278, 2319.
Cincinnati Tract. Co. v. Baron, etc., Co., pp. 1714, 1821.
—— Dougherty v.
—— Goodwin v.
—— Hamburger v.
—— v. Hamburger, p. 1824.
—— Holzenkamp v.
—— v. Holzenkamp, 74 O. St. 379, 78 N. E. 529, 6 L. R. A., N. S., 800, 113 Am. St. Rep. 980—pp. 1503, 2685.
—— v. Holzenkamp, 3 N. P., N. S., 537, 539, 16 O. D. N. P. 673—pp. 1508, 1516.
—— v. Leach, p. 2187.
Cincinnati, etc., Mail Line Co. v. Boal, pp. 771, 809, 3898.
Cincinnati, etc., Packet Co. v. Bay, p. 3422.
Cincinnati, etc., R. Co. v. Aller, p. 2528.
—— Altemeier v.
—— Bailey v.
—— Ballard v.
—— v. Barkley, pp. 2425, 2634, 2774.
—— Beiser v.
—— v. Berdan & Co., pp. 948, 956, 959, 989, 990, 1032.
—— v. Brandenburg, p. 2529.
—— v. Bravard, pp. 2693, 2779.
—— v. Brown, pp. 1714, 2682, 2697, 2844.
—— v. Carper, pp. 1544, 2126, 2127, 2227, 2607.
—— v. Carson, pp. 2447, 2459, 2462, 2664, 3078, 3079, 3080, 3083, 3098.
—— v. Case, pp. 1303, 1305, 1442.
—— v. Chester, p. 2604.
—— v. Cole, p. 3096.
—— v. Cook, p. 168.
—— v. Cooper, pp. 1707, 1971, 1972, 1991, 2121, 2997, 3008.
—— Corry v.
—— Coursel v.
—— Crawford v.
—— v. Dagner, p. 1789.
—— v. Disbrow & Co., pp. 1048, 1361, 1365, 1367, 1384.
—— v. Dufrain, p. 2248.
—— v. Eaton, pp. 2565, 2773.
—— Fairbanks & Co. v.
—— v. Fairbanks & Co., pp. 726, 782, 783, 3289, 3341.
—— Farley v.
—— Fatman v.
—— Fatman & Co. v.
—— v. Giboney, p. 1773.
—— Glascock v.
—— v. Graves, p. 1397.
—— Gray v.
—— v. Green, pp. 1346, 1481, 1482.
—— v. Greening, pp. 1454, 1456, 3284, 3327, 3388, 3416.
—— v. Gregg, pp. 1439, 3304.
—— v. Grover, pp. 1457, 1467.
—— Gwyn v.
—— v. Hansford & Son, pp. 721, 848, 858.
—— v. Harris, pp. 1612, 1613, 2038, 2056, 2777, 3076.
—— v. Holcomb, p. 2374.
—— Hollingsworth v.
—— Howe v.
—— Interstate Commerce Comm. v.
—— v. Interstate Commerce Commission, 162 U. S. 184, 40 L. Ed. 935, 16 S. Ct. 700, 4 Am. & Eng. R. Cas., N. S., 223—pp. 3609, 3610, 3632, 3633, 3667, 3668, 3669, 3676, 3709, 3712, 3723, 3730, 3737, 3767, 3770, 3785, 3786, 3806, 3831.
—— v. Interstate Commerce Commission, 167 U. S. 479, 42 L. Ed. 243, 17 S. Ct. 896—p. 3709.
—— v. Interstate Commerce Commission, 206 U. S. 142, 51 L. Ed. 995, 27 S. Ct. 648—pp. 3634, 3783, 3785, 3786, 3797, 3799.
Cincinnati, etc., R. Co. v. Jackson, p. 2703.
—— Jones v.
—— v. Kassen, p. 1972.
—— v. Kern, pp. 1454, 1458.
—— Lake Shore, etc., R. Co. v.
—— v. Logan, pp. 1462, 1463, 1464, 1465.
—— v. Lohe, 68 O. St. 101, 8 R. R. R. 447, 31 Am. & Eng. R. Cas., N. S., 447, 67 N. E. 161, 67 L. R. A. 637—pp. 2122, 2123, 2184, 2189, 2190.
—— v. Lohe, 48 W. L. Bull., 507—p. 2128.
—— v. Lorton, pp. 1841, 2336, 2969.
—— McClain, p. 2354.
—— v. McCool, pp. 894, 899, 910.
—— v. Marcus, pp. 760, 3117, 3119, 3125, 3126, 3152, 3153.
—— Mercer v.
—— v. Miles & Son, p. 3309.
—— Mitchell v.
—— v. Morley, pp. 1694, 1726, 1822, 1937, 2113, 2213, 2521, 2523.
—— v. Mounts, p. 1777.
—— Muller v.
—— Murnahan v.
—— v. Murray, pp. 2009, 2014.
—— Mussellam v.
—— v. Paine, p. 3044.
—— v. Parrott, p. 341.
—— v. Pendleton, pp. 1334, 1473, 1474, 3267, 3410.
—— v. Peters, pp. 1772, 2232, 2615.
—— v. Pontius, pp. 319, 321, 322, 323, 333, 949, 953, 989, 3251, 3254, 3342.
—— v. Kaine, pp. 1968, 2074.
—— Reibel v.
—— Revalee, pp. 2268, 2655.
—— v. Richardson, pp. 3046, 3047, 3049, 3065, 3066, 3074.
—— v. Sanders, p. 1367.
—— Shrum v.
—— v. Skillman, pp. 1596, 1597, 1598, 1599, 1602, 2467, 2473, 2476.
—— v. Sleeper, pp. 2087, 2088, 2568, 2627.
—— v. Spratt, pp. 792, 848, 853.
—— State v.
—— v. Steele, pp. 352, 402, 598.
—— v. Strosnider, pp. 3071, 3076.
—— v. Stout, p. 3299.
—— v. Taylor, pp. 2870, 3077.
—— v. Troy, p. 20.
—— Tuttle v.
—— v. Vivion, p. 2955.
—— v. Webb, pp. 727, 732, 734, 746, 1309.
—— White v.
—— Woodburn v.
—— v. Worthington, pp. 1705, 2596, 2602.
—— Zagelmeyer v.
Cincinnati, etc., Railway v. Burkhardt, p. 2617.
Cincinnati, etc., St. R. Co. v. Lohe, pp. 2189, 2190, 2309, 2320.
—— Schwartz v.
Cincinnati, etc., Tract. Co., Behm v.
—— v. Norfolk, etc., Railway, p. 713.
—— v. Rosnagle, pp. 2409, 2428.
Cisco Oil Mill, Texas, etc., R. Co. v.
Citizens' Bank, Haas v.
—— v. Nantucket Steamboat Co., pp. 292, 770, 818, 1135.
—— St Louis, etc., R. Co. v.
Citizens' Elect. St. R. Co., Sauvan v.
—— Williams v.
Citizens' Nat. Bank, Blaidsell Co. v.
—— v. C. N. O. & T. P. R. Co., p. 331.

Citizens' Nat. Bank, National Bank v.
Citizens' R. Co. v. Craig, pp. 1712, 1732.
—— v. Farley, p. 1697.
—— v. Hall, pp. 1903, 2870.
—— Huelsenkamp v.
—— McKeon v.
—— Olsen v.
—— Seymour v.
—— v. Sinclair, pp. 1812, 1817, 1821, 1822, 1978.
—— v. Wade, pp. 1827, 1987.
—— Wyatt v.
Citizens' Steamboat Co., Rathbun v.
Citizens' St. R. Co., Anderson v.
—— v. Clark, pp. 2464, 2483, 2834.
—— Conner v.
—— Dresslar v.
—— Furgason v.
—— v. Hoffbauer, pp. 1960, 1961, 1982, 2297.
—— v. Huffer, pp. 2618, 2645.
—— v. Jolly, pp. 1519, 1522, 2143, 2293, 2330, 2586, 2925, 2926.
—— v. Merl, 134 Ind. 609, 33 N. E. 1014—pp. 1711, 1740, 1969, 2617.
—— v. Merl, 26 Ind. App. 284, 59 N. E. 491—pp. 1518, 1880, 1901, 2143, 2516, 2517, 2551.
—— O'Rouke v.
—— Prothero v.
—— v. Shepherd, pp. 2066, 2595.
—— v. Spahr, pp. 1880, 2618.
—— v. Stockdell, p. 2835.
—— v. Twiname, pp. 1721, 1749, 2630.
—— Udell v.
—— v. Wagner, p. 2615.
—— v. Willoeby, 134 Ind. 563, 33 N. E. 627—pp. 2483, 3029, 3095.
—— v. Willoeby, 15 Ind. App. 312, 43 N. E. 1058, 58 Am. & Eng. R. Cas. 485—p. 2042.
Citizens' Tract. Co., Cameron v.
—— Wrasse v.
Citizens', etc., Bank v. Southern R. Co., pp. 353, 393, 872, 901.
Citizens', etc., R. Co., Beattie v.
—— Farrell v.
—— v. Twiname, p. 1817.
Citta Di Messina, The.
Citta Di Palermo, The.
City Bank v. Rome, etc., R. Co., pp. 378, 3274.
City Council, Armour & Co. v.
—— v. Augusta, etc., R. Co., p. 3589.
—— v. Shoemaker, p. 28.
City Elect. Co., McDonald v.
—— Turner v.
City Elect. R. Co., Keeley v.
—— Mabry v.
—— McDonald v.
—— Salmon v.
—— v. Shropshire, pp. 2053, 2482, 2534.
—— Turner v.
City Mills Co., Central, etc., R. Co. v.
City of Boston, The.
City of Kingston, The.
City of Portsmouth, The.
City Passenger R. Co., Healey v.
City Properties Co. v. Jordan, p. 3554.
City R. Co. v. Lee, pp. 1957, 2198.
City Transfer Co. v. Draper, pp. 3110, 3141.
City Waterworks v. White, p. 2642.
City, etc., R. Co., Anderson v.
—— v. Brauss, pp. 2564, 3054, 3089, 3091.
—— Harris v.
—— v. Svedborg, 20 App. D. C. 533—pp. 2320, 2687, 2909, 2938, 2984.
—— v. Svedborg, 194 U. S. 201, 48 L. Ed. 935, 24 S. Ct. 650—p. 2320.
City, etc., R. Co., Wenzel v.
—— Wynn v.
City, etc., Railway, Churn v.
—— v. Findley, pp. 1748, 1749, 2826.
Civil Rights Cases, pp. 1945, 1948.
Claflin v. Boston, etc., R. Co., pp. 551, 728.
Claiborne v. Chesapeake, etc., R. Co., p. 2060.
—— v. Missouri, etc., R. Co., pp. 2116, 2208, 2519.
Clancy v. Dutton, p. 3943.
—— v. Yonkers R. Co., p. 2313.
Clanton v. Southern R. Co., pp. 1836, 2172, 2225, 2884.
Clapp v. Minneapolis, etc., R. Co., p. 2737.
Clapp Bros. & Co. v. Peck, pp. 1211, 1228, 1229, 1232, 1233, 1234.
—— v. Sohmer & Co., pp. 1211, 1225, 1226.
Clare v. Northwestern Pac. R. Co., p. 2852.
—— Providence, etc., Steamship Co. v.
—— v. Providence, etc., Steamship Co., p. 1988.
Claridav, Southern R. Co. v.
Clark, Adams v.
—— v. American Exp. Co., pp. 137, 514, 515, 580, 640.
—— v. Atchison, etc., R. Co., pp. 2237, 2650, 2760.
—— Baker v.
—— Baring v.
—— v. Barnwell, pp. 332, 336, 339, 343, 732, 748, 752, 1035, 1036, 1037, 3884, 3891, 3896, 3897, 3900, 3901, 3903, 3921, 4017, 4019, 4023, 4030, 4031.
—— v. Burns, p. 3145.
—— v. Chicago, etc., R. Co., 15 Fed. 588, 4 McCrary 360—p. 2585.
—— v. Chicago, etc., R. Co., 127 Mo. 197, 29 S. W. 1013, 2 Am. & Eng. R. Cas., N. S., 307—pp. 1723, 1738, 1999, 2011, 2015, 2694, 2699.
—— Citizens' St. R. Co. v.
—— v. Clyde Steamship Co., p. 3879.
—— v. Colorado, etc., R. Co., p. 1569.
—— Crawford v.
—— v. Durham Tract. Co., p. 1519.
—— v. Eastern R. Co., pp. 725, 726, 3174.
—— v. Eighth Ave. R. Co., pp. 1718, 1719, 2182, 2193, 2286.
—— v. Faxton, p. 3165.
—— Finn v.
—— Fish v.
—— v. Geer, p. 2106.
—— v. Great Northern R. Co., 72 Pac. 477, 31 Wash. 658—p. 2715.
—— v. Great Northern R. Co., 79 Pac. 1108, 37 Wash. 537—pp. 2529, 2532.
—— Green v.
—— Gulf, etc., R. Co. v.
—— Hagar v.
—— v. Harrisburg Tract. Co., p. 2489.
—— v. Hiles, p. 2678.
—— v. Howard, p. 2504.
—— International, etc., R. Co. v.
—— Israel v.
—— v. Jonesboro, etc., R. Co., pp. 1595, 1596.
—— v. Kansas City, p. 3775.
—— Lehigh Valley R. Co. v.
—— Little Rock, etc., R. Co. v.
—— v. Louisville, etc., R. Co., 101 Ky. 34, 39 S. W. 840, 18 Ky. L. Rep. 1082, 36 L. R. A. 123—p. 2202.
—— v. Louisville, etc., R. Co., 49 S. W. 1120, 20 Ky. L. Rep. 1839—p. 2029.
Clark v. Lowell, etc., R. Co., p. 1157.
—— v. Lynch, pp. 1219, 1220.
—— McDonald v.
—— v. Manhattan R. Co., p. 2731.
—— v. Martin, p. 1058.
Clark v. Masters, pp. 530, 531.
—— v. Mauran, p. 1210.
—— v. Merchants', etc., Transp. Co., p. 1198.
—— Missouri, etc., R. Co. v.
—— v. New York, etc., R. Co., p. 3982.
—— Oil Creek, etc., R. Co. v.
—— v. Pacific R. Co., pp. 745, 746, 749, 750.
—— Pennsylvania Co. v.
—— Pennsylvania R. Co. v.
—— v. Richards, pp. 727, 732, 748, 752, 768, 3907, 3914.
—— v. Russell, pp. 1764, 1765, 1766.
—— St. Louis, etc., R. Co. v.
—— v. St. Louis, etc., R. Co., pp. 820, 1370, 1457.
—— v. Scandinavian - American Bank, p. 2984.
—— Sharp v.
—— v. Smith, p. 2751.
—— Southern Kansas R. Co. v.
—— State v.
—— Texas, etc., R. Co. v.
—— v. Ulster, etc., R. Co., pp. 1292, 1294, 1295, 1297.
—— v. Wilmington, etc., R. Co., p. 2429.
—— v. Zarniko, p. 2119.
Clarke, Burk v.
—— v. Canal Co., p. 256.
—— v. Crabtree, p. 1170.
—— Georgia R., etc., Co. v.
—— Gulf, etc., R. Co. v.
—— v. Louisville, etc., R. Co., p. 1587.
—— v. Needles, pp. 286, 744, 882, 884.
—— v. Philadelphia, etc., R. Co., p. 3564.
—— v. Rochester, etc., R. Co., pp. 740, 1351.
—— Waring v.
Clarke-Lawrence Co. v. Chesapeake, etc., R. Co., pp. 551, 564, 580, 596, 597, 598, 599, 645, 668, 855, 1080.
Clarkson, Felton v.
Clastrier v. Sun Mut. Ins. Co., p. 3928.
Claunts, Chicago, etc., R. Co. v.
Clay, Birmingham Elect. R. Co. v.
—— Birmingham R., etc., Co. v.
—— Southern R. Co. v.
Claybrook v. Hannibal, etc., R. Co., pp. 1665, 3089.
Clay Gin Co., St. Louis, etc., R. Co. v.
Clay St. Hill R. Co., Cook v.
Clay Street R. Co., Tompkins v.
Clayton, Brown, etc., Co. v.
—— Chicago, etc., R. Co. v.
—— Missouri, etc., R. Co. v.
—— v. Smith, p. 1593.
—— Texas, etc., R. Co. v.
—— Wallace v.
Cleary v. Bloomington, P. & J. Electric Ry. Co., pp. 1745, 2000.
—— St. Louis, etc., R. Co. v.
Cleburne Ice, etc., Co., Gulf, etc., R. Co. v.
Cleere, St. Louis, etc., R. Co. v.
Clegg, Atlantic City R. Co. v.
—— v. St. Louis, etc., R. Co., p. 3694.
—— v. Southern R. Co., p. 797.
Clement v. Boston, etc., Railroad, pp. 2351, 2909.
—— v. Louisville, etc., R. Co., p. 3674.
—— v. New York, etc., R. Co., pp. 513, 517.
—— v. Phoenix Ins. Co., p. 3792.
Clements v. Burlington, etc., R. Co., p. 600.

Clements, Chicago, etc., Co. v.
Clementson v. Grand Trunk R. Co., p. 1247.
Clemmens v. Washington Park Steamboat Co., pp. 2666, 2913.
Clemmons, Houston, etc., R. Co. v.
Clemston v. Grand Trunk R. Co., p. 1221.
Clendaniel v. Tuckerman, pp. 564, 565.
Clerc v. Morgan's, etc., R. Co., pp. 2117, 2118, 2119, 2336.
Cleve v. Chicago, etc., R. Co., 108 N. W. 982, 77 Neb. 166, 15 Am. & Eng. Ann. Cas. 13—pp. 1306, 1457.
—— v. Chicago, etc., R. Co., 84 Neb. 158, 120 N. W. 959—p. 1338.
Cleveland, Cleveland City R. Co. v.
—— v. Cleveland City R. Co., pp. 78, 79.
—— v. Cleveland Elect. R. Co., pp. 78, 79.
—— Jeffersonville R. Co. v.
—— v. New Jersey Steamboat Co. (N. Y.), 5 Hun 523—p. 2756.
—— v. New Jersey Steamboat Co., 68 N. Y. 306—pp. 1561, 1563.
—— v. New Jersey Steamboat Co., 125 N. Y. 299, 26 N. E. 327—pp. 1688, 2029.
—— v. New Jersey Steamship Co., p. 2320.
Cleveland, C., C. & St. Ry. Co., Huff v.
Cleveland City R. Co. v. Cleveland, pp. 78, 79.
—— v. Conner, pp. 1650, 2458, 2459, 2464, 3077, 3078.
—— v. Osborn, pp. 1687, 1995, 2006, 2667, 2668.
—— v. Roebuck, p. 2485.
Cleveland Elect. R. Co., Cleveland v.
—— v. Wadsworth, p. 2113.
Cleveland Iron Min. Co., Sawyer v.
Cleveland R. Co., Bacon v.
Cleveland, etc., R. Co., Aronson v.
—— v. Backus, pp. 3552, 3571, 3572, 3591, 3592, 3594.
—— Bacon v.
—— v. Bartram, pp. 191, 211, 1492, 1493, 1559, 1564, 1602, 1605, 1612, 1619, 1620, 1667, 1858, 1937, 1974, 2425, 3140.
—— Bass v.
—— Beam v.
—— v. Beckett, pp. 2468, 2470.
—— v. Best, p. 1502.
—— Brown v.
—— Butts v.
—— Cary v.
—— Case v.
—— Clingan v.
—— v. Closser, pp. 113, 220, 222, 422, 1176, 1178, 1179, 1180, 1181, 1183, 1184, 1185, 1187, 1188.
—— v. Colson, p. 2585.
—— Colton v.
—— v. Curran, pp. 949, 1567, 1568, 2092, 2098, 2099.
—— Davis v.
—— v. Druien, pp. 939, 941.
—— Etter v.
—— Foster v.
—— v. Freiberg, p. 501.
—— Frieberg v.
—— v. Hadley, pp. 2117, 2118, 2682, 2683, 2791, 2925, 2970.
—— v. Harvey, pp. 1799, 2593.
—— v. Hayes, p. 3660.
—— v. Heath, pp. 745, 746, 1305, 1361, 1363.
—— Hennigh v.
—— v. Henry, 170 Ill. 94, 83 N. E. 710, 712—pp. 2, 214, 215, 244, 245, 417, 727, 732, 748, 951, 1720, 2102.
Cleveland, etc., R. Co. v. Henry (Ind. App.), 80 N. E. 636—pp. 2092, 2104.
—— v. Hirsch, 3705.
—— v. Holden, pp. 700, 714.
—— v. Hollowell, p. 1372.
—— Hoyt v.
—— v. Illinois, pp. 35, 72, 97, 98, 3512, 3513, 3514, 3515, 3516, 3519, 3523, 3539, 3480, 3481, 3484, 3491, 3497, 3498, 3503, 3504, 3505.
—— v. Jones, p. 1714.
—— v. Kennedy, pp. 1361, 1363.
—— v. Ketcham, pp. 1564, 1565, 1566, 1760, 1761, 2206.
—— v. Kinsley, p. 1615.
—— Knecht v.
—— v. Lamm, p. 700.
—— v. La Tourette, pp. 322, 333, 956, 960, 981, 1003, 1016.
—— Leonard Seed Co. v.
—— v. Louisville, etc., Stove Co., pp. 782, 783, 784.
—— McClurg v.
—— v. McNutt, pp. 1033, 1045.
—— v. Manson, pp. 1712, 1714, 1715, 1762, 2113, 2120, 2126, 2220, 2221.
—— Manville v.
—— v. Maxwell, p. 1873.
—— v. Moline Plow Co., pp. 477, 479, 588.
—— v. Moneyhun, p. 2167.
—— v. Newell, 75 Ind. 542, 8 Am. & Eng. R. Cas. 377—pp. 1812, 1987, 2681.
—— v. Newell, 104 Ind. 264, 3 N. E. 836, 23 Am. & Eng. R. Cas., 492, 54 Am. Rep. 312—pp. 1740, 2843.
—— v. Newlin, p. 1413.
—— v. Offutt, p. 3069.
—— Parrill v.
—— v. Patterson, p. 1365.
—— v. Patton, 203 Ill. 376, 67 N. E. 804—pp. 1360, 1387.
—— v. Patton, 104 Ill. App. 550, 555—pp. 1292, 1353.
—— Penfield v.
—— v. Perishow, p. 1361.
—— v. Perkins, p. 1462.
—— v. Potts & Co., pp. 435, 588, 986, 990, 996, 997, 1087, 1102, 1110.
—— v. Rudy, pp. 798, 1339, 1353, 1408, 1429, 1430.
—— v. Sargent, pp. 540, 541, 564, 773, 1217.
—— v. Schaefer, pp. 1027, 3396.
—— Schmidt v.
—— Scott v.
—— v. Scott, pp. 1561, 1562, 2322.
—— Sellers v.
—— Shoot v.
—— Sisson v.
—— Smith v.
—— Starkey v.
—— Stewart v.
—— v. Stewart, p. 2611.
—— v. Sutherland, p. 2300.
—— Tebbs v.
—— Voss v.
—— v. Walwrath, 6 O. Dec. 718—p. 3234.
—— v. Walrath, 38 O. St. 461, 43 Am. Rep. 433, 8 Am. & Eng. R. Cas. 371—pp. 1837, 2074, 3225, 3226, 3231.
—— Warren v.
—— v. Wells, 61 O. St. 268, 55 N. E. 827— p. 69.
—— v. Wells, 65 O. St. 313, 62 N. E. 332, 58 L. R. A. 651—p. 143.
—— v. Wilson, pp. 285, 292, 997, 1000.
—— v. Wright, p. 553.
Cleveland, etc., Railway v. Barron-Boyle Co., p. 3307.
—— Knepfle v.
Cleveland, etc., Railway v. Sites, p. 2797.
Cleveland, etc., Tract. Co. v. Ward, pp. 1695, 1848, 2740.
Clifford v. Brocton Transp. Co., pp. 573, 767.
Clift, Baltimore, etc., R. Co. v.
Clifton, Missouri, etc., R. Co. v.
Clinch Valley Lumber Co., Carolina, etc., Railway v.
Cline v. Pittsburg R. Co., pp. 2667, 2690, 2886.
Clines v. Frisbee, p. 854.
Clingan v. Cleveland, etc., R. Co., p. 430.
Clinton v. Brooklyn Heights R. Co., p. 2332.
—— v. Root, pp. 2126, 2127.
—— v. Worcester, etc., St. R. Co., p. 81.
Clippenger, Texas, etc., R. Co. v.
Clisbee, Fisher v.
Cloes, Lake Erie, etc., R. Co. v.
Close v. Cooper, p. 1955.
Closser, Cleveland, etc., R. Co. v.
Clothworthy v. Hannibal, etc., R. Co., pp. 1884, 1899.
Cloud, Denver Tramway Co. v.
Clough v. Grand Trunk, etc., R. Co., pp. 955, 1575.
—— Packet Co. v.
Clow v. Pittsburg Tract. Co., p. 2692.
Clowes, Chesapeake, etc., R. Co. v.
Cluck v. Houston, etc., R. Co., p. 2853.
Clukey v. Seattle Elect. Co., p. 2954.
Clunn v. Williamsport, etc., R. Co., p. 1524.
Clute v. Chicago, etc., R. Co., pp. 496, 637, 681, 682.
Clutzbeher v. Union Passenger R. Co., p. 2541.
Clyde, Barclay v.
—— v. Brooklyn, etc., R. Co., p. 1775.
—— v. Graves, p. 831.
—— v. Hubbard, p. 3261.
—— Patterson v.
—— v. Richmond, etc., R. Co., p. 1701.
Clyde Coal Co. v. Pittsburg, etc., R. Co., p. 469.
Clyde Steamship Co., Bachman v.
—— Billinger v.
—— v. Burrows, p. 727.
—— v. Charleston, p. 3582.
—— Clark v.
—— Interstate Commerce Comm. v.
—— Jennings v.
—— Sea Coast Lumber Co. v.
—— Stone v.
C. N. O. & T. P. R. Co., Citizens' Nat. Bank v.
—— v. Graves, p. 1454.
Coachman, Atlantic, etc., R. Co. v.
Coady v. Brooklyn Heights R. Co., p. 2795.
Coal, Two Thousand Tons of.
Coal Co. v. Estievenard, p. 2190.
—— Louisville, etc., R. Co. v.
Coal, etc., R. Co. v. Conley, pp. 44, 48, 49, 53, 66, 69, 119, 123, 134, 178.
—— Teel v.
Coal, etc., Supply Co., Neilson v.
Coast Line R. Co. v. Boston, p. 2829.
—— Green v.
Coates v. Chicago, etc., R. Co., p. 114.
—— Cooper v.
—— v. United States Exp. Co., pp. 3290, 3312.
Coats v. Chicago, etc., R. Co., 87 N. E. 929, 239 Ill. 154—pp. 431, 988, 1033, 1045, 3250, 3257, 3330, 3347, 3357.
—— v. Chicago, etc., R. Co., 134

Ill. App. 217—pp. 539, 932, 1026, 1046.
Cobb v. Beall, pp. 349, 478, 479.
—— v. Brown, pp. 332, 3273, 3300.
—— v. Columbia, etc., R. Co., p. 2043.
—— Dows v.
—— Illinois Cent. R. Co. v.
—— v. Illinois Cent. R. Co., p. 494.
—— v. Lindell R. Co., pp. 2597, 2905.
—— Missouri, etc., R. Co. v.
—— St. Louis, etc., R. Co. v.
—— v. St. Louis, etc., R. Co., pp. 1810, 1844.
Cobb, etc., Co., Illinois Cent. R. Co. v.
—— v. Illinois Cent. R. Co., 38 Iowa 601—pp. 210, 231, 250, 253, 261, 270, 277, 753, 871, 848, 854.
—— v. Illinois Cent. R. Co., 88 Ill. 394—pp. 246, 626.
Cobban v. Doune, p. 280.
Coburn, Commonwealth v.
—— v. Moline, etc., R. Co., 90 N. E. 741, 243 Ill. 448—pp. 2121, 2177.
—— v. Moline, etc., R. Co., 149 Ill. App. 132—pp. 1559, 2178, 2780.
—— v. Morgan's, etc., R. Co., pp. 1623, 1631.
—— v. Philadelphia, etc., R. Co., p. 2229.
Cochran, Atchison, etc., R. Co. v.
—— v. Dinsmore, p. 1037.
Cochran, etc., Co., Landauer & Bro. v.
Cock, International, etc., R. Co. v.
Cocke v. Des Moines City R. Co., p. 2897.
Cockerel, Louisville, etc., R. Co. v.
Cockermouth & Worthington R. Co., Harris v.
Cockrell, Francis v.
—— v. Texas, etc., R. Co., pp. 2293, 2308.
Cocreham, Missouri, etc., R. Co. v.
Coddington v. Brooklyn Crosstown R. Co., pp. 1721, 1722.
—— Ogden v.
Cody v. Central Pac. R. Co., pp. 1573, 1617.
—— v. Duluth St. R. Co., pp. 2370, 2371, 2395.
—— Louisville, etc., R. Co. v.
—— v. Market St. R. Co., pp. 2688, 3000, 3007.
—— Nashville, etc., R. Co. v.
—— v. New York, etc., R. Co., pp. 1953, 2128, 2211, 2261.
Coe v. Errol, p. 3431.
—— Frink & Co. v.
—— Holliday v.
—— v. Louisville, etc., R. Co., 3 Fed. 775, 782—p. 3823.
—— v. Louisville, etc., R. Co., 25 Ky. L. Rep. 1679, 78 S. W. 439—p. 2280
Coeur D'Alene, etc., R. Co. v. Union Pac. R. Co., pp. 3665, 3668, 3681, 3719, 3756, 3766, 3767.
Coeur D'Alene, etc., Transp. Co. v. Ferrell, pp. 86, 102.
Coey, Johnson v.
Cofer, Southern R. Co. v.
Coffee v. Louisville, etc., R. Co., pp. 3111, 3135.
Coffey v. Atlantic, etc., R. Co., p. 161.
—— v. Omaha, etc., St. R. Co., 79 Neb. 286, 112 N. W. 589—pp. 2347, 2860.
Coffin, Atchison, etc., R. Co. v.
Coffin v. New York Cent. R. Co., p. 611.
—— Stout v.
Coffin, Barker v.
Coger v. Northwestern, etc., Packet Co., p. 1950.
Coggin, Texas, etc., R. Co. v.
Coggins, Alabama, etc., R. Co. v.
Coggins Co., Pennsylvania R. Co. v.
Coggs v. Bernard, pp. 729, 731, 734, 750, 752, 1759.
Coggswell v. Weir, pp. 1044, 1049.
Cogswell, Atchison, etc., R. Co. v.
—— Strawn v.
—— v. West St., etc., R. Co., pp. 1559, 1561, 1750, 1817, 1827, 1841, 1988, 2004, 2073, 2080, 2194, 2630, 2920, 2956.
Cohen v. Boston Elev. R. Co., p. 2318.
—— v. Brooklyn Heights R. Co., pp. 2657, 2824.
—— v. Brooklyn, etc., R. Co., p. 2785.
—— v. Farmers' Loan, etc., Co., pp. 2654, 2678, 2679, 2740.
—— v. Frost, p. 3145.
—— v. Hume, pp. 284, 1682.
—— v. Morris, etc., Exp. Co. (App. Div.), 132 N. Y. S. 347—pp. 1067, 1070.
—— v. Morris, etc., Exp. Co., 136 N. Y. S. 489, 151 App Div. 672—pp. 1067, 1072.
—— v. New York, etc., R. Co., pp. 3220, 3233.
—— v. Philadelphia Rapid Transit Co., p. 1898.
—— v. Rome R. Co., p. 587.
—— St. Louis, etc., R. Co. v.
—— v. St. Louis, etc., R. Co., pp. 3160, 3168.
—— v. Sioux City Tract. Co., pp. 1891, 2823, 2922.
—— v. Southern Exp. Co., 45 Ga. 148—pp. 3257, 3291, 3295, 3300.
—— v. Southern Exp. Co., 53 Ga. 128—pp. 135, 586, 820, 3281.
—— v. United States Exp. Co., p. 1049.
—— v. West Chicago, etc., R. Co., p. 1888.
Cohen Bros. v. Missouri, etc., R. Co., pp. 331, 332, 333, 337, 338, 339, 341, 585, 799, 808.
Cohn v. Adams Exp. Co., p. 939.
—— Houston, etc., R. Co. v.
—— v. Platt, p. 1282.
—— v. St. Louis, etc., R. Co., 181 Mo. 30, 79 S. W. 961—pp. 94, 136, 137.
—— v. St. Louis, etc., R. Co., 151 Mo. App. 661, 133 S. W. 59, 131 S. W. 881—p. 75.
Cohn-Goodman Co. v. Wells-Fargo Exp. Co., p. 1068.
Cohn & Co., Atlantic, etc., R. Co. v.
Cohoes R. Co. v. Public Service Comm., p. 70.
Coine v. Chicago, etc., R. Co., pp. 2711, 3084.
Colbath v. Bangor, etc., R. Co., pp. 781, 3305, 3396, 3399.
Colbeck v. Sampsell, p. 1542.
Colburn v. Oberlin Bldg., etc., Ass'n, pp. 267, 294, 296.
Colby, Atkins v.
—— Chicago, etc., R. Co. v.
Colder, Laing v.
Cole v. Atlanta, etc., R. Co., pp. 2016, 2040, 2041, 2057.
—— v. Chesapeake, etc., R. Co., pp. 1997, 2820.
—— Cincinnati, etc., R. Co. v.
—— Georgia R., etc., Co. v.
—— v. Goodwin, pp. 1003, 1004, 1008, 3158, 3163, 3165.
—— Gulf, etc., R. Co. v.
Cole v. Lake Shore, etc., R. Co., p. 1774.
—— v. Minneapolis, etc., R. Co., pp. 1054, 1074, 1454, 1456, 1458, 1470.
—— Persse v.
—— v. Rankin, pp. 803, 810, 849, 864.
—— v. Rowen, pp. 111, 112, 192.
—— Texas, etc., R. Co. v.
—— v. The Atlantic, p. 3937.
—— v. Wabash, etc., R. Co., p. 580.
Cole & Co., Georgia R. Co. v.
Coleman v. Allen, p. 2775.
—— Birmingham R., etc., Co. v.
—— Bruhl v.
—— v. Georgia R., etc., Co., pp. 2249, 2511, 2512, 2514, 2540.
—— Jencks v.
—— v. Metropolitan St. R. Co., p. 2655.
—— Michigan Cent. R. Co. v.
—— Michigan, etc., R. Co. v.
—— v. New York, etc., R. Co., pp. 1977, 2483, 2530, 2855, 3019, 3030.
—— v. Pullman Co., pp. 3472, 3581.
—— v. Riches, pp. 306, 308.
—— v. Second Ave. R. Co., p. 2196.
—— Southern R. Co. v.
—— v. Southern R. Co., pp. 1611, 1612, 1665, 1670, 1673, 1677, 3042, 3044, 3045.
—— Savannah, etc., R. Co. v.
—— v. Western Union Tel. Co., p. 3550.
—— v. Yazoo, etc., R. Co., p. 2051.
Coles v. Central R., etc., Co., 82 Ga. 149, 9 S. E. 127—p. 3386.
—— v. Central R., etc., Co., 85 Ga. 251, 12 S. E. 749—pp. 3250, 3257, 3263, 3291.
—— v. Illinois, etc., R. Co., p. p. 989.
—— v. Louisville, etc., R. Co., pp. 320, 323, 727, 1012, 1087, 1096, 3326.
Colfax Mountain Fruit Co. v. Southern Pac. Co. (Cal.), 46 Pac. 668—pp. 3276, 3296, 3352, 3361, 3394.
—— v. Southern Pac. Co., 50 Pac. 775, 118 Cal. 648, 40 L. R. A. 78—p. 3257.
Colgate v. Pennsylvania Co. (N. Y.), 31 Hun 297—p. 558.
—— v. Pennsylvania Co., 102 N. Y. 120, 6 N. E. 114—p. 557.
Colima, The.
Coll. Pittsburgh, etc., R. Co. v.
Collard v. S. E. Railway Co., p. 653.
Collenberg, The.
Collender v. Dinsmore, pp. 333, 409, 412, 532, 591.
Colleton Mercantile, etc., Co. v. Atlantic, etc., R. Co., p. 3546.
Collett v. London, etc., R. Co., p. 1575.
—— v. Railroad Co., p. 1578.
Collier, Alabama, etc., R. Co. v.
—— Chicago, etc., R. Co. v.
—— Louisville, etc., R. Co. v.
—— Missouri Pac. R. Co. v.
—— v. Swinney, pp. 438, 630.
—— Taylor & Co. v.
—— v. Valentine, pp. 3907, 3908, 3911, 3912.
Collins v. Alabama, etc., R. Co., pp. 895, 900, 917, 1152.
—— Atchison, etc., R. Co. v.
—— Baldwin v.
—— v. Boston, etc., Railroad, p. 3124.
—— v. Burns, pp. 582, 914.
—— Chicago, etc., R. Co. v.

Collins v. Illinois Cent. R. Co., p. 2385.
—— Masonic Fraternity Temple Ass'n v.
—— Pharr v.
—— Savannah, etc., R. Co. v.
—— v. Southern R. Co., p. 1876.
—— v. Texas, etc., R. Co., pp. 2033, 2091.
—— v. Toledo, etc., R. Co., pp. 2500, 2544, 2733.
—— Witzler v.
Collins Park, etc., R. Co., Freeman v.
Collinsworth, Chesapeake, etc., R. Co. v.
Collison v. Illinois Cent. R. Co., pp. 1988, 2719.
Collman v. Collins, pp. 1158, 1159.
Colly, Illinois Cent. R. Co. v.
Colombia, The.
Colombo, The.
Colorado Cent. R. Co., White v.
Colorado Fuel, etc., Co., Southern Pac. Co. v.
Colorado Mid. R. Co. v. McGarry, pp. 2761, 2762, 2980.
—— Morris v.
Colorado Springs, etc., R. Co. v. Allen, p. 1745.
—— Farrier v.
—— Montgomery v.
—— v. Petit, pp. 1517, 2680, 2836.
—— Snyder v.
Colorado, etc., R. Co., Adams v.
—— Bleecker v.
—— v. Breniman, p. 1278.
—— Clark v.
—— Consumers' League v.
—— v. McGeorge, pp. 1728, 1742.
—— v. Manatt, pp. 948, 972, 1055, 1070.
—— United States v.
Colsch v. Chicago, etc., R. Co., 149 Iowa 176, 127 N. W. 198, 34 L. R. A., N. S., 1013, Ann. Cas. 1912 C. 915—p. 1270.
—— v. Chicago, etc., R. Co. (Iowa), 117 N. W. 281—pp. 1333, 1347, 1353, 1354, 1363, 1366, 1377, 1454, 1456, 1466, 1467.
Colson, Cleveland, etc., R. Co. v.
Colt v. McMechen, pp. 728, 733, 737, 749, 821.
Colton v. Cleveland, etc., R. Co., p. 1037.
—— v. Delaware, etc., R. Co., p. 1633.
Columbia Elect. St. R., etc., Co., Dennis v.
—— Harrell v.
—— Wade v.
Columbia Elect., etc., Co. Wade v.
Columbia Grocery Co. v. L. & N. R., p. 3679.
Columbia R., etc., Co., Wise v.
Columbia River, etc., R. Co., Gray v.
Columbia Southern R. Co., Radley v.
Columbia St. R., etc., Co., Norton v.
Columbia Transfer Co. Model Clothing Co. v.
Columbia, etc., Elect. R. Co., White v.
Columbia, etc., Power Co., Wade v.
Columbia, etc., Railroad, Battle v.
—— Dickerson v.
Columbia, etc., R. Co., Abrahams v.
—— Baldwin, etc., Land Co. v.
—— Berley v.
—— Cobb v.
—— Comer v.
—— Faulk v.
—— Felder v.
—— Fischer v.
—— Martin v.
Columbia, etc., R. Co. v. Means, p. 2914.
—— Moore v.
—— Oliver v.
—— Pate v.
—— Piedmont Mfg. Co. v.
—— Pool v.
—— Radley v.
—— Wallingford v.
Columbia, etc., Steamboat Co., Andrus v.
Columbian Ins. Co. v. Catlett, pp. 3944, 3946.
Columbian Nat. Bank v. White p. 396.
Columbus Iron, etc., Co. v. Kanawha, etc., R. Co., p. 3820.
Columbus R. Co. v. Asbell, pp. 1535, 2303, 2319, 2860, 2882.
—— Holland v.
Columbus R., etc., Co., Judge v.
Columbus Rolling-Mill, Minneapolis, etc., R. Co. v.
Columbus, etc., R. Co., Cox v.
—— v. Farrell, pp. 1780, 1924.
—— v. Flournoy, pp. 533, 611, 660.
—— v. Kennedy, pp. 820, 824, 1038, 1454, 1456.
—— v. Ludden, pp. 895, 900, 905, 907.
—— v. Powell, pp. 1544, 1593, 1858, 2528, 2607.
—— v. Tillman, p. 3412.
—— v. Wright, p. 3591.
Colver, Griffin v.
Colvin v. Brooklyn Heights R. Co., p. 2830.
Colwell v. Manhattan R. Co., p. 2354.
Combes, Gulf, etc., R. Co. v.
Combs, Central Kentucky Tract. Co. v.
—— Central Railroad v.
—— Central R. Co. v.
—— v. Lakewood, p. 29.
Combs & Co., Stadhecker v.
Comer v. Columbia, etc., R. Co., pp. 1366, 1475, 1478, 3304.
—— v. Foley, pp. 1616, 1617, 1634, 2664, 3099, 3319.
—— Stewart v.
—— v. Stewart, pp. 1289, 1365, 1367, 1377.
Comerford v. New York, etc., R. Co., pp. 2358, 2931.
Comfort, Chappell v.
Comly v. Pennsylvania R. Co., pp. 1509, 1515.
Commander-in-Chief, pp. 3890, 3897, 3898, 3899.
Commander-in-Chief, The.
Commerce, The.
Commerce Comm. v. Chicago, etc., R. Co., p. 3634.
Commercen, The.
Commercial Bank v. Armsby Co., pp. 361, 390.
—— v. Chicago, etc., R. Co., p. 548.
—— North Pennsylvania R. Co. v.
—— v. Pfeiffer, p. 382.
—— v. Hurt, pp. 356, 369.
Commercial Club of Omaha v. Chicago R. Co., p. 3679.
Commercial Guano Co., Savannah, etc., R. Co. v.
Commercial Nat. Bank v. Heilbronner, p. 352.
—— North Pennsylvania R. Co. v.
Commercial State Bank, Ladd, etc., Bank v.
Commercial Union Ins. Co., St. Louis, etc., R. Co. v.
Commins v. Atlantic, etc., R. Co., pp. 681, 684.
Commissioners of Taxes and Assessments, People v.
Commonwealth, Adams Exp. Co. v.
—— Atlantic, etc., R. Co. v.
—— v. Atlantic, etc., R. Co., p. 38.
Commonwealth, Berea College v.
—— v. Boston, etc., Railroad, p. 181.
—— v. Boston, etc., R. Corp., 65 Mass. (11 Cush.) 512—p. 179.
—— v. Boston, etc., R. Corp., 134 Mass. 211—p. 179.
—— v. Boston, etc., R. Co., pp. 1517, 1531.
—— v. Breakwater Co., pp. 3505, 3506.
—— v. Brockton St. R. Co., p. 2069.
—— v. Carey, p. 111.
—— Chesapeake, etc., R. Co. v.
—— v. Chesapeake, etc., R. Co., 101 Ky. 159, 40 S. W. 250, 19 Ky. L. Rep. 329—p. 3484.
—— v. Chesapeake, etc., R. Co., 24 Ky. L. Rep. 1886, 72 S. W. 360—p. 180.
—— v. Chesapeake, etc., R. Co., 24 Ky. L. Rep. 1887, 72 S. W. 758—p. 180.
—— v. Chesapeake, etc., R. Co., 24 Ky. L. Rep. 1888, 72 S. W. 361—pp. 178, 180.
—— v. Coburn, pp. 179, 181.
—— v. Connecticut R. Co., p. 147.
—— v. Connecticut Valley St. R. Co., pp. 68, 69.
—— v. Corey, p. 257.
—— Crigler v.
—— Delaware, etc., Canal Co. v.
—— v. Eastern R. Co., 71 Mass. (5 Gray) 473—p. 180.
—— v. Eastern R. Co., 103 Mass. 254, 4 Am. Rep. 555—pp. 255, 1857.
—— v. Erie R. Co., pp. 3566, 3567.
—— v. Fitchburg R. Co., p. 183.
—— Henderson Bridge Co. v.
—— Illinois Cent. R. Co. v.
—— v. Jones, pp. 183, 1646.
—— v. Keary, p. 3499.
—— v. Killian, p. 185.
—— v. Lehigh Valley R. Co., pp. 3551, 3560.
—— Louisville, etc., Ferry Co. v.
—— Louisville, etc., R. Co. v.
—— v. Louisville, etc., R. Co., 20 Ky. L. Rep. 491, 46 S. W. 700—p. 84.
—— v. Louisville, etc., R. Co., 112 Ky. 75, 23 Ky. L. Rep. 1382, 65 S. W. 158—p. 180.
—— v. McGinn, p. 2424.
—— v. Mansfield, p. 2422.
—— v. Marcum, p. 2417.
—— v. Mobile, etc., R. Co., p. 3472.
—— New York, etc., R. Co. v.
—— v. New York, etc., R. Co., p. 3573.
—— Norfolk, etc., R. Co. v.
—— v. Old Dominion Steamship Co. v.
—— Pennsylvania R. Co. v.
—— v. People's Exp. Co., pp. 546, 3434.
—— Philadelphia, etc., Steamship Co. v.
—— v. Power, pp. 111, 191, 201, 2420, 2423, 2528.
—— Robertson v.
—— Ryman Steamboat Line Co. v.
—— v. Sandford, p. 180.
—— v. Selliger, p. 3590.
—— v. Smith, p. 3577.
—— Southern Railway v.
—— Southern Ry. Co. v.
—— v. Vermont, etc., R. Co., pp. 179, 182, 1586.
—— United States Fidelity, etc., Co. v.
—— Virginia Passenger, etc., Co. v.
—— Washington Southern R. Co. v.

Commonwealth, Washington, etc., R. Co. v.
—— Winchester, etc., R. Co. v.
—— v. Worcester, etc., R. Co., p. 141.
Commonwealth Cotton Mfg. Co., Alabama, etc., R. Co. v.
Commonwealth, No. 1, Pullman's Palace Car Co. v.
Commonwealth, No. 2, Pullman's Palace Car Co. v.
Compagnie Francaise, etc., Cie, De Felice v.
Compagnie Francaise, etc., Vapeur v. Louisiana State Board, p. 3441.
Compania, etc., La Flecha v. Brauer, pp. 947, 950, 952, 960, 1012, 3911, 4018, 4020, 4022, 4023, 4024, 4026.
Compania, etc., Navegacion v. Spanish-American Light, etc., Co., pp. 3865, 3867, 3868.
Compagnie Generale Transatlantique Donovan v.
—— People v.
—— Weinberger v.
Companhia De Moagens De Barreiro, London Assur. v.
Compta, The.
Compton, Gulf, etc., R. Co. v.
—— v. Long Island R. Co., p. 1675.
—— Southern, etc., Tract. Co. v.
—— v. Van Volkenburgh, pp. 2422, 2847.
—— v. Western Stage Co., p. 3249.
Comptoir d'Escompt de Paris, Rodger v.
Comstock, In re v.
—— Shannon v.
Conard v. Atlantic Ins. Co., pp. 364, 367, 369, 373, 378, 383, 542, 3274.
Conatser, Little Rock, etc., R. Co. v.
Concord Railroad, Osgood v.
—— Welch v.
Concord R. Corp., Johnson v.
—— Murch v.
—— Thorp v.
Concord St. Railway, Bass v.
Concord, etc., Railroad, Cutler v.
—— v. Forsaith, pp. 1181, 1182, 1188.
Conder, Gulf, etc., R. Co. v.
Condict v. Grand Trunk R. Co. (N. Y.), 4 Lans 106—p. 3259.
—— v. Grand Trunk R. Co., 54 N. Y. 500— pp. 628, 742.
Condict & Co. v. Rosenfield & Son, pp. 1220, 1227, 1229, 1233, 1248, 1249.
Condon, Lake Erie, etc., R. Co. v.
—— v. Marquette, etc., R. Co., pp. 885, 886, 3264, 3287, 3301.
Condor, Atlanta, etc., Railroad v.
—— Atlanta, etc., R. Co. v.
Condran v. Chicago, etc., R. Co., p. 1572.
Cone v. Southern Railway, pp. 273, 286, 3134, 3135, 3139.
Conestoga Tract. Co., Gensemer v.
Coneton v. Old Colony St. R. Co., pp. 1905, 2825.
Coney Island Co. v. Dennan, p. 4002.
Coney Island, etc., R. Co., Catalanotto v.
—— Cross v.
—— Lansing v.
—— Murphy v.
—— Sheeron v.
Congar v. Chicago, etc., R. Co., pp. 562, 753, 756.
—— v. Galena, etc., R. Co., pp. 364, 478, 479, 484, 869, 872, 3298.
Conger v. Hudson River R. Co., pp. 628, 654, 728.
Conger v. St. Paul, etc., R. Co., p. 2785.
Congress, etc., R. Co., Brown v.
Conheim v. Chicago, etc., R. Co., pp. 674, 3157, 3198.
Conkey v. Milwaukee, etc., R. Co., pp. 885, 887, 3284, 3302.
Conklin, Chicago, etc., R. Co. v.
—— v. New York, etc., R. Co., p. 2501.
Conkling v. Brooklyn Lumber Co., p. 3963.
Conley, Chicago, etc., R. Co. v.
—— Coal, etc., R. Co. v.
—— v. Forty Second St., etc., R. Co., p. 2249.
—— v. Richmond, etc., R. Co., p. 2587.
—— v. Sherman, etc., R. Co., p. 151.
—— White v.
Conly, Sherman, etc., R. Co. v.
Connaughton v. Brooklyn, etc., R. Co., p. 2787.
Connecticut Co., De Cecco v.
—— Kebbe v.
—— Kruck v.
—— Moffit v.
—— Powers v.
Connecticut Fire Ins. Co. v. Erie R. Co., p. 793.
Connecticut R. Co., Commonwealth v.
Connecticut R., etc., Co., Elwood v.
Connecticut River R. Co., Bassett v.
—— Blaisdell v.
—— Morse v.
—— Nutting v.
—— Stimson v.
—— Connecticut River Steamboat Co., Hall v.
Connecticut Valley St. R. Co., Commonwealth v.
—— Sawin v.
Connecting Terminal R. Co. v. Miller, 70 N. E. 472, 178 N. Y. 194—p. 3563.
—— v. Miller, 82 N. Y. S. 582, 84 App. Div. 174—p. 3590.
Connecticut, etc., R. Co., Beard v.
—— Harvey v.
Connell v. Chesapeake, etc., R. Co., pp. 1692, 1715, 1723, 1735, 2016, 2031, 2671, 3209.
—— Hestonville Passenger R. Co. v.
—— v. Mobile, etc., R. Co., pp. 1872, 1873.
—— v. New York, etc., R. Co., p. 2035.
—— Pennsylvania R. Co. v.
—— v. Seattle, etc., R. Co., pp. 2954, 2977
Connelly v. Manhattan R. Co., 60 Hun. 495, 39 N. Y. St. Rep. 561, 15 N. Y. S. 176—p. 1680.
—— v. Manhattan R. Co., 142 N. Y. 377, 37 N. E. 462—pp. 1982, 2000.
Conner v. Citizens' St. R. Co., 105 Ind. 62, 4 N. E. 441, 26 Am. & Eng. R. Cas. 210, 55 Am. Rep. 177—pp. 1880, 2152.
—— v. Citizens' St. R. Co., 45 N. E. 662, 146 Ind. 430—pp. 1861, 2370
—— Cleveland City R. Co. v.
—— East Tennessee, etc., R. Co. v.
—— v. Seattle, etc., R. Co., p. 2866.
Connolly, Lawson v.
—— v. New York, etc., R. Co., p. 2276.
—— v. Warren, pp. 3115, 3119, 3123, 3131.
Connor v. Metropolitan St. R. Co., p. 2830.
Connors v. Cunard Steamship Co., p. 3976.
—— v. United States, p. 3849.
Conolly v. Crescent City R. Co., p. 2488.
Conqueror, The
Conrad v. De Montcourt, p. 3943.
Conrad Schoop Fruit Co. v. Pittsburg, etc., R. Co., pp. 873, 1113.
Conroy v. Boston Elevated R. Co., p. 1535.
—— v. Chicago, etc., R. Co., pp. 1527, 1772, 1962, 1979, 2166, 2406, 2918.
—— v. Detroit United Railway, pp. 2688, 2799.
—— v. Pennsylvania R. Co., p. 2113.
Consolidated Cattle Co., Atchison, etc., R. Co. v.
Consolidated Coal Co., St. Louis v.
Consolidated Elevator Co., Vega Steamship Co. v.
Consolidated R. Co., Chaffee v.
—— Cosgrove v.
—— Lebov v.
—— Norton v.
—— Sperry v.
Consolidated St. R. Co., Poole v.
Consolidated Tobacco Co., Ikelheimer v.
Consolidated Tract. Co., Flynn v.
—— Freeman v.
—— Friedman v.
—— Sowash v.
—— v. Taborn, pp. 1647, 2432, 2475.
—— v. Thalheimer, pp. 2234, 2688.
—— Whalen v.
Constable v. National Steamship Co., pp. 251, 510, 528, 529, 531, 539, 739, 891, 892, 902, 930, 947, 958, 959, 4024, 4025, 4054.
Constantine, Louisville, etc., R. Co. v.
Consumers' Ice Co., Mott v.
Consumers' League v. Colorado, etc., R. Co., pp. 23, 40.
Conti v. American Exp. Co., p. 3398.
Continental Coal Co. v. Bowne, p. 3964.
Continental Furniture Co., Rhodes, etc., Co. v.
Continental Ins. Co., Craig v.
Contra Costa, Agnew v.
Contra Costa Steam Nav. Co., Yoemans v.
Contreras, Galveston, etc., R. Co. v.
—— v. San Antonio Tract. Co., p. 1730.
Converse v. Boston, etc., Railroad, p. 562.
—— v. Brainerd, p. 775.
—— Delaware, etc., R. Co. v.
—— v. Norwich, etc., Transp. Co., pp. 3249, 3266, 3280, 3302, 3313.
—— v. Railroad Co., pp. 2413, 2419.
Convoy's Wheat, The.
Conway, Chicago, etc., R. Co. v.
—— v. Lewiston, etc., R. Co., 87 Me. 283, 32 Atl. 901, 2 Am. & Eng. R. Cas., N. S., 339—p. 1803.
—— v. Lewiston, etc., R. Co., 38 Atl. 110, 90 Me. 199—pp. 1702, 1805.
—— v. Metropolitan St. R. Co., pp. 1516, 2597.
—— v. New Orleans, etc., R. Co., 46 La. Ann. 1429, 16 So. 362—p. 1889.
—— v. New Orleans, etc., R. Co., 24 So. 780, 51 La. Ann. 146—p. 2137.
—— v. Taylor, pp. 3475, 3477, 3478, 3588.

Conway Bank v. American Exp. Co. (Mass.), 8 Allen 512—pp. 895, 911.
Conwell v. Tri-City R. Co., p. 3036.
Conwill v. Gulf, etc., R. Co., pp. 1684, 1875, 2114, 2117, 2118, 2373, 2937, 2986.
Conyers v. Ennis, p. 1228.
Cook, Central, etc., R. Co. v.
—— v. Chicago, etc., R. Co., 81 Iowa 551, 46 N. W. 1080, 9 L. R. A. 164, 25 Am. St. Rep. 512—pp. 220, 1135, 1178, 1183, 1190, 1191, 1192, 1193, 1194, 1196.
—— v. Chicago, etc., R. Co., 136 Iowa 497, 113 N. W. 1079—pp. 147, 1638.
—— v. Chicago, etc., R. Co., 78 Neb. 64, 23 R. R. R. 606, 46 Am. & Eng. R. Cas., N. S., 606, 110 N. W. 718—pp. 1085, 1408, 1409.
—— Cincinnati, etc., R. Co. v.
—— v. Clay St. Hill R. Co., p. 2007.
—— Eaton v.
—— v. Erie R. Co., p. 871.
—— v. Gourdin, pp. 729, 733.
—— v. Houston, etc., Nav. Co., pp. 1502, 2525, 2544, 2548, 2549, 2629.
—— Louisville, etc., R. Co. v.
—— Mahony v.
—— Missouri, etc., R. Co. v.
—— North Chicago St. R. Co. v.
—— North Chicago, etc., R. Co., v.
—— v. Pennsylvania, pp. 3439, 3564, 3568.
—— Plant Inv. Co. v.
—— v. Smith, pp. 4043, 4056.
—— v. Southern R. Co., pp. 2575, 3056.
—— Texas, etc., R. Co. v.
—— Tilley v.
Cook Brewing Co., Louisville, etc., R. Co. v.
Cooke v. Baltimore Tract. Co., p. 2334.
—— v. Kansas City, etc., R. Co., p. 1279.
—— v. Northern Pac. R. Co., p. 1098.
—— v. Springfield Tract Co., pp. 1721, 1880.
—— Union Pac., etc., R. Co. v.
Cooley v. Minnesota Transfer R. Co., pp. 573, 579.
—— v. Pennsylvania R. Co., pp. 3044, 3052.
Coolidge v. La Crosse City R. Co., p. 2800.
—— Oregon R., etc., Co. v.
—— St. Louis, etc., R. Co. v.
Coon v. Atchison, etc., R. Co., pp. 2277, 2326.
Cooney v. Pullman Palace Car Co., pp. 3113, 3123, 3125, 3129, 3130, 3201, 3218, 3222, 3241.
Coons, Louisville, etc., R. Co. v.
Cooper v. Atlantic, etc., R. Co., 69 S. C. 479, 48 S. E. 458—pp. 2617, 2509, 2512, 2547.
—— v. Atlantic, etc., R. Co., 78 S. C. 562, 59 S. E. 704—pp. 2331, 2358.
—— Baltimore, etc., Exp. Co. v.
—— Bank v.
—— Berry v.
—— v. Berry, pp. 435, 727, 796, 961, 1009.
—— v. Bill, p. 1228.
—— Central R., etc., Co. v.
—— v. Century Realty Co., pp. 1488, 2659, 2667, 2673, 2935, 2939.
—— Chicago City R. Co. v.
—— Cincinnati, etc., R. Co. v.
—— Close v.
Cooper v. Coates, p. 301.
—— Ex parte.
—— Galveston, etc., R. Co. v.
—— v. Georgia Pac. R. Co., p. 841.
—— v. Georgia, etc., R. Co., 56 S. C. 91, 34 S. E. 16—pp. 2126, 2127, 2265, 2280.
—— v. Georgia, etc., R. Co., 61 S. C. 345, 39 S. E. 543, 16 Am. & Eng. R. Cas., N. S., 12—pp. 2066, 2115, 2671, 2885, 2904, 2906.
—— Greenwood v.
—— Indianapolis Union R. Co. v.
—— International, etc., R. Co. v.
—— v. Kane, p. 615.
—— Lenahart v.
—— Leuckhart v.
—— v. London, etc., R. Co., p. 221.
—— Louisville, etc., R. Co. v.
—— v. McKenna, p. 2629.
—— v. Raleigh, etc., R. Co., pp. 727, 732, 740, 748, 820, 948, 972, 1018, 1267, 1268, 1269, 1337, 1339, 1361, 1364, 1365, 1367, 1372, 1384, 1389, 1390, 1433, 1454, 1456, 1470, 1476.
—— New York, etc., R. Co. v.
—— v. St. Paul City R. Co., p. 1890.
—— v. Seaboard Air Line Railway, p. 3396.
—— Transportation Line v.
—— Western Union Tel. Co. v.
—— v. Young, pp. 595, 596, 597, 638, 653, 660, 670, 672.
Cooper Grocer Co. v. Britton, p. 693.
Co-Operative Ass'n, Jones v.
Cooperstown, etc., R. Co., Hunter v.
—— Hunter v.
Coopwood, Gulf, etc., R. Co. v.
Coos Bay, etc., Nav. Co. v. Siglin, p. 576.
Coosa River Steamboat Co. v. Barclay, pp. 302, 428.
Cope v. Cordova, p. 536.
—— Ohio, etc., R. Co. v.
Copeland, Gulf, etc., R. Co. v.
—— Illinois Cent. R. Co. v.
—— International, etc., R. Co. v.
—— Memphis, etc., R. Co. v.
—— v. Metropolitan St. R. Co., p. 2137.
—— Mobile, etc., R. Co. v.
—— St. Louis, etc., R. Co. v.
—— v. Southern Railway, p. 868.
Copley, Houston, etc., R. Co. v.
Copp v. Louisville, etc., R. Co., p. 3839.
Copper v. Century Realty Co., p. 2585.
Coppock v. Long Island R. Co., p. 2105.
Copson v. New York, etc., R. Co., p. 2302.
Coquillard Wagon Works' Assignees, Louisville, etc., R. Co. v.
Corbett v. Chicago, etc., R. Co., p. 1315.
—— Labbe v.
—— v. Twenty-Third St. R. Co., pp. 1605, 2412.
Corbin, Wandell v.
Corcoran v. Albuquerque Tract. Co., p. 2741.
—— Little Rock, etc., R. Co. v.
—— v. Louisville, etc., R. Co., p. 3499.
—— v. New York, etc., R. Co., pp. 2501, 2546.
Cordes, Niagara v.
—— Propeller Niagara v.
Cordiner v. Los Angeles Tract. Co., pp. 2082, 2084.
Cordova, Cape v.
Core, South Covington, etc., St. R. Co. v.
Corey, Commonwealth v.
Cork Distilleries Co. v. Great Southern R. Co., p. 1239.
Cork, etc., R. Co. Burns v.
Corley v. Southern Railway, pp. 2444, 2463.
Corlin v. West End St. R. Co., p. 2156.
Corliss, Nassau Elect. R. Co. v.
Cormack v. New York, etc., R. Co., pp. 608, 1669, 1675, 1676.
Cornelius v. Atchison, etc., R. Co., pp. 1097, 1102, 1419.
—— Campbell v.
—— Louisville, etc., R. Co. v.
—— Texas, etc., R. Co. v.
Cornell v. Chicago, etc., R. Co., pp. 1612, 2650.
—— Friedlander & Co. v.
—— Jardine v.
—— Nebraska Tel. Co. v.
Cornette v. Baltimore, etc., R. Co., p. 2821.
Cornforth, Merchants' Dispatch & Transp. Co. v.
—— Merchants', etc., Transp. Co. v.
Cornie Stave Co., Edgar Lumber Co. v.
Corning & Co. v. Peoria, etc., R. Co., p. 267.
Cornish, Robinson v.
Cornwall, Missouri Pac. R. Co. v.
Cornwall, etc., R. Co., Rhoades v.
Cornwell, Missouri Pac. R. Co. v.
Corporation Comm. v. Southern R. Co., p. 3483.
Corrigan Consol. St. R. Co., Wilkerson v.
—— Willmot v.
—— Willmott v.
Corrigan, etc., St. R. Co., Willmott v.
Corrinth, Moer v.
Corry v. Cincinnati, etc., R. Co., pp. 191, 2444, 2483.
Corsar v. Spreckels & Bros. Co., pp. 3898, 3900, 3910, 3928, 4068.
Corse v. Peck, p. 3871.
Corso v. New Orleans, etc., R. Co., pp. 845, 852, 3271.
Corson, State v.
Cortland, etc., Tract. Co., Kay v.
Corvallis, etc., R. Co., State v.
Cory v. Thames Iron Works, p. 653.
Cosgrove v. Augusta, p. 112.
—— v. Consolidated R. Co., p. 2259.
Cosmos Cotton Co. v. First Nat. Bank, pp. 356, 373, 383, 391, 394, 395, 396, 397.
Cossitt v. St. Louis, etc., R. Co., pp. 1803, 2239, 2272.
Costello v. St. Louis Transit Co., p. 2146.
Costigan v. Michael Transp. Co., p. 728.
—— v. Warren, etc., St. R. Co., 174 Mass. 553, 55 N. E. 317—pp. 1978, 2585.
Cotant v. Boone Suburban R. Co., p. 2350.
Cotchett v. Savannah, etc., R. Co., pp. 1826, 2174, 2221, 2223.
Cote v. New York, etc., R. Co., pp. 3394, 3396.
Cotesworth, Ford v.
Cottengim, Louisville, etc., R. Co. v.
Cotter, Illinois Cent. R. Co. v.
Cotting v. Godard, pp. 3432, 3533 3534.
—— v. Kansas City Stockyards Co., 79 Fed. 679—p. 3534.
—— v. Kansas City Stockyards Co., 82 Fed. 839—pp. 3432, 3533, 3534.
—— v. Kansas City Stockyards Co., 82 Fed. 850—pp. 3432, 3533, 3534.

Cotting v. Kansas City Stockyards Co., 183 U. S. 79, 46 L. Ed. 92, 22 S. Ct. 30—p. 35.
Cotton, Chicago, etc., R. Co. v.
—— Jeffersonville R. Co. v.
—— Lake Erie, etc., R. Co. v.
—— Lane v.
—— North Chicago St. R. Co. v.
Cottrell v. Carolina, etc., R. Co., 141 N. C. 383, 54 S. E. 288—p. 143.
—— v. Pawtucket St. R. Co., p. 2170.
Coudy v. St. Louis, etc., R. Co., pp. 2603, 2691.
Coughtry, Kemp v.
Coulahan v. Metropolitan St. R. Co., p. 2699.
Coulson, St. Louis, etc., R. Co. v.
Coultas, Rockford, etc., R. Co. v.
Coulter, Gulf, etc., R. Co. v.
—— Kuykendall v.
Coulter v. Weir, p. 3578.
Council v. St. Louis, etc., R. Co., p. 1347.
—— United States Exp. Co. v.
Council Bluffs v. Kansas, etc., R. Co., p. 3421.
Counselman v. Hitchcock, pp. 3779, 3782.
County of Cook, Tilley v.
County of Mobile v. Kimball, pp. 3418, 3419, 3420, 3421, 3439, 3445, 3446.
Coup v. Wabash, etc., R. Co., pp. 189, 214, 244, 774, 3271.
Coupland v. Housatonic R. Co., pp. 1006, 1073, 1288, 1339, 1381, 1475, 1480.
Coursel v. Cincinnati, etc., R. Co., p. 2801.
Coursey, Southern R. Co. v.
—— v. Southern R. Co., pp. 2249, 2258, 2291, 2358, 2689.
Courteen v. Kanawha Dispatch, p. 3356.
Courtney, Gulf, etc., R. Co. v.
Courts v. Louisville, etc., R. Co., pp. 1606, 3042.
Cousar Mercantile Co. v. Southern R. Co., pp. 153, 165.
Cousineau v. Muskegon Tract., etc., Co., 145 Mich. 314, 318, 108 N. W. 720—pp. 1796, 2134, 2875.
—— v. Muskegon Tract., etc., Co., 115 N. W. 987, 152 Mich. 48—pp. 2027, 2328.
Cousins v. Lake Shore, etc., R. Co., pp. 2152, 2267.
Coutourie, Texas, etc., R. Co. v.
Covell v. Hill, p. 302.
—— v. Hitchcock, pp. 1219, 1220, 1229, 1232, 1238.
Coventry v. Gladstone, pp. 1224, 1228, 1234, 1235.
Covetts, Louisville, etc., R. Co. v.
Covington, Covington, etc., Bridge Co. v.
—— v. Pullman Co., p. 3581.
—— South Covington, etc., R. Co. v.
—— v. Western, etc., R. Co., pp. 2249, 2373.
Covington Stock Yards Co. v. Keith, pp. 219, 1267, 1269, 1278, 1279, 1280, 1299, 1301, 3647, 3648, 3728.
Covington, etc., Bridge Co. v. Covington, p. 3588.
—— v. Kentucky, pp. 34, 3418, 3421, 3433, 3473, 3474, 3475, 3477, 3491, 3493, 3497, 3527, 3552, 3571.
Covington, etc., R. Co., Reineman & Co. v.
Covington, etc., St. R. Co., Wise v.
Covington, etc., Turnpike Road Co. v. Sandford, pp. 34, 58, 60, 115, 119, 3664, 3676, 3678.
Cowan, Ault v.
Cowan v. Bond, p. 3697.
—— Denver City Tramway Co. v.
—— v. Western Union Tel. Co., p. 641.
Cowan, etc., Co. v. East Tennessee, etc., R. Co., pp. 1182, 1187, 1191.
Coward v. East Tennessee, etc., R. Co., pp. 726, 949, 3114, 3116, 3123, 3124, 3129, 3161, 3162, 3166, 3176, 3178, 3180.
Cowden v. Pacific Coast, etc., Co., 94 Cal. 470, 29 Pac. 873, 18 L. R. A. 221, 28 Am. St. Rep. 142—pp. 1176, 1178, 1181, 1190, 1191, 1204.
Cowen, Winters v.
—— v. Winters, p. 3318.
Coweta County v. Central, etc., R. Co., pp. 238, 243, 752, 755, 757, 765, 815, 830.
Cowham, Haskell v.
Cowherd, Louisville, etc., R. Co. v.
—— v. St. Louis, etc., R. Co., pp. 653, 679.
Cowing v. Snow, pp. 3944, 3945.
Cowles, Illinois Cent. R. Co. v.
Cowley v. Davidson, pp. 438, 472, 855.
—— Litt v.
—— v. Northern Pac. R. Co., pp. 3605, 3694.
Cownie Glove Co. v. Merchants' Dispatch Transp. Co., pp. 3, 727, 732, 748, 753, 765, 773, 818, 821.
Cox, Alabama, etc., R. Co. v.
—— v. American Exp. Co., pp. 1296, 1467, 1474, 1477.
—— v. Atlantic, etc., R. Co., pp. 149, 150.
—— Baltimore, etc., R. Co. v.
—— v. Central Vermont R. Co., pp. 986, 1040, 1087, 1088, 1095, 1118, 1123, 1124.
—— v. Columbus, etc., R. Co., pp. 245, 585.
—— v. Foscue, pp. 3888, 3897.
—— v. High Point, etc., R. Co., pp. 2860, 2900.
—— Indianapolis, etc., R. Co. v.
—— v. Los Angeles Terminal R. Co., pp. 2425, 2426.
—— v. Missouri, etc., R. Co., p. 159.
—— Pecos, etc., R. Co. v.
—— v. Pennsylvania R. Co., p. 96.
—— St. Louis, etc., R. Co. v.
—— Southern Kansas R. Co. v.
—— v. United States, p. 1490.
—— Waring v.
—— Western Gravel Road Co. v.
Cox & Co., Missouri, etc., R. Co. v.
Cox, Patterson & Co. v. Bruce Co., p. 308.
Cox, etc., Co., McClure & Co. v.
—— v. Peterson, pp. 333, 337, 512, 540.
—— Winston v.
Cox, etc., Grocery Co. v. National Bank, p. 385.
Coxe v. Heisley, p. 759.
Coxon v. North Eastern R. Co., 4 Ry. & C. T. Cas. 284—p. 907.
Coy v. Boston Elev. R. Co., pp. 2017, 2741.
—— v. Detroit, etc., Railway, pp. 80, 195, 1598.
Coye v. People's R. Co., p. 2225.
Coyer, Pennsylvania Co. v.
Coyle v. Baltimore, etc., R. Co., p. 2110.
—— v. People's R. Co., pp. 1682, 1741, 1867, 1874, 1881, 1888, 1919, 2290, 2653, 2686.
—— v. Southern R. Co., pp. 190, 1596, 1597, 1601, 1616, 1634, 2408, 2434, 2466, 2468, 2483.
—— v. Western R. Corp., pp. 292, 293, 883.
Coyne v. United K. Co., p. 2653.
Cozine, Lexington R. Co. v.
Crabtree, Clarke v.
—— v. Washington County R. Co., pp. 1614, 1621.
Craddock & Co. v. Wells-Fargo Co.'s Exp., p. 245.
Crady, Illinois Cent. R. Co. v.
Craft v. Boston Elev. R. Co., p. 2779.
—— Southern Exp. Co. v.
Cragin v. New York Cent. R. Co., 51 N. Y. 61, 10 Am. Rep. 559—pp. 728, 733, 749, 1340.
—— v. New York Cent. R. Co., 51 N. Y. 63—p. 292.
Craig, Bayler County v.
—— v. Boston Elev. R. Co., p. 1993.
—— v. Childress, p. 11, 729, 733, 737, 750, 822, 1011, 1020.
—— Citizens' R. Co. v.
—— v. Continental Ins. Co., pp. 4030, 4038, 4042, 4045, 4046, 4049, 4054, 4055, 4056.
—— Denison, etc., R. Co. v.
—— Kinloch v.
—— Lake Shore Elevated R. Co. v.
—— v. Marx, pp. 349, 1207, 1208.
—— Omaha St. R. Co. v.
—— Railroad v.
—— Tweedie Trading Co. v.
—— v. Wabash R. Co., pp. 1866, 2250.
Craighead v. Brooklyn, etc., R. Co., pp. 1821, 1957.
Crain, General Oil Co. v.
Craker v. Chicago, etc., R. Co., p. 3076.
Cralle, Board v.
Crall, Western Union Tel. Co. v.
Cram, Chicago, etc., R. Co. v.
—— v. Chicago, etc., R. Co., 84 Neb. 607, 122 N. W. 31, 26 L. R. A., N. S., 1022—pp. 21, 134, 135, 155.
—— v. Chicago, etc., R. Co., 85 Neb. 586, 123 N. W. 1045, 26 L. R. A., N. S., 1022—pp. 135, 167, 168.
Cramblet v. Chicago, etc., R. Co., p. 2677.
Cramer v. American, etc., Exp. Co., pp. 894, 899, 3289.
—— v. Brooklyn Heights R. Co., pp. 1817, 2172, 2894.
—— v. Burlington, p. 2300.
—— Chicago, etc., R. Co. v.
—— v. Chicago, etc., R. Co., pp. 3521, 3702, 3741, 3748, 3749.
—— v. Springfield Tract. Co., pp. 1997, 2595.
Crandall v. International R. Co., pp. 1647, 1648.
—— v. Minneapolis, etc., R. Co., p. 2777.
—— v. Nevada, pp. 3549, 3563, 3564, 3594.
Crane, Whitesell v.
Crane Iron Works v. United States, p. 3661.
Crangle, Moorehouse v.
Crank, Chesapeake, etc., R. Co. v.
Cranwell v. The Fanny Fosdick, p. 727.
Crary v. Lehigh Valley R. Co., pp. 2097, 2704.
Craucher, Ohio, etc., R. Co. v.
Crauf, Chicago City R. Co. v.
—— v. Chicago City R. Co., pp. 1742, 1890, 1901.
Craven v. Central Pac. R. Co., pp. 2297, 2370.
—— v. International R. Co., p. 2878.
—— v. Ryder, p. 1225.
—— v. State, p. 177.
Cravens, Little Rock, etc., R. Co. v.
—— v. Rogers, p. 101.
Crawford, Adams Exp. Co. v.

Crawford v. Cincinnati, etc., R. Co., pp. 191, 1637, 1638, 2122, 2420, 2425, 2430, 2467.
—— v. Clark, pp. 528, 539, 891, 893.
—— Davis v.
—— v. Georgia Railroad, p. 1748.
—— v. Louisville, etc., R. Co., p. 1984.
—— v. Maine Cent. Railroad, pp. 2790, 2872.
—— v. Mellor, p. 355.
—— Philadelphia, etc., R. Co. v.
—— San Antonio Tract. Co. v.
—— v. Southern K. Ass'n, pp. 3256, 3258, 3289, 3294.
—— v. Southern R. Co., pp. 1036, 1366, 1458, 3518.
—— v. Williams, p. 1145.
Crawleigh v. Galveston, etc., R. Co., pp. 1550, 2517, 2780.
Crawley, American Exp. Co. v.
Crawshay v. Eades, p. 1232.
Cray v. Hartford Fire Ins. Co., p. 1118.
Craybill, Scioto Valley Tract. Co. v.
Craycraft, Louisville, etc., R. Co. v.
Craycroft v. Atchison, etc., R. Co., pp. 320, 945, 994, 995.
Crayton, Louisville, etc., R. Co. v.
Cream City R. Co. v. Chicago, etc., R. Co., pp. 799, 1013, 3166.
Creamer v. West End St. R. Co., p. 1535.
Creason v. St. Louis, etc., R. Co., pp. 1824, 2296.
Creath, Missouri Pac. R. Co. v.
Creditors, Markwald, etc., Co. v.
Credle v. Norfolk, etc., K. Co., p. 1773.
Creech v. Charleston, etc., R. Co., pp. 1520, 2152, 2600.
Creed v. Pennsylvania R. Co., p. 2210.
Creeden, State v.
Creenan v. International R. Co., p. 1807.
Creery v. Holly, p. 333.
Creety, Georgia Railroad v.
Crenshaw, Southern Pac. Co. v.
Crenshawe v. Pearce, p. 338.
Crescent City R. Co., Conolly v.
—— Cronan v.
—— Ober v.
—— Summers v.
Crescent Coal Co. v. Louisville, etc., R. Co., pp. 220, 222, 224, 225, 251, 264, 1190.
Crescent Liquor Co. v. Platt, p. 245.
Cressap, Adams Exp. Co. v.
Cresson v. Philadelphia, etc., R. Co., pp. 1638, 2430.
Crews, Pecos, etc., R. Co. v.
—— v. Richmond & D. R. Co., p. 3704.
—— Terre Haute, etc., R. Co. v.
Crickett, McManus v.
Crider, Western Union Tel. Co. v.
Crier, Galveston, etc., K. Co. v.
Crigler v. Commonwealth, 87 S. W. 280, 25 Ky. L. Rep. 927—p. 3427.
—— v. Commonwealth, 120 Ky. 512, 87 S. W. 276, 27 Ky. L. Rep. 918—p. 3427.
—— v. Commonwealth (Ky.), 87 S. W. 281—p. 3427.
Crilly, Jackson v.
Crine v. East Tennessee, etc., R. Co., pp. 1752, 1753, 1757, 1989.
Crippen, Galveston, etc., R. Co. v.
Crisham, Davis v.
Crisp v. United States, etc., Steamship Co., p. 3961.
Crispi, Galveston, etc., R. Co. v.
Crissey v. Hestonville, etc., R. Co., p. 1961.
Criswell, Missouri, etc., R. Co. v.
Crittenden, Atchison, etc., R. Co. v.
—— v. Wilson, p. 1198.
Critzer, Pacific Exp. Co. v.
Croaker v. Chicago, etc., R. Co., pp. 2038, 2042, 2047.
Crocker, First Nat. Bank v.
—— v. New London, etc., R. Co., pp. 1601, 2413, 2466, 2469, 2486, 2493, 2494.
—— Wood v.
Crockett v. St. Louis, etc., R. Co., p. 3334.
—— Texas, etc., K. Co. v.
Croff v. Great Northern R. Co., p. 1443.
Croft v. Baltimore, etc., R. Co., pp. 3176, 3177, 3181.
—— v. Northwestern Steamship Co., pp. 3992, 3997, 3998.
Crofts v. Waterhouse, p. 1687.
Croll v. Pullman Co., pp. 3223, 3231.
Crommelin v. New York, etc., R. Co., pp. 700, 714, 715.
Cromwell, Bird v.
—— New York, etc., R. Co. v.
Cronan v. Crescent City R. Co., pp. 1705, 1961.
—— v. St. Louis, etc., R. Co., pp. 215, 247, 249, 261.
Crone, Houston, etc., R. Co. v.
—— Southern R. Co. v.
Cronin v. Highland St. R. Co., p. 1645.
Croninger, Adams Exp. Co. v.
Cronk v. Wabash R. Co., pp. 2694, 2736, 2918, 3004.
Cronkite v. Wells, p. 280.
Crook, Southern Exp. Co. v.
Crooks v. Allen, p. 3881.
—— v. The Fanny Skolfield, pp. 3904, 3906.
Croom v. Chicago, etc., K. Co., pp. 1495, 1496.
Crosby, Atlanta, etc., R. Co. v.
—— Atlantic, etc., R. Co. v.
—— v. Fitch, pp. 10, 510, 3889, 3902.
—— v. Maine Cent. R. Co., pp. 1573, 1614.
—— v. Pere Marquette R. Co., p. 148.
—— v. Seaboard, etc., Railway, pp. 2581, 2821, 2824.
Cross, American Contract Co. v.
—— v. Beard, pp. 699, 717.
—— v. Coney Island, etc., R. Co., p. 2820.
—— v. Detroit Citizens' St. R. Co., pp. 2025, 2885.
—— v. Graves, pp. 335, 340, 442, 941, 960, 975, 1043, 1101, 1317.
—— Hadley v.
—— v. Kansas City, etc., R. Co., pp. 1561, 2436.
—— v. Lake Shore, etc., R. Co., pp. 1773, 1776.
—— v. McFaden, pp. 246, 441, 446, 447, 448, 450, 621, 1272, 1293.
—— Rio Grande R. Co. v.
Crossan v. New York, etc., R. Co., pp. 777, 1155, 1156, 1157, 3390.
Crossley & Co., Georgia R., etc., Co. v.
Crossman, Bolton Steam Shipping Co. v.
—— Burrill v.
—— v. Burrill, p. 3868.
—— Gulf, etc., R. Co. v.
—— v. Lurman, p. 3482.
Crosstown St. R. Co., Does v.
—— Masterson v.
Croswell v. Va. Bibber, pp. 361, 362.
Crotzer v. Freeport R., etc., Co., p. 1891.
Crouch v. Great Northern R. Co., pp. 211, 221.
—— v. London, etc., R. Co., pp. 211, 221.
Croucher v. Wilder, p. 3895.
Crow v. Atchison, etc., K. Co., p. 3539.
—— v. Chicago, etc., R. Co., pp. 971, 1061, 1062, 1099, 1457.
—— Galveston, etc., Co. v.
—— Galveston, etc., R. Co. v.
—— v. Metropolitan St. R. Co., p. 2907.
—— Omaha, etc., R. Co. v.
Crowder, St. Louis, etc., R. Co. v.
—— Southern R. Co. v.
Crowe, Louisville, etc., R. Co. v.
Crowell, Flood v.
—— v. Union oil Co., p. 3922.
—— Van Winkle v.
Crowell Lumber, etc., Co., Missouri Pac. R. Co. v.
Crowley v. Boston Elevated R. Co., pp. 1830, 1993, 2741.
—— v. Fitchburg, etc., K. Co., pp. 1646, 1647, 1649, 2425, 2431.
—— v. Hurd, pp. 3956, 3960.
—— v. Louisville, etc., R. Co., pp. 1470, 1457.
—— Texas, etc., R. Co. v.
Crown Coal Co., Louisville, etc., R. Co. v.
Crowninshield, Choate v.
Croxton, Louisville, etc., R. Co. v.
Crozier v. Boston, etc., Steamboat Co., pp. 3146, 3148.
—— Louisville, etc., R. Co. v.
Crudup, Illinois Cent. R. Co. v.
Crull, Norfolk, etc., R. Co. v.
Crum, Mexican Nat. R. Co. v.
Crumbacker v. Tucker, pp. 480, 481.
Crump v. Davis, pp. 2228, 2357.
—— Southern Kansas R. Co. v.
Crunk, Louisville, etc., R. Co. v.
Cruse, Illinois Cent. K. Co. v.
—— Sabine, etc., R. Co. v.
Cruseturner, International, etc., R. Co. v.
—— v. International, etc., R. Co., pp. 1766, 1967, 2884.
Crutcher v. Choctaw, etc., R. Co., pp. 642, 645.
—— v. Kentucky, pp. 3427, 3429, 3472, 3481, 3503, 3504, 3550, 3570, 3571.
—— South Covington, etc., St. R. Co. v.
Crystal Palace v. Vanderpool, p. 3145.
Cubbage v. Estate, p. 2319.
—— Jacksonville Elect. Co. v.
—— v. Youngerman, pp. 1743, 1750, 2869, 2883, 2901.
Cudahy Packing Co. v. Dorsey, pp. 479, 495.
Cuddy v. Horn, pp. 2083, 2091.
Culberson v. Empire Coal Co., pp. 1682, 2015, 2019, 2035, 2039, 2050, 2051, 2578, 2606.
Culbreth v. Philadelphia, etc., R. Co., pp. 524, 727, 752, 757.
Cullar v. Missouri, etc., R. Co., p. 2826.
Cullen, Pennewill v.
—— v. Seaboard, etc., R. Co., pp. 1194, 1197, 1198, 1201.
—— Southern R. Co. v.
—— Walsh v.
Culliford v. Gomila, pp. 3868, 3873.
Cullison, Ohio, etc., R. Co. v.
Cully v. Baltimore, etc., K. Co., p. 1948.
Culton, Pattison v.
Culver, Gibson v.
—— v. Lester, p. 729.
—— Montgomery, etc., R. Co. v.
—— Niles v.
—— St. Louis, etc., R. Co. v.
Cumberland Tel., etc., Co. v. Morgan's, etc., R. Co., p. 256.
—— v. Texas, etc., R. Co., p. 257.

Cumberland Valley R. Co., Appeal of.
—— Hoffman v.
—— v. Maugans, pp. 2255, 2333, 2334.
—— v. Myers, p. 1530.
—— Ryan v.
—— Shutt v.
Cumberland Valley R. Co.'s Appeal, p. 222.
Cumberland, etc., R. Co., State v.
—— v. State, p. 3590.
—— v. Thompson, p. 1705.
Cumbie, St. Louis, etc., R. Co. v.
—— v. St. Louis, etc., R. Co., 105 Ark. 406, 151 S. W. 237—pp. 1090, 1109.
—— v. St. Louis, etc., R. Co. (Ark.), 151 S. W. 240—pp. 247, 446, 448, 449.
Cumby Mercantile, etc., Co., Missouri, etc., R. Co. v.
Cumming v. Barracouta, p. 820.
Cummings v. Detroit United Railway, p. 2989.
—— Graham v.
—— Wichita R., etc., Co. v.
—— v. Worcester, etc., St. R. Co., pp. 2189, 2197.
Cummins v. Atlantic, etc., R. Co., p. 695.
—— v. Dayton, etc., R. Co., p. 3282.
Cunard Steamship Co., Bradford v.
—— Connors v.
—— Eggermont v.
—— Fonseca v.
—— Glovinsky v.
—— Kelley v.
—— v. Kelley, pp. 283, 294, 306, 338, 829, 3928, 3932, 4059.
—— Levensohn v.
—— Mountford v.
—— O'Brien v.
—— O'Regan v.
—— Rabinowitz v.
—— Rintamaki v.
—— Vitelli v.
—— Wood v.
—— Zabron v.
Cunning, Tittabawassee Boom Co. v.
Cunningham v. Boston, etc., St. R. Co., p. 77.
—— v. Great Northern R. Co., p. 757.
—— Gulf, etc., R. Co. v.
—— Illinois Cent. R. Co. v.
—— v. International R. Co., pp. 2074, 2113, 2162.
—— Louisville, etc., R. Co. v.
—— v. Pennsylvania R. Co., 40 Pa. Super. Ct. 212—pp. 834, 835.
—— v. Pennsylvania R. Co., 50 Pa. Super Ct. 609—p. 1021.
—— St. Louis, etc., R. Co. v.
—— v. Seattle Elect. R., etc., Co., pp. 2059, 2060, 2411, 3104.
—— Southern R. Co. v.
—— v. Wabash R. Co., pp. 1313, 1339, 1454, 1470.
Curl v. Chicago, etc., R. Co., pp. 2429, 2851, 3104.
Curran, Cleveland, etc., R. Co. v.
Curray, Porter v.
Currel, Arayo v.
Currell v. Hannibal, etc., R. Co., pp. 457, 459, 1298.
Currie v. Mendenhall, p. 2906.
—— v. Raleigh, etc., R. Co., pp. 169, 3484.
—— v. Seaboard, etc., R. Co., pp. 163, 753, 765, 879.
—— Texas, etc., R. Co. v.
—— The M. C.
Curry v. Georgia, etc., R. Co., pp. 1882, 1883.
—— Hot Springs v.
—— Illinois Cent. R. Co. v.
—— Kansas, etc., R. Co. v.
Curry v. Kansas, etc., R. Co., 58 Kan. 6, 48 Pac. 579—p. 3695.
—— v. Kansas, etc., R. Co., 60 Pac. 325, 61 Kan. 541—p. 3041.
—— Mulford Co. v.
—— v. Roulstone, p. 1222.
—— Texas, etc., R. Co. v.
Curtis v. Avon, etc., R. Co., p. 3173.
—— Buffington v.
—— v. Central Railway, p. 2009.
—— Chicago, etc., R. Co. v.
—— v. Chicago, etc., R. Co., pp. 455, 819, 832.
—— v. Delaware, etc., R. Co., pp. 1489, 3116, 3120, 3129, 3141, 3184.
—— Detroit, etc., R. Co. v.
—— v. Detroit, etc., R. Co., p. 2300.
—— v. Leavitt, p. 1489.
—— v. Louisville City R. Co., 94 Ky. 573, 23 S. W. 363, 21 L. R. A. 649, 15 Ky. L. Rep. 351—pp. 1603, 2433.
—— v. Louisville City R. Co., 14 Ky. L. Rep. 272—p. 1603.
—— Michigan Cent. R. Co. v.
—— Missouri Pac. R. Co. v.
—— v. Rochester, etc., R. Co., pp. 1684, 1687, 1720, 1823, 1847, 2667, 2673.
—— v. Sioux, etc., R. Co., p. 3083.
—— v. Southern R. Co., p. 2697.
—— Wabash R. Co. v.
Curtis Bros., Southern Kansas R. Co. v.
—— Southern, etc., R. Co. v.
Cushing v. Wells, etc., Co., pp. 594, 595, 596, 855.
Cushman, Ft. Worth, etc., R. Co. v.
Cushney, Gulf, etc., R. Co. v.
Cusick v. Interurban St. R. Co., p. 2311.
—— Leavenworth Elect. R. Co. v.
Custer, Pullman Co. v.
Cutcliff v. Birmingham R., etc., Co., p. 2169.
Cutler v. Concord, etc., Railroad, p. 2756.
—— v. Lennox, p. 3865.
—— v. Winsor, pp. 3865, 3916.
Cutter, Kansas Pac. R. Co. v.
—— Wells Fargo & Co. v.
—— v. Wells Fargo & Co., pp. 846, 1059.
Cutting v. Florida R., etc., Co., p. 3664.
—— v. Grand Trunk R. Co., pp. 638, 653, 1167.
—— v. Miner, p. 659.
Cutts v. Boston Elev. R. Co., pp. 2123, 2343, 2759, 2802, 2892.
—— v. Brainard, p. 3256.
Cuyler v. Decker, p. 2128.
Cynthia, Giles v.

D

Dacus, Illinois Cent. R. Co. v.
Dages, Toledo, etc., R. Co. v.
Daggett, Ft. Worth, etc., R. Co. v.
—— v. North Jersey St. R. Co., p. 2914.
—— v. Shaw, pp. 728, 733, 749, 753, 765, 768.
—— Spencer v.
Dagnall v. Southern R. Co., pp. 1631, 2712.
Dagner, Cincinnati, etc., R. Co. v.
Dahlberg v. Minneapolis St. R. Co., pp. 1718, 2008, 2201.
Dahlberg Brokerage Co., Atlantic, etc., R. Co. v.
Dahrooge v. Pere Marquette R. Co., p. 3154.
Dakota Cent. R. Co., Oviatt v.
Dalby, Philadelphia, etc., R. Co. v.
—— St. Louis, etc., R. Co. v.
Dalby & Co. v. Mexican Cent. R. Co., p. 488.
Dale v. Brooklyn City, etc., R. Co., p. 2145.
Daley v. Chicago, etc., R. Co., pp. 1572, 2529, 2530, 2531.
—— v. Port Jervis, etc., R. Co., p. 2876.
—— v. Redburn, p. 2649.
Dalhi, etc., R. Co., Hoffbauer v.
Dallas, Illinois Cent. R. Co. v.
—— v. Illinois Cent. R. Co., pp. 1491, 2248, 2906.
—— St. Louis, etc., R. Co. v.
Dallas Consol. Elect. St. R. Co. v. Ison, pp. 1687, 1710.
—— v. Pettit, p. 2867.
Dallas Consol. Tract. R. Co. v. Randolph, pp. 1685, 1693, 1731, 1732, 1737.
Dallas Rapid Transit Co. v. Payne, 98 Tex. 211, 82 S. W. 649, 15 R. R. R. 25, 38 Am. & Eng. R. Cas., N. S., 25—pp. 1556, 1562, 1563, 1879, 2151, 2319, 2359, 2940.
—— v. Payne (Tex. Civ. App.), 78 S. W. 1085—p. 1879.
Dallas, etc., Nav. Co., Sievers v.
Dallas, etc., R. Co. v. Reeman, p. 1791.
—— v. Spicker, p. 2289.
Dallas, etc., St. R. Co. v. Black, p. 2594.
—— v. Broadhurst, pp. 1842, 1978, 2684.
—— v. Gilmore, pp. 1721, 2039.
—— v. Lasch, p. 2251.
—— v. Pettit, pp. 2051, 2052.
Dallenbach v. Illinois Cent. R. Co., p. 216.
Dalton v. Beers, p. 3096.
—— Kansas, etc., R. Co. v.
—— v. Kansas, etc., R. Co., pp. 2848, 3037, 3047.
Daly v. Central R. Co., 49 N. Y. S. 901, 26 App. Div. 200—p. 2907.
—— v. Central R. Co., 57 N. Y. S. 44, 38 App. Div. 632—p. 2828.
Dalzell v. Saxon, pp. 732, 738.
Damont v. New Orleans, etc., R. Co., p. 2263.
Dampman v. Pennsylvania R. Co., p. 2673.
Dan, The.
Dana v. Fiedler, p. 653.
—— The.
Danbeeh, New Jersey Tract. Co. v.
Danbury, Hinckley v.
Danciger v. Wells, Fargo & Co., pp. 245, 3814, 3823.
Dancy, Louisville, etc., R. Co. v.
Dandridge, Pennsylvania, etc., Nav. Co. v.
Dane, Chicago, etc., R. Co. v.
Danforth, Northern Texas Tract. Co. v.
Dangerfield v. Atchison, etc., R. Co., pp. 1628, 1630.
Daniel v. Brooklyn Heights R. Co., pp. 1574, 2448, 2487.
—— North Alabama Tract. Co. v.
—— v. North Jersey St. R. Co., pp. 196, 1500, 3112.
—— v. Petersburg R. Co., pp. 2045, 2046, 2049.
Daniel Ball, The.
Daniels v. Ballantine, pp. 744, 847.
—— v. Florida, etc., R. Co., pp. 1632, 2057, 2663, 2850, 2851.
—— Gulf, etc., R. Co. v.
—— Illinois Cent. R. Co. v.
—— Little Rock, etc., R. Co. v.
—— Stephan v.
—— v. Western, etc., R. Co., pp. 1768, 1884, 1912, 1915.
D'Anjou v. Deagle, p. 485.
Danshank, Gulf, etc., R. Co. v.

Dant & Co. v. Northwestern Union Packet Co., pp. 512, 596.
Dantzler Lumber Co. v. Churchill, p. 3968.
Danville St. Car Co. v. Payne, p. 1986.
Danville St. R., etc., Co., Barnes v.
Danville, etc., R. Co. v. Brown, p. 2500.
Danville, etc., Road Co. v. Stewart, pp. 2082, 2083.
Danziger v. Interborough Rapid Transit Co., p. 2054.
Daoust v. Chicago, etc., R. Co., p. 624.
Da Ponte v. New Orleans Transfer Co., p. 3141.
Darby, Alabama Mid. R. Co. v.
—— v. Baines, pp. 3865.
—— Gulf, etc., R. Co. v.
D'Arcais, Southern Pac. R. Co. v.
D'Arcy v. Adams Exp. Co., p. 1067.
Darden v. Atlantic, etc., R. Co., p. 1921.
—— Thompson v.
Dare, St. Louis, etc., R. Co. v.
Dargan v. Pullman Palace Car Co., pp. 3201, 3202, 3215, 3216, 3230, 3238.
Darling v. Atchison, etc., R. Co., p. 1477.
—— v. Boston, etc., R. Corp., pp. 3259, 3313.
—— v. Westmoreland, p. 2738.
Darlington, Missouri, etc., R. Co. v.
—— v. Missouri Pac. R. Co., pp. 700, 701, 702, 714, 718.
Darlington Lumber Co. v. Missouri Pac. R. Co., 116 S. W. 530, 216 Mo. 658—pp. 215, 700.
—— v. Missouri Pac. R. Co. (Mo.), 147 S. W. 1052—pp. 87, 122, 138.
Darnana v. La Compagnie Generale Transatlantique, p. 4033.
Darnell, Adams Exp. Co. v.
—— v. Illinois Cent. R. Co., p. 3790.
—— v. Indiana, p. 3557.
—— Pacific Exp. Co. v.
—— v. State, pp. 3557, 3567.
Darnell Bros., Pacific Exp. Co. v.
Darnell-Taenzer Lumber Co. v. Southern Pac. Co., p. 3794.
Darting Evansville, etc., R. Co. v.
Dater, Anchor Line v.
—— Erie, etc., Transp. Co. v.
Daube v. Chicago, etc., R. Co., p. 677.
Dauchy v. Silliman, p. 723.
Daughdrill, Southern R. Co. v.
Daugherty v. Chicago, etc., R. Co., pp. 1553, 1569.
—— Louisville, etc., R. Co. v.
—— New York, etc., R. Co. v.
—— v. State, p. 185.
Daughty v. Northwestern R. Co., p. 3307.
Dave v. Morgan's, etc., Steamship Co., pp. 1855, 1867.
Davenport v. Brooklyn City R. Co., p. 2137.
—— Fowler v.
—— Illinois Cent. R. Co. v.
—— Powers v.
—— St. Louis, etc., R. Co. v.
—— Sinnot v.
Davenport Co. v. Pennsylvania R. Co., p. 785.
Davenport Nat. Bank v. Homeyer, pp. 355, 359, 363, 365, 366, 404.
Davey v. Mason, p. 3136.
David, Nashville, etc., R. Co. v.
David & Carolina, The
Davidson v. Adams Exp. Co., p. 3521.
—— Cowley v.
—— Fay v.
Davidson, Galveston, etc., R. Co. v.
—— v. Graham, pp. 728, 730, 731, 733, 739, 740, 749, 751, 752, 814, 822, 946, 947, 949, 956, 960, 981, 1003, 1007, 1019, 1032, 1036, 3161.
—— Gulf, etc., R. Co. v.
—— Illinois Cent. R. Co. v.
—— McCauley v.
—— Missouri, etc., R. Co. v.
—— Oregon, etc., R. Co. v.
—— v. St. Louis Trans. Co., p. 2923.
—— Texas Pac. R. Co. v.
—— Weide v.
Davidson Development Co. v. Southern R. Co., pp. 626, 638, 654, 662, 673.
Davidson Steamship Co., Ohio Transp. Co. v.
—— v. 119,254 Bushels of Flaxseed, p. 3947.
Davies v. Eastern Steamboat Co., p. 3983.
—— v. Michigan Cent. R. Co., p. 530.
Davies, Turner & Co., Blakiston v.
Davis, Alabama, etc., R. Co. v.
—— v. Atchison, etc., R. Co., pp. 1667, 2094.
—— v. Atlanta, etc., R. Co., pp. 2354, 2913.
—— v. Atlantic etc., R. Co., pp. 612, 613, 614.
—— Baltimore, etc., R. Co. v.
—— v. Button, p. 1487.
—— v. Camden, etc., R. Co., p. 2234.
—— v. Cayuga, etc., R. Co., pp. 3115, 3118, 3127, 3130, 3139.
—— v. Central Railroad, p. 2666.
—— v. Central, etc., R. Co., pp. 319, 321, 323, 333, 337, 354, 744, 914, 958, 959, 987.
—— v. Chesapeake, etc., R. Co., pp. 1577, 1578, 2101.
—— Chicago, etc., R. Co. v.
—— v. Chicago, etc., R. Co., 45 Fed. 543—pp. 1569, 1585.
—— v. Chicago, etc., R. Co., 83 Iowa 744, 49 N. W. 77—pp. 3163, 3187.
—— v. Chicago, etc., R. Co., 93 Wis. 470, 67 N. W. 16, 1132, 33 L. R. A. 654, 57 Am. St. Rep. 935, 4 Am. & Eng. R. Cas., N. S., 622—pp. 1696, 1715, 2092, 2098, 3001, 3034.
—— v. Cleveland, etc., R. Co., 146 Fed. 403—p. 3543.
—— v. Cleveland, etc., R. Co., 217 U. S. 157, 54 L. Ed. 708, 30 S. Ct. 463, 27 L. R. A., N. S., 823, 18 Am. & Eng. Ann. Cas. 907—p. 3544.
—— v. Crawford, p. 474.
—— v. Crisham, pp 10, 1489.
—— Crump v.
—— Ft. North, etc., R. Co. v.
—— Galveston, etc., R. Co. v.
—— v. Galveston, etc., R. Co., pp. 1731, 2694, 2843.
—— Georgia R., etc., Co. v.
—— v. Georgia R., etc., Co., p. 2962.
—— Hayden v.
—— Houston, etc., R. Co. v.
—— v. Houston, etc., R. Co., 25 Tex. Civ. App. 8, 59 S. W. 844—pp. 3373, 3375, 3376.
—— v. Houston, etc., R. Co., 29 Tex. Civ. App. 42, 68 S. W. 733—pp. 1768, 1771, 1796, 2788.
—— Howatt v.
—— International, etc., R. Co. v.
—— v. Iowa Cent. R. Co., 2334.
—— v. Jacksonville Southeastern Line, pp. 456, 804, 3294.
—— Johnston v.
—— Kansas, etc., R. Co. v.
Davis v. Kansas, etc., R. Co., 86 S. W. 995, 75 Ark. 165—pp. 2242, 2906.
—— v. Kansas, etc., R. Co., 53 Mo. 317, 14 Am. Rep. 457—pp. 1955, 2427, 2434.
—— Lake Shore, etc., R. Co. v.
—— v. Louisville, etc., R. Co., p. 2366.
—— Lovell v.
—— v. Michigan, etc., R. Co., 20 Ill. 412—pp. 894, 899.
—— v. Michigan, etc., R. Co., 22 Ill. 278, 74 Am. Dec. 151—pp. 3126, 3130, 3151, 3180, 3189, 3190.
—— Missouri, etc., R. Co. v.
—— v. Missouri, etc., R. Co., p. 2645.
—— Mobile, etc., R. Co. v.
—— v. Mobile, etc., R. Co., p. 1200.
—— v. New York, etc., R. Co., 70 Minn. 37, 72 N. W. 823—p. 3355.
—— v. New York, etc., R. Co. (N. Y.), 1 Hilt. 543—p. 848.
—— v. Oregon, etc., R. Co., p. 2121.
—— v. Paducah R., etc., Co., pp. 1697, 2392, 2673, 3006.
—— Reeve v.
—— v. Russell, p. 1224.
—— St. Louis, etc., R. Co. v.
—— San Antonio Tract. Co. v.
—— Scruggs v.
—— v. Seaboard Air Line Railway, pp. 501, 1104, 3402.
—— v. Seaboard, etc., Railway, p. 2547.
—— v. Smokeless Fuel Co., pp. 3951, 3974.
—— v. South Carolina, etc., R. Co., pp. 1616, 1618, 2442.
—— Southern R. Co. v.
—— v. Southern R. Co., pp. 151, 152, 176, 3423.
—— Stiles v.
—— v. Taff Vale R. Co., p. 221.
—— Texas, etc., R. Co. v.
—— v. Texas, etc., R. Co., pp. 1276, 1277, 1473, 1479.
—— Wabash R. Co., p. 1363.
—— v. Wabash, etc., R. Co., 89 Mo. 340, 1 S. W. 327—pp. 728, 730, 733, 734, 742, 746, 749, 825.
—— v. Wabash, etc., R. Co., 13 Mo. App. 449—pp. 828, 848.
—— v. Wakelee, p. 3830.
—— v. Wallace, p. 699.
—— v. Western Union Tel. Co., p. 1119.
—— v. Yazoo, etc., R. Co., p. 2848.
Davis Bros. v. Blue Ridge R. Co., pp. 1039, 1353, 1381, 1392, 1473, 1475.
—— v. Vandalia R. Co., p. 1033.
Davis Coal, etc., Co., Christie v.
Davis-Fowler Co., Texas, etc., R. Co. v.
Davis & Co., Graham & Co. v.
—— Morrison v.
Davison v. Von Lingen, pp. 3872, 3873.
Dawkins, Gulf, etc., R. Co. v.
Dawley v. Wagner Palace Car Co., pp. 3145, 3215, 3223, 3239.
Dawson, Atchison, etc., R. Co. v.
—— v. Boston, etc., R. Co., pp. 1881, 2146, 2155, 2300, 2749.
—— v. Chicago, etc., R. Co., pp. 246, 247, 607, 621, 622, 1020, 1021, 3279.
—— Gulf, etc., R. Co. v.
—— v. Louisville, etc., R. Co., 4 Ky. L. Rep. 731—p. 2862.
—— v. Louisville, etc., R. Co., 4 Ky. L. Rep. 801, 11 Am. & Eng.

R. Cas. 134—pp. 1870, 1884, 1906, 2846, 3058.
Dawson v. Louisville, etc., R. Co., 6 Ky. L. Rep. 668—pp. 3043, 3050, 3058.
—— Missouri, etc., R. Co. v.
—— v. St. Louis, etc., R. Co, pp. 1087, 1413, 1477.
—— Southern R. Co. v.
—— Texas, etc., R. Co. v.
Dawson Bros., Missouri, etc., R. Co. v.
Day v. Brooklyn City R. Co., p. 2524.
—— Ft. Worth, etc., R. Co. v.
—— Michigan, etc., R. Co. v.
—— O'Neal v.
—— v. Owen, pp. 190, 194, 195, 196, 197, 1950, 2571.
—— St. Louis, etc., R. Co. v.
—— Shoninger v.
—— Smith v.
—— Taylor v.
—— Day, etc., Co. v. Ridley, pp. 485, 729, 734, 816, 817, 822.
Dayton v. Parke, p. 713.
—— v. Pennsylvania, etc., R. Co., p. 2839.
—— The L. P.
Dayton, etc., R. Co., Cummins v.
Dayton, etc., Tract. Co., Eller v.
Deagle, D'Anjou v.
Deake v. United States Exp. Co., pp. 1331, 1465.
Deakins, Southern R. Co. v.
Dean v. Chicago General R. Co., p. 1487.
—— v. Chicago, etc., R. Co., p. 849.
—— v. King, pp. 267, 283, 294, 296, 306, 307, 309, 337, 338, 339, 341, 411, 3893.
—— Little Rock, etc., R. Co. v.
—— Southern R. Co. v.
—— Texas Mid. R. Co. v.
—— United R., etc., Co. v.
—— v. Vaccaro, p. 527, 542, 544, 545, 596, 849, 892, 894, 901, 903.
Deane, United R., etc., Co. v.
Deans v. Atlantic, etc., R. Co., p. 1108.
Dear, Alabama, etc., R. Co. v.
Dearborn, First Nat. Bank v.
Dearden v. San Pedro, etc., R. Co., pp. 2677, 2697, 2809, 2895.
Deason, Louisville, etc., R. Co. v.
Deaver-Jeter Co. v. Southern R. Co., pp. 493, 1084, 1110.
De Barnales, Shepard v.
De Baun v. Atchison, p. 3896.
Debbins v. Old Colony R. Co., p. 2136.
De Blois v. Great Northern R. Co., p. 2506.
De Board v. Camden Interstate R. Co., pp. 1648, 2103, 2453, 2465, 3097.
Debes, In re.
Decan v. Shipper, pp. 369, 373, 374, 375, 377.
De Castillo, Galveston, etc., R. Co. v.
—— v. Galveston, etc., R. Co., p. 2822.
De Cecco v. Connecticut Co., p. 1841.
Decker v. Atchison, etc., R. Co., pp. 191, 2420, 2421.
—— v. Chicago, etc., R. Co., pp. 1575, 2880, 2911.
——Cuyler v.
—— Prentice v.
—— Southern R. Co. v.
De Coursey, United States v.
Decuir v. Benson, pp. 190, 195, 1947.
—— Hall v.
Dedham, etc., St. R. Co., Westwood v.
Deemar, Bixby v.
Deen v. Wheeler, p. 807.
Deep River Logging Co., Harvey v.
Deer Creek Lumber Co., New York Cent. & H. R. Co. v.
Deere Plow Co. v. Wyland, p. 3541.
Deery v. Camden, etc., R. Co., p. 2247.
De Felice v. Compagnie Francaise, etc., Cie, p. 4009.
Defford v. Seinour, p. 484.
Defrier v. Nicaragua, pp. 1941, 3145, 4009.
Defries, Eagle Packet Co. v.
Degado v. Wilbur, p. 359.
De Glopper v. Nashville K., etc., Co., pp. 1491, 1492.
DeGrau v. Wilson, 17 Fed. 698—p. 916.
—— v. Wilson, 22 Fed. 560—p. 893.
Dehsoy v. Milwaukee Elect. R. etc., Co., p. 2955.
Deierling v. Wabash R. Co., pp. 1027, 1030, 1292.
Deininger, In re.
Deitch, Western, etc., R. Co. v.
DeKay v. Chicago, etc., R. Co., pp. 1526, 1963, 1964, 2139, 2140.
Delamatyr v. Milwaukee, etc., R. Co., pp. 2229, 2263, 2348.
De Land, etc., R. Co., King, v.
Delaney v. United States Exp. Co., pp. 608, 645, 686, 1080, 3277.
Delaney, etc., Iron Co. v. Iroquois Transp. Co., p. 3546.
Delano, Arnold v.
Delaware v. Andrews, p. 1861.
—— v. Oregon Iron Co., pp. 1016, 1017.
—— The.
Delaware Bank v. Smith, p. 796.
Delaware Mut. Safety Ins. Co., Insurance Co. v.
Delaware Mut., etc., Ins. Co., Insurance Co. v.
Delaware Railroad Tax, pp. 3549, 3552, 3553, 3558, 3572, 3590, 3591, 3593.
Delaware, etc., Canal Co. v. Commonwealth, p. 3558.
—— Draper v.
—— v. English v.
—— Ham v.
—— Hope v.
—— Lewis v.
—— Menner v.
—— Palmer v.
—— Sullivan v.
—— v. Webster, pp. 2126, 2255.
—— Williams v.
Delaware, etc., Co., Attorney General v.
—— Automatic Merchandising Co. v.
—— Losie v.
—— v. United States v.
Delaware, etc., R. Co., American Sugar Refin. Co. v.
—— v. Ashley, pp. 1723, 1745, 1752, 1754, 1757, 2003, 2097, 2098, 2099, 2215, 2860.
—— Atwater v.
—— Ayres v.
—— Bacon v.
—— Besecker v.
—— Brooks v.
—— Bullock v.
—— v. Bullock, p. 3113.
—— Carr v.
—— Case v.
—— v. Central Stock Yard, etc., Co., 31 Am. & Eng. R. Cas. 82, 43 N. J. Eq. 71, 10 Atl. 490—p. 242.
—— v. Central Stock Yard, etc., Co., 43 N. J. Eq. 605, 12 Atl. 374, 13 Atl. 615—p. 254.
—— Colton v.
—— v. Converse, p. 3792.
—— Curtis v.
—— Earnest v.
—— Eaton v.
—— Feinberg v.
—— Field v.
—— Forepaugh v.
Delaware, etc., R. Co. v. Frank, pp. 1616, 1617, 1618.
—— Gable v.
—— Gale v.
—— Gamble-Robinson Comm. Co. v.
—— Goble v.
—— Harris v.
—— Henly v.
—— Hickenbottom v.
—— Holtbauer v.
—— Hoffman v.
—— Interstate Commerce Comm. v.
—— v. Interstate Commerce Commission, 166 Fed. 498—pp. 3657, 3688.
—— v. Interstate Commerce Commission, 169 Fed. 894—p. 3791.
—— Irvine v.
—— Kingsley v.
—— v. Kutter, pp. 3632, 3633, 3636, 3668.
—— Lester v.
—— Lyne v.
—— Martin v.
—— Mettler v.
—— v. Napheys, p. 2687.
—— National Newark Banking Co. v.
—— Pease v.
—— Poole v.
—— State v.
—— v. Stevens, p. 3485.
—— Taber v.
—— v. Trautwein, pp. 209, 1492, 1589, 1590, 1767, 1775.
—— United States v.
—— v. United States, pp. 3652, 3654.
—— Vosler v.
—— v. Walsh, p. 3084.
—— Wood v.
—— Woodbridge v.
Delcourt, Chicago City R. Co. v.
De Leon v. McKernan, p. 3052.
Delhi, etc., R. Co., Hoffbauer v.
Delk, St. Louis, etc., R. Co. v.
—— v. St. Louis, etc., R. Co., pp. 3452, 3455.
Dellwood Park Co., O'Callaghan v.
Delmonte v. Southern Pac. Co., p. 2563.
Del Norte, The.
Deloney, Hot Springs R. Co. v.
De Lorme v. Atlantic, etc., R. Co., pp. 842, 3285, 3545.
Delta Bag Co. v. Frederick Leyland & Co., p. 3905.
—— v. Kearns, pp. 1225, 1228.
De Lucas v. New Orleans, etc., R. Co., pp. 1646, 1647, 2438.
Del Valle v. Richmond, p. 3145.
De Mahy v. Morgan's, etc., Steamship Co., p. 1699.
Demann v. Eighth Ave. R. Co., pp. 2354, 2834.
Demarest, Bergen County Tract. Co. v.
Demars, Illinois Cent. R. Co. v.
Demby, Hot Springs v.
De Mendoza, Bonner v.
Dement, Missouri, etc., R. Co. v.
De Milley, Texas, etc., R. Co. v.
—— v. Texas, etc., R. Co., p. 1625.
Deming v. Grand Trunk R. Co., pp. 630, 631, 633, 634, 667, 668, 669, 678.
—— v. Merchants' Cotton-Press, etc., Co., pp. 7, 282, 778, 822, 913, 931, 946, 949, 958, 972, 1012, 1013, 1022, 1023, 3320, 3348, 3349.
—— v. Norfolk, etc., R. Co., 21 Fed. 25, 16 Am. & Eng. R. Cas. 232—p. 3376.
—— v. Norfolk, etc., R. Co. (Pa.), 17 Phila. 540—p. 3286.
De Montcourt, Conrad v.

De Mott v. Laraway, pp. 511, 728, 788.
Dempsey, Fordyce v.
—— Gillingham v.
Dempster v. Oregon, etc., R. Co., p. 2698.
Denaby Main Colliery Co. v. Manchester, S. & L. R. Co., p. 3685.
Denham v. Washington Water Power Co., p. 2919.
Denison, Kingman & Co. v.
—— v. Carter, 98 Tex. 196, 82 S. W. 782, 107 Am. St. Rep. 626—pp. 2299, 2302, 2524.
—— v. Carter (Tex. Civ. App.), 79 S. W. 320—pp. 2191, 2322.
—— v. Craig, p. 2143.
—— Fuller v.
—— v. Johnson, pp. 1532, 1562, 2656, 2657.
—— v. Randell, pp. 2415, 2853.
Denman v. Chicago, etc., R. Co., p. 1438.
Denmark, The.
Denmead, Slaughter v.
Dennan, Coney Island Co. v.
Dennie, Naylor v.
—— Way v.
Dennis v. Columbia Elect. St. R., etc., Co., p. 3021.
—— v. Pittsburg, etc., R. Co., pp. 1951, 1953, 2690.
—— v. Slyfield, pp. 3867, 3868, 3871, 3872, 3925.
—— Texas, etc., R. Co. v.
Dennison, Gulf, etc., R. Co. v.
—— v. Seattle, etc., R. Co., pp. 27, 81.
Denny v. Cabot, p. 3916.
—— v. Chicago, etc., R. Co., pp. 1573, 2811.
—— v. Manhattan Co. (N. Y.), 2 Denio 115—p. 628.
—— v. Manhattan Co. (N. Y.), 5 Denio 639—p. 628.
—— v. New York Cent. R. Co., p. 744.
—— v. New York, etc., R. Co., pp. 1977, 2439.
—— v. North Carolina R. Co., pp. 2122, 2176, 2264.
—— v. The New York Central & Hudson R. R., p. 1974.
De Nobra, Albion Lumber Co. v.
Densmore Comm. Co. v. Duluth, etc., Railway, p. 784.
Denton, Bradley v.
—— v. Chicago, etc., R. Co., pp. 818, 1040.
—— v. Great Northern R. Co., pp. 1670, 1672, 1675.
Denver, Atchison, etc., R. Co. v.
Denver City Tramway Co. v. Cowan, pp. 2725, 2726, 2928, 2932.
—— v. Hills, pp. 1536, 1834, 2675, 2687, 2740.
Denver Consol. Tramway Co., Griffith v.
—— Posten v.
—— v. Rush, p. 2688.
Denver Tramway Co. v. Cloud, pp. 2565, 3089.
—— v. Owens, p. 1889.
—— v. Reed, pp. 2411, 2710, 3027.
—— v. Reid, 22 Colo. 349, 45 Pac. 378—p. 2192.
—— v. Reid, 4 Colo. App. 53, 35 Pac. 269—pp. 1718, 1749, 1833, 2684.
Denver, etc., R. Co. v. Andrews, p. 1680.
—— Atchison, etc., R. Co. v.
—— v. Atchison, etc., R. Co., p. 3247.
—— Baer Bros. Mercantile Co. v.
—— v. Baer Bros. Mercantile Co., p. 3773.
—— v. Bedell pp. 1711.
—— Blythe v.
Denver, etc., R. Co., Brashaw v.
—— v. Cahill, pp. 1442, 1449.
—— Central Trust Co. v.
—— v. Church, p. 3574.
—— v. Derry, pp. 1495, 1496, 1531, 1532, 1579, 2121, 2322, 2866, 3211, 3226, 3227.
—— v. De Witt, p. 538.
—— Estes v.
—— Felt v.
—— v. Frame, pp. 481, 486, 490, 858.
—— v. Gunning, pp. 2569, 2777.
—— v. Harris, p. 1054.
—— v. Hill, pp. 1153, 1155.
—— v. Hodgson, pp. 1740, 1792, 2833.
—— Hopper v.
—— Interstate Commerce Comm., pp. 3609, 3739.
—— v. Johnson, pp. 3113, 3116, 3152, 3155, 3156, 3187.
—— Oppenheimer v.
—— v. Peterson, pp. 839, 840, 905, 907.
—— v. Pickard, p. 2150.
—— v. Pilgrim, pp. 1702, 1834.
—— Price v.
—— v. Roberts, p. 3139.
—— v. Roller, p. 2088.
—— v. Spencer, pp. 2509, 2539, 2546, 2859.
—— v. Whan, pp. 105, 1597, 2102, 2106.
—— Whittle v.
—— v. Woodward, p. 2693.
Denver, etc., Transit Co. v. Dwyer, pp. 2197, 2625.
De Palos, Hooker v.
De Pascale, Mahoning Valley R. Co. v.
Depew v. New York City R. Co., pp. 2187, 2310, 2890.
Depp, Louisville, etc., R. Co. v.
—— v. Louisville, etc., R. Co., p. 2597.
Derby, Philadelphia, etc., R. Co. v.
De Rochemont v. New York, etc., Railroad, p. 3543.
De Rosear, Mexican Cent. R. Co. v.
Derosia v. Winona, etc., R. Co., pp. 896, 899, 904, 907, 910, 914, 915, 918.
De Rozas v. Metropolitan St. R. Co., p. 2876.
Derry, Denver, etc., R. Co. v.
—— v. Flitner, p. 638.
Derwort v. Loomer, pp. 1003, 1004, 1007, 1741, 2856.
De Saussure, Southern R. Co. v.
Deschamps v. Atlantic, etc., R. Co., 82 S. C. 26, 64 S. E. 144—p. 897.
—— v. Atlantic, etc., R. Co., 66 S. E. 414, 84 S. C. 358—p. 1072.
Deshler, Rawls v.
Deshong, St. Louis, etc., R. Co. v.
Deskins v. Chicago, etc., R. Co., pp. 1789, 1801, 1870, 1911.
Deslions v. La Compagnie Generale Transatlantique, pp. 3979, 4012.
Des Moines City R. Co., Blades v.
—— Boice v.
—— Cocke v.
—— Mitchell v.
—— Parker v.
—— Root v.
Des Moines R. Co., Root v.
Des Moines Val. R. Co., Rose v.
Des Moines, etc., R. Co., Hiatt v.
Des Moines, etc., R. Co., Moore v.
De Sola v. Pomares, p. 3885.
De Soucey v. Manhattan R. Co., pp. 1993, 2169.
Despatch Line v. Glenny & Co., pp. 283, 759, 760, 762.
Des Portes v. Southern Railway, p. 1619.
Dessau, Rosenthal v.
Desso, Houston City, etc., R. Co. v.
De Tamble Motors Co., American Thresherman v.
Detchett v. Spuyten Duyvil, etc., R. Co., p. 2300.
Detmold v. Engle, p. 3567.
Detrich v. Metropolitan St. R. Co., pp. 2582, 2583.
—— v. Detroit Citizens' St. R. Co., pp. 34, 63, 64, 77, 78, 79.
—— v. Fort Wayne, etc., R. Co., p. 1611.
Detroit Citizens' St. R. Co., Cross v.
—— Detroit v.
Detroit City R. Co., Ashton v.
—— Heffron v.
—— Kirchner v.
—— Lucas v.
—— Upham v.
—— Wormsdorf v.
Detroit City Railway, McCahill v.
—— Mahoney v.
Detroit Elect. Railway, Keen v.
—— Nieboer v.
Detroit Railway, Selby v.
Detroit St. R. Co., Bowdle v.
—— Gardner v.
Detroit United R. Co., Thurston v.
—— Walters v.
Detroit United Railway, Beattie v.
—— Conroy v.
—— Cummings v.
—— Formiller v.
—— Gerlach v.
—— Goodfellow v.
—— Kalis v.
—— Krouse v.
—— Malinowski v.
—— Miller v.
—— Ottinger v.
—— People v.
—— Plefka v.
—— Reese v.
—— Rouston v.
—— Sewell v.
—— Sloan v.
—— Smith v.
—— West Bloomfield Tp. v.
—— Wilson v.
Detroit, etc., Ferry Co., Meisner v.
Detroit, etc., R. Co. v. Adams, pp. 883, 1000, 1001.
—— Bowdle v.
—— Burnham v.
—— Butler v.
—— Carvey v.
—— Curtis v.
—— v. Curtis, pp. 1881, 1918.
—— Farmers', etc., Bank v.
—— v. Farmers', etc., Bank, pp. 946, 1036, 3327, 3339.
—— Freeman v.
—— French v.
—— Gates v.
—— Gaukler v.
—— Greenfield v.
—— Interstate Commerce Comm. v.
—— v. Interstate Commerce Comm., pp. 3430, 3608, 3634, 3635, 3637, 3713, 3716, 3720, 3721, 3789, 3790.
—— Keating v.
—— Konieczny v.
—— Light v.
—— v. McKenzie, pp. 3258, 3275.

Detroit, etc., R. Co., McLaren v.
—— v. Michigan R. Comm., pp. 41, 46, 47, 50, 83, 121, 124, 125.
—— Minock v.
—— Pingree v.
—— Reason v.
—— Rice v.
—— Smalley v.
—— v. State, p. 3508.
—— Stoody v.
—— Strohn v.
—— Sturges v.
—— Sturgis v.
—— Vandercook v.
—— Walker v.
Detroit, etc., Railway, Coy v.
—— Dolbee v.
—— Eberts v.
—— Johnson v.
—— Kissane v.
—— Richard v.
—— v. State, p. 3454.
—— Vining v.
Deutschmann v. Third Ave. R. Co., p. 2752.
Devainey, Houston, etc., R. Co. v.
Devainy, Houston, etc., R. Co. v.
De Vane v. Atlantic, etc., R. Co., pp. 1501, 1506.
Dever, Baltimore, etc., R. Co. v.
Devereaux v. Buckley, pp. 638, 640, 654, 656.
De Villers v. Schooner John Bell, pp. 727, 3256, 3898.
Devin, Woods v.
Devine v. Chicago City R. Co., 86 N. E. 689, 237 Ill. 278—p. 3022.
—— v. Chicago City R. Co., 141 Ill. App. 583—pp. 2485, 2486, 2487.
—— v. Chicago, etc., R. Co., 162 Ill. App. 243—pp. 1050, 1506, 1556.
—— v. Chicago, etc., R. Co., 100 Iowa 692, 69 N. W. 1042—pp. 1877, 2990.
Devino v. Central, etc., R. Co., pp. 2587, 2588.
Devroe v. Portland R., etc., Co., pp. 2777, 2859.
Dewar v. Mowinckel, pp. 3955, 3966, 3971.
Dewey, Chicago, etc., R. Co. v.
Dewin, Pittsburgh, etc., R. Co. v.
Dewire v. Boston, etc., R. Co., pp. 1521, 2181.
De Witt v. Berry, p. 3871.
—— Denver, etc., R. Co. v.
—— Hallenbeck v.
De Wolff v. Adams Exp. Co., pp. 320, 323, 1063, 1064, 1075.
Dexter, Atlantic, etc., R. Co. v.
—— v. Seaboard, etc., Railway, p. 1450.
—— v. Syracuse, etc., R. Co., pp. 3114, 3119, 3120, 3129.
Dexterville Mfg., etc., Co., In re.
Dey, Burlington, etc., R. Co. v.
—— Chicago, etc., R. Co. v.
Deyo v. New York Cent. R. Co., pp. 1684, 1687, 1711, 1712, 1720, 1726, 2285, 2667.
De Yoe v. Seattle Elect. Co., pp. 2671, 2690, 2893.
Diadem, The.
Diamond Block Coal Co. v. Edmondson, p. 2605.
Diamond Coal Co., Baltimore, etc., R. Co. v.
Diamond Glue Co. v. United States Glue Co., p. 3424.
Diamond Joe Line v. Carter, p. 914.
—— Myres v.
Diamond Roller Mills, International, etc., R. Co. v.
Dibble v. Brown, pp. 727, 732, 748, 3109, 3114, 3115, 3116, 3117, 3119, 3121, 3124, 3126, 3129, 3131, 3132, 3141, 3142, 3143, 3151, 3187, 3189, 3190.
—— Morgan v.
—— v. Morgan, pp. 530, 531, 736, 741.
Di Benedetto v. Milwaukee Elect. R., etc., Co., p. 3087.
Dice v. Willamette Transp., etc., Co., pp. 1528, 1965.
Dick, Reed v.
—— Texas, etc., R. Co. v.
Dickens v. New York Cent. R. Co., p. 2228.
Dickerman v. St. Paul Union Depot Co., pp. 1636, 1851.
Dickerson, Atchison, etc., R. Co. v.
—— Atlanta, etc., R. Co. v.
—— Birmingham R., etc., Co. v.
—— v. Columbia, etc., Railroad, p. 2860.
—— Louisville, etc., R. Co. v.
—— v. Louisville, etc., R. Co., pp. 3756, 3776.
—— Ohio, etc., R. Co. v.
—— St. Louis, etc., R. Co. v.
—— v. Seelye, pp. 310, 338.
Dickert v. Salt Lake City R. Co., pp. 1717, 1735, 1894, 2950, 2974.
Dickinson, Atlanta, etc., R. Co. v.
—— Atlantic, etc., R. Co. v.
—— Chicago, etc., R. Co. v.
—— v. Dodds, p. 3868.
—— v. Haslet, p. 3949.
—— v. Port Huron, etc., R. Co., pp. 1815, 2365.
—— v. West End St. R. Co., pp. 1584, 1760.
Dickman v. Williams, p. 1219.
Dickson v. Chaffee, p. 575.
—— Chicago, etc., R. Co. v.
—— v. Gt. Northern Ry. Co., p. 211.
—— v. Merchant's Elevator Co., p. 365.
—— v. Northern R. Co., pp. 236, 243.
—— Pennsylvania Co. v.
—— Southern Exp. Co. v.
Dieckmann v. Chicago, etc., R. Co. (Iowa), 105 N. W. 526—pp. 2138, 2786.
—— v. Chicago, etc., R. Co., 145 Iowa 250, 121 N. W. 676, 31 L. R. A., N. S., 338, 32 R. R. R. 346, 55 Am. & Eng. R. Cas., N. S., 346—pp. 1509, 1512, 1513, 1768, 1791, 1792, 2126, 2127, 2140, 2326, 2673, 2860.
Die Elbinger v. Armstrong, p. 653.
Diefenbach, Texas, etc., R. Co. v.
Diehl, Woodruff, etc., Coach Co. v.
Diem v. Koblitz, pp. 1206, 1209, 1210, 1211, 1212, 1213, 1214, 1245.
Diepenbrock v. Wove Realty Co., pp. 2740, 2837.
Dierig v. South Covington, etc., St. R. Co., p. 2571.
Dies, Louisville, etc., R. Co. v.
—— Railroad v.
Dieterich v. Fargo, p. 238.
Diether, Grand Rapids, etc., R. Co. v.
Dietrich v. Pennsylvania R. Co., pp. 1529, 1612, 1862, 1974, 1975.
Difendaffer, New York, etc., R. Co. v.
Diffenbaugh, Interstate Commerce Comm. v.
Diffendal, Philadelphia, etc., R. Co. v.
Diggs v. Louisville, etc., R. Co., 156 Fed. 564, 84 C. C. A. 330, 14 L. R. A., N. S., 1029—p. 1923.
Diggs v. Louisville, etc., R. Co., 158 Fed. 97, 85 C. C. A. 565—p. 1923.
Di Giorgio, Importing, etc., Co. v. Pennsylvania R. Co., pp. 216, 217, 249, 258, 261.
Dilburn, Louisville, etc., R. Co. v.
—— v. Louisville, etc., R. Co., 156 Ala. 228, 47 So. 210—pp. 1884, 2249, 2252, 2361, 2744, 2751, 2909.
—— v. Louisville, etc., R. Co. (Ala.), 59 So. 438—pp. 2249, 2258.
Dill, Atchison, etc., R. Co. v.
—— Missouri, etc., R. Co. v.
—— v. South Carolina R. Co., pp. 3139, 3142, 3198.
Dillard Bros. v. Louisville, etc., R. Co., pp. 931, 946, 972, 977, 979, 987, 3161, 3162, 3166, 3330.
Dillender v. St. Louis, etc., R. Co., pp. 249, 262.
Dilleshaw v. Charleston, etc., R. Co., pp. 1770, 1771.
Dillingham v. Anthony, pp. 2042, 2046.
—— Fordyce v.
—— v. Hodges, p. 1938.
—— v. Labatt, p. 1193.
—— v. Pierce, p. 2514.
—— v. Russell, pp. 2016, 2017, 2018.
—— v. Teeling, pp. 1779, 1793, 2505.
—— v. Wood, pp. 1729, 1731, 1755.
Dillman v. Chicago, etc., R. Co., pp. 1858, 1859.
Dillon v. Erie R. Co., pp. 1612, 3500.
—— v. Lindell R. Co., 64 Mo. App. 418—p. 2444.
—— v. Lindell R. Co., 71 Mo. App. 631—pp. 1662, 1663.
Dills, Kentucky Cent. R. Co. v.
Dilworth, Missouri, etc., R. Co. v.
Dimmey v. Wheeling, etc., R. Co., pp. 2261, 2766.
Dimmick v. Milwaukee, etc., R. Co., pp. 910, 913.
Dimmitt, Gulf, etc., R. Co. v.
—— v. Hannibal, etc., R. Co., pp. 2260, 2701, 2844.
—— v. Kansas, etc., R. Co., pp. 3292, 3343.
Dimmit County Pasture Co., International, etc., R. Co. v.
Dimock, The H. F.
Dimond, Hall v.
Dingman, Chicago, etc., R. Co. v.
—— v. Duluth, etc., R. Co., p. 101.
Dininny v. New York, etc., R. Co., pp. 3169, 3170, 3171.
Dinnigan v. Peterson, pp. 1959, 2693.
Dinsmark, Lendsberg v.
Dinsmore, Belger v.
—— Brehme v.
—— Brooks v.
—— Chicago City R. Co. v.
—— Chicago, etc., R. Co. v.
—— Cochran v.
—— Collender v.
—— Ghormley v.
—— Gott v.
—— Hirschberg v.
—— Huntington v.
—— Kirkland v.
—— Landsberg v.
—— Lansberg v.
—— v. Louisville, etc., R. Co., p. 108.
—— Magnin v.
—— Peck v.
—— Rosebrooks v.
—— Smith v.
—— Trammel v.
—— Wetzell v.
Dinwiddie, Gulf, etc., R. Co. v.

Dionne v. Canadian Pac. R., p. 959.
Disbrow & Co., Cincinnati, etc., R. Co. v.
Dishman, Texas, etc., R. Co. v.
Dismukes, Mobile, etc., R. Co. v.
Disney v. Furness, etc., Co., pp. 3869, 3874, 3875.
Dissen, Fort Produce Co. v.
Dista v. Westchester Elect. R. Co., p. 2835.
Distler v. Long Island R. Co., pp. 1879, 1998, 2126, 2153.
Ditchfield v. Philadelphia, etc., Tract. Co., p. 2819.
Ditmars, Atchinson, etc., R. Co. v.
Dittey, Ohio River, etc., R. Co. v.
Dittman, etc., Shoe Co. v. Keokuk, etc., R. Co., pp. 3170, 3172, 3195.
—— v. Mixon, p. 3547.
Dittmar v. Brooklyn Heights R. Co., p. 1796.
Ditto, Indiana, etc., R. Co. v.
Dixey, Murrell v.
—— v. Philadelphia Tract. Co., p. 2691.
Dixie Cigar Co. v. Southern Exp. Co., pp. 977, 1087, 1089.
Dixie Tobacco Co., Norfolk, etc., R. Co. v.
Dixon v. Baldwin, p. 1240.
—— v. Brooklyn, etc., R. Co., pp. 1805, 1812, 2147.
—— v. Central, etc., R. Co., pp. 285, 288, 289, 433, 520, 699, 700, 701, 895, 910.
—— v. Great Falls, etc., R. Co., pp. 1512, 1866, 2875.
—— v. Mobile, etc., R. Co., p. 2387.
—— v. New England Railroad, pp. 1620, 1976, 1977, 2629.
—— v. Richelieu Nav. Co., p. 3149.
—— v. Richmond, etc., R. Co., pp. 3183, 3399.
—— v. Yates, p. 1225.
Dlabola v. Manhattan R. Co., p. 2895.
Doan, Chicago, etc., R. Co. v.
—— v. St. Louis, etc., R. Co., pp. 728, 817, 828, 1281, 1456.
Doane, New York, etc., R. Co. v.
—— v. Russell, p. 1168.
Dobbin v. Michigan Cent. R. Co., p. 543.
Dobbins, Little Rock R., etc., Co. v.
—— v. Little Rock R., etc., Co., pp. 2421, 2476, 3027.
—— v. Syracuse, etc., R. Co., pp. 215, 247, 248.
Dobiecki v. Sharp, pp. 1783, 2133.
Dobney v. Chicago, etc., R. Co., pp. 225, 248.
Dobson v. Central R. Co., p. 987.
—— Knoxville Iron Co. v.
—— v. New Orleans, etc., R. Co., p. 1582.
—— v. Receivers, pp. 1884, 2226, 2357, 3066, 3070.
Dochtermann v. Brooklyn Heights R. Co., p. 2692.
Dodd, Blossom v.
—— St. Louis, etc., R. Co. v.
Dodd, etc., Exp. Co., Florman v.
Dodds, Dickinson v.
—— Illinois Cent. R. Co. v.
Dodds & Co., Little Miami, etc., R. Co. v.
Dodge v. Boston, etc., Steamship Co., pp. 1504, 1505, 1506, 1528, 1537, 1715, 1723, 1749, 1750, 1964, 1965, 2125, 2950, 4004.
—— v. Chicago, etc., R. Co., pp. 3330, 3536.
—— v. Hall, pp. 1518, 1542, 1561.
—— Kennedy v.
—— v. Meyer, p. 486.
—— Tempel v.
Dodge, United States v.
Dodson, Chicago, etc., R. Co. v.
—— St. Louis, etc., R. Co. v.
Doe, Richards v.
Does v. Crosstown St. R. Co., p. 2700.
Doggett v. Illinois Cent. R. Co., p. 2208.
Doherr v. Houston, 123 Fed. 334—pp. 3903, 3905.
—— v. Houston, 128 Fed. 594, 64 C. C. A. 102—pp. 3922, 3926.
—— v. The Etona, p. 4071.
Doherty v. Boston, etc., R. Co., pp. 1709, 1744, 2811, 2895.
—— v. California Nav., etc., Co., pp. 3993, 4001.
—— v. Northern Pac. R. Co., pp. 191, 196, 200, 1595, 2122, 2427, 2847, 3204, 3213.
Dohn, Indianapolis Union R. Co. v.
Dolan, St. Louis, etc., R. Co. v.
—— San Antonio, etc., R. Co. v.
Dolbee v. Detroit, etc., Railway, p. 2653.
Dolphin v. Worcester Consol. St. R. Co., p. 2950.
Domenico v. El Paso Elect. R. Co., pp. 2664, 2778.
Donahoe v. Boston Elev. R. Co., p. 2954.
—— Galveston, etc., R. Co. v.
Donahue, Pittsburg, etc., R. Co. v.
—— Trumbull v.
Donald, Scott v.
Donaldson, Louisville, etc., R. Co. v.
—— v. Perry Co., pp. 3925, 4059.
—— Pomeroy v.
—— v. Severn River Glass Sand Co., 138 Fed. 691—p. 3962.
—— v. Severn River Glass Sand Co., 138 Fed. 694—p. 3962.
—— The J. P.
Donalson v. Gulf, etc., R. Co., p. 1639.
Donath v. Broomhead, pp. 1211, 1229, 1235, 1244.
Donlon Bros. v. Southern Pac. Co., pp. 948, 952, 1064, 1079, 1137, 1138, 1140, 1398.
Donnegan v. Erhardt, p. 1815.
Donnell v. Amoskeag Mfg. Co., pp. 3950, 3965.
—— v. Canadian Pac. R. Co., p. 846.
—— Sproat v.
Donnelly v. Buffalo, etc., Tract. Co., p. 1889.
—— v. Chicago City R. Co., p. 2332.
Donnovan v. Pennsylvania Co., pp. 99, 111, 132.
Donohue v. Public Service R. Co., p. 2883.
Donovan, Batson v.
—— v. Compagnie Generale Transatlantique, p. 723.
—— v. Greenfield, etc., St. R. Co., p. 2855.
—— v. Hartford St. R. Co., pp. 1507, 2669.
—— Highland Ave., etc., R. Co. v.
—— v. Kansas City, etc., R. Co., p. 1808.
—— Pennsylvania Co. v.
—— v. Pennsylvania Co., 57 C. C. A. 362, 120 Fed. 215, 61 L. R. A. 140—pp. 99, 132.
—— v. Pennsylvania Co., 199 U. S. 279, 50 L. Ed. 192, 26 S. Ct. 91—pp. 99, 111.
—— Reading v.
—— Rucker v.
—— v. Standard Oil Co., pp. 330, 992, 993.
—— v. Texas, etc., R. Co., pp. 30, 189, 190, 537.
Doolan, International, etc., R. Co. v.
Dooley v. Burlington, etc., R. Co., p. 2713.
Doolin v. Omnibus Cable Co., p. 2898.
Doolittle v. Southern R. Co., pp. 1697, 1911, 1921, 2113, 2114, 2115, 2174, 2361, 2861, 2892.
Doremeyer, Indiana, etc., R. Co. v.
Dorff v. Brooklyn Heights R. Co., p. 2882.
Dorman, St. Louis, etc., R. Co. v.
Dorn v. Chicago, etc., R. Co., pp. 1821, 1842, 2319, 2671.
Dorough, Kansas, etc., R. Co. v.
Dorr v. Lehigh Valley R. Co., p. 1992.
—— v. New Jersey Steam Nav. Co., pp. 946, 1003, 1004, 1007.
Dorr Cattle Co. v. Chicago, etc., R. Co., pp. 1333, 1340, 1446, 1466, 1477.
Dorrah v. Illinois, etc., R. Co., pp. 1906, 3057.
Dorrance v. Michigan United R. Co., pp. 2742, 2859, 2883.
Dorrance & Co. v. International, etc., R. Co., p. 235.
Dorsett v. Atlantic, etc., R. Co., pp. 2445, 2716, 3090.
Dorsey v. Atchison, etc., R. Co., p. 1760.
—— Central, etc., R. Co. v.
—— v. Central, etc., R. Co., pp. 2774, 3049.
—— Cudahy Packing Co. v.
—— Florida R. Co. v.
—— v. Packwood, p. 3867.
—— v. Smith, p. 3905.
—— v. State, p. 3480.
—— Texas Cent. R. Co. v.
Dorsey Fuel Co., Railway Co. v.
Dorsey Produce Co., Ayres, etc., Co. v.
Doss v. Missouri, etc., R. Co., pp. 2357, 2512, 2514.
Dothan Mule Co., Atlantic, etc., R. Co. v.
—— Central, etc., R. Co. v.
Dotson v. Erie R. Co., pp. 2131, 2133.
—— Houston, etc, R. Co. v.
Dotterer, Williams & Co. v.
Doty v. Strong, pp. 208, 209, 211, 212, 222, 246, 820.
Doublin Whiskey Distillery Co. v. Midland, etc., R. Co., p. 254.
Dougan v. Champlain Transp. Co., pp. 1687, 1838.
Dougherty, B. & O. R. Co. v.
—— v. Chicago, etc., R. Co., p. 2262.
—— v. Cincinnati Tract. Co., p. 1515.
—— Georgia R., etc., Co. v.
—— v. Missouri R. Co., 81 Mo. 325, 51 Am. Rep. 239, 21 Am. & Eng. R. Cas. 497—pp. 1894, 2691, 2692.
—— v. Missouri R. Co., 97 Mo. 647, 8 S. W. 900, 11 S. W. 251, 37 Am. & Eng. R. Cas. 206—pp. 1728, 1894, 2392, 2759.
—— v. Pittsburgh R. Co., p. 2685.
—— v. Yazoo, etc., R. Co., pp. 2223, 2365.
Dougherty Co., Atlas Portland Cement Co. v.
Doughitt v. Louisville, etc., R. Co., p. 2842.
Doughty, Illinois Cent. R. Co. v.
Douglas, Goodwyn, etc., Co. v.
—— Missouri Pac. R. Co. v.
—— v. People's Bank, pp. 356, 360, 364, 372, 387, 388, 389, 547.
—— v. Sioux City St. R. Co., pp. 2013, 2897, 2950.
Douglas Co. v. Minnesota Transfer R. Co., pp. 760, 1074.
Douglas County St. R. Co., Burt v.

Douglas County, etc., R. Co., Burt v.
Douglas Sons, Missouri Pac. R. Co. v.
Douglas & Sons, Missouri Pac. R. Co. v.
Douglas, etc., R. Co. v. Swindle, pp. 1763, 1990, 2576, 2614.
Douglass v. Annistong, p. 29.
—— Galveston, etc., R. Co. v.
—— v. Hannibal, etc., R. Co., pp. 1303, 1320.
—— Louisville, etc., R. Co. v.
—— v. Montgomery, etc., R. Co., pp. 3189, 3190.
Douthitt v. Louisville, etc., R. Co., p. 1747.
Douyette v. Nashua St. Railway, p. 2926.
Dow v. Beidelman, pp. 34, 36, 38, 39, 43, 44, 51, 58, 60, 61, 64, 115, 116, 124, 1136.
—— v. Portland Steam Packet Co., pp. 821, 1456.
—— v. Syracuse, etc., Railway, p. 2103.
Dowd v. Albany Railway, pp. 196, 2854, 3112.
—— v. Chicago, etc., R. Co., pp. 1568, 2509.
—— v. Metropolitan St. R. Co., pp. 2370, 2379.
Dowdell v. United States Dist. Court, p. 4083.
Dowgate Steamship Co. v. Arbuckle p. 3903.
Dowgiallo, St. Louis, etc., R. Co. v.
Downe, Cobban v.
Downer, People v.
—— Pickett v.
—— The.
—— Transportation Co. v.
Downey v. Chesapeake, etc., R. Co., pp. 203, 204, 2114, 2116, 2123, 2208.
—— v. Hendrie, pp. 2188, 2858.
—— v. Philadelphia, etc., R. Co., p. 2013.
—— v. Pittsburg R. Co., p. 2898.
Downing, International, etc., R. Co. v.
—— v. Outerbridge, p. 517.
Downman, Gulf, etc., R. Co. v.
Downs, Flower v.
—— Illinois Cent. R. Co. v.
—— v. New York Cent. R. Co., p. 2225.
—— v. New York, etc., R. Co., pp. 1638, 2430.
Dows v. Cobb, pp. 480, 485, 490.
—— v. Greene, 24 N. Y. 638—p. 364.
—— v. Greene (N. Y.). 32 Barb. 490—pp. 1222, 1223.
—— Huntly v.
—— v. National Exch. Bank, pp. 352, 353, 364, 369, 373, 378, 390, 392, 396, 403, 3274.
—— v. Perrin, pp. 372, 1221.
Doyl, Baltimore, etc., R. Co. v.
Doyle, Baltimore, etc., R. Co. v.
—— v. Baltimore, etc., R. Co., pp. 963, 965.
—— Bank v.
—— v. Boston, etc., R. Co., pp. 2036, 2929, 2968.
—— v. Fitchburg R. Co., 162 Mass. 66, 37 N. E. 770, 25 L. R. A. 157, 44 Am. St. Rep. 335—pp. 1584, 2092, 2093.
—— v. Fitchburg R. Co., 166 Mass. 492, 44 N. E. 611, 33 L. R. A. 844, 55 Am. St. Rep. 417—pp. 1582, 1584, 2092.
—— v. Kiser, pp. 3123, 3125, 3126, 3127, 3129, 3148, 3149, 3151, 3189, 3191, 4008.
—— Little Rock R., etc., Co. v.
—— v. Metropolitan St. R. Co., p. 2682.
—— v. Roth Mfg. Co., p. 352.
Dracachi v. Anglo-Egyption Nav. Co., p. 365.
Drainage Comm'rs, Chicago, etc., R. Co. v.
Drake, Chicago, etc., R. Co. v.
—— v. Great Northern R. Co., pp. 1291, 1333, 1342.
—— v. Nashville, etc., R. Co., pp. 230, 1109, 3267, 3268, 3298, 3314, 3332.
—— Oakford v.
—— v. Pennsylvania R. Co., pp. 199, 202, 1788, 2122, 2246.
Draper, City Transfer Co. v.
—— v. Delaware, etc., Canal Co., pp. 889, 896.
—— v. Evansville, etc., R. Co., pp. 1802, 2610.
Drawdy v. Atlantic, etc., R. Co., p. 2327.
Dresbach v. California Pac. R. Co., p. 537.
Dresser v. Canadian Pac. R. Co., pp. 1609, 3316.
—— Meyer v.
—— v. West Virginia Transp. Co., pp. 512, 581, 877.
Dresslar v. Citizens' St. R. Co., pp. 1702, 2263, 2670.
Dressner v. Manhattan Delivery Co., pp. 478, 479.
Drew, Bell v.
—— Bennett v.
—— v. Central Pac. R. Co., pp. 1529, 1973.
—— Pardee v.
—— v. Sixth Ave. R. Co., 26 N. Y. 49—p. 2065.
—— v. Sixth Ave. R. Co., 42 N. Y. (3 Keyes) 429, 1 Abb. Dec. 556—p. 2065.
—— v. Wabash R. Co., pp. 2621, 2852.
Drew Glass Co. v. Ohio, etc., R. Co., p. 3343.
Drey, etc., Glass Co. v. Missouri Pac. R. Co., p. 991.
Dreyer v. Illinois, p. 23.
Dreyfus v. Mayer, pp. 1219, 1221.
—— St. Louis, etc., R. Co. v.
Dreyfus-Weil Co., Nashville, etc., R. Co. v.
Driess v. Friederick, p. 1762.
Drinkwater, Herman v.
Driscoll v. Nichols, p. 456.
Drisdale, McGhee v.
Drishell, Texas, etc., R. Co. v.
Driven, Cleveland, etc., R. Co. v.
D. R. Martin, Barney v.
Droymund v. Metropolitan St. R. Co., p. 1569.
Drolshagen v. Union Depot R. Co., p. 2534.
Drought & Co., International, etc., R. Co. v.
Drummond, Alabama, etc., R. Co. v.
—— Quanah, etc., R. Co. v.
—— v. Southern Pac. Co., pp. 1573, 1616, 1632, 1634.
Drummy v. Minneapolis, etc., R. Co., pp. 1777, 1780, 2325, 2873.
Dryden v. St. Louis Transit Co., p. 1666.
Dry Dock, etc., R. Co., Allen v.
—— Bernstein v.
—— Casper & Co. v.
—— Hines v.
—— Kleffmann v.
—— Lewyt v.
—— Littmann v.
—— O'Neill v.
—— Rosen v.
—— Saffer v.
—— Schmitt v.
—— Seitz v.
—— Taylor v.
—— Tregear v.
—— Walker v.
Dryden, Yoakum v.
Drysdale, Western, etc., Railroad v.
Duane, Pearson v.
Dublin, etc., R. Co., McCook v.
Dubnow v. New York City R. Co., p. 1980.
Du Bose v. Atlantic, etc., R. Co., pp. 1524, 1788.
—— Louisville, etc., R. Co. v.
—— v. Louisville, etc., R. Co., pp. 1552, 1610.
Dubuque, Keokevoet v.
Dubuque St. R. Co., Bonce v.
Dubuque, etc., Co., Bonce v.
Dubuque, etc., R. Co., Amsden v.
—— Bonce v.
—— Francis v.
—— Nichols v.
Duchemin v. Boston Elevated R. Co., p. 1516.
Duchess, etc., R. Co., People v.
Duck, St. Louis, etc., R. Co. v.
—— v. St. Louis, etc., R. Co., pp. 1937, 2707.
Duckstein, Chicago Union Tract. Co. v.
Duckworth, Charleston, etc., R. Co. v.
Dudley v. Camden, etc., Ferry Co., pp. 725, 726.
—— v. Chicago, etc., R. Co., pp. 268, 501, 551, 552, 553, 569, 796, 909.
—— Eastern v.
—— Easton v.
—— v. Front St. Cable R. Co., p. 1900.
Dudzik, West Chicago St. R. Co. v.
Duell v. Chicago, etc., R. Co., pp. 2646, 2822, 3033.
Duff v. Allegheny Valley R. Co., p. 1588.
—— Holtzclaw v.
Duffy, Gleason v.
—— v. Thompson, pp. 3114, 3125, 3129.
Dufolt v. Gorman, p. 1157.
Dufour, Simpson v.
Dufrain, Cincinnati, etc., R. Co. v.
Dufresne, South Chicago City R. Co. v.
—— South Chicago, etc., R. Co. v.
Dugan v. Blue Hill St. R. Co., pp. 1585, 2100, 2866.
—— v. State, p. 3480.
Duggan v. Baltimore, etc., R. Co., pp. 2060, 2061.
—— v. New Jersey, etc., Ferry Co., pp. 1682, 1742, 4002.
Duhme v. Hamburg-American Packet Co., pp. 3992, 3999.
Duke, Baltimore, etc., R. Co. v.
Dulaney v. Philadelphia, etc., R. Co., pp. 311, 313.
—— v. United R., etc., Co., p. 99.
Dulany, Sawyer v.
Du Laurans v. First Division, etc., R. Co., pp. 1596, 1599, 1601, 1602, 2467, 2468, 2469, 2470, 2492, 3079, 3080, 3083, 3098.
Duling v. Philadelphia, etc., R. Co., p. 1667.
Duluth St. R. Co., Cody v.
—— Fosnes v.
—— Jarmy v.
—— Swanson v.
Duluth-Superior Mill. Co. v. Northern Pac. R. Co., pp. 3435, 3436, 3489.
Duluth, etc., Railway, Densmore Comm. Co. v.
Duluth, etc., R. Co., Boehm v.
—— Campbell v.
—— Dingman v.
—— Reed v.
Dumas, Houston, etc., R. Co. v.
—— v. Missouri, etc., R. Co., p. 1692.
—— Oregon R., etc., Co. v.
—— Oregon, etc., Co. v.
Dumphy v. Erie R. Co., p. 1502.
Dumser, Chicago, etc., R. Co. v.

Dun v. Seaboard, etc., R. Co., pp. 2200, 2202.
Dunbar v. Boston, etc., R. Corp., p. 554.
—— v. Buck, pp. 1145, 3876.
—— v. Charleston, etc., R. Co., pp. 987, 990, 3354.
—— Evans v.
—— Missouri, etc., R. Co. v.
—— Ohio, etc., R. Co. v.
—— v. Port Royal, etc. R. Co., pp. 457, 458, 461, 3327.
Dunbar, etc., Co. v. Port Royal, etc., R. Co., p. 805.
Duncan v. Atch., Topeka & Santa Fe, p. 3666.
—— Evansville, etc., R. Co. v.
—— v. Great Northern R. Co., pp. 728, 730, 733, 749, 753, 765, 842, 867.
—— International, etc., R. Co. v.
—— Louisville, etc., R. Co. v.
—— v. Maine Cent. R. Co., pp. 2094, 2096.
—— Morse v.
—— v. Railroad Co., p. 3681.
—— Southern Pac. R. Co. v.
—— Thompson v.
—— v. Wyatt Park R. Co., p. 2249.
Dunham v. Boston, etc., R. Co., 70 Me. 164, 35 Am. Rep. 314—p. 3282.
—— v. Boston, etc., R. Co. (N. Y.), 46 Hun 245, 11 N. Y. St. Rep. 472—pp. 722, 901, 906.
—— Greve & Co. v.
—— v. Public Service Corp., p. 2619.
—— St. Louis, etc., R. Co. v.
Dunie v. Atlantic, etc., R. Co., p. 587.
Dunipace, Brabley v.
Dunkirk, etc., R. Co. v. Campbell, p. 3573.
Dunlap v. Chicago, etc., R. Co., p. 2792.
—— v. International Steamboat Co., pp. 3119, 3120, 3124, 3125, 3126.
—— Louisville, etc., R. Co. v.
—— v. Northern Pac. R. Co., p. 1635.
—— v. Steamboat Reliance, p. 1684.
Dunlop v. Edinburgh, etc., R. Co., p. 1670.
Dunman, Gulf, etc., R. Co. v.
Dunn v. Branner, pp. 428, 3155.
—— Durchman v.
—— Durchmann v.
—— v. Grand Trunk R. Co., pp. 1545, 1550, 1752, 1755.
—— Gulf, etc., R. Co. v.
—— v. Hannibal, etc., R. Co., pp. 855, 1087, 1091, 1099, 1392, 1417, 3261, 3302.
—— v. New Haven Steamboat Co., p. 3196.
—— v. Pennsylvania R. Co., p. 2354.
—— Riddick v.
—— St. Louis, etc., R. Co. v.
—— Self v.
—— Yoakum v.
Dunne v. New York, etc., R. Co., pp. 2510, 2515.
—— v. St. Louis, etc., R. Co., pp. 679, 3754.
Dunnigan, Illinois Cent. R. Co. v.
Dunning v. Lake Erie, etc., R. Co., p. 2269.
Dunnington & Co. v. Louisville, etc., R. Co., pp. 318, 885.
Dunphy v. Erie R. Co., pp. 1976, 2439.
Dunseth v. Wade, p. 3297.
Dunson v. New York Cent. R. Co., pp. 742, 743, 750, 885, 886, 3262, 3286.
Duntley v. Boston, etc., R. Co., pp. 650, 1074, 1137.
Dunwody v. The Campbell, p. 3972.
Duplan Silk Co. v. American, etc., Marine Ins. Co., p. 3854.
Dupont, Lehigh Valley R. Co. v.
Dupont, etc., Co. v. Vance, pp. 3894, 3899, 3908, 3909, 3919, 3945, 3946, 4021, 4022.
Dupre, Mann Boudoir Car Co. v.
Dupree, Texas Exp. Co. v.
Dupree Comm. Co., Texas Steamship Co. v.
Dupuis v. Saginaw Valley Tract. Co., p. 2860.
Durand, Chicago, etc., R. Co. v.
Durchman v. Dunn, 101 Fed. 606—pp. 3959, 3972.
—— v. Dunn, 106 Fed. 950, 46 C. C. A. 62—p. 3957.
Durden v. Southern R. Co., p. 3042.
Durell, Bloomingdale v.
Durfee v. Johnstown, etc., R. Co., p. 2088.
—— v. Union Pac. R. Co., p. 3100.
Durgin v. American Exp. Co., pp. 320, 323, 945, 986.
Durgy Cement, etc., Co. v. O'Brien, pp. 1218, 1219, 1229, 1232.
Durham v. Louisville, etc., R. Co., pp. 2600, 2615.
Durham Tract. Co., Briggs v.
—— Clark v.
—— Morarity v.
—— Thorp v.
Durham, etc., R. Co., McNeill v.
—— Poythress v.
Durkin, Toledo, etc., R. Co. v.
Durrence, Georgia, etc., R. Co. v.
Duryee v. New York, p. 855.
Dusar v. Murgatroyd, pp. 850, 3934.
Dusenberry, Highland Ave., etc., R. Co. v.
—— Little v.
Dusenbury v. North Hudson County R. Co., pp. 1817, 2901.
Dutchess, Tompkins v.
Dutton, Bennett v.
—— Clancy v.
—— v. Strong, pp. 3248, 3529.
Duty v. Chesapeake, etc., R. Co., pp. 1882, 1891, 2598, 2859.
Duval v. Pullman's Palace Car Co., p. 3206.
Duvenick v. Missouri Pac. R. Co., pp. 945, 973, 974, 1287, 1288.
Duvernet v. Morgan's Louisiana, etc., Co., p. 2272.
Dwelle, Atchison, etc., R. Co. v.
Dwight v. Brewster, pp. 283, 762, 769, 770.
Dwight Mfg. Co., Central R. Co. v.
—— Rice v.
Dwinelle v. New York, etc., R. Co., pp. 2038, 2045, 2047, 2075, 2567.
D'Wolf v. Harris, p. 478.
Dwyer v. Auburn, etc., R. Co., pp. 2258, 2823.
—— Denver, etc., Trans. Co. v.
—— Gulf, etc., R. Co. v.
—— v. Gulf, etc., R. Co., pp. 156, 328, 331, 518, 519.
—— Houston, etc., Nav. Co. v.
—— v. New York, etc., R. Co., p. 2272.
Dye v. Chicago, etc., R. Co., p. 1923.
—— Texas, etc., R. Co. v.
—— v. Virginia Mid. R. Co., p. 1969.
Dyer v. Grand Trunk R. Co., pp. 522, 581, 683, 1154, 1167, 1171, 1172.
—— v. Great Northern R. Co., p. 542.
—— Gulf, etc., R. Co. v.
—— Louisville, etc., R. Co. v.
—— v. National Steamship Co., p. 3933.
Dyke v. Erie, R. Co., pp. 1489, 1490, 1491.
Dykes, San Antonio, etc., R. Co. v.
Dykstra v. Grand Rapids, etc., R. Co., pp. 2405, 2637, 2638.
Dymock v. Midland Nat. Bank, pp. 1221, 1224.
—— v. Missouri, etc., R. Co., pp. 360, 361, 1221, 1224.
Dysart v. Missouri, etc., R. Co., pp. 1544, 1550, 1553.
Dyson, Southern R. Co. v.

E

Eades, Crawshay v.
Eads v. Metropolitan R. Co., p. 2418.
Eagen v. Jersey City, etc., St. R. Co., p. 2277.
Eager v. Jonesboro, etc., Exp. Co., p. 578.
—— Stanton v.
Eagle, The.
—— v. White, pp. 211, 523, 728, 733, 749, 898.
Eagle Ins. Co., Wolcott v.
Eagle Packet Co. v. Defries, p. 2683.
—— St. Louis v.
Eagle White Lead Co. v. Interstate Commerce Comm., pp. 3678, 3798.
Eaglesfield, Ex parte.
Eakin, Louisville, etc., R. Co. v.
Eames v. Texas, etc., R. Co., pp. 1766, 1814.
Earl, Jones v.
Earle, Ballou v.
—— v. Cadmus, pp. 1082, 3166.
—— Merritt v.
—— Packard v.
—— Philips v.
—— Phillips v.
Early-Clement Grain Co., Missouri, etc., R. Co. v.
Earnest v. Delaware, etc., R. Co., p. 480.
—— v. Express Co., p. 760.
—— International, etc., R. Co. v.
Earn-Line Steamship Co., Northern Steamship Co. v.
Earnwood, The.
Earwood, Western, etc., R. Co. v.
Easler v. Southern R. Co., p. 2381.
Easley v. Alabama, etc., R. Co., p. 2842.
East v. Brooklyn Heights R. Co., p. 183.
East Alabama R. Co., Young v.
East Boston Ferry Co., Le Barron v.
Eastburn, Toledo, etc., R. Co. v.
East Carolina R. Co., Norman v.
East Coast Transp. Co., Indian River Steamboat Co. v.
East Line, etc., R. Co. v. Hall, pp. 268, 274, 286, 288, 292, 293, 294, 331, 425, 478, 479, 487, 488, 794, 795, 835.
—— Hull v.
—— v. Lee, pp. 2087, 2497, 3105.
East Line, etc., R. Co. v. Kushing, pp. 1762, 1866, 1885, 1887, 1928, 2001, 2862.
—— v. Smith, pp. 1825, 1834, 2211.
East Louisiana R. Co., Ford v.
Eastman, Gale v.
—— v. Maine Cent. Railroad, p. 1633.
East Omaha St. R. Co. v. Godola, pp. 1487, 1715, 1750, 1986, 2174.
East River Ferry Co., Fash v.
East Saginaw City R. Co. v. Bohn, pp. 1956, 1962, 2163, 2167, 2191, 2524.
East St. Louis, Wiggins Ferry Co. v.
East St. Louis Connecting R. Co. v. Wabash, etc., R. Co., p. 2383.
East St. Louis, etc., R. Co., Asher v.
—— v. Belleville, p. 46.

East St. Louis, etc., R. Co. v. Wabash, etc., R. Co., p. 806.
—— v. Zink, pp. 2323, 2720, 2733, 2946.
East Side Packing Co. v. Vandalia R. Co., pp. 40, 70.
East Tennessee R. Co., Miller v.
East Tennessee, etc., Railroad, Moses v.
East Tennessee, etc., R. Co., Barnett v.
—— v. Brumley, pp. 321, 323, 987, 3326, 3330, 3340, 3349, 3350.
—— Butler v.
—— Central Trust Co. v.
—— v. Conner, pp. 1919, 2126, 2256.
—— Cowan, etc., Co. v.
—— Coward v.
—— Crine v.
—— v. Fleetwood, pp. 2040, 2045, 2055, 2056, 2919, 2959, 3071, 3075.
—— Gibson v.
—— v. Green, pp. 1748, 1989, 2160, 2171, 2840.
—— v. Hale, pp. 7, 677, 862, 1321, 1327.
—— Heck v.
—— v. Herrman, pp. 1283, 1353, 1357, 1481.
—— v. Holmes p. 2253.
—— v. Hughes, 92 Ga. 388, 17 S. E. 949—pp. 2120, 2126, 2266.
—— v. Hughes, 22 S. E. 397, 97 Ga. 330—p. 2777.
—— v. Hunt, pp. 709, 714, 1143.
—— v. Hyde, pp. 2784, 3075.
—— Interstate Commerce Comm. v.
—— v. Interstate Commerce Commission, 39 C. C. A. 413, 99 Fed. 52—pp. 3669, 3708.
—— v. Interstate Commerce Commission, 181 U. S. 1, 45 L. Ed. 719, 21 S. Ct. 516—pp. 3687, 3699, 3713, 3714, 3716, 3721, 3722, 3767, 3798, 3807, 3832.
—— Johnson v.
—— v. Johnson, pp. 653, 658, 665, 693, 854, 3257, 3281, 3282, 3291.
—— v. Johnston, pp. 726, 848, 1038, 1040, 1273, 1274, 1275, 1364, 1391.
—— Jones v.
—— v. Kelley, 91 Tenn. 699, 20 S. W. 312, 17 L. R. A. 691, 30 Am. St. Rep. 902, 55 Am. & Eng. R. Cas. 621—pp. 515, 849, 890, 894.
—— v. Kelly, 91 Tenn. 708, 20 S. W. 314—pp. 515, 890, 894, 913.
—— v. King, pp. 1638, 2432.
—— Lane v.
—— v. Lee, pp. 3009, 3068.
—— Little Rock, etc., R. Co. v.
—— v. Lockhart, pp. 2771, 3047, 3048, 3051.
—— Lowe v.
—— v. Massengill, pp. 2248, 2260, 2616.
—— Miller v.
—— v. Miller, pp. 1727, 1748, 2840, 2955.
—— v. Mitchell, p. 2667.
—— v. Montgomery, pp. 423, 3296, 3339.
—— v. Nelson, pp. 211, 246, 479, 488, 489, 490, 493, 533, 611, 621, 622, 3262, 3275, 3280.
—— Nicoll v.
—— v. Rogers, pp. 3257, 3280, 3291.
—— Trotlinger v.
—— United States v.
—— v. Watson, p. 1794.
—— v. Whittle, pp. 4, 5, 752, 758, 774.
—— Witt v.
—— v. Wright, pp. 1046, 3305.
East & West Indian Dock Co., Glyn Miller, etc., Co. v.
East, etc., R. Co. v. Waldrop, p. 2373.
Easter v. New York, etc., Exp. Co., p. 485.
Eastern Coal Co., Baltimore, etc., Barge Co. v.
Eastern Cos. R. Co., Piggott v.
Eastern Counties R. Co., Beadell v.
—— Motteran v.
Eastern Exp. Co., Grindle v.
—— Morley v.
Eastern Kentucky R. Co. v. Holbrook, p. 252.
Eastern R. Co., Alderman v.
—— Brown v.
—— Carpenter v.
—— Clark v.
—— Commonwealth v.
—— v. Ellis, p. 3509.
—— Hartan v.
—— Harvey v.
—— Hinton v.
—— Krulevitz v.
—— Merrill v.
—— Pressed Steel Car Co. v.
—— Sears v.
—— Snow v.
—— Stevenot v.
—— Wentworth v.
Eastern Steamboat Co., Davies v.
Eastern Steamship Co., Hix v.
Eastern Wisconsin, R., etc., Co., Hirte v.
Eastern, etc., R. Co., Jones v.
—— Ransome v.
Eastin, Red River, etc., R. Co. v.
—— Texas, etc., R. Co. v.
Easton v. Dudley, pp. 419, 441, 442, 443, 1296, 1443, 1469.
—— Ex parte.
—— Houston, etc., R. Co. v.
—— v. Houston, etc., R. Co., p. 1179.
—— Insurance Co. v.
—— v. Waters, pp. 1598, 2467, 2470.
Easton, etc., Transp. Co., Insurance Co. v.
Eaton, Abbe v.
—— v. Boston, etc., Railroad, p. 2298.
—— v. Boston, etc., R. Co., pp. 1741, 1999, 2002.
—— v. Cargo of Lumber, pp. 3950, 3971.
—— Chicago, etc., R. Co. v.
—— Cincinnati, etc., R. Co. v.
—— v. Cook, pp. 1211, 1215, 1226, 1242, 1243.
—— v. Delaware, etc., R. Co., pp. 1549, 1553, 1569.
—— v. McIntire, p. 1627.
—— v. St. Louis, etc., R. Co., pp. 894, 899.
—— v. Wilmington City R. Co., pp. 1682, 1687, 1689, 1696, 1741, 1817, 1818, 1825, 1840, 1987, 2291, 2696.
Ebaugh, Ft. Clark St. Railroad v.
Ebert v. Gulf, etc., R. Co., pp. 1958, 1990, 1992, 2115, 2891.
Eberts v. Detroit, etc., Railway, pp. 1585, 2100, 2835.
Ebling v. Second Ave. R. Co., p. 2306.
Ebsery v. Chicago City R. Co., pp. 3032, 3034, 3035, 3036.
Eby, New York Cent. etc., R. Co. v.
—— Schumacher v.
Echols, Louisville, etc., R. Co. v.
—— v. Louisville, etc., R. Co., pp. 595, 596, 599, 848.
Eckel v. Murphey, p. 654.
Eckels, Chudnovski v.
Eckerd v. Chicago, etc., R. Co., pp. 1782, 1871, 2244.
Eckert v. Pennsylvania R. Co., pp. 1087, 1111, 1408, 1433, 3263, 3290.
—— Reading City Pass. Co. v.
Eckford, International, etc., R. Co. v.
Eckles v. Missouri Pac. R. Co., 72 Mo. App. 296—p. 3335.
—— v. Missouri Pac. R. Co., 87 S. W. 99, 112 Mo. App. 240—pp. 421, 3331, 3354.
—— v. Norfolk, etc., R. Co., pp. 2569, 2647.
Eckman, Purington-Kimball Brick Co. v.
Eclipse Towboat Co., New Orleans v.
—— v. Pontchartrain R. Co., p. 113.
Ecton v. Chicago, etc., R. Co., pp. 1303, 1305, 1308, 1312.
Eddins, Gulf, etc., R. Co. v.
Eddy, Brill v.
—— v. Elliott, p. 2427.
—— v. Harris, pp. 1609, 1666, 3060.
—— v. Letcher, p. 2001.
—— McCann v.
—— Nichols v.
—— v. Rider, pp. 30, 187, 191, 195, 1494, 1596, 1599, 2436.
—— v. Rowell, p. 2435.
—— v. Searey, pp. 1666, 3060.
—— v. Still, pp. 1798, 2873.
—— v. Syracuse Rapid Transit R. Co., pp. 1650, 2475.
—— The.
—— v. Wallace, pp. 1754, 1872, 1878, 2066, 2125, 2126, 2256, 2440.
Edelman v. Interurban St. R. Co., p. 2655.
Edelstein, Philadelphia, etc., R. Co. v.
Edgar Lumber Co. v. Cornie Stave Co., pp. 220, 1183.
Edgerly v. Union St. R. Co., pp. 2419, 2491.
Edgerton v. Chicago, etc., R. Co., 240 Ill. 311, 88 N. E. 808—pp. 484, 486, 916.
—— v. Chicago, etc., R. Co., 146 Ill. App. 199—p. 492.
—— v. New York, etc., R. Co., 39 N. Y. 227—p. 1755.
—— v. New York, etc., R. Co. (N. Y.), 35 Barb. 193—p. 2209.
Edinburgh, etc., R. Co., Dunlop v.
Edinburgh, etc., Redwood Co., Bucksport, etc., R. Co. v.
Edins, Texas, etc., R. Co. v.
Edison v. Pennsylvania Co., pp. 741, 770.
Edison Elect. Illuminating Co., Moore v.
Edling, Missouri, etc., R. Co. v.
Edloff, Gulf, etc., R. Co. v.
Edlund v. St. Paul, etc., R. Co., pp. 1813, 1817, 2900.
Edminson v. Baxter, p. 849.
Edmond, Texas, etc., R. Co. v.
Edmonds, Montgomery, etc., R. Co. v.
Edmondson, Diamond Block Coal Co. v.
—— Louisville, etc., R. Co. v.
Edmunds v. Merchants' Despatch Transp. Co., pp. 554, 555.
—— v. Pullman Palace Car Co., p. 3208.
—— Southern R. Co. v.
Edney, Oppenheimer v.
Edsall v. Camden, etc., Transp. Co., pp. 1012, 3383.
Edson v. Southern Pac. Co., p. 120.
—— v. Western, p. 573.
Edward Frohlich Glass Co. v. Pennsylvania Co., p. 784.
Edward Hines Lumber Co. v. Chamberlain, p. 3875.
Edward T. Stotesbury, The.
Edwards v. American Exp. Co., pp. 508, 1283.
—— v. Brewer, p. 1211.
—— v. Cahawba, p. 1030.

Edwards v. Cheraw, etc., R. Co., p. 523.
—— v. Lake Shore, etc., R. Co., pp. 1627, 1628, 2443.
—— v. Lee, p. 1301.
—— v. Manufacturers' Bldg. Co., p. 1488.
—— Missouri Pac. R. Co. v.
—— v. New Jersey, etc., Ferry Co., p. 1959.
—— St. Louis, etc., R. Co. v.
—— v. Sherratt, p. 284.
—— v. Smith, p. 340.
—— v. Southern R. Co., pp. 2649, 3079, 3084.
—— v. The Robert F. Stockton, p. 3937.
—— v. White Line Transit Co., pp. 574, 575.
Edwards & Co., Texas Mid. Railroad v.
—— v. Texas Mid. R. Co. (Tex. Civ. App.), 81 S. W. 800—p. 283.
—— v. Texas Mid. R. Co. (Tex. Civ. App.), 84 S. W. 1097—p. 779.
Edwin I. Morrison, The.
Edye, People v.
—— v. Robertson, 18 Fed. 135, 21 Blatchf. 460—p. 3566.
—— v. Robertson, 112 U. S. 580, 28 L. Ed. 798, 5 S. Ct. 247—p. 3566.
Eel River, etc., R. Co., Carr v.
Eells v. St. Louis, etc., R. Co., p. 958.
Efland v. Southern R. Co., p. 164.
Efron, Galveston, etc., R. Co. v.
—— v. Wagner Palace Car Co., pp. 3216, 3219, 3223.
Egan v. Old Colony St. R. Co., pp. 2347, 2694, 1750.
Ege, First Nat. Bank v.
Eggermont v. Cunard Steamship Co., p. 4034.
Egner v. United R., etc., Co., p. 2815.
E. H. Pray, The.
Ehrhard v. Metropolitan St. R. Co., p. 2804.
Ehrhardt, Prairie Oil, etc., Co. v.
Ehrlich, Ocean Steamship Co. v.
Ehrman, Pullman's Palace Car Co. v.
Eichberg v. Central, etc., R. Co., p. 1082.
—— Merchants', etc., Transp. Co. v.
Eichengreen v. Louisville, etc., R. Co., pp. 2060, 2061, 2071.
Eichofer, Alabama, etc., R. Co. v.
Eichhorn v. Missouri, etc., R. Co., pp. 1767, 1773, 2145.
Eickhof v. Chicago, etc., R. Co., p. 2684.
Eidem v. Chicago, etc., R. Co., p. 1586.
Eidson v. Southern R. Co., p. 2488.
Eight Hundred and Sixty-Nine Cedar Logs, Peterson v.
Eight Ave. R. Co., Clark v.
—— Demann v.
—— Loudoun v.
—— Maverick v.
—— Sanford v.
Eikleberry, Walker v.
Eikrem v. New England Briquette Coal Co., p. 3973.
Eisen, Seigel v.
Eiswald v. Southern Exp. Co., p. 640.
Ela v. American, etc., Exp. Co., p. 547.
Elam v. St. Louis, etc., R. Co., p. 744.
Elben, Illinois Cent. R. Co. v.
Elberta Peach Co. v. Georgia, etc., R. Co., p. 445.
Elder, Atchison, etc., R. Co. v.
—— v. International R. Co., pp. 1603, 2420, 2424.
Elder, Planters' Fertilizer Mfg. Co. v.
—— Savannah, etc., R. Co. v.
—— Summeril v.
Elder Dempster Shipping, Pouppirt v.
—— v. Pouppirt, pp. 3995, 3996.
Elder, etc., Co. v. St. Louis, etc., R. Co., p. 402.
Eldredge, Barron v.
—— v. Boston Elev. R. Co., pp. 2196, 2347, 2860.
Eldridge v. Long Island R. Co., p. 2620.
—— v. Minneapolis, etc., R. Co., p. 2898.
—— North Chicago St. R. Co. v.
Electric R. Co. v. Carson, p. 2676.
Electric Storage Battery Co., Attorney General v.
Elgin City R. Co. v. Wilson, p. 1986.
Elgin Condensed Milk Co., St. Louis, etc., R. Co. v.
Elgin, etc., R. Co. v. Bates Mach. Co., 200 Ill. 636, 66 N. E. 326, 93 Am. St. Rep. 218—p. 3296.
—— v. Bates Mach. Co., 98 Ill. App. 311—pp. 244, 981, 1033, 1045, 3257, 3291, 3330, 3331.
Elgin, etc., Tract. Co. v. Hench, p. 1817.
—— Keeshan v.
—— Petersen v.
—— v. Wilson, 75 N. E. 436, 217 Ill. 47—pp. 1711, 2696, 2757, 2897.
—— v. Wilson, 120 Ill. App. 371—pp. 1985, 2765.
Elias, Homesly v.
Eliason v. Henshaw, p. 3867.
Eliza, The.
Eliza Lines, The.
Elkhart, Platter v.
Elkins v. Boston, etc., Railroad, p. 486.
—— v. Boston, etc., R. Co., pp. 1, 5, 209, 769, 3155, 3156.
—— v. Empire Transp. Co., p. 1074.
—— Ward's Cent., etc., Co. v.
Elkins & Co. v. New York, etc., Steamship Co., p. 861.
Ellard, Birmingham R., etc., Co. v.
Eller v. Dayton, etc., Tract, Co., p. 2189.
Ellerd, Texas, etc., R. Co. v.
Ellershaw v. Magniac, p. 352.
Ellet v. St. Louis, etc., R. Co., pp. 745, 746, 1680, 1809, 1981.
Ellinger v. Philadelphia, etc., R. Co., p. 2033.
Eliot, Eddy v.
Elliott v. Atlantic, etc., R. Co., p. 3520.
—— v. Brooklyn Heights R. Co., p. 2700.
—— Georgia, etc., R. Co. v.
—— Gulf, etc., R. Co. v.
—— v. James Robb, p. 1461.
Elliott v. Metropolitan St. R. Co., p. 1991.
—— Missouri, etc., R. Co. v.
—— Nashville, etc., R. Co. v.
—— v. Newport St. R. Co., pp. 1745, 1819, 1820, 1957, 2125, 2197.
—— v. New York, etc., R. Co., p. 2442.
—— Peters v.
—— v. Rossell, pp. 3898, 3930.
—— v. Seattle, etc., R. Co., pp. 2349, 2581.
—— v. Southern Pac. Co., 145 Cal. 441, 79 Pac. 420, 68 L. R. A. 393—pp. 1623, 1624, 1626, 1634, 2492, 2784.
—— v. Southern R. Co., 155 N. C. 235, 71 S. E. 339—p. 152.
—— Texas, etc., R. Co. v.
—— Toledo, etc., R. Co. v.
Elliott v. Western, etc., R. Co., p. 3100.
—— v. Wilmington City R. Co., pp. 1682, 1687, 1714, 1866, 1874, 1888, 1919, 2119, 2225, 2288, 2290, 2686.
Elliott & Son, Alabama, etc., R. Co. v.
Ellis, Atlantic, etc., R. Co. v.
—— v. Atlantic, etc., R. Co., p. 223.
—— Eastern R. Co. v.
—— Gulf, etc., R. Co. v.
—— v. Houston, etc., R. Co., pp. 200, 203, 1607, 2783.
—— v. Hunt, p. 1228.
—— Louisville, etc., R. Co. v.
—— v. New York City R. Co., p. 2005.
—— Seaboard, etc., Railway v.
—— v. Willard, pp. 338, 3384.
Ellison v. Adams Exp. Co., p. 945.
—— Grand Rapids, etc., R. Co. v.
—— Gulf, etc., R. Co. v.
—— Krudler v.
—— Texas Mid. Railroad v.
Ellsworth v. Chicago, etc., R. Co., pp. 1560, 1609, 1610, 2449, 2458, 2463, 2475.
—— v. Pennsylvania Co., pp. 1615, 1620, 1621, 1622, 1636.
—— v. Tartt, pp. 3181, 3323.
—— v. Wild Hunter, p. 527.
Ellwood v. Connecticut R., etc., Co., p. 2906.
Elmira Shepherd, The.
Elmira, etc., R. Co., Gregory v.
—— Parker v.
—— Webster v.
Elmore v. Brooks, p. 513.
—— v. Naugatuck R. Co., pp. 1161, 3254, 3258.
—— v. Sands, pp. 1612, 1624, 2447.
Elmslie, Hagar v.
El Paso Elect. R. Co. v. Alderete, pp. 2418, 2662.
—— v. Boer, pp. 1524, 1532, 1996.
—— v. Bolgiano, p. 2912.
—— Domenico v.
—— v. Kitt, p. 2290.
—— v. Ruckman, p. 1891.
El Paso, etc., R. Co. v. Gutierrez, pp. 3463, 3465.
—— v. Harry, pp. 1524, 1679, 1731, 2643, 2649.
—— v. Kitt, p. 2199.
—— v. Landon, p. 2661.
—— Sawyer v.
Elphicke v. Iroquois Furnace Co., p. 3972.
—— The C. W.
Elrod, St. Louis, etc., R. Co. v.
Elvira Harbeck, Brown v.
—— The.
Elvis, Houston Elect. St. R. Co. v.
Elwood v. Chicago City R. Co., p. 2670.
—— v. Connecticut R., etc., Co., pp. 2259, 2820.
Elwood Grain Co. v. St. Joseph, etc., R. Co., pp. 3733, 3734.
Ely, Hathorn v.
—— v. New Haven Steamboat Co., p. 892.
—— v. St. Louis, etc., R. Co., pp. 1809, 2925, 2964.
—— v. Southwest Missouri R. Co., pp. 1903, 1991, 1993, 1996, 1997, 1998.
Elzy v. Adams Exp. Co., pp. 641, 644, 670, 672.
Embry, Kansas City Southern R. Co. v.
—— Kansas, etc., R. Co. v.
Emerson v. Boston, etc., Railroad, pp. 88, 1642, 1643.
—— v. Butte Elect. R. Co., pp. 2568, 2677, 2806.

Emerson v. McNeil, p. 112.
—— Pacific Exp. Co. v.
—— v. St. Louis, etc., R. Co., p. 170.
Emerson Co. v. Reunis, p. 3902.
Emerson, etc., Co., In re.
Emert v. Missouri, pp. 3539, 3550, 3552, 3572.
Emery v. Boston, etc., Railroad, pp. 1884, 2908.
—— v. Chicago, etc., R. Co., p. 2539.
—— v. Hersey, pp. 727, 732, 749.
Emery's Sons v. Irving Nat. Bank, pp. 334, 349, 351, 353, 358, 362, 363, 367, 368, 371, 372, 380, 392, 476, 477, 479.
Emigh v. Pittsburg, etc., R. Co., p. 2564.
Emily v. Carney, p. 850.
—— The.
Emison v. Ohio, etc., R. Co., pp. 295, 838.
Emmerson, Indianapolis Southern R. Co. v.
—— Indianapolis, etc., R. Co. v.
Emmett, Southern Kansas R. Co. v.
E. M. Norton, The.
Empey v. Grand Ave. Cable Co., p. 2833.
Empire Brick, etc., Co., Washburn v.
Empire Coal Co., Culberson v.
Empire Rubber Mfg. Co., Indiana, etc., K. Co. v.
Empire State Cattle Co. v. Atchison, etc., R. Co., 129 Fed. 480—p. 458.
—— v. Atchison, etc., R. Co., 135 Fed. 135—pp. 744, 1338, 3304.
—— v. Atchison, etc., R. Co., 210 U. S. 1, 52 L. Ed. 931, 28 S. Ct. 607, 15 Am. & Eng. Ann. Cas. 70—p. 1283.
Empire State Chemical Co., Louisville, etc., R. Co. v.
Empire Transp. Co., Bishop v.
—— Elkins v.
—— Parsons v.
—— v. Philadelphia, etc., Iron Co., pp. 3955, 3960, 3961, 3973.
—— v. Wallace, p. 631.
—— v. Wamsutta Oil Refin., etc., Co., pp. 783, 822, 827, 870, 871.
Employers' Liability Cases, pp. 3439, 3441, 3459, 3461, 3462, 3463, 3465.
Employers' Liability Cases, The.
Emporium Department Store Co., Perrault v.
Emrich, Ohio, etc., R. Co. v.
Emslie, Hagar v.
Enches, New York, etc., R. Co. v.
—— v. New York, etc., R. Co., p. 2822.
Engel, Chicago City R. Co. v.
Engesether v. Great Northern R. Co., p. 1410.
England v. Boston, etc., R. Co., pp. 1920, 1921, 2238, 2248, 2256, 2258, 2259.
—— v. International, etc., R. Co., pp. 1626, 2451.
Engle, Detmold v.
Englehaupt v. Erie R. Co., p. 2820.
Englert v. New Orleans R., etc., Co., p. 2082.
English v. Delaware, etc., Canal Co., 66 N. Y. 454, 23 Am. Rep. 69—p. 2487.
—— v. Delaware, etc., Canal Co. (N. Y.), 4 Hun 683—p. 2709.
—— Ezell v.
—— v. Ocean Steam Nav. Co., p. 758.
Ennis, Bacon v.
—— Carbon Slate Co. v.
—— Conyers v.
Enos, Ft. Worth, etc., R. Co. v.
Enos, Missouri, etc., R. Co. v.
—— v. Rhode Island, etc., R. Co., pp. 1585, 2698.
Enrich, Ohio, etc., R. Co. v.
Ensch, McNulta v.
Enslen, Birmingham R., etc., Co. v.
Ensley, Jeffersonville, etc., R. Co. v.
—— Southern Exp. Co. v.
Entzminger v. Seaboard, etc., Railway, p. 3057.
Ephland v. Missouri Pac. R. Co., p. 1697.
—— v. Missouri, etc., R. Co., p. 2068.
Eppendorf v. Brooklyn, etc., R. Co., pp. 1880, 2153, 2297.
Eppes v. Tucker, p. 1146.
Epply, American Exp. Co. v.
Equitable Powder Mfg. Co. v. St. Louis, etc., R. Co., 99 Ark. 497, 138 S. W. 964—pp. 549, 552, 553, 601.
—— v. St. Louis, etc., R. Co. (Ark.), 150 S. W. 1028—pp. 542, 544.
Equitable Safety Ins. Co., Benner v.
Equi Valley Marble Co. v. Becker, pp. 3877, 3883.
Erastus Corning, The.
Erb v. Great Western Ry. Co., pp. 305, 308, 306, 314, 339.
—— v. Kockuk Packet Co., p. 835.
—— v. Morasch, pp. 3481, 3503.
E. Reboulin Fils & Co., In re.
Erhardt, Donnegan v.
Ericius v. Brooklyn Heights R. Co., p. 2819.
Erickson, Chicago, etc., R. Co. v.
—— Trumbull v.
Erie, The.
Erie Boatman's Transp. Co., Spann v.
Erie Dispatch v. Johnson, pp. 552, 596.
Erie R. Co., Ackerson v.
—— Allenza v.
—— Baird v.
—— Bartnik v.
—— Bartow v.
—— Behr v.
—— Blair v.
—— Bobbink v.
—— Bordeaux v.
—— Burke v.
—— v. Cappel, p. 3285.
—— Chapman v.
—— Commonwealth v.
—— Connecticut Fire Ins. Co. v.
—— Cook v.
—— Dillon v.
—— Dotson v.
—— Dumphy v.
—— Dunphy v.
—— Dyke v.
—— Englehaupt v.
—— v. Erie, etc., Transp. Co., p. 4043.
—— Euston & Co. v.
—— Falkenberg v.
—— Farmers', etc., Nat. Bank v.
—— Galloway v.
—— Gill v.
—— Giovanelli v.
—— Harper v.
—— Horton v.
—— Isham v.
—— Knowlton v.
—— Kulman v.
—— v. Littell, pp. 2458, 3080.
—— v. Lockwood & Son, pp. 848, 853, 855, 946, 1039, 1041, 3300.
—— McElwain v.
—— McGregor v.
—— Mason v.
—— Morrison v.
—— v. Pennsylvania, pp. 3590, 3591, 3593.
—— People v.
Erie R. Co. v. Pond Creek Mill, etc., Co., pp. 431, 432.
—— Purdy v.
—— v. Purdy, p. 34.
—— Rogers, etc., Mach. Works v.
—— Russell v.
—— Scheu v.
—— Schwartz & Co. v.
—— Shelton v.
—— Spencer v.
—— Spiess v.
—— v. Star, etc., Mill. Co., p. 3371.
—— v. State, p. 3565.
—— Steiger v.
—— Stoneman v.
—— Traphagen v.
—— Truesdell v.
—— Truex v.
—— Union Locomotive, etc., Co. v.
—— United States v.
—— v. United States, p. 3628.
—— Valk v.
—— v. Waite, pp. 701, 702, 704.
—— Walker v.
—— v. Wanaque Lumber Co., pp. 525, 539, 3761, 3770.
—— Wentz v.
—— Whitworth v.
—— Wigg v.
—— v. Wilcox, pp. 752, 931, 981, 988, 989, 1004, 3372.
—— Wood v.
—— Youghiogheny, etc., Coal Co. v.
Erie Railway, Phillips. Co. v.
Erie Transfer Co., Caldwell v.
Erie, etc., Co. v. Winter, p. 2713.
Erie, etc., Despatch v. Cecil, p. 1180.
Erie, etc., R. Co., Millcreek v.
Erie, etc., Transp. Co. v. Dater, pp. 981, 1033, 1045.
—— Erie R. Co. v.
—— McCoy v.
—— Mannheim Ins. Co. v.
—— Phoenix Ins. Co. v.
—— Stewart v.
Errol, Coe v.
Erskine v. Steamboat Thames, p. 580.
Ervin, Indianapolis, etc., R. Co. v.
Erwin v. Kansas, etc., R. Co., p. 2703.
Escanaba, etc., Transp. Co. v. Chicago, p. 3468.
Eskew, Georgia R., etc., Co. v.
—— Georgia, etc., R. Co. v.
Esler v. Southern Pac. Co., p. 2471.
E. Sondheimer Co. v. Illinois Cent. R. Co., p. 3679.
Espenscheid, Louisville, etc., R. Co. v.
—— v. Thames, p. 891.
Estate, Cubbage v.
Estes v. Denver, etc., R. Co., pp. 960, 1012, 1030, 1362, 1392, 1419, 1458.
—— v. Missouri Pac. R. Co., pp. 1710, 2605, 2697, 2772.
—— Nashville, etc., R. Co. v.
—— v. St. Paul, etc., R. Co., p. 3141.
Estey v. Truxel, pp. 1219, 1220.
Estievenard, Coal Co. v.
Estill, New York, etc., R. Co. v.
—— v. New York, etc., R. Co., pp. 1357, 1470, 1472.
Ethridge v. Central, etc., R. Co., p. 231.
Etson v. Fort Wayne, etc., R. Co., 110 Mich. 494, 68 N. W. 298—pp. 1992, 1993, 1996, 2823.
—— v. Fort Wayne, etc., R. Co., 114 Mich. 605, 72 N. W. 598—p. 2890.
Etter v. Cleveland, etc., R. Co., p. 86.
Eubank, Louisville, etc., R. Co. v.

Eubanks, Little Rock, etc., R. Co. v.
—— Western Union Tel. Co. v.
Eubaugh, Ft. Clark St. Railroad v.
Eufaula Grocery Co. v. Missouri Nat. Bank, p. 396.
Eugene, The.
Eureka Springs R. Co. v. Timmons, pp. 1487, 1732, 2693, 2946.
Europeon, The.
European, etc., R. Co., Hanson v.
—— Stevens v.
Euston & Co. v. Erie R. Co., pp. 653, 678, 694.
Eva D. Rose, The.
Evans v. Atlanta, etc., R. Co., pp. 402, 3307, 3394, 3395, 3397, 3398, 3403, 3408.
—— Baltimore, etc., R. Co. v.
—— v. Blair, pp. 3951, 3964.
—— v. Dunbar, p. 1439.
—— v. Fitchburg R. Co., pp. 728, 733, 740, 749, 765, 766, 1341, 1456.
—— International, etc., R. Co. v.
Evans v. Interstate, etc., R. Co., pp. 1881, 1896, 2964.
—— Judd v.
—— v. Lake Shore, etc., R. Co., p. 2440.
—— v. Memphis, etc., R. Co., pp. 190, 2435, 2466, 2468.
—— Missouri Pac. R. Co. v.
—— Missouri, etc., R. Co. v.
—— v. Mobile, etc., R. Co., pp. 1442, 1445.
—— Moore v.
—— v. New York, etc., Steamship Co., p. 3887.
—— v. Rudy, pp. 847, 856.
—— St. Louis, etc., R. Co. v.
—— v. St. Louis, etc., R. Co., pp. 1625, 1699.
—— Schneider v.
—— v. Southern Pac. Co., p. 2326.
—— Union Pac. R. Co. v.
—— Werner v.
Evans, etc., Cultivator Co. v. Missouri, etc., R. Co., p. 1215.
Evansich, Gulf, etc., R. Co. v.
Evans-Snyder-Buel Co., Pecos, etc., R. Co. v.
Evansville Elect. R. Co. v. Lerch, p. 2777.
Evansville St. R. Co. v. Meadows, p. 1983.
Evansville, etc., Packet Co. v. Rehkoph, p. 3931.
Evansville, etc., R. Co. v. Androscoggin Mills, pp. 3253, 3376, 3380, 3381.
—— v. Athon, pp. 1720, 1878, 2066, 2248, 2546, 2617.
—— v. Barnes, p. 1581.
—— v. Baum, p. 2483.
—— v. Cates, p. 2458.
—— v. Darting, p. 2020.
—— Draper v.
—— v. Duncan, pp. 253, 1801, 1870, 2242, 2394, 2575, 2578, 2944.
—— v. Gilmore, pp. 1596, 2467.
—— v. Keith, pp. 273, 274, 753, 798.
—— v. Kevekordes, 35 Ind. App. 706, 73 N. E. 1135—p. 433.
—— v. Kevekordes (Ind. App.), 69 N. E. 1022— pp. 969, 978, 984, 986, 1016, 1294.
—— Kyte, pp. 1855, 1867, 2562, 2575.
—— v. Marsh, pp. 521, 581.
—— v. Mills, pp. 2216, 2656, 2691.
—— Reid v.
—— Romine v.
—— Sage v.
—— v. Weikle, p. 2618.
—— White v.
—— v. Wilson, pp. 1666, 2573.
—— v. Young, p. 1007.
Evansville, etc., Steam Packet Co. v. Wildman, p. 2607.
Evart v. The Loundes, p. 585.
Eveleth, Johnson v.
Evening Star, Moore v.
Evens, St. Louis, etc., R. Co. v.
Everets, Stewart v.
Everett v. Chicago, etc, R. Co., pp. 1600, 1601, 2467, 2468.
—— Gulf, etc., R. Co. v.
—— Houston, etc., R. Co. v.
—— National Bank v.
—— v. Norfolk, etc., R. Co., p. 822.
—— v. Oregon, etc., R. Co., pp. 1544, 1545, 1547, 1548, 1550, 2517.
—— Saltus v.
—— Southern Exp. Co. v.
—— v. Southern Exp. Co., pp. 759, 760.
—— v. Vendryes, p. 1489.
Everhart v. Terre Haute, etc., R. Co., pp. 2525, 2526.
Everleigh v. Sylvester, pp. 729, 768.
Evers v. Wiggins Ferry Co., 92 S. W. 118, 116 Mo. App. 130—pp. 3996, 3998.
—— v. Wiggins Ferry Co., 105 S. W. 306, 127 Mo. App. 236—pp. 4004, 4005.
Evershed v. London & N. W. R. Co., p. 3685.
—— v. London & Northwestern R. Co., p. 3692.
Ewan v. Tredegar Co., p. 3960.
Ewart v. Kerr, pp. 522, 581, 683.
—— v. Street (S. C.), 2 Bailey 157, 23 Am. Dec. 131—pp. 729, 730, 733, 734, 736, 745, 746, 750, 788, 815.
—— v. Street (S. C.), 2 Bailey 421—p. 822.
Ewing, Leavenworth v.
—— v. Leavenworth, p. 3579.
Excelsior Coal Co., In re.
Exchequer Chamber, p. 3153.
Ex parte Banner, p. 352.
Ex parte Barrow, pp. 1228, 1234.
Ex parte Battes, p. 34.
Ex parte Benson, p. 221.
Ex parte Benson & Co., pp. 1175, 1177, 1178, 1179.
Ex parte Boyer, p. 4054.
—— Brown, pp. 2089, 2090.
Ex parte Cooper, pp. 1228, 1231, 1232, 1234.
Ex parte Eaglesfield, p. 3566.
Ex parte Easton, p. 3939.
Ex parte Falke, p. 1246.
Ex parte Fritz, p. 3428.
Ex parte Insley, p. 3585.
Ex parte Koehler, 25 Fed. 73—p. 74.
Ex parte Koehler, 30 Fed. 867—pp. 3610, 3611.
Ex parte Koehler, 31 Fed. 315, 12 Sawy. 446—pp. 3696, 3713, 3714.
Ex parte Lorenzen, p. 1643.
Ex parte Phenix Ins. Co., pp. 4038, 4039, 4073, 4074, 4075, 4077.
Ex parte Plessy, p. 1945.
Ex parte Slayton, pp. 4072, 4073, 4074.
Ex parte Terry, p. 3467.
Ex parte Vance, p. 34.
Ex parte Watkins, p. 3467.
Ex parte Yarbrough, p. 3467.
Ex parte Young, p. 129.
Exposition Cotton Mills, Western, etc., R. Co. v.
—— v. Western, etc., R. Co., pp. 808, 3305, 3391.
Express Cases, pp. 4, 253, 3668, 3669.
Express Co., Bernstine v.
—— v. Caldwell, pp. 9, 930, 947, 948, 961, 977.
—— Earnest v.
—— v. Jackson, p. 7.
Express Co. v. Kountze Bros., pp. 500, 503, 947, 953.
—— Rosenfield v.
—— v. Schwab, p. 949.
—— Weil v.
Exton v. Central R. Co., 62 N. J. L. 7, 42 Atl. 486, 14 Am. & Eng. R. Cas., N. S., 240—pp. 1510, 1512, 1513, 1514, 1518, 2027.
—— v. Central R. Co., 63 N. J. L. 356, 46 Atl. 1099, 56 L. R. A. 508—pp. 2323, 2726, 2871.
Ezell v. English, p. 496.
—— Midland Valley R. Co. v.
Ezzell, Robinson v.

F

Faber v. Chicago, etc., R. Co., pp. 200, 1602, 2424.
Fadley v. Baltimore, etc., R. Co., p. 2247.
Fagan, Missouri Pac. Co. v.
—— Missouri Pac. R. Co. v.
—— v. Rhode Island Co., pp. 2700, 2765.
Fahey, Chicago, etc., R. Co. v.
Fahr v. Manhattan R. Co., pp. 2611, 2612.
Fain v. Southern R. Co., p. 828.
Fairbairn, St. Louis, etc., R. Co. v.
Fairbank v. United States, pp. 3439, 3571, 3572, 3594.
Fairbanks, Cincinnati, etc., R. Co. v.
Fairbanks & Co., Cincinnati, etc., R. Co. v.
—— v. Cincinnati, etc., R. Co., p. 3376.
Fairchild v. California Stage Co., pp. 1684, 2692.
—— Milwaukee, etc., R. Co. v.
—— Oregon R., etc., Co. v.
—— Pennsylvania Co. v.
—— v. Philadelphia, etc., R. Co., pp. 944, 3377, 3382.
—— Slocum v.
—— v. Slocum, p. 814.
Fairclough, Chicago, etc., R. Co. v.
Fairfax v. New York, etc., R. Co., 67 N. Y. 11—pp. 821, 3160, 3168, 3169, 3194.
—— v. New York, etc., R. Co., 73 N. Y. 167, 29 Am. Rep. 119—pp. 3115, 3116, 3125, 3132, 3181, 3198.
Fairfield v. Louisville, etc., R. Co., p. 1627.
Fairford Lumber Co. v. Tombigbee Valley R. Co., p. 1200.
Fair Haven, etc., R. Co., Baldwin v.
—— Brennan v.
—— Brockett v.
Fairmont Coal Co., Merchants' Coal Co. v.
Fairmount, etc., R. Co. v. Stutler, pp. 1865, 1890.
Faison v. Alabama, etc., R. Co., p. 3399.
Faithorn, Patten v.
Falcon, The.
Faler, New Orleans, etc., R. Co. v.
Fales, Galveston, etc., R. Co. v.
Falina v. Union Pac. R. Co., p. 1036.
Falk, Kemp v.
—— v. New York, etc., R. Co., pp. 1767, 1871.
Falke, Ex parte.
Falkenan v. Fargo, p. 408.
Falkenberg v. Erie R. Co., p. 1112.
Falkner v. Ohio, etc., R. Co., p. 2436.
Fall River Ironworks, Taylor v.
Fall River R. Co., Jordan v.
Falls v. San Francisco, etc., R. Co., p. 1786.

Falls River, etc., Mach. Co. v. Pullman Palace Car Co., pp. 3201, 3202, 3214, 3216, 3218, 3219, 3230.
Falvey v. Georgia Railroad, pp. 5, 210, 3176, 3257, 3291, 3306.
—— Metropolitan R. Co. v.
—— v. Northern Transp. Co., pp. 994, 1036.
Fambro, St. Louis, etc., R. Co. v.
Fambrough, Texas, etc., R. Co. v.
Fane v. Philadelphia Rapid Trans. Co., p. 2765.
Fanizzi v. New York, etc., R. Co., p. 1711.
Fanning v. Gregorie, pp. 3474, 3475, 3476, 3477.
—— v. St. Louis, etc., R. Co., pp. 1524, 1532, 1906.
Fanny, The.
Fanshaw v. Norfolk, etc., Tract. Co., pp. 1898, 1902, 2409, 2418, 2827.
Fant Fish Co., Southern Exp. Co. v.
Farber v. Missouri Pac. R. Co., p. 2516.
Fargo, Ames v.
—— Armstrong v.
—— v. Auditor General, p. 3557.
—— Bowden v.
—— Byrne v.
—— Dieterich v.
—— Falkenan v.
—— Giles v.
—— Gorham Mfg. Co. v.
—— Grossman v.
—— Harris v.
—— v. Hart, pp. 3556, 3562, 3572, 3590, 3594.
—— Houseman v.
—— v. Ledger-Standard Co., p. 30.
—— Little v.
—— McMurray v.
—— v. Michigan, pp. 3422, 3447, 3475, 3491, 3497, 3553, 3554, 3555, 3558, 3559, 3566, 3575, 3579, 3602.
—— Nebenzahl v.
—— Oderkirk v.
—— Richer v.
—— Rowden v.
—— Shwartz v.
—— Sutro v.
—— Thompson v.
—— Waldron v.
—— Westcott v.
Fargo & Co., Cutter v.
Faris v. Brooklyn, etc., R. Co., pp. 2196, 2814.
Farish & Co. v. Reigle, pp. 729, 1685, 1715, 1726, 1735, 1821, 1837, 1841, 2015, 2693.
Farley v. Cincinnati, etc., R. Co., pp. 1501, 1502, 1521, 1523.
—— Citizens' R. Co. v.
—— v. Lavary, pp. 8, 727, 732, 749, 753, 765.
—— v. Norfolk, etc., R. Co., pp. 2127, 2257, 2267, 2988.
—— v. Philadelphia Tract. Co., 6 Pa. Co. Ct. Rep. 347—p. 2161.
—— v. Philadelphia Tract. Co., 132 Pa. 58, 18 Atl. 1090—pp. 1833, 2686.
—— v. R. & D. R. Co., 81 Va. 783—p. 2116.
Farlow v. Kelly, pp. 1813, 1815, 2163, 2200, 2201.
Farmen v. United States Exp. Co., pp. 843, 917.
Farmer, Spivey v.
—— The.
Farmers' Fertilizer Co., Reid Phosphate Co. v.
Farmers' Ins. Co., Patrick v.
Farmers' Loan & Trust Co. v. Henning, p. 255.
Farmers' Loan, etc., Co. v. Baltimore, etc., R. Co., p. 2095.
—— Betts v.
—— Cohen v.
—— v. Northern Pac. R. Co., 83 Fed. 249—p. 3668.
—— v. Northern Pac. R. Co., 57 C. C. A. 533, 120 Fed. 873—pp. 451, 453, 3254, 3280, 3364, 3365.
—— v. Oregon R., etc., Co., p. 915.
—— Reagan v.
—— State v.
—— Stone v.
Farmers' Union Gin Co., St. Louis, etc., R. Co., v.
Farmers', etc., Bank v. Chaplain Transp. Co., 16 Vt. 52, 42 Am. Dec. 491—p. 903.
—— v. Champlain Transp. Co., 18 Vt. 131—p. 1010.
—— v. Champlain Transp. Co., 23 Vt. 186, 56 Am. Dec. 68—pp. 240, 278, 537, 602, 770, 1004, 1007, 1008, 3346.
—— Detroit, etc., R. Co. v.
—— v. Detroit, etc., R. Co., p. 723.
Farmers', etc., Comm. Firm, Louisville, etc., R. Co. v.
Farmers', etc., Cotton Co. v. Atlantic, etc., R. Co., p. 3278.
Farmers', etc., Ins. Co., Wagner v.
Farmers', etc., Nat. Bank, Allen, etc., Co. v.
—— v. Erie R. Co., 72 N. Y. 188—p. 310.
—— v. Hanks, 104 Tex. 320, 137 S. W. 1120—p. 1751.
—— v. Hanks (Tex. Civ. App.), 128 S. W. 147—p. 1751.
—— v. Hazeltine, pp. 373, 375.
—— Heiskell v.
—— Hieskell v.
—— v. Logan, pp. 352, 369.
Farmers', etc., Trust. Co. v. Northern Pac. R. Co., 83 Fed. 249—pp. 3787, 3788, 3791, 3795.
—— v. Northern Pac. R. Co., 112 Fed. 829—p. 3891.
—— v. Northern Pac. Co., 57 C. C. A. 533, 120 Fed. 873—pp. 996, 997, 1000.
Farmington Mercantile Co. v. Chicago, etc., R. Co., p. 3394.
Farnham v. Camden, etc., R. Co., pp. 917, 946, 949, 958, 988, 1018, 1037, 1042, 1047, 1074, 3161.
Farnon v. Boston, etc., R. Co., pp. 1960, 2120, 2168, 2891.
Farnsworth v. National Exp. Co., pp. 761, 962, 997.
—— v. New York, etc., R. Co., p. 3356.
—— Ulmer v.
Farr v. Adams Exp. Co., p. 818.
—— St. Louis, etc., R. Co. v.
—— Smith v.
Farr, etc., Mfg. Co., International Nav. Co. v.
—— v. International Nav. Co., 94 Fed. 675—p. 4061, 4083.
—— v. International Nav. Co., 98 Fed. 636, 39 C. C. A. 197—pp. 4062, 4063.
Farrell v. Atlantic, etc., R. Co., p. 167.
—— v. Citizens', etc., R. Co., pp. 1903, 2909.
—— Columbus, etc., R. Co. v.
—— v. Great Northern R. Co., pp. 1721, 2117, 2239, 2240, 2242.
—— v. Houston, etc., R. Co., pp. 2219, 2303, 2805.
—— v. Richmond, etc., R. Co., pp. 1162, 1163, 1212, 1214, 1215, 1220, 1229, 1232, 1235, 1248, 1249.
Farrell & Co. v. Great Northern R. Co., p. 217.
Farrier v. Colorado Springs, etc., R. Co., pp. 2016, 2021, 2857, 2858, 2859, 2870.
Farrington v. Boston Elevated R. Co., pp. 1803, 1804, 2820, 2821, 2833.
Farris v. Baltimore, etc., R. Co., p. 555.
Farrow v. American Agricultural Chemical Co., p. 3960.
Farwell, Gibbons v.
Farwell Farmers' Warehouse Ass'n v. Minneapolis, etc., R. Co., p. 85.
Fash v. East River Ferry Co., p. 2779.
Fassett v. Ruark, p. 762.
Fast v. Canton, etc., R. Co., p. 1439.
Fasy v. International Nav. Co., pp. 296, 819, 837.
Fatman & Co. v. Cincinnati, etc., R. Co., pp. 503, 504, 505, 822, 1039, 3251, 3356.
Faucher v. Wilson, pp. 726, 765, 766, 771.
Faul v. North Jersey St. R. Co., p. 2798.
Faulk v. Columbia, etc., R. Co., pp. 982, 1025, 1065, 1071, 1400, 1403.
Faulkner v. Boston, etc., Railroad, pp. 2674, 2791, 2792.
—— v. Hart, 82 N. Y. 413, 37 Am. Rep. 574—pp. 722, 888, 896, 901.
—— v. Hart, 44 N. Y. Super. Ct. 471—p. 769.
—— Houston, etc., R. Co. v.
—— Missouri, etc., R. Co. v.
—— O'Toole v.
—— St. Louis, etc., R. Co. v.
—— v. South Pac. Railroad, pp. 246, 621.
—— v. Wright, pp. 10, 768.
Fauntleroy, Giles v.
—— v. Chicago, etc., R. Co., pp. 1040, 1455, 1456, 1458, 1467.
—— v. South Carolina R. Co., pp. 573, 574.
—— v. Southern R. Co., pp. 1246, 1247.
—— Yazoo, etc., R. Co. v.
Favre v. Louisville, etc., R. Co., p. 2201.
Faxton, Clark v.
Fay v. Alliance Ins. Co., p. 3940.
—— v. Davidson, p. 2776.
—— Galena, etc., R. Co. v.
—— v. Metropolitan St. R. Co., p. 2877.
—— v. New World, p. 725.
Fay, etc., Co., Midland Valley R. Co. v.
Faylor, Louisville, etc., R. Co. v.
Feagin v. Gulf, etc., R. Co., p. 2650.
Fearn v. West Jersey Ferry Co., p. 2686.
Fearn, etc., Co. v. Richardson, pp. 294, 305, 306, 308, 338.
Fears v. State, p. 239.
—— Williams v.
Feary v. Metropolitan St. R. Co., pp. 1986, 2594, 2644, 3001, 3003.
Febo, Galveston, etc., R. Co. v.
Federal St., etc., R. Co. v. Gibson, p. 2700.
Federal Sugar Refin. Co., Milburn v.
Federal, etc., R. Co., McMillan v.
Feely, New York, etc., R. Co. v.
Feige v. Michigan, etc., R. Co., pp. 896, 931, 986, 1012.
Feil v. West Jersey, etc., R. Co., pp. 1770, 2666.
Fein v. Weir, pp. 488, 770, 836, 841.

Feinberg v. Delaware, etc., R. Co., pp. 1270, 1278.
Feintuch, Chicago, etc., R. Co. v.
Feise v. Wray, pp. 1211, 1215, 1216.
Feital v. Middlesex R. Co., pp. 417, 1746, 2086, 2694, 3175.
Feitl v. Chicago City R. Co., pp. 2668, 2671.
Feld v. Platt, p. 1059.
Felder v. Columbia, etc., R. Co., pp. 3176, 3181, 3182, 3185.
—— Southwestern R. Co. v.
Feldheim v. Brooklyn, etc., R. Co., pp. 2181, 2672.
Feldman, Northern Alabama R. Co. v.
Feldschneider v. Chicago, etc., R. Co., pp. 2098, 2683, 2895.
Felix v. Brandstetter Co., p. 1228.
—— The.
Felker, First Nat. Bank v.
—— v. First Nat. Bank, pp. 395, 396.
—— Texas, etc., R. Co. v.
Fellows, Fenkhausen v.
—— v. Powell, pp. 305, 306, 308.
—— Vedder v.
Felt, v. Denver, etc., R. Co., pp. 3453, 3455.
—— Puget Sound Elect. Railway v.
Felton, Caldwell v.
—— Central, etc., R. Co. v.
—— v. Central, etc., R. Co., p. 3291.
—— Chicago, etc., R. Co. v.
—— v. Chicago, etc., R. Co., p. 2029.
—— v. Clarkson, p. 1340.
—— v. Holbrook, pp. 2694, 2942.
—— v. Horner, pp. 1715, 1752, 1755, 2170.
—— v. McCreary-McClellan Live Stock Co., p. 3275.
Fenig v. North Jersey St. R. Co., p. 2909.
Fenkhausen v. Fellows, p. 1215.
Fenley, St. Louis, etc., R. Co. v.
Fenn, Baldosta St. R. Co. v.
—— v. Timpson, p. 1306.
—— Valdosta St. R. Co. v.
Fennell, Missouri Pac. Co. v.
Fenner v. Buffalo, etc., R. Co. (N. Y.), 46 Barb. 103—pp. 3287, 3301.
—— v. Buffalo, etc., R. Co., 44 N. Y. 505, 4 Am. Rep. 709—pp. 889, 901.
Fentiman v. Atchison, etc., R. Co., pp. 734, 738, 742, 744, 753, 765, 815, 822, 870, 873.
Fenwick, Texas, etc., R. Co. v.
Ferguson v. Cappeau, pp. 797, 804, 805, 814.
—— Chicago, etc., R. Co. v.
—— Ft. Worth St. R. Co. v.
—— v. Herring, p. 1244.
—— v. Michigan Cent. R. Co., pp. 2429, 2473.
—— v. Missouri Pac. R. Co., pp. 2475, 2663, 2664.
—— Norfolk, etc., R. Co. v.
—— Plessy v.
—— St. Louis, etc., R. Co. v.
—— v. Southern Railway, pp. 733, 742, 745, 825, 869.
—— Texas, etc., R. Co. v.
—— v. Truax, 132 Wis. 478, 110 N. W. 395, 111 N. W. 657, 112 N. W. 513, 14 L. R. A., N. S., 350, 13 Am. & Eng. Ann. Cas. 1092—pp. 1502, 1507, 2742, 2983.
—— v. Truax, 136 Wis. 637, 118 N. W. 251—pp. 2320, 2883.
Ferguson-McKinney Dry Goods Co., Gulf, etc., R. Co. v.
Fergusson v. Brent, pp. 728, 734, 736, 737, 742.
Fern, Kentucky Cent. R. Co. v.
Fernandez v. Silva, pp. 516, 580.
Ferree, Werner Sawmill Co. v.
Ferrell v. C., H. & D. R. Co., pp. 1683, 1789, 2016, 2032.
—— Coeur d'Alene, etc., Transp. Co. v.
—— Louisville, etc., R. Co. v.
Ferrell & Co. v. Great Northern R. Co., pp. 465, 3639.
Ferris v. Adams Exp. Co., p. 3346.
Ferry v. Manhattan R. Co., pp. 1890, 1897, 2827, 2995.
Ferry Co., St. Louis v.
Fertilizer, Two Hundred & Sixteen Loads & Six Hundred & Seventy-Eight Barrels of.
Fewings v. Mendenhall, 83 Minn. 237, 86 N. W. 96, 55 L. R. A. 713—p. 2029.
—— v. Mendenhall, 88 Minn. 336, 93 N. W. 127, 60 L. R. A. 601, 97 Am. St. Rep. 519—p. 1678, 2781.
Fewson, Young v.
Fibel v. Livingston, pp. 984, 987, 1007, 1066, 1068.
Fick v. Chicago, etc., R. Co., pp. 2043, 2076.
Ficklen v. Shelby County Taxing Dist., p. 3474.
—— v. Taxing Dist., pp. 3552, 3553, 3559, 3560, 3570, 3572.
Ficklin v. Wabash R. Co., pp. 818, 1479, 1268.
Fidelity Lumber Co. v. Great Northern R. Co., pp. 3764, 3787.
Fidelity Storage, etc., Co., Lee v.
Fieber v. Manhattan Dist. Tel. Co., p. 571.
Field v. Banker, p. 3878.
—— Chicago, etc., R. Co. v.
—— v. Chicago, etc., R. Co., pp. 945, 1008, 1049, 3326, 3330, 3347, 3359.
—— v. Delaware, etc., R. Co., p. 2893.
—— v. French, pp. 1488, 2883.
—— v. Mills, p. 3877.
—— v. New York City R. Co., p. 2724.
—— Northey v.
—— v. Spokane, etc., R. Co., p. 2083.
—— v. The Lovett Peacock, p. 531.
—— Winhein v.
Fielder v. Adams Exp. Co., pp. 850, 1052, 1053.
—— v. Missouri, etc., R. Co., 92 Tex. 176, 179, 46 S. W. 633—pp. 85, 512.
—— v. Missouri, etc., R. Co. (Tex. Civ. App.), 42 S. W. 362—p. 3469.
—— v. St. Louis, etc., R. Co., p. 2769.
Fielders v. North Jersey St. R. Co., pp. 1806, 2911.
Fielding, Pullman's Palace Car Co. v.
Fielder, Dana v.
Fifth Ave. Coach Co., Sturgis v.
Fifth Ave. Transp. Co., Frobisher v.
Fifth Nat. Bank, Chicago, etc., R. Co. v.
Figlia Maggiore, The.
Filbin v. Chesapeake, etc., R. Co., p. 1809.
File v. Wilmington City R. Co., pp. 1878, 1890, 2142, 2290, 2637, 2687.
Filer v. New York Cent. R. Co., 49 N. Y. 47, 10 Am. Rep. 327—pp. 1878, 2066, 2249.
—— v. New York Cent. R. Co., 59 N. Y. 351—pp. 2126, 2258.
—— v. New York, etc., R. Co., 68 N. Y. 124—pp. 1879, 2265.
Files v. Boston, etc., R. Co., pp. 1549, 1556, 1569, 2207, 2238.
Filebrown v. Grand Trunk R. Co., pp. 727, 995, 1003, 1007, 1008, 1036.
Filley v. Pope, p. 3872.
Fillingham v. Michigan United Railways, p. 2660.
—— v. St. Louis Trans. Co., pp. 2238, 2592.
Fillo v. Jones, p. 2745.
Filson, Chicago, etc., R. Co. v.
Filyaw, Bennett v.
Finch v. Gregg, pp. 392, 394, 395, 396.
—— v. Northern Pac. R. Co., p. 3101.
—— Pier v.
Findley v. Central, etc., R. Co., p. 2657.
—— City, etc., Railway v.
—— Smith v.
—— State v.
Fine v. Interurban St. R. Co., p. 1699, 2817.
Fine & Bro. v. Southern Exp. Co., pp. 761, 854.
Finger v. Wichita R., etc., Co., p. 2358.
Fink v. Albany, etc., R. Co., p. 2454.
—— Galveston, etc., R. Co. v.
—— Harrison v.
Finkeldey v. Omnibus Cable Co., pp. 1833, 1879, 2153, 2882, 2913.
Finley v. Lewis, p. 603.
—— Pullman Co. v.
—— St. Louis, etc., R. Co. v.
Finn v. Clark (Mass.), 10 Allen 479—pp. 1148, 1150, 1151.
—— v. Clark (Mass.), 12 Allen 522—pp. 1148, 1150, 1151.
—— v. Valley, etc., R. Co., p. 1893.
—— v. Western R. Corp., 102 Mass. 283—pp. 500, 518, 519, 1148, 1150, 1151.
—— v. Western R. Corp., 112 Mass. 524, 17 Am. Rep. 128—pp. 478, 490, 491, 681, 1148, 1150, 1151.
Finnegan v. Chicago, etc., R. Co., pp. 1515, 1875.
Finney Milwaukee, etc., R. Co. v.
Finseth v. Suburban R. Co., p. 2963.
Fire Ass'n v. Leob, 25 Tex. Civ. App. 508, 84 S. W. 663—p. 822.
—— v. Loeb, 25 Tex. Civ. App. 24, 59 S. W. 617—pp. 843, 1047,
—— St. Louis, etc., R. Co. v.
Firebaugh v. Seattle Elect. Co., pp. 2684, 2702, 2882.
First Div., etc., R. Co., Ames v.
—— Christian v.
—— Du Laurans v.
—— Pinney v.
First Nat. Bank, Cosmos Cotton Co. v.
—— v. Crocker, pp. 353, 362.
—— v. Dearborn, pp. 353, 362, 363, 378, 3274.
—— v. Ege, pp. 349, 382, 401.
—— Felker v.
—— v. Felker, pp. 393, 400.
—— v. Hartford Fire Ins. Co., p. 326.
—— v. Kelly, p. 353.
—— Kessler v.
—— Livingston County v.
—— v. McSwain, pp. 355, 371, 391, 479.
—— v. Marietta, etc., R. Co., pp. 1714, 3109, 3120, 3125, 3126, 3129, 3146, 3147.
—— v. Mineral Wells, etc., R. Co., pp. 394, 395, 396.
—— v. Mt. Pleasant Mill Co., p. 359.
—— Nebraska, etc., Grain Co. v.

First Nat. Bank v. New York, etc., K. Co., pp. 556, 557, 559.
—— v. Northern Pac. R. Co., p. 555.
—— v. Northern Railroad, p. 558.
—— Petitt & Co. v.
—— v. Pettit, p. 1224.
—— v. San Antonio, etc., R. Co., 77 S. W. 410, 97 Tex. 201—pp. 387, 390, 519, 586.
—— v. San Antonio, etc., R. Co. (Tex. Civ. App.), 72 S. W. 1033—pp. 390, 403.
—— v. Schmidt, pp. 1221, 1224.
—— v. Shaw, pp. 350, 430.
—— Sioux City, etc., R. Co. v.
—— v. Stewart, p. 3864.
—— Texas, etc., R. Co. v.
—— United States v.
—— Walsh, etc., Co. v.
—— v. Walsh, etc., Co., p. 391.
—— v. Wilkesbarre Lace Mfg. Co., pp. 371, 395.
First Trust, etc., Bank v. Southern Indiana R. Co., p. 3700.
Fischer v. Columbia, etc., Co., pp. 1549, 1557, 1743.
—— Klien v.
—— v. New York City R. Co., p. 1648.
Fish v. Chapman, pp. 1, 2, 4, 8, 10, 246, 257, 727, 732, 735, 736, 737, 748, 765, 771, 1003, 1007, 1069, 3153.
—— v. Clark (N. Y.), 2 Lans. 176—p. 211.
—— v. Clark, 49 N. Y. 122, pp. 11, 771.
—— Louisville, etc., R. Co. v.
Fisher v. Abeel, p. 699.
—— Baltimore, etc., R. Co. v.
—— Birmingham K., etc., Co. v.
—— v. Boston, etc., Railroad, pp. 2730, 2873.
Fisher v. Boston, etc., R. Co., pp. 3268, 3269, 3287.
—— Campbell v.
—— Chicago, etc., R. Co. v.
—— v. Clisbee, p. 1682.
—— v. Geddes, pp. 277, 3158.
—— v. Great Northern R. Co., pp. 3442, 3719, 3720, 3753.
—— v. Lake Shore, etc., R. Co., p. 855.
—— Louisville, etc., R. Co. v.
—— v. New York Cent. R. Co., pp. 140, 143, 1197.
—— v. Northern Pac. R. Co., pp. 889, 897.
—— Parmelee v.
—— v. Paxon, p. 1909.
—— People v.
—— San Antonio, etc., R. Co. v.
—— v. Scharadin, p. 3792.
—— v. Southern Pac. R. Co., pp. 1720, 1755, 2942.
—— Texas Cent. R. Co. v.
—— Texas, etc., K. Co. v.
—— v. West Virginia, etc., R. Co., 39 W. Va. 366, 19 S. E. 578, 58 Am. & Eng. R. Cas. 337, 23 L. R. A. 758—pp. 1715, 1718, 1719, 1723, 2191.
—— v. West Virginia, etc., R. Co., 42 W. Va. 183, 24 S. E. 570, 4 Am. & Eng. R. Cas., N. S., 86, 33 L. R. A. 69—pp. 1962, 2114, 2125, 2163, 2172, 2179.
Fisher Bros., Yazoo, etc., R. Co. v.
Fishkill, etc., Road Co., People v.
Fisk v. Newton, pp. 534, 566.
Fitch, Crosby v.
—— v. Mason, etc., Tract. Co., 89 N. W. 33, 116 Iowa 716—p. 2759.
—— v. Mason, etc., Tract. Co., 100 N. W. 618, 124 Iowa 665—pp. 2205, 2671, 2692, 2739, 3004, 3006.
Fitch v. Newberry, pp. 230, 233, 246, 1142, 1155, 1156, 1158, 1159.
Fitchburg R. Co., Block v.
—— Blumartle v.
—— Bucher v.
—— Cazneau v.
—— Commonwealth v.
—— Doyle v.
—— Evans v.
—— v. Gage, pp. 93, 220, 1179, 1181, 1186.
—— Graves v.
—— Harlow v.
—— Jeffris v.
—— Kidder v.
—— Leary v.
—— Leonard v.
—— Littlefield v.
—— Littlejohn v.
—— Massachusetts Loan, etc., Co. v.
—— v. Nichols, pp. 1752, 1757, 1761, 2105.
—— Northern R. Co. v.
—— Percy v.
—— Snow v.
—— Swift River Co. v.
—— Vermont, etc., K. Co., v.
—— Warren v.
—— Webster v.
—— White v.
Fitchburg R. Corp., Moore v.
Fitchburg, etc., R. Co. v. Hanna, pp. 285, 287, 291, 1173.
Fitchburg, etc., St. R. Co., Ormandroyd v.
Fite, Kansas, etc., R. Co. v.
Fitzgerald v. Adams Exp. Co., pp. 210, 243, 244, 411, 816, 818.
—— v. Chicago, etc., R. Co., p. 3089.
—— Kessenger v.
—— Kissenger v.
—— v. Fitzgerald etc., Constr. Co., p. 3753.
—— v. Grand Trunk R. Co., p. 3705.
—— v. Midland R. Co., pp. 1670, 1675.
—— v. Southern Pac. Co., pp. 2340, 2970, 3317.
—— Terre Haute, etc., R. Co. v.
—— Yazoo, etc., R. Co. v.
Fitzgerald, etc., Constr. Co., Fitzgerald v.
Fitzgibbon v. Chicago, etc., R. Co., 108 Iowa 614, 14 Am. & Eng. R. Cas., N. S., 270, 79 N. W. 477—pp. 1543, 1544, 2652.
—— v. Chicago, etc., K. Co., 119 Iowa 261, 6 R. R. R. 680, 29 Am. & Eng. R. Cas., N. S., 680, 93 N. W. 276—p. 1545.
Fitzhugh, The Genesee Chief v.
—— v. Wiman, pp. 333, 337.
Fitzmaurice v. New York, etc., R. Co., p. 1573.
Fitzpatriek, Montgomery Tract. Co. v.
—— v. New Albany, etc., R. Co., p. 1582.
Fitzsimmons v. Joslin, p. 1212.
—— v. Milwaukee, etc., K. Co., p. 2037.
—— v. Southern Exp. Co., p. 546.
Five Hundred and Seventy-Six Granite Blocks, Chadwick v.
Five Thousand Two Hundred and Fifty-Six Bundles of Elm Staves, Brouty v.
Fix, Gretschmann v.
—— Lake Erie, etc., Co., v.
—— Lake Erie, etc., R. Co. v.
Flagg, Backer v.
—— Chicago, etc., R. Co. v.
—— Jean, etc., Co. v.
—— v. Manhattan R. Co., p. 2873.
—— Parker v.
Flaherty v. Boston, etc., Railroad, pp. 1705, 2510, 2540.
Flaherty, Chicago, etc., R. Co. v.
—— v. Northern Pac. R. Co., p. 2083.
—— v. St. Louis Trans. Co., pp. 2914, 2967.
—— Savannah, etc., R. Co. v.
Flake, Nashville, etc., R. Co. v.
Flakne v. Great Northern R. Co., p. 1303.
Flanagan v. Baltimore, etc., R. Co., p. 2943.
—— v. New York, etc., R. Co., p. 2828.
—— v. Philadelphia, etc., K. Co., pp. 2273, 2276.
—— Texas Cent. R. Co. v.
Flanary & Co., Old Dominion Steamship Co. v.
Flanigan, Southern R. Co. v.
Flannagan, Louisville, etc., R. Co. v.
Flannery v. Baltimore, etc., R. Co., pp. 2020, 3072.
Flash, etc., Co. v. New Orleans, etc., R. Co., p. 410.
Flautt v. Lashley, p. 11.
Flavin v. Chicago, etc., R. Co., p. 3106.
Fleck v. Union R. Co., p. 2356.
Fleetwood, East Tennessee, etc., R. Co. v.
—— Wood v.
Fleischman v. Caldwell, p. 184.
Fleischman, etc., Co. v. Southern Railway, pp. 3138, 3149, 3168, 3186, 3189.
Fleming v. Brooklyn City R. Co., pp. 1588, 2525.
—— v. Hammond, pp. 270, 271.
—— Illinois Cent. R. Co. v.
—— v. Kansas, etc., K. Co., p. 1982.
—— Louisville, etc., R. Co. v.
—— McLean v.
—— v. Mills, p. 409.
—— v. Pittsburgh, etc., R. Co., p 2669.
Fletcher, American Exp. Co. v.
—— v. Boston, etc., Railroad (Mass.), 1 Allen 9, 79 Am. Dec. 695—p. 2080.
—— v. Boston, etc., Railroad, 73 N. E. 552, 187 Mass. 463, 105 Am. St. Rep. 414—p. 2238.
—— Urann v.
Fletcher Land Co., Hart v.
Flexman, Chicago, etc., R. Co. v.
Flinn, Atchison, etc., R. Co. v.
—— v. Philadelphia, etc., R. Co., pp. 1567, 1708, 1741, 2092, 2103.
Flint v. Boston, etc., Railroad, pp. 1278, 1474.
—— v. Christall, pp. 947, 4056.
—— v. Norwich, etc., Transp. Co., 6 Blatchf. 158, Fed. Cas. No. 4,873—p. 2024.
—— v. Norwich, etc., Transp. Co., 34 Conn. 554—p. 2024.
—— Sulakowski v.
Flint, etc., R. Co., Haggerty v.
—— Hansen v.
—— Hanson v.
—— Southern R. Co. v.
—— Hengstler v.
—— Jacobs v.
—— Lentz v.
—— Lewis v.
—— v. Stark, pp. 1883, 1918, 2585, 2647, 2648.
—— v. Weir, pp. 1760, 3144, 3184.
Flintham, Harmon v.
Flintshire, Ullman v.
Flitner, Derry v.
Floersheim Mercantile Co., Brown v.
Floersheim Mercantile Co., Brown v.
Flood v. Chesapeake, etc., K. Co., p. 2426.
—— v. Crowell, p. 3979.

Flood, Missouri, etc., R. Co. v.
Floody v. Great Northern R. Co., p. 2580.
Florence, Kansas, etc., R. Co. v.
Florence, etc., R. Co. v. Jensen, pp. 361, 362, 370, 548, 588.
—— v. Radetsky, p. 575.
Florida, Osborne v.
—— v. Pullman Palace Car Co., pp. 3223, 3224.
Florida Cent., etc., R. Co. v. Berry, pp. 533, 561, 627.
—— v. Lucas, pp. 1732, 1747, 1749.
Florida Fruit Exch., Savannah, etc., R. Co. v.
Florida R. Co. v. Dorsey, pp. 1679, 1682, 1744, 1880, 2268, 2909, 2993, 2994.
Florida R. Comm'rs v. Atlantic, etc., R. Co., pp. 23, 55, 67.
Florida R., etc., Co., Cutting v.
—— v. Webster, pp. 1757, 1812, 2210.
Florida So. R. Co. v. Hirst, pp. 193, 201, 202, 203, 204.
Florida, etc., R. Co. v. Berry, p. 895.
—— Daniels v.
—— v. Geiger pp. 2395, 2588.
—— Gillman v.
—— v. Hirst, pp. 1715, 2122, 2211, 2292.
—— v. Katz, pp. 1854, 1856.
—— v. Lucas, pp. 2676, 2840, 2945, 2954.
—— McIver v.
—— Railroad Comm'rs v.
—— v. Rudulph, pp. 2839, 2840, 2843, 2858.
—— v. Southern Supply Co., p. 659.
—— v. Sullivan, p. 2213.
—— Susong v.
—— Taylor v.
—— v. United States, 200 Fed. 797—pp. 3681, 3803.
—— v. United States, 234 U. S. 167, 34 S. Ct. 867—p. 3673.
—— v. Wade, pp. 1696, 1705.
Florida, etc., Tobacco Co., Georgia, etc., R. Co. v.
Florman v. Dodd, etc., Exp. Co., pp. 1034, 1067.
Florshein Bros. v. Howell, p. 1219.
Flory, San Antonio Tract. Co. v.
—— v. San Antonio Tract. Co., pp. 1910, 1913.
Flournoy, Columbus, etc., R. Co. v.
—— Nashville, etc., Railway v.
Flower v. Downs, p. 296.
—— v. Pennsylvania R. Co., p. 2526.
Floyd, Central, etc., R. Co. v.
Floytrup v. Boston, etc., Railroad, pp. 1877, 2238, 2297, 2748.
Flucks v. St. Louis, etc., R. Co., p. 1988.
Fluker v. Georgia R., etc., Co., pp. 190, 192, 205, 2525, 2527, 2528.
Flushing, etc., R. Co., Terry v.
Flynn v. Central Park R. Co., p. 2851.
—— Chicago City R. Co. v.
—— v. Consolidated Tract. Co., 45 Atl. 799, 64 N. J. L. 375—p. 2204.
—— v. Consolidated Tract. Co., 52 Atl. 369, 67 N. J. L. 546—pp. 1703, 2204.
—— v. Interborough Rapid Trans. Co., pp. 2687, 2690.
—— New York, etc., R. Co. v.
—— v. St. Louis, etc., R. Co., pp. 1036, 1037, 3394.
Foard v. Atlantic, etc., R. Co., pp. 499, 642, 654, 673, 3370.
Fockens v. United States Exp. Co., pp. 821, 824, 843, 880.
Foden v. Brooklyn Heights R. Co., pp. 1900, 1904, 2687.
Fogel v. San Francisco, etc., R. Co., p. 2298.
Foggan v. Lake Shore, etc., R. Co., pp. 556, 1249.
Foley v. Boston, etc., Railroad, pp. 1993, 1994, 2169.
—— v. Boston, etc., St. R. Co., pp. 204, 205, 1742, 2035.
—— v. Brunswick Tract. Co., pp. 1684, 1687, 2997.
—— Comer v.
—— Illinois Cent. R. Co. v.
—— Pacific Exp. Co. v.
Folliard, International, etc., R. Co. v.
Folmina, The.
Folsom, Kirk v.
Folts, International, etc., R. Co. v.
Fonda v. St. Paul City R. Co., pp. 2326, 2878, 2879, 3009.
Fonda, etc., R. Co., Goller v.
Fonseca v. Cunard Steamship Co., pp. 3141, 3164.
Fonsler, Atlantic City v.
Fontaine v. Boatmen's Sav. Inst., p. 340.
Fookes, Missouri, etc., R. Co. v.
Foot, In re.
Forbes v. Boston, etc., R. Co., pp. 370, 378, 389, 551, 553, 556, 595, 596, 597, 3274.
—— v. Chicago etc., R. Co., pp. 1540, 1541, 2355, 2374.
—— McGuinn v.
—— v. Merchants' Exp., etc., Co., p. 3924.
Ford v. Atlantic, etc., R. Co., pp. 3141, 3142, 3143.
—— v. Chicago, etc., R. Co., p. 3750.
—— v. Cotesworth, p. 355.
—— v. East Louisiana R. Co., pp. 1500, 2471, 2472.
—— Ft. Smith, etc., R. Co. v.
—— Houston, etc., R. Co. v.
—— v. Minneapolis St. R. Co., p. 3064.
—— v. Mitchell, p. 279.
—— v. Paducah City Railway, p. 2359.
—— v. Southern Railway, p. 2650.
—— Springer v.
Fordyce v. Allen, p. 2263.
—— v. Beecher, pp. 1542, 1562, 1563, 2428, 2473, 2483, 2493.
—— v. Chancy, pp. 1729, 1731, 2778.
—— v. Dempsey, p. 483.
—— v. Dillingham, pp. 1868, 1883.
—— Fullerton v.
—— v. Jackson, pp. 1577, 1814, 2004.
—— v. Johnson, pp. 156, 157.
—— v. McFlynn, pp. 726, 740, 1268, 1281.
—— v. Manuel, pp. 1596, 1599, 2468, 3103.
—— v. Merrill, p. 1797.
—— v. Moore, p. 2583.
—— v. Nix, pp. 2565, 3062.
—— v. Withers, pp. 1683, 1689, 1691, 1729, 1731, 1738, 2669.
Foro v. Alabama, etc., R. Co., p. 2322.
Forehand, Central, ect,. R. Co. v.
Foreman, Missouri Pac. R. Co. v.
—— v. Missouri Pac. R. Co. (Tex.), 46 S. W. 834—p. 1966.
—— v. Missouri Pac. R. Co., 4 Tex. Civ. App. 54, 23 S. W. 422—pp. 1966, 2602.
—— v. Norfolk, etc., Co., p. 1536.
—— v. Pennsylvania R. Co., p. 1576.
Forepaugh v. Delaware, etc., R. Co., p. 940.
Formes, Indianapolis Tract., etc., Co. v.
Formiller v. Detroit United Railway, pp. 1888, 1892, 2653, 2656, 2721, 2967.
Forrest, Louisville, etc., R. Co. v.
—— Southern R. Co. v.
Forrester, Georgia R., etc., Co. v.
—— v. Georgia R., etc., Co., 92 Ga. 699, 19 S. E. 811—pp. 615, 617, 732, 741, 748, 765, 766, 767, 3306, 3307, 3394, 3395, 3397, 3405.
—— v. Georgia R., etc., Co., 96 Ga. 428, 23 S. E. 416—p. 3306.
—— v. Metropolitan St. R. Co., pp. 2598, 2656.
Forrester & Co. v. Southern R. Co., pp. 782, 783, 785.
Forsaith, Concord, etc., Railroad v.
Forsee v. Alabama, etc., R. Co., pp. 1596, 1599, 1605, 2467, 2468, 2469, 3091.
Forster, O'Conner v.
Forsyth v. Boston, etc., R. Co., p. 2272.
—— McCall v.
Forsyth Bros. & Co., Camden, etc., R. Co. v.
Forsythe, Indianapolis, etc., R. Co. v.
—— v. Kimball, p. 3871.
—— v. Los Angeles R. Co., p. 2005.
—— v. Walker, pp. 756, 3370.
Fort v. Saunders, p. 862.
—— v. Southern Railroad, p. 3056.
—— Texas, etc., Railroad v.
Ft. Clark St. Railroad v. Ebaugh, pp. 2420, 2421, 2422.
Fort Dodge, etc., R. Co., Heggen v.
—— Sandquist v.
Fort Grain Co. Gulf, etc., R. Co. v.
Fort Pitt Tract. Co., Gray v.
Fort Produce Co. v. Dissen, pp. 329, 478, 479.
Ft. Scott, etc., R. Co. v. Sparks, p. 2217.
Fort Smith Light., etc., Co., Oliver v.
Ft. Smith, etc., R. Co. v. Chandler Cotton Oil Co., pp. 1200, 3669.
—— v. Ford, pp. 1856, 1867.
—— v. Williams, pp. 659, 676.
Fort. Wayne Elect. Co., Louisville, etc., R. Co. v.
Ft. Wayne Tract. Co. v Hardendorf, pp. 197, 200, 2123, 2193, 2194, 2867, 2893.
Ft. Wayne, etc., R. Co., Archer v.
—— Bradley v.
—— Detroit v.
—— Etson v.
—— Kingston v.
—— Werbowlsky v.
Ft. Wayne, etc., Tract. Co. v. Olinger, pp. 1901, 1903, 2599.
Ft. Worth St. R. Co. v. Ferguson, pp. 2087, 2088, 2604.
Ft. Worth Transfer Co. v. Isaacs, pp. 601, 871.
Ft. Worth, etc., R. Co. v. Alexander, p. 1342.
—— Andrews v.
—— v. Beauchamp, pp. 238, 695.
—— v. Bribble, p. 2425.
—— v. Cage Cattle Co., p. 1279.
—— v. Caruthers, pp. 479, 483.
—— v. Cushman, p. 1639.
—— v. Daggett, pp. 1285, 1287, 1289, 1343, 3357.
—— v. Davis, pp. 1518, 1770, 1785.
—— v. Day, pp. 2813, 2845, 2895.
—— v. Enos, pp. 1730, 2869.
—— v. Fuller, pp. 3311, 3337, 3345.
—— v. Galton, pp. 208, 243, 1279, 1338.

Ft. Worth, etc., R. Co., Garlington v.
—— v. Garrison, p. 839.
—— v. Greathouse, pp. 474, 693, 855, 977, 1054, 1063, 1073, 1076, 1077, 1078, 1085, 1086, 1095, 1096, 1116, 1117, 1122, 1304, 1317, 1318, 1320, 1322, 1323, 1327, 1341, 1350, 1398, 1414, 1415, 1453, 1470, 1480, 1481, 3368.
—— v. Gribble, pp. 2434, 2480.
—— v. Hamm, p. 1327.
—— Hardin v.
—— v. Hardin, p. 1524.
—— v. Harlan, pp. 831, 835, 837.
—— v. Harrold, p. 1441.
—— v. Hyatt, pp. 1938, 1939.
—— v. James, pp. 1316, 1331, 1332.
—— Jones v.
—— v. Jones, pp. 1630, 2444.
—— v. Kennedy, pp. 1524, 1740.
—— v. Lock, p. 1270.
—— v. McAnulty, pp. 796, 1336, 3289.
—— v. McCarty, p. 3140.
—— Martin v.
—— v. Martin, pp. 273, 274, 275, 286, 292, 293, 295.
—— v. Masterson, pp. 3271, 3272.
—— v. Richards, p. 1326.
—— v. Riley, pp. 268, 272, 273.
—— v. Rogers, 21 Tex. Civ. App. 605, 53 S. W. 366—pp. 947, 950, 2093, 2772.
—— v. Rogers, 24 Tex. Civ. App. 382, 60 S. W. 61—pp. 1729, 1753, 1755, 2094, 2172, 2345.
—— v. Rosenthal Millinery Co., pp. 3122, 3149.
—— v. Shanley, pp. 822, 3396.
—— v. Spear, pp. 1766, 1910, 1911, 2904.
—— v. Stewart, p. 2023.
—— v. Stingle, pp. 1694, 2772.
—— v. Stone, p. 1730.
—— Sturdivant v.
—— v. Underwood, pp. 452, 453, 461.
—— v. Viney, pp. 1884, 1885.
—— v. Waggoner Nat. Bank, pp. 276, 1279, 1336, 1340, 1479.
—— v. Walker, pp. 2288, 2777.
—— v. White, pp. 1988, 1991, 2760.
—— v. Wilkerson, p. 2913.
—— v. Williams, pp. 3311, 3331, 3337, 3367.
—— v. Wilson, p. 1105.
—— Woolridge & Sons v.
—— v. Word, pp. 753, 758, 1347.
—— v. Work, pp. 1701, 1782, 1797, 1910, 1913, 2873, 2875, 2876.
—— v. Wright (Tex.), 58 S. W. 846—p. 1043.
—— v. Wright, 24 Tex. Civ. App. 291, 58 S. W. 846—pp. 971, 978, 984, 1002, 1016, 1048, 1374, 1393, 1394, 3337, 3365.
—— v. Wright, 27 Tex. Civ. App. 198, 64 S. W. 1001—p. 1043.
—— v. Wright, 30 Tex Civ. App. 234, 70 S. W. 335—pp. 424, 451.
Fortier v. Pennsylvania Co., p. 997.
Fortin v. Bay City Tract., etc., Elect. Co., p. 2934.
Fortlage, Harrison v.
Fortune, Chesapeake, etc., R. Co. v.
—— v. Southern R. Co., p. 2507.
Forty Second St., etc., R. Co., Conley v.
—— Garner v.
—— Hayes v.
Forty Second St., etc., R. Co., Howard v.
—— Lax v.
—— Platt v.
—— Rott v.
—— Unger v.
Forty-Second, etc., R. Co., Franklin v.
Foseue, Cox v.
Fosnes v. Duluth St. R. Co., p. 2252.
Foss v. Boston, etc., R. Co., pp. 1867, 1912, 2122.
—— Toledo, etc., R. Co. v.
Foster, Cheshire Railroad v.
—— Chicago City R. Co. v.
—— v. Cleveland, etc., R. Co., p. 3648.
—— v. Davenport, pp. 3478, 3569.
—— v. Frampton, pp. 1231, 1235.
—— Houston, etc., R. Co. v.
—— International, etc., R. Co. v.
—— Kansas, etc., R. Co. v.
—— Ladd v.
—— Lake Shore, etc., R. Co. v.
—— Louisville, etc., R. Co. v.
—— Missouri, etc., R. Co. v.
—— v. Old Colony St. R. Co., pp. 2313, 2795.
—— St. Louis, etc., R. Co. v.
—— v. Seattle Elect. Co., pp. 1504, 1505, 1519, 1521, 2154, 2942, 2965.
—— Thurston v.
—— v. Union Tract. Co., p. 2393.
—— Wabash R. Co. v.
Foster Lumber Co., Atchison, etc., R. Co. v.
Foulks, Illinois Cent. R. Co. v.
Fourche River Lumber Co. v. Bryant Lumber Co., p. 3701.
450 Tons of Kainit, West Hartlepool Steam Nav. Co. v.
Fourteenth St. R. Co., Wilson v.
4,885 Bags of Linseed, pp. 3936, 3939, 3944, 3945, 3946, 3947.
4,300 Tons Pyrites Ore, Adamson v.
Foust v. Lee, p. 1339.
Foward v. Pitlard, pp. 729, 734, 750, 752.
Fowden v. Pacific Coast Steamship Co., p. 3998.
Fowle v. Pitt, p. 3288.
Fowler, Chickering v.
—— v. Davenport, pp. 735, 808, 810, 849, 850, 853, 855, 1014.
—— Gulf, etc., R. Co. v.
—— Louisville, etc., R. Co. v.
—— Pullman Palace Car Co. v.
—— St. Louis, etc., R. Co. v.
—— v. Sterling, p. 337.
—— Texas Cent. R. Co. v.
Fowler Comm. Co. v. Chicago, etc., R. Co., p. 245.
Fowlks v. Southern R. Co., p. 3045.
Fox, Baltimore, etc., R. Co. v.
—— v. Boston, etc., R. Co., pp. 617, 638, 653, 658, 3276, 3410.
—— v. Chicago, etc., R. Co., p. 2912.
—— Gulf, etc., R. Co. v.
—— v. Holt, pp. 520, 1170, 3865.
—— Louisville, etc., R. Co. v.
—— v. Metropolitan St. R. Co., p. 2825.
—— v. Michigan Cent. R. Co., pp. 2116, 2191, 2322.
—— Southern Exp. Co. v.
Fox & Bro. v. Willis & Bro., pp. 1212, 1244.
Fox River Valley, etc., R. Co., Zimmer v.
Fox v. Chicago, etc., R. Co., p. 3274.
—— v. Troy, etc., R. Co., p. 3257.
Fraam v. Grand Rapids, etc., R. Co., pp. 3172, 3174.
Frahm v. Siegel-Cooper Co., p. 1751.
Frair, Johnson v.
Fraloff, New York, etc., R. Co., v.
—— v. New York, etc., R. Co., p. 3197.
—— Railroad Co. v.
Frame, Denver, etc., R. Co. v.
—— v. Oregon Liquor Co., pp. 1212, 1219, 1220, 1229, 1237, 1246.
Frampton, Foster v.
Francis v. Cockrell, p. 1849.
—— v. Dubuque, etc., R. Co., pp. 894, 899.
—— Mobile, etc., R. Co. v.
—— v. New York Steam Co., p. 2202.
Francis Wright, The.
Francisco v. Troy, etc., R. Co., 78 Hun 13, 29 N. Y. S. 247, 60 N. Y. St. Rep. 797—p. 2194.
—— v. Troy, etc., R. Co., 88 Hun 464, 34 N. Y. S. 859, 68 N. Y. St. Rep. 792—pp. 1986, 2178, 2889.
Frank v. Adams Exp. Co., p. 783.
—— Delaware, etc., R. Co. v.
—— v. Grand Tower, etc., R. Co., pp. 529, 900, 903, 907.
—— v. Ingalls, pp. 1610, 1612, 1616.
—— v. Keith, p. 750.
—— v. Metropolitan St. R. Co., pp. 1699, 2896.
Frank Bird Transfer Co. v. Krug, p. 2231.
Frank Bros. & Co. v. Central R Co., pp. 577, 897, 906, 916, 917.
Frank Co., Gulf, etc., R. Co. v.
Frank Simpson Fruit Co. v. Southern Pac. Co., p. 329.
Frank Waterhouse & Co., Sweeney v.
Frank & Co., Southern R. Co. v.
Frankenberg, Illinois Cent. R. Co. v.
Frankford, etc., R. Co., Aikin v.
—— Kandall v.
Frankfort, etc., R. Co., Thomas v.
Frankfort, etc., Tract. Co., Marshall v.
—— v. Marshall, p. 1853.
Frankfurt v. Weir, p. 494.
Franklin v. Atlanta, etc., R. Co., p. 2088.
—— v. Forty-Second, etc., R. Co., p. 2811.
—— Gulf, etc., R. Co. v.
—— v. Louisville, etc., R. Co., pp. 647, 651, 659, 660, 662, 679.
—— St. Louis, etc., R. Co. v.
—— v. St. Louis, etc., R. Co., p. 2244.
—— v. Southern California Motor Road Co., p. 1868.
—— v. Visalia Elect. R. Co., p. 2753.
Franklin Printing, etc., Co. v. Behrens, p. 2837.
Franklin Trust Co. v. Philadelphia, etc., R. Co., 222 Pa. 96, 70 Atl. 949, 22 L. R. A., N. S., 828—pp. 311, 315, 337, 356, 370, 372, 380.
—— v. Philadelphia, etc., R. Co., 237 Pa. 519, 85 Atl. 855—p. 407.
Franklin, etc., Publishing Co. v. Behrens, p. 2689.
Franks, St. Louis, etc., R. Co. v.
Fraser v. California, etc., R. Co., pp. 2119, 2311.
—— v. Harper House Co., p. 1751.
—— v. Witt, p. 1211.
Frasier v. Charleston, etc., R. Co., pp. 811, 1376, 1383, 1483.
Fraywick v. Southern Railway, p. 642.
Frazar, St. Louis, etc., R. Co. v.
Frazee, Louisville, etc., R. Co. v.

Frazer, Chicago, etc., R. Co. v.
—— v. Marsh, p. 3864.
—— v. Smith, p. 659.
Frazer & Co. v. Hilliard, p. 1239.
Frazier, Alabama, etc., R. Co. v.
—— v. Atchison, etc., R. Co., p. 517.
—— Camden Interstate R. Co. v.
—— v. Kansas, etc., R. Co., pp. 232, 273, 284.
—— v. New York, etc., K. Co., pp. 2085, 2086.
—— Sanderson v.
—— Young v.
Frederich v. N. Y., N. H. & H. R. R., 3668.
Frederick v. Louisville, etc., R. Co., pp. 818, 890, 917.
—— v. Marquette, etc., R. Co., pp. 1049, 2462.
Frederick Leyland & Co., Delta Bag Co. v.
Fredericks v. Northern Cent. Railroad, pp. 1687, 1723, 2031, 2961.
Freeback v. Missouri Pac. R. Co., p. 2517.
Freed, Memphis, etc., R. Co. v.
Freedon v. New York, etc., R. Co., p. 1498.
Freeman v. Atchison, etc., R. Co., pp. 1622, 1623, 1631, 1632.
—— v. Bank, pp. 383, 393.
—— Central R. Co. v.
—— Chy Lung v.
—— v. Collins Park, etc., K. Co., p. 3006.
—— v. Consolidated Tract. Co., p. 2910.
—— v. Detroit, etc., R. Co., p. 158.
—— Galveston, etc., R. Co. v.
—— Gulf, etc., R. Co. v.
—— v. Louisville, etc., R. Co., pp. 3282, 3388.
—— v. Metropolitan St. R. Co., p. 1936.
—— v. Newton, p. 3140.
—— v. New York City R. Co., p. 1644.
—— v. Pere Marquette R. Co., p. 2168.
—— v. Puckett, pp. 1867, 1869, 2721, 2750, 2753.
—— v. Quebedeaux, p. 779.
—— St. Louis, etc., R. Co. v.
—— v. St. Louis, etc., R. Co., pp. 1025, 1031.
—— v. Wilmington, etc., Tract. Co., pp. 1687, 1695, 1742, 1890, 1996, 2234, 2290, 2653, 2687, 2858.
—— Ziegler v.
Freeman & Sons Mfg. Co., Pratt v.
Freeport R., etc., Co., Crotzer v.
Freiberg, Cleveland, etc., R. Co. v.
Freidenrich v. Baltimore, etc., K. Co., pp. 1633, 2442.
Fremont v. Metropolitan St. R. Co., p. 2816.
Fremont, etc., R. Co. v. French, pp. 1501, 1764, 2839.
—— Heumphreus v.
—— v. Haghlad, pp. 1501, 1512, 1513, 1524, 1537, 2580, 2590.
—— v. New York, etc., R. Co., pp. 3330, 3347.
—— v. Root, pp. 2211, 2653, 2851.
—— Shellenberg v.
—— State v.
—— v. Waters, pp. 211, 1493, 3262, 3289.
French v. Buffalo, etc., R. Co., pp. 931, 1018, 1037.
—— v. Detroit, etc., R. Co., p. 2141.
—— Field v.
—— Fremont, etc., R. Co. v.
—— v. Merchants', etc., Transp. Co., pp. 1631, 3162, 3166.
French, St. Louis, etc., R. Co. v.
—— v. Star Union Transp. Co., p. 573.
Frere v. Von Schoeler, p. 3585.
Fresno City R. Co., Maxwell v.
—— Renfro v.
Fretwell v. Seaboard, etc., Railway, p. 2516.
Fretz v. Bull, p. 4054.
Freudenstein, Pullman Palace Car Co. v.
Frey v. New York Cent., etc., K. Co., p. 617.
—— Stockton v.
—— Texas Mid. R. Co. v.
—— The.
Fri, The.
Friar, Johnson v.
—— v. Orange, etc., R. Co., pp. 2042, 2052.
Fricar, Johnson v.
Frieberg v. Cleveland, etc., R. Co., pp. 567, 872.
Fried v. Wells Fargo & Co., p. 1046.
Friedel v. Brooklyn Heights R. Co., p. 2860.
Friederick, Driess v.
Friedlander v. Texas, etc., R. Co., pp. 306, 308, 317, 356, 357, 371, 373, 376, 389.
Friedlander & Co. v. Cornell, p. 279.
Friedman v. Consolidated Tract. Co., p. 2910.
—— v. Metropolitan, etc., Co., p. 528.
—— Seaboard Air Line Railway v.
—— Wabash, etc., R. Co. v.
Friel, Chesapeake, etc., R. Co. v.
Friend, Illinois Cent. R. Co. v.
—— v. Woods, pp. 729, 736, 737.
Friend Paper Co., Brooks v.
Friendschaft, The.
Frier, Atchison, etc., R. Co. v.
Fries, Pennsylvania K. Co. v.
Friesland, The.
Frink v. Potter, p. 2127.
—— Woodbury v.
Frink & Co. v. Coe, pp. 1726, 1749, 1837, 3069.
Frisbee, Clines v.
Frisby, St. Louis, etc., R. Co. v.
—— v. Sheridan, p. 551.
Fritz, Ex parte.
—— v. Southern R. Co., p. 2871.
Frizzell v. Omaha St. R. Co., pp. 204, 2723.
Frobisher v. Fifth Ave. Transp. Co., pp. 1833, 1838.
Frogley, Missouri, etc., R. Co. v.
Frohlich Glass Co. v. Pennsylvania Co., pp. 432, 992, 993.
Frohriep v. Lake Shore, etc., R. Co., p. 1844.
Fromme, Gulf, etc., R. Co. v.
Front St. Cable R. Co., Dudley v.
Front St., etc., R. Co., Hawkins v.
Frost, Cohen v.
—— v. Grand Trunk R. Co., pp. 1922, 1964, 2163.
—— v. Los Angeles R. Co., p. 2882.
—— Williams v.
Frothingham v. Jenkins, pp. 1153, 1166.
Fruit Dispatch Co., Kemendo v.
Fry v. Mercantile Bank, p. 713.
—— Missouri, etc., K. Co. v.
—— v. St. Louis Transit Co., p. 1703.
—— State v.
Fuhry v. Chicago City R. Co., p. 2004.
Fulbright v. Wabash R. Co., p. 1479.
Fulgham, Louisville, etc., R. Co. v.
Fulghum v. Atlantic, etc., R. Co., pp. 1784, 2128.
Fulks v. St. Louis, etc., R. Co., pp. 2125, 2152, 2373, 2620, 2876.
Fullbright, Cincinnati St. R. Co. v.
Fuller v. Atlantic, etc., R. Co., p. 1476.
—— v. Boston, etc., R. Co., p. 2285.
—— v. Bradley, pp. 3, 209, 602.
—— Byrnes v.
—— v. Chicago, etc., R. Co., pp. 142, 173, 1197.
—— v. Denison, etc., K. Co., pp. 1712, 2302.
—— Ft. Worth, etc., R. Co. v.
—— v. Jamestown St. R. Co., p. 2744.
—— v. Lake Shore, etc., R. Co., p. 978.
—— v. Madison Mut. Ins. Co., pp. 323, 984.
—— v. Naugatuck R. Co., pp. 210, 2570, 2666, 2751.
—— Railroad Co. v.
—— Toledo Consol. St. R. Co. v.
—— Wells, Fargo & Co.'s Exp. v.
Fuller's Exp. Co., American Silk Dyeing, etc., Co. v.
Fullerton v. Atlantic, etc., R. Co., p. 152.
—— v. Fordyce, pp. 1781, 2089, 2269.
—— State v.
Fulmer, Jenks v.
—— v. Southern R. Co., p. 1598.
Fulton, Chandler v.
—— Mad River, etc., R. Co. v.
—— Merriman v.
Fulton, etc., Co., Merriman v.
—— v. Thompson, p. 1209.
Fulton, etc., Cotton Mills v. Hudson Nav. Co., p. 553.
Fults v. Metropolitan St. K. Co., pp. 2157, 2746.
Funderburg v. Augusta, etc., R. Co., pp. 191, 194, 199, 1604, 1936, 2428.
Funderburk, Texas, etc., R. Co. v.
Funk, Gulf, etc., R. Co. v.
Funsten Dried Fruit, etc., Co. v. Toledo, etc., R. Co., pp. 765, 870, 872, 3342.
Fuqua, Gulf, etc., R. Co. v.
Furgason v. Citizens' St. R. Co., pp. 1911, 1912, 1918, 2026.
Furlow, St. Louis, etc., R. Co. v.
Furman v. Chicago, etc., R. Co., 57 Iowa 42, 10 N. W. 272—p. 577.
—— v. Chicago, etc., R. Co., 62 Iowa 395, 17 N. W. 598, 6 Am. & Eng. R. Cas. 280—pp. 575, 576.
—— v. Chicago, etc., K. Co., 81 Iowa 540, 46 N. W. 1049—p. 577.
—— v. Union Pac. R. Co., pp. 361, 378, 561, 3274.
Furnam, Putnam v.
Furness, Baunwall, etc., Co. v.
Furness, etc., Co., Disney v.
—— Johnstone v.
—— v. Leyland Shipping Co., p. 3957.
—— Swift & Co. v.
Furnish v. Missouri Pac. K. Co., 102 Mo. 438, 44 Am. & Eng. R. Cas. 322, 13 S. W. 1044, 22 Am. St. Rep. 781—pp. 1716, 1732, 1740, 1812, 1842, 2694, 3005.
—— v. Missouri Pac. R. Co., 102 Mo. 669, 15 S. W. 315, 22 Am. St. Rep. 800—p. 2694.
Furniss, Buckley v.
Furstenheim v. Memphis, etc., R. Co., pp. 3176, 3179.

Furthman, Merchants' Despatch Transp. Co. v.
—— Merchants' Dispatch Transp. Co. v.
Furthmann, Merchants' Dispatch Transp. Co. v.
Fussell, St. Louis, etc., R. Co. v.

G

Gabbert v. Hackett, pp. 1559, 1565.
Gable v. Delaware, etc., R. Co., pp. 2164, 2165.
Gabler v. McChesney, 70 N. Y. S. 191, 60 App. Div. 583—pp. 3956, 3961.
—— v. McChesney, 70 N. Y. S. 195, 60 App. Div. 590—p. 3964.
Gaborron v. Kreeft, pp. 352, 353.
Gabriel v. Metropolitan St. R. Co., p. 1894.
Gaddie, Louisville, etc., R. Co. v.
Gadsden, etc., R. Co. v. Causler, pp. 1736, 1739, 1869, 1883, 2175, 2242.
Gaffman v. Boston, etc., R. Co., p. 3167.
Gaffney v. Brooklyn City R. Co., p. 2816.
—— v. St. Paul City R. Co., pp. 1515, 1517, 1519, 1522, 2859, 2863.
—— v. Union Tract. Co., p. 2195.
Gage, Fitchburg R. Co. v.
—— v. Illinois Cent. R. Co., p. 1914.
—— v. Jaqueth, p. 302.
—— Machine Co. v.
—— v. Morse, pp. 355, 701, 714.
—— v. St. Louis Transit Co., pp. 1958, 2166, 2337, 2738, 2882, 2893.
—— Tirrell v.
—— v. Tirrell, pp. 10, 728, 733, 749, 750.
Gagnon v. Boston Elevated R. Co., p. 1830.
Gail, Smith v.
Gaines v. Chester Tract. Co., pp. 1689, 2810.
—— Louisville, etc., R. Co. v.
—— Pullman Southern Car Co. v.
—— v. Union, etc., Ins. Co., pp. 322, 325, 326, 781, 813, 897, 946, 956, 981, 988, 996, 1000, 1007, 1032, 1033, 1036, 1039, 3880.
—— Wilson v.
Gainesville Mid. Railway v. Jackson, pp. 1881, 1892, 1893.
Gaither v. Barnet, p. 734.
Galam, The.
Galaviz v. International, etc., R. Co., p. 1552.
Galbraith, etc., Co., Adler v.
Gale, Brock v.
—— Brunswick, etc., R. Co. v.
—— v. Delaware, etc., R. Co., p. 1973.
—— v. Eastman, p. 1490.
—— Levois v.
Galehouse v. Minneapolis, etc., R. Co., p. 1524.
Galena, etc., R. Co., Corgar v.
—— v. Fay, pp. 1684, 1721, 1727, 2113, 2119, 2220, 2294, 2368, 2377, 2400, 2951.
—— v. Kae, pp. 208, 210, 216, 228, 229, 233, 234, 246 247, 253, 607, 621, 653, 1153.
—— v. Yarwood, 15 Ill. 468—pp. 210, 1738, 2220.
—— v. Yarwood, 17 Ill. 509, 65 Am. Dec. 682—pp. 2260, 2673.
Gales v. Hailman, p. 789.
Galgate Ship Co., Starr & Co. v.
Gallagher v. Bowie, pp. 1728, 1729, 1749, 1984, 2034, 2037, 2942.
—— Hedding v.
Gallagher, Herrick v.
—— Texas Mex. R. Co. v.
—— Texas, etc., R. Co. v.
—— v. West End St. R. Co., pp. 2154, 2383.
—— West Philadelphia, etc., R. Co. v.
Gallaher, New York, etc., R. Co. v.
Gallegly v. Kansas, etc., R. Co., pp. 2417, 3021.
Gallena v. Hot Springs Railroad, pp. 2480, 2483, 2485.
Galliers v. Chicago, etc., R. Co., pp. 1447, 1448.
Galligan v. Old Colony St. R. Co., p. 2956.
Galliher, Norfolk, etc., R. Co. v.
Galloway v. Chicago, etc., R. Co., 87 Iowa 458, 54 N. W. 447, 58 Am. & Eng. R. Cas. 245—pp. 1712, 2258, 2367, 2514.
—— v. Chicago, etc., R. Co., 56 Minn. 346, 57 N. W. 1058, 23 L. R. A. 442, 45 Am. St. Rep. 468—pp. 2507, 2527.
—— v. Erie R. Co., 95 N. Y. S. 17, 107 App. Div. 210, 17 N. Y. Ann. Cas. 209—p. 1286.
—— v. Erie R. Co., 102 N. Y. S. 25, 116 App. Div. 777—pp. 1012, 1383.
—— v. Hughes, pp. 531, 538.
Galt v. Adams Exp. Co., pp. 731, 763, 767, 768.
—— v. Archer, pp. 1145, 1172, 1173.
Galton, Ft. Worth, etc., R. Co. v.
Galveston Chamber of Commerce, Railroad Comm. v.
—— v. Railroad Comm., p. 124.
Galveston City R. Co., Allen v.
—— Christie v.
—— v. Hewitt, pp. 1731, 1978.
Galveston, etc., R. Co. v. Alberti, p. 1886.
—— Allen v.
—— v. Allison, pp. 946, 3342, 3357.
—— Armstrong v.
—— v. Armstrong, p. 3545.
—— Avey v.
—— v. Ball, pp. 822, 847, 849, 853, 854, 855, 861, 949, 950, 954, 1055, 1069, 1073, 1077, 1079, 1099, 1102, 1111.
—— v. Barnett, pp. 490, 682, 802.
—— v. Bean, pp. 2046, 2095.
—— v. Bell, pp. 851, 860.
—— v. Berry, p. 1885.
—— v. Boothe, pp. 1087, 1095, 1414, 1415.
—— v. Borden, pp. 583, 1302.
—— v. Botts, 22 Tex. Civ. App. 609, 55 S. W. 514—pp. 451, 996, 1297, 3336.
—— v. Botts (Tex. Civ. App.), 70 S. W. 113—pp. 1318, 1352.
—— Burton v.
—— Cassiano v.
—— Christie v.
—— v. Contreras, pp. 2603, 2604.
—— v. Cooper, 70 Tex. 67, 8 S. W. 68—pp. 1910, 1964.
—— v. Cooper, 2 Tex. Civ. App. 42, 20 S. W. 990—pp. 1527, 1885, 1910, 1964, 1965.
—— Crawleigh v.
—— v. Crier, pp. 738, 742, 1680, 1691, 2844.
—— v. Crippen, p. 1077.
Galveston, etc., R. Co. v. Crispi, pp. 1869, 1875, 1885, 1887.
—— v. Crow, pp. 522, 3469, 3604, 3661, 3840.
—— v. Davidson, pp. 2113, 2171.
—— Davis v.
—— v. Davis, p. 2300.
—— De Castillo v.
—— v. De Castillo, p. 2264.
Galveston, etc., R. Co. v. Donahoe, p. 2059.
—— v. Douglass, pp. 652, 660, 679.
—— v. Efron, pp. 815, 849, 855, 865, 1027, 1036, 1041.
—— v. Fales, pp. 937, 3114, 3123, 3132, 3536.
—— v. Febo, p. 1073.
—— v. Fink, pp. 1502, 1503, 1882, 2329, 2576.
—— v. Freeman, p. 1440.
—— v. Garcia, pp. 2589, 2604.
—— v. Gildea, p. 695.
—— v. Giles, p. 864.
—— Good v.
—— v. Goodwin, p. 2734.
—— v. Green, p. 2694.
—— v. Harman, p. 1408.
—— Henderson v.
—— Herring v.
—— v. Herring, 102 Tex. 100, 113 S. W. 521—pp. 1694, 2113.
—— v. Herring (Tex. Civ. App.), 24 S. W. 939—p. 3358.
—— v. Herring (Tex. Civ. App.), 28 S. W. 580—p. 1355.
—— v. Herring (Tex. Civ. App.), 36 S. W. 129, 130—pp. 1120, 1303, 1311, 1337, 2583.
—— Hicks v.
—— v. Horne, pp. 815, 822, 1027, 1130.
—— v. House, pp. 335, 1127, 1129, 1199, 1202, 1203, 1204.
—— v. Houston, p. 3344.
—— v. Hubbard, p. 1886.
—— v. Hunt, pp. 700, 712, 897, 901.
—— v. Ivey, p. 3358.
—— v. Jackson, pp. 286, 287, 1279, 1332, 1335.
—— v. Jessee, pp. 643, 659, 666, 667, 668, 669, 672, 673, 683.
—— Johnson v.
—— v. Johnson (Tex.), 19 S. W. 867—pp. 834, 855, 856, 1321, 1350, 1353.
—— v. Johnson (Tex. Civ. App.), 29 S. W. 428—p. 1353.
—— v. Karrer, pp. 1313, 1319, 1323.
—— v. Kelley, pp. 854, 1127, 1128, 1351.
—— v. Kinnebrew, pp. 1613, 1635.
—— v. Krenek, p. 2249.
—— v. La Prelle, pp. 2051, 2053, 2055, 2064, 2771.
—— v. Le Gierse, pp. 2113, 2114, 2143, 2151, 2156, 2319.
—— Liefert v.
—— v. Long, pp. 1689, 1692, 2028, 2030, 2417, 2418, 2419.
—— Lytle v.
—— McCarty v.
—— v. McMonigal, pp. 2042, 2046, 2705.
—— McNeil v.
—— v. Mathes, pp. 1526, 1887, 2269.
—— v. Matula, p. 3398.
—— v. Matzdorf, p. 2508.
—— v. Morris, 94 Tex. 505, 61 S. W. 709—pp. 1953, 2114, 2151, 2172.
—— v. Morris, pp. 1956, 2221, 2283, 2292.
—— v. Morrison, p. 1766.
—— Mullen v.
—— v. Noelke, p. 1336.
—— Norton v.
—— Norwood v.
—— v. Parsley, pp. 1689, 1691, 1694, 2211, 2589, 2683, 2697.
—— v. Patillo, pp. 1694, 1985, 2220.
—— v. Patterson, pp. 1605, 1606.
—— v. Piper Co., pp. 3604, 3661, 3662, 3663, 3840.
—— v. Powers, p. 1337.

Galveston, etc., R. Co. v. Quilhot (Tex. Civ. App.), 123 S. W. 200—p. 807.
—— v. Quilhot (Tex. Civ. App.), 134 S. W. 261—pp. 760, 763, 764, 845.
—— Ratteree v.
—— v. Roemer, pp. 796, 2566.
Galveston, etc., R. Co. v. Sanchez, p. 2251.
—— v. Schafermeyer, p. 3398.
—— v. Schmidt, p. 215.
—— v. Scott, 44 S. W. 589, 18 Tex. Civ. App. 321—pp. 2078, 2772.
—— v. Scott, 79 S. W. 642, 34 Tex. Civ. App. 501—p. 2428.
—— v. Short, pp. 507, 1094, 1140, 1411, 3331.
—— v. Silegman, pp. 333, 334, 335, 337, 607, 637, 851, 864, 865, 956, 1118 1122, 1123, 1127, 1128, 1272, 1360.
—— v. Smith, 59 Tex. 406—pp. 2151, 2249, 2263, 2319.
—— v. Smith, 81 Tex. 479, 482, 17 S. W. 133—pp. 919, 2570, 3160, 3161, 3169, 3174.
—— v. Smith, 2 Tex. App. Civ. Cas., § 138—pp. 639, 758, 778, 880.
—— v. Smith (Tex. Civ. App.), 24 S. W. 668—pp. 3160, 3161, 3169.
—— v. Snead, pp. 1562, 1565, 1808, 1985.
—— State v.
—— v. Stovall, pp. 471, 1314, 1351.
—— v. Texas, pp. 3551, 3552, 3559, 3560, 3561, 3562.
—— v. Thompson (Tex. Civ. App.), 23 S. W. 930—pp. 1086, 1096, 1107, 1415.
—— v. Thompson (Tex. Civ. App.), 44 S. W. 8—pp. 441, 443, 1295, 1325
—— v. Thompson (Tex. Civ. App.), 44 S. W. 810—p. 442.
—— v. Thornsberry, pp. 1767, 1798, 1878, 2357, 2570, 2639, 2906, 2984.
—— v. Tuckett (Tex. Civ. App.), 25 S. W. 150—pp. 863, 881, 1307, 1327, 1351, 1359.
—— v. Tuckett (Tex. Civ. App.), 25 S. W. 670—p. 856.
—— v. Turner, p. 2473.
—— v. Waldo, p. 1808.
—— v. Walker, pp. 2733, 2734.
—— v. Wallace (Tex. Civ. App.), 117 S. W. 169—pp. 3445, 3602, 3661, 3662.
—— v. Wallace, 223 U. S. 481, 56 L. Ed. 516, 32 S. Ct. 205—pp. 3444, 3469, 3470.
—— v. Warnken, pp. 1303, 1312, 1327.
—— v. Watson, pp. 637, 643, 664, 666.
—— Williams v.
—— v. Williams (Tex. Civ. App.), 25 S. W. 311—pp. 1092, 1093, 1096.
—— v. Williams (Tex. Civ. App.), 25 S. W. 1019—pp. 864, 1085, 1086, 1095, 1359, 1415, 1431.
—— v. Wiseman, p. 1664.
—— v. Wood, etc., Cattle Co., p. 1203.
—— v. Word, p. 262.
—— v. Young, pp. 1841, 1999, 2683, 2793.
—— v. Zantzinger, p. 2482.
Galvin, Warehouse, etc., Supply Co. v.
Gamble, Central R., etc., Co. v.
Gamble-Robinson Comm. Co. v. Chicago, etc., R. Co., pp. 3632, 3706.
Gamble-Robinson Comm. Co. v. Delaware, etc., R. Co., p. 430.
—— v. Northern Pac. R. Co., 107 Minn. 187, 119 N. W. 1068—p. 690.
—— v. Northern Pac. R. Co., 119 Min. 40, 137 N. W. 19—pp. 1113, 1115.
Gammage, St. Louis, etc., R. Co. v.
Gammett, Holland v.
Ganguzza v. Anchor Line, p. 3989.
Ganiard v. Rochester, etc., R. Co., pp. 2149, 2817.
Ganley v. Brooklyn City R. Co., p. 2803.
Gann v. Chicago, etc., R. Co., 65 Mo. App. 670—p. 465.
—— v. Chicago, etc., R. Co., 72 Mo. App. 34—pp. 1297, 1315.
—— Georgia R. Co. v.
—— Gulf, etc., R. Co. v.
Gannon v. Chicago, etc., R. Co., pp. 1526, 1965, 2075, 2305, 2306, 2366.
—— v. New York, etc., R. Co., p. 2886.
Gans v. Auchincloss, p. 3951.
—— v. St. Louis, etc., R. Co. v.
Gans Steamship Line, Holman v.
Gants, Atchison, etc., R. Co. v.
Gantt, Pollock & Co. v.
Garber v. Joline, p. 2810.
Garberson v. Transcontinental Freight Co., p. 772.
Garcia, Galveston, etc., R. Co. v.
—— Mexican Nat. R. Co. v.
—— Texas, etc., R. Co. v.
Garden Grove Bank v. Humeston, etc., R. Co., pp. 338, 356, 360, 369, 378, 3274.
Gardiner, Chicago, etc., R. Co. v.
Gardiner v. New York, etc., R. Co., pp. 1075, 3163, 3164, 3166.
Gardner, Atlanta, etc., R. Co. v.
—— v. Boston Elevated R. Co., pp. 1743, 2952.
—— v. Chase, p. 333.
—— Chicago, etc., R. Co. v.
—— v. Detroit St. R. Co., pp. 1890, 3005.
—— v. Metropolitan St. R. Co., 122 S. W. 389, 223 Mo. 389, 18 Am. & Eng. Ann. Cas. 1166—pp. 1737, 1818, 2337, 2654, 2700, 2738.
—— v. Metropolitan St. R. Co., 167 Mo. App. 605, 152 S. W. 98—pp. 1891, 2241.
—— v. New Haven, etc., Co., pp. 1502, 1506, 1537, 1543.
—— New Jersey Tract. Co. v.
—— v. New Orleans, etc., R. Co., pp. 821, 829, 867.
—— Pullman Palace Car Co. v.
—— Shaw v.
—— Southern R. Co. v.
—— v. Southern R. Co., p. 969.
—— Texas, etc., R. Co. v.
—— v. Wayeross, etc., R. Co., 94 Ga. 538, 19 S. E. 757—pp. 1990, 2575.
—— v. Wayeross, etc., R. Co., 97 Ga. 482, 25 S. E. 334, 54 Am. St. Rep. 435—pp. 1561, 1715, 1718, 1989, 2334, 2335, 2839, 2840.
Gardner, etc., St. R. Co., Thompson v.
Garey v. Meagher & Co., p. 771.
Garfield, etc., Coal Co., Morgan v.
Garland v. Boston Elev. R. Co., pp. 2358, 2908.
—— v. Southern R. Co., pp. 1755, 1989, 1991.
Garlington v. Fort Worth, etc., R. Co., pp. 654, 657, 693, 695.
Garner v. Chicago, etc., Tract. Co., pp. 2678, 2679.
—— v. Forty-Second St., etc., R. Co., p. 1996.
—— St. Louis, etc., R. Co. v.
Garner v. St. Louis, etc., R. Co., p. 285, 292.
Garnett, In re.
Garrett v. Atlantic, etc., R. Co., p. 1539.
—— International, etc., R. Co. v.
—— Louisville, etc., R. Co. v.
—— Missouri, etc., R. Co. v.
—— O'Neill v.
—— v. St. Louis Trans. Co., pp. 2410, 2534.
Garrison v. Baggage Transp. Co., 94 Mo. 130, 6 S. W. 701—p. 456.
—— Ft. Worth, etc., R. Co. v.
—— v. Memphis Ins. Co., p. 4021.
—— v. Southern R. Co., pp. 138, 150, 178, 3517.
—— v. United R., etc., Co. v., pp. 77, 1649, 2447, 2473, 2572.
Garthright, Richmond R., etc., Co. v.
Garton v. Bristol, etc., R. Co., pp. 211, 213, 221, 225, 1181.
—— Herne v.
—— Zambetti v.
Garvan v. New York, etc., R. Co., pp. 484, 486, 867, 1954, 3379.
Garvey v. Rhode Island Co., pp. 1516, 2141.
Garvik v. Burlington, etc., R. Co., 124 Iowa 691, 100 N. W. 498—pp. 2646, 2868.
—— v. Burlington, etc., R. Co., 131 Iowa 415, 108 N. W. 327, 117 Am. St. Rep. 432—pp. 2341, 2785.
Gary v. Gulf, etc., R. Co., pp. 1683, 1801, 1870, 2744.
—— v. Wells, Fargo & Co's Exp., pp. 512, 594.
Gasaway, Chicago, etc., R. Co. v.
Gas Co. v. Glass Co., p. 659.
Gascogne, La.
Gascoigne v. Metropolitan, etc., R. Co., p. 2872.
Gashweiler v. Wabash, etc., R. Co., pp. 894, 899, 902.
Gaskins v. Southern R. Co., pp. 478, 488.
Gass v. Astoria Veneer Mills, pp. 332, 349, 360, 361, 365, 371, 374, 381, 382, 542, 543, 546.
—— v. New York, etc., R. Co., pp. 285, 3301, 3312.
—— v. Southern Pac. Co., p. 382.
Gastka North Chicago City R. Co. v.
Gaston, Central, etc., R. Co. v.
Gasway v. Atlanta, etc., R. Co., pp. 2038, 2040, 2041, 2045, 2064, 3064, 3073.
Gate City St. R. Co., Houston v.
Gates v. Bekins, p. 581.
—— Chicago, etc., R. Co. v.
—— v. Chicago, etc., R. Co., pp. 361, 369, 371, 378, 544, 547, 556, 3274.
—— v. Detroit, etc., R. Co., p. 538.
—— v. Quincy, etc., R. Co., pp. 1562, 2473, 2474.
—— v. Ryan, pp. 712, 1511.
Gatewood, Gulf, etc., R. Co. v.
—— Louisville, etc., R. Co. v.
Gathright, Pacific Exp. Co. v.
—— v. Pacific Exp. Co., pp. 418, 420, 465.
Gathwright, Pacific Exp. Co. v.
Gattman, Hamburg-American Packet Co. v.
Gatton v. Chicago, etc., R. Co., pp. 3494, 3606.
—— v. United States Exp. Co., p. 989.
Gaukler v. Detroit, etc., R. Co., pp. 2478, 2489, 2854.
Gault Lumber Co. v. Atchison, etc., R. Co., pp. 715, 716.
Gaunce v. Gulf, etc., R. Co., pp. 2172, 2174, 2221, 2222, 2891.

Gavett v. Manchester, etc., R. Co., p. 2248.
Gavin, Pullman Palace Car Co. v.
Gay v. Milwaukee Elect. R., etc., Co., pp. 2684, 2841, 3033.
—— Thomas v.
—— Ware v.
Gaylord, Pullman Palace Car Co. v.
Gaynor v. Old Colony, etc., R. Co., pp. 1722, 1776, 1780.
Gazelle, The.
G. C. & S. F. R. Co. v. Holliday, p. 1350.
—— v. Levy, p. 796.
—— v. McGowan, pp. 4, 5, 933, 2092, 2095.
—— v. Moetze, p. 935.
—— Murray Bro. v.
—— v. Wilhelm, p. 956.
Gebus v. Minneapolis, etc., R. Co., p. 2858.
Geddes, Fisher v.
—— v. Metropolitan R. Co., pp. 2878, 2887.
—— United States v.
Gee v. Lancashire, etc., R. Co. (Eng.), 6 Hurl. & N. 211—pp. 637, 653, 674.
—— v. Lancashire, etc., R. Co. (Eng.), 6 Hurl. & N. 217—p. 646.
Geer, Clark v.
—— v. Michigan Cent. R. Co., pp. 145, 1672.
Geiger, Florida, etc., R. Co. v.
—— v. Pittsburg R. Co., pp. 1519, 2947, 2959.
Geis, South Covington, etc., St. R. Co. v.
Geiser, The.
Geismer v. Lake Shore, etc., R. Co., p. 619.
Geitz v. Milwaukee City R. Co., p. 2197.
General Elect. Co., New York, etc., R. Co. v.
—— v. Southern Railway, p. 561.
General Fire Extinguisher Co. v. Carolina, etc., Co., pp. 739, 744.
General Iron Screw Collier Co., Grill v.
General Mut. Ins. Co. v. Sherwood, pp. 4021, 4022.
General Oil Co. v. Crain, p. 3568.
General Smith, The.
General Transatlantic Co., Guillaume v.
Geneva, etc., Tract. Co., Paine v.
Gensemer v. Conestoga Tract Co., p. 2903.
Gent, Jeffersonville, etc., R. Co. v.
Gentleman, The.
Gentry, Wells Fargo & Co's Exp. v.
Geogagn v. New York, etc., R. Co., p. 2247.
Geopp, Central, etc., R. Co. v.
George, Chicago, etc., R. Co. v.
—— v. Chicago, etc., R. Co., 108 Mich. 572, 66 N. W. 479—p. 818.
—— v. Chicago, etc., R. Co., 214 Mo. 551, 113 S. W. 1099—pp. 66, 1274, 1372, 1373, 1408, 1417.
—— v. Chicago, etc., R. Co., 57 Mo. App. 358—pp. 815, 818, 823, 1457.
—— Georgia, etc., R. Co. v.
—— Houston, etc., R. Co. v.
—— Jones v.
—— Midland Valley R. Co. v.
—— v. St. Louis, etc., R. Co., pp. 1722, 1812, 2693
—— v. Skivington, p. 1849.
George W. Garlick, The.
George W. Roby, The.
George & Co. v. Louisville, etc., R. Co., pp. 519, 557.
—— New Orleans, etc., R. Co. v.
Georgetown, etc., R. Co. v. Smith, pp. 2204, 2337, 2893.
Georgia, Hennington v.
Georgia Fruit, etc., Exch., Central R., etc., Co. v.
Georgia Granite R. Co., Gregory v.
Georgia Home Ins. Co., Yazoo, etc., R. Co. v.
Georgia Pac. R. Co., Central Trust Co. v.
—— Cooper v.
—— Head v.
—— v. Hughart, p. 1073.
—— v. Love, p. 2702.
—— v. Robinson, pp. 1505, 1521, 1522.
—— Smith v.
—— v. Underwood, p. 2202.
—— Watson v.
Georgia Railroad, Bird v.
—— Crawford v.
—— v. Creety, pp. 3760, 3840.
—— Falvey v.
—— Nunn v.
—— Partee v.
—— v. Richards, p. 601.
—— v. Spears, pp. 727, 732, 740, 748, 961, 962, 967, 968, 972, 981, 1005, 1267, 1269, 1361, 1364, 1369, 1372, 3379.
Georgia R. Co., American Nat. Bank v.
—— v. Baldoni, pp. 1631, 2409, 2450, 2482, 3100.
—— v. Beatie, pp. 727, 732, 748, 959, 961, 962, 967, 968, 1005, 1018, 1267, 1361, 1364.
—— v. Cole & Co., pp. 503, 3297.
—— v. Gann, pp. 947, 961, 962, 967, 968, 1003, 1007, 1019, 3306, 3397.
—— v. Hayden, pp. 3040, 3052.
—— v. Homer, pp. 1748, 2408, 2409, 2432, 2481, 2775, 3090, 3091, 3096.
—— Horne-Andrews Comm. Co. v.
—— v. Johnson, p. 765, 3172.
—— Kerr v.
—— v. Maddox, p. 3247.
—— Mitchell v.
—— v. Newsome, p. 2045.
—— v. Olds, pp. 1612, 2457, 2458, 2481, 3092.
—— Peavy v.
—— v. Smith, pp. 22, 23, 35, 62, 63.
Georgia R., etc., Co. v. Adams, pp. 1783, 2133, 2591, 3006.
—— Allison v.
—— Almand v.
—— v. Baker, 120 Ga. 991, 48 S. E. 355—pp. 3083, 3084.
—— v. Baker, 125 Ga. 562, 54 S. E. 639, 20 R. R. R. 789, 43 Am. & Eng. R. Cas., N. S., 789, 7 L. R. A., N. S. 103, 114 Am. St. Rep. 246, 5 Am. & Eng. Ann. Cas. 484—pp. 1613, 1644, 1648, 1651, 2458, 2464, 3064.
—— v. Baker, 58 S. E. 88, 1 Ga. App. 832—pp. 1949, 2058, 2075, 2770.
—— v. Baldoni, p. 2528.
—— Battle v.
—— Burge v.
—— v. Clarke, p. 1615.
—— v. Cole, pp. 1506, 1508, 1509, 1517, 1518, 1747, 2777.
—— Coleman v.
—— v. Crossley & Co., p. 1199.
—— Davis v.
—— v. Davis, pp. 2474, 2777.
—— v. Dougherty, pp. 1610, 2459, 2460, 3093.
—— v. Eskew, pp. 2409, 2432, 2464, 2475, 2485, 3078, 3079, 3080, 3081, 3082, 3083.
—— Fluker v.
—— Forrester v.
—— v. Forrester, p. 3397.
—— v. Gilleland, pp. 1747, 2127, 2128, 2367, 2400, 2839, 2899.
Georgia R., etc., Co. v. Greer, pp. 1492, 1493, 1494.
—— v. Haas, p. 480.
—— Ham v.
—— Hardwick v.
—— Hillman v.
—— Hornesby v.
—— v. Hopkins, pp. 2055, 2056.
—— Jackson v.
—— v. Jett, p. 3061.
—— Johnson v.
—— Joseph v.
—— v. Keating, pp. 1884, 1885.
—— v. Keener, pp. 820, 823, 947, 948, 1038, 1055, 1056, 1065, 1075, 1079, 1080.
—— Killian v.
—— v. Lloyd, pp. 1790, 2591, 2592.
—— Lyndon v.
—— v. McAllister, pp. 1705, 2129, 2689, 3045, 3063.
—— McBride v.
—— v. McCurdy, pp. 1864, 1878.
—— v. Maddox, p. 233.
—— Miller v.
—— Morris v.
—— v. Murden, 83 Ga. 753, 10 S. E. 364—pp. 1596, 1597, 2633.
—— v. Murden, 86 Ga. 434, 12 S. E. 630—pp. 200, 1596, 1597, 1599, 1600, 2469.
—— v. Murrah, p. 3285.
—— v. Norris, p. 2913.
—— Pennsylvania Steel Co. v.
—— Phillips v.
—— v. Phillips, pp. 1538, 3158, 3159, 3169.
—— Pickens v.
—— Pierce v.
—— Poole v.
—— v. Reeves, pp. 2634, 2688, 3006.
—— v. Reid, pp. 972, 1270, 1361, 1364, 1365, 1367, 1372, 1384, 1390, 1407, 1434.
—— v. Rich, p. 2069.
—— v. Richmond, pp. 1525, 2040, 2056, 2526.
—— v. Rives, pp. 1912, 2601, 2911.
—— v. Smith, 83 Ga. 626, 10 S. E. 235—p. 3249.
—— v. Smith, 128 U. S. 174, 32 L. Ed. 377, 9 S. Ct. 47—pp. 36, 61, 62, 63, 64.
—— v. Thompson, pp. 894, 898, 919, 3174, 3194.
—— v. Tice, pp. 2777, 2918.
—— v. Usry, pp. 1767, 1768, 2350.
—— Walker v.
—— Wolfe v.
—— Wood v.
—— Wright v.
—— Wynn v.
Georgia Southern Railroad, McCaffrey v.
—— McCaffrey & Co. v.
Georgia Southern R. Co. v. Johnson, etc., Co., p. 724.
Georgia Southern, etc., R. Co., Hicks v.
—— v. Murray, p. 1876.
Georgia, etc., Co., Autrey v.
Georgia, etc., R. Co. v. Asmore, pp. 1596, 1597, 1599, 1603, 2468, 2473, 2493.
—— v. Barfield, pp. 736, 813, 834, 874.
—— v. Bigelow, pp. 1625, 2415, 3089, 3103.
—— Brown v.
—— v. Brown, p. 1615.
—— v. Cartledge, p. 2721.
—— Cooper v.
—— Curry v.
—— v. Durrence, p. 444.
—— Elberta Peach Co. v.
—— v. Elliott, pp. 626, 796.
—— v. Eskew, p. 1638.

Georgia, etc., R. Co. v. Florida, etc., Tobacco Co., p. 406.
—— v. George, pp. 2840, 2491.
—— v. Greer, pp. 1031, 1271, 1361, 1364, 1389, 1390.
—— Hicks v.
—— Hill v.
—— Holleman v.
—— v. Hutchins, pp. 2252, 2820.
—— v. Johnson, etc., Co., pp. 954, 1020, 1038, 1040, 1056, 1071, 1081, 1137.
—— Jones v.
—— v. Knight, p. 574.
—— v. Marchman, pp. 269, 434.
—— v. Murray, pp. 1922, 2240.
—— v. Pattison, pp. 894, 898, 899, 900.
—— v. Pound, pp. 894, 898, 899, 900, 919.
—— Ricks v.
—— v. Sizer & Co., p. 289.
—— v. Smith, p. 34.
—— Suber v.
—— v. Underwood, p. 1816.
—— v. Watkins, pp. 1895, 2120.
——Whelan v.
Geppert, Trinity, etc., R. Co. v.
Geraldon, Texas Mid. R. Co. v.
Gerrdy v. Louisville, etc., R. Co., pp. 1671, 1676, 1678.
Geraty, Atlantic, etc., R. Co. v.
—— v. Atlantic, etc., R. Co., 211 Fed. 227—pp. 3666, 3670, 3816.
—— v. Atlantic, etc., R. Co., 81 S. C. 367, 62 S. E. 444—p. 1020.
Gerber v. Wabash R. Co., p. 3751.
Gerhard v. Neese, pp. 565, 608, 609, 610, 638, 677, 1144, 1146.
Gerhard Mennen Chemical Co. v. Merchants' Exp. Co., p. 500.
Gerlach v. Detroit United Railway, pp. 1826, 2721, 2777, 2881.
German v. Brooklyn Heights R. Co., pp. 2684, 2882.
—— v. Chicago, etc., Co., 150 Ill. App. 149—p. 2684.
—— v. Chicago, etc., R. Co., 38 Iowa 127—pp. 996, 997, 1374.
—— v. Lake Erie, etc., R. Co., p. 442.
German Fruit Co. v. California, etc., R. Co., p. 435.
German Nat. Bank, Arkansas Southern R. Co. v.
—— Arkansas, etc., R. Co. v.
German Security Bank, Holmes, etc., Co. v.
Germania Fire Ins. Co. v. Memphis, etc., R. Co., pp 319, 321, 325, 333, 335, 958, 987, 996, 3880, 3881.
Germania Ins. Co. v. La Crosse, etc., Packet Co., p. 891.
Germanic, The.
Germann v. Great Northern R. Co., pp. 2786, 3075.
Germantown Pass. R. Co. v. Brophy, pp. 1820, 2200.
—— v. Walling, pp. 2178, 2193, 2343, 2344, 2347.
Germany, St. Louis, etc., R. Co. v.
Gernon, Missouri Pac. R. Co. v.
Gerreiss, Kentucky Cent. R. Co. v.
Gerren, Missouri, etc., R. Co. v.
Gerry v. American Exp. Co., pp. 1004, 1006.
Gerson, Louisville, etc., R. Co. v.
Gerstle v. Union Pac. R. Co., p. 1953.
Getman, Packard v.
Getz, Stewart Taxi Service Co. v.
Gewin, & Son, Alabama, etc., R. Co. v.
Geyer v. United States Exp. Co., pp. 944, 1273.
Ghazee, The.
G. H. & H. R. Co. v. Allison, pp. 503, 504, 508.
G. H. & H. R. Co. v. Moore, p. 2120.
G. H. & S. A. R. Co. v. Stovall, p. 1321.
—— v. Van Winkle & Co., pp. 405, 830, 852.
—— v. Watson, p. 858.
Ghio v. Metropolitan St. R. Co., pp. 1903, 2252.
Ghormley v. Dinsmore, 51 N. Y. Super. Ct. 196—p. 1108.
—— v. Dinsmore, 53 N. Y. Super. Ct. 36—p. 1010.
Gibbes, Charlotte, etc., R. Co. v.
Gibbons v. Farwell, pp. 551, 573, 574, 579.
—— v. Ogden pp. 3418, 3419, 3420, 3439, 3440, 3474, 3476, 3477, 3478, 3549, 3569, 3571, 3581.
—— v. Robinson, pp. 337, 338.
—— v. Wade, pp. 948, 1007.
Gibbs, Alabama, etc., R. Co. v.
—— Southern Exp. Co. v.
—— v. Van Buren, p. 3895.
Giblin v. National Steamship Co., pp. 1456, 1476.
Giboney, Cincinnati, etc., R. Co. v.
Gibson v. American Merchants' Union Exp. Co., pp. 3328, 3371.
—— v. Atlantic, etc., R. Co., pp. 695, 697, 1116.
—— v. Culver, pp. 534, 903.
—— v. East Tennessee, etc., R. Co., p. 2476.
—— Federal St., etc., R. Co. v.
—— v. International Trust Co., 177 Mass. 100, 58 N. E. 278, 52 L. R. A. 928—pp. 1488, 1690, 2678, 2902.
—— v. International Trust Co., 72 N. E. 70, 186 Mass. 454—p. 1696.
—— Lake Shore, etc., Railway v.
—— Lake Shore, etc., R. Co. v.
—— v. Little Rock, etc., R. Co., pp. 785, 3395.
—— St. Louis, etc., R. Co. v.
—— v. Stevens, p. 383.
—— Valpy v.
Gibson Line, Levy's Son & Co. v.
Gidley, Louisville, etc., R. Co. v.
Giesen, International, etc., R. Co. v.
Gilbert, Alabama, etc., R. Co. v.
—— v. Chicago, etc., R. Co., pp. 1284, 1306.
—— Gulf, etc., R. Co. v.
—— International, etc., R. Co. v.
—— Richards v.
—— Waite v.
—— v. West End St. R. Co., p. 1723.
Gilbert Bros. v. Chicago, etc., R. Co., pp. 727, 732, 765, 1268, 1470.
Gilbert Transp. Co. v. Borden, p. 3965.
Gilbert, etc., Co., Railroad v.
Gilbreath, St. Louis, etc., Railway v.
—— St. Louis, etc., R. Co. v.
Gilchrist v. Chicago & N. R. Co., pp. 1453, 1456.
—— Lumberman's Min. Co. v.
—— O'Brien v.
—— Stimpson v.
Gilcher v. Seattle Elect. Co., pp. 2876, 2921.
Gildea, Galveston, etc., R. Co. v.
Giles v. Cynthia, p. 1170.
—— v. Fargo, pp. 785, 987.
—— v. Fauntleroy, pp. 3116, 3123, 3130.
—— Galveston, etc., R. Co. v.
—— v. Great Western R. Co., p. 1498.
Gilhooly v. New York, etc., Nav. Co., p. 2846.
Gilkinson v. The Scotland, p. 588.
Gill v. Erie R. Co., pp. 2095, 2100, 3694.
Gill, McGregor v.
—— Mississippi, etc., R. Co. v.
—— v. Rochester, etc., R. Co., p. 2489.
—— St. Louis, etc., R. Co. v.
—— Williams v.
Gilleland, Georgia R., etc., Co. v.
—— v. Louisville, etc., R. Co., p. —1447.
Gillen v. Minneapolis, etc., R. Co., p. 3102.
Gillenwater v. Madison, etc., R. Co., pp. 1582, 1749, 1760, 2036, 2037.
Gillespie v. Brooklyn Heights R. Co. pp. 2568, 3064, 3065.
—— International Text-Book Co. v.
—— v. Louisville, etc., R. Co., p. 1309.
Gillett, Chicago, etc., R. Co. v.
—— v. Missouri, etc., R. Co., pp. 500, 785.
Gilliland v. Illinois Cent. R. Co., p. 142.
—— Louisville, etc., Mail Co. v.
—— v. Southern R. Co., pp. 954, 1012, 1290, 1388, 1427, 1475.
Gillingham v. Dempsey, pp. 848, 850.
—— v. Ohio River R. Co., pp. 1487, 1492, 1542, 2038, 2059, 2075.
Gillis v. Pennsylvania R. Co., pp. 2502, 2508.
Gillman v. Florida, etc., R. Co., p. 3054.
Gillshannon v. Stony Brook R. Corp., p. 1581.
Gillum v. New York, etc., Steamship Co., pp. 2287, 2288, 3995, 4003.
Gilly v. New Orleans, etc., R. Co., p. 2311.
Gilman v. Boston, etc., Railroad, pp. 1831, 2349, 2794.
—— v. Philadelphia, pp. 3439, 3440, 3566.
Gilmer, Higley v.
—— v. Highley, pp. 1571, 2719.
—— International, etc., R. Co. v.
—— Kennon v.
—— Kermon v.
—— Louisville, etc., R. Co. v.
—— Ryan v.
—— Schafer v.
Gilmore v. Brooklyn Heights R. Co., p. 2683.
—— v. Carman, pp. 728, 739.
—— Dallas, etc., St. R. Co. v.
—— Evansville, etc., R. Co. v.
—— v. Houston Elect. Co., pp. 1732, 1737.
—— v. Milford, etc., St. R. Co., p. 1825.
—— v. Philadelphia, etc., R. Co., pp. 1774, 2073.
—— v. Seattle, etc., R. Co., p. 2928.
—— Texas, etc., R. Co. v.
Gilson v. Gwinn, p. 1158.
—— v. Jackson County Horse R. Co., pp. 1684, 1685.
Giltman v. Brooklyn Heights R. Co., 113 N. Y. S. 1046, 129 App. Div. 654—p. 2809.
—— v. Brooklyn Heights R. Co., 113 N. Y. S. 1048, 129 App. Div. 919—p. 2809.
Gilvin, Toledo, etc., R. Co. v.
Ginn v. Ogdensburg Transit Co., pp. 1118, 1119, 1123, 4028.
—— v. Pennsylvania R. Co., pp. 2673, 2674, 2781, 2800.
Ginna v. Second Ave. R. Co., pp. 2180, 2186.
Girnell-Collins Co. v. Illinois Cent. R. Co., pp. 484, 495.
Ginnochio-Jones Fruit Co. v. Missouri, etc., R. Co., pp. 551, 569.

Ginsburg v. Adams Exp. Co., pp. 430, 1067.
Giovanelli v. Erie R. Co., pp. 1881, 2877.
Girardeau v. Southern Exp. Co., pp. 587, 590.
Girod, Birmingham R., etc., Co. v.
Girton v. Lehigh Valley R. Co., p. 2363.
Gisleson v. Minneapolis, etc., R. Co., p. 3101.
Gist, Missouri, etc., R. Co. v.
Gittings v. Baker, p. 511.
Gladson v. Minnesota, pp. 97, 98, 103, 3481, 3482, 3483, 3503, 3504, 3513, 3514, 3516.
—— State v.
—— Gladstone, Birley v.
—— Coventry v.
—— Mercantile & Exchange Bank v.
Gladys, The.
Glasco v. New York Cent. R. Co., pp. 3109, 3157, 3180, 3187, 3191, 3192.
Glascock v. Cincinnati, etc., R. Co., pp. 2259, 2315, 2719.
Glascow, Barker & Co. v.
Glasgow, Louisville, etc., R. Co. v.
Glasgow Steam Shipping Co. v. Tweedle Trading Co., pp. 3892, 3893.
Glass, Central R. Co. v.
—— v. Chicago, etc., R. Co., pp. 2653, 2655.
—— v. Goldsmith, pp. 272, 290, 337, 338, 339, 346.
—— Missouri, etc., R. Co. v.
Glassberg v. Interurban St. R. Co., p. 2892.
Glass Co., Gas Co. v.
Gleadell v. Thomson, p. 892.
Gleason, Central R. Co. v.
—— v. Duffy, pp. 4056, 4073, 4074, 4079.
—— v. Goodrich Transp. Co., pp. 274, 278, 3111, 3115, 3116, 3122, 3125, 3128, 3137, 3146, 3148, 3156, 3157, 3164, 3165.
—— v. Willamette Valley, pp. 1940, 1941.
Gledhill Wall Paper Co. v. Baltimore, etc., R. Co., p. 641.
Gleeson v. Virginia Mid. R. Co., pp 1575, 1680, 1807, 1808, 1809, 1810, 2070, 3005.
Glencoe Land etc., Co. v. Hudson Bros. Comm. Co., p. 455.
Glenk, Gulf, etc., R. Co. v.
Glenn, Birmingham R., etc., Co. v.
—— Bonner v.
—— Southern Exp. Co. v.
—— v. Southern Exp. Co., pp. 1087, 1090, 1091, 1107.
—— v. Western Union Tel. Co., p. 2576.
Glennen v. Boston Elevated R. Co., pp. 1682, 1727, 2016, 2020, 2021, 2026, 2727, 2860.
Glenny, Great Western Despatch, etc., Shore Line v.
Glenny & Co., Despatch Line v.
Glens Fall, etc., R. Co., Wright v.
Glens Falls, etc., St. R. Co., Regner v.
—— Butler v.
Glidden v. New York Cent., etc., R. Co., pp. 2218, 2892.
Glidewell, Little Rock, etc., R. Co. v.
Glinn v. Pennsylvania R. Co., p. 1824.
Globe Nav. Co., Revett v.
—— v. Russ Lumber, etc., Co., pp. 3888, 3889, 3902.
Globe Transfer, etc., Co. Kettenhofen v.
Glossup, St. Louis, etc., R. Co. v.
Gloucester Ferry Co. v. Pennsylvania, pp. 3418, 3419, 3420, 3421, 3423, 3429, 3433, 3445, 3446, 3447, 3471, 3472, 3474, 3475, 3476, 3477, 3478, 3479, 3552, 3556, 3564, 3566, 3568, 3572, 3581, 3584, 3587.
Glover v. Atchison, etc., R. Co., p. 2855.
—— Augusta R. Co. v.
—— Bass v.
—— Birmingham R., etc., Co. v.
—— v. Charleston, etc., R. Co., p. 3066.
—— Hepp v.
—— Huse v.
—— Illinois Cent. R. Co. v.
Glovinsky v. Cunard Steamship Co., 4 Misc. Rep. 266, 24 N. Y. S. 136—pp. 3118, 3129.
—— v. Cunard Steamship Co., 6 Misc. Rep. 388, 26 N. Y. S. 751—p. 3149.
Glyn Miller, etc., Co. v. East & West Indian Dock Co., p. 401.
G. N. R. Co., Martin v.
Goben, Louisville, etc., R. Co. v.
Goble v. Delaware, etc., R. Co., pp. 1725, 2696.
Godair, Gulf, etc., R. Co. v.
Godair Comm. Co., Missouri, etc., R. Co. v.
Godard, Cotting v.
Godbout v. St. Paul Union Depot Co., pp. 99, 101.
Goddard v. Barnard, p. 638.
—— v. Grand Trunk Railway, pp. 1722, 2041, 2042, 3072.
—— Richardson v.
Godfrey, Alabama, etc., R. Co. v.
—— The T. A.
—— v. Meridian R., etc., Co., pp. 1852, 2704, 3011, 3016.
—— v. New York, etc., R. Co., p. 2551.
—— v. Ohio, etc., R. Co., pp. 2078, 2090, 2453, 2460.
—— v. Pullman Co., pp. 3115, 3116, 3123, 3125, 3152, 3215, 3221, 3230, 3239, 3240.
Godkin, Savannah, etc., R. Co. v.
Godman, Louisville, etc., R. Co. v.
Godola, East Omaha St. R. Co. v.
Gody v. Lyon, p. 346.
Goehring v. Beaver Valley Tract. Co., pp. 1585, 1587, 2342, 2865.
Goerner, Little Rock R., etc., Co. v.
Goetchins, Pennsylvania R. Co. v.
Goetz v. Bank, p. 396.
—— v. Hannibal, etc., R. Co., p. 1615.
—— v. Metropolitan St. R. Co., p. 2731.
Goforth, Alabama, etc., R. Co. v.
Goggin v. Kansas Pac. R. Co., pp. 931, 948, 1087, 1408, 1425.
Goins v. Western Railroad, pp. 3042, 3056.
—— v. Western R. Co., p. 3059.
Goldberg v. Ahnapee, etc., R. Co., pp. 280, 729, 3134, 3195.
—— v. Interurban, etc., R. Co., p. 1695.
—— v. New York, etc., R. Co., p. 1793.
—— Southern Exp. Co. v.
Gold Hunter, The.
Goldbowitz v. Metropolitan Exp. Co., p. 514.
Golden v. Pittsburg R. Co., pp. 2452, 2460.
Goldey v. Pennsylvania R. Co., pp. 742, 1380, 1381, 1567.
Golding, Gulf, etc., R. Co. v.
Goldman, Texas, etc., R. Co. v.
Goldsmith, Glass v.
—— v. Holland Bldg. Co., pp. 1488, 2982.
—— v. Tower Hill Steamship Co., pp. 1314, 1315.
Goldstein, Birmingham R., etc., Co. v.
—— International, etc., R. Co. v.
—— v. Metropolitan St. R. Co., p. 2655.
—— v. Sherman, etc., R. Co., p. 3338.
—— v. Southern Railway, pp. 162, 163.
Goldstein Bros., Southern R. Co. v.
Goller v. Fonda, etc., R. Co., p. 2337.
Gomez v. New York City R. Co., p. 1889.
Gomila, Culliford v.
Gomm v. Oregon R., etc., Co., pp. 3166, 3175, 3176, 3177, 3178
Gonthier v. New Orleans, etc., R. Co., pp. 3155, 3158.
Gonzales v. New York, etc., R. Co., 38 N. Y. 440, 98 Am. Dec. 58—pp. 2247, 2278.
—— v. New York, etc., R. Co. (N. Y.), 39 How. Prac. 497—p. 2116.
—— v. New York, etc., R. Co. (N. Y.), 50 How. Prac. 126—p. 2247.
Gonzalez, Birmingham R., etc., Co. v.
Gooch v. Stephenson, p. 1168.
Good v. Galveston, etc., R. Co., pp. 840, 1093, 1094, 1095, 1305, 1410, 1473.
Good Hope, The.
Goodbar v. Wabash R. Co., p. 285.
Goodfellow v. Detroit United Railway, p. 2036.
Goodfield v. Platt, pp. 607, 670, 1067.
Goodholm, Missouri Pac. R. Co. v.
Goodin, Atlantic City R. Co. v.
—— v. Southern R. Co., pp. 653, 660, 668.
Goodkind v. Metropolitan St. R. Co., pp. 2700, 2859.
Goodloe v. Memphis, etc., R. Co., pp. 2045, 2050, 2069.
—— v. Metropolitan St. R. Co., pp. 2068, 2698.
Goodman, Central, etc., R. Co. v.
—— Great Western R. Co. v.
—— Louisville R. Co. v.
—— Mexican Cent. R. Co. v.
—— v. Oregon R., etc., Co., pp. 753, 757, 817, 838, 879, 3304, 3412.
—— v. Simonds, 19 Mo. 106—p. 381.
—— v. Simonds (U. S.), 20 How. 343, 15 L. Ed. 934—pp. 358, 375.
—— v. Stewart, pp. 1153, 1154.
Goodrich, Hermann v.
—— v. Norris, pp. 333, 337.
—— v. Thompson, 44 N. Y. 324—pp. 501, 789, 3267.
—— v. Thompson, 27 N. Y. Super. Ct. 75—pp. 771, 3289, 3297.
Goodrich Trans. Co., Interstate Commerce Comm. v.
—— v. Interstate Commerce Comm., pp. 3612, 3615.
Goodrich Transp. Co., Black v.
—— Browning v.
—— Gleason v.
—— White v.
Goodridge, Union Pac. R. Co. v.
Goodsell v. Taylor, pp. 1722, 1750, 1839, 1841, 2685.
Goodspeed v. Ithaca St. R. Co., 184 N. Y. 351, 77 N. E. 392—p. 144.
—— v. Ithaca St. R. Co., 88 App. Div. 147, 84 N. Y. S. 383, 14 N. Y. Ann. Cas. 6—p. 144.
Goodwin, Atlantic, etc., R. Co. v.
—— v. Baltimore, etc., R. Co., 50 N. Y. 154, 10 Am Rep. 457—pp. 527, 531, 564.

Goodwin v. Baltimore, etc., R. Co. (N. Y.), 58 Barb. 95—pp. 893, 907.
—— v. Boston, etc., Railroad. p. 2183.
—— v. Cincinnati Tract. Co., pp. 2043, 2867.
—— Cole v.
—— Galveston, etc., R. Co. v.
—— Keeler v.
—— Western, etc., Railroad v.
Goodwyn, etc., Co. v. Douglas, p. 769.
Goodyear, Houston, etc., R. Co. v.
Goold v. Chapin (N. Y.), 10 Barb. 612—p. 887.
—— v. Chapin, 20 N. Y. 259, 75 Am. Dec. 398—pp. 523, 886, 887, 888, 3265, 3360.
Goold, State v.
Goorin v. Allegheny Tract. Co., p. 2895.
Gorbett, Houston, etc., R. Co. v.
Gordon, Adams Exp. Co. v.
—— v. Buchanan, pp. 11, 768, 822, 1020.
—— v. Grand St., etc., R. Co., pp. 1511, 1512, 1517.
—— v. Hutchinson, pp. 8, 252, 768, 771.
—— v. Little, pp. 729, 946.
—— v. Manchester, etc., Railroad, pp. 1612, 1670, 1671, 1672, 1673, 1674.
—— v. Nassau Elect. R. Co., p. 2906.
—— v. West End St. R. Co., pp. 1518, 2332.
Gordon Campbell, The.
Gore, Chicago, etc., R. Co. v.
—— v. Norwich, etc., Transp. Co., pp. 3146, 3148.
—— Southern R. Co. v.
Gorham Mfg. Co. v. Fargo (N. Y.), 45 How. Prac. 90—pp. 762, 763.
—— v. Fargo, 35 N. Y. Super. Ct. 434—p. 763.
Gorman, Dufolt v.
—— Gulf, etc., R. Co. v.
—— International, etc., R. Co. v.
—— v. New York, etc., R. Co., pp. 2739, 2810.
—— St. Louis, etc., R. Co. v.
—— v. St. Louis Trans. Co., p. 2595.
—— v. Southern Pac. Co., pp. 3083, 3084.
Gormer, Tooker v.
Gormley, Lake Street, etc., R. Co. v.
—— Louisville, etc., R. Co. v.
Gortatowsky, Central, etc., R. Co. v.
Gortikov, Illinois Cent. R. Co. v.
Gortikow, Illinois Cent. R. Co. v.
Gortikoy, Illinois Cent. R. Co. v.
Gorton, Miles v.
Gosnell, St. Louis, etc., R. Co. v.
Goss v. Northern Pac. R. Co., pp. 2777, 2841.
—— Richardson v.
—— Smith v.
—— State v.
Gossler v. Schepeler, p. 1216.
Gott v. Dinsmore, pp. 725, 966, 1001, 1003, 1004, 1007.
Gottlieb, Western Union Tel. Co. v.
Gottlob v. North Jersey St. R. Co., p. 2861.
Gould v. Boston, etc., R. Co., p. 2791.
—— v. Chicago, etc., R. Co., pp. 2472, 2473.
—— v. Hill, p. 739.
—— v. New York, etc., R. Co., p. 2799.
Gould, Tri-City R. Co. v.
Gourdin, Cook v.
Governor Carey, The.
Gowling v. American Exp. Co., p. 969.
Grabenstein v. Metropolitan St. R. Co., pp. 2302, 2910.
Grabfelder, Alabama, etc., R. Co. v.
Grabler v. New York, etc., Ferry Co., p. 2318.
Grace v. Adams, pp. 320, 323, 337, 958, 984, 986, 1044, 3880.
—— v. St. Louis R. Co., pp. 1734, 2910, 2934, 2989, 2990, 2991, 2996.
Grace & Co., Wright v.
Gracie v. Marine Ins. Co., p. 510.
—— v. Palmer, pp. 3, 3866, 3873, 3944.
Gracy, Stewart v.
Graddy, Southern Railway v.
Gradert v. Chicago, etc., R. Co., pp. 1530, 1544, 1545.
Gradin v. St. Paul, etc., R. Co., pp. 1760, 2519.
Grady, Irvine v.
—— v. St. Louis Trans. Co., pp. 2746, 2750.
Graefe v. St. Louis Transit Co., pp. 2088, 2160, 2925.
Graeff v. Philadelphia, etc., R. Co., p. 2034.
Graff v. Bloomer, pp. 511, 540.
Grafton, The.
Gragg, Chicago, etc., R. Co. v.
Graham, Chicago, etc., R. Co. v.
—— v. Chicago, etc., R. Co., 131 Iowa 741, 107 N. W. 595, 7 L. R. A., N. S., 603, 17 Am. St. Rep. 445—p. 2517.
—— v. Chicago, etc., R. Co., 53 Wis. 473, 10 N. W. 609—p. 1197.
—— v. Cummings, p. 3164.
—— Davidson v.
—— v. McNeill, pp. 1951, 1953, 2173, 2180, 2343.
—— Macon, etc., R. Co. v.
—— v. Macon, etc., R. Co., p. 3251.
—— v. Manhattan R. Co., 149 N. Y. 336, 43 N. E. 917—pp. 1797, 1951, 1952, 1953, 2069.
—— v. Manhattan R. Co., 8 Misc. Rep. 305, 28 N. Y. S. 739—p. 2186.
—— v. New York City R. Co., p. 2777.
—— v. Pacific R. Co., pp. 1580, 2465.
—— v. Pennsylvania Co., pp. 1779, 2269.
—— v. Planters' Compress Co., pp. 3956, 3963.
—— Roberts v.
—— Union Exp. Co. v.
Graham & Co. v. Davis & Co., pp. 730, 731, 739, 751, 752, 822, 946, 948, 951, 956, 982, 1019, 1032, 1036, 1039, 3898, 3921.
Graham Ice Co. v. Chicago etc., R. Co., pp. 35, 44.
Grahn v. International, etc., R. Co., pp. 1549, 2780.
Gramling, St. Louis, etc., R. Co. v.
Gran Canaria, The.
Grand v. Livingston, 158 N. Y. 688, 53 N. E. 1125—p. 939.
—— v. Livingston, 4 App. Div. 589, 34 N. Y. S. 490, 73 N. Y. St. Rep. 646, 158 N. Y. 688, 53 N. E. 1125—pp. 942, 1013.
Grand Ave. Cable Co., Empey v.
—— Jackson v.
—— Taylor v.
Grand Junction R. Co., Palmer v.
—— Pickford v.
Grand Rapids, etc., R. Co. v. Boyd, p. 3034.
Grand Rapids, etc., R. Co. v. Diether, pp. 703, 1142, 1143.
—— Dykstra v.
—— v. Ellison, pp. 2010, 2036, 2161, 2867.
—— Fraam v.
—— Hufford v.
—— v. Huntley, pp. 1684, 1687, 1734, 1823, 1848, 1985, 2667, 2736, 2758.
—— v. Martin, pp. 2500, 2541.
—— Rickerson Roller-Mill Co. v.
—— Starks Co. v.
—— v. United States, pp. 3844, 3851.
—— White v.
Grand Rapids, etc., Railway, Wolf v.
Grand St., etc., R. Co., Gordon v.
—— Platt v.
Grand Tower Mfg., etc., Co. v. Ullman, pp. 273, 274, 285, 286, 288.
Grand Tower, etc., R. Co., Frank v.
Grand Trunk R. Co., Armstrong v.
—— Ascher v.
—— Baldwin v.
—— Brooke v.
—— Bruty v.
—— Burnham v.
—— Burnside v.
—— Burroughs v.
—— Cadwallder v.
—— Caher v.
—— Carpenter v.
—— Clementson v.
—— Clemston v.
—— Condict v.
—— Cutting v.
—— Deming v.
—— Dunn v.
—— Dyer v.
—— Fillebrown v.
—— Fitzgerald v.
—— Frost v.
—— Gurney v.
—— Hale v.
—— Hall v.
—— Harris v.
—— Harvey v.
—— Hecht v.
—— Heineman v.
—— Holyoke v.
—— Horseman v.
—— Howell v.
—— v. Ives, p. 2116.
—— Jennings v.
—— Johnson v.
—— Joslyn v.
—— Keeney v.
—— Kerr v.
—— Lee v.
—— Maine v.
—— v. Michigan R. Comm., 198 Fed. 1009—pp. 24, 98, 3517.
—— v. Michigan R. Comm., 231 U. S. 457, 34 S. Ct. 152—p. 3616.
—— Quellette v.
—— v. Parks, p. 2082.
—— Penton v.
—— Pratt v.
—— Rainey v.
—— Renders v.
—— Shaw v.
—— Stapleton v.
—— State v.
—— Stearns v.
—— v. Stevens, p. 1566.
—— Taylor v.
—— v. United States, p. 3623.
—— Van Dusan v.
—— Vineburg v.
—— v. Walker, p. 2015.
—— Wheeler v.
—— Willis v.
—— Woodward v.
—— Worthen v.
Grand Trunk Railway, Brown v.
—— Goddard v.

Grand Trunk Railway, Helliwell v.
—— International Exp. Co. v.
—— Jewell v.
—— Regan v.
—— Wilson v.
Grand Trunk R. System, Bekins Household Shipping Co. v.
—— Brown, etc., Coal Co. v.
Grand Trunk Western R. Co., Kelley v.
—— Lundquist v.
—— Minahan v.
—— Williamson v.
Grand Trunk, etc., K. Co., Clough v.
—— Kelley v.
Grand Western R. Co., Hawkins v.
Granger, Merchant's etc., Transp. Co. v.
Granier v. Louisiana, etc., R. Co., pp. 1630, 2663.
Granite Mills, Capehart v.
Grant, Atchison, etc., R. Co. v.
—— Louisville, etc., R. Co. v.
—— v. Metropolitan St. R. Co., p. 2699.
Grant v. New Orleans R., etc., Co., p. 1902.
—— v. Newton, pp. 3114, 3126, 3131.
—— v. Norway, pp. 291, 294, 305, 306, 308.
Grant v. Raleigh, etc., R. Co., pp. 1813, 1815, 2734.
—— v. Spokane Tract. Co., pp. 3035, 3036.
—— Taxicab Co. v.
—— Pomaski v.
—— Washington, etc., R. Co. v.
—— Williams v.
—— v. Wood, pp. 1148, 1149, 1150, 1151.
—— Yazoo, etc., R. Co. v.
Grant Bros. Constr. Co., Santa Fé, etc., R. Co. v.
Grant St. Elect. R. Co., Henry v.
—— Vasele v.
Gratiot St. Warehouse Co. v. Missouri, etc., R. Co., pp. 361, 370, 486, 490, 742, 1062, 1063, 1074.
—— v. St. Louis, etc., R. Co., pp. 814, 908.
Graven v. MacLeod, pp. 1792, 2247, 2273, 2275.
Graves v. Adams Exp. Co., pp. 982, 986, 1065, 1067, 1068, 1074.
—— Carter v.
—— Cincinnati, etc., R. Co. v.
—— Clyde v.
—— C. N. O. & T. P. Ry. Co. v.
—— Cross v.
—— v. Fitchburg R. Co., p. 3160.
—— v. Hartford, etc., Steamboat Co., pp. 511, 891, 896, 897.
—— v. Harwood, p. 339.
—— v. Lake Shore, etc., R. Co., pp. 337, 1074.
—— Memphis St. R. Co. v.
—— Missouri Pac. R. Co. v.
—— v. Norfolk, etc. R. Co., p. 2320.
—— Receivers, etc., R. Co. v.
—— San Antonio, etc., R. Co. v.
—— Texas, etc., R. Co. v.
Gray, Benson v.
—— v. Boston, etc., Railroad, pp. 1774, 2037, 2069.
—— v. Cincinnati, etc., R. Co., pp. 190, 1949, 1950.
—— v. Columbia River, etc., R. Co., pp. 1588, 2178.
—— Fitchburg R. Co. v.
—— v. Fort Pitt Tract. Co., p. 2277.
—— Gulf, etc., R. Co. v.
—— Houston, etc., R. Co. v.
—— v. Jackson & Co., pp. 431, 3285, 3327.
—— McLendon, p. 23.
—— v. Metropolitan, etc., R. Co., pp. 2069, 2887, 2888.
Gray v. Minneapolis, etc., R. Co., p. 3501.
—— v. Missouri River Packet Co., pp. 725, 853, 854, 855.
—— v. Moore, p. 455.
—— Morison v.
—— Pittsburg, etc., R. Co. v.
—— Pittsburgh, etc., R. Co. v.
—— v. St. Louis, etc., R. Co., pp. 679, 859.
—— Spring v.
—— Texas, etc., R. Co. v.
—— v. The Reveille, p. 808.
—— v. Wabash R. Co., p. 249.
Grayson, St. Louis, etc., R. Co. v.
Grayson County Nat. Bank, Nashville, etc., R. Co. v.
—— v. Nashville, etc., Railway, pp. 327, 328, 353, 357, 389, 402, 549, 555, 591, 597, 1101, 1102, 3382.
Greason v. St. Louis, etc., R. Co., p. 429.
Great Eastern R., Prevost v.
Great Eastern R. Co., Becker v.
—— Buckmaster v.
—— Schulze v.
Great Falls St. R. Co., Hamilton v.
Great Falls, etc., R. Co., Dixon v.
—— v. Hill, pp. 2294, 2295, 2731.
—— Pierce v.
Great Lakes Towing Co. v. Mill Transp. Co., pp. 4037, 4040.
Great Northern Exp. Co., Spokane Grain Co. v.
Great Northern R. Co., Appeal of.
—— Ausk v.
—— Baldwin v.
—— Banner Grain Co. v.
—— Barnum Grain Co. v.
—— Beaulieu v.
—— v. Bruyere, pp. 2514, 2532, 2548.
—— Clark v.
—— Croff v.
—— Crouch v.
—— Cunningham v.
—— De Blois v.
—— Denton v.
—— Dickson v.
—— Drake v.
—— Duncan v.
—— Dyer v.
—— Engesether v.
—— Farrell v.
—— Ferrell & Co. v.
—— Fidelity Lumber Co. v.
—— Fisher v.
—— Flakne v.
—— Floody v.
—— Germann v.
—— Haluptzok v.
—— Hamlin v.
—— Hanson v.
—— Harris v.
—— v. Harrison, p. 1574.
—— v. Hawcroft, pp. 1665, 1670, 1673.
—— Herrman v.
—— Holden v.
—— Janny v.
—— Jarrett v.
—— Jennings v.
—— Johnson v.
—— v. Kalispell Lumber Co., p. 3674.
—— Kleven v.
—— Lamson v.
—— Lemery v.
—— Lindh v.
—— v. Loonan Lumber Co., p. 3712, 3811, 3812.
—— McGuire v.
—— McKiblin v.
—— McNamara v.
—— Mageau v.
—— Martin v.
—— Mathews v.
—— Melody v.
—— Merriman v.
Great Northern R. Co., Nelson v.
—— Newbury v.
—— O'Connor v.
—— v. O'Connor, pp. 3750, 3752, 3762.
—— O'Malley v.
—— Page v.
—— v. Railroad Comm. (Wash.), 92 Pac. 457—p. 43.
—— v. Railroad Comm., 52 Wash. 33, 100 Pac. 184—p. 23.
—— Reed v.
—— Reynolds v.
—— Roasted v.
—— Rolette v.
—— Rosted v.
—— Ryan v.
—— Schlosser v.
—— v. Sheperd (Eng.), 8 Exch. 30, 30 Railw. Cas. 310, 21 L. J. Exch. 286—pp. 3133, 3149.
—— v. Shepherd, 9 Eng. L. & Eq. Rep. 477—p. 3125.
—— Smith v.
—— Starr v.
—— State v.
—— Steenerson v.
—— Sultan R., etc., Co. v.
—— Turner v.
—— United States v.
—— v. United States, pp. 3806, 3842.
—— Vance v.
—— Wahle v.
—— Wells v.
—— Wenzel v.
—— Zalk v.
—— Zetterberg v.
Great Southern R. Co., Cork Distilleries Co. v.
Great Western, The.
Great Western Despatch, Mack, etc., Co. v.
Great Western Despatch Co., St. Paul Roller Mill Co. v.
Great Western Despatch, etc., Shore Line v. Glenny, p. 811.
Great Western Dispatch, Lesinsky v.
Great Western R. Co., Austin v.
—— Brehm v.
—— Buckley v.
—— Bunch v.
—— v. Burns, pp. 222, 236, 3279.
—— Chapman v.
—— Erb v.
—— Giles v.
—— v. Goodman, p. 3140.
—— v. Hawkins, pp. 1275, 1446.
—— Hay v.
—— Hurst v.
—— Lewis v.
—— Longmore v.
—— v. McComas, pp. 482, 486, 574.
—— v. McDonald, pp. 3394, 3408.
—— Macrow v.
—— v. Miller, pp. 2411, 2412, 2476, 2480, 2607.
—— Moffatt v.
—— O'Hanlan v.
—— O'Neill v.
—— Parker v.
—— Patscheider v.
—— Root v.
—— Sloman v.
—— Stallard v.
—— v. Sutton, pp. 1181, 3685.
—— Talley v.
—— Webb v.
—— v. Wheeler, p. 890.
—— White v.
—— Williams v.
—— Woodgate v.
Greathouse, Ft. Worth, etc., R. Co. v.
Greb v. Pennsylvania R. Co., p. 2048.
Greek-American Produce Co. v. Illinois Cent. R. Co., pp. 528, 530, 900.

Greek-American Sponge Co. v. Richardson Drug Co., p. 3420.
Green, Adams Exp. Co. v.
—— Baltimore, etc., R. Co. v.
—— v. Baltimore, etc., R. Co. v. pp. 495, 556.
—— Bean v.
—— v. Boston, etc., R. Co., pp. 763, 842, 858.
—— v. Bridgeton, p. 1944.
—— v. Campbell, p. 520.
—— v. Chicago, etc., R. Co., 137 S. W. 611, 156 Mo. App. 259—p. 1339.
—— v. Chicago, etc., R. Co., 42 Neb. 379—p. 356.
—— Cincinnati, etc., R. Co. v.
—— v. Clark (N. Y.), 13 Barb. 57—pp. 493, 494.
—— v. Clark (N. Y.), 5 Denio 497—pp. 484, 488.
—— v. Clark, 12 N. Y. 343—pp. 487, 681.
—— v. Coast Line R. Co., p. 2091.
—— East Tennessee, etc., R. Co. v.
—— Galveston, etc., R. Co. v.
—— v. Houston Electric Co., p. 1518.
—— Illinois Cent. R. Co. v.
—— v. Indianopolis, etc., R. Co., p. 826.
—— Lawrence v.
—— v. Louisville, etc., R. Co., p. 1778.
—— Memphis, etc., R. Co. v.
—— v. Metropolitan St. R. Co., pp. 1903, 2358, 2656.
—— v. Middlesex Valley R. Co., p. 2873.
—— v. Milwaukee, etc., R. Co., 38 Iowa 100—pp. 274, 3136, 3187.
—— v. Milwaukee, etc., R. Co., 41 Iowa 410—pp. 267, 3135, 3137, 3138, 3194.
—— v. Missouri, etc., R. Co., pp. 1669, 1755, 2563.
—— v. New York R. Co., p. 3183.
—— v. Pacific Exp. Co., p. 1103.
—— v. Pacific Lumber Co., pp. 1755, 2368, 2656, 2696, 2930.
—— Pennsylvania R. Co. v.
—— v. Pennsylvania R. Co., p 1773.
—— People's Pass. R. Co. v.
—— Philadelphia, etc., R. Co. v.
—— v. Pittsburg, etc., St. R. Co., p. 2858.
—— Pullman Co. v.
—— St. Louis, etc., R. Co. v.
—— State v.
—— Thompson v.
—— United States v.
—— v. Van Buskirk, p. 3556.
—— Walker v.
—— Ward v.
Green Bay Lumber Co. v. Chicago, etc., R. Co., p. 106.
Green Bay Tract. Co., Sigl v.
Green Bay, etc., R. Co., Leasum v.
—— Skow v.
—— v. Union Steamboat Co., p. 3251.
Green Co. v. Atlantic, etc., R. Co., p. 642.
Green, etc., Nav. Co. v. Marshall, pp. 500, 512.
Greenburg, Arderson Art. Co. v.
Greene, Dows v.
—— v. St. John, etc., R. Co., pp. 211, 240.
—— Southern R. Co. v.
Greenfield v. Detriot, etc., R. Co., pp. 190, 201, 202, 203, 204, 1494, 1550, 2898, 2900, 2946, 2948.
—— v. Wells Fargo & Co., pp. 1082, 1083.
Greenfield Bank v. Leavitt, p. 856.
Greenville Lumber Co. v. National Pressed Brick Co., p. 380.
Greenfield, etc., St. R. Co., Donovan v.
Greenfield's Estate, In re.
Greenhalgh, American Exp. Co. v.
Greenham, Isham v.
Greening, Cincinrati, etc., R. Co. v.
Greenleaf Johnson Lumber Co., Roberson v.
Greensboro, etc., Coal Co., Southern R. Co. v.
Greenthal, St. Louis, etc., R. Co. v.
Greenville St. R. Co., Bowie v.
Greenville Tract. Co., McCarter v.
—— McKittrick v.
—— Moore v.
Greenville, etc., R. Co., Wilmington, etc., R. Co. v.
Greenwald v. Barrett, pp. 990, 1051, 1052, 1054, 1055, 1059, 1060, 1066.
—— Mobile, etc., R. Co. v.
—— v. Weir, 115 N. Y. S. 311, 130 App. Div. 696—pp. 1051, 1054, 1055, 1071, 3332.
—— v. Weir, 111 N. Y. S. 235, 59 Misc. Rep. 431—pp. 948, 1053, 3444, 3604.
Greenway, Howland v.
Greenway Bro. & Co., Seawell v.
Green-Wheeler Shoe Co. v. Chicago, etc., R. Co., pp. 619, 741, 743.
Greenwich Ins. Co. v. Memphis, etc., Packet Co., pp. 3109, 3121, 3124, 3149, 3150.
Greenwood v. Cooper, pp. 287, 291, 861.
—— Lake Shore, etc., R. Co. v.
—— North Coast Lighterage Co. v.
—— Richmond, etc., R. Co. v.
Greenwood Grocery Co., Yazoo, etc., R. Co. v.
Greer, Georgia R., etc., Co. v.
—— Georgia, etc., R. Co. v.
—— Houston, etc., R. Co. v.
—— v. Union St. R. Co., pp. 2748, 2751.
—— Warden v.
Gregg, Chicago City R. Co. v.
—— Cincinnati, etc., R. Co. v.
—— Finch v.
—— v. Illinois Cent. R. Co., pp. 567, 779, 894, 1153, 1164, 1167.
—— v. Northern Pac. R. Co., pp. 1513, 1515, 2139.
Gregorie, Fanning v.
Gregorio v. New York City R. Co., p. 2688.
Gregory v. Burlington, etc., R. Co., pp. 1573, 2444.
—— v. Chicago, etc., R. Co., pp. 196, 197, 2420, 2422, 2492, 3112.
—— v. Elmira, etc., R. Co., pp. 1957, 2172.
—— v. Georgia Grarite K. Co., p. 1559, 1583, 1584, 1589.
—— Gulf, etc., R. Co. v.
—— Louisville, etc., R. Co. v.
—— v. Sturgis Nat. Bank, pp. 375, 399.
—— v. Wabash R. Co., pp. 882, 884.
—— v. Webb, p. 3136.
Gregston, Chesapeake, etc., R. Co. v.
Greif & Bro. v. Seligman, p. 478.
Greinke, Chicago City R. Co. v.
—— v. Chicago City R. Co., pp. 2575, 2605, 2796.
Greismer v. Lake Shore, etc., R. Co., pp. 607, 608, 620, 627, 628, 629, 634.
Gresham, St. Louis, etc., R. Co. v.
—— Southern R. Co. v.
Greso, Pennsylvania Co. v.
Gress v. Missouri Pac. R. Co., pp. 2249, 2252.
Gretschmann v. Fix, pp. 3995, 3997.
Gretzner v. New Orleans, etc., R. Co., p. 2829.
Greve & Co. v. Dunham, pp. 1219, 1220, 1229, 1232, 1242.
Grey, Hestonville Passenger R. Co. v.
—— v. Mobile Trade Co., pp. 828, 945, 1035, 1038.
—— Sharp v.
Gribble, Ft. Worth, etc., R. Co. v.
Grieff v. Switzer, p. 821.
Grier v. St. Louis, etc., R. Co., p. 818.
Grieve v. Illinois Cent. R. Co., pp. 326, 330, 427, 821, 828, 1085, 1366, 1390, 1448, 1456, 1457, 1458.
—— v. New York, etc., R. Co., pp. 901, 910, 911, 916.
Griffen v. Manice, 77 N. Y. S. 626, 74 App. Div. 371—p. 2668.
—— v. Manice, 73 N. Y. S. 559, 36 Misc. Rep. 364—p. 2668.
Griffen v. Atlantic, etc., R. Co., pp. 288, 874.
—— Blossom v.
—— Building, etc., Ass'n v.
—— Chicago, etc., R. Co. v.
—— v. Colver, pp. 638, 653, 659, 667, 669, 678.
—— Illinois Cent. R. Co. v.
—— v. Interurban St. R. Co., pp. 146, 147.
—— James v.
—— Nashville St. R. Co. v.
—— Nashville St. Railway v.
—— v. Pacific Elect. R. Co., pp. 2234, 2688.
—— Roy v.
—— San Antonio, etc., R. Co. v.
—— v. Southern R. Co., p. 3066.
—— v. Utica, etc., R. Co., p. 3318.
—— v. Wabash R. Co., pp. 1456, 1945, 3746, 3763.
Griffing Florida Orchard Co., Hasler Co. v.
Griffith, Arkansas Mid. R. Co. v.
—— Arkansas, etc., R. Co. v.
—— v. Charlotte, etc., R. Co., p. 1254.
—— v. Denver Consol. Tramway Co., p. 2857.
—— Gulf, etc., R. Co. v.
—— v. Ingledew, pp. 493, 682.
—— International, etc., R. Co. v.
—— Ladue v.
—— v. Missouri Pac. R. Co., pp. 1703, 1873, 2065, 2126, 2241, 2576, 3073.
—— St. Louis, etc., R. Co. v.
—— San Antonio, etc., R. Co. v.
—— Scovill v.
—— Smith v.
—— v. Utica, etc., R. Co., p. 2168.
Griggs v. Austin, p. 3949.
—— Texas Mid. Railroad v.
Grigsby, Houston, etc., R. Co. v.
—— v. Texas, etc., R. Co., p. 622.
Grill v. General Iron Screw Collier Co., p. 3067.
Grimes, Chicago, etc., R. Co. v.
—— v. Lake Erie, etc., R. Co., p. 443.
—— Louisville, etc., R. Co. v.
—— v. Minneapolis, etc., R. Co., p. 1640.
—— v. Pennsylvania Co., pp. pp. 1510, 1512, 1513, 1797.
Grimes Dry Goods Co., Scott Bros. v.
Grimm, Chicago, etc., R. Co. v.
Grimshaw v. Lake Shore, etc., R. Co., p. 1548.
Grimsley v. Atlantic, etc., R. Co., pp. 2020, 2021, 2022, 2420, 2871.
—— St. Louis, etc., R. Co. v.
Grindle v. Eastern Exp. Co., p 594.

Grinnell, Lakeman v.
—— Merrill v.
—— v. Wisconsin Cent. Co., p. 796.
Grisim v. Milwaukee City R. Co., p. 2744.
Grismore, Pacific Steam Whaling Co. v.
Grissinger v. International R. Co., p. 1803.
Griswold v. Chicago, etc., R. Co., p. 2511.
—— v. New York Ins. Co., p. 1150.
—— v. New York, etc., R. Co., pp. 1566, 2094, 2102.
—— Telegraph Co. v.
—— v. Webb, pp. 192, 193.
Griton v. Lehigh Valley R. Co., p. 2274.
Grizzle, Southern R. Co. v.
Groat, Satterlee v.
Groce, Missouri, etc., R. Co. v.
—— St. Louis, etc., R. Co. v.
Groesbeck, Central, etc., R. Co. v.
—— Missouri Pac. R. Co. v.
Grogan v. Adams Exp. Co., pp. 815, 822, 1074.
—— v. Brooklyn Heights R. Co., p. 2870.
—— v. Chesapeake, etc., R. Co., pp. 1624, 2447.
Groll v. Prospect Park, etc., R. Co., p. 2873.
Grom, Pittsburg, etc., R. Co. v.
—— Pittsburgh, etc., R. Co. v.
Groner, Chicago, etc., R. Co. v.
Groot v. Oregon, etc., R. Co., pp. 1284, 1285, 1304, 1351, 1464.
Grosvelose, Norfolk, etc., R. Co. v.
Groshong v. United K. Co., pp. 1716, 1902.
Gross, Gulf, etc., R. Co. v.
—— Illinois Cent. R. Co. v.
Grossman v. Fargo, pp. 572, 908.
Grosvenor v. New York Cent. R. Co., pp. 268, 269, 272, 277, 284, 286, 292, 3137.
Grotarian, Guaranty Trust Co. v.
Grote v. Chester, etc., R. Co., p. 1850.
Groton, etc., St. R. Co., Thorson v.
Grotsch v. Steinway R. Co., pp. 2168, 2890.
Grout v. Hill, p. 1242.
Grove v. Brien, pp. 349, 351, 354, 3883.
Grover, Birmingham Ore., etc., Co. v.
—— Cincinnati, etc., R. Co. v.
Groves, Houston, etc., R. Co. v.
Grubbs, Houston, etc., R. Co. v.
Grubman v. The Ontario, pp. 3929, 3930.
Grumbach, Bonner v.
Grummond, Laffrey v.
Grund v. Pendergast, pp. 211, 468.
Grundy, Louisville, etc., R. Co. v.
Grunfelder v. Brooklyn Heights R. Co., p. 1979.
Grush, Toledo, etc., R. Co. v.
Gruss, Chicago, etc., R. Co. v.
Grzywacz v. New York, etc., R. Co., pp. 3127, 3128.
Guadeloupe, The.
Gualala, The.
Guance v. Gulf, etc., R. Co., p. 1991.
Guaranty Trust Co. v. Grotarian, p. 399.
—— Hannay v.
Guardian, The.
Gude v. Pennsylvania R. Co., pp. 3396, 3398.
Guenther v. Metropolitan R. Co., pp. 2368, 2725.
Guess, Gulf, etc., R. Co. v.
Guess v. Southern Railway, pp. 642, 677.
Guffey v. Alaska, etc., Steamship Co., p. 3937.
Guffey Petroleum Co., Unique Shipping Co. v.
Guggenheim, Atlantic, etc., Steamship Co. v.
—— Harris v.
Guiding Star, The.
—— Western Mfg. Co. v.
Guildhall, The.
Guilford, Alabama Mid. R. Co. v.
—— Alabama, etc., R. Co. v.
—— v. Smith, pp. 1229, 1232, 1235, 1243.
Guillaume v. General Transatlantic Co., pp. 325, 550, 998.
Guinan, Louisville, etc., R. Co. v.
—— v. Weaver Coal, etc., Co., p. 3970.
Gulf City Constr. Co. v. Louisville, etc., R. Co., pp. 564, 707, 1152.
Gulf Compress Co. v. Alabama, etc., R. Co., pp. 225, 232.
—— v. Jones Cotton Co., p. 491.
Gulf Line R. Co., Payton v.
Gulf, etc., R. Co., Abram v.
—— v. Adams, pp. 2016, 2418, 2620, 2639.
—— Albin v.
—— Alderson v.
—— v. Allcorn, pp. 879, 3353, 3368.
—— Alley v.
—— Allin v.
—— Amory Mfg. Co. v.
—— Askew v.
—— v. Bagby (Tex. Civ. App.), 115 S. W. 858—pp. 1906, 1908.
—— v. Bagby (Tex. Civ. App.), 127 S. W. 254—p. 1907.
—— v. Baird, pp. 1269, 1339, 2496, 3294, 3298, 3299, 3310, 3311, 3331, 3337, 3344, 3366, 3375, 3377.
—— v. Barnett (Tex. Civ. App.), 34 S. W. 449—pp. 2409, 2433.
—— v. Barnett, 47 S. W. 1039, 19 Tex. Civ. App. 626—pp. 1799, 1800, 2873, 2874.
—— v. Batte (Tex. Civ. App.), 81 S. W. 813—pp. 1326, 1350.
—— v. Batte (Tex. Civ. App.), 94 S. W. 345—p. 1474.
—— v. Batte (Tex. Civ. App.), 107 S. W. 632—p. 426.
—— v. Baugh, pp. 533, 539, 1303.
—— Baumbach v.
—— Baumbach v.
—— Beattie, p. 1304.
—— v. Bell, 93 Tex. 632, 57 S. W. 939—pp. 1766, 2170, 2319, 2335, 2369.
—— v. Bell, 24 Tex. Civ. App. 579, 58 S. W. 614—pp. 1681, 2603, 2635.
—— Belton Oil Co. v.
—— v. Belton Oil Co., pp. 573, 767, 838.
—— v. Bolton, p. 2133.
—— v. Booth, pp. 1886, 1916, 1917, 2287, 2288.
—— v. Booton, 4 Texas App. Civ. Cas., § 67, 15 S. W. 502—pp. 663, 849, 850, 852.
—— v. Booton, 4 Tex. App. Civ. Cas., § 230, 15 S. W. 909—pp. 586, 1051, 1078, 1079.
—— v. Booton, 4 Tex. Civ. App. 103, 15 S. W. 502—p. 526.
—— v. Boyce, pp. 735, 746, 873.
—— British, etc., Ins. Co. v.
—— British, etc., Marine Ins. Co. v.
—— v. Brown, 99 Tex. 349, 89 S. W. 971—pp. 419, 1295, 3289.
—— v. Brown, 4 Tex. Civ. App. 435, 23 S. W. 618—pp. 348, 403, 2126, 2255.
—— v. Brown, 16 Tex. Civ. App. 93, 40 S. W. 608—pp. 1732, 2003, 2589, 2630.
Gulf, etc., R. Co. v. Browne, pp. 520, 729, 822, 843, 1154, 1169.
—— v. Buford, p. 2570.
—— v. Bunn, pp. 1560, 2429, 2493, 2529.
—— v. Butcher, pp. 1518, 1731, 1770.
—— v. Butler, pp. 1340, 1352, 1358.
—— Butterick Pub. Co. v.
—— v. Campbell, pp. 1549, 1550, 1551, 1572, 2114, 2208.
—— v. Chinski, pp. 639, 640, 697.
—— v. Clark, pp. 522, 533, 539, 549, 762, 849, 857, 858.
—— v. Clarke, pp. 1118, 1121, 1122, 1126, 3326.
—— v. Cleburne Ice, etc., Co., pp. 590, 596, 599, 603.
—— v. Cole, 101 Miss. 411, 58 So. 208—p. 2821.
—— v. Cole, 4 Texas App. Civ. Cas., § 97, 16 S. W. 176—p. 686.
—— v. Cole, 8 Tex. Civ. App. 635, 28 S. W. 391—pp. 1293, 1296, 2496, 3374.
Gulf, etc., R. Co. v. Combes, pp. 426, 1296.
—— v. Compton (Tex. Civ. App.), 38 S. W. 220, 221—pp. 286, 620, 667, 668, 671, 672, 738.
—— v. Compton (Tex. Civ. App.), 38 S. W. 1007—pp. 292, 293.
—— v. Conder, pp. 2016, 2060, 2414.
—— Conwill v.
—— v. Coopwood, p. 1763.
—— v. Copeland, pp. 1610, 1613, 2709.
—— v. Coulter, p. 857.
—— v. Courtney, p. 919.
—— v. Crossman, p. 3337.
—— v. Cunningham, pp. 1275, 1287.
—— v. Cushney, pp. 3395, 3396, 3413.
—— v. Daniels, pp. 1614, 2448.
—— v. Danshank, p. 2203.
—— v. Darby, pp. 584, 663, 665, 744.
—— v. Davidson, p. 1971.
—— v. Dawkins, pp. 1553, 1554.
—— v. Dawson, pp. 1138, 1193.
—— v. Dennison, 22 Tex. Civ. App. 89, 58 S. W. 834—p. 475.
—— v. Dennison, 25 Tex. Civ. App. 127, 60 S. W. 281—pp. 475, 503.
—— v. Dimmitt, p. 464.
—— v. Dinwiddie, pp. 419, 441, 443, 1296.
—— Donalson v.
—— v. Downman, p. 2185.
—— v. Dunman, pp. 953, 1274.
—— v. Dunn, pp. 1287, 1291.
—— Dwyer v.
—— v. Dwyer, 75 Tex. 572, 12 S. W. 1001, 7 L. R. A. 478, 16 Am. St. Rep. 926—pp. 156, 157, 254, 937, 938, 1120, 3311, 3403.
—— v. Dwyer, 84 Tex. 194, 19 S. W. 470—p. 157.
—— v. Dyer, pp. 1597, 1599, 1600, 2432, 2487.
—— Ebert v.
—— v. Eddins, pp. 851, 937, 938, 950, 954, 978, 1092, 1093, 1119, 1120, 1121, 1122, 1302, 1356, 1363, 3342, 3363, 3368.
—— v. Edloff, 89 Tex. 454, 34 S. W. 414, 35 S. W. 144—pp. 3309, 3344, 3392, 3396, 3409, 3417.
—— v. Edloff (Tex. Civ. App.), 34 S. W. 410—p. 3358.
—— v. Elliott, pp. 1129, 1130.
—— v. Ellis, pp. 58, 60.
—— v. Ellison, pp. 729, 1270, 1462, 1466, 1467.

Gulf, etc., R. Co. v. Evansich, p. 2300.
—— v. Everett, pp. 515, 568, 664, 796, 852.
—— Feagin v.
—— v. Ferguson-McKinney Dry Goods Co., pp. 872, 900, 907, 916.
—— v. Fort Grain Co. (Tex. Civ. App.), 72 S. W. 419—p. 172.
—— v. Fort Grain Co. (Tex. Civ. App.), 73 S. W. 845—p. 172.
—— v. Fowler, pp. 518, 549, 553, 1299.
—— v. Fox, pp. 1600, 1782, 1883, 2116, 2150, 2373.
—— v. Frank Co., pp. 539, 837.
—— v. Franklin, p. 2790.
—— v. Freeman, p. 519.
—— v. Fromme, p. 442.
—— v. Funk, p. 451.
—— v. Fuqua, pp. 900, 903.
—— v. Gann, pp. 1284, 1287, 1290, 1409.
—— Gary v.
—— v. Gatewood, pp. 618, 629, 631, 731, 752, 930, 957, 1021, 1118, 1121, 1122 1124, 1128, 1313, 3331.
—— Gaunce v.
—— v. Gilbert, pp. 643, 645, 646, 647, 659, 666, 667, 668, 674, 686, 860.
—— v. Glenk, pp. 1540, 1774, 1775, 1780, 2504.
—— v. Godair, pp. 847, 1355.
—— v. Golding, pp. 1109, 1131, 3331.
—— v. Gorman, p. 2577.
—— v. Gray, pp. 1126, 1420, 3618.
—— v. Gregory, p. 604.
—— v. Griffith, p. 3338.
—— v. Gross, p. 1770.
—— v. Guess, p. 2515.
—— v. Halbrook, pp. 1613, 2449, 2463.
—— v. Harris, pp. 551, 3355.
—— Hassler v.
—— v. Head, pp. 1869, 1875, 2243, 2668, 2689.
—— v. Hefley, pp. 1159, 3448, 3498, 3499, 3500, 3668, 3735, 3741, 3745, 3748, 3750, 3751, 3753, 3754, 3755, 3760, 3764.
—— v. Henry, pp. 1620, 1621, 1635, 1974.
—— v. Higby, p. 1729.
—— v. Hodge, 10 Tex. Civ. App. 543, 30 S. W. 829—pp. 264, 419, 427, 441, 443, 446, 450, 457, 468, 471, 1296.
—— v. Hodge (Tex. Civ. App.), 39 S. W. 986—p. 472.
—— v. Hodges, 76 Tex. 90, 13 S. W. 64—p. 1978.
—— v. Hodges (Tex. Civ. App.), 24 S. W. 563, 2 Am. & Eng. R. Cas., N. S., 574—pp. 1775, 1784.
—— v. Holder, pp. 344, 345, 829.
—— v. Holliday, p. 474.
—— v. Holt, pp. 1699, 2083.
—— v. House, pp. 454, 463, 1318, 1335, 1345.
—— v. Hughes, pp. 1326, 1327.
—— v. Hume Bros., 87 Tex. 211, 221, 27 S. W. 110—pp. 211, 425, 442, 443, 444, 450, 451, 657, 1118, 1120, 1121, 1122, 1123, 1129, 1130, 1295, 1324, 1452.
—— v. Hume Bros., 6 Tex. Civ. App. 653, 657, 24 S. W. 915—pp. 419, 441, 442, 450, 621, 624, 1121, 1130, 1320, 1321, 1355.
—— v. Humphries, pp. 485, 487, 493, 513, 549, 553, 596, 602, 604, 1440.
—— v. Hurley, pp. 2626, 2775.
—— Johnson v.
Gulf, etc., R. Co., Jordan v.
—— v. Insurance Co. (Tex. Civ. App.), 28 S. W. 237—pp. 400, 776.
—— v. Ions, pp. 2496, 3374, 3376.
—— v. Irvine, pp. 424, 442, 443, 500, 502, 503, 508, 509, 1334, 1473.
—— v. Jackson, 99 Tex. 343, 89 S. W. 968—pp. 419, 420, 426, 442, 443, 1294, 1295, 1296, 1327, 3251, 3289.
—— v. Jackson, 4 Texas App. Civ. Cas., § 47, 15 S. W. 128—pp. 663, 852, 3160, 3169.
—— v. Jackson (Tex. Civ App.), 86 S. W. 47—pp. 452, 1293, 1294, 1295.
—— v. Johnson, p. 2639.
—— v. Jones, p. 3394.
—— v. Jordan, p. 1875.
—— Kaase v.
—— v. Kemp, pp. 854, 1351.
—— v. Key, p. 1404.
—— v. Killebrew, pp. 1684, 1738, 1810, 2201.
—— v. Kimble, pp. 1289, 1378, 3353.
—— v. Kirkbride, pp. 2533, 2717.
—— v. Kuenhle, pp. 1634, 2441, 2855.
—— Laurel Cotton Mills v.
—— v. Laurel Cotton Mills, p. 3757.
—— v. Leatherwood, pp. 464, 1139, 1202, 1203.
—— v. Lee, pp. 1329, 1350.
—— Leeke v.
—— v. Levi (Tex.), 12 S. W. 677—pp. 729, 733, 750, 751, 752, 753, 765, 935.
—— v. Levi, 76 Tex. 337, 13 S. W. 191, 8 L. R. A., N. S., 323, 18 Am. St. Rep. 45—pp. 499, 608, 609, 617, 618, 628, 629, 630, 729, 738, 739, 751, 752, 765, 847, 957, 1307.
—— v. Lewine, p. 544.
—— v. Looney, pp. 1625, 3316, 3331, 3367, 3374, 3375.
—— v. Loonie, 82 Tex. 323, 18 S. W. 221, 27 Am. St. Rep. 891—p. 647.
—— v. Loonie, 84 Tex. 259, 263, 19 S. W. 385—pp. 169, 172, 596.
—— Lovett v.
—— v. Luther, pp. 2040, 2057.
—— v. McAulay, pp. 1311, 1327.
—— v. McCampbell, p. 3337.
—— McCardell v.
—— McCarty v.
—— v. McCarty, pp. 286, 289, 291, 419, 450, 451, 473, 474, 654, 855, 960, 970, 971, 973, 976, 1097, 1101, 1126, 1318, 1321, 1322, 1350.
—— v. McCord, p. 451.
—— v. McCormick, p. 2430.
—— v. McCorquodale, pp. 248, 268, 286, 294, 446, 448, 463, 594, 621, 624, 638, 654, 729, 734, 744, 1272, 1309, 1311, 1460, 1464.
—— v. McCown, pp. 328, 519.
—— v. McGowan, p. 2721.
—— v. McGown, pp. 1513, 1558, 1564, 1642, 1760, 2037.
—— McLean v.
—— v. McLean, p. 275.
—— v. McWhirter, p. 2082.
—— v. Maetze, pp. 562, 568, 627, 657, 665, 666, 672, 673, 696, 756, 1085.
—— v. Malone, p. 3359.
—— v. Martin, pp. 472, 1323, 1324.
—— v. Mathews, p. 1359.
—— v. Miami Steamship Co., 30 C. C. A. 142, 86 Fed. 407—p. 3656.
Gulf, etc., R. Co. v. Miami Steamship Co., 86 Fed. 567, 2 L. R. A. 289—p. 3659.
—— Mississippi R. Comm. v.
—— v. Moody, 3 Tex. Civ. App. 622, 22 S. W. 1009—pp. 191, 198, 200, 2418, 2420, 2422.
—— v. Moody (Tex. Civ. App.), 30 S. W. 574—p. 3157.
—— v. Moore, 98 Tex. 302, 83 S. W. 362—pp. 1859, 2455, 3839.
—— v. Moore (Tex. Civ. App.), 80 S. W. 426—p. 3648.
—— v. Moorman, pp. 1607, 1608.
—— v. Morgan, pp. 1792, 1793, 1986, 2327.
—— Murray v.
—— v. Nelson, 4 Tex. Civ. App. 345, 23 S. W. 732—p. 3729.
—— v. Nelson (Tex. Civ. App.), 139 S. W. 81—pp. 431, 649, 3344, 3405.
—— v. North Texas Grain Co., pp. 399, 400, 520, 568, 744, 911, 1154, 1168, 1169.
—— v. Overton, 110 S. W. 736, 101 Tex. 583, 19 L. R. A., N. S., 500—p. 1712.
—— v. Overton (Tex. Civ. App.), 107 S. W. 71—p. 2832.
—— Parks v.
—— Patterson & Co. v.
—— v. Patterson & Co., p. 490.
—— v. Pendery, pp. 2289, 2340.
—— v. Pepperell Mfg. Co., pp. 1024, 1025.
—— v. Pettit, pp. 643, 645, 650, 654, 666, 683.
—— v. Phillips, pp. 2336, 2738, 2883.
—— v. Pickens, pp. 595, 638, 859, 860.
—— v. Pitts & Son, pp. 797, 852, 3395.
—— v. Pomeroy, p. 746.
—— v. Pool, pp. 274, 275, 284, 286, 289, 290, 291.
—— v. Porter, pp. 1303, 1310.
—— v. Powers, pp. 1893, 1894.
—— Prokop v.
—— v. Railroad Comm., pp. 54, 115, 122, 123, 125, 126, 128.
—— v. Rather, pp. 1544, 1613, 2064, 2444, 2456, 2458.
—— v. Redeker, pp. 1706, 1763, 2565, 2566.
—— v. Riney, pp. 1624, 1632, 2434, 2447.
—— v. Roberts, pp. 729, 734, 740, 750, 815, 849, 862, 865, 881.
—— v. Rotter Bros., pp. 478, 517, 1250.
—— v. Roundtree, p. 1965.
—— v. Rowland, 82 Tex. 166, 18 S. W. 96—pp. 2300, 2751.
—— v. Rowland, 90 Tex. 365, 38 S. W. 756—pp. 1895, 2151, 2268, 2371, 2923.
—— v. Ryan, 69 Tex. 665, 7 S. W. 83—pp. 1825, 2163.
—— v. Ryan, 4 Tex. App. Civ. Cas., § 305, 18 S. W. 866—p. 1857.
—— St. John v.
—— v. St. John, pp. 2444, 2445, 2458, 2496, 3375.
—— v. Scott, p. 2583.
—— Selman v.
—— v. Shelton, 72 S. W. 165, 96 Tex. 301—p. 2077.
—— v. Shelton, 30 Tex. Civ. App. 72, 69 S. W. 653—pp. 1783, 1969, 2067, 2126, 2227, 2251, 2255, 2265, 2303.
—— v. Shelton (Tex. Civ. App.), 70 S. W. 359—pp. 2067, 2126, 2227, 2255, 2265, 2303.
—— v. Shieder, pp. 2287, 2288, 2289, 2666.
—— v. Shields, pp. 1692, 1728, 2022, 2028, 2030, 2037, 2857.

Gulf, etc., R. Co. v. Short, pp. 419, 3336, 3337, 3338.
—— v. Simmons, pp. 1350, 1352.
—— v. Smith, 74 Tex. 276, 11 S. W. 1104—pp. 1812, 2585, 2586, 2604, 2638, 2669, 2694, 2760.
—— v. Smith, 87 Tex. 348, 28 S. W. 520—p. 1730.
—— v. Smith, 10 Tex. Civ. App. 338, 30 S. W. 361—pp. 1823, 1828, 1846.
—— v. Somerville Mercantile Agency, pp. 568, 664.
—— v. Southwick, pp. 1797, 2723.
—— v. Sparger, pp. 1599, 2468, 2469.
—— v. Stanley, 80 Tex. 42, 33 S. W. 109—p. 1032.
—— v. Stanley, 89 Tex. 42, 44, 33 S. W. 109, 2 Am. & Eng. R. Cas., N. S., 480—pp. 451, 490, 851, 971, 973, 1086, 1087, 1089, 1090, 1120, 1123, 1129, 1322, 1325, 1353, 1355, 1414, 1422, 1440.
—— State v.
—— v. State, pp. 937, 1203.
—— v. Staton, pp. 1339, 1342, 1360.
—— v. Stewart, p. 851.
—— v. Stricklin, p. 1728.
—— v. Taliaferro, p. 1345.
—— v. Taylor, p. 484.
—— v. Tennant, p. 3357.
—— Terry v.
—— v. Terry, pp. 1354, 3336.
—— Texas, etc., R. Co. v.
—— v. Texas, pp. 3422, 3425, 3492.
—— v. Texas Star Flour Mills, pp. 742, 746, 845.
—— v. Texas, etc., R. Co., p. 107.
—— v. Thompson, p. 3331.
—— v. Trawick, 68 Tex. 314, 4 S. W. 567, 2 Am. St. Rep. 494, 30 Am. & Eng. R. Cas. 49, 49 Am. & Eng. R. Cas. 171—pp. 4, 294, 729, 734, 750, 753, 765, 931, 932, 933, 934, 935, 951, 971, 977, 1083, 1085, 1087, 1088, 1118, 1119, 1121, 1122, 1124, 1127, 1129, 1268, 1269, 1330, 1339, 1361, 1398.
—— v. Trawick, 80 Tex. 270, 15 S. W. 568, 18 S. W. 948—pp. 268, 280, 287, 293, 294, 822, 883, 934, 971, 1124, 1125, 1127, 1128, 1129, 1278, 1332.
—— Trout v.
—— v. Turner, p. 1778.
—— v. Rowland, pp. 2115, 2117, 2118, 2250.
—— v. Vaughn, pp. 951, 1413, 3331, 3340, 3342.
—— v. Vinson, pp. 1913, 2245.
—— v. Wagley, p. 2546.
—— v. Wallen, pp. 1689, 1692, 2129, 2314.
—— v. Walters, pp. 2287, 2616.
—— v. Ware, p. 1322.
—— v. Warlick, pp. 1749, 1782.
—— v. Wells, p. 1771.
—— v. Wells-Fargo Exp. Co., p. 1643.
—— v. White, pp. 1118, 1120, 1125.
—— v. Wilbanks, pp. 1125, 3344.
—— v. Wilhelm, pp. 1272, 1415, 1443.
—— v. Williams, 70 Tex. 159, 8 S. W. 78—pp. 1885, 1886, 1916, 1917, 2114, 2289, 2666, 2821, 2827.
—— v. Williams, 4 Tex. Civ. App. 294, 23 S. W. 626—pp. 1124, 1126, 1127.
—— v. Williams, 21 Tex. Civ. App. 469, 51 S. W. 653—pp. 1800, 2507.
Gulf, etc., R. Co. v. Wilm, p. 1351.
—— v. Wilson, pp. 1502, 1504, 1558, 1564, 1575, 1577, 1814, 2004, 2212, 2589, 2603, 2604, 3344.
—— v. Wiltnebert, pp. 757, 758, 759, 3308.
—— v. Wolston, pp. 484, 487.
—— v. Wood, pp. 935, 971, 997, 1345, 1478.
—— v. Wortham, p. 552.
—— v. Wright, 1 Tex. Civ. App. 402, 21 S. W. 80—pp. 419, 450, 452, 960, 976, 1099, 1412.
—— v. Wright, 2 Tex. Civ. App. 463, 21 S. W. 399—pp. 969, 1086, 1096, 1607, 1610, 1623, 1624, 1625, 1626, 2450, 2464, 2706, 3373, 3374, 3375.
—— v. Wright, 10 Tex. Civ. App. 179, 30 S. W. 294—pp. 1623, 1624.
—— v. Yates, pp. 1408, 1409.
—— v. York, pp. 1110, 1352, 1358.
—— v. Younger, p. 2583.
—— v. Zimmerman & Co., pp. 775, 789, 790, 791, 792, 795, 822, 824, 1041.
Gulf, etc., Tel. Co. v. Richardson, p. 663.
Gulick, Indiana Cent. R. Co. v.
Gulliver v. Adams Exp. Co., pp. 425, 428, 727, 732, 748, 768, 770, 3298.
Gulzoni v. Tyler, pp. 2089, 2377.
Gunn v. Metropolitan St. R. Co., p. 2825.
Gunning, Denver, etc., R. Co. v.
Gunter, St. Louis, etc., R. Co. v.
Gunterman, Illinois Cent. R. Co. v.
Gunther v. Baltimore, p. 3582.
Guntzer v. Yonkers R., Co., p. 2907.
Gurley, Anniston Transfer Co. v.
—— v. Springfield St. R. Co., pp. 2146, 2341, 2721.
Gurney v. Grand Trunk R. Co., pp. 3119, 3120, 3121, 3151.
Gurwitz v. Weir, p. 492.
Gustin, Chicago, etc., R. Co. v.
Gustine v. Phillips, p. 1209.
Gutenfels, The.
Guthier v. Minneapolis, etc., R. Co., p. 3062.
Gutierrez, El Paso, etc., R. Co. v.
Guthrie v. Atlantic, etc., R. Co., p. 805.
—— v. Louisville, etc., R. Co., p. 1848.
Guy v. Baltimore, pp. 3440, 3529, 3530, 3531.
—— Louisville, etc., R. Co. v.
—— v. New York, etc., R. Co., pp. 2472, 2491.
—— v. P., C., C. & St. R. Co., pp. 2429, 2474, 2483, 2533.
Guyton, Louisville, etc., R. Co. v.
Gwinn, Gilson v.
Gwyn v. Cincinnati, etc., R. Co., p. 1695.
Gwyn Harper Mfg. Co. v. Carolina Cent. R. Co., pp. 978, 1091, 3394, 3400, 3402.
Gwyn Real Estate Trust, etc., Co. v.
Gwyn, etc., Co. v. Richmond, e c., R. Co., p. 1217.
Gyle v. Joline, p. 1507.
Gyles v. Southern Railway, pp. 2331, 2358, 2777.

H

Haaga v. Austro-Americana Line, p. 4010.
—— v. Citizens' Bank, pp. 308, 355, 369, 396.
—— Georgia R., etc., Co. v.
—— v. Kansas City, etc., R. Co., pp. 356, 360, 371, 403, 487, 495 628, 629.
Haaga v. St. Louis, etc., R. Co., 111 Mo. App. 706, 90 S. W. 1155—p. 2697.
—— v. St. Louis, etc., R. Co., 128 Mo. App. 79, 106 S. W. 599—p. 1832.
—— Southern Pac. R. Co. v.
—— v. Wichita R., etc., Co., pp. 2142, 2145, 2328.
Haase v. Oregon R., etc., Co., pp. 2145, 2148.
Haase & Sons Fish Co. v. Merchant's Despatch Transp. Co., pp. 620, 689, 694, 1021.
Habeck v. Chicago, etc., R. Co., pp. 2480, 2489.
Haber, Missouri, etc., R. Co. v.
Haberzettle v. Trinity, etc. R. Co., pp. 638, 645, 650, 654, 660, 668.
Habil, The.
Hackett v. Boston etc., Railroad, pp. 636, 848, 851.
—— Gabbert v.
Hadd v. United States, etc., Exp. Co., pp. 426, 3259, 3286, 3289.
Haddow v. Perry, p. 3884.
Hadencamp v. Second Ave. R. Co., p. 2181.
Haderlein v. St. Louis R. Co., pp. 2319, 2671.
Hadfield v. Jameson, p. 1149.
Hadley v. Baxendale, pp. 637, 642, 645, 651, 652, 668.
—— Cleveland, etc., R. Co. v.
—— v. Cross, pp. 1685, 1717, 1720, 1846.
—— St. Louis, etc., R. Co. v.
Hafer v. St. Louis, etc., R. Co., pp. 1119, 1123, 1124.
Haff v. Minneapolis, etc., R. Co., p. 1487.
Hagan v. Cargo of Lumber, pp. 3948, 3957, 3958, 3962.
—— Meigs v.
—— v. Philadelphia, etc., R. Co., p. 2263.
—— v. Providence, etc., R. Co., p. 3087.
—— v. Tucker, p. 3952.
Hagar v. Clark, pp. 3864, 3865.
—— v. Elmslie, pp. 3970, 3972.
—— Holland Gulf Steamshipping Co. v.
—— Uren v.
Hagblad, Fremont, etc., R. Co. v.
Hagerman v. Norton, pp. 709, 3964, 3970.
Hagestrom v. West Chicago St. R. Co., p. 2517.
Haggard, American Exp. Co. v.
—— Birmingham R., etc., Co. v.
Haggerty v. Flint, etc., R. Co., p. 2495.
—— v. Palmer, p. 1222.
Hague, Chicago, etc., R. Co. v.
Hahl v. Laux, pp. 1154, 1158, 1164, 1165.
Hahn v. St. Louis, etc., R. Co., p. 1019.
Haight, Pullman Co. v.
—— v. Turner, p. 3008.
Haile v. Texas, etc., R. Co., p. 1707.
Hailey, Louisville, etc., R. Co. v.
—— Railroad v.
Haille v. Smith, p. 350.
Hailman, Gales v.
Haines v. Chicago, etc., R. Co., pp. 3124, 3149, 3151, 3153, 3188.
—— United States Exp. Co. v.
Haislup, Pittsburgh, etc., R. Co. v.
Halbrook, Gulf, etc., R. Co. v.
Halbustro, People v.
Hale v. Barrett, pp. 522, 1159, 1164, 1165.
—— Birmingham Union R. Co. v.
—— v. Bonner, pp. 663, 1254, 1256.
—— v. Chesapeake, etc., R. Co., pp. 2025, 2026.

Hale, Chicago, etc., R. Co. v.
—— East Tennessee, etc., R. Co. v.
—— v. Grand Trunk R. Co., p. 2504.
—— v. Henkel, pp. 3447, 3778, 3779, 3781.
—— Louisville, etc., R. Co. v.
—— Michigan Cent. R. Co. v.
—— Midland Valley R. Co. v.
—— v. Milwaukee Dock Co., p. 355.
—— v. Missouri Pac. R. Co., p. 1444.
—— v. New Jersey Steam Nav. Co., pp. 10, 430, 727, 732, 748, 768, 1003, 1004, 1007, 1490.
Halenbake, Arnold v.
Hales v. The London & N. W. R. W. Co., p. 253.
Haley v. Chicago, etc., R. Co., pp. 2490, 2491.
—— v. St. Louis Transit Co., pp. 1703, 1855.
Halff, etc., Co. v. Allyn & Co., pp. 1217, 1229, 1230, 1232, 1233, 1236, 1237, 1238, 1239.
Hall, American Refrigerator Trans. Co. v.
—— v. American Refrigerator Trans. Co., pp. 3575, 3581.
—— v. Bessemer, etc., R. Co., pp. 1537, 1799.
—— v. Boston, etc., R. Corp., pp. 549, 894, 914.
—— Central, etc., R. Co. v.
—— v. Cheney, pp. 804, 821, 945, 1036.
—— Chesapeake, etc., R. Co. v.
—— Citizens' R. Co. v.
—— v. Connecticut River Steamboat Co., pp. 1684, 1741, 2723, 2776.
—— v. Decuir, pp. 1492, 1496, 1936, 1937, 1947, 3511, 3513, 3515.
—— v. Dimond, pp. 1229, 1235.
—— Dodge v.
—— East Line, etc., R. Co. v.
—— v. Grand Trunk R. Co., p. 898.
—— Illinois Cent. R. Co. v.
—— Indianapolis, etc., R. Co. v.
—— v. Keller, pp. 394, 396.
—— v. Mayo, pp. 339, 3884.
—— v. Memphis, etc., R. Co., 9 Fed. 585—pp. 2437, 2486.
—— v. Memphis, etc., R. Co., 15 Fed. 57—pp. 2448, 2486.
—— Missouri Pac. R. Co. v.
—— v. Morrisons' Adm'r, p. 843.
—— v. Murdock, p. 1759.
—— v. Nashville, etc., R. Co., p. 493.
—— v. Norfolk, etc., R. Co., p. 141.
—— v. Northern Pac. R. Co., p. 2860.
—— v. Pennsylvania Co., p. 586.
—— v. Pennsylvania R. Co., p. 1023.
—— Plantation No. 4 v.
—— v. Power, pp. 111, 192, 2528.
—— Pullman's Palace Car Co. v.
—— v. Railroad Cos., p. 730.
—— v. Richardson, p. 1210.
—— Ryder v.
—— Skinner v.
—— v. South Carolina R. Co., pp. 2469, 2716.
—— Southern Pac. Co. v.
—— v. Southern Railway, p. 2138.
—— v. State, p. 1802.
—— v. Terre Haute Elect. Co., p. 2319.
—— Texas, etc., R. Co. v.
—— Union Pac. R. Co. v.
—— v. Union Pac. R. Co., p. 256.
Hall & Co. v. Renfro, pp. 11, 727, 732, 749, 765, 768, 872, 1340.
Hall Grain Co. v. Louisville, etc., R. Co., pp. 626, 627, 689, 696.
Hall, etc., Mach. Co., St. Louis, etc., R. Co. v.
Hallenbeck v. DeWitt, pp. 323, 984.
Hallgarten, Becker v.
Halliday v. Hamilton, pp. 317, 318, 349, 350.
—— v. St. Louis, etc., R. Co., pp. 3180, 3377.
Halliday Mill. Co. v. Louisiana, etc., R. Co., pp. 1200, 1202.
Hallock, Merchants' Dispatch Transp. Co. v.
Halloren, International, etc., R. Co. v.
Halsell, Chicago, etc., R. Co. v.
Halsey v. Warden, pp. 378, 3274.
Haluptzok v. Great Northern R. Co., p. 2076.
Halverson v. Seattle Elect. Co., p. 2174.
Ham v. Delaware, etc., Canal Co., pp. 1544, 1560, 2472.
—— v. Georgia R., etc., Co., pp. 1688, 1979.
Haman v. Omaha Horse R. Co., pp. 2055, 2483.
Hambel, Chicago, etc., R. Co. v.
Hambrick, St. Louis, etc., R. Co. v.
Hamburg-American Packet Co., Duhme v.
—— v. Gattman, pp., 876, 3119, 3124, 3152, 3187.
—— Higgins v.
—— Jarowski v.
—— Koeningshein v.
—— Moses v.
Hamburg-Amerikanische, etc., Gesellschaft, United States v.
Hamburg, etc., Gesellschaft, New York Millinery, etc., Co. v.
Hamburg, etc., Packet Co., Klein v.
Hamburger, Baltimore, etc., R. Co. v.
—— Cincinnati Tract. Co. v.
—— v. Cincinnati Tract. Co., p. 1824.
Hamburgh American Packet Co., Hirschsohn v.
—— Hurwitz v.
Hamel v. Brooklyn, etc., Ferry Co., p. 2059.
Hamil v. New York, etc., Co., p. 779.
Hamilton v. Boston Elev. R. Co., pp. 2319, 2332, 2876.
—— v. Boston, etc., St. R. Co., pp. 2307, 2878.
—— v. Chicago, etc., R. Co., 103 Iowa 325, 72 N. W. 536—pp. 517, 562, 576, 592.
—— v. Chicago, etc., R. Co., 119 Iowa 650, 93 N. W. 594—pp. 2529, 2530.
—— v. Great Falls St. R. Co., pp. 1736, 2696, 2955.
—— Halliday v.
—— v. Kankakee Elect. R. Co., p. 1901.
—— Midland Valley R. Co. v.
—— v. Metropolitan St. R. Co., pp. 2586, 2643, 2671.
—— v. New York Cent. R. Co., pp. 1973, 1974.
—— v. Nickerson, p. 484.
—— v. Pittsburg, etc., R. Co., p. 2491.
—— v. Pittsburgh, p. 256.
—— v. Southern Pac. Co. v.
—— Texas, etc., R. Co. v.
—— v. Texas, etc., R. Co., p. 2508.
—— The.
—— v. Third Ave. R. Co., 53 N. Y. 25—p. 3091.
—— v. Third Ave. R. Co., 13 Abb. Prac., N. S., 318, 44 How. Prac. 294, 35 N. Y. Super. Ct. 118—p. 2413.
Hamilton, Toledo, etc., R. Co., p.
—— v. West-End St. R. Co., p. 2007.
—— v. Western, etc., R. Co., pp. 1316, 1321.
—— Wilson v.
Hamlen & Sons Co. v. Illinois Cent. R. Co., pp. 3740, 3754, 3762.
Hamler, Chicago, etc., R. Co. v.
Hamlin v. Great Northern R. Co., p. 1670.
Hamm, Ft. Worth, etc., R. Co. v.
—— Texas, etc., R. Co. v.
—— Hammer, Illinois Cent. R. Co. v.
—— United States Exp. Co. v.
—— v. Wiggins Ferry Co., p. 3550.
Hammett v. Chase, etc., Co., p 3956.
—— St. Louis, etc., R. Co. v.
—— v. Wabash R. Co., p. 588.
Hammond v. Anderson, p. 1208.
—— Bohannan v.
—— Fleming v.
—— McClures v.
—— v. Northeastern R. Co., pp. 1503, 1575.
—— Thorp v.
—— Toledo, etc., R. Co. v.
Hammond, etc., R. Co. v. Antonia, p. 2612.
—— v. Spyzchalski, pp. 2015, 2605.
Hammonds v. Barclay, p. 1164.
Hampe, Chicago Union Tract. Co. v.
Hampton, Houston, etc., R. Co. v.
—— v. Occidental, etc., Steamship Co., p. 4004.
—— Oostanaula, etc., Steamboat Co. v.
—— v. Pullman Palace Car Co., pp. 3215, 3217, 3221, 3232.
Hamrick Bros. & Co. v. Southern R. Co., p. 176.
Hanaw, Southern Exp. Co. v.
Hance v. Pacific Exp. Co., 48 Mo. App. 179—pp. 209, 249, 1037, 1047, 1456.
—— v. Pacific Exp. Co., 66 Mo. App. 486—p. 1456.
—— v. Wabash, etc., R. Co., 56 Mo. App. 476—pp. 945, 970, 3348.
—— v. Wabash, etc., R. Co., 62 Mo. App. 60—p. 492.
Harcock v. Chicago, etc., R. Co., pp. 1372, 1373, 1423.
—— Heilbroner v.
—— Interurban R., etc., Co. v.
—— Lewis v.
—— v. Louisville, etc., R. Co., p. 2454.
—— Missouri, etc., R. Co. v.
—— v. New York, etc., R. Co., 76 N. E. 1096, 184 N. Y. 540—pp. 2363, 2910.
—— v. New York, etc., R. Co., 91 N. Y. S. 601, 100 App. Div. 161—p. 2350.
Hand v. Baynes, pp. 502, 505, 848, 3888, 3889, 3890, 3902.
—— Philadelphia, etc., R. Co. v.
—— Simpson v.
—— Union Pac. R. Co. v.
Handley v. Missouri Pac. R. Co., p. 2516
Handy, Birmingham R., etc., Co. v.
—— Illinois Cent. R. Co. v.
Hanes, Alabama, etc., R. Co. v.
Hankerson, Southwestern R. Co. v.
Hanks, Farmers', etc., Nat. Bank v.
—— v. Missouri Pac. R. Co., pp. 3734, 3768.

Hanley v. Brooklyn Heights R. Co., 96 N. Y. S. 249, 110 App. Div. 429—pp. 2850, 2852.
—— v. Brooklyn Heights R. Co., 111 N. Y. S. 575, 127 App. Div. 355—p. 2005.
—— v. Chicago, etc., R. Co., pp. 1283, 1339, 1457, 1458, 1460.
—— v. Kansas, etc., R. Co., pp. 129, 3421, 3422, 3423, 3491.
—— Lennon v.
—— United States v.
Hanlon v. Central R. Co., p. 2066.
—— v. Illinois Cent. R. Co., pp. 1607, 1623, 1624, 1632, 1636.
Hammer, Chesapeake, etc., R. Co. v.
Hanna, Fitchburg, etc., R. Co. v.
—— International, etc., R. Co. v.
—— v. Nassau, etc., R. Co., pp. 1665, 2492.
—— v. Pitt, p. 754.
Hannay v. Guaranty Trust Co., p. 399.
Hannay-Frerichs & Co., Texas Cent. R. Co. v.
Hannestad v. Chicago, etc., R. Co., 132 Iowa 232, 109 N. W. 718—p. 2820.
—— v. Chicago, etc., R. Co. (Iowa), 118 N. W. 38—p. 2315.
Hannibal, etc., R. Co., Brown v.
—— Cantling v.
—— Claybrook v.
—— Clothworthy v.
—— Currell v.
—— Dimmitt v.
—— Douglass v.
—— Dunn v.
—— Goetz v.
—— Harris v.
—— Hicks v.
—— Higgins v.
—— Holt v.
—— Kelly v.
—— Logan v.
—— v. Martin, 11 Ill. App. 386—pp. 1522, 2085.
—— v. Martin, 111 Ill. 219—pp. 2224, 2930.
—— Miller v.
—— Missouri Coal, etc., R. Co. v.
—— Pruitt v.
—— Sawyer v.
—— Sherman v.
—— Snyder v.
—— Spooner v.
—— v. Swift, pp. 210, 267, 285, 726, 731, 755, 759, 782, 1502, 1679, 3113, 3115, 3116, 3118, 3124, 3127, 3128, 3141, 3142, 3148, 3152, 3157, 3158.
—— Swigert v.
—— Waller v.
Hanriford, Little Rock, etc., R. Co. v.
Hanning, Railroad Co. v.
Hannon v. Boston Elev. R. Co., p. 1971.
—— v. St. Louis Trans. Co., p. 2656.
Hanover Junction, etc., R. Co. v. Anthony, pp. 2126, 2164.
Hanrahan v. Manhattan R. Co., p. 2144.
Hansberger v. Sedalia Elect. R., etc., Co., pp. 2333, 2637, 2657.
Hansen v. North Jersey St. R. Co., 64 N. J. L. 686, 46 Atl. 718—pp. 1712, 1715, 1951.
—— v. North Jersey St. R. Co. (N. J.), 43 Atl. 663—p. 2806.
—— v. Third Ave. R. Co., p. 2818.
Hansford & Son, Cincinnati, etc., R. Co. v.
Hansley v. Jamesville, etc., R. Co., 115 N. C. 602, 20 S. E. 528, 32 L. R. A. 543, 44 Am. St. Rep. 474—pp. 1510, 3054.
Hansley v. Jamesville, etc., R. Co., 117 N. C. 565, 23 S. E. 443, 32 L. R. A. 543, 53 Am. St. Rep. 600—pp. 1674, 3054.
Hanson v. Atchison, etc., R. Co., p. 1286.
—— v. Chicago, etc., R. Co., p. 2906.
—— v. European, etc., R. Co., pp. 2042, 2052, 3074.
—— v. Flint, etc., R. Co., pp. 305, 333, 334, 410, 3255.
—— v. Great Northern R. Co., pp. 431, 948, 952, 978, 1056, 1063.
—— v. Haywood Bros., etc., Co., p. 4068.
—— v. Marsfield R., etc., Co., p. 2207.
—— May v.
—— v. Urbana, etc., St. R. Co., p. 2770.
—— Wells Fargo & Co. v.
Hanthorn, Chicago Union Tract. Co. v.
Hapgood Plow Co. v. Wabash R. Co., p. 912.
Haralson, Atlanta, etc., R. Co. v.
—— v. San Antonio Tract. Co., pp. 2357, 2648, 2659.
Harbeck, Keyser v.
Harber, New York, etc., R. Co. v.
Harbin, Baltimore, etc., R. Co. v.
Harbison v. Metropolitan R. Co., p. 2172.
Harbor Master v. Sutherland, p. 3433.
Harby v. Southern R. Co., pp. 608, 3377, 3382.
Hardage, Atlanta Consol. St. R. Co. v.
Hardaway v. Southern R. Co., pp. 1195, 1200, 1202, 3750.
Hardee v. Brown, p. 3579.
Harden, Birmingham R., etc., Co. v.
—— v. Chesapeake, etc., R. Co., pp. 1267, 1271, 1289, 1339, 1341, 1402, 1471.
—— v. Chicago, etc., R. Co., pp. 2335, 2891.
Hardenbergh v. St. Paul, etc., R. Co., 39 Minn. 3, 34 Am. & Eng. R. Cas. 359, 38 N. W. 625, 12 Am. St. Rep. 610—pp. 1571, 1953, 1954, 1955, 2427, 2476.
—— v. St. Paul, etc., R. Co., 41 Minn. 200, 42 N. W. 933—p. 3099.
Hardendorf, Ft. Wayne Tract. Co. v.
Harder, International, etc., R. Co. v.
Hardesty, United R., etc., Co. v.
Hardie, Chicago, etc., R. Co. v.
—— Yazoo, etc., R. Co. v.
Hardie & Co. v. Vicksburg, etc., R. Co., pp. 359, 360.
Hardin v. Chicago, etc., R. Co., p. 1990.
—— Ft. Worth, etc., R. Co. v.
—— v. Ft. Worth, etc., R. Co., 33 Tex. Civ. App. 448, 77 S. W. 431—pp. 1524, 1525, 1526, 1527, 1749, 1752, 1979.
—— v. Fort Worth, etc., R. Co., 49 Tex. Civ. App. 184, 108 S. W. 490—p. 2725.
—— v. Fort Worth, etc., R. Co. (Tex. Civ. App.), 100 S. W. 995—pp. 1991, 2209, 2891.
—— Leisy v.
—— Savannah, etc., R. Co. v.
—— Southern R. Co. v.
—— Texas, etc., R. Co. v.
Hardin Grain Co. v. Missouri Pac. R. Co., pp. 640, 653, 1109, 3334.
Harding v. Chicago, etc., R. Co., p. 2650.
Harding v. New York, etc., R. Co., p. 3083.
—— v. Philadelphia Rapid Transit Co., p. 2192.
—— Western Union Tel. Co. v.
Harding Paper Co. v. Allen, p. 1233.
Hardman v. Montana Union R. Co., pp. 910, 913.
Hardway, St. Louis, etc., R. Co. v.
Hardwick v. Georgia R., etc., Co., pp. 1690, 1881, 1971, 1995.
—— Richardson v.
Hardwick Farmers' Elevator Co., Chicago, etc., R. Co. v.
—— v. Chicago, etc., R. Co., p. 3501.
Hardy v. American Exp. Co., pp. 572, 601, 874.
—— v. Milwaukee St. R. Co., p. 2985.
—— v. North Carolina Cent. R. Co., p. 2587.
—— Parsons v.
—— St. Louis, etc., R. Co. v.
—— South Covington, etc., St. R. Co. v.
Hare v. Browne, p. 352.
Haring, New York, etc., R. Co. v.
Harkey v. Texas, etc., R. Co., p. 1780.
Harkins v. Seattle Elect. Co., pp. 2860, 2965.
Harkless v. Chicago, etc., R. Co., pp. 1541, 2435, 3084.
Harkness v. Kansas, etc., R. Co., p. 2904.
Harkow v. New York City R. Co., p. 1648.
Harlan v. Adams Exp. Co., p. 209.
—— Chesapeake, etc., R. Co. v.
—— Ft. Worth, etc., R. Co. v.
Harlow v. Fitchburg R. Co., p. 3191.
Harman v. Chicago, pp. 3479, 3569, 3585.
—— Galveston, etc., R. Co. v.
—— Norfolk, etc., R. Co. v.
Harmon v. Chicago, p. 3585.
—— Chicago, etc., R. Co. v.
—— v. Flintham, pp. 1796, 2878.
—— v. Jensen, pp. 1573, 1631.
—— Louisville, etc., R. Co. v.
—— Norfolk, etc., R. Co. v.
—— Richardson v.
—— Robinson v.
—— St. Louis, etc., R. Co. v.
—— v. United R. Co., pp. 2289, 2617.
—— Washington, etc., R. Co. v.
—— v. Washington, etc., R. Co., pp. 2319, 2357.
Harmonson, Missouri Pac. R. Co. v.
Harmony v. Bingham, pp. 437, 630, 633, 1195.
Harn, Houston, etc., R. Co. v.
Harnden Exp. Co., Hubbard & Co. v.
Harnden's Exp. Co., Meyer v.
—— Moriata v.
Harned, Louisville, etc., R. Co. v.
—— v. Missouri, etc., R. Co., pp. 1087, 1088, 1107, 1111, 1114, 1421.
Harnett v. Westcott pp. 829, 83[illegible].
Harp v. Choctaw, etc., R. Co., 118 Fed. 169—pp. 30, 96.
—— v. Choctaw, etc., R. Co., 81 C. C. A. 405, 125 Fed. 445—pp. 89, 187, 188, 189.
—— v. Southern R. Co., pp. 2425, 2430, 2444.
Harper v. Erie R. Co., p. 2114.
—— Illinois Cent. R. Co. v.
—— Little Rock, etc., R. Co. v.
—— Philadelphia, etc., R. Co. v.

Harper v. Pittsburg, etc., R. Co., pp. 2135, 2324, 2777.
—— St. Louis, etc., R. Co. v.
—— Southern Transp. Co. v.
Harper Bros., Missouri Pac. R. Co. v.
Harper Furniture Co. v. Southern Exp. Co., 144 N. C. 639, 57 S. E. 458, 12 Am. & Eng. R. Cas. 924—pp. 493, 690.
—— v. Southern Exp. Co., 148 N. C. 87, 62 S. E. 145, 30 L. R. A., N. S., 483, 128 Am. St. Rep. 588—pp. 638, 641, 642, 649, 650, 654, 657, 658, 666, 667, 668, 671, 674, 695.
Harper House Co., Fraser v.
Harrell v. Columbia Elect. St. R., etc., Co., pp. 2117, 2816.
—— Little Rock, etc., R. Co. v.
—— v. Owens, pp. 211, 728, 733, 749.
—— v. Wilmington, etc., R. Co., p. 278.
Harrill Bros. v. Southern R. Co., pp. 157, 531, 3499.
Harriman, Interstate Commerce Comm. v.
—— v. Interstate Commerce Comm., pp. 3600, 3767, 3780.
—— Missouri, etc., R. Co. v.
—— v. Reading, etc., St. R. Co., pp. 2694, 2898, 2946.
—— The.
Harrington v. American, etc., Lumber Co., p. 3958.
—— v. King, p. 681.
—— v. Lyles, pp. 729, 749, 768.
—— v. McShane, pp. 11, 728, 730, 733, 749.
—— v. Manchester St. Railway, p. 2910.
—— Pecos River R. Co. v.
—— Southern R. Co. v.
—— Texas, etc., R. Co. v.
—— v. Wabash R. Co., pp. 764, 3267.
Harris, Adams Exp. Co. v.
—— Arkansas, etc., R. Co. v.
—— v. Balk, p. 577.
—— Brown v.
—— Carson v.
—— v. Central R. R., p. 2547.
—— v. Central, R., etc., Co., p. 706.
—— Chesapeake, etc., R. Co. v.
—— v. Cheshire R. Co., p. 846.
—— Cincinnati, etc., R. Co. v.
—— v. City, etc., R. Co., p. 1582.
—— v. Cockermouth & Worthington R. Co., p. 3692.
—— v. Delaware, etc., R. Co., 77 N. J. L. 278, 72 Atl. 50—pp. 1016, 1633, 3065.
—— v. Delaware, etc., R. Co., 61 N. Y. 656—pp. 848, 855.
—— Denver, etc., R. Co. v.
—— D'Wolf v.
—— Eddy v.
—— v. Fargo, p. 649.
—— v. Grand Trunk R. Co., pp. 3257, 3289, 3338.
—— v. Great Northern R. Co., p. 1001.
—— v. Guggenheim, p. 2902.
—— Gulf, etc., R. Co. v.
—— Houston, etc., R. Co. v.
—— v. Hannibal, etc., R. Co., 37 Mo. 307—p. 814.
—— v. Hannibal, etc., R. Co., 89 Mo. 233, 1 S. W. 325, 58 Am. Rep. 111—pp. 2120, 2170.
—— v. Hart, pp. 1227, 1229, 1232, 1237, 1240, 1243.
—— v. Howe, pp. 2092, 2496, 3315, 3331, 3373, 3375.
—— Illinois Cent. R. Co. v.
—— Knoxville, etc., R. Co. v.
—— Kurfees v.
—— Lafaye v.
—— Louisville, etc., R. Co. v.
Harris v. Louisville, etc., R. Co., pp. 529, 564, 565, 890.
—— v. Minneapolis, etc., R. Co., p. 3357.
—— Missouri Pac. R. Co. v.
—— Missouri, etc., R. Co. v.
—— v. Moody, 30 N. Y. 266, 86 Am. Dec. 375—p. 818.
—— v. Moody, 17 N. Y. Super. Ct. 210—p. 818.
—— v. New Jersey Cent. R. Co., p. 185.
—— v. Northern Indiana R. Co., pp. 753, 827, 1288, 1273.
—— v. Packwood, p. 1037.
—— v. Panama R. Co., 58 N. Y. 660—p. 1464.
—— v. Panama R. Co., 16 N. Y. Super. Ct. 7—pp. 857, 862.
—— v. Panama R. Co., 18 N. Y. Super. Ct. 312—p. 848.
—— Pecos Valley, etc., R. Co. v.
—— v. Pittsburg, etc., R. Co., pp. 2249, 2912.
—— v. Pratt, pp. 381, 382, 1227, 1237, 1238, 1239.
—— v. Puget Sound Elect. Railway, pp. 1585, 1586, 2004, 2100, 2645, 2697, 2720, 2762.
—— Railroad Co. v.
—— v. Rayner, p. 2651.
—— Savannah, etc., R. Co. v.
—— v. Seattle, etc., R. Co., pp. 1535, 1536, 1537, 1806, 2934.
—— v. Stevens, pp. 192, 197, 1513, 1637, 1802, 2122, 2631.
—— v. Story, pp. 323, 984.
—— Tallulah Falls R. Co. v.
—— Ten Eyck v.
—— v. Tenney, pp. 1206, 1219, 1220, 1221, 1229, 1236, 1237, 1238.
—— Union Pac. R. Co. v.
—— v. Union Pac. R. Co., p. 1816.
—— v. Union R. Co., p. 2268.
—— United States v.
—— United States Exp. Co. v.
Harris & Co., Wabash R. Co. v.
Harrisburg, The.
Harrisburg Tract. Co., Clark v.
—— Neff v.
—— Redington v.
Harrisburg, etc., R. Co., Light v.
Harrison, Chicago, etc., R. Co. v.
—— v. Fink, pp. 2055, 2058, 2466, 2473, 2474, 2481.
—— v. Fortlage, p. 3896.
—— Great Northern R. Co. v.
—— v. Hixson, pp. 813, 837, 838.
—— Mississippi, etc., R. Co. v.
—— v. Missouri Pac. R. Co., pp. 449, 453, 1018, 1044.
—— Missouri, etc., R. Co. v.
—— v. Missouri, etc., R. Co., p. 1779.
—— New Orleans, etc., R. Co. v.
—— v. New Orleans, etc., R. Co., pp. 469, 470.
—— v. Pennsylvania R. Co., p. 2564.
—— v. Roy, p. 8.
—— St. Louis, etc., R. Co. v.
—— Shepherd v.
—— v. Smith, p. 709.
—— Southern R. Co. v.
—— v. Stewart, pp. 456, 3888.
—— v. Sutter St. R. Co., p. 2699.
—— v. United States, p. 3441.
—— v. Weir, 69 N. Y. S. 957, 34 Misc. Rep. 519—pp. 1298, 1333.
—— v. Weir, 75 N. Y. S. 909, 71 App. Div. 248—p. 1348.
Harrison Granite Co. v. Pennsylvania R. Co., p. 261.
Harrold, Ft. Worth, etc., R. Co. v.
—— v. Winona, etc., R. Co., p. 2928.
Harry, El Paso, etc., R. Co. v.
Harry, Wilson v.
Harry & Bros., Houston, etc., R. Co. v.
Harshman v. Little Miami R. Co., p. 3251.
—— v. Little Miami, etc., Railways, pp. 504, 851.
Hart v. Allen, pp. 728, 745, 749, 778.
—— v. Baltimore, etc., R. Co., pp. 167, 169, 1199.
—— v. Baxendale, p. 243.
—— v. Capital Tract. Co., pp. 2178, 2179, 2292.
—— v. Chicago, etc., R. Co., pp. 727, 753, 755, 774.
—— Fargo v.
—— Faulkner v.
—— v. Fletcher Land Co., p. 1840.
—— Harris v.
—— v. Metropolitan St. R. Co., 65 App. Div. 493, 72 N. Y. S. 797—p. 2567.
—— v. Metropolitan St. R. Co., 58 N. Y. S. 1087, 28 Misc. Rep. 766—p. 2829.
—— v. Metropolitan St. R. Co., 69 N. Y. S. 906, 34 Misc. Rep. 521—pp. 1521, 2486.
—— v. New Orleans, etc., R. Co., p. 2641.
—— v. North German Lloyd Steamship Co., 95 N. Y. S. 733, 108 App. Div. 279—pp. 4009, 4010.
—— v. North German Lloyd Steamship Co., 92 N. Y. S. 338, 46 Misc. Rep. 426—p. 4008, 4011.
—— v. Pennsylvania R. Co., pp. 930, 947, 953, 958, 1073, 1076, 1083, 1137, 1151, 1406.
—— v. Railroad, p. 359.
—— v. Rensslaer, etc., R. Co., pp 3160, 3169, 3175, 3179.
—— Rice v.
—— v. St. Louis, etc., R. Co., p. 2667.
—— v. Spalding, p. 848.
—— v. State, p. 3511.
—— Texarkana St. R. Co. v.
—— Western Railway v.
Hartan v. Eastern R. Co., pp. 3317, 3322, 3323.
Harten v. Brightwood R. Co., p. 2277.
Harter v. Charleston, etc., R. Co., pp. 808, 846, 3399, 3557.
Hartford City, Pittsburgh, etc., R. Co. v.
Hartford Deposit Co. v. Pederson, p. 2883.
—— v. Sollitt, pp. 1750, 2739, 2756, 2984.
Hartford Fire Ins. Co. v. Chicago, etc., R. Co., pp. 9, 947, 1277.
—— Cray v.
—— First Nat. Bank v.
Hartford Ins. Co., Riddlebarger v.
Hartford Steamboat Co., Camp v.
Hartford St. R. Co., Donovan v.
Hartford, etc., R. Co., Boies v.
—— Havens v.
—— v. Jackson, pp. 1137, 1138.
—— Merriam v.
—— State v.
Hartford, etc., Steamboat Co., Camp v.
—— Graves v.
Hartford, etc., Tramway Co., Wheeler v.
Hartford, etc., Transp. Co., Pisapia v.
Hartley v. St. Louis, etc., R. Co., pp. 3248, 3262, 3329, 3330, 3331, 3334, 3406.
Hartman, Louisville R. Co. v.
Hartmann v. Louisville, etc., R. Co., pp. 430, 886, 894, 943.
Hartshorn, Price v.
Hartshorne v. Johnson, p. 1160.

Hartung, St. Louis, etc., R. Co. v.
Hartwell, Louisville, etc., R. Co. v.
—— v. Louisville, etc., R. Co., pp. 482, 802.
Hartford, The City of.
—— v. Northern Pac. Exp. Co., pp. 989, 1085.
Hartwell R. Co. v. Kidd, pp. 808, 828.
Hartwig v. Chicago, etc., R. Co., pp. 1873, 2140, 2727.
Harty v. New York, etc., R. Co., p. 2890.
Hartzig v. Lehigh Valley R. Co, p. 2367.
Harvard College, Stewart v.
Harvey v. Atlantic, etc., R. Co., pp. 1619, 2471.
—— v. Chicago, etc., R. Co., pp. 2124, 2257, 2385, 2929.
—— Cleveland, etc., R. Co. v.
—— v. Connecticut, etc., R. Co., pp. 434, 469, 471, 638, 653, 659, 1140.
—— v. Deep River Logging Co., pp. 2209, 2334, 2836.
—— v. Eastern R. Co., p. 2151.
—— v. Grand Trunk R. Co., p. 471.
—— v. Louisiana Western R. Co., p. 2504.
—— Pullman's Palace Car Co. v.
—— v. Rose, pp. 11, 768.
—— Schieffelin v.
—— v. Terre Haute, etc., R. Co., pp. 485, 1037.
—— The D.
Harville, Michigan Cent. R. Co. v.
Harvy v. Pike, p. 404.
Harwell, Western R. Co. v.
Harwood, Graves v.
Harzburg & Co. v. Southern R. Co., pp. 3142, 3143, 3144, 3196.
Hasbrouck v. New York, etc., R. Co., 95 N. E. 808, 202 N. Y. 363, 35 L. R. A., N. S., 537, Ann. Cas. 1912 D, 1150—pp. 1912, 1913, 3109, 3115, 3116, 3117, 3123, 3124, 3125, 3145, 3146, 3148, 3156, 3186.
—— v. New York, etc., R. Co., 122 N. Y. S. 123, 137 App. Div. 532—pp. 3142, 3144.
Haselton v. Portsmouth, etc., Railway, pp. 1516, 1518, 1535, 2788, 2874.
Haskell v. Boston Dist. Messenger Co., p. 9.
—— v. Cowham, pp. 3532, 3533.
—— Hunt v.
—— Kansas Natural Gas Co. v.
—— v. Manchester St. Railway, p. 2728.
—— v. Metropolitan St. R. Co., p. 2358.
—— Spring v.
Haskins v. Lake Shore, etc., R Co., pp. 1863, 2437, 2455.
—— United Steamship Co. v.
Hasler Co. v. Griffing Florida Orchard Co., p. 569.
Haslet, Dickinson v.
Hassard, Philadelphia City Pass. R. Co. v.
—— Philadelphia, etc., R. Co. v.
Hasse v. American Exp. Co., pp. 572, 573, 889, 891.
Hasselkus, Central R., etc., Co. v.
Hassell, International, etc., R. Co. v.
—— Texas, etc., R. Co. v.
Hasseltine v. Southern Railway, p. 1678.
Hassen v. Nassau Elect. R. Co., p. 2194.
Hassler v. Gulf, etc., R. Co., pp. 645, 646.
Hastings v. Boland, p. 2989.
Hastings v. Central Crosstown R. Co., pp. 2174, 2696, 2899.
—— v. New York, etc., R. Co., pp. 211, 262.
—— v. Northern Pac. R. Co., pp. 1938, 2340.
—— v. Pepper, pp. 10, 337, 728, 733, 749, 753, 764, 3862.
Hatch, Lake Erie, etc., R. Co. v.
—— v. Minneapolis, etc., R. Co., pp. 1412, 1417, 1418, 1431.
—— Pullman Sleeping Car Co. v.
—— v. Pullman Sleeping Car Co., p. 3237.
—— Railroad Co. v.
—— v. Reardon, p. 3556.
—— St. Louis, etc., R. Co. v.
—— Willamette Iron Bridge Co. v.
—— Yazoo, etc., R. Co. v.
Hatchard, Hathaway v.
Hatchell, International, etc., R. Co. v.
Hatcher, Alabama Mid. R. Co. v.
—— Law v.
Hatchkiss, L. S. & M. S. R. Co. v.
Hathaway v. Hatchard, p. 2629.
Hathorn v. Ely, pp. 893, 910.
Hatten v. Railroad Co., pp. 1493, 1529, 1612, 1621, 1974.
Hatter & Son, Southern R. Co. v.
Hattie Palmer, The.
Hatton, Ohio, etc., R. Co. v.
Hauer, Baltimore, etc., R. Co. v.
Haugh, etc., Transfer Co., Lloyd v.
Haught, Adams & Co. v.
Haughton v. The Memphis, p. 3899.
Hauk v. New York, etc., R. Co., p. 2505.
Haurigan v. Chicago, etc., R. Co., p. 87.
Hause & Son v. Judson, pp. 1209, 1210, 1219, 1220.
Hausman, Baltimore, etc., R. Co. v.
Haussman, Pensacola, etc., R. Co. v.
Hauterman v. Bock, pp. 1206, 1243.
Haven, Ringgold v.
Havens, Barker v.
—— v. Hartford, etc., R. Co., pp. 2420, 2423.
Haver v. Central R. Co., 62 N. J. L. 282, 41 Atl. 916, 12 Am. & Eng. R. Cas., N. S., 261, 72 Am. St. Rep. 647, 43 L. R. A. 84—p. 2045.
—— v. Central R. Co., 45 Atl. 593, 64 N. J. L. 312—p. 2485.
Haverhill, etc., Dispatch Co., Bullock v.
Haverhill, etc., St. R. Co., Tozier v.
Haverlund v. Chicago, etc., R. Co., p. 3035.
Haverstick, Indianapolis, etc., R. Co. v.
Haweroyt, Great Northern R. Co. v.
Hawes v. Southern R. Co., p. 163.
Hawgood v. One Thousand Three Hundred and Ten Tons of Coal, p. 701.
Hawk, Alabama, etc., R. Co. v.
—— Chicago, etc., R. Co. v.
—— v. Chicago, etc., R. Co., pp 1755, 1993, 2703.
Hawkhurst Steamship Co. v. Keyser, p. 3955.
Hawkins v. Alfalfa Products Co., pp. 369, 396, 398, 493.
—— Birmingham R., etc, Co. v.
—— v. Front St. etc., R. Co., pp 2164, 2667, 2673.
—— Great Western R. Co. v.
Hawkins v. Great Western R. Co., pp. 1374, 1380.
—— v. Hoffman, pp. 790, 3114, 3115, 3117, 3121, 3123, 3124, 3127, 3129, 3130, 3141, 3142, 3145.
—— Missouri, etc., R. Co. v.
—— St. Louis, etc., R. Co. v.
—— Southern R. Co. v.
—— Texas, etc., R. Co. v.
Hawkinsville, etc., R. Co. v. Livingston, p. 1200.
Hawley, Louisville, etc., R. Co. v.
—— v. Screven, pp. 3176, 3177, 3179.
—— Western Transp. Co. v.
Hay v. Great Western R. Co., p. 1827.
—— Missouri, etc., R. Co. v.
—— Molby v.
—— Mollory v.
—— Robertson v.
Hayden v. Davis, pp. 573, 3892
—— Georgia R. Co. v.
—— Texas, etc., R. Co. v.
Hayes v. Adams Exp. Co., 73 N. J. L. 105, 62 Atl. 284—pp. 1065, 1069.
—— v. Adams Exp. Co., 74 N. J. L. 537, 65 Atl. 1044, 23 R. R. R. 506, 46 Am. & Eng. R. Cas., N. S., 506—pp. 1067, 1070.
—— Cleveland, etc, R. Co. v.
—— v. Forty-Second St., etc., R. Co., pp. 1993, 1996, 2804.
—— Missouri, etc., R. Co. v.
—— v. Missouri, etc., R. Co., pp. 1292, 1419, 1420, 1421.
—— v. New York, etc., R. Co., p. 2429.
—— Ormund v.
—— v. St. Louis R. Co., pp. 2770, 2771.
—— v. Wabash R. Co., pp. 1607, 3052.
—— v. Wells Fargo & Co., pp. 760, 764.
Hayman v. Canadian, etc., R. Co., p. 563.
—— v. Pennsylvania R. Co., pp. 1720, 2671, 2674, 2675, 2686.
—— v. Philadelphia R. Co., pp 1339, 1451, 1457.
Haynes, Adams Exp. Co. v.
—— Illinois Cent. R. Co. v.
—— International, etc., R. Co. v.
—— Missouri Pac. R. Co. v.
—— St. Louis, etc., R. Co. v.
—— v. Wabash R. Co., p. 753
Haynes & Co., Missouri Pac. R. Co. v.
Haynie v. Baylor, p. 771.
Hays v. Houston, etc., R. Co., p. 3086.
—— v. Kennedy (Pa.), 3 Grant. 351—pp. 822, 828.
—— v. Kennedy, 41 Pa. 378, 80 Am. Dec. 627—pp. 728, 733, 736, 737, 749, 751, 752, 825.
—— Mouille v.
—— v. Mouille, pp. 1163, 1208, 1214, 1220, 1229, 1230, 1232, 1237, 1238, 1240, 1243, 1245.
—— v. Pacific Mail Steamship Co, pp. 3478, 3581, 3583, 3584.
—— Pittsburgh, etc., R. Co. v.
—— Ryan v.
—— St. Louis, etc, R. Co. v.
—— Texas, etc., R. Co. v.
—— Third Nat. Bank v.
—— v. Wabash R. Co., p. 2708.
—— Williams v.
Hays Co. v. Pennsylvania Co., pp. 1179, 3691.
Hayter v. Brunswick Tract. Co., p. 2483.
Hayward, Candee v.
—— v. Middleton, pp. 1148, 1150, 1151.
—— Pullman's Palace Car Co. v.
Haywood Bros., etc., Hanson v.

Hazard v. Chicago, etc., R. Co., pp. 1720, 1752, 1754.
—— Jordan v.
Hazel v. Chicago, etc., R. Co., pp. 939, 940, 941, 945.
Hazeltine, Farmers, etc., Nat. Bank v.
Hazelton Coal Co. v. Buck Mountain Coal Co., p. 447.
Hazen, Pittsburgh, etc., R. Co. v.
Hazlett, Missouri, etc., R. Co. v.
—— Van Studdiford v.
Hazman v. Hoboken Land, etc., Co., p. 1750.
Hazzard, Chicago, etc., R. Co. v.
—— v. Chicago, etc., R. Co., p. 1550.
Head v. Georgia Pac. R. Co., pp. 1628, 1629, 2408, 2444, 2566.
—— Gulf, etc., R. Co. v.
—— Illinois Cent. R. Co. v.
—— Louisville, etc., R. Co. v.
—— v. Pacific Exp. Co., pp. 760, 762, 763, 815.
Head Money Cases, pp. 3531, 3564.
Headland, Atchison, etc., R. Co. v.
Healey v. City Passenger R. Co., pp. 2414, 2483, 2485, 2548, 2850.
Healy v. Chicago City R. Co., p. 2742.
—— Sun Co. v.
Heard, Kansas City, etc., R. Co. v.
—— v. State, p. 177.
Hearne, Central R. Co. v.
Heath, Cleveland, etc., R. Co. v.
—— Missouri Pac. R. Co. v.
—— v. St. Louis, etc., Railway v.
Heath v. South Bound R. Co., p. 722.
Heathdene, The.
Heaton, Bigelow v.
—— v. Morgan's, etc., Steamship Co., pp. 933, 957, 958.
Heazle v. Indianapolis, etc., R. Co., pp. 2693, 2953.
Hebblethwaite v. Old Colony St. R. Co., pp. 2670, 2860.
Hebert v. Portland R. Co., pp. 1585, 1586.
Hecht v. Grand Trunk R. Co., p. 869.
Heck v. East Tennessee, etc., R. Co., pp. 3614, 3640.
—— v. Missouri Pac. R. Co., p. 823.
Hecker v. Chicago, etc., R. Co., p. 2249.
Hecksher, Pottinger v.
Hedding v. Gallagher, 69 N. H. 650, 45 Atl. 96, 76 Am. St. Rep. 204—p. 3158.
—— v. Gallagher, 72 N. H. 377, 57 Atl. 225, 64 L. R. A. 811—p. 100.
Heddleston, Alabama, etc., R. Co. v.
Hedge, St. Joseph, etc., R. Co. v.
Hedger, Louisville, etc., R. Co., v.
Hedges v. Hudson River R. Co., 49 N. Y. 223, 3 Am. R. Rep. 346—pp. 896, 901, 907.
—— v. Hudson River R. Co., 29 N. Y. Super. Ct. 119—pp. 564, 896, 901.
—— v. Wilmington, etc., R. Co., p. 2735.
Heenrich v. Pullman Palace Car Co., pp. 2037, 2627.
Heff, Matter of.
Heffron v. Detroit City R. Co., pp. 1649, 1650, 2448.
—— v. Michigan, etc., R. Co., pp. 213, 432.
—— v. Pollard, p. 490.
Hefley, Gulf, etc., R. Co. v.
Hegeman v. Western R. Corp. (N. Y.), 16 Barb. 353—pp. 2673, 2695, 2743.
—— v. Western R. Corp., 13 N. Y. 9, 64 Am. Dec. 517—pp. 1682, 1720, 1823, 1848, 1850.
Heger, Louisville, etc., R. Co. v.
Heggen v. Fort Dodge, etc., R. Co., pp. 2051, 2075.
Heggie, Nashville, etc., R. Co. v.
Heide, Hubener v.
Heidenheimer v. Johnston, p. 1350.
—— Missouri Pac. R. Co. v.
Heidenheimer & Co. v. Schlett, p. 597.
Heighway v. Voorhees, p. 2161.
Heike v. United States, p. 3778.
Heil v. St. Louis, etc., R. Co., pp. 851, 1037, 1047, 3343.
Heilbroner v. Hancock, pp. 1172, 1173.
Heilbronner, Commercial Nat. Bank v.
Heilprin & Co., Louisville, etc., R. Co. v.
Heineman v. Grand Trunk R. Co., pp. 4, 749.
Heinken, Shephard v.
Heinlien v. Boston, etc., R. Co., p. 1510.
Heins v. Savannah, etc., R. Co., p. 2087.
Heinz v. Railroad Transfer Co., p. 1211.
Heinze v. Interurban R. Co., pp. 1901, 1998, 2357.
Heirn v. McCaughan, pp. 1670, 1851, 2565, 2566, 2567, 3043.
Heiserman v. Burlington, etc., R. Co., pp. 67, 1194, 1195, 1196, 1198.
Heiskell v. Farmers', etc., Nat. Bank, pp. 378, 402, 403, 404.
Heisley, Coxe v.
Heitman v. Chicago, etc., R. Co., pp. 1318, 1340, 1349, 1440, 1466, 1480, 1482.
Heittner, International, etc., R. Co. v.
Helena, Nelson v.
Helena-Glendale Steam Ferry Co. v. State, p. 3587.
Helena St. R. Co., Wall v.
Helena, etc., R. Co., Robinson v.
Helene, The.
Heller v. Chicago, etc., R. Co., pp. 728, 1268, 1341, 1454.
—— Lincoln Tract. Co. v.
—— Petrie v.
Helliwell v. Grand Trunk Railway, pp. 246, 621, 623, 767, 3279.
Hellman v. Holladay, pp. 3120, 3148, 3150.
Helm v. Missouri Pac. R. Co., p. 1296.
Helms, Baltimore Tract. Co. v.
Heltzen v. Union R. Co., p. 2829.
Hemmingway v. Chicago, etc., R. Co., 67 Wis. 668, 31 N. W. 268, 28 Am. & Eng. R. Cas. 216—pp. 1872, 1877.
—— v. Chicago, etc., R. Co., 72 Wis. 42, 37 N. W. 804, 33 Am. & Eng. R. Cas. 511, 7 Am. St. Rep. 823—pp. 1878, 2255, 2952, 2987.
—— United States Exp. Co. v.
Hemphill v. Chenie, pp. 536, 3272.
Hempstead v. Chicago, etc., R. Co., pp. 241, 252.
—— v. New York Cent. R. Co., pp. 532, 589, 3389.
Henadale v. Weed, p. 1172.
Hench, Elgin, etc., Tract. Co. v.
Henderson, American Nat. Bank v.
—— Atlantic, etc., R. Co. v.
—— Central R. Co. v.
—— Central, etc., R. Co. v.
—— Chicago, etc., R. Co. v.
—— v. Galveston, etc., R. Co. (Tex. Civ. App.), 38 S. W. 1136—pp. 1949, 1950.
—— v. Galveston, etc., R. Co. (Tex. Civ. App.), 42 S. W. 1030—pp. 1937, 1950, 2773.
—— Henderson Bridge Co. v.
—— International, etc., R. Co. v.
Henderson v. Louisville, etc., R. Co., 16 Am. & Eng. R. Cas. 397, 20 Fed. 430—p. 3145.
—— v. Louisville, etc., R. Co., 110 La. 1047, 41 So. 252, 114 Am. St. Rep. 582—pp. 308, 311, 312, 313, 315.
—— v. Louisville, etc., R. Co., 123 U. S. 61, 8 S. Ct. 60, 31 L. Ed. 92—p. 3148.
—— v. Metropolitan St. R. Co., p. 2575.
—— v. Maid of Orleans, pp. 851, 852, 861.
—— v. Nassau Elect. R. Co., p. 2347.
—— v. New York, pp. 3418, 3420, 3564.
—— Pennsylvania R. Co. v.
—— St. Louis, etc., R. Co. v.
Henderson Bridge Co. v. Commonwealth, 99 Ky. 623, 17 Ky. L. Rep. 389, 31 S. W. 486—p. 3587.
—— v. Commonwealth, 17 S. Ct. 532, 166 U. S. 150, 41 L. Ed. 953—p. 3588.
—— v. Henderson, 141 U. S. 679, 35 L. Ed. 900, 12 S. Ct. 114—p. 3587.
—— v. Henderson, 173 U. S. 592, 43 L. Ed. 823, 19 S. Ct. 553—pp. 116, 3473.
—— v. Henderson, 173 U. S. 624, 43 L. Ed. 835, 19 S. Ct. 877—p. 3473.
—— v. Kentucky, p. 3498.
Henderson Elevator Co., Illinois Cent. R. Co. v.
Hendrick v. Boston, etc., R. Co., pp. 1043, 1286, 1465, 1466, 1477.
—— v. Chicago, etc., R. Co., p. 1534.
—— Jeffersonville R. Co. v.
—— v. Walton, pp. 932, 950.
Hendrick v. American Exp. Co., pp. 663, 681.
—— Jeffersonville R. Co., v.
—— Jeffersonville, etc., R. Co. v.
—— Louisville, etc., R. Co. v.
—— St. Louis, etc., R. Co. v.
Hendrickson, Leonard v.
Hendrie, Downey v.
Hendrix v. Wabash R. Co., p. 1351.
Hengstler v. Flint, etc., R. Co., pp. 984, 986, 1292.
Henkel, Hale v.
Henlein, South, etc., R. Co. v.
Henly v. Deleware, etc., R. Co., p. 2439.
Hennessey, Missouri Pac. R. Co. v.
Hennessy v. Muskegon Tract., etc., Co., p. 2903.
—— v. St. Louis, etc., R. Co., p. 2977.
Hennick, Stoutenburgh v.
Hennigh v. Cleveland, etc., R. Co., p. 1033.
—— Pittsburgh, C. & St. L. Ry. Co. v.
—— Pittsburgh, etc., R. Co. v.
—— v. Pittsburgh, etc., R. Co. v.
Henning, Farmers' Loan & Trust Co. v.
—— v. Louisville R. Co., p. 2993.
Henningsen v. Watkins, p. 3971.
Hennington v. Georgia, pp. 34, 1946, 3466, 3478, 3481, 3482, 3498, 3499, 3504, 3505, 3512.
Henrotin, Wilcke v.
Henry v. Atchinson, etc., R. Co., p. 743.
—— Atchison, etc., R. Co. v.
—— v. Central R., etc., Co., pp. 828, 847, 848, 3397.
—— Chicago City R. Co. v.
—— Cleveland, etc., R. Co. v.
—— v. Grant St. Elect. R. Co., pp. 1804, 2241, 2402, 2986.
—— Gulf, etc., R. Co. v.
—— Keokuk Packet Co. v.

Henry, Louisville, etc., R. Co. v.
—— Moore & Son v.
—— v. St. Louis, etc., R. Co. v.
—— Sangamon, etc., R. Co. v.
Henry B. Hyde, Montague v.
—— The.
Henshaw, Eliason v.
—— Quimit v.
—— v. Rowland, p. 526.
Hensler v. Stix, pp. 1488, 2645, 2901.
Hentz & Co., Lovell v.
—— v. Lovell, p. 362.
Hepburn, Warfield v.
Hepner, Union Pac. R. Co. v.
Hepp v. Glover, pp. 1211, 1219, 1220, 1229.
Heran, Bradstreet v.
Herbert, Babcock v.
—— Lucas v.
—— v. Portland R. Co., p. 2604.
—— v. St. Paul City R. Co., pp. 1830, 1840.
Herbich v. North Jersey St. R. Co., pp. 1893, 1894.
Herbst v. The Asiatic Prince, pp. 557, 3895.
Herdman v. New York, etc., R. Co., p. 2252.
Herf, etc., Chemical Co. v. Lackawanna Line, 70 Mo. App. 274—pp. 501, 513, 899.
—— v. Lackawanna Line, 100 Mo. App. 164, 73 S. W. 340—pp. 899, 903, 939.
Herman v. Chicago, etc., R. Co., pp. 2314, 2315.
—— v. Drinkwater, p. 3189.
Hermann v. Goodrich, p. 901.
—— v. St. Joseph R., etc., Co., pp. 1495, 2777.
Herndon, Alexander, etc., R. Co. v.
—— Alexandria, etc., R. Co. v.
—— v. Chicago, etc., R. Co., p. 3514.
—— Indianapolis, etc., R. Co. v.
Herne v. Garton, pp. 236, 238.
Hernsfield v. Adams, p. 3297.
Hernsheim v. Newport News, etc., Co., pp. 743, 778.
Herold, Western Maryland R. Co. v.
—— Western, etc., R. Co. v.
Herr v. Tweedie Trading Co., pp. 3872, 3949.
Herrick v. Gallagher, p. 571.
—— Lakeshore, etc., R. Co. v.
—— Maysville, etc., R. Co. v.
Herriman v. Burlington, etc., R. Co., p. 145.
Herring v. Atlantic, etc., R. Co., pp. 331, 1076, 3522.
—— v. Chesapeake, etc., R. Co., pp. 619, 729, 734, 738, 744, 750, 1267, 1338, 3260.
—— Chicago, etc., R. Co. v.
—— Ferguson v.
—— Galveston, etc., R. Co. v.
—— v. Galveston, etc., R. Co., 102 Tex. 100, 113 S. W. 521—p. 2288.
—— v. Galveston, etc., R. Co. (Tex. Civ. App.), 108 S. W. 977—pp. 1694, 1752, 1755, 1978, 1979, 2113, 2288, 2289, 2308.
—— Lexington R. Co. v.
—— v. Utley, pp. 209, 211, 768.
—— v. Wilmington, etc., R. Co., p. 2300.
Herrman, East Tennessee, etc., R. Co. v.
—— v. Great Northern R. Co., pp. 2085, 3001.
Hersey, Emery v.
Hersfield v. Adams, pp. 771, 3369.
Hersh v. Northern Cent. R. Co., pp. 68, 86, 1179.
Herstine v. Lehigh Valley R. Co., p. 2690.
Hertel, United R., etc., Co. v.
Hertzberg, Pacific Exp. Co. v.
Heshion v. Boston Elev. R. Co., p. 2192.
Hess v. Baltimore, etc., R. Co., p. 2333.
—— v. Missouri Pac. R. Co., pp. 1111, 1114.
—— Northern Pac. R. Co. v.
—— v. Public Service R. Co., p. 2597.
—— v. South Dakota Cent. R. Co., pp. 478, 493, 764, 831.
—— Southern Exp. Co. v.
Hesse v. Meriden, etc., Tramway Co., pp. 2196, 2301.
Hessler, International, etc., R. Co. v.
Hester Houston, etc., R. Co. v.
—— v. Savannah Elect. Co., p. 2225.
Hestonville Passenger R. Co. v. Connell, p. 2518.
—— v. Grey, p. 2548.
—— Biddle v.
—— v. Biddle, p. 2535.
—— Crissey v.
—— Keller v.
—— Sandford v.
—— Smedley v.
Hett v. Boston, etc., Railroad, pp. 521, 573, 575.
Heucke v. Milwaukee City R. Co., pp. 1720, 1724, 1999, 2007, 2896.
Heule, North German Lloyd v.
Heumphries v. Fremont, etc., R. Co., pp. 753, 2217.
Hewes v. Chicago, etc., R. Co., 75 N. E. 515, 217 Ill. 500—p. 2206.
—— v. Chicago, etc., R. Co., 119 Ill. App. 393—p. 2206.
—— v. Philadelphia, etc., R. Co., p. 2662.
Hewett v. Chicago, etc., R. Co., pp. 614, 732, 734, 743, 3289, 3402.
—— Missouri Pac. R. Co. v.
Hewitt, Barnes v.
—— Galveston City R. Co. v.
Hewlett v. Burrell, p. 3895.
Heyde v. St. Louis Trans. Co., pp. 2694, 2900.
Heyer, Mottram v.
Heyl v. Inman Steamship Co., pp. 743, 821.
Heyman, Southern R. Co. v.
—— v. Southern R. Co., p. 573.
—— v. Stryker, p. 512.
Heyser, St. Louis, etc., R. Co. v.
Heyward v. Boston, etc., R. Co., pp. 1752, 2798.
Hiatt v. Des Moines, etc., R. Co., pp. 1797, 2963.
Hibbard, Adams Exp. Co. v.
—— v. New York, etc., R. Co., pp. 1612, 1637, 1638, 1542, 2411, 2413, 2420, 2424, 2431, 2473, 2474.
Hibbitts, Missouri, etc., R. Co. v.
Hibernia Ins. Co. v. St. Louis, etc., Transp. Co., pp. 1037, 4021.
Hibler v. McCarthy, pp. 776, 1017.
Hickenbottom v. Delaware, etc., R. Co., p. 1881.
Hickey v. Boston, etc., R. Co., pp. 2179, 2238.
—— v. Chicago City R. Co., pp. 1559, 1574.
—— Choctaw, etc., R. Co. v.
—— Washington, etc., R. Co. v.
Hickman v. Missouri Pac. R. Co., pp. 1896, 2232.
Hickory Marble, etc., Co. v. Southern R. Co., p. 153.
Hickox v. Naugatuck R. Co., pp. 285, 3125, 3126, 3135, 3139, 3140.
Hicks, Abbott v.
—— v. Galveston, etc., R. Co., p. 2656.
—— v. Georgia Southern, etc., R. Co., pp. 2113, 2220, 2237.
Hicks v. Hannibal, etc., R. Co., p. 3089.
—— v. Pacific R. Co., pp. 2501, 2503, 2536, 2541.
—— v. Wabash R. Co., pp. 894, 899, 3145.
Hiers v. Atlantic, etc., R. Co., p. 2831.
Hieskell v. Farmers', etc., Nat Bank, p. 3274.
Higby, Gulf, etc., R. Co. v.
Higdon, Kansas City, etc., R. Co. v.
—— v. Louisville, etc., R. Co. v.
Higgins v. Cherokee R. Co., pp. 1569, 1689, 1826, 2541, 2775.
—— v. Hamburg-American Packet Co., p. 3913.
—— v. Hannibal, etc., R. Co., p. 1953.
—— v. Louisville, etc., R. Co., p. 3062.
—— v. New Orleans, etc., R. Co., p. 2102.
—— v. Southern R. Co., pp. 2411, 2482, 2528.
—— v. United States Exp. Co., pp. 515, 568, 611, 638, 663, 667, 668, 680, 695, 982.
—— v. United States Mail, etc., Co., pp. 336, 337.
—— v. Watervliet, etc., R. Co., pp. 2411, 2483.
Higgs, Pittsburgh, etc., R. Co. v.
—— Topeka City R. Co. v.
High v. International, etc., R. Co., p. 2252.
High Co. v. Adams Exp. Co., p. 881.
High Point, etc., R. Co., Cox v.
Highland Ave., etc., R. Co. v. Burt, pp. 1899, 1900, 1903.
—— Daniel v.
—— v. Donovan, pp. 1953, 2173, 2180.
—— v. Dusenberry, p. 2641.
—— McDaniel v.
—— v. Robinson, pp. 2532, 2543.
—— v. Winn, p. 2660.
Highland St. R. Co., Cronin v.
Higley v. Burlington, etc., R. Co., pp. 1196, 1198, 1199.
—— Gilmer v.
Highnote, St. Louis, etc., R. Co. v.
—— v. Gilmer, pp. 1501, 1504, 1505, 1559, 2516, 2725, 2726.
Hildebrand, Porter v.
Hiles, Clark v.
Hill v. Adams Exp. Co., 78 N. J. L. 333, 74 Atl. 674—pp. 486, 1034, 1066.
—— v. Adams Exp. Co., 80 N. J. L. 604, 77 Atl. 1073—p. 987.
—— v. Adams Exp. Co., 82 N. J. L. 373, 81 Atl. 859—pp. 1029, 1030, 1066, 1068.
—— Alabama, etc., R. Co. v.
—— v. Birmingham Union R. Co., p. 2224.
—— v. Boston, etc., R. Co., pp. 986, 994, 995, 1074, 1401, 1403.
—— Chesapeake, etc., Canal Co. v.
—— v. Chicago City R. Co., pp. 2640, 2693.
—— Choctaw, etc., R. Co. v.
—— Covell v.
—— Denner, etc., R. Co. v.
—— v. Georgia, etc., R. Co., pp. 811, 3327, 3347.
—— Gould v.
—— Great Falls, etc., R. Co. v.
—— Grout v.
—— Houston, etc., R. Co. v.
—— v. Humphreys, pp. 534, 602
—— v. Illinois, etc., R. Co., p. 1209
—— v. Leadbetter, pp. 1145, 1172, 1173.
—— v. Louisville, etc., R. Co., pp. 2115, 2357, 2511.
—— Lyons v.

Hill, McNeil v.
—— v. Minneapolis St. R. Co., pp. 1737, 1742.
—— v. Missouri Pac. R. Co., p. 3343.
—— v. New Orleans, etc., R. Co., pp. 3065, 3068.
—— v. Ninth Ave. R. Co., p. 2005.
—— v. P. & R. K. Co., p. 2738.
—— v. Pullman Co., pp. 3209, 3215, 3217, 3232, 3234.
—— St. Louis, etc., R. Co. v.
—— v. St. Louis, etc., R. Co., 67 Ark. 402, 55 S. W. 216—p. 3273.
—— v. St. Louis, etc., R. Co., 109 S. W. 523, 85 Ark. 529, 28 R. R. R. 753, 51 Am. & Eng. R. Cas., N. S., 753—pp. 1524, 1534, 1537, 1897, 2351, 2906, 2909.
—— v. St. Louis, etc., R. Co. (Tex. Civ. App.), 75 S. W. 874—pp. 88, 226.
—— v. Scott, p. 729.
—— Southern Exp. Co. v.
—— v. Starin, pp. 4000, 4001, 4003.
—— v. Sturgeon, 28 Mo. 323—pp. 728, 730, 745, 746, 778, 821.
—— v. Sturgeon, 35 Mo. 212, 86 Am. Dec. 149—pp. 778, 1040.
—— v. Syracuse, etc., R. Co., 63 N. Y. 101—pp. 1624, 1636, 2447, 2745.
—— v. Syracuse, etc., R. Co., 73 N. Y. 351, 29 Am. Rep. 163—pp. 321, 325, 333, 335, 984, 987.
—— Virginia, etc., R. Co. v.
—— v. Wadley Southern R. Co., pp. 40, 44, 76.
—— v. West End St. R. Co., p. 2351.
—— v. Western Union Tel. Co., pp. 1087, 1113.
Hill Mfg. Co. v. Boston, etc., R. Corp., pp. 892, 417, 3295.
—— Providence, etc., Steamship Co. v.
—— v. Providence, etc., Steamship Co., p. 844.
Hilliard, Frazer & Co. v.
—— v. Goold, pp. 1597, 2413, 2467.
—— Singleton v.
—— Swindler v.
—— v. Wilmington, etc., R. Co., pp. 894, 901.
Hillis v. Chicago, etc., R. Co., pp. 3147, 3221, 3222, 3224, 3229, 3230.
Hillman v. Boston Elev. R. Co., p. 2505.
—— v. Georgia R., etc., Co., pp. 1945, 2017, 2417, 2418, 2961, 2962.
—— Denver City Tramway Co. v.
Hillsdale Coal, etc., Co. v. Pennsylvania R. Co., p. 228.
Hillsdale, etc., Turnpike Road, People v.
Hilson, Cherokee Packet Co. v.
Hilton, Bowman v.
Hilton Lumber Co. v. Atlantic, etc., R. Co., 136 N. C. 479, 48 S. E. 813—p. 96.
—— v. Atlantic, etc., R. Co., 141 N. C. 171, 53 S. E. 823, 6 L. R. A., N. S., 225—pp. 87, 96.
Hilton, etc., Lumber Co., Actieselskabet Barfod v.
Himelright v. Johnson, p. 2537.
Hinckley v. Chicago, etc., R. Co., p. 3087.
—— v. Danbury, pp. 1742, 1959.
—— v. New York Cent., etc., R. Co., pp. 333, 3297, 3298.
—— v. Wilson Lumber Co., p. 3960.
Hindoo, Unnevehr v.
Hinds, Nashville, etc., Railway v.
—— Pittsburgh, etc., R. Co. v.
Hindsdell, Atchison, etc., R. Co. v.
Hindsman, St. Louis, etc., R. Co. v.
Hine, Louisville, etc., R. Co. v.
—— Pennsylvania Co. v.
—— The.
Hines v. Boston Elevated R. Co., pp. 1690, 1971.
—— v. Dry Docke, etc., R. Co., p. 2567.
—— v. Wilmington, etc., R. Co., pp. 86, 138.
Hines Lumber Co. v. Chamberlain, p. 3941.
Hines, etc., Co., Central R., etc., Co. v.
Hingham, etc., Turnpike Corp. v. Norfolk, p. 114.
Hinkle v. Southern R. Co., pp. 822, 1039, 1107, 1389, 1427.
Hinkley v. New York, etc., R. Co., p. 3346.
Hinote v. Brigman, p. 2921.
Hinsdale, Southern Kansas R. Co. v.
Hinshaw v. Raleigh, etc., R. Co., p. 1868.
Hinson v. Lott, p. 3551.
Hinton v. Eastern R. Co., pp. 724, 821, 1036, 1038.
Hiort v. London, etc., R. Co., p. 849.
Hipp v. Southern R. Co., pp. 816, 869, 873, 897.
Hipsley v. Kansas, etc., R. Co., pp. 2694, 2735.
Hiram, The.
Hiram Blow & Co., Louisville, etc., R. Co. v.
Hirsch, Cleveland, etc., R. Co. v.
—— v. Hudson River Line, pp. 816, 817.
—— v. Leathers, p. 3295.
—— Louisville, etc., R. Co. v.
—— v. New England Nav. Co., 93 N. E. 524, 200 N. Y. 263—p. 417.
—— v. New England Nav. Co., 113 N. Y. S. 395, 129 App. Div. 178—p. 3616.
—— v. Steamboat Quaker City, pp. 893, 901, 902, 910.
—— v. Union R. Co., p. 2799.
Hirschberg v. Brooklyn, etc., R. Co., p. 2877.
—— v. Dinsmore, p. 1087.
Hirschsohn v. Hamburgh American Packet Co., p. 3119.
Hirshfield v. Central Pac. R. Co., pp. 896, 900.
Hirst, Florida So. R. Co. v.
—— Florida, etc., R. Co. v.
Hirte v. Eastern Wisconsin, R., etc., Co., pp. 2485, 2784.
His Creditors, Lalande v.
Historical Pub. Co. v. Adams Exp. Co., p. 3343.
Hitchcock v. Brooklyn City R. Co., 44 Hun 627, 8 N. Y. St. Rep. 848—p. 2683.
—— v. Brooklyn City R. Co., 50 Hun 606, 3 N. Y. S. 218, 21 N. Y. St. Rep. 945—p. 2821.
—— Counselman v.
—— Covell v.
Hite v. Central Railroad, pp. 708, 716.
—— Central R. Co. v.
—— v. Metropolitan St. R. Co., pp. 1687, 1984, 1992, 2673, 2674.
Hix v. Eastern Steamship Co., pp. 931, 945, 983.
Hixson, Harrison v.
Hoadley v. Northern Transp. Co., pp. 320, 744, 958, 1034.
Hoagland, Pennsylvania Co. v.
Hoar v. Maine Cent. R. Co., pp. 1505, 1760.
Hoard, Central, etc., R. Co. v.
Hobart, Attorney General v.
—— Lake Shore Elect. Railway v.
—— Lake Shore, etc., R. Co. v.
Hobart v. Norton, p. 3902.
Hobart & Co. v. Littlefield Bros., pp. 352, 368.
Hobbs, Arkansas River Packet Co. v.
—— v. Chicago Packing, etc., Co., p. 551.
—— Illinois Cent. R. Co. v.
—— v. Memphis, etc., R. Co., p. 2579.
—— Southern R. Co. v.
—— v. Texas, etc., R. Co., pp. 203, 2423, 2476, 2478.
Hobensack, Mershon v.
Hoblit v. Minneapolis St. R. Co., pp. 2319, 2986.
Hoboken Land, etc., Co., Hazman v.
Hochstim, Lake Shore, etc., R. Co. v.
Hocker, Pullman Palace Car Co. v.
Hockett, American Exp. Co. v.
—— Indianapolis St. R. Co. v.
Hockfield v. Southern R. Co., pp. 700, 3426, 3495.
Hocking Valley R. Co., Johnson Coal Min. Co. v.
—— Klunk v.
—— Railroad Commission v.
—— United States v.
—— v. United States, pp. 3604, 3633, 3706, 3846.
Hocking Valley Railway v. Railroad Comm., pp. 1594, 1595.
Hodapp, Lake Shore, etc., R. Co. v.
Hodde, Houston, etc., R. Co. v.
Hodgdon v. New York, etc., R. Co., p. 709.
Hodge, Gulf, etc., R. Co. v.
Hodges v. Bearse, p. 2726.
—— Dillingham v.
—— Gulf, etc., R. Co. v.
—— v. New Hanover Transit Co., pp. 1799, 2143.
—— v. Peacock, p. 1168.
—— Savannah Elect. Co. v.
—— v. Southern R. Co., 120 N. C. 555, 27 S. E. 128, 8 Am. & Eng. R. Cas., N. S., 46—pp. 1880, 2906.
—— v. Southern R. Co., 122 N. C. 992, 29 S. E. 939—p. 2256.
—— Williams v.
—— v. Wilmington, etc., R. Co., p. 2562.
Hodgson, Denver, etc., R. Co. v.
—— v. Loy, pp. 1210, 1228.
Hodkinson v. London & N. W. R. Co., p. 3173.
Hoeffner, Springfield Consol. R. Co. v.
Hoeflich, Philadelphia, etc., R. Co. v.
Hoeger v. Chicago, etc., R. Co., pp. 3149, 3161, 3169, 3174.
Hoehn v. Chicago etc., R. Co., p. 2248.
Hocing, Adams Exp. Co. v.
—— v. Adams Exp. Co., pp. 477, 489.
Hoelljes v. Interurban St. R. Co., pp. 1650, 2425.
Hoerr, Peoria, etc., Terminal Railway v.
Hoffard v. New York, etc., R. Co., p. 3174.
Hoffbauer, Citizens' St. R. Co. v.
—— v. Delhi, etc., R. Co., pp. 196, 1596, 1597, 2429, 2467, 2473.
Hoffbert v. Bumford, pp. 822, 828.
Hoffecker, Texas, etc., R. Co. v.
Hoffeld v. United States, pp. 4048, 4053.
Hoffman v. Cedar Rapids, etc., R. Co., pp. 2723, 2918, 2932, 2943, 2951.
—— v. Cumberland Valley R. Co., pp. 3289, 3327.

Hoffman v. Delaware, etc., R. Co., pp. 508, 511, 607, 1112, 3355.
—— Hawkins v.
—— Indiana R. Co. v.
—— v. Lake Shore, etc., R. Co., p. 494.
—— v. National City Bank, pp. 396, 397.
—— v. New York, etc., R. Co., 87 N. Y. 25, 41 Am. Rep. 337—pp. 2529, 2530, 2533.
—— v. New York, etc., R. Co., 44 N. Y. Super. Ct. 1—pp. 2548, 2664.
—— v. New York, etc., R. Co., 46 N. Y. Super. Ct. 526—pp. 2414, 2548.
—— v. Northern Pac. R. Co., pp. 1616, 2711.
—— v. Third Ave. R. Co., pp. 2669, 2672, 2691, 2695.
—— v. Union Pac. R. Co., pp. 3289, 3323, 3348.
—— Western Union Tel. Co. v.
Hoffman Co., Midland Valley Co. v.
Hoffman Coal Co., Midland Valley R. Co. v.
Hoffman, etc., Stave Co. v. St. Louis, etc., R. Co., pp. 218, 261.
Hoffmans, The.
Hoffmayer, Savannah, etc., R. Co. v.
Hogan v. Long Island R. Co., p. 1596.
—— v. Metropolitan St. R. Co., p. 2313.
—— Southern Pac. Co. v.
—— Vincent v.
Hogg, Houston, etc., R. Co. v.
Hogner v. Boston Elevated R. Co., pp. 1501, 1505, 1507, 2853.
Hogue, Atchison, etc., R. Co. v.
Hohl v. Norddeutscher Lloyd, p. 4027.
Hoke v. United States, p. 3441.
Holbrook, Eastern Kentucky R. Co. v.
—— Felton v.
—— Murphy v.
—— Utica, etc., R. Co., pp. 2667, 2673.
—— v. Vose, pp. 1211, 1225.
Holck, Landa v.
Holcomb, Cincinnati, etc., R. Co. v.
—— Missouri Pac. R. Co. v.
Holcombe, Atlanta, etc., R. Co. v.
—— v. Southern R. Co., pp. 1513, 1538, 2501, 2903.
Holcombe & Co., Atlanta, etc., R. Co. v.
Holden, Cleveland, etc., R. Co. v.
—— v. Great Northern R. Co., pp. 2331, 2357.
—— Kansas, etc., R. Co. v.
—— v. New York Cent. R. Co., p. 3402.
—— v. Rutland R. Co., p. 2625.
Holder, Gulf, etc., R. Co. v.
Holderman, Pennsylvania Co. v.
Holdridge, Chicago, etc., R. Co. v.
—— v. Utica, etc., R. Co., pp. 3159, 3171.
Holladay, Hellman v.
—— v. Kennard, pp. 725, 726, 746, 748, 751.
Hollahan v. Metropolitan St. R. Co., pp. 2679, 2899.
Holland v. Chicago, etc., R. Co., pp. 694, 936, 955, 975, 1100, 1308, 1311.
—— v. Columbus R. Co., pp. 2043, 2048, 2064.
—— v. Gammett, p. 3920.
—— House v.
—— Kansas City, etc., R. Co. v.
—— Lake Erie, etc., R. Co. v.
—— v. Metropolitan St. R. Co., p. 2235.
—— Muser v.
Holland, Rawson v.
—— v. St. Louis, etc., R. Co., p. 2694.
—— v. 725 Tons of Coal, p. 3891.
—— Southern Exp. Co. v.
—— v. West End St. R. Co., pp. 1995, 2191, 2801.
—— Williams v.
—— Witbeck v.
Holland Bldg. Co., Goldsmith v.
Holland Gulf Steamshipping Co. v. Hagar, pp. 3959, 3967.
Holeman v. Georgia, etc., R. Co., p. 2888.
Holley v. Jamestown, etc., Ferry Co., p. 2785.
Holliday v. Boston Elev. R. Co., pp. 2339, 2859.
—— v. Coe, p. 1143.
—— G. C. & S. F. R. Co. v.
—— Gulf, etc., R. Co. v.
—— Longmeid v.
—— United States v.
Hollingsworth v. Cincinnati, etc., R. Co., pp. 2161, 2198, 2319, 2346.
—— v. Napier, p. 1227.
—— v. Skelding, pp. 1683, 1687, 2810.
Hollis, Chicago, etc., R. Co. v.
Hollister v. Nowlen, pp. 733, 749, 1003, 1007, 3141, 3142, 3143, 3163, 3165.
Hollman v. Houston, etc., R. Co., pp. 1689, 2115.
Hollocher v. Hollocher, p. 340.
Holloway, Atchison, etc., R. Co. v.
—— Central, etc., R. Co. v.
—— Memphis, etc., R. Co. v.
—— v. Pasadena, etc., R. Co., pp. 2347, 2891.
—— Selway v.
Hollowell, Cleveland, etc., R. Co. v.
—— Pittsburgh, etc., R. Co. v.
Holly v. Atlanta St. Railroad, pp. 1748, 2016, 2024, 2606, 2940.
—— Creery v.
—— v. Huggeford, p. 1164.
—— Louisiana R., etc., Co. v.
—— v. Southern R. Co., p. 3163.
Holman v. Gans Steamship Line, pp. 3963, 3965, 3969, 3970.
—— Illinois Cent. R. Co. v.
—— v. Union St. R. Co., p. 2869.
Holmes, Adams Exp. Co. v.
—— Alabama, etc., R. Co. v.
—— v. Allegheny Tract. Co., pp. 1712, 1892, 2147, 2721, 2867.
—— Ashtabula Rapid Transit Co. v.
—— v. Ashtabula Rapid Transit Co., pp. 1714, 1716, 2113, 2249, 2319.
—— Atchison, etc., R. Co. v.
—— v. Birmingham, etc., R. Co., p. 1567.
—— v. Carolina Cent. R. Co., p. 3054.
—— Central, etc., R. Co. v.
—— East Tennessee, etc., R. Co. v.
—— Manter v.
—— v. North German Lloyd Steamship Co., pp. 4035.
—— v. North, etc., Steamship Co., p. 3167.
—— v. Oregon, etc., R. Co., p. 2288.
—— v. Pennsylvania R. Co., p. 573.
—— St. Louis, etc., R. Co. v.
—— v. Wakefield, p. 2413.
Holmes, etc., Co. v. German Security Bank, p. 363.
Holohan v. Washington, etc., R. Co., p. 2116.
Holsapple, Louisville, etc., R. Co. v.
Holst v. Pownall, p. 1232.
—— Robinson v.
Holt, Fox v.
—— Gulf, etc., R. Co. v.
—— v. Hannibal, etc., R. Co., 74 S. W. 631, 174 Mo. 524—pp. 2474, 2663, 2715.
—— v. Hannibal, etc., R. Co., 87 Mo. App. 203—pp. 1562, 2715.
—— Illinois Cent. R. Co. v.
—— Macon, etc., R. Co. v.
—— Wahl v.
—— v. Westcott, pp. 1148, 1149 1150.
Holtzclaw v. Duff, pp. 894, 899.
Holway, Carroll v.
Holyoke v. Grand Trunk R. Co., pp. 2736, 2741.
Holyoke St. R. Co., Blanchette v.
—— McGarry v.
Holzab v. New Orleans, etc., R. Co., pp. 2127, 2260.
Holzenkamp, Cincinnati Tract. Co. v.
—— v. Cincinnati Tract. Co., pp. 1504, 1508, 1509, 1517.
Home Industry Iron Works, Rasmussen v.
Home Ins. Co., Minneapolis, etc., R. Co. v.
—— v. Pennsylvania R. Co., p. 855.
Homer, Georgia R. Co. v.
—— v. Oregon, etc., R. Co., pp. 946, 3162, 3810, 3814.
Homesly v. Elias, p. 538.
Homeyer, Adams v.
—— Davenport Nat. Bank v.
Homiston v. Long Island R. Co., p. 2432.
Honea, St. Louis, etc., R. Co. v.
Honeyman v. Oregon, etc., R. Co., pp. 211, 236, 242, 243, 3122, 3155, 3165.
Hood, Malott v.
—— v. New York etc., R. Co., pp. 3175, 3321, 3327.
—— Southern Exp. Co. v.
Hood Rubber Co. v. Rutland Trans. Co., pp. 3863, 3876.
Hooe v. Mason, p. 1145.
Hook, St. Louis, etc., R. Co. v.
Hooker, Boston, etc., Railroad v.
—— v. Boston, etc., Railroad, pp. 3163, 3165.
—— v. De Palos, p. 1861.
—— v. Interstate Commerce Comm., pp. 3678, 3798.
—— Jacobs v.
—— v. Knapp, p. 3835.
—— McCotter v.
Hooks v. Alabama, etc., R. Co., pp. 1920, 1922, 2906.
Hooks Smelting Co. v. Planters' Compress Co., p. 642.
Hooper v. California, pp. 3445, 3471.
—— v. Chicago, etc., R. Co., pp. 490, 885, 3286, 3401.
—— v. London R. Co., p. 3180.
—— v. Metropolitan St. R. Co., p. 1701.
—— Northern Texas Tract. Co. v.
—— v. Wells, Fargo & Co., pp. 727, 732, 748, 966, 967, 1012, 1013, 3289, 3360, 3370, 3371.
Hooper & Co., Steamship Wellesley Co. v.
Hoosey, Camden, etc., R. Co. v.
Hoosier Stone Co. v. Louisville, etc., R. Co., p. 448.
Hoover, Chicago, etc., R. Co. v.
—— Manning v.
—— v. Pennsylvania R. Co., pp. 92, 95, 136, 1177, 1179, 1181, 1183, 1184, 1185, 1186, 1187, 1188, 1192.
—— v. Tibbits p. 1239.
Hope v. Delaware, etc., Canal Co., p. 3372.
—— Mierson v.
Hopkins v. Atlantic, etc., Railroad, p. 3068.

Hopkins v. Boyd, p. 2543.
—— v. Chicago, etc., R. Co., p. 2657.
—— Georgia R., etc., Co. v.
—— Medbury v.
—— v. Michigan Tract. Co., p. 2617.
—— Missouri, etc., R. Co. v.
—— Mobile, etc., R. Co. v.
—— v. St. Louis, etc., R. Co., p. 333.
—— United States v.
—— v. United States, pp. 3418, 3419, 3421, 3432, 3435, 3445.
—— v. Westcott, pp. 986, 991, 1006, 3115, 3127, 3128, 3166.
Hopkinsville Canning Co., Illinois Cent. R. Co. v.
Hopper v. Denver, etc., R. Co., p. 2696.
Hopperton v. Louisville, etc., R. Co., p. 1865.
Horan v. Rockwell, pp. 1698, 2193.
Horgan v. Boston Elev. R. Co., p. 2051.
Horn, Cuddy v.
—— v. New Jersey Steamboat Co., p. 3998.
Horn Silver Min. Co. v. State, p. 3471.
Hornbeck, Texas, etc., R. Co. v.
Hornberger, Illinois Cent. R. Co. v.
Horne, Atlanta, etc., R. Co. v.
—— Galveston, etc., R. Co. v.
—— Marsh v.
—— Riley v.
—— West Chicago, etc., R. Co. v.
Horne-Andrews Comm. Co. v. Georgia R. Co., pp. 272, 284.
Horner, Felton v.
—— Southern R. Co. v.
Hornesby v. Georgia R., etc., Co., pp. 1646, 1649, 2438.
Hornstein v. United Railways, p. 2668.
Hornthal v. Roanoke, etc., Steamboat Co., pp. 917, 918.
Horseman v. Grand Trunk R. Co., p. 339.
Horst, Indianapolis, etc., R. Co. v.
Horton v. Erie R. Co., pp. 1619, 1620.
Horton v. Houston, etc., R. Co., pp. 2128, 2809.
—— v. Seaboard, etc., R. Co., p. 3431.
—— Southern R. Co. v.
—— v. Southern R. Co., p. 114.
Hosapple v. Rome, etc., R. Co., pp. 1019, 1022.
Hosea v. McCrory, pp. 277, 280, 723, 771.
Hosking, Western Transit Co. v.
Hoskins, Merchants' Dispatch Transp. Co. v.
—— v. Missouri Pac. R. Co., pp. 464, 1044.
—— v. Northern Pac. R. Co., pp. 1575, 1576, 1577, 1985, 2585, 2588.
—— v. Southern Pac. Co., pp. 3137, 3139.
Hosmer v. Old Colony R. Co., pp. 1577, 2101, 2106.
Hospes v. Chicago, etc., R. Co., p. 1760.
Hossfeld South Covington, etc., R. Co. v.
Hostetter v. Baltimore, etc., R. Co. pp. 333, 454.
—— Chicago etc., R. Co. v.
—— v. Park, pp. 328, 510, 1020, 3889, 4021.
Hot Springs v. Curry, p. 112.
—— v. Demby, p. 111.
Hot Springs Railroad, Gallena v.
Hot Springs R. Co., Boylan v.
—— v. Deloney, pp. 2458, 3051.
Hot Springs R. Co. v. Hudgins, pp. 585, 587.
—— v. Trippe & Co., pp. 3280, 312.
Hotchkiss v. Artisans' Bank, p. 544.
—— Kirtland v.
—— Lake Shore, etc., R. Co. v.
Hotel Stevens Co., Wheeler v.
Hotenbrink v. Boston Elevated R. Co., p. 1830.
Houck v. Southern Pac. R. Co., pp. 1944, 1949.
Hough, Jones v.
—— Lynde v.
—— Wolf v.
Houghton v. Louisville R. Co., pp. 2820, 2956.
—— v. Market St. R. Co., p. 2699.
Houghton County St. R. Co., Bartle v.
Houlder, Steamship Rutherglen Co. v.
Hourney v. Brooklyn City R. Co., pp. 2181, 2810, 2895.
Housatonic R. Co., Coupland v.
—— Sanford v.
—— Tucker v.
House v. Alexander, p. 1166.
—— v. Chicago, etc., R. Co., pp. 3118, 3123, 3127, 3128, 3177.
—— Galveston, etc. R. Co. v.
—— Gulf etc., R. Co. v.
—— v. Holland, pp. 331, 332, 333, 337.
—— v. Metcalf, p. 2738.
—— v. Soder, pp. 565, 753, 889, 1144, 1146.
Houseman v. Fargo, pp. 3745, 3749.
Houston, Brown v.
—— Doherr v.
—— Galveston, etc., R. Co. v.
—— v. Gate City St. R. Co., p. 2545.
—— Schurr v.
—— Shurr v.
Houston City, etc., R. Co. v. Desso, p. 1694.
—— v. Ross, p. 1694.
—— v. Wheeler, p. 1694.
Houston Coal, etc., Co. v. Norfolk, etc., R. Co. p. 3819.
Houston Direct Nav. Co., Cook v.
—— v. Insurance Co., pp. 936, 937.
—— Markham v.
Houston Elect. Co., Gilmore v.
—— Green v.
—— Lewis v.
—— v. Nelson, p. 1731.
—— v. Park, p. 2052.
—— Townsend v.
Houston Elect. St. R. Co. v. Elvis, p. 2128.
Houston Transfer, etc., Co. v. Whitcomb, pp. 857, 858.
Houston, etc., Nav. Co., Cook v.
—— v. Dwyer, pp. 729, 733, 750, 768, 3899.
—— v. Insurance Co., p. 3331.
Houston, etc., R. Co. v. Adams, pp. 7, 512, 539, 549, 550, 551, 552, 553, 563, 897, 901.
—— v. Anderson, p. 3138.
—— v. Arey, pp. 1627, 1630, 2443, 2458.
—— v. Baker, p. 1028.
—— v. Barden, p. 809.
—— v. Batchler, 32 Tex. Civ. App. 14, 73 S. W. 981—pp. 1537, 2055.
—— v. Batchler, 37 Tex. Civ. App. 116, 83 S. W. 902—pp. 2046, 2055, 2607.
—— Bath v.
—— v. Bath, 17 Tex. Civ. App. 697, 711, 44 S. W. 595—pp. 739, 835, 959, 1039, 1041, 1042.
—— v. Bath, 40 Tex. Civ. App. 270, 90 S. W. 55—pp. 345, 837, 838.
Houston, etc., R. Co. v. Berry, pp. 2437, 2716.
—— Bessling & Co. v.
—— v. Bolling, pp. 1553, 2522.
—— Boozer, p. 1978.
—— Brashear v.
—— v. Bright, p. 3509.
—— v. Brown, 33 Tex. Civ. App. 237, 238, 76 S. W. 580—pp. 860, 1316, 1317, 1327.
—— v. Brown, 37 Tex. Civ. App. 595, 85 S. W. 44—p. 1276.
—— v. Bryant, pp. 1956, 2179.
—— v. Buchanan, 38 Tex. Civ. App. 165, 84 S. W. 1073—p. 1474.
—— v. Buchanan, 42 Tex. Civ. App. 620, 625, 94 S. W. 199—pp. 158, 507, 508, 1293.
—— Bullock v.
—— v. Burke, pp. 729, 759, 858. 862, 933, 934.
—— v. Burns, pp. 1300, 1343.
—— v. Bush, 104 Tex. 26, 133 S W. 245, 33 L. R. A., N. S., 1201—p. 2046.
—— v. Bush (Tex. Civ. App.), 123 S. W. 201—p. 2048.
—— v. Campbell, 91 Tex. 551, 561, 45 S. W. 2, 42 L. R. A. 225—pp. 136, 157, 158, 159, 160, 161, 174, 230, 265, 421, 1276.
—— v. Campbell (Tex. Civ. App.), 40 S. W. 431—p. 472.
—— v. Cheatham, pp. 1985, 2694, 2898, 2900.
—— v. Clemmons, pp. 2116, 2163, 2210.
—— Cluck v.
—— v. Cohn, pp. 1532, 1906, 1908. 1909, 2410.
—— v. Copley, pp. 1881, 1882.
—— v. Crone, p. 2439.
—— Davis v.
—— v. Davis, 88 Tex. 593, 32 S. W. 510—pp. 809, 1092, 1095, 1122, 1414, 1415, 1431.
—— v. Davis, 11 Tex. Civ. App. 24 31 S. W. 308—pp. 959, 1079, 1086, 1092, 1093, 1094, 1095, 1107, 1116, 1117, 1409, 1414, 1421, 1423.
—— v. Davis, 50 Tex. Civ. App. 74, 109 S. W. 422—p. 1105.
—— v. Devainy, pp. 2234, 2452, 2477.
—— v. Dotson, pp. 1518, 1866, 1884, 1920.
—— v. Dumas, pp. 3753, 3754.
—— Easton v.
—— v. Easton, p. 1532.
—— Ellis v.
—— v. Everett, 99 Tex. 269, 89 S. W. 761—pp. 507, 3297, 3299, 3300, 3311, 3398.
—— v. Everett (Tex. Civ. App.), 86 S. W. 17—p. 3487.
—— Farrell v.
—— v. Faulkner (Tex. Civ. App.), 56 S. W. 253—p. 2782.
—— v. Faulkner (Tex. Civ. App.), 63 S. W. 655—p. 2467.
—— v. Ford, pp. 1610, 1627, 2438.
—— v. Foster, pp. 608, 654, 657.
—— v. George, pp. 1694, 1729, 1978.
—— v. Goodycar, pp. 1895, 1907.
—— v. Gorbett, pp. 2037, 2065, 2113, 2117, 2118, 2119.
—— v. Gray, p. 1477.
—— v. Greer, pp. 1685, 1719, 1731, 1732, 1846, 2881.
—— v. Grigsby, p. 2531.
—— v. Groves, pp. 809, 3337, 3342.
—— v. Grubbs, p. 1796.
—— v. Hampton, pp. 1575, 2205.
—— v. Harn, pp. 517, 809, 852.
—— v. Harris, 30 Tex. Civ. App. 179, 70 S. W. 335—pp. 1885, 1886.

Houston, etc., R. Co. v. Harris (Tex. Civ. App.), 120 S. W. 550—p. 1989.
—— v. Harry & Bros., pp. 21, 22, 38, 156, 512.
—— Hays v.
—— v. Hester, p. 1104.
—— v. Hill, 63 Tex. 381, 51 Am. Rep. 642—pp. 417, 659, 1641, 3251.
—— v. Hill, 70 Tex. 51, 7 S. W. 659—pp. 136, 1641.
—— v. Hodde, pp. 268, 271, 272, 273, 275, 276, 296.
—— v. Hogg, pp. 546, 678.
—— Hollman v.
—— Horton v.
—— v. Houx, pp. 509, 693.
—— v. Hubbard, pp. 2597, 2598.
—— v. Jackson, 62 Tex. 209, 213, 21 Am. & Eng. R. Cas. 126—pp. 639, 662, 851, 853, 855, 856, 1350.
—— v. Jackson (Tex. Civ. App.), 61 S. W. 440—pp. 202, 2437, 2849.
—— v. Japhet & Co., p. 839.
—— v. Johnson, pp. 2172, 2176, 2184, 2220, 2354.
—— v. Keeling, 102 Tex. 521, 120 S. W. 847—pp. 1730, 1731.
—— v. Keeling, 51 Tex. Civ. App 386, 112 S. W. 808—p. 1727.
—— v. Keeling (Tex. Civ. App.), 142 S. W. 108—p. 1738.
—— Lamline v.
—— v. Lee, pp. 1691, 2807.
—— v. Leslie, pp. 2113, 2114, 2116, 2117, 2118, 2119, 2127, 2257, 2263.
—— v. Lewis, pp. 3602, 3661, 3662.
—— v. Lindsey, p. 2844.
—— McCarty v.
—— v. McCarty, pp. 1779, 1780, 1781.
—— v. McCullough, pp. 1575, 2212.
—— v. McFadden, pp. 1039, 1041, 3311.
—— v. McGlossom, pp. 818, 864.
—— v. Mayes, 44 Tex. Civ. App. 31, 97 S. W. 318—pp. 451, 453, 1092, 1094, 1105, 1106, 1275, 1286, 1414, 3336, 3348.
—— v. Mayes, 44 Tex. Civ. App. 621, 99 S. W. 1166—p. 1276.
—— v. Mayes, 201 U. S. 321, 50 L. Ed. 772, 26 S. Ct. 491—pp. 3480, 3481, 3485, 3486, 3487, 3503, 3504, 3515, 3516, 3517, 3523.
—— Metropolitian Trust Co. v.
—— v. Miller, p. 1766.
—— v. Moore, pp. 4, 30, 187, 188, 190, 191, 194, 198, 202, 1537, 1544, 1550, 1553, 1554, 2122, 2163, 2665.
—— v. Moss, pp. 1884, 2039.
—— v. Ney, pp. 858, 3395, 3396.
—— v. Norris, pp. 202, 1808, 2398, 2720.
—— Oxsher v.
—— v. Park, pp. 931, 938, 946, 949, 3289, 3326, 3331.
—— v. Perkins, pp. 2017, 2018, 3228, 3229.
—— v. Peters, p. 3518.
—— v. Phillio, pp. 1510, 1513, 2018, 2020, 2028, 2499, 2510, 2527.
—— Poole v.
—— v. Poole pp. 1209, 1212, 1215.
—— Railroad Comm. v.
—— v. Raud, pp. 1852, 2037.
—— v. Reason, pp. 1783, 1798.
—— v. Richards, 59 Tex. 373, 377—p. 2163.
—— v. Richards, 20 Tex. Civ. App. 203, 49 S. W. 687—pp. 1689, 1808, 1846.
—— v. Ritter, pp. 2482, 2483.
Houston, etc., R. Co., Robinson v.
—— v. Robinson, pp. 479, 486, 488, 490, 491.
—— v. Rogers, pp. 1678, 1822, 2905.
—— v. Rowell, pp. 1991, 2643.
—— Runnels v.
—— v. Runnels, p. 1879.
—— v. Rust, pp. 82, 83, 220, 1180, 1183.
—— v. Schuttee, p. 2153.
—— v. Scott, pp. 507, 3412
—— v. Smith, 63 Tex. 322, 22 Am. & Eng. R. Cas. 421—pp. 208, 211, 221, 222, 235, 246, 247, 248, 262, 263, 264, 499, 635, 657, 1493.
—— v. Smith (Tex. Civ. App.), 32 S. W. 710, 2 Am. & Eng. R. Cas., N. S., 177—p. 1868.
—— v. Smith, 44 Tex. Civ. App. 299, 97 S. W. 836—pp. 984, 1002, 1374, 3337.
—— v. Stell, pp. 203, 2122, 2437.
—— v. Stewart, 37 S. W. 770, 14 Tex. Civ. App. 703—p. 2249.
—— v. Stewart, 21 Tex. Civ. App. 33, 50 S. W. 580—pp. 1687, 1882, 1896, 2818.
—— v. Storey, pp. 41, 52.
—— v. Summers, 92 Tex. 621, 51 S. W. 324—pp. 1813, 2638, 2734.
—— v. Summers (Tex. Civ. App.), 49 S. W. 1106—pp. 1814, 1847, 2589, 2638, 2657.
—— v. Swancey, pp. 1822, 1841.
—— Thweatt v.
—— v. Trammell, pp. 533, 1278, 1279, 1299, 1335.
—— v. United States, 94 C. C. A. 307, 168 Fed. 895—p. 3629.
—— v. United States, 205 Fed. 391—p. 3605.
—— v. United States, 234 U. S. 342, 34 S. Ct. 833—p. 3709.
—— v. Waller, p. 2300.
—— v. Washington, pp. 1563, 2035, 2046.
—— v. White, pp. 202, 2437, 2849.
—— v. Wilkerson Bros., pp. 787, 881.
—— v. Wilkins, pp. 1752, 1990.
—— v. Williams, pp. 940, 1073, 1079, 1352, 1358, 1359.
Houtz v. Union Pac. R. Co., pp. 1298, 1361, 1362, 1363, 1364, 1370, 1418, 1419.
Houx, Houston, etc., R. Co. v.
Hovze v. New Orleans, etc., R. Co., pp. 1476, 1477.
Hovey, McDonald v.
—— v. The Sarah E. Brown, p. 483.
Howard v. American Exp. Co., pp. 796, 949, 1069.
—— Broadie v.
—— Chesapeake, etc., R. Co. v.
—— v. Chesapeake, etc., R. Co., pp. 2088, 3258, 3373.
—— v. Chicago, etc., R. Co., pp. 1614, 1624, 2441.
—— v. Clark v.
—— v. Forty Second St., etc., R. Co., pp. 1889, 2306.
—— v. Illinois Cent. R. Co., pp. 3439, 3441, 3461, 3462.
—— v. Louisville R. Co., pp. 1888, 1894, 2372, 2816.
—— Nashville Railroad v.
—— v. Old Dominion Steamship Co., pp. 550, 566.
—— Peyroux v.
—— v. Scarritt Estate Co., p. 1735.
—— Southern R. Co. v.
—— v. State, p. 3582.
—— The.
—— Tison v.
—— v. Union Tract. Co., p. 2082.
Howard & Co's Exp., Newberger v.
Howard Exp. Co. v. Wile, p. 916.
Howard Supply Co., Atlantic, etc., R. Co. v.
Howard Supply Co. v. Chesapeake, etc., R. Co., pp. 3815, 3824.
Howatt v. Davis, pp. 1207, 1209, 1210, 1212, 1213, 1249.
Howe v. C. H. & D. R. Co., pp. 477, 478.
—— v. Chicago, etc., R. Co., pp. 478, 803.
—— v. Cincinnati, etc., R. Co., pp. 1209, 1210, 1211, 1212, 1213, 1214, 1248, 1249, 1250.
—— Harris v.
—— v. Lexington, p. 903.
—— v. Northern Pac. R. Co., p. 2697.
—— v. Oswego, etc., R. Co., pp. 728, 730, 733, 749, 779, 781, 788.
—— v. Parker, p. 3792.
Howell, Florshein Bros. v.
—— v. Grand Trunk R. Co., pp. 3143, 4010.
—— v. Lansing City Elect. R. Co., pp. 2118, 2260, 2400, 2869, 2882.
—— Linklater v.
—— v. Morlan, p. 482.
—— v. St. Charles St. R. Co., p. 1889.
—— Southern R. Co. v.
—— v. Union Tract. Co., p. 2821.
—— United States v.
Howells, Langdon v.
Howerton, Indianapolis, etc., R. Co. v.
Howland v. Greenway, pp. 3894, 3897, 3898, 3901, 4017, 4019.
—— v. New York, etc., R. Co., p. 2997.
—— v. Oakland Consol. St. R. Co., p. 2764.
—— v. The Henry Hood, p. 527.
Howze v. New Orleans, etc., R. Co. p. 1129.
Hoye v. Pennsylvania R. Co., 191 N. Y. 101, 83 N. E. 586, 17 L. R. A., N. S., 641, 14 Am. & Eng. Ann. Cas. 414—pp. 1014, 1116.
—— v. Pennsylvania R. Co., 100 N. Y. S. 190, 114 App. Div. 821—pp. 410, 874, 3406.
Hoyle, Pullman Co. v.
Hoylman v. Kanawha, etc., R. Co., pp. 2248, 2289, 2290.
Hoyt v. Chicago, etc., R. Co., p. 541.
—— v. Cleveland, etc., R. Co., p. 157.
—— v. Nevada County, etc., R. Co., p. 917.
—— New York, etc., R. Co., p. 2235.
—— v. Sixth Ave. R. Co., p. 65.
—— v. Thompson, p. 1489.
—— Western Transp. Co. v.
Hozier v. Caledonian R. Co., p. 1181.
Hozzard v. Illinois, etc., R. Co., p. 316.
Hrebrik v. Carr, pp. 1525, 1528, 1964, 1965.
Hubbard, Baltimore, etc., Co. v.
—— Clyde v.
—— Galveston, etc., R. Co. v.
—— Houston, etc., R. Co. v.
—— v. Mobile, etc., R. Co., pp. 1489, 3110, 3131, 3141, 3142, 3143, 3149, 3150.
Hubbard Bros. & Co., Southern R. Co. v.
Hubbard & Co. v. Harnden Exp. Co., pp. 749, 751.
Hubbell, Chicago, etc., R. Co. v.
Hubbersty v. Ward, pp. 308, 308.
Hubbs, International, etc., R. Co. v.
Hubener v. Heide, 70 N. Y. S. 1115, 62 App. Div. 308—p. 2837.
—— v. Heide, 76 N. Y. S. 758, 72 App. Div. 200—p. 2837.
Huber v. Cedar Rapids, etc., R. Co., p. 2206.
—— v. United, etc., German Congregation, p. 1861.

Huchel v. Pittsburgh, etc., R. Co., p. 2410.
Huchings v. Ladd, p. 3410.
Huchingson v. Texas Cent. R. Co., p. 2510.
Huddleston v. St. Louis, etc., R Co., pp. 1787, 2680.
Hudelson, Indiana Cent. R. Co. v.
Hudgins, Hot Springs R. Co. v.
—— Louisville City R. Co. v.
Hudman, Texas, etc., R. Co. v.
Hudson, Baltimore, etc., R. Co. v.
—— v. Lynn, etc., R. Co., pp. 2419, 2425, 2489.
—— Metropolitan St. R. Co. v.
—— v. Midland R. Co., p. 3117.
—— v. Northern Pac. R. Co., pp. 653, 1112, 1113, 1321.
Hudson Bros. Comm. Co., Glencoe Land, etc., Co. v.
Hudson Nav. Co., Fulton, etc., Cotton Mills v.
Hudson R. Co., Johnson v.
Hudson River Lighterage Co. v. Wheeler Condenser, etc., Co., pp. 820, 823.
Hudson River Line, Hirsch v.
Hudson River R. Co., Bailey v.
—— Bliven v.
—— Boice v.
—— Boswell v.
—— Butler v.
—— Conger v.
—— Hedges v.
—— Kent v.
—— v. Lounsherry, p. 483.
—— McCormick v.
—— Nelson v.
—— Russell v.
—— Schroeder v.
—— Sherman v.
—— Spade v.
—— Van Schaick v.
—— Webster v.
Hudson Valley R. Co., Powell v.
Hudson, etc., R. Co. v. State Board, 96 N. E. 435, 203 N. Y. 119—p. 3576.
—— v. State Board, 127 N. Y. S. 918, 143 App. Div. 26—p. 3553.
Huelsenkamp v. Citizens' R. Co., 34 Mo. 45—p. 2399.
—— v. Citizens' R. Co., 37 Mo. 537, 90 Am. Dec. 399—pp. 1684, 1715, 1720, 1721.
Huerstel v. New York, etc., R. Co., p. 2422.
Huff, Buckeye Nat. Bank v.
—— v. Cleveland, C. C. & St. Ry. Co., p. 1745.
—— Missouri, etc., R. Co. v.
—— Turner v.
Huffer, Citizens' St. R. Co. v.
Huffman, Lake Erie, etc., R. Co v.
—— South, etc., R. Co. v.
—— Texas, etc., R. Co. v.
Huffnagle, Bolin v.
Hufford v. Grand Rapids, etc., R Co., 53 Mich. 113, 18 N. W. 580—p. 2462.
—— v. Grand Rapids, etc., R. Co., 64 Mich. 631, 31 N. W. 544, 8 Am. St. Rep. 859—pp. 200, 1649, 2462, 2713.
—— v. Metropolitan St. R. Co., pp. 1922, 1997.
Hugen, International, etc., R. Co. v.
Huggeford, Holly v.
Huggins v. Atlantic, etc., R. Co., pp. 1454, 1456, 3407.
—— Chattanooga, etc., R. Co. v.
Hughart, Georgia Pac. R. Co. v.
Hughes, Atchison, etc., R. Co. v.
—— v. Chicago, etc., R. Co., 150 Iowa 232, 129 N. W. 956—pp. 2322, 2389.
—— v. Chicago, etc., R. Co., 127 Mo. 447, 30 S. W. 127, 2 Am & Eng. R. Cas., N. S., 284—p. 1787.
—— East Tennessee, etc., R. Co. v.
Hughes, Galloway v.
—— v. Gulf, etc., R. Co. v.
—— Louisville, etc., R. Co. v.
—— v. New York, etc., R. Co., p. 2664.
—— Pecos, etc., R. Co. v.
—— Pennsylvania R. Co. v.
—— v. Pennsylvania R. Co., pp. 940, 3520.
—— v. Pullman's Palace Car Co., p. 3243.
—— Smith v.
—— Texas, etc., R. Co. v.
—— v. Western Railroad, pp. 3050, 3056, 3059.
—— Yazoo, etc., R. Co. v.
Hughlett v. Louisville, etc., R. Co., p. 2252.
Hughson v. Richmond, etc., R. Co., pp. 1579, 1580.
—— v. Winthrop Steamboat Co., p. 3979.
Huguelet v. Warfield, pp. 104 1081.
Huide Koper, McAfee v.
Hulbert v. New York Cent. R. Co., p. 1794.
Hull v. Boston, etc., Railroad, pp. 190, 2016, 2035, 2412, 2422, 3112.
—— v. Chicago, etc., R. Co., pp. 821, 945, 1036, 1038, 1456.
—— v. East Line, etc., R. Co., pp. 279, 1127, 1859, 1864, 1866, 1881.
—— Louisville, etc., R. Co. v.
—— v. Minneapolis, etc., R. Co., pp. 1760, 2331.
—— Owings v.
—— v. Seaboard Air Line Railway, p. 2949.
Hull & Co. v. Missouri Pac. R. Co., pp. 569, 894, 910.
Humble, Texas, etc., R. Co. v.
Humboldt, The.
Humboldt Steamship Co., Interstate Commerce Comm. v.
Hume, Cohen v.
Hume Bros., Gulf, etc., R. Co. v.
Humeston, etc., R. Co., Garden Grove Bank v.
Humphrey v. Michigan United R. Co., pp. 2058, 3065, 3076.
—— Tucker v.
—— Yazoo, etc., R. Co. v.
Humphreys, Hill v.
—— v. Perry, pp. 3125, 3151, 3152, 3153, 3154.
—— Porterfield v.
—— v. Reed, pp. 869, 1167.
—— v. St. Louis, etc., R. Co. v.
Humphreysville Copper Co. v. Vermont Copper Min. Co., p. 668.
Humphries, Alabama Cent. R. Co. v.
—— Gulf, etc., R. Co. v.
—— v. Illinois Cent. R. Co., p. 1861.
—— Southern R. Co. v.
—— Texas, etc., R. Co. v.
Hundley, Adams Exp. Co. v.
—— v. Southern R. Co. v.
Hungerford, State v.
—— v. Winnebago, etc., Transp Co., p. 522.
Hunnicutt, Birmingham R., etc, Co. v.
—— Southern Exp. Co. v.
Hunt v. Boston Elev. R. Co., p. 2797.
—— v. Brooklyn Heights R. Co., p. 1646.
—— East Tennessee, etc., R. Co. v.
—— Ellis v.
—— Galveston, etc., R. Co. v.
—— v. Haskell, p. 1145, 1168, 1170.
—— v. Metcalf, p. 3865.
—— v. Metropolitan St. R. Co., p. 2698.
—— v. Michigan, etc., R. Co., pp. 3394, 3407.
Hunt v. Mississippi Cent. R. Co., pp. 294, 305, 306, 308, 315, 332, 333, 337, 338.
—— v. Missouri, etc., K. Co., p. 712.
—— v. Morris (La.), 6 Mart., O. S. 676, 12 Am. Dec. 489—pp. 727, 737, 739.
—— v. Morris, 12 N. J. L. 175, 22 Am. Dec. 300—p. 821.
—— v. New York, etc., R. Co., 93 N. E. 787, 212 Mass. 102—p. 1590.
—— v. New York, etc., R. Co., (N. Y.), 1 Hilt. 228—pp. 3285, 3307.
—— v. Nutt, pp. 782, 783, 3354, 3355.
—— v. Old Colony St. R. Co., p. 2326.
—— Pittsburgh, etc., R. Co. v.
—— v. St. Louis, etc., R. Co. v.
—— Southern R. Co. v.
—— v. Southern R. Co., pp. 1558, 1561.
—— Western, etc., R. Co. v.
Hunt Bros. v. Missouri, etc., R. Co., p. 744.
Hunter v. Atlantic, etc., R. Co., p. 2224.
—— Central, etc., R. Co. v.
—— Chesapeake, etc., K. Co. v.
—— v. Cooperstown, etc., R. Co., 112 N. Y. 371, 19 N. E. 820, 8 Am. St Rep. 752, 2 L. R. A. 832—p. 2127.
—— v. Cooperstown, etc., R. Co., 126 N. Y. 18, 26 N. E. 958, 12 L. R. A. 429—p. 2124.
—— v. Coopertown, etc., R. Co., p. 2373.
—— Little Rock, etc., R. Co. v.
—— v. Louisville, etc., R. Co., p. 2253, 2282.
—— v. New York, etc., Salt Co., p. 3869.
—— v. Philadelphia, etc., R. Co., p. 2595.
—— Pullman Palace Car Co. v.
—— v. St. Louis, etc., R. Co., pp. 419, 3747, 3749, 3760.
—— v. Southern Pac. R. Co., pp. 3289, 3327, 3331.
—— Southern R. Co. v.
—— v. Southern Railway, pp. 1662, 2661, 3044.
Hunter & Co., Texas Cent. R. Co. v.
Hunterson v. Union Tract. Co., pp. 2153, 2290.
Huntington v. Dinsmore, p. 408.
Huntley, Grand Rapids, etc., R. Co. v.
Huntly v. Dows, p. 701.
Huntress, The.
Huntting Elevator Co. v. Bosworth, pp. 522, 523, 888, 3259.
Hurd, Crowley v.
Hurlbut, Jackson Architectural Iron Works v.
Hurley v. Big Sandy, etc., R. Co., p. 87.
—— Gulf, etc., R. Co. v.
—— v. Metropolitan St. R. Co., pp. 1902, 1997, 2268, 2269.
Huron Barge Co. v. Turney, p. 3966.
Hurley & Son v. Norfolk, etc., R. Co., pp. 564, 729, 878, 889, 897, 910.
Hurry v. Hurry, p. 3866.
Hurst, Central, etc., R. Co. v.
—— v. Great Western R. Co., p. 1671.
—— Monongahela River Consol. Coal, etc., Co. v.
—— New Orleans, etc., R. Co. v.
—— Railroad Co. v.
—— v. St. Louis, etc., R. Co. v.
Hurt, Commercial Bank v.
—— Illinois Cent. R. Co. v.
—— v. Illinois Cent. R. Co., pp 2155, 2922.

Hurt v. St. Louis, etc., R. Co., p. 1896.
—— Union Dray Line Co. v.
Hurwitz v. Hamburgh-American Packet Co., pp. 3119, 3121, 3159.
Hus v. Kempf, p. 3942.
Huse v. Glover, pp. 3479, 3528, 3529, 3530, 3531, 3569.
Husen, Railroad Co. v.
Hussey v. Saragossa, pp. 1455, 1456.
Huston v. Peters, p. 813.
Huston Bros. v. Wabash R. Co., p. 217.
Hutcheis v. Cedar Rapids, etc., R. Co., pp. 2384, 2403.
Hutcheson v. Louisville, etc., R. Co., pp. 74, 136, 939.
Hutchings v. Ladd, pp. 3251, 3270.
Hutchings & Co. v. Western, etc., K. Co., pp. 3109, 3114, 3124, 3125, 3126, 3167, 3168.
Hutchingson, Texas Cent. R. Co. v.
Hutchins, Georgia, etc., R. Co. v.
—— v. Macomber, p. 2227.
—— v. Penobscot Bay, etc., Steamboat Co., p. 2508.
—— v. Pennsylvania R. Co., pp. 3163, 3177.
—— Schoolher v.
—— v. United States Exp. Co. v.
Hutchinson v. Capital Traction Co., p. 1963.
—— v. Chicago, etc., R. Co., pp. 320, 323, 986, 1344, 1369, 1391.
—— Gordon v.
—— Illinois Cent. R. Co. v.
—— v. St. Louis, etc., R. Co. v.
—— Stump v.
—— v. United States Exp. Co., pp. 535, 564, 729, 734, 735, 750, 751, 752, 772, 773, 891, 910.
Hutchison v. Southern R. Co., pp. 1857, 1859, 3057.
Hutchison Lumber, etc., Co., Tyron Co. v.
Hutkoff v. Pennsylvania R. Co., pp. 822, 823.
Hutti, Louisville R. Co. v.
Hutto v. Southern Railway, p. 3163.
Hyades, The.
Hyatt, Chicago, etc., R. Co. v.
—— Ft. Worth, etc., K. Co. v.
Hyde, East Tennessee, etc., R. Co. v.
—— v. New York, etc., Steamship Co., p. 760.
—— v. Seattle Elect. Co., p. 2810.
Hydraulic Engineering Co. v. McHaffie, p. 638.
Hyett, Moulthrop v.
Hyman v. Central Vermont R. Co., pp. 3179, 3183.
Hynes, International, etc., R. Co. v.
H. & T. C. R. Co. v. Smith, pp. 82, 216.
—— v. State, p. 166.
—— v. Stewart & Co., pp. 486, 490, 596.

I

Iekenroth v. St. Louis Trans. Co., p. 2483.
Idaho, The.
Igo, Chicago, etc., R. Co. v.
Ikelheimer v. Consolidated Tobacco Co., p. 1165.
Illinois, Cleveland, etc., R. Co. v.
—— Dreyer v.
—— Illinois Cent. R. Co. v.
—— Keokuk, etc., Bridge Co. v.
—— Munn v.
—— Ruggles v.
—— The.
—— Wabash, etc., R. Co. v.
Illinois Cent. R. Co. v. Able, pp. 2262, 2267.
—— v. Adams, pp. 746, 1287, 1288, 1379.
Illinois Cent. R. Co. v. Alexander, pp. 714, 894.
—— v. Allen, pp. 195, 1496.
—— Ammon v.
—— v. Anderson, pp. 2098, 2099
—— v. Antoon, p. 3124.
—— Ardison v.
—— Armstrong v.
—— Armstrong, etc, Co. v.
—— Arnold v.
—— v. Ashmead, pp. 250, 271, 273, 285, 287, 288, 438, 745.
—— v. Ball, p. 1893.
—— v. Bauer, pp. 1597, 1601, 2473, 2474.
—— Beard v.
—— v. Beebe, 174 Ill. 13, 50 N. E. 1019, 43 L. R. A. 210, 66 Am. St. Rep. 253, 11 Am. & Eng. R. Cas., N. S., 163—pp. 429, 1489, 1490, 1757, 1992, 2097, 2098, 2099, 2216.
—— v. Beebe, 69 Ill. App. 363—pp. 2092, 2093, 2671.
—— v. Billington, p. 1592.
—— Bishop v.
—— v. Black, p. 2664.
—— Blank v.
—— Bogard v.
—— v. Bogard, pp. 1110, 1111, 1114, 1429.
—— v. Boles, p. 2824.
—— Brand v.
—— v. Brelsford, p. 1339.
—— Brimmer v.
—— v. Brookhaven Mach. Co., pp. 521, 594, 666.
—— Brown v.
—— v. Brown, 54 S. W. 159, 21 Ky. L. Rep. 1089—p. 1440.
—— v. Brown, 77 Miss. 338, 28 So. 949—pp. 2117, 2210, 2213.
—— Bruff v.
Illinois Cent. R. Co. v. Bundy, pp. 217, 1480.
—— Burbank v.
—— v. Byrne, pp. 447, 676.
—— Carter v.
—— v. Carter, 46 N. E. 374, 165 Ill. 570, 36 L. R. A. 527—pp. 565, 981, 1033, 3295, 3351.
—— v. Carter, 62 Ill. App. 618—pp. 551, 891, 902, 903.
—— v. Chambers, pp. 1855, 2262.
—— Chadbourne v.
—— v. Cheek, p. 2148.
—— Cobb v.
—— v. Cobb, 72 Ill. 148—p. 854. 579.
—— v. Cobb, 72 Ill. 148—p. 854.
—— Cobb, etc., Co. v.
—— v. Cobb, etc., Co., pp. 250, 253, 438, 494, 622, 688.
—— Collins v.
—— Collison v.
—— v. Colley, pp. 2777, 2890, 2971.
—— v. Commonwealth, 23 Ky. L. Rep. 544, 63 S. W. 448—pp. 73, 180.
—— v. Commonwealth, 23 Ky. L. Rep. 1159, 64 S. W. 975—p. 180.
—— v. Commonwealth, 28 Ky. L. Rep. 802, 90 S. W. 602—pp. 177, 181, 183.
—— v. Copeland, pp. 3109, 3125, 3126, 3131, 3139, 3176, 3177, 3185, 3189, 3190, 3315.
—— v. Cotter, p. 1520.
—— v. Cowles, pp. 411, 3180, 3300, 3399.
—— v. Crady, p. 2341.
—— v. Crudup, p. 2101.
—— v. Cruse, p. 2963.
—— v. Cunningham, 67 Ill. 316—pp. 2468, 3102.
—— v. Cunningham, 102 Ill. App. 206—p. 2248.
—— v. Curry, pp. 1353, 1450, 3273, 3284, 3387, 3388, 3416, 3417, 3623.
—— v. Dacus, p. 3076.
—— Dallas v.
Illinois Cent. R. Co. v. Dallas, pp. 1502, 1739, 1866, 1885, 1925, 1996, 2119, 2228, 2777.
—— Dallenbach v.
—— v. Daniels, pp. 1773, 2117, 2135, 2325, 2326.
—— Darnell v.
—— v. Davenport, pp. 2485, 2643, 2646, 2713, 3023, 3027, 3038.
—— v. Davidson, 64 Fed. 301, 12 C. C. A. 118—p. 2230.
—— v. Davidson, 22 C. C. A. 306, 76 Fed. 517—pp. 1739, 1782, 2296, 2963.
—— v. Demars, pp. 1641, 3041.
—— v. Dodds, p. 3054.
—— Doggett v.
—— v. Doughty, pp. 316, 317.
—— v. Downs, p. 2724.
—— v. Dunnigan, p. 1594.
—— v. Elben, p. 1377.
—— E. Sondheimer Co. v.
—— v. Fleming, pp. 1612, 2705, 3013, 3050, 3063, 3076, 3757.
—— v. Foley, p. 1795.
—— v. Foulks, 191 Ill. 57, 60 N. E. 890—p. 3314.
—— v. Foulks, 92 Ill. App. 391—p. 3249.
—— v. Frankenberg, pp. 1, 208, 233, 727, 732, 748, 894, 1003, 1007, 1049, 3291, 3326, 3341, 3359.
—— v. Friend, pp. 536, 894.
—— Gage v.
—— Gilliland v.
—— v. Glover, p. 2332.
—— v. Gortikov, pp. 1619, 2409, 2449, 2459, 3095.
—— Greek-American Produce Co. v.
—— v. Green, p. 2243.
—— Gregg v.
—— Grieve v.
—— v. Griffin, pp. 1776, 2323, 2872.
—— Grinnell-Collins Co. v.
—— v. Gross, pp. 814, 845.
—— v. Gunterman, pp. 1711, 2017, 2019, 2068, 2959.
—— v. Hall, p. 1377.
—— Hamlen & Sons Co. v.
—— v. Hammer, pp. 2501, 2503.
—— v. Handy, pp. 3125, 3126, 3145, 3216, 3218, 3220, 3221, 3224, 3228.
—— Harlon v.
—— v. Harper, pp. 198, 1663, 2409, 2456, 2463.
—— v. Harris, 56 N. E. 316, 184 Ill. 57, 48 L. R. A. 175—pp. 1274, 1473.
—— v. Harris, 81 Miss. 208, 32 So. 309, 59 L. R. A. 742, 95 Am. St. Rep. 466—p. 1626.
—— v. Haynes, 63 Miss. 485—p. 1273.
—— v. Haynes, 64 Miss. 604, 1 So. 765—p. 662.
—— v. Head, pp. 1673, 3044, 3045, 3052.
—— v. Henderson Elevator Co., 138 Ky. 220, 127 S. W. 779—pp. 3747, 3750.
—— v. Henderson Elevator Co., 33 S. Ct. 176, 226 U. S. 441, 57 L. Ed. 290—pp. 3745, 3754.
—— v. Hobbs, pp. 1458, 1459.
—— v. Holman, p. 3709.
—— v. Holt, pp. 1271, 1303, 1321, 1343, 1353, 1375, 1376, 1378, 3289.
—— v. Hopkinsville Canning Co., 123 Ky. 783, 97 S. W. 426, 30 Ky. L. Rep. 78—pp. 671, 675
—— v. Hopkinsville Canning Co., 132 Ky. 578, 116 S. W. 758—pp. 495, 642, 644, 645, 646, 659, 660, 903, 3277.
—— v. Hornberger, p. 250.
—— Howard v.
—— Humphries v.
—— Hurt v.
—— v. Hurt, pp. 2820, 2822.

Illinois Cent. R. Co. v. Hutchinson, p. 2121.
—— v. Illinois, 108 U. S. 541, 27 L. Ed. 818, 2 S. Ct. 839—pp. 34, 35, 43, 44, 63.
—— v. Illinois, 163 U. S. 142, 41 L. Ed. 107, 16 S. Ct. 1096—pp. 97, 3448, 3450, 3513, 3514, 3515, 3516.
—— Interstate Commerce Comm. v.
—— v. Interstate Commerce Comm., pp. 3638, 3668, 3669, 3676, 3677, 3712, 3713, 3715, 3761, 3770, 3772, 3777, 3785, 3786, 3799, 3803.
—— v. Jackson, pp. 2459, 2462, 3102.
—— v. James, p. 1255.
—— v. Jennings, 217 Ill. 140, 20 R. R. R. 15, 43 Am. & Eng. R. Cas., N. S., 15, 75 N. E. 457—pp. 1567, 2293, 2365.
—— v. Jennings, 82 N. E. 403, 229 Ill. 608—pp. 2207, 2666, 2787.
—— v. Johnson, 34 Ill. 389—p. 3201.
—— v. Johnson, 67 Ill. 312—pp. 1599, 2468, 3102.
—— v. Johnson, 123 Ill. App. 300—pp. 1793, 2241.
—— v. Johnson, 94 S. W. 600, 116 Tenn. 624—p. 515.
—— v. Jolly, pp. 2237, 2353, 2393.
—— v. Jones, p. 3405.
—— v. Jonte, p. 945.
—— Jurkiewicz v.
—— v. Keegan, pp. 2130, 2872.
—— v. Kerl, p. 1333.
—— v. Kerr, 125 Ill. App. 365—pp. 1695, 1696.
—— v. Kerr, 68 Miss. 14, 8 So. 330—p. 3260.
—— King v.
—— v. Kuhn, pp. 1680, 1714, 1720, 1724, 1808, 1810, 1812, 1821, 2004, 2694, 2695.
—— Lake Shore Nitro-Glycerine Co. v.
—— v. Lancashire Ins. Co., pp. 973, 975, 978.
—— v. Langdon, p. 1469.
—— v. Latimer, 128 Ill. 163, 21 N. E. 7—p. 2487.
—— v. Latimer, 28 Ill. App. 552—p. 2479.
—— Law v.
—— v. Lence, p. 3009.
—— Lennon v.
—— v. Louthan, pp. 1636, 2424.
—— v. Lutz, p. 2262.
—— v. McClellan, pp. 250, 438, 516, 614, 615, 617, 624, 727, 732, 748, 752, 765.
—— McDonald v.
—— McMelon v.
—— McMichael v.
—— v. McMillion, pp. 1505, 1506, 1537.
—— McNaughton v.
—— Majestic Coal, etc., Co. v.
—— Marbury v.
—— v. Marlett, pp. 1622, 1623, 2447.
—— v. Massey, pp. 1921, 1963, 2250.
—— v. Matthews, pp. 3114, 3119, 3121, 3150, 3151, 3152, 3153, 3154, 3155, 3184.
—— v. Meacham, pp. 1502, 1550, 1569.
—— v. Miller, p. 484.
—— v. Minor, pp. 2020, 2951, 2952.
—— Mississippi R. Comm. v.
—— v. Mississippi R. Comm., p. 3516.
—— v. Mitchell, pp. 886, 3262, 3286, 3301.
—— v. Moore, p. 3053.
—— Morris v.
—— v. Morrison, pp. 945, 1364, 1377.
Illinois Cent. R. Co. v. Mossbarger, pp. 650, 676, 677, 839.
—— Mulberry Hill Coal Co. v.
—— Mulberry, etc., R. Co. v.
—— Mulligan v.
—— Mullins v.
—— Nelson v.
—— v. Nelson, 59 Ill. 110—p. 2435.
—— v. Nelson, 30 Ky. L. Rep. 114, 97 S. W. 757—pp. 341, 642, 645, 647, 650, 651, 653, 677.
—— Newberger Cotton Co. v.
—— v. O'Connell, pp. 1743, 1832.
—— v. O'Keefe, 154 Ill. 508, 39 N. E. 606—p. 2174.
—— v. O'Keefe, 168 Ill. 115, 48 N. E. 294, 39 L. R. A. 149, 61 Am. St. Rep. 68—pp. 1555, 1561.
—— v. O'Keefe, 63 Ill. App. 102—pp. 1502, 2096.
—— v. O'Keefe (Ill.), 9 Am. & Eng. R. Cas., N. S., 611—pp. 1520, 1521.
—— v. Owens, p. 1382.
—— Ozamee v.
—— Painkinsky v.
—— v. Parks, p. 581.
—— Patterson v.
—— Payne v.
—— v. Pearson, pp. 1677, 3056.
—— Pennington v.
—— People v.
—— v. People, 121 Ill. 304, 12 N. E. 670—pp. 97, 142.
—— v. People, 143 Ill. 434, 33 N. E. 173, 19 L. R. A. 119—p. 98.
—— v. People, 19 Ill. App. 141—p. 215.
—— v. Peterson, p. 1286.
—— Phelps v.
—— v. Phelps, p. 250.
—— Pierson v.
—— v. Porter, pp. 1575, 2678, 2694, 2806.
—— Pressley Co. v.
—— v. Proctor, 18 R. R. R. 531, 41 Am. & Eng. R. Cas., N. S., 531, 122 Ky. 92, 89 S. W. 714, 28 Ky. L. Rep. 598—pp. 1514, 1517, 2134, 2136, 2137, 2138, 2141, 2319, 2878.
—— v. Proctor, 102 S. W. 826, 31 Ky. L. Rep. 494—p. 2731.
—— Quinn v.
—— v. Radford, pp. 1085, 1397, 1408.
—— v. Read, p. 2095.
—— v. Reid, p. 3093.
—— Rice v.
—— v. River, etc., Coke Co., pp. 216, 247, 264.
—— v. Roberts, pp. 2705, 3013, 3050, 3757.
—— v. Rothschild, pp. 1567, 2809.
—— Royston v.
—— v. Sandusky, pp. 2220, 2900, 3074.
—— v. Schwartz, 11 Ill. App. 482—p. 482.
—— v. Schwartz, 13 Ill. App. 490—pp. 490, 491, 1016.
—— Scorenson v.
—— v. Scruggs, p. 1339.
—— v. Segarl & Co., p. 3752.
—— v. Seitz, pp. 1141, 1171.
—— Shackt v.
—— v. Siddons, pp. 1852, 2626.
—— Siler v.
—— v. Simmons, 38 Ill. 242—pp. 2615, 2620.
—— v. Simmons, 49 Ill. App. 443—p. 1315.
—— v. Simpson, p. 544.
—— v. Slatton, p. 2268.
—— v. Smith, 37 So. 643, 85 Miss. 349, 70 L. R. A. 642, 107 Am. St. Rep. 293—pp. 1496, 3042.
—— v. Smith (Miss.), 59 So. 87—p. 3066.
—— v. Smyser, pp. 267, 270, 273, 277, 285, 288, 292, 425.
—— Sorenson v.
Illinois Cent. R. Co. v. Souders, p. 2909.
—— v. Southern Bank, pp. 365, 558, 561.
—— v. Southern Seating, etc., Co., pp. 642, 643, 647, 650, 652, 678, 679, 699, 816, 3355.
—— State v.
—— Steever v.
—— v. Stevens, pp. 3407, 3415.
—— Stone v.
—— v. Strauss, p. 2230.
—— v. Sutton, 42 Ill. 438, 92 Am. Dec. 81—pp. 2468, 2479.
—— v. Sutton, 53 Ill. 397—p. 3103.
—— v. Swanson, pp. 420, 588.
—— Tate v.
—— v. Taylor, 24 Ill. 323—pp. 3189, 3190.
—— v. Taylor, 46 Ill. App. 141—p. 2826.
—— v. Taylor, 24 Ky. L. Rep. 1169, 70 S. W. 825—p. 2317.
—— v. Teams, pp. 1456, 1474.
—— Thacker v.
—— v. Trail, p. 2265.
—— v. Treat, pp. 1514, 1783, 1796, 2730.
—— v. Troustine, pp. 285, 725, 3135, 3137.
—— Udell v.
—— v. Vinson, pp. 2925, 2926.
—— Wade v.
—— v. Walker, p. 1857.
—— v. Wall, p. 2503.
—— v. Warren, pp. 1921, 2166.
—— v. Waters, pp. 1306, 1307, 1315.
—— v. Watkins, p. 839.
—— White v.
—— v. White, p. 1758.
—— v. Whittaker, p. 2361.
—— v. Whittemore, pp. 188, 196, 1637, 2122, 2479, 2854.
—— Wilke v.
—— v. Williams, pp. 1629, 1630, 2620, 3083.
—— Winne v.
—— v. Winslow, p. 2868.
—— Woodward v.
—— v. Word, pp. 1455, 1456, 1457, 1467, 1471.
Illinois Custom Tailoring Co. v. Adams Exp. Co., p. 1033.
Illinois Match Co. v. Chicago, etc., R. Co., pp. 330, 331, 988, 1029, 1032, 1034, 3258, 3330, 3347, 3351, 3412.
Illinois So. R. Co., Sparta Gas, etc., Co. v.
Illinois Terminal R. Co., United States v.
Illinois, etc., R. Co., Beard v.
—— Coles v.
—— v. Davidson, p. 1788.
—— Dorrah v.
—— Grieve v.
—— Hill v.
—— Hozzard v.
—— Interstate Commerce Comm. v.
—— v. King, p. 2077.
Ilsley v. Stubbs, pp. 1210, 1211, 1215, 1216, 1217, 1225, 1241.
Ilwaco R. etc., Co., Oregon, etc., R. Co. v.
—— v. Oregon, etc., R. Co., p. 3656.
Imhoff v. Chicago, etc., R. Co., 20 Wis. 362—pp. 1533, 1780, 2949.
—— v. Chicago, etc., R. Co., 22 Wis. 649—p. 2520.
Independence Mills Co. v. Burlington, etc., R. Co., pp. 803, 807, 880, 888, 895.
India, The.
Indian River Steamboat Co. v. East Coast Transp. Co., p. 102.
Indiana, American Exp. Co. v.
—— v. American Exp. Co., p. 3578.
—— Darnell v.
—— v. Pullman Car Co., p. 3580.

Indiana Cent. R. Co. v. Gulick, pp. 3189, 3191.
—— v. Hudelson, pp. 1504, 1506.
—— v. Mundy, pp. 2094, 2096.
Indiana Natural Gas., etc., Co., Manufacturers' Gas, etc., Co. v.
Indiana R. Co. v. Hoffman, p. 81.
—— v. Maurer, pp. 2129, 2406, 2922, 2923, 2926, 2932.
Indiana Union Tract. Co. v. Benadum, p. 1280.
—— v. Jacobs, pp. 2230, 2591.
—— v. Keiter, pp. 1742, 2228, 2289, 2348.
—— v. Langley, p. 1582.
—— v. Love, p. 1984.
—— v. McKinney, pp. 2586, 2694.
—— v. Maher, pp. 2696, 2979.
—— v. Ohne, p. 2004.
—— v. Scribner, pp. 1841, 3998, 4000, 4005, 4006.
—— v. Swafford, pp. 2359, 2585.
Indiana, etc., R. Co. v. Burdge, pp. 2615, 2617, 2660.
—— v. Ditto, pp. 2475, 2485.
—— v. Doremeyer, pp. 573, 575.
—— v. Empire Rubber Mfg. Co., p. 434.
—— v. James, pp. 1476, 1477.
—— v. Masterson, pp. 1752, 1755, 1991.
—— Snow v.
—— v. Zilly, pp. 3141, 3158, 3174.
Indianapolis v. Navin, p. 35.
Indianapolis Abattoir Co. v. Neidlinger, p. 1584.
Indianapolis Freight Bureau v. P. R. Co., p. 3679.
Indianapolis Southern R. Co. v. Emmerson, p. 1742.
—— v. Tucker, pp. 1524, 1742, 1755, 2589, 2590, 2605, 2615.
—— v. Wall, p. 2635.
Indianapolis St. R. Co. v. Hockett. 159 Ind. 677, 66 N. E. 39—pp. 2267, 2358, 2991, 3000.
—— v. Hockett, 67 N. E. 106, 166 Ind. 196—pp. 2535, 2536, 2548.
—— v. Lawn, p. 2834.
—— v. Kay, p. 2634.
—— v. Robinson, p. 2390.
—— v. Schmidt, pp. 2604, 2609, 2613, 2671.
—— Smith v.
—— v. Tenner, p. 1535.
—— v. Whitaker, p. 2372.
—— v. Wilson, pp. 1651, 2458, 2464.
Indianapolis Tract., etc., Co., Caughell v.
—— v. Formes, p. 2609.
—— v. Lawson, pp. 1564, 3003.
—— v. Lockman, pp. 2417, 2425, 2487, 2494.
—— v. Miller, p. 1889.
—— v. Pressell, pp. 2230, 2591, 2612.
—— v. Richey, p. 2346.
—— v. Romans, pp. 1583, 2013.
Indianapolis Union R. Co. v. Cooper, pp. 2045, 2658.
—— v. Dohn, p. 100.
Indianapolis, etc., Co. v. Andis, p. 1580.
—— v. Klentchy, pp. 1564, 1565.
Indianapolis, etc., R. Co. v. Allen, p. 1363.
—— v. Backus, pp. 3575, 3591.
—— v. Barnes, pp. 1703, 2289, 2609.
—— v. Beaver, p. 1567.
—— Bergman v.
Indianapolis, etc., R. Co., Bergman v.
—— v. Birney, pp. 1673, 3042, 3043, 3044.
—— v. Cox, pp. 1007, 3162, 3163, 3164.
—— v. Emmerson, pp. 1712, 2602.
—— v. Ervin, 118 Ill. 250, 8 N. E. 862, 59 Am. Rep. 369—p. 89.
—— v. Ervin (Ill.), 27 Am. & Eng. R. Cas. 8—p. 1180.
Indianapolis, etc., R. Co. v. Forythe, pp. 797, 945, 1040.
—— Green v.
—— v. Hall, p. 1984.
—— v. Haverstick, p. 2193.
—— Heazle v.
—— v. Herndon, p. 561.
—— v. Horst, pp. 1550, 1558, 1567, 1694, 1714, 1715, 1721, 1724, 1742, 1755, 1756, 1757, 1958, 2034, 2286, 2304.
—— v. Howerton, p. 3099.
—— Interstate Stockyards Co. v.
—— v. Jurey, p. 1341.
—— Keep v.
—— v. Kennedy, pp. 2436, 2784.
—— McCollom v.
—— v. Milligan, pp. 2775, 3102.
—— v. Murray, pp. 532, 3288.
—— Ober v.
—— v. Pitzer, p. 2516.
—— v. Remmy, pp. 333, 805.
—— Rice v.
—— v. Rinard, pp. 210, 1492, 1596, 2468, 2470.
—— v. Rutherford, pp. 1828, 1961, 2202, 2279.
—— v. State, p. 255.
—— v. Strain, p. 3357.
—— Union Mut. Ins. Co. v.
—— v. Wall, pp. 2583, 2585, 2753.
Indianapolis, etc., Rapid Transit Co. v. Walsh, p. 2228.
Indianapolis, etc., Trans. Co. v. Walsh, p. 2600.
Indrani, The.
Indrapura, The.
Inferior Court, Powers v.
Ing, International, etc., R. Co. v.
Ingalls v. Adams Exp. Co., p. 2505.
—— v. Bills, pp. 1684, 1687, 1691, 1722, 1837, 1842, 1846, 1848, 2127, 2260.
—— v. Brooks, p. 3298.
—— Frank v.
—— Libby v.
Ingledew, Griffith v.
—— v. Northern Railroad, pp. 638, 653, 832.
Ingles v. Metropolitan St. R. Co., p. 2659.
—— v. Usherwood, pp. 1215, 1216.
Inglis, Bothlingk v.
Ingrafia v. Samuels, p. 2838.
Ingraham v. Pullman Co., p. 3243.
Ingram v. Weir, pp. 1119, 1123.
Inhabitants of Norfolk, Inhabitants of Wrenthan v.
Inhabitants of Wrentham v. Inhabitants of Norfolk, p. 114.
Inland, etc., Coasting Co. v. Tolson, pp. 2116, 2670.
Inman v. Buffalo, etc., R. Co., p. 898.
—— v. South Carolina R. Co., pp. 208, 251, 789, 790, 791, 792, 795, 930, 947, 1035.
Inman Steamship Co., Heyl v.
—— Sherman v.
—— v. Tinker, p. 3530.
Inman & Co. v. St. Louis, etc., R. Co., pp. 252, 263, 264, 472, 657, 1323.
—— v. Seaboard, etc., R. Co., pp. 187, 208, 257, 726, 948, 953, 954, 962, 963, 964, 975, 978, 985, 988, 1003, 1026, 1027, 1030, 1048, 1063, 1090.
Inness v. Boston, etc., R. Co., pp. 1516, 2864.
In re Allowance for Lining and Heating Cars, p. 3630.
In re Allowances to Elevators (U. S.), 12 Interst. Com. R. 85, 88—p. 3732.
In re Allowances to Elevators (U. S.), 14 Interst. Com. Com'n R. 315, 316—p. 3732.
In re Arkansas R. Rates, 163 Fed. 141—p. 54.
In re Arkansas R. Cases, 187 Fed. 290—pp. 34, 35, 39, 44, 45, 47, 49, 53, 57, 3490.
In re Bearns, pp. 1231, 1243.
In re Burke & Co., pp. 1237, 1238.
In re California Nav., etc., Co., 110 Fed. 670—pp. 1566, 1760, 3998.
In re California Nav., etc., Co., 110 Fed. 678—p. 4070.
In re Cargo of Brimstone, p. 3949.
In re Cargo of 3,408 Tons of Pocahontas Coal, p. 3965.
In re Charge to Grand Jury, p. 3697.
In re Churchill, p. 3907.
In re Comstock, p. 1216.
In re Debs, pp. 3440, 3443, 3447, 3448, 3461, 3467, 3468.
In re Deininger, p. 3428.
In re Dexterville Mfg., etc., Co., p. 2091.
In re Emerson, etc., Co., 117 C. C. A. 635, 199 Fed. 95—p. 8.
In re Emerson, etc., Co., 117 C. C. A. 639, 199 Fed. 99—p. 8.
In re E. Reboulin Fils & Co., pp. 362, 363.
In re Excelsior Coal Co., pp. 4046, 4085.
In re Foot, pp. 1239, 1240.
In re Garnett, pp. 4036, 4053, 4054.
In re Greenfield's Estate, pp. 323, 984.
In re Jeremiah Smith & Sons, p. 4045.
In re Kimball Steamship Co., pp. 3992, 3997, 4046.
In re Lakeland Transp. Co., pp. 4028, 4049.
In re Lennon, pp. 3617, 3809, 3818.
In re Levin, pp. 361, 362.
In re Meyer, p. 4037.
In re Michigan Steamship Co., pp. , 4055, 4081.
In re Minneapolis, etc., R. Co., p. 3.
In re Morrison, pp. 4036, 4049, 4071, 4072, 4073.
In re New Orleans, etc., R. Co., p. 1372.
In re New York, etc., Goods Co., pp. 1208, 1219, 1228, 1232, 1233.
In re 948 Pieces of Lumber, p. 1170.
In re Opinion of the Justices, p. 1593.
In re Pacific Mail Steamship Co., pp. 4043, 4044.
In re Paterson Co., pp. 1228, 1243.
In re Petitions of Peterson, pp. 625, 3301, 3302.
In re Pooling Freights, pp. 3724, 3852.
In re Rahrer, pp. 3418, 3420, 3429, 3538, 3539.
In re Ross, 196 Fed. 921—p. 4054.
In re Ross, 204 Fed. 248, 122 C. C. A. 516—pp. 4046, 4079.
In re Southern Wisconsin Power Co., 140 Wis. 245, 122 N. W. 801—pp. 3468, 3535.
In re Southern Wisconsin Power Co., 140 Wis. 265, 122 N. W. 809—pp. 3468, 3535.
In re Swan, p. 3467.
In re Talbot, pp. 1243, 1244.
In re 2,098 Tons of Coal, p. 709.
In re Union Tank Line Co., p. 3575.
In re Westznthins, p. 1224.
In re Winbourn, p. 2089.
Inslee v. Lane, pp. 1213, 1219, 1220, 1229, 1232, 1233, 1234, 1242.
Insley, Ex parte.
Insurance Co. v. Delaware Mut., etc., Ins. Co., pp. 723, 3705.
—— v. Easton, pp. 790, 794.
—— v. Easton, etc., Transp. pp. 3921, 4031.
—— Gulf, etc., R. Co. v.
—— Houston Direct Nav. Co. v.
—— Houston, etc., Nav. Co. v.

Insurance Co. v. Lake Erie, etc., R. Co., pp. 770, 840.
—— v. Leyland & Co., p. 3921.
—— Liverpool, etc., Steam Co. v.
—— Merchants', etc., Storage Co. v.
—— Morgan v.
—— Nord-Deutscher Lloyd v.
—— v. North German Lloyd Co., pp. 3882, 3924, 3936, 4024, 4058, 4062.
—— v. Railroad Co., pp. 960, 3258.
—— v. St. Louis, etc., R. Co., p. 854.
—— Thompson v.
—— v. Thwing, p. 3906.
—— v. Young, p. 3867.
Insurance Cos. v. Carrier Cos., p. 1182.
Interborough Rapid Transit Co., Brewster v.
—— Brown v.
—— Busch v.
—— Danziger v.
—— Flynn v.
—— Kaplowitz v.
—— Kohm v.
—— Lang v.
—— McCormack v.
—— McGuire v.
—— McMahon v.
—— Maillefert v.
—— Olopp v.
—— O'Rourke v.
—— Rubin v.
—— Scholtz v.
—— Schwartz v.
—— Segelman v.
—— Victorson v.
—— Wachser v.
—— Wertheimer v.
—— Windels v.
International Coal Min. Co., Pennsylvania R. Co. v.
International Exp. Co. v. Grand Trunk Railway, p. 109.
International Marine Ins. Co., Missouri Pac. R. Co. v.
International Mercantile Marine Co., Kohn v.
—— v. Smith, pp. 3988, 4002.
International Nav. Co., Farr, etc., Mfg. Co. v.
—— v. Farr, etc., Mfg. Co., pp. 3907, 3908, 3909, 4061, 4062, 4063, 4065, 4066.
—— Fasy v.
—— Kahaner v.
International R. Co., Bamberg v.
—— Bingemann v.
—— Crandall v.
—— Craven v.
—— Creenan v.
—— Cunningham v.
—— Elder v.
—— Grissinger v.
—— Miller v.
—— Speck v.
—— Tietz v.
—— Ward v.
International Steamboat Co., Dunlap v.
International Steamship Co., Murray v.
International Text-Book Co. v. Gillespie, p. 3557.
International Trust Co., Gibson v.
International, etc., R. Co. v. Addison, 97 S. W. 1037, 100 Tex. 241, 8 L. R. A., N. S., 880—p. 2369.
—— v. Addison (Tex. Civ. App.), 93 S. W. 1081—p. 2774.
—— v. Anderson, 82 Tex. 516, 17 S. W. 1039, 27 Am. St. Rep. 902—pp. 2412, 2529, 2665.
—— v. Anderson, 3 Tex. Civ. App. 8, 21 S. W. 691—pp. 246, 621, 624, 1311, 1397, 3344, 3345, 3368.
—— v. Anderson, 15 Tex. Civ. App. 180, 53 S. W. 606—pp. 1916, 2047, 2066.
International, etc., R. Co. v. Anthony, pp. 1808, 1828, 1956, 2585.
—— v. Armstrong, pp. 2036, 2067.
—— v. Aten, pp. 863, 3354.
—— Beauchamp v.
—— v. Bergman, pp. 729, 738, 744, 747, 750.
—— v. Best, pp. 1610, 1635, 3322.
—— v. Bibolet, pp. 1813, 2583.
—— v. Blanton, etc., Co., p. 344.
—— v. Bohannon, pp. 2480, 2782.
—— v. Caldwell, p. 1078.
—— v. Campbell, pp. 460, 2496, 3342, 3375.
—— Carter v.
—— v. Causler, p. 2242.
—— v. Clark (Tex. Civ. App.), 71 S. W. 587—pp. 2592, 2729.
—— v. Clark, 36 Tex. Civ. App. 195, 81 S. W. 821—pp. 1683, 1769.
—— v. Cock (Tex.), 14 S. W. 242—pp. 1826, 2685.
—— v. Cock, 68 Tex. 713, 5 S. W. 635, 2 Am. St. Rep. 521—pp. 1554, 1679, 1753, 2522, 2565, 2936.
—— v. Cooper, p. 2526.
—— v. Copeland, pp. 1716, 1893, 2169.
—— Cruseturner v.
—— v. Cruseturner, pp. 1753, 1758, 1979, 2754, 2755, 2911.
—— v. Davis, pp. 1575, 1938, 1939.
—— v. Diamond Roller Mills, p. 402.
—— v. Dimmit County Pasture Co., pp. 217, 268, 286, 289, 291, 292, 293, 294, 295, 448, 851, 855, 863, 1332, 1350, 1354.
—— v. Doolan, pp. 1663, 1777, 1778.
—— Dorrance & Co. v.
—— v. Downing, pp. 1885, 1920, 1967, 2578, 2579, 2588, 2601, 2613, 2748.
—— v. Drought & Co., pp. 758, 857.
—— v. Duncan, p. 2028.
—— v. Earnest, pp. 1351, 3355, 3368.
—— v. Eckford, pp. 1766, 1767, 1923.
—— England v.
—— v. Evans, p. 2704.
—— v. Folliard, pp. 278, 1702, 1895, 2114, 2265, 3137, 3138.
—— v. Folts, pp. 1076, 1398, 3162, 3179, 3183, 3396, 3398.
—— v. Foster, p. 2727.
—— Galaviz v.
—— Garrett, pp. 950, 954, 1086, 1095, 1096, 1099, 1118, 1121, 1416.
—— v. Giesen, p. 2022.
—— v. Gilbert, pp. 1544, 2067, 2452, 2478, 3103.
—— v. Gilmer, pp. 1912, 2065.
—— v. Goldstein, pp. 1637, 1851, 2424, 2435.
International, etc., R. Co. v. Gorman, p. 2159.
—— Grahn v.
—— v. Griffith, p. 334, 335, 1018.
—— v. Halloren, pp. 729, 733, 736, 745, 746, 1680, 1683, 1684, 1712, 1731, 1738, 1807, 1808, 1809, 1810, 1812, 1821, 1822, 1841, 1845, 1982, 2034, 2037, 2970.
—— v. Hanna, p. 1554.
—— v. Harder, pp. 1669, 1673, 1674, 1676, 2662.
—— v. Hassell, pp. 1562, 2117, 2118, 2455, 2485, 2707.
—— v. Hatchell, pp. 686, 1316, 1317, 1327.
—— v. Haynes, p. 765.
—— v. Heitmeier, pp. 1092, 1105, 1106, 1115, 3353.
—— v. Henderson, p. 2017.
—— v. Hessler, p. 2608.
International, etc., R. Co., Higa v.
—— v. Hubbs, pp. 1823, 2880
—— v. Hugen, pp. 1732, 1737, 2035, 2066, 2639, 2649, 2660.
—— v. Hynes, pp. 617, 618, 619, 629, 734, 1307, 1309, 1314, 1330.
—— v. Ing, pp. 1613, 1616, 2465, 2642.
—— v. Irvine, pp. 1547, 1755, 1756.
—— v. Johnson, 1 Texas App. Civ. Cas., § 354—p. 1611.
—— v. Johnson, 43 Tex. Civ. App. 147, 95 S. W. 595—p. 1778.
—— v. Jones, pp. 1440, 1441.
—— v. Kentle, pp. 2017, 2042.
—— v. Kilgo, p. 2845.
—— v. Lane, p. 2037.
—— v. Leake, pp. 2482, 2483.
—— Lee v.
—— v. Lewis, pp. 621, 624, 855, 1271, 1285, 1311, 1326.
—— v. Lister, p. 1600.
—— McCarn v.
—— v. McCown, pp. 3115, 3116, 3125, 3132.
—— v. McCullough, pp. 1278, 1346.
—— v. McRea, pp. 1285, 3628.
—— v. Mahula, pp. 3377, 3381.
—— v. Miller, pp. 2020, 2414.
—— v. Moody, pp. 934, 959, 1028, 3378.
—— v. Mulliken, pp. 1518, 1712, 1870, 2065, 2066.
—— v. Neff, p. 2128.
—— v. Nicholson, pp. 853, 854, 857, 858, 864.
—— v. Nowaski, pp. 1330, 1342.
—— v. Ormond, 62 Tex. 274—p. 2937.
—— v. Ormond, 64 Tex. 485—pp. 1953, 2213.
—— v. Parish, pp. 849, 932, 1355, 1384, 1396.
—— v. Pevey, pp. 1768, 1778, 1779.
—— v. Philips, pp. 654, 3186, 3199.
—— v. Phillips, pp. 1825, 2792.
—— v. Pool, pp. 1272, 1347.
—— Prince v.
—— v. Prince, pp. 1553, 1826, 2522, 2685.
—— v. Railroad Comm., p. 107.
—— v. Rhoades, p. 2287.
—— v. Ritchie, pp. 635, 1314.
—— Rozwadosfskie v.
—— v. Sammon, p. 2626.
—— v. Sampson, pp. 1867, 2821.
—— v. Satterwhite, 38 S. W. 401, 15 Tex. Civ. App. 102—pp. 2249, 2511, 2514, 2545, 2546.
—— v. Satterwhite, 19 Tex. Civ. App. 170, 47 S. W. 41—pp. 2301, 2515.
—— v. Server, pp. 607, 608, 609, 629, 630, 637, 957.
—— v. Shands, p. 344.
—— v. Smith v.
—— v. Smith (Tex.), 1 S. W. 565—pp. 2452, 3103.
—— v. Smith (Tex.), 14 S. W. 642, 44 Am. & Eng. R. Cas 324—pp. 1769, 1870, 1922, 2065, 2126.
—— v. Smith, 40 Tex. Civ. App. 432, 90 S. W. 709—p. 2455.
—— v. Startz, 97 Tex. 167, 77 S. W. 1—pp. 3331, 3367.
—— v. Startz (Tex. Civ. App.), 33 S. W. 575—pp. 472, 1323, 1324, 1326.
—— Stewart v.
—— v. Tashy, pp. 1712, 1732, 1737.
—— v. Terry, p. 3048.
—— v. Thompson, pp. 1813, 1814, 2694.
—— v. Thornton, pp. 3326, 3331.
—— v. Tisdale, pp. 607, 608, 628, 629, 638, 1396, 2642, 2643, 3180, 3284, 3310, 3366, 3392, 3417.

International, etc., R. Co. v. True, pp. 443, 449, 971, 1274.
—— v. Underwood, 62 Tex. 21, 21 Am. & Eng. R. Cas. 143—pp. 1104, 1110, 1111.
—— v. Underwood, 64 Tex. 463, 27 Am. & Eng. R. Cas. 240—pp. 1685, 2953.
—— v. Underwood, 67 Tex. 589, 4 S. W. 216—pp. 2088, 2578, 2579.
—— United States v.
—— v. Vandeventer, pp. 932, 938, 940, 943, 948, 949, 954, 1063, 1077, 3377.
—— v. Washington, p. 2052.
—— v. Watt, pp. 426, 941, 987.
—— Weed v.
—— v. Welbourne, pp. 786, 3326, 3332.
—— v. Welch, 86 Tex. 203, 204, 24 S. W. 390, 58 Am. & Eng. R. Cas. 70, 40 Am. St. Rep. 829—pp. 1683, 1684, 1729, 1731, 1766, 1822, 2037.
—— v. Welsh (Tex. Civ. App.), 24 S. W. 854—pp. 2172, 2174.
—— v. Wentworth, 87 Tex. 311, 28 S. W. 277—pp. 423, 475, 632.
—— v. Wentworth, 8 Tex. Civ. App. 5, 14, 27 S. W. 680—pp. 475, 502, 505, 510, 511, 631, 633, 729, 734, 750, 1330, 1334.
—— v. Wilbourne, pp. 3661, 3663.
—— v. Wilkes, pp. 2429, 3105.
—— Williams v.
—— v. Williams, pp. 1710, 1951, 1953, 1956, 2028, 2182, 2601.
—— v. Young (Tex. Civ. App.), 28 S. W. 819—p. 449.
—— v. Young (Tex. Civ. App.), 72 S. W. 68—pp. 608, 609, 1304, 1318, 1339, 1359, 3368.
Interstate Car Transfer Co., St. Clair County v.
Interstate Commerce Comm. v. Alabama Mid. R. Co., 69 Fed. 227—p. 3667.
—— v. Alabama Mid. R. Co., 21 C. C. A. 51, 74 Fed. 715—pp. 3668, 3681.
—— v. Alabama Mid. R. Co., 168 U. S. 144, 42 L. Ed. 414, 18 S. Ct. 45—pp. 3631, 3633, 3637, 3664, 3667, 3668, 3669, 3676, 3683, 3684, 3687, 3688, 3690, 3711, 3712, 3713, 3714, 3715, 3716, 3721, 3722, 3723, 3725, 3748, 3749, 3773, 3783, 3785, 3786, 3798, 3800, 3803, 3806, 3825, 3831.
—— Atchison, etc., R. Co. v.
—— v. Atchison, etc., R. Co., 50 Fed. 295—pp. 3714, 3721, 3794.
—— v. Atchison, etc., R. Co., 149 U. S. 264, 37 L. Ed. 727, 13 S. Ct. 837—p. 3770.
—— v. Atchison, etc., R. Co., 234 U. S. 294, 34 S. Ct. 814—pp. 3635, 3676, 3690, 3728.
—— Atlantic, etc., R. Co. v.
—— v. Baird, pp. 3775, 3778, 3779, 3780, 3783.
—— Baltimore, etc., R. Co. v.
—— v. Baltimore, etc., R. Co., 43 Fed. 37—pp. 3605, 3631, 3725.
—— v. Baltimore, etc., R. Co., 8 R. & C. L. J. 343—p. 1179.
—— v. Baltimore, etc., R. Co., 145 U. S. 263, 36 L. Ed. 699, 12 S. Ct. 844—pp. 3448, 3600, 3601, 3602, 3609, 3631, 3632, 3633, 3636, 3637, 3664, 3667, 3683, 3686, 3687, 3688, 3696, 3697, 3708, 3711, 3717, 3725, 3726, 3770.
—— v. Baltimore, etc., R. Co., 225 U. S. 326, 56 L. Ed. 1107, 32 S. Ct. 742, Ann. Cas. 1914A, 504—pp. 3689, 3823, 3833, 3836, 3837.
—— v. Bellaire, etc., R. Co., p. 3425.
—— v. Brimson, pp. 3418, 3439, 3440, 3445, 3447, 3603, 3604, 3607, 3609, 3617, 3631, 3650, 3664, 3683, 3711, 3724, 3735, 3741, 3748, 3752, 3764, 3767, 3768, 3769, 3770, 3779, 3780, 3781, 3782, 3817, 3819, 3841.
Interstate Commerce Comm. v. Chesapeake, etc., R. Co., p. 3765.
—— Chicago, etc., R. Co. v.
—— v. Chicago, etc., R. Co., 94 Fed. 272—pp. 3796, 3799, 3835.
—— v. Chicago, etc., R. Co., 98 Fed. 173—p. 3727.
—— v. Chicago, etc., R. Co., 43 C. C. A. 209, 103 Fed. 249—p. 3667.
—— v. Chicago, etc., R. Co., 141 Fed. 1003—pp. 3601, 3605, 3632, 3637, 3665, 3676, 3678, 3679, 3682, 3813.
—— v. Chicago, etc., R. Co., 186 U. S. 320, 46 L. Ed. 1182, 22 S. Ct. 824—pp. 3667, 3675, 3727, 3728, 3741, 3742, 3798, 3803.
—— v. Chicago, etc., R. Co., 209 U. S. 108, 52 L. Ed. 705, 28 S. Ct. 493—pp. 3633, 3667, 3670, 3676, 3678, 3682, 3699, 3764.
—— v. Chicago, etc., R. Co., 215 U. S. 479, 54 L. Ed. 291, 30 S. Ct. 163—pp. 3447, 3450, 3641, 643, 3644.
—— v. Chicago, etc., R. Co., 218 U. S. 88, 54 L. Ed. 946, 30 S. Ct. 651—pp. 3670, 3671, 3674, 3676, 3677, 3682, 3684, 3775, 3797, 3799, 3802, 3804, 3805.
—— v. Chicago, etc., R. Co., 218 U. S. 113, 54 L. Ed. 959, 30 S. Ct. 660—pp. 3797, 3799.
—— Cincinnati, etc., R. Co. v.
—— v. Cincinnati, etc., R. Co., 56 Fed. 925, 54 Am & Eng. R. Cas. 365—pp. 1148, 3612, 3680, 3714, 3717, 3718, 3796.
—— v. Cincinnati, etc., R. Co., 64 Fed. 981—pp. 3792, 3801.
—— v. Cincinnati, etc., R. Co., 76 Fed. 183—p. 3667.
—— v. Cincinnati, etc., R. Co., 124 Fed. 624—p. 3638.
—— v. Cincinnati, etc., R. Co., 146 Fed. 559—pp. 3635, 3685.
—— v. Cincinnati, etc., R. Co., 167 U. S. 479, 42 L. Ed. 243, 17 S. Ct. 896—pp. 3631, 3664, 3668, 3669, 3675, 3676, 3684, 3709, 3711, 3724, 3729, 3735, 3737, 3747, 3748, 3749, 3764, 3767, 3768, 3769, 3770, 3777, 3784, 3785, 3817.
—— v. Clyde Steamship Co., pp. 3687, 3713, 3716, 3721, 3722, 3798, 3807.
—— Delaware, etc., R. Co. v.
—— v. Delaware, etc., R. Co., 64 Fed. 723—pp. 3708, 3801.
—— v. Delaware, etc., R. Co., 216 U. S. 531, 54 L. Ed. 605, 30 S. Ct. 415—pp. 3618, 3776.
—— v. Delaware, etc., R. Co., 220 U. S. 235, 55 L. Ed. 448, 31 S. Ct. 392—pp. 3685, 3689, 3690, 3797, 3805.
—— Denver, etc., R. Co. v.
—— Detroit, etc., R. Co. v.
—— v. Detroit, etc., R. Co., 57 Fed. 1005—pp. 3713, 3721, 3775.
—— v. Detroit, etc., R. Co., 167 U. S. 633, 42 L. Ed. 306, 17 S. Ct. 986—pp. 3430, 3610, 3637, 3711, 3720, 3735, 3741, 3743, 3744.
—— v. Diffenbaugh, pp. 3679, 3730, 3731, 3732, 3733, 3734.
—— Eagle White Lead Co. v.
—— East Tennessee, etc., R. Co. v.
—— v. East Tennessee, etc., R. Co., pp. 3668, 3680, 3712, 3716, 3721, 3798, 3815.
—— Goodrich Trans. Co. v.
—— v. Goodrich Trans. Co., pp. 3441, 3612, 3615, 3771, 3772.
Interstate Commerce Comm., Harriman v.
—— v. Harriman, p. 3784.
—— Hooker v.
—— v. Humboldt Steamship Co., pp. 3612, 3670, 3675, 3767, 3773, 3803, 3837.
—— Illinois Cent. R. Co. v.
—— v. Illinois Cent. R. Co., pp. 3447, 3450, 3639, 3640, 3641, 3643, 3644, 3670, 3671, 3676, 3684, 3797, 3802, 3803, 3804, 3805, 3833.
—— v. Lake Shore, etc., R. Co., 134 Fed. 942—p. 3796.
—— v. Lake Shore, etc., R. Co., 202 U. S. 613, 50 L. Ed. 1171, 26 S. Ct. 766—p. 3668.
—— v. Lehigh Valley R. Co., 49 Fed. 177—pp. 3787, 3801.
—— v. Lehigh Valley R. Co., 74 Fed. 784—p. 3681.
—— Louisville, etc., Railroad v.
—— Louisville, etc., R. Co. v.
—— v. Louisville, etc., R. Co., 73 Fed. 409—pp. 3691, 3692, 3763, 3789.
—— v. Louisville, etc., R. Co., 101 Fed. 146—p. 3808.
—— v. Louisville, etc., R. Co., 102 Fed. 709—pp. 3785, 3799, 3800.
—— v. Louisville, etc., R. Co., 118 Fed. 613—pp. 3669, 3670, 3678, 3681, 3707, 3708, 3730, 3784, 3786, 3790, 3792.
—— v. Louisville, etc., R. Co., 190 U. S. 273, 47 L. Ed. 1047, 23 S. Ct. 687—pp. 3637, 3687, 3711, 3714, 3715, 3720, 3722, 3805, 3806, 3832.
—— Missouri, etc., R. Co. v.
—— v. Nashville, etc., R. Co., pp. 3634, 3666, 3682.
—— v. New York, etc., R. Co. v.
—— v. Northeastern R. Co., p. 3668.
—— v. Northern Pac. R. Co., pp. 3660, 3670, 3671, 3678, 3803, 3805.
—— Omaha, etc., R. Co. v.
—— Omaha, etc., St. R. Co. v.
—— Philadelphia, etc., R. Co. v.
—— v. Philadelphia, etc., R. Co., pp. 3778, 3782.
—— v. Reichmann, pp. 3442, 3700.
—— Southern Pac. Co. v.
—— v. Southern Pac. Co., 74 Fed. 42—p. 3790.
—— v. Southern Pac. Co., 123 Fed. 597—pp. 3800, 3788, 3790.
—— v. Southern Pac. Co., 132 Fed. 829—pp. 3725, 3763, 3796.
—— v. Southern Pac. Co., 137 Fed. 606—p. 3808.
—— v. Southern Pac. Co., 234 U. S. 315, 34 S. Ct. 820—pp. 3635, 3676, 3690, 3728.
—— Southern Pac. R. Co. v.
—— Southern Pac. Terminal Co. v.
—— v. Southern R. Co., 105 Fed. 703—pp. 3679, 3807.
—— v. Southern R. Co., 117 Fed. 741—pp. 3677, 3681, 3691, 3713, 3715, 3767.
—— Stickney v.
—— v. Stickney, p. 3727.
—— Texas, etc., R. Co. v.
—— v. Texas, etc., R. Co., 52 Fed. 187—pp. 3691, 3692, 3699, 3790.
—— v. Texas, etc., R. Co., 57 Fed. 948, 6 C. C. A. 653—pp. 3699, 3790, 3799.
—— v. Union Pac. R. Co., pp. 3670, 3673, 3675, 3682, 3778, 3797, 3799, 3802, 3803, 3805, 3833.
—— United States v.
—— v. Western New York etc., R. Co., pp. 3775, 3795

Interstate Commerce Comm. v. Western, etc., R. Co., 88 Fed. 186—pp. 3692, 3711, 3712, 3713, 3716, 3729.
—— v. Western, etc., R. Co., 35 C. C. A. 217, 93 Fed. 83—pp. 3666, 3714, 3716.
Interstate R. Co., Louisville, etc., R. Co. v.
Interstate Rapid Transit Co., Carroll v.
Interstate Rapid Trans. R. Co., Evans v.
Interstate Stock Yards Co. v. Indianapolis, etc., R. Co., pp. 3430, 3605, 3639, 3825, 3826.
Interstate, etc., R. Co., Evans v.
Interstate, etc., Transfer Co., St. Clair v.
Interurban R. Co., Heinze v.
—— McGovern v.
Interurban R., etc., Co. v. Hancock, pp. 1719, 1744, 2113, 2117, 2201, 2202.
Interurban St. R. Co., Baker v.
—— Chiert v.
—— Cusick v.
—— Edelman v.
—— Fine v.
—— Glassberg v.
—— Griffin v.
—— Hoelljes v.
—— Johnson v.
—— Klein v.
—— Laverty v.
—— Meyerowitz v.
—— Moon v.
—— Moritz v.
—— Mullarkey v.
—— Munzer v.
—— Murphy v.
—— Stappers v.
—— Swigelsky v.
—— Wainwright v.
—— Walsh v.
—— Winter v.
Interurban, etc., R. Co., Goldberg v.
—— Lynch v.
Intoxicating Liquors, State v.
Ionia Transp. Co., Lehigh Valley Coal Co. v.
—— v. Two Thousand Ninety-Eight Tons of Coal, pp. 3953, 3961, 3968.
Ionic, The.
Ionnone v. New York, etc., R. Co., pp. 1581, 1582.
Ions, Gulf, etc., R. Co. v.
Iowa, American Exp. Co. v.
—— Bartemeyer v.
—— Chicago, etc., R. Co. v.
—— v. Chicago, etc., R. Co., p. 3659.
—— Monroe v.
—— Rhodes v.
Iowa Cent. R. Co., Davis v.
—— McElroy v.
—— Mosteller v.
—— Newlin v.
—— Willard v.
Ireland v. Mobile, etc., R. Co., pp. 3253, 3331.
Irelson v. Southern Pac. R. Co., pp. 1843, 1846.
Irish v. Chapman, p. 237.
—— v. Milwaukee, etc., R. Co., pp. 827, 885, 3302.
—— v. Northern Pac. R. Co., p. 2126.
Irish North-Western R. Co., Bradshaw v.
Iron Co., New Buffalo v.
Iron Mountain R. Co. v. Memphis, p. 3496.
Iron R. Co. v. Lawrence Furnace Co., p. 143.
—— v. Mowery, pp. 2113, 2128, 2674, 2685, 2697, 2844.
Irons, Richmond v.
Iroquois, The.
Iroquois Furnace Co., Elphicke v.
Iroquois Transp. Co., Delaney, etc., Iron Co. v.
Irrawaddy, The.
Irvin, Jeffersonville, etc., R. Co. v.
—— Missouri Pac. R. Co. v.
—— v. Missouri Pac. R. Co., pp. 1785, 1786.
—— v. Nashville, etc., R. Co., p. 3249.
Irvine v. Delaware, etc., R. Co., pp. 1719, 2667, 2674, 2923, 2924.
—— v. Grady, p. 420.
—— Gulf, etc., R. Co. v.
—— International, etc., R. Co. v.
—— Norfolk, etc., R. Co. v.
Irving v. Pullman Co., p. 3233.
Irving Nat. Bank, Emery's Sons v.
Irwin v. Louisville, etc., R. Co., pp. 1683, 1698, 1821, 1822, 1841, 2020, 2027, 2029.
—— v. New York Cent. R. Co., pp. 3311, 3354.
Irzo v. Perkins, pp. 532, 712.
Isaacs, Blanchard v.
—— Ft. Worth Transfer Co. v.
—— Mt. Adams, etc., R. Co. v.
—— v. Third Ave. R. Co., pp. 2040, 2045.
Isaacson v. New York, etc., R. Co., pp. 3139, 3175.
Isbell v. Pittsfield Elect. St. R. Co., pp. 2113, 2953.
Iseman v. South Carolina, etc., R. Co., pp. 1542, 2853.
Isenhower, Texas, etc., R. Co. v.
Isham v. Erie R. Co., pp. 1114, 3280, 3355.
—— v. Greenham, pp. 521, 1142, 1143, 1144, 1154, 1159, 1160, 1171.
Island City Boating, etc., Ass'n, New York, etc., Steamship Co. v.
Island City Mercantile, etc., Co., Williams v.
Isola Di Procida, The.
Ison, Dallas Consol. Elect. St. R. Co. v.
Israel v. Clark, p. 1845.
Italia, The.
Ithaca St. R. Co., Goodspeed v.
Ives, Grand Trunk R. Co. v.
—— v. Polak, pp. 1222, 1223, 1227.
—— v. Smith, p. 3724.
Ivey, Galveston, etc., R. Co. v.
Ivy, Missouri Pac. R. Co. v.
Izlar v. Manchester, etc., R. Co., p. 2507.
I. & G. N. R. Co., Beauchamp v.
—— v. Blanton, etc., Co., p. 817.
—— v. Ormond, p. 2370.
—— v. Pichard, p. 1194.
—— v. Server, p. 1020.
I., etc., R. Co. v. Juntzen, p. 629.

J

Jaber, Chicago, etc., R. Co. v.
Jackson, —— v.
—— Adams Exp. Co. v.
—— v. Alabama, etc., R. Co., p. 2855.
—— Atkeson v.
—— Cincinnati, etc., R. Co. v.
—— v. Crilly, p. 2188.
—— Express Co. v.
—— Fordyce v.
—— Gainesville Mid. Railway v.
—— Galveston, etc., R. Co. v.
—— v. Georgia R., etc., Co., pp. 2369, 2370.
—— v. Grand Ave. R. Co., pp. 1487, 1727, 1736, 1750, 1890, 1891, 1905, 2241, 2932, 2933, 2991.
—— Gulf, etc., R. Co. v.
—— Hartford, etc., R. Co. v.
—— Houston, etc., R. Co. v.
—— Illinois Cent. R. Co. v.
—— Louisville, etc., R. Co. v.
—— Metropolitan Railway v.
—— Mexican Nat. R. Co. v.
—— Mobile, etc., R. Co. v.
Jackson Mott v.
—— Nashville, etc., R. Co. v.
—— v. Natchez, etc., R. Co., p. 2183.
—— v. Nichol (Eng.), 5 Bing. N. Cas. 508—p. 1162.
—— v. Nichol (Eng.), 5 Bing. N. C. 510, 35 E. C. L. 202—pp. 1228, 1232, 1234, 1239, 1240, 1248.
—— v. Norfolk, etc., R. Co., p. 1582.
—— v. Old Colony St. R. Co., pp. 2026, 2045, 2049, 2054, 2293, 2629, 3073.
—— v. Pennsylvania R. Co., p. 139.
—— v. Philadelphia Tract. Co., p. 2170.
—— v. Rogers, p. 211.
—— v. Sacramento Val. R. Co., pp. 727, 732, 748, 773, 820, 825, 896, 900, 910, 917.
—— v. St. Louis, etc., R. Co., 28 So. 241, 52 La. Ann. 1706—p. 2533.
—— v. St. Louis, etc., R. Co., 87 Mo. 422, 56 Am. Rep. 460, 25 Am. & Eng. R. Cas. 327—pp. 2038, 2072.
—— v. St. Louis, etc., R. Co., 29 Mo. App. 495—p. 2249.
—— v. St. Paul City R. Co., pp. 1556, 1962.
—— San Antonio, etc., R. Co. v.
—— v. Second Ave. R. Co., pp. 2483, 2665.
—— v. State, pp. 177, 182.
—— Stimson v.
—— Terre Haute, etc., R. Co. v.
—— Texas, etc., R. Co. v.
—— v. The Magnolia, p. 4054.
—— Walker v.
—— Western Union Tel. Co. v.
Jackson & Co., Gray v.
—— St. Louis, etc., R. Co. v.
Jackson & Son v. New York Cent., etc., R. Co., pp. 564, 899.
Jackson Architectural Iron Works v. Hurlbut, pp. 8, 9, 726, 728, 871.
Jackson County Horse R. Co., Gilson v.
Jackson Elect. R., etc., Co., Bridges v.
—— v. Lowry, pp. 201, 1850, 1866, 1874, 1875, 2056, 3055.
Jackson Vinegar Co., Yazoo, etc., R. Co. v.
Jackson, etc., Tract. Co., Leslie v.
Jacksonville Elect. Co. v. Batchis, p. 2597.
—— v. Cubbage, pp. 2657, 2955.
Jacksonville Southeastern Line, Davis v.
Jacksonville St. R. Co. v. Chappell, pp. 2113, 2118, 2667, 2817, 2936.
Jacksonville Terminal Co., State v.
Jacksonville, etc., R. Co. v. Neff, p. 2921.
—— v. Southworth, pp. 2734, 2761, 2949.
—— State v.
Jacob v. Flint, etc., R. Co., p. 2263.
—— Nanson v.
Jacobs v. Bentley, pp. 1228, 1232.
—— v. Central R. Co., 208 Pa. 535, 57 Atl. 982, 11 R. R. R. 562, 34 Am. & Eng. R. Cas., N. S., 562—pp. 3162, 3164.
—— v. Central R. Co., 19 Pa. Super. Ct. 13—p. 3120.
—— v. Hooker, p. 3285.
—— Indiana Union Tract. Co. v.
—— St. Louis, etc., R. Co. v.
—— Southern Exp. Co. v.
—— v. Third Ave. R. Co., pp. 2061, 2070, 2409, 2458, 2459, 2460, 2496.
—— v. Tutt, pp. 3121, 3148, 3149, 3170, 3171.
—— v. West End St. R. Co., pp. 1980, 2722.

Jacobs' Pharmacy Co., Atlanta, etc., R. Co. v.
—— Atlantic, etc., R. Co. v.
Jacobson v. St. Louis Trans. Co., p. 2657.
—— Wisconsin, etc., Railroad v.
—— v. Wisconsin, etc., R. Co., p. 3535.
Jacobson & Co. v. Adams Exp. Co., pp. 431, 721, 763, 949, 1033, 1039, 1061, 1076.
—— v. St. Paul, etc., R. Co., pp. 945, 1564, 1570, 1760, 1953, 2095, 2114.
—— United States Metals Refin. Co. v.
Jacoby, Kentucky Cent. R. Co. v.
—— v. Laussatt, p. 480.
Jagger v. People's St. R. Co., p. 2358.
Jaggerman, Wabash, etc., R. Co. v.
Jahn, Missouri, etc., R. Co. v.
Jakobsen v. Springer, pp. 4006, 4043.
James v. American Exp. Co., p. 691.
—— Birmingham R., etc., Co. v.
—— v. Boston Elev. R. Co., 87 N. E. 474, 201 Mass. 263—p. 2809.
—— v. Boston Elev. R. Co., 90 N. E. 513, 204 Mass. 158—p. 3008.
—— Central, etc., R. Co. v.
—— Chicago, etc., R. Co. v.
—— Ft. Worth, etc., R. Co. v.
—— v. Griffin, pp. 1228, 1234.
—— Illinois Cent. R. Co. v.
—— Indiana, etc., R. Co. v.
—— v. James, p. 1028.
—— Jordan, etc., Co. v.
—— Lake Erie, etc., R. Co. v.
—— v. Metropolitan St. R. Co., p. 2785.
—— v. Missouri Pac. R. Co., pp. 1781, 2549, 2550.
—— v. Oakland Tract. Co., p. 1988.
—— St. Louis, etc., R. Co. v.
—— v. Standard Oil Co., 189 Fed. 719—p. 3893.
—— v. Standard Oil Co., 191 Fed. 827—p. 3944.
—— Texas Pac. R. Co. v.
—— Texas, etc., R. Co. v.
—— Western Union Tel Co. v.
James Baird, The.
James Martin, The.
James Music Co. v. Bridge, p. 1229.
James Robb, Elliott v.
Jameson v. Boston Elev. R. Co., p. 2893.
—— Hadfield v.
—— v. Sweeney, 61 N. Y. S. 464, 29 Misc. Rep. 584—p. 3953.
—— v. Sweeney, 66 N. Y. S. 494, 32 Misc. Rep. 645—p. 3974.
Jamestown St. R. Co., Chase v.
—— Fuller v.
Jamestown, etc., Ferry Co., Holley v.
Jamesville, etc., R. Co., Hansley v.
Jamieson, St. Louis, etc., R. Co. v.
Jamison v. San Jose, etc., R. Co., pp. 1735, 1810, 1970, 2270.
Jane Grey, The.
Jannett, Miller v.
Janney v. Tudor Co., pp. 765, 3892.
Jannin v. State, p. 184.
Janny v. Great Northern R. Co., pp. 1548, 1552.
Jansen v. Minneapolis, etc., R. Co., p. 2016.
Janson, Arkansas Cent. R. Co. v.
Japhet & Co., Houston, etc., R. Co. v.
Jaques v. Sioux City Tract. Co., pp. 2148, 2876.
Jacqueth, Gage v.
Jaquette v. Capital Tract. Co., p. 2586.
Jarboe, Mobile, etc., R. Co. v.
Jardine v. Cornell, pp. 2414, 2415, 2483.
Jarmy v. Duluth St. R. Co., p. 1911.
Jarowski v. Hamburg-American Packet Co., p. 4003.
Jarrard, Missouri Pac. R. Co. v.
Jarrell v. Charleston, etc., R. Co., pp. 2611, 2612, 2616.
—— Missouri, etc., R. Co. v.
Jarrett v. Atlanta, etc., R. Co., p. 2252.
—— v. Great Northern R. Co., pp. 488, 579, 804.
—— Main v.
Jarvis Co., Braker v.
Jarvis, etc., Cold Storage Co., Lembeck v.
Jason, The.
Jasper Trust Co. v. Kansas City, etc., R. Co., pp. 308, 316, 356, 358, 359, 366, 367, 369, 371, 374.
Jay Wai Nam v. Anglo-American Oil Co., p. 4067.
Jean, Baltimore, etc., R. Co. v.
Jean Webre v. Kendall, etc., Co., pp. 825, 826.
Jean, etc., Co. v. Flagg, pp. 816, 829.
Jefferson v. Birmingham R., etc., Co., pp. 2518, 2542.
—— Richmond, etc., R. Co. v.
—— The.
Jefferson Ave. R. Co., Sullivan v.
Jefferson Bank, Smith v.
Jeffersonville R. Co. v. Cleveland, pp. 896, 898, 899, 907.
—— v. Cotton, p. 515.
—— v. Hendricks, pp. 1720, 1911, 2117, 2118, 2263, 2615.
—— v. Rogers, 28 Ind. 1, 92 Am. Dec. 276—pp. 1594, 1596, 1599, 2468, 2476, 2565, 3078.
—— v. Rogers, 38 Ind. 116, 10 Am. Rep. 103—pp. 2468, 2471, 2565, 3092.
—— v. Swift, pp. 2256, 2263.
—— v. White, p. 513.
Jeffersonville, etc., R. Co. v. Ensley, pp. 1450, 1452.
—— v. Gent, p. 583.
—— v. Hendricks, p. 2618.
—— v. Irvin, pp. 556, 584.
—— McEwen v.
—— v. Parmalee, p. 1537.
—— v. Riley, p. 1787.
—— v. Worland, pp. 1450, 1452.
Jeffray, Lindsay v.
Jeffries, Blair v.
—— v. Chicago, etc., R. Co., pp. 607, 614, 1288, 1310, 1363, 1481.
Jeffris v. Fitchburg R. Co., pp. 1213, 1229, 1231, 1232, 1234.
Jellett v. St. Paul, etc., R. Co., pp. 552, 570, 595, 596, 599, 848.
Jellison, Wabash R. Co. v.
Jemison v. Birmingham, etc., R. Co., pp. 296, 316.
Jencks v. Coleman, pp. 191, 210, 1488, 1492, 1499, 1500, 2122.
Jenkins v. Atlantic Coast Line R Co., 66 S. E. 416, 84 S. C. 360—p. 3396.
—— v. Atlantic Coast Line R Co., 66 S. E. 415, 84 S. C. 351—p. 3396.
—— v. Atlantic, etc., R. Co., 65 S. E. 636, 83 S. C. 473—p. 795.
—— v. Atlantic, etc., R. Co., 84 S. C. 343, 66 S. E. 409—p. 165.
—— v. Atlantic, etc., R. Co., 84 S. C. 520, 66 S. E. 407—pp. 761, 762, 810, 854, 872, 875.
—— v. Brooklyn Heights R. Co., 29 App. Div. 8, 51 N. Y. S. 216, 5 N. Y. Ann. Cas. 315—pp. 193, 2775.
—— v. Brooklyn Heights R. Co., 51 N. Y. S. 868, 30 App. Div. 622—p. 1649.
—— v. Chesapeake, etc., R. Co., pp. 2560, 2651, 3011, 3012.
Jenkins, Chicago, etc., R. Co. v.
—— v. Chicago, etc., R. Co., pp. 753, 1505.
—— Frothingham v.
—— Louisville, etc., R. Co. v.
—— v. Louisville, etc., R. Co., pp. 1837, 3237.
—— Missouri, etc., R. Co. v.
—— v. Motlow, pp. 726, 3155.
—— Nobel's Explosives Co. v.
—— v. Northern Pac. R. Co., p. 2789.
—— v. Pickett, p. 280.
—— v. Southern R. Co., pp. 153, 154, 172, 176.
Jenks v. Fulmer, p. 1242.
Jenkyns v. Brown, p. 352.
—— v. Usborne, p. 1217.
Jenneson v. Camden, etc., Transp. Co., p. 813.
Jennings, American Exp. Co. v.
—— v. Big Sandy, etc., R. Co., pp. 3488, 3491.
—— Chicago, etc., R. Co. v.
—— v. Clyde Steamship Co., p. 3893.
—— v. Grand Trunk R. Co., 127 N. Y. 438, 28 N. E. 394, 40 N. Y. St. Rep. 318, 49 Am. & Eng. R. Cas. 98—pp. 967, 1013, 1029, 1101, 1087, 1090, 3258.
—— v. Grand Trunk R. Co., 52 Hun 227, 5 N. Y. S. 140, 23 N. Y. St. Rep. 15—pp. 421, 433, 974, 994, 995, 1000, 3372.
—— v. Grand Trunk R. Co., 15 Ont. App. 477—p. 1577.
—— v. Great Northern R. Co., pp. 204, 205.
—— Illinois Cent. R. Co. v.
—— Oakland Cotton Mfg. Co. v.
—— v. Smith, pp. 978, 986, 1396, 1402.
—— v. Union Tract. Co., p. 2237.
Jensen v. Barbour, pp. 1960, 2073, 2076.
—— Florence, etc., R. Co. v.
—— Harmon v.
Jereissati, Castelli v.
Jeremiah Smith & Sons, In re.
Jerolman v. Chicago, etc., R. Co., p. 2378.
Jerome v. Smith, pp. 2430, 2649.
—— v. United R. Co., p. 1892.
Jersey City, etc., R. Co., Barlow v.
—— v. Morgan, pp. 1604, 2428.
—— Nirk v.
Jersey City, etc., St. R. Co., Eagen v.
Jersey, etc., R. Co., Barlow v.
Jersey, etc., St. R. Co., Quagliana v.
Jessee, Galveston, etc., R. Co. v.
Jesse French Piano, etc., Co., Sanger v.
Jessel v. Bath, pp. 308, 365.
Jesson v. Soly, p. 355.
Jester, Tippecanoe Loan, etc., Co. v.
Jesup, Neilson v.
Jett, Georgia R., etc., Co. v.
Jevons v. Union Pac. R. Co., pp. 1618, 2450.
Jewell v. Grand Trunk Railway, pp. 564, 896.
—— v. New York, etc., R. Co., p. 2879.
Jewett, Klein v.
—— v. Klein, pp. 2137, 2138.
—— Loomis v.
—— McKinney v.
—— v. Olsen, pp. 573, 577.
—— Slater v.
—— Terry v.
Jillson, People v.
Jirachek v. Milwaukee Elect. R., etc., Co., pp. 1891, 2936, 3033.
Joerg v. Atchison, etc., R. Co., p. 765.
Joestinz Merchants' Despatch Transp. Co. v.
Johannes v. Phoenix Ins. Co., p. 2560.

Johanson v. Sondheim, 2 Alaska 556—p. 3877.
—— v. Sondheim, 145 Fed. 620, 76 C. C. A. 310—p. 3892.
John, Gulf, etc., R. Co. v.
—— v. Northern Pac. R. Co., pp. 87, 88, 95, 1740, 1762, 2096, 2560, 2673, 2703.
John Anda Co., Pennsylvania R. Co. v.
John H. Pearson, The.
John H. Starin, The.
John L. Stephens, Morrison v.
Johns, Atchison, etc., R. Co. v.
—— v. Charlotte, etc., R. Co., p. 1774.
Johnsen v. Oakland, etc., R. Co., pp. 1986, 2912.
Johnson v. Alabama, etc., R. Co., pp. 1036, 1363, 1364, 1388, 1482, 1483.
—— Atchison, etc., R. Co. v.
—— Atlantic Nav. Co. v.
—— Atlantic, etc., R. Co. v.
—— v. Atlantic, etc., R. Co., p. 2315.
—— Beck v.
—— v. Birmingham R., etc., Co., p. 2589.
—— v. Boston, etc., R. Co., p. 2506.
—— v. Brooklyn Heights R. Co., p. 1695.
—— v. B. & O. R. Co., p. 2116.
—— v. Cedar Rapids, etc., R. Co., p. 1789.
—— v. Chicago, etc., R. Co., 51 Iowa 25, 50 N. W. 543—p. 2528.
—— v. Chicago, etc., R. Co., 58 Iowa 348, 12 N. W. 329—p. 2488.
—— v. Coey, pp. 1708, 2015.
—— v. Concord R. Corp., pp. 191, 193, 1612, 1622, 1858, 1974, 1975.
—— Denison, etc., R. Co. v.
—— Denver, etc., R. Co. v.
—— v. Detroit, etc., Railway, p. 3023.
—— East Tennessee, etc., R. Co. v.
—— v. East Tennessee, etc., R. Co., pp. 209, 607, 608, 609, 1492, 3281.
—— Erie Dispatch v.
—— v. Eveleth, pp. 1229, 1230, 1231, 1232.
—— Fordyce v.
—— v. Friar, pp. 11, 768, 869, 931, 946, 949, 1020.
—— Galveston, etc., R. Co. v.
—— v. Galveston, etc., R. Co., pp. 2583, 2637.
—— Georgia R. Co. v.
—— v. Georgia R., etc., Co., pp. 1593, 1594, 1597, 1599, 1601.
—— Georgia, etc., R. Co. v.
—— v. Grand Trunk R. Co., p. 576.
—— v. Great Northern R. Co., p. 3455.
—— Gulf, etc., R. Co. v.
—— v. Gulf, etc., R. Co., 82 Miss. 452, 34 So. 357—p. 483.
—— v. Gulf, etc., R. Co., 2 Tex. Civ. App. 139, 21 S. W. 274—p. 1822.
—— Hartshorne v.
—— Himelright v.
—— Houston, etc., R. Co. v.
—— v. Hudson R. Co., p. 70.
—— Illinois Cent. R. Co. v.
—— International, etc., R. Co. v.
—— v. Interurban St. R. Co., p. 2690.
—— Lexington R. Co. v.
—— v. Loper, p. 3586.
—— Louisville, etc., R. Co. v.
—— v. Louisville, etc., R. Co., p. 2488.
—— v. McClung, p. 2560.
—— Macon, etc., R. Co. v.
—— v. Mathews, p. 638.
Johnson v. Michigan United R. Co., pp. 1662, 2661, 2705.
—— v. Midland R. Co. (Eng.), 4 Exch. 327—p. 221.
—— v. Midland R. Co. (Eng.), 6 Railw. Cas. 61, 1 Ry. & C. Y. Cas. 16—pp. 211, 231, 236, 237, 246.
—— Miles v.
—— Missouri Pac. R. Co. v.
—— v. Missouri, etc., R. Co., p. 3352.
—— Moss v.
—— Nashville, etc., R. Co. v.
—— v. New York Cent. R. Co., pp. 508, 3267, 3268, 3298, 3361.
—— v. New York, etc., Railroad, pp. 3631, 3648.
—— v. New York, etc., R. Co., p. 2425.
—— Patten v.
—— v. Pensacola, etc., R. Co., pp. 1, 4, 220, 221, 1135, 1175, 1176, 1178, 1179, 1180, 1181, 1184, 1187, 1191.
—— v. Philadelphia, etc., R. Co., pp. 1529, 2451.
—— v. Richmond, etc., R. Co., p. 949.
—— Roberts v.
—— v. St. Joseph R., etc., Co., pp. 1735, 1890, 1963, 2151, 2267.
—— St. Louis, etc., R. Co. v.
—— v. St. Louis, etc., R. Co., pp. 2644, 2807.
—— v. Seaboard, etc., Railway, p. 148.
—— v. Southern Pac. Co., pp. 3431, 3450, 3461, 3464.
—— Southern Pac. R. Co. v.
—— Southern R. Co. v.
—— v. Southern R. Co., pp. 2509, 2512, 2513, 2639.
—— Steamboat John Owen v.
—— v. Stoddard, pp. 303, 3878.
—— v. Stone, pp. 3115, 3124, 3125, 3142, 3186, 3189, 3190.
—— v. Strader, pp. 581, 582.
—— v. Texas Cent. R. Co., pp. 1518, 7766, 1966, 2872.
—— Texas Mid. R. Co. v.
—— Texas Trunk R. Co. v.
—— Texas, etc., R. Co. v.
—— v. Three-Hundred and Eighteen and One-Half Tons of Coal, pp. 187, 188, 210, 213, 214.
—— v. Toledo, etc., R. Co., pp. 320, 3297, 3415.
—— Union Pac. R. Co. v.
—— v. Union Pac. R. Co., 29 R. I. 80, 69 Atl 298—p. 3544.
—— v. Union Pac. R. Co., 100 Pac. 390, 35 Utah 285—p. 2761.
—— v. Washington Water Power Co., pp. 1536, 2867, 2960, 3033.
—— v. West Chester, etc., R. Co., p. 3180.
—— West Chicago St. R. Co. v.
—— v. West Jersey, etc., R. Co., pp. 1041, 1042.
—— v. Winona, etc., R. Co., pp. 1722, 2229, 2831.
—— v. Yazoo, etc., R. Co., p. 2189.
—— v. Yonkers R. Co., p. 2225.
Johnson & Co. v. Central Vermont R. Co., pp. 366, 689, 691, 902, 3391.
Johnson-Brinkman Comm. Co. v. Wabash R. Co., pp. 656, 657.
Johnson Coal Min. Co. v. Hocking Valley R. Co., pp. 220, 254, 255, 257.
Johnson R. Co., Abbott v.
Johnson, etc., Co., Georgia Southern R. Co. v.
—— Georgia, etc., R. Co. v.
Johnston v. Cedar Rapids, etc., R. Co., pp. 1866, 2923.
—— Central etc., R. Co. v.
—— Chicago, etc., R. Co. v.
—— v. Chicago, etc., R. Co., pp. 1250, 1301, 1306.
—— v. Davis, p. 581.
Johnston, East Tennessee, etc., R. Co. v.
—— Heidenheimer v.
—— Louisville, etc., R. Co. v.
—— v. New York City R. Co., p. 1888.
—— v. St. Louis, etc., R. Co., pp. 1835, 1836.
—— Union Pac. R. Co. v.
Johnstone v. Furness, etc., Co., p. 3927.
—— v. Richmond, etc., R. Co., pp. 321, 323, 822, 984, 987, 1036, 1039, 1074, 1389.
—— v. Seattle, etc., R. Co., p. 2766.
Johnstown Pass. R. Co., Burns v.
Johnstown, etc., R. Co., Durfee v.
Joiner, Wrightsville, etc., R. Co. v.
Joint Traffic Ass'n, United States v.
Joliet St. R. Co. v. Call, pp. 2725, 2760.
Joliet, etc., R. Co., Pell v.
Joliffe, Steamship Co. v.
Joline, Berkelhamer v.
—— Brumberger v.
—— Garber v.
—— Gyle v.
—— Kaliniak v.
—— Knaisch v.
—— Reiss v.
—— Stevenson v.
Jolley v. Chicago, etc., R. Co., p. 148.
Jolliffe v. Northern Pac. R. Co., pp. 949, 1388, 1389, 1473, 1480.
Jolly, Citizens' St. R. Co. v.
—— Illinois Cent. R. Co. v.
—— v. Young, p. 3865.
Jonas v. Long Island R. Co., p. 2690.
Jonasen v. Keyser, p. 3954.
Jonasson v. Weir, p. 1067.
Jones, Adams Exp. Co. v.
—— Alabama, etc., R. Co. v.
—— Arnold v.
—— v. Atlantic, etc., R. Co., pp. 1452, 1453, 1470.
—— v. Baltimore, etc., R. Co., 4 App. D. C. 158—p. 2366.
—— v. Baltimore, etc., R. Co., 10 Mackey (21 D. C.) 346—pp. 2125, 2255, 2731.
—— Bank v.
—— v. Boston, etc., R. Co., 163 Mass. 245, 39 N. E. 1019—pp. 1505, 1506, 1519, 1520, 1521, 2155.
—— v. Boston, etc., R. Co., 205 Mass. 108, 90 N. E. 1152—pp 2092, 2093, 2299, 2718.
—— Campbell v.
—— v. Canal, etc., R. Co., p. 2251.
—— Central, etc., R. Co. v.
—— v. Chicago City R. Co., pp. 1994, 1995.
—— Chicago, etc., R. Co. v.
—— v. Chicago, etc., R. Co., 42 Minn. 183, 43 N. W. 1114—p. 1878.
—— v. Chicago, etc., R. Co., 43 Minn. 279, 45 N. W. 444—pp. 202, 2211.
—— v. Christian, pp. 1207, 1210.
—— v. Cincinnati, etc., R. Co., pp. 320, 323, 324, 983, 984, 985, 3349, 3377.
—— Cleveland, etc. R. Co. v.
—— Commonwealth v.
—— v. Co-Operative Ass'n, pp. 2034, 2767, 2869.
—— v. Earl, pp. 1247, 1249
—— v. Eastern, etc., R. Co., p. 1181.
—— v. East Tennessee, etc., R. Co., p. 2548.
—— Fillo v.
—— Ft. Worth, etc., R. Co. v.

Jones v. Ft. Worth, etc., R. Co., p. 2666.
—— v. George, p. 638.
—— v. Georgia, etc., R. Co., p. 2254.
—— Gulf, etc., R. Co. v.
—— v. Hough, p. 3881.
—— Illinois Cent. R. Co. v.
—— International, etc., R. Co. v.
—— v. Jones, pp. 1231, 1232, 1239.
—— Lengsfield v.
—— Littlejohn v.
—— Louisville, etc., R. Co. v.
—— v. Louisville, etc., R. Co., p. 147.
—— v. Memphis, etc., Packet Co., pp. 3932, 1482, 1483.
—— Metropolitan R. Co. v.
—— v. Minneapolis, etc., R. Co., pp. 733, 742, 821, 825, 1331, 1337.
—— v. Missouri, etc., R. Co., p. 2028.
—— Nashville, etc., R. Co. v.
—— v. New England, etc., Steamship Co., p. 878.
—— v. New York Cent., etc., R. Co., 156 N. Y. 187, 50 N. E. 856, 41 L. R. A. 490—pp. 1521, 1883, 1998, 2814.
—— v. New York Cent., etc., R. Co., 61 N. Y. S. 721, 46 App. Div. 470—p. 2144.
—— v. New York, etc., R. Co., p. 653.
—— v. Norwich, etc., Transp. Co., pp. 3159, 3168, 3170, 3171.
—— Pacific Exp. Co. v.
—— Pennsylvania R. Co. v.
—— v. Pennsylvania R. Co., pp. 2089, 3322.
—— v. Pitcher & Co., pp. 726, 732, 734, 736, 748, 768, 804.
—— v. Priester, pp. 3114, 3115, 3126, 3130, 3131, 3132.
—— Railroad Co. v.
—— St. Louis, etc., R. Co. v.
—— v. St. Louis, etc., R. Co., 125 Mo. 666, 28 S. W. 883, 26 L. R. A. 718, 46 Am. St. Rep. 514—pp. 1580, 2092.
—— v. St. Louis, etc., R. Co., 89 Mo. App. 653—p. 3340.
—— v. Sims (Ala.), 6 Port 138—pp. 477, 479.
—— v. Sims, 9 Port. 236, 33 Am. Dec. 313—p. 3916.
—— Southern R. Co. v.
—— v. Springfield Tract. Co., pp. 1890, 1902.
—— Texas, etc., R. Co. v.
—— v. Texas, etc., R. Co., p. 1884.
—— v. United R., etc., Co., pp. 2160, 2289, 2293, 2333, 2334.
—— v. Voorhees, pp. 8, 948, 960, 1003, 1008, 1019, 3114, 3115, 3123, 3125, 3129, 3152, 3153, 3165, 3167.
—— v. Wabash, etc., R. Co., pp. 1547, 2435.
—— v. Walker, pp. 11, 296, 729, 733, 750.
—— v. Wells, Fargo & Co., p. 512.
—— v. Western Vermont R. Co., p. 211.
—— Wood v.
Jones Bros. v. Southern R. Co., p. 25.
Jones Cotton Co., Bank v.
—— Gulf Compress Co. v.
—— Southern R. Co. v.
Jones-Lane Co. v. Atlantic, etc., R. Co., pp. 1060, 1062, 1063, 1064, 1412, 1418, 1454, 1456, 1470.
Jonesbora, etc., Exp. Co. Eager v.
Jonesboro, etc., R. Co., Brenner v.
—— Brookfield, p. 1593.
—— Chapman, etc., Land Co. v.
—— Chapman, etc., Lumber Co. v.
—— Clark v.
Jonesville Mfg. Co. v. Southern Railway, pp. 817, 3292, 3537.
Jonte, Illinois Cent. R. Co. v.
Jopes, New Orleans, etc., R. Co. v.
Joplin, Louisville, etc., R. Co. v.
Joplin, etc., R. Co., Tempfer v.
Jordan v. American Exp. Co., pp. 766, 778.
—— Birmingham R., etc., Co. v.
—— Chesapeake, etc., R. Co. v.
—— City Properties Co. v.
—— v. Fall River R. Co., pp. 210, 236, 239, 240, 277, 287, 3125, 3126, 3138.
—— Gulf, etc., R. Co. v.
—— v. Gulf, etc., R. Co., pp. 1439, 1440, 1454, 1456, 1481.
—— v. Hazard, p. 804.
—— Louisville, etc., R. Co. v.
—— v. New York, etc., R. Co., pp. 1743, 1776.
—— v. Old Colony St. R. Co., p. 2895.
—— v. Patterson, p. 646.
—— v. Pennsylvania Co., p. 363.
—— v. Seattle, etc., R. Co., pp. 2700, 2701.
—— Southern R. Co. v.
Jordan, etc., Co. v. James, pp. 328, 333, 367, 517, 1154, 1160, 1207, 1209, 1210, 1212, 1214, 1222, 1225, 1229, 1235, 1239, 1248.
Jorden v. St. Louis, etc., R. Co., pp. 2658, 2683.
Jordon Stock Food Co., Atchison, etc., K. Co. v.
Joseph, Central, etc., R. Co. v.
—— v. Georgia K., etc., Co., p. 3307.
—— McCormick v.
Joseph Grant, The.
Josey, San Antonio, etc., R. Co. v.
Joshua Barker, The.
Joslin, Fitzsimmons v.
—— Sawyer v.
—— Ward v.
Joslyn v. Grand Trunk R. Co., p. 560.
Joyce v. Los Angeles R. Co., pp. 2195, 2248, 2688.
—— v. Metropolitan St. R. Co., pp. 1769, 2370, 2383, 2391, 2728, 2875, 2951.
—— v. St. Paul City R. Co., p. 2828.
—— v. Swan, p. 354.
—— United States Exp. Co. v.
Joynes v. Pennsylvania R. Co., 83 Atl. 318, 234 Pa. 321—p. 1203.
—— v. Pennsylvania R. Co., 235 Pa. 232, 83 Atl. 1016, Ann. Cas. 1913D, 964—pp. 607, 610, 622, 624, 696.
—— v. Pennsylvania R. Co., 239 Pa. 93, 86 Atl. 653—p. 871.
Judah v. Kemp, p. 513.
Judd v. Evans, p. 615.
—— v. New York, etc., Steamship Co., 117 Fed. 206, 54 C. C. A. 238—pp. 908, 912, 913.
—— v. New York, etc., Steamship Co., 130 Fed. 991—p. 918.
—— Opsahl v.
Judge v. Columbus R., etc., Co., pp. 1603, 2428.
—— v. Northern Pac. R. Co., p. 722.
Judice v. Southern Pac. Co., pp. 3046, 3058.
Judson, Hause & Son v.
—— v. Western R. Corp. (Mass.), 4 Allen 520, 81 Am. Dec. 718—pp. 288, 885, 3259, 3286.
—— v. Western R. Corp. (Mass.), 6 Allen 486, 83 Am. Dec. 646—pp. 958, 1003, 1005, 1006, 1007, 3347.
Jump Co., Murray v.
Jumper, Texas Mid. R. Co. v.
June v. Boston, etc., R. Co., p. 1509.
Jung, Birmingham R., etc., Co. v.
Junker, Watkins v.
Junod v. Chicago, etc., R. Co., pp. 3711, 3719, 3721.
Juntzen, L., etc., R. Co. v.
Jurey, Indianapolis, etc., R. Co. v.
—— Mobile, etc., R. Co. v.
Jurkiewicz v. Illinois Cent. R. Co., p. 2268.
Jurvelius, Keyser & Co. v.
Justis v. Atchinson, etc., R. Co., p. 1612.

K

Kaase v. Gulf, etc., R. Co., pp. 1533, 2482.
Kahaner v. International Nav. Co., p. 3986.
Kahn v. Atlantic, etc., R. Co., pp. 3174, 3188, 3195.
—— Louisville, etc., R. Co. v.
—— Merchants' Despatch Transp. Co. v.
—— Missouri, etc., R. Co. v.
Kahnweiler v. Buck, p. 1242.
Kain v. Kansas City, etc., R. Co., p. 804.
Kaiser, Missouri Pac. R. Co. v.
—— v. Northern Pac. R. Co., p. 2141.
Kalamazoo Hack, etc., Co. v. Sootsma, pp. 101, 106, 190, 192, 196.
Kalen v. United States, p. 3441.
Kalina v. Union Pac. R. Co., pp. 1042, 1432.
Kaliniak v. Joline, p. 2897.
Kalis v. Detroit United Railway, pp. 1820, 1952, 2926.
Kalispell Lumber Co., Great Northern R. Co. v.
Kallaher, Union R., etc., Co. v.
Kallberg, Chicago Union Tract. Co. v.
Kallman v. United States Exp. Co., pp. 945, 948, 956, 986, 1006, 1036, 1066, 1067, 3369, 3370.
Kambour v. Boston, etc., Railroad, pp. 2116, 2120, 2254, 2361, 2503.
Kanawha Dispatch, Courteen v.
Kanawha, etc., R. Co., Columbus Iron, etc., Co. v.
—— Hoylman v.
—— Norvell v.
—— Searle v.
Kane, Baltimore, etc., R. Co. v.
—— Barrow Steamship Co. v.
—— v. Cicero, etc., R. Co., pp. 1502, 1519, 1538.
—— Cooper v.
—— Schwabacher v.
—— v. State, pp. 3588, 3589.
—— United States v.
Kankakee Elect. R. Co., Hamilton v.
Kansas, American Book Co. v.
—— Asbell v.
—— Mugler v.
—— Smiley v.
—— The.
—— Thomas v.
Kansas City, Clark v.
Kansas City Cable R. Co., Carter v.
—— Ridenhour v.
—— Sharp v.
—— Sweeney v.
—— Weber v.
Kansas City Distillery Co., Tillman v.
Kansas City Elev. R. Co., Rawson v.
—— Stevens v.
—— Van Vranken v.
Kansas City Southern R. Co. v. Embry, p. 3399.
Kansas City Stockyards Co., Cotting v.
Kansas City St. R. Co., Ross v.
Kansas City Terminal R. Co., Kaw Valley Drainage Dist. v.
Kansas City Transfer Co. v. Neiswanger, pp. 894, 899.
Kansas City, etc., R. Co., Blake v.
—— Brown v.

Kansas City, etc., R. Co., Carter v.
—— Cherry v.
—— Chicago, etc., R. Co. v.
—— Cooke v.
—— Cross v.
—— Donovan v.
—— Haas v.
—— v. Heard, p. 1388.
—— v. Heigdon, pp. 3111, 3122.
—— v. Holland, p. 1381.
—— Jasper Trust Co. v.
—— Kain v.
—— Kirkpatrick v.
—— v. Lilly, pp. 272, 878.
—— McDonald v.
—— v. McGahey, pp. 3115, 3148, 3154, 3160, 3168, 3171, 3174.
—— Marshall, etc., Grain Co. v.
—— Marshall, etc., R. Co. v.
—— v. Mayes, p. 2264.
—— v. Morrison, pp. 587, 689, 900.
—— O'Donnell v.
—— Owens v.
—— v. Pace, p. 1386.
Kansas City, etc., R. Co. v. Patten, pp. 727, 3168, 3174.
—— Patterson v.
—— Rivers v.
—— St. Clair v.
—— Seawell v.
—— v. Sharp, pp. 3345, 3381.
—— v. Simpson, pp. 948, 1074, 1397, 1400.
—— v. Spann, p. 804.
—— v. Williford, p. 2207.
—— Yarnell v.
Kansas Natural Gas Co. v. Haskell, p. 3533.
—— West v.
Kansas Pac. R. Co., Bayles v.
—— v. Bayles, p. 221.
—— v. Cutter, p. 3070.
—— Goggin v.
—— v. Kessler, p. 3093.
—— v. Kunkel, p. 2568.
—— v. McCann, p. 700.
—— v. Miller, p. 2681.
—— v. Montelle, p. 3191.
—— v. Nichols, etc., Co., pp. 727, 732, 740, 748, 1267.
—— v. Reynolds, 8 Kan. 623—pp. 727, 740, 1036, 1362.
—— v. Reynolds, 17 Kan. 251—pp. 945, 976.
—— v. Salmon, pp. 1580, 1581.
—— v. Searle, p. 811.
—— Travers v.
Kansas Pac. Railway, Rice v.
Kansas, etc., R. Co. v. Albers Comm. Co., 79 Kan. 59, 99 Pac. 819—pp. 1195, 1196, 1201.
—— v. Albers Comm. Co., pp. 1195, 3738, 3739, 3745, 3746, 3747, 3756, 3766, 3853.
—— American, etc., Timber Co. v.
—— v. Ayers, pp. 1307, 1412, 1413, 1420.
—— v. Barnett, pp. 285, 288, 726, 732, 748, 1357, 1482.
—— Barth v.
—— Beadle v.
—— v. Belknap, p. 2749.
—— v. Berry, pp. 1761, 2520.
—— Blake v.
—— v. Board, p. 3423.
—— Bolles v.
—— Bowers v.
—— Brown v.
—— v. Butler, p. 2604.
—— v. Carl, 91 Ark. 97, 121 S. W. 932—pp. 950, 3332, 3396.
—— v. Carl, 227 U. S. 639, 33 S. Ct. 391—pp. 3752, 3762.
—— Cherry v.
—— Council Bluffs v.
—— Curry v.
—— v. Curry, p. 3041.
—— v. Dalton, p. 3049.
—— Davis v.
—— v. Davis, pp. 1919, 2120, 2121, 2233, 2380, 2676, 2689.
—— Dimmitt v.
Kansas, etc., R. Co. v. Dorough, pp. 2090, 2114, 2126, 2250, 2391, 2966.
—— v. Embry, p. 3313.
—— Erwin v.
—— v. Fite, p. 3057.
—— Fleming v.
—— v. Florence, p. 2772.
—— v. Foster, pp. 2416, 2459, 2462, 2495, 2572, 3080, 3083.
—— Frazier v.
—— Gallegly v.
—— Hanley v.
—— Harkness v.
—— Hipsley v.
—— v. Holden, pp. 2472, 2478.
—— Kellerman v.
—— Kellerman & Son v.
—— v. Kirksey, p. 2502.
—— v. Little, pp. 1862, 3085.
—— Live Stock Co. v.
—— v. Love, 23 Okla. 224, 100 Pac. 22—pp. 127, 128.
—— Marshall v.
—— Marshall, etc., Grain Co. v.
—— Martindale v.
—— v. Matthews, pp. 2282, 2359, 2361, 2380, 2585, 2586, 2612, 2657, 2859.
—— v. Morrison, pp. 3127, 3128, 3130, 3131, 3132.
—— One Hundred and One Live Stock Co. v.
—— Patterson v.
—— v. Railroad Comm., p. 131.
—— v. Riley, pp. 2461, 2463.
—— Rivers v.
—— v. Rodebaugh, pp. 3162, 3163.
—— v. Rosebrook-Josey Grain Co., pp. 276, 331, 796, 814.
—— St. Clair v.
—— v. Sanders, pp. 2000, 2636.
—— v. Scott, p. 2058.
—— v. Skinner, pp. 3113, 3114, 3115, 3116, 3117, 3119.
—— v. Smith, p. 2740.
—— v. State, pp. 178, 3121.
—— v. Stoner, 1 C. C. A. 231, 49 Fed. 209—pp. 2009, 2084, 2975.
—— v. Stoner, 2 C. C. A. 437, 51 Fed. 649, 52 Am. & Eng. R. R. Cas. 462—p. 2010.
—— Straus v.
—— v. Thomas, p. 3174.
—— v. Tonn, pp. 1139, 1198, 1204.
—— v. United States, pp. 3771, 3772, 3773, 3826, 3833.
—— v. Washington, p. 3176.
—— v. Watson, pp. 2085, 2131, 2324.
—— v. West, p. 1314.
—— v. White, p. 2190.
—— v. Worthington, pp. 1702, 1867, 1874, 1880, 2264, 2356, 2360.
—— v. Young, pp. 2618, 2744.
Kantner v. Philadelphia, etc., R. Co., p. 2858.
Kaplan v. Midland R. Terminal Co., p. 1330.
Kaplowitz v. Interborough Rapid Transit Co., p. 1786.
Kapp, Chicago, etc., R. Co. v.
Karnes v. American Fire Ins. Co., p. 1119.
Karr v. Milwaukee Light, etc., Co., pp. 1515, 2134, 2135, 2137, 2138, 2141, 2326, 2883.
Karrer, Galveston, etc., R. Co. v.
Kaskaskia Bridge Co. v. Shannon, p. 1172.
Kaskell, North Baltimore Pass. R. Co. v.
Kaspers, North Chicago St. R. Co. v.
—— North Chicago, etc., R. Co. v.
Kassen, Cincinnati, etc., R. Co. v.
—— Railroad Co. v.
Kates v. Atlanta Baggage, etc., Co., pp. 99, 100, 190, 192, 193, 220, 221, 257, 1768.
—— v. Atlanta, etc., Cab Co., pp. 3110, 3140.
Kates v. Pullman's Palace Car Co., pp. 3215, 3217, 3220, 3221, 3223, 3224, 3231, 3237.
Kates Transfer, etc., Co. v. Klassen, pp. 834, 856, 857, 861.
Katz, Florida, etc., R. Co. v.
Katzenbach, Chicago, etc., R. Co. v.
Katzenberger, Louisville, etc., R. Co. v.
Kauffman v. Robey, p. 420.
Kauffman & Co., Louisville, etc., R. Co. v.
Kaufman v. Seaboard, etc., Railway, pp. 486, 519.
—— Southern Exp. Co. v.
Kaul Lumber Co., Lawrence v.
Kavanaugh, Central, etc., R. Co. v.
Kavanaugh & Co. v. Southern R. Co., pp. 939, 967, 981, 3333, 3523.
Kaw Valley Drainage Dist. v. Kansas City Terminal R. Co., p. 3519.
Kay v. Metropolitan St. R. Co., 57 N. E. 751, 163 N. Y. 447—pp. 2679, 2731.
—— v. Metropolitan St. R. Co., 51 N. Y. S. 724, 29 App. Div. 466—p. 2697.
Kean v. Baltimore, etc., R. Co., p. 2121.
—— v. West Chicago, etc., R. Co., p. 2186.
Kearney v. Oregon R., etc., Co., pp. 2338, 2884.
—— v. Seaboard, etc., R. Co., pp. 1743, 1755, 1890, 1928, 2114, 2226, 2245, 2315, 2825.
Kearney Mill, etc., Co. v. Union Pac. R. Co., p. 1224.
Kearns, Delta Bag Co. v.
Keary, Commonwealth v.
Keating v. Detroit, etc., R. Co., pp. 1834, 1841, 1986, 2757, 2859.
—— Georgia R., etc., Co. v.
—— v. New York, etc., R. Co., 49 N. Y. 673—p. 1917.
—— v. New York, etc., R. Co. (N. Y.), 3 Lans 469—p. 2130.
Keator v. Scranton Tract. Co., p. 1517.
Kebbe v. Connecticut Co., pp. 1682, 1741, 1951, 1980, 2168, 2881, 2888.
Kechnie, Powell v.
Keck v. Calumet, etc., R. Co., p. 2777.
Keckevoet v. Dubuque, p. 3586.
Keedy, Baltimore, etc., R. Co. v.
Keefe, v. Boston, etc., R. Co., pp. 1767, 1779, 1798, 2271, 2873.
—— v. Lexington, etc., St. R. Co., pp. 77, 79.
Keefer, Louisville, etc., R. Co. v.
—— United States Exp. Co. v.
Keegan, Illinois Cent. R. Co. v.
—— v. Third Ave. R. Co., p. 2896.
Keel, Rome R., etc., Co. v.
Keeler v. Goodwin, p. 1208.
—— Southern Exp. Co. v.
Keeley v. Boston, etc., R. Co., p. 1635, 2453.
—— v. City Elect. R. Co., pp. 1682, 1892, 2935.
Keeling, Houston, etc., R. Co. v.
Keen v. Detroit Elect. Railway, pp. 2462, 2463, 2572.
—— v. St. Louis, etc., R. Co., pp. 2042, 2048.
Keenan, Walker v.
Keene v. Lizardi, pp. 2038, 2056.
Keener, Georgia R., etc., Co. v.
Keeney v. Grand Trunk R. Co., 47 N. Y. 525—p. 1385.
—— v. Grand Trunk R. Co. (N. Y.), 59 Barb. 104—p. 222.
Keeny, Atlanta Consol. St. R. Co. v.
—— Atlantic Consol. St. R. Co. v.
Keep v. Indianapolis, etc., R. Co., pp. 2073, 2080.

Keep Mfg. Co. v. Moore, pp. 1164, 1167, 1220, 1221.
Keeshan v. Elgin, etc., Tract. Co., pp. 2415, 2624.
Keeter v. Wilmington, etc., R. Co., pp. 154, 612.
Kefauver v. Philadelphia, etc., R. Co., p. 2608.
Kehn, Merchants' Despatch Transp. Co. v.
Kehrer v. Stewart, pp. 3577, 3593.
Keifner v. Pittsburg, etc., R. Co., pp. 1511, 1512, 1792, 2134, 2137, 2138, 2325.
Keiter, Indiana Union Tract. Co. v.
—— Union Tract. Co. v.
Keith, Covington Stockyards Co. v.
—— Evansville, etc., R. Co. v.
—— Frank v.
—— Louisville, etc., R. Co. v.
—— v. New York Cent. R. Co., pp. 3123, 3142, 3143, 3184, 3189.
Keitt, St. Louis, etc., R. Co. v.
Kelham v. Steamship Kensington, p. 1037.
Kellar, Sprowl v.
Keller v. Baltimore, etc., R. Co., p. 3328.
—— Hall v.
—— v. Hestonville, etc., R. Co., p. 1833.
—— Louisville, etc., R. Co. v.
—— St. Louis, etc., R. Co. v.
—— v. Sioux, etc., R. Co., pp. 1895, 1899.
—— v. Wove Realty Co., pp. 2740, 2837.
Kellerman v. Kansas, etc., R. Co., pp. 420, 969, 970, 986, 989, 1061, 1062, 1399.
Kellerman & Son v. Kansas, etc., R. Co., pp. 978, 1012.
Kelley v. Boston Elev. R. Co., pp. 2026, 2027, 2730.
—— v. Bowker, pp. 306, 339, 1144, 3884.
—— Brooklyn St. R. Co. v.
—— Cunard Steamship Co. v.
—— v. Cunard Steamship Co., p. 3928.
—— Galveston, etc., R. Co. v.
—— v. Grand Trunk, etc., R. Co., pp. 2102, 2667, 2640.
—— v. Manhattan R. Co., p 1713.
Kellogg, Ackley v.
—— v. Boston, etc., Railroad, p. 2880.
—— v. Smith, p. 2239.
—— v. Suffolk, etc., R. Co., pp. 149, 232.
Kellow v. Central, etc., R. Co., pp. 1715, 1720, 1722, 1999, 2011, 2183.
Kelly v. Adams Exp. Co., p. 1269.
—— v. Benedict, pp. 806, 807.
—— Chicago, etc., R. Co. v.
—— v. Chicago, etc., R. Co., p. 2684.
—— Cunard Steamship Co. v.
—— East Tennessee, etc., R. Co. v.
—— Farlow v.
—— First Nat. Bank v.
—— v. Hannibal, etc., R. Co., p. 2263.
—— Louisville, etc., R. Co. v.
—— v. Malott, pp. 1578, 2105.
—— v. New York City R. Co., pp. 1645, 1646, 1668.
—— v. New York, etc., R. Co., pp. 1687, 1833, 2794.
—— Pullman Co. v.
—— v. Railway Co., pp. 2519, 2524.
—— v. Southern Railway, pp. 819, 1072, 1111, 1116.
—— v. Southern, etc., R. Co., p. 2737.
—— Texas, etc., R. Co. v.
—— Torrey v.
—— Transfer Co. v.
—— W. & A. R. Co. v.
Kelm, Chicago, etc., R. Co. v.
Kelsey, Cincinnati St. R. Co. v.
—— Lake Shore, etc., R. Co. v.
—— Louisville, etc., R. Co. v.
—— v. Michigan Cent. R. Co., pp. 1977, 2447.
Kember v. Southern Exp. Co., p. 1070.
Kemendo v. Fruit Dispatch Co., pp. 692, 820, 826, 3333, 3661, 3662, 3663.
Kemp, Baltimore City Pass. R. Co. v.
—— v. Coughtry, p. 728.
—— v. Falk, p. 1224.
—— Gulf, etc., R. Co. v.
—— Judah v.
—— Louisville, etc., R. Co. v.
—— v. New York, etc., R. Co., p. 2306.
Kempf, Hus v.
Kempton, Northern Pac. R. Co. v.
Kendall, Chicago, etc., R. Co. v.
—— Louisville, etc., R. Co. v.
—— v. Marshall, p. 1240.
Kendall, etc., Co., Jean Webre v.
Kendrick, Missouri, etc., R. Co. v.
—— Southern R. Co. v.
—— Staub v.
Kennard, Holladay v.
—— New Jersey R. Co. v.
—— v. New Jersey, etc., R. Co., p. 2113.
Kennard Glass, etc., Co., Pennsylvania Co. v.
—— Pennsylvania R. Co. v.
Kennebec Steamboat Co., Rogers v.
Kennedy v. Birmingham R., etc., Co., pp. 2466, 2469.
—— v. Chesapeake, etc., R. Co., pp. 1683, 1719, 1720, 1756, 1757, 2657.
—— Cleveland, etc., R. Co. v.
—— Columbus, etc., R. Co. v.
—— v. Dodge, p. 527.
—— Ft. Worth, etc., R. Co. v.
—— Hays v.
—— Indianapolis, etc., R. Co. v.
—— v. Metropolitan St. R. Co., pp. 2594, 2654.
—— Mississippi Cent. R. Co. v.
—— Moore v.
—— v. Morgan, p. 2587.
—— v. Pennsylvania R. Co., pp. 2021, 2789.
—— Robertson & Co. v.
—— v. Roman, p. 891.
—— St. Louis, etc., R. Co. v.
—— Southern Pac. R. Co. v.
—— v. Southern R. Co., pp. 2280, 2284.
—— Wadley Southern R. Co. v.
Kennedy Bros. v. Mobile, etc., R. Co., pp. 895, 900.
Kennedy, etc., R. Co. v. Buckler, p. 2318.
Kennelly, West Chicago St. R. Co. v.
Kenney v. New York, etc., R. Co., 125 N. Y. 422, 26 N. E. 626—pp. 1579, 1580, 2105.
—— v. New York, etc., R. Co., 54 Hun 143, 7 N. Y. S. 225, 26 N. Y. St. Rep. 636—pp. 2104, 2105.
Kennon v. Gilmer, 5 Mont. 257, 5 Pac. 847, 51 Am. Rep. 45—pp. 1684, 1732, 1737.
—— v. Gilmer, 131 U. S. 22, 33 L. Ed. 110, 9 S. Ct. 696—pp. 1837, 2742, 3063.
Kenny Co. v. Atlanta, etc., R. Co., pp. 525, 544, 912.
Kensington, The.
Kent, Baltimore, etc., R. Co. v.
—— v. Baltimore, etc., R. Co., pp. 1619, 1631, 1633, 1636, 3165.
—— Canal Boat Montgomery v.
—— v. Hudson River R. Co., pp. 653, 1321.
—— v. Lincoln, p. 2737.
—— v. Mason, p. 2479.
—— v. Midland R. Co., p. 3183.
Kent, Silver v.
—— v. Wadley, etc., R. Co., p. 262.
Kentle, International, etc., R. Co. v.
Kentucky, Adams Exp. Co. v.
—— Chesapeake, etc., R. Co. v.
—— Covington, etc., Bridge Co. v.
—— Crutcher v.
—— Henderson Bridge Co. v.
—— Louisville, etc., Ferry Co. v.
—— Louisville, etc., R. Co. v.
Kentucky Cent. R. Co. v. Biddle, pp. 3012, 3049.
—— v. Dills, pp. 2113, 2116, 3067, 3068, 3069.
—— v. Fern, p. 3012.
—— Gerreiss, pp. 2080, 2667.
—— v. Jacoby, p. 2201.
—— v. McMurtry, pp. 2580, 2678, 3073.
—— Parks v.
—— v. Thomas, pp. 1953, 1958, 2210, 2211.
Kentucky Hotel Co. v. Camp, pp. 1739, 1750, 1978, 2983.
Kentucky Wagon Mfg. Co. v. Louisville, etc., R. Co., p. 700.
—— v. Ohio, etc., R. Co., pp. 114, 700, 701, 703, 704, 705, 706, 707, 709, 714, 716, 717.
Kentucky, etc., Bridge Co. v. Louisville, etc., R. Co., pp. 5, 6, 3650, 3657, 3659, 3718, 3738, 3787, 3789, 3795.
—— v. McKinney, pp. 1788, 2341, 2617.
—— v. Quinkert, pp. 1720, 1877, 1970, 1995, 2673, 2828.
Kentucky, etc., Fire Ins. Co. v. Western, etc., R. Co., pp. 3265, 3286.
Kentucky, etc., R. Co. v. Shrader, p. 2820.
—— Smoot v.
Kenwood Bridge Co., Pennsylvania Co. v.
Keokuk v. Keokuk Northern Line Packet Co., p. 3586.
—— Packet Co. v.
—— The.
Keokuk Northern Line Packet Co., Keokuk v.
—— v. True, p. 2117.
—— Williams v.
Keokuk Packet Co. v. Henry, pp. 1543, 2512, 2541.
Keokuk, etc., Bridge Co. v. Illinois, p. 3588.
Keokuk, etc., Packet Co., Loeffler v.
—— v. True, p. 1740.
—— Yerkes v.
Keokuk, etc., K. Co., Dittman, etc., Shoe Co. v.
—— v. Missouri, p. 3484.
Kepper, Texas, etc., R. Co. v.
Kerl, Illinois Cent. R. Co. v.
Kermit, Van Horn v.
Kermon v. Gilmer, pp. 2281, 2286, 2287, 2291.
Kern, Cincinnati, etc., R. Co. v.
Kerr, Ewart v.
—— v. Georgia R. Co., p. 3317
—— v. Grand Trunk R. Co., pp. 268, 272, 3136.
—— Illinois Cent. R. Co. v.
—— McConnochie v.
—— v. Norman, pp. 820, 828.
—— v. Schwaner, pp. 3969, 3970, 3971.
Kerrigan v. Southern Pac. R. Co., p. 3374.
Kerry v. Pacific Marine Co., p. 4040.
Kessenger v. Fitzgerald, p. 3856.
Kessler v. First Nat. Bank, p. 3367.
—— Kansas Pac R. Co. v.
—— v. New York Cent. R. Co., pp. 3175, 3181.
—— v. New York, etc., R. Co., p. 3182.
Ketcham, Cleveland, etc., R. Co. v.

Ketcham, Terre Haute, etc., R. Co. v.
Ketcheson v. Southern Pac. Co., pp. 1630, 1634, 2441.
Ketchum v. American Merchants' Union Exp. Co., pp. 821, 823, 1007.
—— v. New York City R. Co., p. 1648.
—— New York, etc., R. Co. v.
Ketrow, Toledo R., etc., Co. v.
Kettell, Sutton v.
Kettenhofen v. Globe Transfer, etc., Co., pp. 10, 846.
Keyekordes, Evansville, etc., R. Co. v.
Key, Gulf, etc., R. Co. v.
Keyes, Northern Pac. R. Co. v.
Keyes-Marshall Bros. Livery Co. v. St. Louis, etc., R. Co., 80 S. W. 53, 105 Mo. App. 556—pp. 1267, 1477.
—— v. St. Louis, etc., R. Co., 113 Mo. App. 144, 87 S. W. 553—p. 1407.
Keys, Belfast, etc., R. Co. v.
—— St. Louis, etc., R. Co. v.
—— Vandalia R. Co. v.
Keyser v. Harbeck, p. 3879.
—— Hawkhurst Steamship Co. v.
—— Jonasen v.
—— Schmidt v.
—— Skantze v.
—— Sorensen v.
—— Wold v.
—— Wood v.
Keyser & Co. v. Jurvelius, pp. 3959, 3967.
Keystone, The.
Keystone Lumber Co., Yazoo, etc., R. Co. v.
Keystone Lumber Yard v. Yazoo, etc., R. Co., 94 Miss. 192, 47 So. 803—p. 170.
—— v. Yazoo, etc., R. Co., 97 Miss. 433, 53 So. 8—p. 613.
Kibby v. Michigan Cent. R. Co., pp. 3331, 3355.
Kibler v. Southern Railroad, 64 S. C. 242, 41 S. E. 977—p. 2571.
—— v. Southern Railway, 62 S. C. 252, 40 S. E. 556—pp. 69, 3090, 3091.
Kichler, Toledo, etc., R. Co. v.
Kickler, Toledo, etc., R. Co. v.
Kidd, Alabama & T. R. R. Co. v.
—— Alabama, etc., R. Co. v.
—— Hartwell R. Co. v.
—— v. Pearson, pp. 3418, 3419, 3420, 3421, 3424, 3440, 3539.
Kidder v. Fitchburg R. Co., p. 109.
Kiefer, Atlantic City R. Co. v.
—— v. Brooklyn Heights R. Co., pp. 2172, 2187, 2797.
Kiff v. Atchison, etc., R. Co., pp. 3377, 3380.
—— v. Old Colony, etc., R. Co., pp. 574, 575, 579.
Kight v. Metropolitan R. Co., pp. 2129, 2887.
—— v. Wrightsville, etc., R. Co., pp. 889, 894, 898, 900, 910.
Kilberry, St. Louis, etc., R. Co. v.
Kilduff v. Boston Elevated R. Co., p. 1581.
Kiley v. Chicago City R. Co., 189 Ill. 384, 59 N. E. 794, 52 L. R. A. 626, 82 Am. St. Rep. 460—pp. 2462, 2487, 2572, 3081.
—— v. Chicago City R. Co., 90 Ill App. 275—pp. 2459, 3081, 3090.
Kilgo, International, etc., R. Co. v.
Kilgore, McGregor & Co. v.
—— Pennsylvania R. Co. v.
Killam v. Wellesley, etc., R. Co., pp. 2689, 2827.
Killebrew, Gulf, etc., R. Co. v.
Killian, Commonwealth v.
Killian v. Georgia R., etc., Co., pp. 1884, 1895, 1896, 2676, 2750, 2753, 2909.
Killmer v. New York, etc., R. Co., pp. 1135, 1179, 1193.
Killmeyer v. Wheeling Tract. Co., pp. 2126, 2127.
Kilpatrick v. Pennsylvania R. Co., p. 2258.
—— St. Louis, etc., R. Co. v.
Kimbal, United States v.
Kimball v. American Exp. Co., p. 1333.
—— County of Mobile v.
—— Forsythe v.
—— Lee v.
—— v. Palmer, p. 2214.
—— v. Rutland, etc., R. Co., pp. 4, 211, 243, 741, 797, 868, 946, 1003, 1004, 1008, 1368.
—— The.
—— v. Tucker, p. 3866.
—— v. Western R. Co., p. 780.
Kimball Co., Kirk v.
Kimball Steamship Co., Ames Mercantile Co. v.
—— In re.
—— Weisshaar v.
Kimber v. Metropolitan, etc., R. Co., p. 2152.
—— State v.
Kimble, Gulf, etc., R. Co. v.
Kimbro, Little Rock Tract., etc., Co. v.
Kimbrough, Louisville, etc., R. Co. v.
Kime v. Southern R. Co., 69 S. E. 264, 153 N. C. 398—pp. 1412, 1413, 1426.
—— v. Southern R. Co., 156 N. C. 451, 72 S. E. 485—pp. 1426, 1482.
—— v. Southern R. Co., 160 N. C. 457, 76 S. E. 509, 43 L. R. A., N. S., 617—pp. 948, 960, 1005, 1426, 3303, 3372.
Kimic v. San Jose-Los Gatos, etc., R. Co., pp. 2083, 2700, 2809, 2895.
Kinchen, Southern R. Co. v.
Kindellan v. Mt. Washington R. Co., p. 1582.
King, Adams Exp. Co. v.
—— v. Atlantic, etc., Railroad, pp. 161, 162, 163.
—— Birmingham R., etc., Co. v.
—— v. Central, etc., R. Co., p. 1525.
—— Chesapeake, etc. R. Co. v.
—— Chicago, etc., R. Co. v.
—— Dean v.
—— v. De Land, etc., R. Co., pp. 538, 931.
—— East Tennessee, etc., R. Co. v.
—— Harrington v.
—— v. Illinois Cent. R. Co., p. 2075.
—— Illinois, etc., R. Co. v.
—— v. Macon, etc., R. Co., p. 3294.
—— v. Michigan, etc., R. Co., pp. 213, 432.
—— Miles v.
—— Miller v.
—— Nashville, etc., R. Co. v.
—— v. Nassau Elect. R. Co., p. 1645.
—— v. New Brunswick, etc., Steamboat Co., pp. 896, 901, 911.
—— v. Ohio, etc., R. Co., p. 2023.
—— v. People's Bank, p. 2641.
—— Pullman's Palace Car Co. v.
—— v. Richards, pp. 547, 1158.
—— v. Shepherd, p. 734.
—— v. Sherwood, p. 851.
—— Southern R. Co. v.
—— v. Southern R. Co., pp. 2050, 2566, 2578, 2831,
—— Steamboat Lynx v.
—— Steamboat New World v.
—— Texas, etc., R. Co. v.
—— Wiggins v.
King v. Wilmington, etc., R. Co., pp. 2586, 2587, 2588.
—— v. Woodbridge, pp. 321, 333, 1016.
—— v. Woodridge, p. 3880.
—— v. Yazoo, etc., R. Co., p. 2366.
King County v. Northern Pac. R. Co., p. 3554.
King Lumber, etc., Co. v. Atlantic, etc., R. Co., pp. 20, 3488.
Kingman, Louisville, etc., R. Co. v.
—— v. Lynn, etc., R. Co., p. 2704.
Kingman & Co. v. Denison, pp. 1227, 1229.
Kingsbury, Missouri Pac. R. Co. v.
—— Shoemaker v.
Kings County, etc., R. Co., Voorhees v.
Kingsley v. Delaware, etc., R. Co., p. 2794.
—— Wabash R. Co. v.
King's Mountain R. Co., Smith v.
Kingston v. Fort Wayne, etc., R. Co., 70 N. W. 315, 112 Mich. 40, 40 L. R. A. 131—p. 2120.
—— v. Fort Wayne, etc., R. Co. (Mich.), 74 N. W. 230—p. 2120.
—— Texas, etc., R. Co. v.
Kingston City R. Co., Smith v.
Kingwood Coal Co., West Virginia, etc., R. Co. v.
Kinloch v. Craig, p. 1216.
Kinnavey v. Terminal R. Ass'n, p. 3710.
Kinnebrew, Galveston, etc., R. Co. v.
Kinner v. Lake Shore, etc., R. Co., p. 1618.
Kinney v. Central R. Co., 32 N. J. L. 407, 90 Am. Dec. 675—pp. 948, 2095.
—— v. Central R. Co., 34 N. J. L. 513, 3 Am. Rep. 265—p. 2095.
—— v. Louisville, etc., R. Co., p. 2033.
—— O'Bryan v.
—— v. Yazoo, etc., R. Co., p. 1867.
—— Yonge v.
Kinnick v. Chicago, etc., R. Co., pp. 1281, 1314.
Kinsley, Cleveland, etc., R. Co. v.
—— v. Lake Shore, etc., R. Co., pp. 3145, 3147, 3225, 3226, 3234.
—— Pendleton v.
Kinyoun v. Metropolitan St. R. Co., pp. 1890, 1904, 2656.
Kirby v. Adams Exp. Co., pp. 767, 815, 818, 821, 945, 986.
—— Baltimore, etc., R. Co. v.
—— Chicago, etc., R. Co. v.
—— v. Chicago, etc., R. Co., 242 Ill. 418, 90 N. E. 252—pp. 421, 1298, 1315, 1393, 1468, 3708, 3758.
—— v. Chicago, etc., R. Co., 146 Ill. App. 31—p. 1033.
—— v. St. Louis, etc., R. Co., pp. 1884, 2598.
—— v. Union Pac. R. Co., p. 1617.
Kirchner v. Detroit City R. Co., pp. 1889, 2396, 2995.
—— v. Oil City, etc., R. Co., pp. 2167, 2174.
Kird v. New Orleans, etc., R. Co., pp. 2336, 2680.
Kirk, American Cotton Oil Co. v.
—— v. Chicago, etc., R. Co., pp. 896, 898.
—— v. Folsom, pp. 818, 821, 825, 1037, 1457.
—— v. Kimball Co., p. 3373.
—— v. Seattle Elect. Co., pp. 191, 1542, 1644, 2122, 2422, 2425, 2466, 2472, 2473, 2484.
—— v. State Board, p. 3525.
—— Texas, etc., R. Co. v.

Kirkbride, Gulf, etc., R. Co. v.
—— Salter v.
Kirkendall v. Union Pac. R. Co., pp. 2097, 2098, 2673, 2696.
Kirkham, Missouri, etc., R. Co. v.
Kirkland v. Charleston, etc., Railway, pp. 2466, 2494, 2850.
—— v. Dinsmore, pp. 321, 325, 931, 984, 987, 988, 990.
—— v. Texas, etc., R. Co., p. 1721.
Kirkman v. Bowman, pp. 304, 305, 306, 307, 337.
—— v. Shawcross, p. 615.
Kirkpatrick v. Kansas City, etc., R. Co., pp. 365, 487, 494.
—— v. Metropolitan St. R. Co., 109 S. W. 682, 211 Mo. 68—pp. 1741, 2659.
—— v. Metropolitan St. R. Co., 143 S. W. 865, 161 Mo. App. 515—pp. 1558, 2671.
—— Monteith v.
Kirksey, Kansas, etc., R. Co. v.
Kirkwood, Marquette, etc., R. Co. v.
—— Robinson v.
Kirst v. Milwaukee, etc., R. Co., pp. 822, 824.
Kirtland v. Hotchkiss, p. 3549.
—— v. Montgomery, pp. 726, 770.
Kiser v. Chicago, etc., R. Co., p. 1468.
—— Doyle v.
Kiser Co. v. Central, etc., R. Co., p. 3820.
Kissane v. Detroit, etc., Railway, p. 80.
Kissenger v. Fitzgerald, pp. 948, 1356, 3520.
Kitchell v. Vanadar, p. 481.
Kitchen, St. Louis, etc., R. Co. v.
—— v. Spear, pp. 1219, 1220, 1229, 1232, 1233.
Kitt, El Paso Elect. R. Co. v.
—— El Paso, etc., R. Co. v.
Kizer v. Texarkana, etc., R. Co., p. 3694.
Klair v. Philadelphia, etc., R. Co., pp. 724, 732, 1293, 1339, 1350, 1353, 1387, 1432, 1433, 1436, 1437, 1451, 1475, 3395.
—— v. Wilmington Steamboat Co., pp. 727, 730, 732, 748, 765, 1331, 3901.
Klass v. Metropolitan St. R. Co, p. 2649.
Klass Comm. Co. v. Wabash R. Co., pp. 537, 539, 1097.
Klassen, Kates Transfer, etc., Co. v.
Klauber v. American Exp. Co., pp. 729, 734, 735, 736, 745, 750, 753, 756, 757.
Kleespies, Baltimore, etc., R. Co. v.
Kleffmann v. Dry Dock, etc., R. Co., pp. 2164, 2321, 2860.
Kleiber v. People's R. Co., pp. 1981, 2009, 2014, 2128, 2261.
Klein, Anacostia, etc., R. Co. v.
—— v. Hamburg, etc., Packet Co., p. 3169.
— v. Interurban St. R. Co., p. 2818.
—— Jewett v.
—— v. Jewett, pp. 2089, 2137.
—— Mobile, etc., R. Co. v.
Klenk v. Oregon, etc., R. Co., pp. 2531, 3021.
Klentschy, Indianapolis, etc., Co. v.
Klepper, Texas, etc., R. Co. v.
Kleszewski v. Chicago, etc., R. Co., pp. 2002, 2003.
Kleven v. Great Northern R. Co., p. 3099.
Klien v. Fischer, p. 1226.
Kline v. Central Pac. R. Co, 37 Cal. 400, 99 Am. Dec. 282—pp. 2411, 2412, 2533.
—— v. Central Pac. R. Co., 39 Cal. 587—p. 2533.
Kline v. Milwaukee Elect. R., etc., Co., pp. 1711, 2022, 2023, 2028, 2786.
—— v. Santa Barbara Consol. R. Co., p. 1747.
Klinger v. United Tract. Co., p. 2694.
Klitch, Pittsburgh, etc., R. Co. v.
Klunk v. Hocking Valley R. Co., p. 816.
Klyman, Louisville, etc., R. Co. v.
Knaisch v. Joline, pp. 1706, 2800.
Knapp, Hooker v.
—— v. Lake Shore, etc., R. Co., p. 3817.
—— v. Northern Pac. R. Co., p. 2784.
—— Union Steamboat Co. v.
—— v. Wells, Fargo & Co., pp. 321, 409.
Knapp, etc., Co. v. McCaffrey, p 1153.
Knecht v. Cleveland, etc., R. Co., p. 1616.
Knell v. United States, etc., Steamship Co., p. 1007.
Knepfle v. Cleveland, etc., Railway, p. 1972.
Knicely v. West Virginia Mid. R. Co., p. 1582.
Knieriem v. New York, etc., R. Co., pp. 3125, 3142, 3145.
Knight, Central, etc., R. Co. v.
—— Georgia, etc., R. Co. v.
—— v. Pacific Coast Stage Co., p. 2795.
—— Pennsylvania R. Co. v.
—— v. Pontchartrain R. Co., p. 2150.
—— v. Portland, etc., R. Co., pp. 1531, 1746, 1794, 3181, 3316, 3317, 3320.
—— v. Providence, etc., R. Co., pp. 1142, 1143, 1144, 1147, 1154, 1161, 3289, 3308.
—— v. Quincy, etc., R. Co., pp. 209, 249.
—— St. Louis, etc., R. Co. v.
—— v. St. Louis, etc., R. Co., pp. 487, 722.
—— v. Southern Railway, pp. 847, 897, 899, 905, 907.
Knight Co., United States v.
Knight & Co. v. Southern Pac. R. Co., p. 66.
Knohr v. Pacific Creosoting Co., pp. 3904, 3905, 3910.
Knopf v. Richmond, etc., R. Co., pp. 1642, 2852.
Knorr v. Philadelphia, etc., R. Co., p. 756.
Knott, Botany Worsted Mills v.
—— v. Botany Worsted Mills, pp. 947, 4018, 4056, 4057, 4059, 4060, 4061.
—— v. Raleigh, etc., R. Co., pp. 3305, 3395, 3402.
Knowles, Anchor Line v.
—— v. Atlantic, etc., R. Co., p. 912.
—— v. Norfolk, etc., R. Co., pp. 2622, 2623, 2634.
Knowlton v. Chicago, etc., R. Co., pp. 1453, 1469.
—— v. Erie R. Co., pp. 949, 2092, 2098.
—— v. Milwaukee City R. Co., pp. 1589, 1890, 2942, 2943.
Knox v. Ninetta, p. 3937.
—— Pittsburgh, etc., R. Co. v.
—— v. Rives, etc., Co., pp. 2, 726, 732, 748, 874.
—— v. South Carolina R. Co., p. 67.
—— Tiedeman v.
Knoxville Iron Co. v. Dobson, p. 1848.
Knoxville Tract. Co. v. Carroll, p. 2395.
—— v. Lane, pp. 2038, 2040, 2056, 3064, 3072.
—— v. Wilkerson, pp. 191, 1593, 1602, 1603, 1604, 2428.
Knoxville, etc., R. Co. v. Harris, p. 3590.
Knuckey v. Butte Elect. R. Co., 41 Mont. 314, 109 Pac. 979—pp. 2597, 2600, 2647, 2686, 2822.
—— v. Butte Elect. R. Co., 45 Mont. 106, 122 Pac. 280—pp 2319, 2825, 2906.
Knudsen-Ferguson Fruit Co. v. Chicago, etc., R. Co., p. 3742.
—— v. Michigan Cent. R. Co., pp. 3741, 3742, 3743, 3830.
Kobbe, Barnard v.
Koblitz, Diem v.
Koch v. Brooklyn Heights R. Co., p. 2870.
—— v. New York City R. Co., p. 1647.
—— Wichita, etc., R. Co. v.
Kochler, Chicago, etc., R. Co. v
—— Ex parte.
—— Roberts v.
Kochne v. New York, etc., R. Co., 58 N. E. 1089, 165 N. Y. 603—p. 2956.
—— v. New York, etc., R. Co., 32 App. Div. 419, 52 N. Y. S 1088—p. 1715.
Koekuk Packet Co., Erb v.
Koekuk, etc., Packet Co., Carlisle v.
—— Loeffler v.
Koenig v. St. Paul City R. Co., p. 2816.
Koenigheim, Osborn v.
Koeningsheim v. Hamburg American Packet Co., p. 1036.
Koerner, Chicago, etc., R. Co. v.
—— United States Exp. Co. v.
Koetter v. Manhattan R. Co., p. 2036.
Kohler v. Pennsylvania R. Co., p. 2134.
—— v. West Side R. Co., p. 3035.
Kohm v. Interborough Rap d Trans. Co., p. 2887.
Kohn v. International Mercantile Marine Co., p. 3988.
—— v. Nassau Electric R. Co., p 1559.
—— v. Packard, pp. 528, 536, 891.
—— v. Richmond, etc., R. Co., pp. 574, 576, 1216.
Kohn Bros. v. Washer, p. 1864.
Kohner v. Capital Tract. Co., pp. 2701, 2867.
Kohr v. Metropolitan St. R. Co, p. 2689.
Kolb, Montgomery, etc., R. Co. v.
—— v. Southern Railway, pp 642, 644, 645.
Kolp, Texas, etc., R. Co. v.
Konieczny v. Detroit, etc., R. Co., p. 2668.
Konigin Luise, The.
Konkle v. St. Paul City R. Co., p 2716.
Koontz, Wheeling, etc., R. Co. v.
—— v. Wheeling, etc., R. Co., pp. 1208, 1212, 1222, 1225, 1226, 1229, 1232, 1233, 1234, 1236, 1239, 1244, 1251.
Koran v. Metropolitan St. R. Co., pp. 1531, 1970, 2820.
Korbe, Louisville, etc., Tract. Co. v.
Korn v. Chesapeake, etc., R. Co., pp. 2411, 2489.
Korzib v. Netherlands-American Steam Nav. Co., p. 4001.
Kotoski, Chicago, etc., Transfer Co. v.
Koues v. Metropolitan St. R. Co, p. 2906.
Kountze Bros., Express Co. v.
Kowalski, Metropolitan R. Co. v.
Kozminsky v. Oregon, etc., R. Co., p. 2446.
Kracker v. Philadelphia Rapid Transit Co., p. 2192.
Kramer v. Brooklyn Heights R. Co., 190 N. Y. 310, 83 N. E. 35—p. 2347.

Kramer v. Brooklyn Heights R. Co., 100 N. Y. S. 276, 114 App. Div. 804—pp. 1817, 2172, 2894.
—— v. Metropolitan St. R. Co., p. 2830.
Krauss, Pullman Co. v.
Kreeft, Gaborron v.
Kreis v. Missouri Pac. R. Co., p. 2141.
Kremer v. Southern Exp. Co., pp. 565, 567, 572, 889, 912.
Krender v. Wolcott, pp. 756, 3370.
Krenek, Galveston, etc., R. Co. v.
Kreuziger v. Chicago, etc., R. Co., p. 2847.
Kriedemacher v. Union R. Co., p. 2154.
Krieg v. Lehigh Valley R. Co., p. 2162.
Krock v. Boston Elev. R. Co., pp. 2358, 2396, 2922.
Kroeger v. Seattle Elect. Co., pp. 1519, 2147.
Krohn v. Oechs, pp. 850, 3934.
Kromshinsky, West Chicago St. R. Co. v.
Kronshage v. Chicago, etc., R. Co., pp. 909, 910.
Krouse v. Detroit United Railway, p. 2820.
—— Pittsburgh, etc., R. Co. v.
Kruck v. Connecticut Co., pp. 2130, 2285, 2286, 2319, 2667, 2814.
Krudler v. Ellison, pp. 364, 477, 478, 488.
Krueger v. Chicago, etc., R. Co., pp. 1623, 2449, 2464.
Krug v. Chicago, etc., R. Co., p. 2805.
—— Frank Bird Transfer Co. v.
Kruger v. Omaha, etc., St. R. Co., p. 1963.
Krulevitz v. Eastern R. Co., 140 Mass. 573, 5 N. E. 500, 26 Am. & Eng. R. Cas. 118—pp. 2063, 2070.
—— v. Eastern R. Co., 143 Mass. 228, 9 N. E. 613—pp. 2063, 2070.
Krumm v. St. Louis, etc., R. Co., p. 2170.
Kruse v. St. Louis, etc., R. Co., pp. 1543, 1546, 1551, 1554, 1569, 1572, 2521.
Kuenhle, Gulf, etc., R. Co. v.
Kuhlen v. Boston, etc., R. Co., pp. 1743, 2026, 2328, 2820, 2869, 2727.
Kuhn, Alabama, etc., R. Co. v.
—— Central Passenger R. Co. v.
—— Central, etc., R. Co. v.
—— Illinois Cent. R. Co. v.
Kulman v. Erie R. Co., pp. 2339, 2877.
Kummer v. Christopher, etc., R. Co., p. 2710.
Kunkel, Kansas Pac. R. Co. v.
Kunzmann v. New York, etc., R. Co., p. 2835.
Kupper, Louisville R. Co. v.
Kupper-Benson Hotel Co., Chambers v.
Kurfees v. Harris, p. 1701.
Kurzmann v. New York, etc., R. Co., p. 2834.
Kuteman, Texas, etc., R. Co. v.
Kuter v. Michigan Cent. R. Co., pp. 236, 239, 240, 770, 3153.
Kutter, Delaware, etc., R. Co. v.
Kuttner v. Central R. Co., pp. 2698, 2880.
Kuykendall v. Coulter, p. 3417.
Kyle, Chicago, etc., R. Co. v.
—— v. Chicago, etc., R. Co., 105 C. C. A. 151, 182 Fed. 613—pp. 1666, 1857.
—— v. Chicago, etc., R. Co., 84 Neb. 621, 122 N. W. 37—p. 135.
—— v. Laurens R. Co., pp. 849, 850, 855, 3255, 3295.
Kyser, Missouri, etc., R. Co. v.
Kyte, Evansville, etc., R. Co. v.
K. & D. M. R. Co., McCoy v.
K. & N. Turnpike, People v.

L

Labor v. Taber, pp. 524, 546, 888.
La Barge v. Union Elect. Co., pp. 1820, 1980, 2199, 2337.
Labatt, Dillingham v.
Labbe v. Corbett, p. 420.
La Bourgogne, 117 Fed. 261—pp. 4044, 4051, 4052.
La Bourgogne, 139 Fed. 433, 71 C. C. A. 489—pp. 4042, 4051, 4052.
La Bourgogne, 144 Fed. 781, 75 C. C. A. 647—pp. 3979, 4012, 4031, 4033, 4035, 4046, 4049, 4051, 4052, 4072, 4081, 4082.
La Bourgogne, 210 U. S. 95, 52 L. Ed. 973, 28 S. Ct. 664—pp. 4035, 4036, 4037, 4040, 4042, 4044, 4045, 4049, 4050, 4051, 4052, 4054, 4055, 4073, 4076.
Lacas v. Detroit City R. Co., pp. 1889, 2226.
Lacey v. Minneapolis St. R. Co., pp. 2337, 2860.
—— v. Oregon R., etc., Co., pp. 728, 733, 749, 753, 765, 972, 977, 978, 1027, 1030, 3299, 3389, 3395, 3396, 3407.
—— Texas, etc., R. Co. v.
La Chapella, St. Marc v.
Lachner Bros. v. Adams Exp. Co., p. 1477.
Lackawanna Line, Herf, etc., Chemical Co. v.
Lackawanna, etc., R. Co., Bockelcamp v.
—— v. Chenewith, pp. 1550, 1814, 2037, 2092, 2106, 2173.
—— Weisenberg v.
—— Yersack v.
Lackland v. Chicago, etc., R. Co., pp. 287, 1335.
Lackman v. Union, etc., R. Co., p. 2424.
La Compagnie Generale Transatlantique, Darnana v.
—— Deslions v.
—— Rundell v.
—— Sterling Amusement Co. v.
La Conner, etc., Transp. Co., Lambert v.
—— v. Widmer, p. 3890.
Lacour v. Springfield St. R. Co., p. 1888.
Lacroix, Merchants' Mut. Ins. Co. v.
La Crosse City R. Co., Champane v.
—— Coolidge v.
La Crosse, etc., Packet Co., Germania Ins. Co. v.
Lacy v. Armour Packing Co., p 3590.
Lacy, etc., Co., Wolfe v.
Ladd v. Foster, p. 1740.
—— Hutchings v.
—— v. St. Louis, etc., R. Co. v.
Ladd, etc, Bank v. Commercial State Bank, pp. 362, 384.
Ladshaw v. Southern Railway, p 2860.
La Due, Baltimore, etc., R. Co. v.
Ladue v. Griffith, pp. 730, 772 885, 3369, 3370.
Lady Franklin, The.
Lady Pike, The.
Lafaye v. Harris, p. 258.
Lafayette v. Wells Fargo & Co. Exp., p. 801.
Lafayette, etc., R. Co. v. Pattison, p. 1195.
—— v. Sims, pp. 2125, 2165.
Laffitte v. New Orleans, etc., R. Co., pp. 2056, 2059, 2071.
Lafflin v. Buffalo, etc., R. Co., pp 1783, 1910, 2229.
Laffrey v. Grummond, p. 3174.
La Floridienne v. Seaboard, etc., Railway, pp. 121, 137.
La Floridienne, etc., Co., Societ Anonyme v. Atlantic, etc., R. Co., pp. 1198, 1202.
La Gascogne, pp. 4006, 4007.
Lagerkrans, Chicago, etc., R. Co. v.
Laing v. Colder, pp. 1684, 1720, 2299, 2671, 2673, 3161, 3162, 3165.
—— v. Rigney, p. 3792
Laird, Atlantic, etc., R. Co. v.
—— v. Pittsburg Tract. Co., pp. 1650, 2450.
Lake, Wood v.
Lake Erie, etc., R. Co. v. Acres, p. 2565.
—— v. Arnold, pp. 2015, 2020, 2580, 2606, 2615.
—— v. Beals, pp. 1884, 1899, 1900, 1902, 1911, 2585, 2590, 2632.
—— v. Cloes, p. 2470.
—— v. Condon, p. 583.
—— v. Cotton, p. 1740.
—— Dunning v.
—— v. Fix, pp. 2461, 2565, 3085.
—— German v.
—— Grimes v.
—— v. Hatch, 6 O. C. C. 230, 3 O. C. D. 430—pp. 897, 906.
—— v. Hatch, 52 O. St. 408, 39 N. E. 1042, 61 Am. & Eng. R. Cas. 293—p. 901.
—— v. Holland, pp. 969, 975, 1368, 1385, 1430, 1445, 1446, 1450.
—— v. Huffman, pp. 1720, 1878, 2357, 2583.
—— Insurance Co. v.
—— v. James, pp. 1252, 1253.
—— v. Lucas, p. 2621.
—— v. Matthews, pp. 2543, 2623, 2625, 2715.
—— v. Mayo, pp. 1601, 1602, 2467, 2468, 2480.
—— v. Morain, p. 2744.
—— v. Oakes, p. 3394.
—— v. Quisenberry, pp. 1598, 2467.
—— v. Zoffinger, p. 2300.
Lakeland Transp. Co., In re.
Lakeman v. Grinnell, pp. 292, 850, 855, 3934.
Lake Roland, etc., R. Co., State v.
Lake Rowland, etc., R. Co., State v.
Lake Shore Elect. Railway v. Hobart, p. 2694.
Lake Shore Nitro-Glycerine Co. v. Illinois Cent. R. Co., p. 829.
Lake Shore, etc., R. Co., Allen v.
—— Anderson v.
—— v. Anderson, p. 1276.
—— Babcock v.
—— v. Bangs, p. 2263.
—— v. Bennett, pp. 628, 629.
—— Bonfiglio v.
—— Bradley v.
—— v. Brown, pp. 1558, 1757, 1960, 1978, 1992, 2037, 2383, 2399, 2400, 2635.
—— Caldwell v.
—— Chamberlain v.
—— v. Cincinnati, etc., R. Co., p. 20.
—— Cole v.
—— Cousins v.
—— Cross v.
—— v. Davis, pp. 982, 1043, 1046, 1049.
—— Edwards v.
—— Evans v.
—— Fisher v.
—— Foggan v.
—— v. Foster, pp. 200, 201, 277, 285, 3111, 3132, 3135.
—— Frohriep v.
—— Fuller v.
—— Geismer v.
—— v. Gibson, pp. 826, 949, 1271, 1369.
—— Graves v.
—— v. Greenwood, pp. 198, 202, 2435, 2436.
—— Greismer v.
—— Grimshaw v.
—— Haskins v.

Lake Shore, etc., R. Co. v. Herrick, p. 1792.
—— v. Hobart, p. 2581.
—— v. Hochstim, p. 3148.
—— v. Hodapp, pp. 562, 756.
—— Hoffman v.
—— v. Hotchkiss, pp. 757, 1568, 1712, 1714, 1766, 1792.
—— Interstate Commerce Comm. v.
—— v. Kelsey, 180 Ill. 530, 54 N. E. 608—pp. 199, 1953, 2122, 2123, 2206, 2345.
—— v. Kelsey, 76 Ill. App. 613—p. 2167.
—— Kinner v.
—— Kinsley v.
—— Knapp v.
—— v. Luce, p. 554.
—— Luken v.
—— McCaslin v.
—— McWilliams v.
—— Morgan v.
—— v. Mortal, pp. 191, 1612, 1631, 1633, 2409, 2451, 2458.
—— v. National Live Stock Bank, 178 Ill. 506, 53 N. E. 326—pp. 294, 295, 308, 477, 478, 483, 484, 1016, 1215.
—— v. National Live Stock Bank, 59 Ill. App. 451—pp. 555, 1245.
—— v. Ohio, pp. 34, 97, 3447, 3481, 3497, 3502, 3511, 3512, 3513, 3515, 3519, 3523.
—— Ohio Dairy Co. v.
—— v. Orndorff, pp. 2420, 2434, 2492.
—— Perego v.
—— v. Perkins, pp. 210, 236, 237, 238, 242, 243, 244, 931, 1018, 1451, 1459, 1460.
—— v. Peterson, pp. 2531, 2552, 2664.
—— Pfaffenback v.
—— v. Pierce, pp. 203, 1666, 1861, 1862, 2455, 2482.
—— Pitcher v.
—— v. Prentice, pp. 2034, 2413, 3073, 3087.
—— Robinson v.
—— Rolfe v.
—— v. Rosenzweig, pp. 198, 199, 1544, 1560, 2122, 2477, 2503.
—— v. Salzman, pp. 1959, 1972.
—— Schofield v.
—— Scofield v.
—— v. Scofield, pp. 1188, 1190, 1192.
—— Shelton v.
—— Smith v.
—— v. Smith, pp. 22, 34, 38, 46, 58, 59, 60, 61, 115, 3513, 3668.
—— Spavin v.
—— Spears v.
—— Stevens v.
—— v. Teeters (Ind.), 74 N. E. 1014—p. 2292.
—— v. Teeters, 166 Ind. 335, 24 R. R. R. 36, 47 Am. & Eng. R. Cas., N. S., 36, 77 N. E. 599, 5 L. R. A., N. S., 425—pp. 1567, 1936, 2098, 2216, 2651.
—— Van Orman v.
—— Wallace v.
—— v. Ward, 135 Ill. 511, 26 N. E. 520—pp. 1767, 2732.
—— v. Ward, 35 Ill. App. 423—pp. 1852, 2723.
—— v. Warren, p. 3198.
—— Wood v.
Lake Shore, etc., Railway v. Gibson, p. 1347.
Lake St. Elevated R. Co. v. Craig, p. 2268.
—— Sandy v.
—— v. Sandy, p. 1680.
Lake St., etc., R. Co. v. Burgess, pp. 1518, 1519, 2874.
—— v. Gormley, p. 1539.
—— v. Shaw, pp. 2655, 2656.
Lake, etc., R. Co. v. Burgess, p. 2145.
—— Spears v.
Lakewood, Combs v.
Lakin v. Oregon Pac. R. Co., pp. 2036, 2038, 2076, 2163, 2739.
—— v. South Side Elevated R. Co., p. 1743.
—— v. Willamette, etc., R. Co., p. 2074.
La Kroma, The.
Lalande v. His Creditors, p. 359.
Lamar v. New York, etc., Nav. Co., p. 233.
—— Sawyer v.
La Matte v. Angl, p. 1173.
Lamb v. Camden, etc., Transp. Co. (N. Y.), 2 Daly 454—pp. 211, 775, 896, 897, 898, 907, 996, 1000, 1001, 3299, 3345, 3346, 3377.
—— v. Camden, etc., Transp. Co., 46 N. Y. 271, 7 Am. Rep. 327—pp. 1037, 1041, 1047, 3345, 3377.
—— v. Camden, etc., R. Co., p. 325.
—— v. Chicago, etc., R. Co., pp. 822, 855, 3415.
—— v. Parkman, p. 765.
—— St. Louis, etc., R. Co. v.
—— v. Western R. Corp., p. 917.
Lambert, Atchison, etc., R. Co. v.
—— v. Benner, p. 825.
—— v. La Conner, etc., Transp. Co., p. 3992.
—— Natchez, etc., R. Co. v.
—— Rich v.
—— v. Robinson, p. 2629.
Lambert-Murry Co. v. Southern Exp. Co., pp. 656, 658.
Lamberton, Sanderson v.
Lambeth v. North Carolina R. Co., pp. 1715, 2126, 2255, 2256, 2673.
Lambkin, San Antonio Tract. Co. v.
Lamkin, Alabama, etc., R. Co. v.
Lamline v. Houston, etc., R. Co., pp. 2869, 2967.
Lamm, Cleveland, etc., R. Co. v.
Lammert v. Chicago, etc., R. Co., pp. 2522, 2542.
Lamont & Co. v. Nashville, etc., R. Co., pp. 503, 619, 744, 745, 746, 747, 750, 871, 3902.
Lamphear v. Buckingham, p. 2089.
Lampkin v. Louisville, etc., R. Co., pp. 2043, 2045, 2578, 2608, 2609.
Lampkins v. Vicksburg, etc., R. Co., p. 2664.
Lamping, Bingham v.
Lampley, Alabama, etc., R. Co. v.
—— Central R., etc., Co. v.
Lampman, Chicago, etc., R. Co. v.
Lamson v. Great Northern R. Co., pp. 1883, 2821, 2845, 2868.
Lanata v. The Henry Grinnell, p. 520.
Lancashire & Y. Ry. Co., Nicholson v.
Lancashire Ins. Co., Illinois Cent. R. Co. v.
Lancashire, etc., R. Co., Bolton v.
—— Gee v.
—— Lees v.
—— Mitchell v.
—— Nicholson v.
Lancaster v. Southern Railway, p. 3066.
Lancaster Mills v. Merchants' Cotton-Press Co., pp. 481, 777, 894, 958, 1023, 1030.
—— Thomas v.
Lancaster R. Co., Muschamp v.
Lancaster, etc., St. R. Co., Moss v.
Lancer v. Anchor Line, p. 3462.
Lanci v. Boston Elev. R. Co., p. 2862.
Lancon v. Morgan's, etc., Steamship Co., pp. 1721, 2219, 2800.
Land v. Wilmington, etc., R. Co., p. 149.
Landa v. Holck, pp. 573, 579.
—— v. Lattin, pp. 357, 370, 371, 374, 377, 381, 395, 396, 397, 400.
Landa, Mercantile Banking Co. v.
—— Smith v.
Landauer, Chicago, etc., R. Co. v.
Landauer & Bro. v. Cochran, etc., Co., p. 1219.
Lander, Ohio Valley R. Co. v.
—— Ohio, etc., R. Co. v.
Landers Louisville, etc., R. Co. v.
—— v. Staten Island K. Co., p. 1589.
Landes v. Pacific Railroad, pp. 292, 410, 488.
Landis, Western Maryland R. Co. v.
Landon, El Paso, etc., R. Co. v.
—— v. Proctor, p. 278.
Landreth, American, etc., Ins. Co. v.
Landrigan v. State, pp. 190, 192.
Landrum, Birmingham R., etc., Co. v.
Landsberg v. Dinsmore, pp. 767, 889, 891, 946, 987.
Lane v. Boston, etc., R. Co., pp. 586, 831, 894, 908, 910, 918.
—— v. Chadwick, p. 572.
—— v. Choctaw, etc., R. Co., pp. 1936, 1951, 1953, 1954, 2211, 2334, 2630, 2888.
—— v. Cotton, p. 211.
—— v. East Tennessee, etc., R. Co., pp. 1602, 2435, 2436, 2468.
—— Inslee v.
—— International, etc., R. Co. v.
—— Knoxville Tract. Co. v.
—— v. Newdigat, p. 3658.
—— v. Old Colony, etc., R. Co., p. 1166.
—— v. Penniman, pp. 3944, 3945.
—— Peoria, etc., R. Co. v.
—— v. Robinson, p. 1239.
—— v. Spokane Falls, etc., R. Co., pp. 1990, 2335, 2891.
Lang v. Brady, p. 806.
—— Chesapeake, etc., R. Co. v.
—— v. Interborough Rapid Transit Co., pp. 1902, 2290.
—— v. Pennsylvania R. Co., p. 735.
Langan, Union Pac. R. Co. v.
Langbehn, Texas & P. Ry. Co. v.
—— Texas, etc., R. Co. v.
Langdon v. Howells, p. 1573.
—— Illinois Cent. R. Co. v.
—— v. New York, etc., R. Co., p. 1198.
—— Norfolk, etc., R. Co. v.
—— Pennsylvania R. Co. v.
—— v. Pennsylvania R. Co., 186 Fed. 237—pp. 3809, 3813.
—— v. Pennsylvania R. Co., 194 Fed. 486—pp. 3649, 3688, 3826.
Lange v. Metropolitan St. R. Co., p. 2312.
Langford, The.
Langin v. New York, p. 2872.
Langley, Indiana Union Tract. Co. v.
—— v. Metropolitan St. R. Co., p. 2691.
Langlois, Montana Union R. Co. v.
Langstaff v. Stix, pp. 1234, 1235.
Langton, Marquette v.
Langworthy v. New York, etc., R. Co., p. 770.
Lanning, Southern R. Co. v.
Lannum, Wabash R. Co. v.
Lans, Bornstein v.
Lansberg v. Dinsmore, p. 3283.
Lansing v. Coney Island, etc., R. Co., p. 2892.
—— v. New York, etc., R. Co., p. 1066.
—— Potter v.
Lansing City Elect. R. Co., Howell v.
Lantz, Michigan Cent. R. Co. v.
—— Michigan, etc., R. Co. v.
Lanin v. Northwestern Elevated R. Co., pp. 1510, 1770.

Lapointe v. Middlesex R. Co., pp. 2392, 2403.
Laporte v. Wells Fargo & Co.'s Exp., pp. 907, 908, 913.
La Prelle, Galveston, etc., R. Co. v.
Larabee Flour Mills Co., Missouri Pac. R. Co. v.
—— v. Missouri Pac. R. Co., pp. 22, 89, 251, 252, 256, 257, 3470, 3485, 3540.
Laraway, De Mott v.
Lardner, Murray v.
Larkin, Burton v.
—— v. Chicago, etc., R. Co., pp. 2765, 2895, 2953.
—— Philadelphia, etc., R. Co. v.
Larned v. Central R. Co., pp. 3144, 3171.
—— St. Louis, etc., R. Co. v.
Larsen v. Allan Line Steamship Co., pp. 3997, 3983, 4031.
—— v. Oregon, etc., R. Co., pp. 946, 977, 978, 1052, 1070, 1081.
Larson v. Boston Elev. R. Co, pp. 1971, 2353, 2758.
—— v. Chase, pp. 1254.
—— v. Chicago, etc., R. Co., pp. 2150, 2157, 2365, 2917.
—— v. Minneapolis, etc., R. Co., pp. 1927, 2362, 2906.
Lasch, Dallas, etc., St. R. Co. v.
Lashinsky v. Russian Co., p. 466.
Lashley, Falutt v.
Lasker v. Third Ave. R. Co., p. 1595.
Lasky v. Southern Exp. Co., pp. 1088, 1112, 1121, 1123, 1128.
Latham v. Boston, etc., R. Co., p. 2091.
—— Pecos River R. Co. v.
—— v. Spragins, pp. 385, 392, 398.
Latimer, Illinois Cent. R. Co. v.
—— v. Metropolitan St. R. Co., p. 2603.
—— v. St. Louis, etc., R. Co., pp. 1695, 1702, 1801, 2908.
Latour v. Southern Railway, pp. 1609, 1669, 1673, 1674, 1677.
La Tourette, Cleveland, etc., R. Co. v.
Latta, Alsberg, etc., Co. v.
—— Chicago, etc., R. Co. v.
—— v. Chicago, etc., R. Co., pp. 432, 731, 1395.
——— v. New Orleans, etc., R. Co., pp. 779, 846.
Latta Martin Pump Co. v. Southern R. Co., p. 175.
Lattin, Landa v.
Lau, Missouri Pac. R. Co. v.
Laub v. Chicago, etc., R. Co., p. 1707.
Laubheim v. Netherland Steamship Co., p. 2078.
Lauchtamacher v. Boston Elev. R. Co., pp. 2365, 2858.
Lauderbach, People's Pass. R. Co. v.
Laughlin v. Atlantic City R. Co., p. 2083.
—— v. Chicago, etc., R. Co., pp. 2395, 3183.
Laughlin Bros. Co. v. Philadelphia etc., R. Co., p 754.
Laughton, Watkinson v.
Laura, The.
Laurel Cotton Mills, Gulf, etc., R. Co. v.
—— v. Gulf, etc., R. Co., pp. 463, 3632, 3633, 3686, 3701, 3704, 3758.
Laurel Mercantile Co. v. Mobile, etc., R. Co., p. 1477.
Laurel, etc., R. Co. v. West Virginia Transp. Co., pp. 4, 35, 36, 38, 62.
Laurence, St. Louis, etc., R. Co. v.
Laurens R. Co., Kyle v.
Laurent v. Vaughn, pp. 473, 595, 849, 855.
Lauricella, Mexican Cent. R. Co. v.
Lausatt, Jacoby v.
Lauterer v. Manhattan R. Co., pp. 1700, 2150, 2157.
Laux, Hahl v.
Lavarrello, United States v.
Lavary, Farley v.
Laveille, Louisiana Nat. Bank v.
Laverty v. Interurban St. R. Co., p. 1996.
Lavin, Chesapeake & O. Ry. Co. v.
—— Chesapeake, etc., R. Co. v.
Lavis v. Wisconsin Cent. R. Co., pp. 2219, 2585, 2691.
Law v. Botsford, p. 3884.
—— v. Hatcher, pp. 364, 485.
—— v. Illinois Cent. R. Co., p. 2485.
—— v. New York City R. Co., p. 1996.
—— St. Louis, etc., R. Co. v.
—— Simmons v.
Lawler, Atchison, etc., R. Co. v.
—— Louisville, etc., R. Co. v.
Lawn, Indianapolis St. R. Co. v.
Lawrence, Chicago Union Tract. Co. v.
—— v. Green, pp. 2128, 2693.
—— v. Kaul Lumber Co., pp. 1545, 1548, 1558, 1564, 1752, 2629.
—— v. Lieutenant Admiral Callomberg, pp. 765, 766.
—— v. McGregor, pp. 303, 328, 333, 510, 511, 728, 781, 871, 3888, 3902, 3914.
—— v. Milwaukee, etc., R. Co., pp. 211, 242.
—— v. Minturn, pp. 349, 351, 364, 477, 743, 3899, 3900, 3903, 3905, 3906, 3918, 3919, 4021, 4022.
—— v. New York, etc., R. Co., pp. 986, 1006.
—— Pullman Palace Car Co. v.
—— v. Pullman's Palace Car Co., p. 3213.
—— St. Louis, etc., R. Co. v.
—— Texas, etc., R. Co. v.
—— v. Winona, etc., R. Co., pp. 885, 886, 3264, 3287, 3289.
Lawrence Furnace, Iron R. Co. v.
Lawrenceburgh, etc., R. Co. v. Montgomery, p. 2125.
Lawshe v. Tacoma R., etc., Co., pp. 1650, 1853, 2457, 2459.
Lawson v. Chicago, etc., R. Co., pp. 2217, 2388.
—— v. Conolly, p. 8.
—— Indianapolis Tract., etc., Co. v.
—— Louisville, etc., R. Co. v.
—— v. Seattle, etc., R. Co., p. 2389.
—— Southern Bldg., etc., Ass'n v.
Lax v. Forty Second St., etc., R. Co., p. 2352.
Lay v. Chicago, etc., R. Co., pp. 1303, 1312.
—— Hodgson v.
Layne v. Chesapeake, etc., R. Co., 67 S. E. 1103, 66 W. Va. 607—pp. 2035, 2039, 2054, 2075, 2960.
—— v. Chesapeake, etc., R. Co., 68 W. Va. 213, 69 S. E. 700, 31 L. R. A., N. S., 414, 39 R. R. R. 143, 62 Am. & Eng. R. Cas., N. S., 143—pp. 1524, 1526, 1527, 1529, 1533, 1537, 1538, 1539, 2770, 2865.
Layton & Sons v. Charleston, etc., R. Co., pp. 564, 899, 903.
Lazard v. Merchants', etc., Transp. Co., pp. 339, 430.
Lazarus v. Barber, 124 Fed. 1007—p. 3904.
—— v. Barber, 136 Fed. 534, 69 C. C. A. 310—pp. 3922, 3927.
—— Louisville, etc., R. Co. v.
Lazer v. Chicago City R. Co., pp. 1762, 2699.
Leach, Cincinnati Tract. Co. v.
—— v. New York, etc., R. Co., pp. 235, 439.
—— v. St. Louis, etc., R. Co., p. 1757.
Leachman, Capps v.
Leadbetter, Hill v.
Leader v. Northern R. Co., p. 849.
Leaf, Louisville, etc., Tract. Co. v.
Leake, International, etc., R. Co. v.
Leakey, Texas, etc., R. Co. v.
Leamons, St. Louis, etc., R. Co. v.
Leapley, Baltimore, etc., R. Co. v.
Leary v. Fitchburg R. Co., pp. 2317, 2670.
—— v. United States, pp. 3864, 3865.
Leas v. Quincy, etc., R. Co., pp. 948, 973, 1062.
Leask v. Scott, pp. 1221, 1224.
Leasum v. Green Bay, etc., R. Co., pp. 2126, 2216.
Leathers v. Aiken, p. 3586.
—— Carson v.
—— Hirsch v.
—— Richmond, etc., R. Co. v.
—— Stricker v.
—— Work v.
Leatherwood, Gulf, etc., R. Co. v.
Leavens v. American Exp. Co., pp. 319, 957.
Leavenworth, Ewing v.
—— v. Ewing, pp. 3549, 3550, 3551, 3577.
Leavenworth County Comm'rs v. Chicago, etc., R. Co., p. 3484.
Leavenworth Elect. R. Co. v. Cusick, pp. 1721, 1898,, 1899, 1901, 2076, 2077.
Leavenworth, etc., R. Co. v. Maris, pp. 530, 531, 896, 900, 902, 905, 907, 910.
Leavitt, Curtis v.
—— Greenfield Bank v.
Le Barron v. East Boston Ferry Co., pp. 11, 1750, 1838.
—— Thomas v.
Leberman v. New Orleans, etc., Co., p. 492.
Le Blanc v. Sweet, pp. 2671, 3994, 3998.
Le Blanche v. London, etc., R. Co., pp. 1670, 1673, 1674.
Lebov v. Consolidated R. Co., p. 2518.
Leclaire v. Tacoma R., etc., Co., pp. 1529, 1678, 3060.
Lecocq, Platt v.
Le Coteur v. Lordon & S. W. R. Co., p. 3147.
Ledbetter, Anniston, etc., R. Co. v.
—— Chicago, etc., R. Co. v.
—— Western, etc., R. Co. v.
Le Deau v. Northern Pac. R. Co., pp. 1809, 2675.
Leder Bros. St. Louis, etc., R. Co. v.
Ledger-Standard Co., Fargo v.
Le Duc v. St. Louis, etc., R. Co., pp. 1789, 1801, 1870, 1874.
Lee, American Nat. Bank v.
—— Baltimore, etc., R. Co. v.
—— Birmingham R., etc., Co. v.
—— v. Bowen, pp. 378, 3274.
—— v. Burgess, pp. 236, 239, 240, 770.
—— Chicago, etc., R. Co. v.
—— City R. Co. v.
—— East Line, etc., R. Co. v.
—— East Tennessee, etc., R. Co. v.
—— Edwards v.
—— v. Fidelity Storage, etc., Co., pp. 7, 499, 521, 601, 603.
—— Faust v.

Lee v. Grand Trunk R. Co., p. 3125.
—— Gulf, etc., R. Co. v.
—— Houston, etc., R. Co. v.
—— v. International, etc., R. Co., pp. 1766, 2288.
—— v. Kimball, pp. 1221, 1224.
—— Louisville, etc., R. Co. v.
—— v. Marsh, pp. 946, 1299, 1349.
—— v. New Orleans, etc., R. Co., pp. 1946, 1947, 2662.
—— Northern Pac. R. Co., v.
—— v. Publishers, etc., Co., 137 Mo. 385, 38 S. W. 1107, p. 2883.
—— v. Publishers, etc., Co., 56 S. W. 458, 155 Mo. 610—pp. 2869, 2883.
—— Pullman Palace Car Co. v.
—— v. Raleigh, etc., R. Co., pp. 753, 946, 1344.
—— v. Rhode Island Co., p. 2154.
—— St. Louis, etc., R. Co. v.
—— v. St. Louis, etc., R. Co., p. 654.
—— v. Salter, p. 1161.
—— Smith v.
—— Southern R. Co. v.
—— Texas, etc., R. Co. v.
—— The R. E.
—— v. Wabash R. Co., pp. 1298, 3335.
Leech, Chouteaux v.
—— v. New York, etc., R. Co., p. 569.
Leech & Co., Chouteaux v.
Leek v. Northern Pac. R. Co., pp. 2409, 3080.
Leeke v. Gulf, etc., R. Co., pp. 2888, 2897.
Lees v. Lancashire, etc., R. Co., p. 221.
Lefebure v. American Exp. Co., pp. 319, 323, 324.
Leffingwell v. Warren, p. 3570.
Leflar, St. Louis, etc., R. Co. v
Leftwich, St. Louis, etc., R. Co. v.
—— Wickham v.
Legge v. New York, etc., R. Co., pp. 1538, 1789.
Leggett v. Western New York, etc., R. Co., pp. 1884, 2268.
Le Gierse, Galveston, etc., R. Co. v.
Lehane v. Butte Elect. R. Co., pp. 1890, 2820, 2821.
Lehberger v. Public Service R. Co., p. 1980.
Lehigh Valley Coal Co. v. Ionia Transp. Co., p. 3960.
Lehigh Valley Railroad, Pavitt v.
Lehigh Valley R. Co., Betts v.
—— Bolles v.
—— Bradley v.
—— Castellucci v.
—— v. Clarke, pp. 3789, 3793.
—— Commonwealth v.
—— Crary v.
—— Dorr v.
—— v. Dupont pp. 2125, 2133, 2390, 2874, 3314, 3315, 3320.
—— Girton v.
—— Griton v.
—— Hartzig v.
—— Herstine v.
—— Interstate Commerce Comm. v.
—— Krieg v.
—— Long v.
—— Loomis v.
—— McGeehan v.
—— Meeker v.
—— v. Mecker, pp. 3683, 3776, 3826.
—— Merritt v.
—— Minor v.
—— Murray v.
—— Naylor & Co. v.
—— Nelson v.
—— Neustadt v.
—— v. Pennsylvania, pp. 3418, 3421, 3422, 3439, 3491, 3560, 4036, 4054.
Lehigh Valley R. Co. v. Rainey, p. 3685.
—— Stewart v.
—— United States v.
—— v. United States, 110 C. C. A. 513, 188 Fed. 879—pp. 3744, 3761, 3774.
—— v. United States, 204 Fed. 986—p. 3802.
Lehigh Valley Transp. Co. v. Pillsbury-Washburn Flour Mills Co., pp. 3257, 3331.
—— v. Post Sugar Co., 228 Ill. 121, 81 N. E. 819—p. 3288.
—— v. Post Sugar Co., 128 Ill. App. 600—p. 326.
Lehigh, etc., R. Co., Redner v.
Lehman v. Louisiana, etc., R. Co., p. 1884.
—— Philadelphia, etc., R. Co. v.
Lehman, etc., Co. v. Central R., etc., Co., pp. 315, 355.
—— v. Morgan's Louisiana, etc., Co., pp. 739, 821, 825.
—— Young v.
Lehmer v. Metropolitan St. R. Co., p. 2657.
—— v. Pittsburgh R. Co., pp. 2128, 2262, 2304, 2313.
Lehr v. Steinway, etc., R. Co., pp. 1951, 2183, 2887.
Leibengood v. Missouri, etc., R. Co., p. 3512.
Leibold, Missouri, etc., R. Co. v.
Leibs Bros. & Co., Schneider v.
Leigh, St. Louis, etc., R. Co. v.
—— v. Smith, p. 3136.
Leigh Valley R. Co., Long v.
Leisy v. Hardin, pp. 3418, 3427, 3429, 3440, 3538, 3539.
Leitch v. Union R. Transp. Co., pp. 320, 323, 945, 986, 954, 966, 1066.
Leiter, Northwestern Transp. Co. v.
Leland v. Chicago, etc., R. Co., pp. 910, 917.
—— Nelson v.
Leloup v. Mobile, pp. 3472, 3550, 3552, 3555, 3571, 3572, 3590.
Lemay v. Springfield St. R. Co., p. 2637.
Lembeck v. Jarvis, etc., Cold Storage Co., 68 N. J. Eq. 492, 59 Atl. 360—p. 1165.
—— v. Jarvis, etc., Cold Storage Co., 69 N. J. Eq. 781, 63 Atl. 257—p. 1165.
Lemcke, Meyer v.
Lemery v. Great Northern R. Co., pp. 1526, 1527, 1528.
Lemke v. Chicago, etc., R. Co., pp. 897, 901, 905, 907.
Lemmon v. Hanley, p. 2696.
Lemon v. Chanslor, pp. 1564, 1749, 1760, 2692.
—— v. Pullman Palace Car Co., pp. 3201, 3204, 3205, 3240.
Lemont v. New York, etc., R. Co., pp. 573, 577.
—— v. Washington, etc., R. Co., pp. 1497, 2419.
Lenahart v. Cooper, p. 1217.
Lena Lumber Co., Chicago, etc., R. Co. v.
Lence, Illinois Cent. R. Co. v.
Lendsberg v. Dinsmark, p. 565.
Lengelsen v. McGregor, p. 2634.
Lengsfield v. Jones, pp. 799, 829, 840.
Lenhart, Pennsylvania Co. v.
Lenix v. Missouri Pac. R. Co., p. 2278.
Lennon v. Chicago, etc., R. Co., p. 2361.
—— v. Illinois Cent. R. Co., pp. 267, 270, 271, 3136.
—— In re.
Lennox, Cutler v.
—— The.
Lenord v. Chicago, etc., R. Co., p. 1102.
Lent v. New York, etc., R. Co., 120 N. Y. 467, 24 N. E. 653, 44 Am. & Eng. R. Cas. 373—pp. 1768, 2224.
—— v. New York, etc., R. Co., 54 N. Y. Super. Ct. 317, 8 N. Y. St. Rep. 93—p. 2884.
Lentz v. Flint, etc., R. Co., p. 1227.
Leo v. St. Paul, etc., R. Co., pp 843, 3394, 3398.
Leob, Fire Ass'n v.
Leonard v. Brooklyn Heights R. Co., pp. 1686, 1844.
—— Chicago Union Tract. Co. v.
—— v. Chicago, etc., R. Co., 54 Mo. App. 293—pp. 451, 728, 1315, 1420.
—— v. Chicago, etc., R. Co., 57 Mo. App. 366—p. 1315.
—— v. Fitchburg R. Co., p. 1464.
—— v. Hendrickson, pp. 728, 825.
—— v. St. Louis Trans. Co., p. 2417.
—— v. Southern Pac. Co., p. 2735.
—— v. Whitcomb, 7 Am. & Eng. R. Cas., N. S., 520—p. 211.
—— v. Whitcomb, 70 N. W. 817, 95 Wis. 646—p. 1368.
Leonard Seed Co. v. Cleveland, etc., R. Co., p. 688.
Leonhardt, Baltimore, etc., Turnpike Road v.
Leovy v. United States, p. 3419.
Lerch, Evansville Elect. R. Co. v.
Lerner v. Public Service R. Co., pp. 2534, 2548.
Leroy, Wade v.
Lesassier v. Southwestern, pp. 381, 1216, 1225.
Lesem, American Exp. Co. v.
Lesinsky v. Great Western Despatch, p. 798.
Leslie v. Atchison, etc., R. Co., pp. 2100, 2124, 2319.
—— Houston, etc., R. Co. v.
—— v. Jackson, etc., Tract. Co., p. 2900.
—— v. Wabash, etc, R. Co., pp. 1733, 1877, 2249.
Lessard v. Boston, etc., Railroad, p. 3163.
Lesser, St. Louis, etc., R. Co. v.
—— St Louis, etc., Railway v.
Lester, Culver v.
—— v. Delaware, etc., R. Co., pp. 546, 552, 561, 564, 580.
—— v. McDowell, p. 480.
—— San Antonio, etc., R. Co. v.
—— Steel v.
Letcher, Central R., etc., Co. v.
—— Eddy v.
Letts v. Wabash R. Co., pp. 1282, 1372, 1412, 1413, 1421, 1424, 1427.
Lette-Spencer Grocery Co. v. Missouri Pac. R. Co., pp. 573, 1206, 1207, 1212, 1219, 1232, 1233.
Leu v. St. Louis Trans. Co., 106 Mo. App. 329, 80 S. W. 273—p. 2333.
—— v. St. Louis Trans. Co., 110 Mo. App. 458, 85 S. W. 137—p. 2333.
Leuckhart v. Cooper, p. 1248.
Levan v. Atlantic, etc., R. Co., pp. 2456, 2775, 2852, 3026, 3032.
Levensohn v. Cunard Steamship Co., p. 4009.
Leveret v. Shreveport Belt R. Co., pp. 2120, 2227, 2680.
Levering v. Union Transp., etc., Co., pp. 962, 979, 980.
Levey & Co., Louisville, etc., Mail Co. v.
Levi v. Brooks, p. 2629.
—— Buckman v.
—— Gulf, etc., R. Co. v.
—— L. N. R. Co. v.
—— v. Lynn, etc., R. Co., p. 769.
—— Missouri Pac. R. Co. v.

Levi v. Missouri, etc., R. Co., pp. 3173, 3174.
—— Steamboat Baltimore v.
Levidow v. Starin, pp. 3999, 4001.
Levien v. Webb, pp. 3208, 3239.
Levin, In re.
—— v. Philadelphia, etc., R. Co., pp. 2674, 2858.
Levine v. Brooklyn, etc., R. Co., p. 2699.
—— Missouri, etc., R. Co. v.
Levins v. New York, etc., R. Co., pp. 3126, 3145, 3147.
Levinson v. Texas, etc., R. Co., 17 Tex. Civ. App. 617, 43 S. W. 901—pp. 1616, 1633, 1639.
—— v. Texas, etc., R. Co. (Tex.), 43 S. W. 1032—p. 1633.
Levinston, Omaha, etc., Bridge Co. v.
Levois v. Gale, pp. 759, 763.
Levy, Benjamin v.
—— v. Campbell (Tex.), 19 S. W. 438—pp. 1712, 1740, 1812, 1821, 1841, 1978.
—— v. Campbell (Tex.), 20 S. W. 196—p. 2772.
—— G., C. & S. F. R. Co. v.
—— v. Louisville, etc., R. Co., p. 511.
—— v. New York City R. Co., p. 2814.
—— v. Providence, etc., Steamship Co., p. 4006.
—— v. Southern Exp. Co., pp. 946, 958, 1008, 3377, 3382.
—— Southern R. Co. v.
—— Toledo, etc., R. Co. v.
—— v. Weir, pp. 488, 492, 568.
Levy's Son & Co. v. Gibson Line, p. 4066.
Lewark v. Norfolk, etc., R. Co., pp. 642, 675, 848, 859.
Lewellen Bros., Missouri, etc., R. Co. v.
—— St. Louis, etc., R. Co. v.
Lewine, Gulf, etc., R. Co. v.
Lewis v. Bowling Green R. Co., p. 1590.
—— v. Chesapeake, etc., R. Co., pp. 284, 970, 1015, 3287, 3301, 3362.
—— Chicago, etc., R. Co. v.
—— v. Delaware, etc., Canal Co., pp. 2065, 2249, 2906.
—— Finley v.
—— v. Flint, etc., R. Co., p. 1707.
—— v. Great Western R. Co., p. 1118.
—— v. Hancock, pp. 3938, 3944, 3945.
—— v. Houston Electric Co., pp. 1515, 2288, 2289.
—— Houston, etc., R. Co. v.
—— International, etc., R. Co. v.
—— v. London, etc., R. Co., p. 1926.
—— Louisville, etc., R. Co. v.
—— v. Louisville, etc., R. Co., pp. 727, 732, 749, 765, 872, 896, 904, 959.
—— v. M'Kee, p. 365.
—— v. Mason, p. 1211.
—— Montgomery St. R. Co. v.
—— v. New York Cent. R. Co., pp. 1604, 2428.
—— v. New York Sleeping Car Co., pp. 3215, 3216, 3217, 3218, 3221, 3223, 3232, 3238.
—— Northern Pac. R. Co. v.
—— v. Pennsylvania R. Co., 59 Atl. 1117, 71 N. J. L. 339—pp. 1311, 1339, 1365, 1455.
—— v. Pennsylvania R. Co., 69 Atl. 821, 220 Pa. 317, 18 L. R. A., N. S., 279, 13 Am. & Eng. Ann. Cas. 1142—p. 1580.
—— v. Portland R., etc., Co., p. 2938.
—— Reed Lumber Co. v.
—— v. Richmond, etc., R. Co., p. 521.
—— St. Louis, etc., R. Co. v.
Lewis v. Salena, etc., R. Co., p. 482.
—— v. Sharvey, pp. 1237, 1243.
—— Smith v.
—— v. Smith, pp. 281, 833, 1331, 3926.
—— Southern R. Co. v.
—— v. Texas, etc., R. Co., p. 1755.
—— v. The Success, p. 848.
—— v. Western R. Corp., pp. 530, 788.
—— v. Western, etc., R. Co., pp. 1622, 2446.
Lewis & Co. v. Ludwick, pp. 729, 733, 735, 750, 751, 752.
Lewis, etc., Co. v. Louisville, etc., R. Co., pp. 908, 909, 915.
—— v. Small & Co., pp. 394, 395, 396, 397.
Lewisohn v. National Steamship Co., p. 940.
Lewiston, etc., R. Co., Cameron v.
—— Conway v.
—— White v.
Lewiston, etc., Railway, White v.
Lewiston, etc., St. R. Co., Cameron v.
Lewiston, etc., St. Railway, Blair v.
—— Cameron v.
—— Stone v.
Lewy, Aststrup v.
Lewyt v. Dry Dock, etc., R. Co., p. 1574.
Lexington, Adams Exp. Co. v.
Howe v.
Lexington Grocery Co. v. Southern R. Co., pp. 151, 155.
Lexington R. Co. v. Britton, p. 1893.
—— v. Cozine, p. 3070.
—— v. Herring, pp. 1516, 1518, 2297, 2332, 2357, 2752.
—— v. Johnson, pp. 2950, 3068.
—— v. Lowe, pp. 1884, 2225, 2926.
—— v. O'Brien, p. 3031.
—— Sandlin v.
Lexington, etc., R. Co. v. Lyons, pp. 2459, 2462, 2713, 3083, 3106.
Lexington, etc., St. R. Co., Keefe v.
Leyland & Co., Insurance Co. v.
Leyland Shipping Co., Furness, etc., Co. v.
Leyser v. Chicago, etc., R. Co., pp. 1613, 2447, 2481, 2483.
Leysor, Merchants' Despatch Transp. Co. v.
Lezinsky v. Metropolitan St. R. Co., pp. 2059, 2071.
Libby v. Ingalls, p. 571.
—— v. Maine Cent. R. Co., pp. 1575, 1680, 1684, 1723, 1746, 1810, 1842, 1844.
—— v. St. Louis, etc., R. Co., pp. 948, 1099, 1303, 1318, 1320, 1329.
License Cases, pp. 3418, 3427, 3429, 3538, 3539.
Lichtenthaler, Lockhart v.
Lichtenhein v. Boston, etc., R. Co., p. 920.
Lickbarrow v. Mason (Eng.), 6 East. 21—p. 371.
—— v. Mason (Eng.), 2 T. R. 63—p. 1221.
—— v. Mason, 27 T. R. (Eng.), 177—pp. 306, 308.
Liddell, Chattanooga, etc., R. Co. v.
Liddicoat, North Birmingham St. R. Co. v.
Lide, Birmingham R., etc., Co. v.
Liefert v. Galveston, etc., R. Co., pp. 521, 1158, 1159.
Lieserowitz, West Chicago St. R. Co. v.
Lieurance, St. Louis, etc., R. Co. v.
Lieutenant Admiral Callomberg, Lawrence v.
Lifeware, Nichols v.
Light v. Detroit, etc., R. Co., p. 2433, 2849, 3104.
—— v. Harrisburg, etc., R. Co., p. 2855.
Lightburne v. Taxing Dist., pp. 3569, 3583.
Lightcap, Pittsburgh, etc., R. Co. v.
Lightfoot Missouri, etc., Railway v.
Lightfoot & Son v. St. Louis, etc., R. Co., p. 744.
Lignante v. Panama R. Co., pp. 3982, 3984.
Ligon v. Missouri Pac. R. Co., pp. 642, 643, 645, 646, 647, 667, 675.
Lillie, Nashville, etc., R. Co. v.
Lillis v. St. Louis, etc., R. Co., pp. 2479, 2482, 2529.
Lilly, Kansas City, etc., R. Co. v.
—— v. St. Louis, etc., R. Co., p. 3055.
Lilly Co. v. Northern Pac. R. Co., pp. 1190, 1191.
Limburger v. Westcott, pp. 962, 964, 1007.
Lin v. Terre Haute, etc., Railroad, pp. 3160, 3168, 3183.
Lin Sing v. Washburn, p. 3566.
Linam, St. Louis, etc., R. Co. v.
Linch v. Pittsburgh Tract. Co., p. 1880.
Lincoln, Kent v.
—— v. New York, etc., Steamship Co., p. 4010.
—— The City of.
Lincoln Grain Co. v. Chicago, etc., R. Co., pp. 575, 597.
Lincoln Rapid Transit Co., Spellman v.
Lincoln Real Estate, etc., Co., Becker v.
Lincoln St. R. Co. v. McClellan, pp. 1746, 1750, 1766, 2403, 2671.
Lincoln Tent, etc., Co. v. Missouri Pac. R. Co., pp. 402, 418.
Lincoln Tract. Co., Bevard v.
—— v. Brookover, p. 2687.
—— v. Heller, pp. 1487, 2668, 2669, 2671.
—— v. McCarty, p. 2859.
—— v. Shepherd, pp. 2673, 2842.
—— Zyrell v.
—— v. Webb, pp. 1487, 2664, 2667, 2668, 2838.
Lincoln, etc., Bldg. Co., Becker v.
Lind, Stoomvart Maatschaffy Nederlandsche Lloyd v.
—— v. United States, p. 3882.
Lindahl, Chicago, etc., R. Co. v.
Lindblom, Northern Commercial Co. v.
Lindell R. Co., Cobb v.
—— Dillon v.
Lindenbaum v. New York, etc., R. Co., pp. 2083, 2700, 2812, 2977.
Linden Oil Co., Smith v.
Lindh v. Great Northern R. Co., pp. 1254, 1257.
Lindley, Atchison, etc., R. Co. v.
—— v. Richmond, etc., R. Co., p. 3395.
—— v. Texas, etc., R. Co., pp. 1857, 1860.
Lindsay v. Chicago, etc., R. Co., p. 2235.
—— v. Jeffray, p. 2642.
—— v. Oregon, etc., R. Co., pp. 2412, 2620, 2622, 2784, 3083, 3085.
—— Railroad Co. v.
—— v. Southern R. Co., pp. 2184, 2251, 2262.
—— v. Wabash R. Co., p. 2626.
Lindsay, etc., Co. v. Mullen, pp. 3418, 3419, 3420, 3479, 3528, 3530, 3547.
Lindsey, Houston, etc., R. Co. v.
—— v. Maine Steamship Co., p. 4034.

Lindsay v. Pennsylvania R. Co., pp. 1575, 1939.
—— v. Wabash R. Co., pp. 2483, 2849.
Lindsley v. Chicago, etc., R. Co., pp. 728, 740, 821, 1036, 1330, 1339, 1388, 1456.
Linhoff v. Seattle, etc., R. Co., p 110.
Link v. Brooklyn Heights R. Co., p. 2300.
Linke, Pullman Co. v.
Linklater v. Howell, p. 3930.
Linseed, 4,885 Bags of.
Linton, Louisville, etc., R. Co. v.
—— Missouri, etc., R. Co. v.
Lipford v. Charlotte, etc., R. Co., pp. 747, 776.
Lipman v. Atlantic, etc., R. Co., pp. 3090, 3670.
Lippman, Central, etc., R. Co. v.
—— v. Pennsylvania R. Co., p. 632.
Lipscomb, Norfolk, etc., R. Co. v.
Liquid Carbonic Co. v. Norfolk, etc., R. Co., pp. 931, 936, 949, 1084, 1085, 1090, 1098, 1100, 1106.
Lister, International, etc., R. Co. v.
Listie, The.
Litt v. Cowley, p. 1246.
Littell, Erie R. Co. v.
Little, Alabama, etc., R. Co. v.
—— v. Boston, etc., Railroad, pp. 815, 817, 818, 821, 827, 848.
—— v. Dusenberry, p. 2089.
—— v. Fargo, p. 1009.
—— Gordon v.
—— Kansas, etc., R. Co. v.
—— v. Semple, p. 539.
—— Texas Mid. Railroad v.
—— Western R. Co. v.
Littlefield v. Fitchburg R. Co., pp. 41, 169.
Littlefield Bros., Hobart & Co. v.
Littlejohn v. Fitchburg R. Co., pp. 1760, 2086.
—— v. Jones, p. 768.
—— v. Richmond, etc., R. Co., p. 2853.
Little Miami R. Co., Check v.
—— Childs v.
—— v. Dodds & Co., pp. 296, 365, 367, 369, 370, 306, 309, 318.
—— Harshman v.
—— v. Washburn, pp. 3269, 3270, 3288.
—— v. Wetmore, pp. 2043, 2044, 2049.
Little Rock R., etc., Co. v. Dobbins, pp. 2784, 3027, 3088, 3102.
—— v. Doyle, p. 1880.
—— v. Goerner, pp. 3018, 3094.
—— Sloan v.
Little Rock Tract., etc., Co. v. Kimbro, pp. 2401, 2402.
—— v. Nelson, pp. 2120, 2518, 2544, 2550, 2295.
—— v. Walker, p. 2070.
—— v. Winn, p. 3094.
Little Rock, etc., Co., Dobbins v.
Little Rock, etc, R. Co. v. Atkins, p. 2249.
—— v. Bruce, p. 530.
—— v. Cavenesse, p. 2936.
—— v. Clark, p. 144.
—— v. Conatser, pp. 228, 263.
—— v. Corcoran, pp. 1036, 1040.
—— v. Cravens, pp. 973, 974.
—— v. Daniels, p. 1194.
—— v. Dean, pp. 1625, 1976.
—— v. East Tennessee, etc., R. Co., pp. 3655, 3809, 3841.
—— v. Eubanks, p. 974.
—— Gibson v.
—— v. Glidewell, pp. 549, 562, 636, 767.
—— v. Hanniford, p. 141.
—— v. Harper, pp. 1036, 1040.
—— v. Harrell, p. 2810.
—— v. Hunter, pp. 285, 288, 884, 3168, 3174.
Little Rock, etc., R. Co. v. Miles, pp. 1567, 1725, 1761.
—— v. Miller Coal Co., p. 598.
—— v. Odom, pp. 3261, 3358.
—— v. Oppenheimer, p. 96.
—— v. Record, pp. 3116, 3127, 3130, 3163, 3176, 3196.
—— v. St. Louis, etc., R. Co., 41 Fed. 559—pp. 3659, 3718.
—— v. St. Louis, etc., R. Co., 59 Fed. 400—pp. 3656, 3660.
—— v. St. Louis, etc., R. Co., 63 Fed. 775, 11 C. C. A. 417, 26 L. R. A. 192—pp. 3656, 3659.
—— v. Talbot, pp. 725, 726, 732, 748, 765.
—— v. Talbot & Co., pp. 958, 1036, 1040, 1047.
—— Taylor Co. v.
—— Taylor & Co. v.
—— Taylor, etc., Co. v.
—— v. Trainer, p. 3013.
Littmann v Dry Dock, etc., R. Co., p. 2196.
Liveright, Pennsylvania Co. v.
Liverpool Dock, Turner v.
Liverpool, etc., Co. v. Benhan, p. 1490.
—— v. Phoenix Ins. Co., p. 1490.
—— v. Saitta, pp. 893, 911.
—— v. Suitter, p. 893.
Liverpool, etc., Steam Co. v. Insurance Co., p. 10, 793.
Liverpool, etc., Steam Co. v. Phenix Ins. Co., pp. 1, 2, 4, 10, 721, 790, 793, 795, 930, 931, 932, 942, 947, 950, 955, 956, 1073, 1151, 3869, 3870, 3897, 3898, 3917, 4017, 4018, 4021, 4023, 4024, 4031, 4057.
Liverpool, etc., Steamboat Co., Redmond v.
Liverpool, etc., Steamship Co., Arend v.
—— Baldwin v.
—— Redmond v.
—— Steers v.
Liversidge v. Berkshire St. R. Co., p. 2421.
Livery v. Philadelphia, p. 742.
Live Stock Co. v. Kansas, etc., R. Co., p. 640.
Livezay, Wall v.
Livingston, Fibel v.
—— Grand v.
—— Hawkinsville, etc., R. Co. v.
—— v. Miller, pp. 484, 573, 574.
—— v. New York, etc., R. Co., pp. 3286, 3299.
—— Russell v.
Livingston County v. First Nat. Bank, p. 3484.
Lizardi, Keene v.
Llano Live Stock Co., Texas, etc., R. Co. v.
Lloyd, Booth v.
—— Chicago & J. E. Ry. Co. v.
—— Georgia R., etc., Co. v.
—— v. Haugh, etc., Transfer Co., pp. 1, 10, 485, 722, 800, 822, 845, 857.
—— Rauch v.
Lobb v. Seattle, etc., R. Co., p. 2701.
Lobdell v. Bullitt, p. 1839.
Lobner v. Metropolitan St. R. Co., pp. 1980, 2309, 2344, 2887.
Lock, Ft. Worth, etc., R. Co. v.
Locke, Mexican Cent. R. Co. v.
Lockhart, East Tennessee, etc., R. Co. v.
—— v. Lichtenthaler, p. 1580.
—— Mollison v.
—— Toledo, etc., R. Co. v.
—— v. Western, etc., R. Co., pp 481, 482, 487, 490.
Locklin v. Beckwith, p. 2560.
Lockman, Indianapolis Tract. Co. v.
—— Indianapolis Tract., etc., Co. v.
Lockport, The.
Lockwood v Boston Elevated R. Co., pp. 1508, 1515, 1516, 1522, 1523, 1709, 1892, 2143, 2328, 2946.
—— New York Cent. R. Co. v.
—— New York, etc., R. Co. v.
—— Railroad Co. v.
Lockwood Mfg. Co., Southern R. Co. v.
Lockwood & Son, Erie R. Co. v.
Loeb, Fire Ass'n v.
—— v. Peters, pp. 380, 381, 382, 387, 391, 1214, 1221, 1225.
—— v. Wabash R. Co., pp. 537, 539.
Loeffler v. Keokuk, etc., Packet Co., pp. 513, 595.
Loescher, Nordemeyer v.
Loeser v. Chicago, etc., R. Co., pp. 1375, 1476.
Loewe, Atchison, etc., R. Co. v.
Loewenberg v. Arkansas, etc., R. Co., p. 521.
Loftis, Pennsylvania Co. v.
Loftus v. Metropolitan St. R. Co., p. 2955.
—— v. Union Ferry Co., p. 1687.
Logan, Central R., etc., Co. v.
—— Cincinnati, etc., R. Co. v.
—— Farmers', etc., Nat. Bank v.
—— v. Hannibal, etc., R. Co., pp. 1612, 1862, 2454, 2639.
—— Louisville, etc., R. Co. v.
—— v. Metropolitan St. R. Co., pp. 2694, 2736, 2968, 2981.
—— v. Pontchartrain R. Co., pp. 1007, 3157, 3158, 3163, 3165.
—— v. Smith, p. 381.
—— Texas, etc., R. Co. v.
—— v. United R. Co., p. 1710.
Logan & Co. v. Central Railroad, pp. 5, 222, 257, 3247, 3271, 3386.
—— Central R. Co. v.
Logan Coal Co. v. Pennsylvania R. Co., pp. 3641, 3642, 3643.
Logan, etc, Co., Chicago, etc., R. Co. v.
Logwood v. Memphis, etc., R. Co., pp. 1944, 1949.
Lohe, Cincinnati, etc., St. R. Co. v.
Lollar, Southern R. Co. v.
Lomas v. New York City R. Co., p. 2691.
Lombard, Lowenstein v.
Lombard, etc., Co., Lowenstein v.
Lombard, etc., Pass. R. Co. v. Christian, p. 2637.
London & N. W. R. Co., Evershed v.
—— Hodkinson v.
London & S. W. R. Co., Le Coteur v.
—— Tyler v.
London Assur. v. Companhia De Moagens Do Barreiro, pp. 320, 3869.
London B. & S. C. R. Co., Ashden v.
—— Richards v.
London K., Caterham R. Co. v.
London R. Co., Butcher v.
—— Hooper v.
London, etc., Fire Ins. Co. v. Rome, etc., R. Co., 144 N. Y. 200, 39 N. E. 79, 43 Am. St Rep. 752—pp. 285, 287, 289, 291, 1280.
—— v. Rome, etc., R. Co., 68 Hun 598, 23 N. Y. S. 231, 52 N. Y. St. Rep. 581—pp. 833, 1010, 1021.
London, etc., R. Co. v. Bartlett, p. 1239.
—— Butcher v.
—— Cahill v.
—— Chilton v.
—— Collett v.
—— Cooper v.
—— Crouch v.
—— Hiort v.
—— LeBlanche v.
—— Lewis v.

London, etc., R. Co., Lovell v.
—— Marriott v.
—— Painter v.
—— Palmer v.
—— Phelps v.
—— Richards v.
—— Simpson v.
—— Weller v.
—— West v.
London, etc., Railway, Maddox v.
Londoner, Union, etc., R. Co. v.
Lone Star Salt Co. v. Texas, etc., R. Co., 90 S. W. 863, 99 Tex. 434, 3 L. R. A., N. S., 828—p. 475.
—— v. Texas, etc., R. Co. (Tex. Civ. App.), 86 S. W. 355—p. 474.
Long v. Abeles & Co., p. 642.
—— v. Chicago, etc., R. Co., 48 Kan. 28, 28 Pac. 977, 53 Am. & Eng. R. Cas. 45, 15 L. R. A. 319, 30 Am. St. Rep. 271—pp. 2018, 2030.
—— v. Chicago, etc., R. Co., 15 Okla. 512, 86 Pac. 289, 6 L. R. A., N. S., 883, 6 Am. & Eng. Ann. Cas. 1005—p. 1256.
—— Galveston, etc., R. Co. v.
—— v. Leigh Valley R. Co., pp. 1578, 2105, 2106.
—— v. Louisville, etc., Packet Co., pp. 728, 733, 766, 776, 1152.
—— Louisville, etc., R. Co. v.
—— Missouri Pac. R. Co. v.
—— v. Mobile, etc., R. Co., pp. 581, 582.
—— v. New York Cent. R. Co., pp. 323, 333, 335, 451, 984, 1016, 1017, 3880, 3881.
—— v. Pennsylvania R. Co., pp. 733, 738, 3186.
—— v. Red River, etc., R. Co., pp. 2748, 2903.
—— San Antonio, etc., R. Co. v.
—— Southern Exp. Co. v.
Longfellow, The.
Long Island R. Co., Barnes v.
—— Baum v.
—— Beecher v.
—— Blaisdell v.
—— Bouker v.
—— Browning v.
—— Bruning v.
—— Compton v.
—— Coppock v.
—— Distler v.
—— Eldridge v.
—— Hogan v.
—— Homiston v.
—— Jonas v.
—— McDonald v.
—— Moffatt v.
—— Mott v.
—— Mullin v.
—— Nelson v.
—— Rogers v.
—— Root v.
—— Stoddard v.
—— Strong v.
—— Tingley v.
—— Valentine v.
—— Werle v.
—— Willis v.
Long & Son, Nashville, etc., Railway v.
Longley, Maine Stage Co. v.
Longmeid v. Holliday, p. 1849.
Longmore v. Great Western R. Co., pp. 1775, 1785.
Loomer, Derwort v.
Loomis v. Jewett, p. 2479.
—— v. Lehigh Valley R. Co., 208 N. Y. 312, 101 N. E. 907—pp. 782, 3734.
—— v. Lehigh Valley R. Co., 132 N. Y. S. 138, 147 App. Div. 195—p. 3743.
—— v. Wabash, etc., R. Co., pp. 417, 581.
—— Wallace v.
Loon, The.
Loonan Lumber Co., Great Northern R. Co. v.
Looney, Gulf, etc., R. Co. v.
Loonie, Gulf, etc., R. Co. v.
Loper, Johnson v.
Loraine v. Pittsburg, etc., R. Co., pp. 255, 256.
Lord v. Maine Cent. R. Co., pp. 277, 279, 292, 652, 653, 672.
—— v. Manchester St. Railway, pp. 2312, 2796.
—— v. Midland R. Co., p. 1671.
—— v. Pueblo, etc., Refin. Co., p. 2858.
—— v. Steamship Co., pp. 3418, 3420, 4036, 4054.
Lord, etc., Co. v. Texas, etc., R. Co., pp. 430, 503, 3334.
Lord Byron, Robinson v.
Lorenzen, Ex parte.
Loria, Suesskind-Schatz Co. v.
Loring, Taggard v.
Lorton, Cincinnati, etc., R. Co. v.
Los Angeles Pac. Co., Morgan v.
Los Angeles R. Co., Campbell v.
—— Cary v.
—— Forsythe v.
—— Frost v.
—— Joyce v.
Los Angeles Terminal R. Co., Cox v.
—— Raub v.
Los Angeles Tract. Co., Babcock v.
—— Badcock v.
—— Bassett v.
—— Cordiner v.
—— Osgood v.
Losie v. Delaware, etc., Co., p. 2669.
Lothrop, Pacific Exp. Co. v.
Lotspeich v. Central R., etc., Co., p. 3250.
Lott, Hinson v.
—— More, etc., Co. v.
—— v. New Orleans, etc., R. Co., p. 2535.
Lottawanna, The.
Lottery Case, pp. 3428, 3441.
Lotz, North Chicago St. R. Co. v.
Loudoun v. Eighth Ave. R. Co., pp. 1687, 2009, 2671, 2764, 2978, 2979.
Lough v. Outerbridge, pp. 220, 222, 1135, 1175, 1176, 1179, 1180, 1181, 1185, 1188, 1189, 1190, 1193, 1194.
Loughin v. McCaulley, p. 4075.
Louis v. Buckeye, p. 848.
Louisiana, Morgan v.
—— Nathan v.
—— Pittsburgh, etc., Coal Co. v.
—— v. Texas, pp. 3441, 3455.
Louisiana Board, Morgan's, etc., Steamship Co. v.
Louisiana Nat. Bank v. Laveille, p. 309.
Louisiana R., etc., Co. v. Holly, pp. 3665, 3754.
—— Oxendine v.
—— Stothard v.
—— Williams v.
Louisiana State Board, Compagnie Francaise, etc., Vapeur v.
Louisiana Western R. Co., Harvey v.
—— Marx v.
Louisiana, etc., R. Co., Abney v.
—— Chaney v.
—— Granier v.
—— Holliday Mill Co. v.
—— Lehman v.
—— Marsalis v.
—— Marx v.
—— v. Railroad Comm., pp. 45, 47, 49.
—— v. Rider, pp. 1854, 3011, 3015, 3060.
Louisiana, etc., R. Co., United States v.
—— v. United States, pp. 3651, 3661, 3728, 3784, 3802, 3804, 3805.
Louisville & N. R. Co. v. Walker, p. 74.
Louisville City R. Co., Curtis v.
—— v. Hudgins, p. 2278.
—— v. Mercer, p. 2480.
—— v. Weams, pp. 1728, 1737.
Louisville R. Co. v. Blum, p. 2083.
—— Brown v.
—— Bullitt v.
—— v. Goodman, p. 2083.
—— Henning v.
—— Houghton v.
—— Howard v.
—— v. Hutti, p. 2427.
—— v. Kupper, pp. 2035, 2060.
—— v. Meglemery, 25 Ky. L. Rep. 1587, 78 S. W. 217—pp. 1535, 1536, 2272, 2381.
—— v. Meglemery, 79 S. W. 287, 25 Ky. L. Rep. 2062—p. 2989.
—— v. Mitchell, pp. 1524, 2115, 2116, 2278, 2364, 2878.
—— Nussbaum v.
—— v. Owens, pp. 2862, 2992.
—— v. Park, pp. 1712, 1715, 1739, 1749, 1830.
—— v. Pulliam, pp. 1888, 1901.
—— Sacrey v.
—— Samuels v.
—— v. Sheehan, pp. 2883, 2888.
—— v. Steubing, p. 2903.
—— Stringfield v.
—— Sweet v.
—— v. Wellington, p. 2962.
—— v. Wilder, pp. 1888, 1893, 2878.
—— v. Williams, p. 2891.
—— v. Worley, p. 2777.
Louisville St. R. Co. v. Brownfield, pp. 2695, 2861.
Louisville Union Benev. Ass'n, Sayre v.
Louisville, etc., Ferry Co. v. Commonwealth, 57 S. W. 624, 22 Ky. L. Rep. 446, 108 Ky. 717—p. 3587.
—— v. Commonwealth, 57 S. W. 626, 22 Ky. L. Rep. 480, 24 L. Rep. 1339—p. 3587.
—— v. Kentucky, pp. 3475, 3478, 3552, 3581, 3584, 3587.
—— v. Nolan, pp. 1750, 2793.
Louisiana, etc., Lumber Co., St. Louis, etc., R. Co. v.
Louisville, etc., Mail Co. v. Barnes, pp. 1698, 4004.
—— v. Gilliland, pp. 4000, 4002.
—— v. Levey & Co., pp. 3284, 3294.
Louisville, etc., Packet Co. v. Bottorff, p. 650.
—— Long v.
—— v. Mulligan, p. 4002.
—— v. Rogers, pp. 3872, 3876, 3878, 3882, 3888, 3897, 3902.
—— v. Smith, pp. 823, 3912.
Louisville, etc., Railroad v. Interstate Commerce Comm., pp. 2666, 3668, 3673, 3675, 3676, 3678, 3679, 3680, 3681, 3682, 3683, 3764, 3799, 3802.
Louisville, etc., R. Co., Adams v.
—— Agee & Co. v.
—— v. Allen, pp. 3745, 3752.
—— v. Allgood, pp. 484, 581.
—— v. Alumbaugh, p. 2709.
—— Anderson v.
—— Anthony v.
—— Armistead Lumber Co. v.
—— Arnold v.
—— v. Arnold, 22 Ky. L. Rep. 199, 56 S. W. 809—p. 1302.
—— v. Arnold, 102 S. W. 322, 31 Ky. L. Rep. 414—pp. 2814, 2965.
—— Attorney General v.
—— Bailey v.

Louisville, etc., R. Co., Baker v.
—— v. Ballard, 85 Ky. 307, 3 S. W. 530, 9 Ky. L. Rep. 7, 7 Am. St. Rep. 600—pp. 2057, 2768, 3011, 3065, 3071.
—— v. Ballard, 88 Ky. 159, 10 Ky. L. Rep. 735, 10 S. W. 429, 2 L. R. A. 694—p. 3062.
—— v. Barkhouse, p. 548.
—— Baughman v.
—— Baxter v.
—— v. Bays, p. 1537.
—— v. Bean, p. 2249.
—— Behlmer v.
—— v. Behlmer, 169 U. S. 644, 42 L. Ed. 889, 18 S. Ct. 502—p. 3808.
—— v. Behlmer, 175 U. S. 648, 44 L. Ed. 309, 20 S. Ct. 209—pp. 3602, 3610, 3638, 3664, 3713, 3714, 3715, 3716, 3721, 3722, 3730, 3785, 3786, 3798, 3806, 3807.
—— v. Bell, 13 Ky. L. Rep. 393—pp. 628, 1419.
—— v. Bell, 100 Ky. 203, 18 Ky. L. Rep. 735, 8 Am. & Eng. R. Cas., N. S., 413, 38 S. W. 3—pp. 1567, 2092, 2093, 2302, 2756.
—— Bennett v.
—— v. Bennett, pp. 3277, 3407.
—— v. Berg, pp. 1737, 2223
—— v. Bernheim, pp. 537, 602.
—— Berry v.
—— v. Berry, pp. 200, 1593.
—— v. Betz, p. 1446.
—— Beyer v.
—— v. Bigger, pp. 733, 749, 765, 1339, 1472.
—— v. Bisch, pp. 1752, 1961, 2126, 2179, 2189.
—— Bitterman v.
—— v. Bitterman, p. 1616.
—— v. Bizzell, pp. 2628, 3019, 3031.
—— v. Blair, pp. 2443, 2445, 3097.
—— v. Board, p. 2861.
—— Boughman v.
—— v. Bourne, 15 Ky. L. Rep. 445—pp. 821, 3267, 3326, 3372.
—— v. Bourne, 16 Ky. L. Rep. 825, 29 S. W. 975—pp. 3262, 3344.
—— v. Bowlds, p. 2760.
—— v. Breckinridge, pp. 2456, 2459, 2474, 2493, 3098.
—— v. Brewer, pp. 1497, 2029.
—— Briant v.
—— Brineger v.
—— v. Brinley, p. 1306.
—— v. Britton, 39 So. 585, 145 Ala. 645—pp. 580, 591, 592, 602.
—— v. Britton, 149 Ala. 552, 43 So. 108—pp. 590, 592, 601.
—— Brooke v.
—— Brown v.
—— v. Brown, 123 Fed. 946—pp. 51, 57.
—— v. Brown, 28 Ky. L. Rep. 772, 90 S. W. 567—pp. 1454, 1456, 1457.
—— v. Brownlee, pp. 320, 908, 910, 958, 986, 988, 1023.
—— Bryant v.
—— Burns v.
—— Butchers' Stock Yards Co. v.
—— Butchers', etc., Stock Yards Co. v.
—— v. Byrley, pp. 3065, 3073.
—— Cain v.
—— v. Campbell (Ky.), 122 S. W. 848—p. 2208.
—— v. Campbell, 54 Tenn. (7 Heisk.) 253—pp. 515, 3257, 3291, 3329, 3330, 3360, 3364.
—— Candiff v.
—— v. Cannon, pp. 1663, 2647.
—— Caples v.
—— v. Carothers, pp. 2721, 2772.
—— v. Castello, p. 1897.
Louisville, etc., R. Co. v. Catron, p. 1947.
—— v. Cayce, pp. 1865, 2575.
—— v. Cecil, 145 Ky. 271, 140 Ky. 186—pp. 1312, 1313, 1329, 1455.
—— v. Cecil, 9 Ky. L. Rep. 402—pp. 2127, 2260.
—— Central Stockyards Co. v.
—— v. Central Stock Yards Co., 30 Ky. L. Rep. 18, 97 S. W. 778—pp. 82, 83, 94, 107, 108, 131, 3247, 3262, 3275, 3518, 3535.
—— v. Central Stock Yards Co., 212 U. S. 132, 133, 53 L. Ed. 441, 29 S. Ct. 246—pp. 98, 109, 224.
—— v. Champion, pp. 2663, 3094.
—— v. Chestnut & Bro., p. 3354.
—— v. Church, pp. 1739, 2585, 2917, 2939, 3225, 3226.
—— Cincinnati Grain Co. v.
—— Clark v.
—— Clarke v.
—— Clement v.
—— v. Coal Co., p. 247.
—— v. Cockerel, p. 1831.
—— v. Cody, pp. 805, 1443, 1445.
—— Coe v.
—— Coffee v.
—— Coles v.
—— v. Collier, pp. 1906, 2264.
—— Commonwealth v.
—— v. Commonwealth, 99 Ky. 132, 18 Ky. L. Rep. 42, 35 S. W. 129, 33 L. R. A. 209, 59 Am. St. Rep. 457—p. 35.
—— v. Commonwealth, 99 Ky. 663, 37 S. W. 79—p. 1949.
—— v. Commonwealth (Ky.), 46 S. W. 702—pp. 85, 86, 180.
—— v. Commonwealth, 104 Ky. 226, 20 Ky. L. Rep. 1102, 1380, 46 S. W. 707, 47 S. W. 210, 598, 43 L. R. A. 541—pp. 74, 118, 180.
—— v. Commonwealth, 105 Ky. 179, 20 Ky. L. Rep. 1099, 48 S. W. 416, 43 L. R. A. 550—pp. 178, 180.
—— v. Commonwealth, 106 Ky. 633, 21 Ky. L. Rep. 232, 51 S. W. 164, 1012, 90 Am. St. Rep. 236—pp. 74, 1187.
—— v. Commonwealth, 108 Ky. 628, 22 Ky. L. Rep. 328, 57 S. W. 508—pp. 96, 178.
—— v. Commonwealth, 114 Ky. 787, 24 Ky. L. Rep. 1593, 1779, 71 S. W. 910—p. 180.
—— v. Commonwealth, 21 Ky. L. Rep. 239, 51 S. W. 167—p. 182.
—— v. Constantine, pp. 2248, 3069, 3073.
—— v. Cook, pp. 1854, 1867, 1906, 1922.
—— v. Cook Brewing Co., 96 C. C. A. 322, 172 Fed. 117, 40 L. R. A., N. S., 798—pp. 257, 3538.
—— v. Cook Brewing Co., 223 U. S. 70, 56 L. Ed. 355, 32 S. Ct. 189—pp. 3427, 3809, 3810, 3814.
—— v. Coons, p. 2397.
—— v. Cooper, 142 Ky. 533, 134 S. W. 920—p. 1479.
—— v. Cooper, 13 Ky. L. Rep. 496— pp. 3284, 3327, 3347.
—— v. Cooper, 19 Ky. L. Rep. 1152, 42 S. W. 1134—p. 3289.
—— v. Cooper, 56 S. W. 144, 21 Ky. L. Rep. 1644—pp. 1297, 3297.
—— Copp v.
—— v. Coquillard Wagon Works' Assignees, p. 3757.
—— Corcoran v.
—— v. Cornelius, pp. 2667, 2668.
—— v. Cottengim, p. 1571, 1604, 2474, 2532, 2715, 2717.
Louisville, etc., R. Co. v. Cottongim, pp. 2474, 3088, 3105.
—— Courts v.
—— v. Covetts, p. 3061.
—— v. Cowherd, pp. 726, 732, 748, 773, 820, 1035, 3349.
—— Crawford v.
—— v. Craycraft, p. 453.
—— v. Crayton, p. 2705.
—— Crescent Coal Co. v.
—— v. Crowe, p. 3694.
—— Crowley v.
—— v. Crown Coal Co., p. 91.
—— v. Croxton, pp. 2915, 2924.
—— v. Crozier, pp. 945, 1362, 3284, 3414.
—— v. Crunk, pp. 2249, 2406, 2510, 2513, 2586, 2588, 2992, 2994.
—— v. Cunningham, p. 869.
—— v. Dancy, pp. 1867, 1869.
—— v. Daugherty, pp. 1775, 2130, 2859.
—— Davis v.
—— Dawson v.
—— v. Deason, pp. 1880, 2120, 2233, 2351, 2828, 2906, 2927, 2974.
—— Depp v.
—— v. Depp, p. 2253.
—— Dickerson v.
—— v. Dickerson, pp. 3738, 3755, 3777.
—— v. Dies, p. 1837.
—— Diggs v.
—— Dilburn v.
—— v. Dilburn, pp. 1720, 1884, 1899, 2294, 2319, 2379, 2380.
—— Dillard Bros. v.
—— Dinsmore v.
—— v. Donaldson, p. 2661.
—— Doughitt v.
—— v. Douglass, p. 2068.
—— Douthitt v.
—— Du Bose v.
—— v. Du Bose, p. 1494.
—— v. Duncan, pp. 3280, 3391.
—— v. Dunlap, pp. 831, 1042.
—— Dunnington & Co. v.
—— Durham v.
—— v. Dyer, pp. 2150, 2723.
—— v. Eakin, pp. 2361, 2989, 2993.
—— Echols v.
—— v. Echols, p. 816.
—— v. Edmondson, pp. 2114, 2155, 2267.
—— Eichengreen v.
—— v. Ellis, p. 2489.
—— v. Empire State Chemical Co., p. 718.
—— v. Espenscheid, p. 2511.
—— v. Eubank, pp. 74, 3480, 3491, 3493, 3497, 3498, 3540.
—— Fairfield v.
—— v. Farmers', etc., Comm. Firm, pp. 3269, 3280, 3343.
—— Favre v.
—— v. Faylor, pp. 1564, 1566, 2001, 2098, 2696, 2698.
—— v. Ferrell, pp. 2532, 3022, 3030, 3066, 3069.
—— v. Fish, pp. 2440, 3100.
—— v. Fisher, pp. 1694, 3206.
—— v. Flannagan, pp. 210, 229, 231, 268, 448, 468, 635, 1176, 1180.
—— v. Fleming, pp. 196, 1415, 1612, 1637, 1638, 1972, 2415, 2425, 2430, 2431, 3081, 3090, 3092.
—— v. Forrest, pp. 1503, 1718, 2040, 2480, 2483, 2776.
—— v. Fort Wayne Elect. Co., pp. 477, 492, 493, 554.
—— v. Foster, pp. 417, 3289, 3294.
—— v. Fowler, pp. 3026, 3082, 3089.
—— v. Fox, pp. 1697, 2735, 2736, 2920.
—— Franklin v.

Louisville, etc., R. Co. v. Frazee, pp. 986, 1072, 1400.
—— Frederick v.
—— Freeman v.
—— v. Fulgham, pp. 94, 332, 333.
—— v. Gaddie, pp. 2754, 3047.
—— v. Gaines, 99 Ky. 411, 36 S. W. 174, 18 Ky. L. Rep. 387, 59 Am. St. Rep. 465—pp. 2449, 2459.
—— v. Gaines, 152 Ky. 255, 153 S. W. 216—p. 2878.
—— v. Garrett, pp. 1503, 2429, 2472, 3092.
—— v. Gatewood, pp. 2477, 2533.
—— George & Co. v.
—— Gerardy v.
—— v. Gerson, pp. 725, 804.
—— v. Gidley, pp. 741, 876, 908, 1038.
—— Gilleland v.
—— Gillespie v.
—— v. Gilmer, pp. 530, 563, 848.
—— v. Glasgow, pp. 1512, 1739, 2134, 2577, 2593, 2864.
—— v. Goben, pp. 2433, 2484, 2625.
—— v. Godman, pp. 210, 229, 287, 1281, 1442, 1449.
—— v. Gormley, 33 Ky. L. Rep. 188, 109 S. W. 346, 111 S. W. 289—pp. 1317, 1318, 1344, 1349, 1351, 1353, 1357, 1480.
—— v. Gormley (Ky.), 121 S. W. 965—p. 1283.
—— v. Grant, pp. 1364, 3415.
—— Green v.
—— v. Gregory, pp. 1828, 1837, 2794.
—— v. Grimes, pp. 1938, 2319, 2862, 2912.
—— v. Grundy, p. 3054.
—— v. Guinan, pp. 1596, 1598, 2716, 3068, 3091.
—— Gulf City Constr. Co. v.
—— Guthrie v.
—— v. Guy, p. 3062.
—— v. Guyton, p. 2921.
—— v. Hailey, pp. 1544, 1549.
—— v. Hale, pp. 1893, 1894.
—— Hall Grain Co. v.
—— v. Harmon, pp. 1491, 1895, 1900, 2387.
—— v. Harned, pp. 1390, 1477.
—— Harris v.
—— v. Harris, pp. 1542, 1627, 2442, 2473.
—— v. Hartman, p. 2364.
—— Hartmann v.
—— Hartwell v.
—— v. Hartwell, pp. 477, 598, 1250.
—— v. Hawley, pp. 1458, 1459.
—— v. Head, p. 2338.
—— v. Hedger, pp. 819, 1363, 1457.
—— v. Heilprin & Co., pp. 567, 636.
—— Henderson v.
—— v. Hendricks, pp. 1815, 2671, 2682.
—— v. Henry, p. 2729.
—— v. Higdon, pp. 225, 231, 237, 251, 263, 537, 538, 1184, 3471.
—— Higgins v.
—— Hill v.
—— v. Hine, pp. 2436, 2437, 2494, 3078, 3079, 3083, 3085.
—— v. Hiram Blow & Co., p. 599.
—— v. Hirsch, p. 1774.
—— v. Holsapple, pp. 1705, 1923.
—— Hoosier Stone Co. v.
—— Hopperton v.
—— v. Hughes, p. 3505.
—— Hughlett v.
—— v. Hull, pp. 1256, 1257.
—— Hunter v.
—— Hutcheson v.
Louisville, etc., R. Co., Interstate Commerce Comm. v.
—— v. Interstate Commerce Comm., 108 Fed. 988, 46 C. C. A. 685—p. 3715.
—— v. Interstate Commerce Comm., 184 Fed. 118—pp. 3671, 3672, 3774, 3801, 3809.
—— v. Interstate R. Co., p. 104.
—— Irwin v.
—— v. Jackson, p. 3057.
—— Jenkins v.
—— v. Jenkins, pp. 1854, 3060.
—— Johnson v.
—— v. Johnson, 92 Ala. 204, 9 So. 269, 25 Am. St. Rep. 35—pp. 2425, 2489.
—— v. Johnson, 108 Ala. 62, 19 So. 51, 31 L. R. A. 372—pp. 2488, 2489.
—— v. Johnson, 33 So. 661, 135 Ala. 232—pp. 900.
—— v. Johnson, 44 Ill. App. 56—p. 2248.
—— v. Johnston, pp. 1870, 2660.
—— Jones v.
—— v. Jones, 83 Ala. 376, 3 So. 902—pp. 2636, 2778.
—— v. Jones, 108 Ind. 551, 9 N. E. 476, 28 Am. & Eng. R. Cas. 170—pp. 1813, 1987, 2693, 2758, 2807, 2888, 3008.
—— v. Jones, 10 Ky. L. Rep. 494—pp. 531, 896.
—— v. Joplin, pp. 2468, 3092, 3103.
—— v. Jordan, pp. 2476, 3101.
—— v. Kahn, pp. 1152, 1153.
—— v. Katzenberger, pp. 729, 733, 750, 1268, 3142, 3143, 3166, 3226, 3228.
—— v. Kauffman & Co., p. 392.
—— v. Keefer, pp. 214, 253, 254, 1578, 2092, 2093, 2100, 2105, 2106.
—— v. Keith, p. 2243.
—— v. Keller, pp. 1533, 3055, 3063.
—— v. Kelly, pp. 2037, 2069, 2222.
—— v. Kelsey, pp. 848, 1344, 1405.
—— v. Kemp, pp. 1739, 2890.
—— v. Kendall, p. 2609.
—— v. Kentucky, 161 U. S. 677, 696, 40 L. Ed. 849, 16 S. Ct. 714—pp. 34, 39, 3481, 3484.
—— v. Kentucky, 183 U. S. 503, 46 L. Ed. 298, 22 S. Ct. 95—pp. 26, 35, 36, 58, 59, 63, 73, 3497, 3498.
—— Kentucky Wagon Mfg. Co. v.
—— Kentucky, etc., Bridge Co. v.
—— v. Kimbrough, p. 3029.
—— v. Kingman, pp. 1575, 3068.
—— Kinney v.
—— v. Klyman, pp. 1620, 1622, 1973, 2440.
—— Lampkin v.
—— v. Landers, pp. 462, 1107, 1422, 1425.
—— v. Lawler, p. 2149.
—— v. Lawson, 88 Ky. 496, 11 S. W. 511—pp. 513, 585.
—— v. Lawson, 9 Ky. L. Rep. 681—pp. 515, 594, 595.
—— v. Lazarus, pp. 1427, 1428, 1458, 1459.
—— v. Lee, pp. 1910, 2066, 2721, 2932.
—— Levy v.
—— Lewis v.
—— v. Lewis, p. 3021.
—— Lewis, etc., Co. v.
—— v. Linton, pp. 2085, 2087.
—— v. Logan, pp. 2419, 2488, 2490.
—— v. Long, pp. 2001, 2146.
Louisville, etc., R. Co. v. Lucas, pp. 1739, 1767, 1779, 1797.
—— Lunsford v.
—— McCampbell v.
—— McCarthy v.
—— v. McCarty, p. 1454.
—— McChord v.
—— v. McClain, p. 3068.
—— McClelland v.
—— v. McClintock, pp. 1454, 1456, 1462.
—— v. McCool, p. 585.
—— v. McCoy, p. 2949.
—— McDonald v.
—— McDowell v.
—— v. McEwan, 17 Ky. L. Rep. 406, 31 S. W. 465, 2 Am. & Eng. R. Cas., N. S., 438—pp. 2025, 2027, 2768.
—— v. McEwan, 21 Ky. L. Rep. 487, 51 S. W. 619—pp. 2025, 2027.
—— v. McGuire & Co., pp. 515, 517, 799, 895, 900.
—— v. McKenna, pp. 1720, 1808, 1814, 1821, 1825, 1827.
—— v. McKenzie, pp. 738, 953, 955.
—— McKinley v.
—— McMurtray v.
—— McMurtry v.
—— v. McNally, pp. 1498, 1507, 3095.
—— v. Magnus Co., p. 1151.
—— v. Mahan, pp. 3160, 3168, 3170, 3172, 3174.
—— Malcomb v.
—— v. Manchester Mills, pp. 487, 833, 1037, 1041.
—— Manning v.
—— v. Marshall, p. 2809.
—— v. Martin, pp. 1285, 1457, 1458.
—— v. Mask, pp. 1869, 1870, 1886, 1906.
—— v. Mason, 4 Ala. App. 353, 58 So. 963—pp. 2429, 2631, 2664.
—— v. Mason, 79 Tenn. (11 Lea) 116, 16 Am. & Eng. R. Cas. 241—pp. 849, 865, 1352, 1355.
—— v. Massie, p. 2321.
—— v. Maybin, pp. 2426, 2442, 3088.
—— Melbourne v.
—— v. Meyer, pp. 324, 325, 798, 986, 996, 999, 1004, 3349, 3350.
—— v. Miles, pp. 190, 198, 1858.
—— v. Miller, pp. 1813, 1986, 2405, 2673, 2839.
—— v. Mink, pp. 305, 641, 643, 645, 648, 671, 674, 680.
—— v. Minogue, pp. 1737, 2002.
—— v. Mississippi, pp. 34, 1946, 1947, 3497, 3498, 3511.
—— v. Moore, 150 S. W. 849, 150 Ky. 692—pp. 2256, 2319.
—— v. Moore (Ky.), 121 S. W. 666—p. 2845.
—— Morningstar v.
—— v. Morris, p. 2185.
—— Moses v.
—— v. Moss, p. 2533.
—— v. Mothershed, p. 2641.
—— Mottley v.
—— v. Mottley, 133 Ky. 652, 118 S. W. 982—pp. 1643, 3694, 3695.
—— v. Mottley, 219 U. S. 467, 55 L. Ed. 297, 31 S. Ct. 265, 34 L. R. A., N. S., 671—pp. 3464, 3631, 3664, 3665, 3684, 3686, 3694, 3696, 3750, 3753, 3765, 3766.
—— Mount v.
—— v. Mount, pp. 2347, 2375, 2638, 2728, 2730, 2780.
—— Mouton v.
—— v. Mulder, pp. 1684, 2036, 2342, 2344, 2885.
—— v. Newman, p. 2566.

Louisville, etc., R. Co. v. Nicholai, pp. 727, 765, 1632.
—— v. Oden, p. 900.
—— O'Donnell v.
—— v. Ohio Valley Tie Co., p. 3435.
—— Olivier v.
—— Order v.
—— Owen v.
—— v. Owen, p. 1283.
—— v. Owens, pp. 1075, 1397.
—— Page v.
—— Parsons-Applegate Co. v.
—— Patterson v.
—— v. Patterson, pp. 1953, 1954.
—— v. Payne, 133 Ky. 539, 118 S. W. 352, 19 Am. & Eng. Ann. Cas. 294—pp. 1798, 2729, 2744.
—— v. Payne, 104 S. W. 752, 31 Ky. L. Rep. 1173—pp. 2245, 2904.
—— v. Pedigo, 108 Ind. 481, 8 N. E. 627, 27 Am. & Eng. R. Cas. 310—pp. 1717, 1723, 1740, 1986, 2638.
—— v. Pedigo, 108 Ind. 481, 8 N. E. W. 116—p. 1268.
—— Pence v.
—— v. Perkins, 144 Ala. 325, 39 So. 305—pp. 2622, 2784, 2849, 3022.
—— v. Perkins, 152 Ala. 133, 44 So. 602—pp. 2581, 2660.
—— v. Pferdmenges, etc., R. Co., p. 311.
—— v. Pittsburg, etc., Coal Co., pp. 102, 132.
—— v. Plummer, p. 830.
—— v. Plunkett, p. 2546.
—— v. Popp, pp. 2517, 2974.
—— v. Price, pp. 584, 590, 602.
—— v. Queen City Coal Co., 99 Ky. 217, 18 Ky. L. Rep. 126, 35 S. W. 626—p. 216.
—— v. Queen City Coal Co., 13 Ky. L. Rep. 832—pp. 208, 210, 216, 242, 257, 263, 264.
—— v. Quick, p. 3051.
—— Quinn v.
—— v. Quinn, 145 Ala. 657, 39 So. 616—pp. 2476, 2935.
—— v. Quinn, 146 Ala. 330, 39 So. 756—pp. 2649, 2706.
—— v. Railroad Comm., 19 Fed. 679—p. 20.
—— v. Railroad Comm., 191 Fed. 757—pp. 3470, 3471.
—— v. Railroad Comm., 196 Fed. 800—pp. 35, 44, 46, 49, 50, 51, 54, 56.
—— Railroad Comm'rs v.
—— v. Railroad Comm'rs, p. 31.
—— v. Rash & Co., p. 1348.
—— Rawitzky v.
—— v. Ray, pp. 2057, 2066, 2074, 2805, 2957, 2972, 3075, 3226.
—— Reary v.
—— Reed v.
—— v. Renfro, pp. 1949, 2025, 2026, 2030, 2755.
—— v. Renicker, p. 2648.
—— v. Reynolds, pp. 2131, 2680, 2902.
—— Rhodes v.
—— v. Richeson, p. 3074.
—— v. Richmond, p. 2001.
—— v. Ricketts, 93 Ky. 116, 19 S. W. 182—p. 1788.
—— v. Ricketts, 96 Ky. 44, 27 S. W. 860, 16 Ky. L. Rep. 281, 6 Am. & Eng. R. Cas., N. S., 186—pp. 1788, 2245, 2246, 2271.
—— v. Ricketts, 18 Ky. L. Rep. 687, 37 S. W. 952—pp. 1788, 1798, 1883.
—— v. Ricketts, 52 S. W. 939, 21 Ky. L. Rep. 662—pp. 2271, 2963.
—— Riley v.
—— v. Ritchel, pp. 1949, 3014, 3050, 3059.
Louisville, etc., R. Co. v. Ritter, 85 Ky. 368, 3 S. W. 591, 9 Ky. L. Rep. 22, 28 Am. & Eng. R. Cas. 167—pp. 1684, 1723, 1814, 2671, 2673, 2839.
—— v. Ritter, 2 Ky. L. Rep. 385—pp. 2694, 3068.
—— v. Ritter, 13 Ky. L. Rep. 44—p. 2671.
—— Robertson v.
—— v. Robinson, pp. 1303, 1318, 1320.
—— v. Rommele, p. 2880.
—— v. Roney, pp. 2820, 3052, 3053, 3062.
—— Rose v.
—— St. Louis Drayage Co. v.
—— v. Sandlin, p. 2637.
—— v. Scalf, pp. 2162, 2754, 2796.
—— v. Scott, 108 Ky. 392, 22 Ky. L. Rep. 30, 56 S. W. 674, 50 L. R. A. 381—pp. 1570, 1582, 1584.
—— v. Scott, 133 Ky. 724, 118 S. W. 990, 19 Am. & Eng. Ann. Cas. 392—pp. 3444, 3773.
—— v. Scott, 141 Ky. 538, 133 S. W. 800, Ann. Cas. 1912 C, 547, 34 L. R. A., N. S., 206—pp. 1607, 1860, 3086, 3090.
—— v. Scott, 219 U. S. 209, 55 L. Ed. 183, 31 S. Ct. 171—pp. 3444, 3469, 3603.
—— Schoenfeld v.
—— v. Seale, 160 Ala. 584, 49 So. 323—pp. 1856, 2706, 2845, 3014.
—— v. Seale, 172 Ala. 480, 55 So. 237—pp. 2341, 2651, 2753, 2846, 2847, 2986.
—— Sears v.
—— v. Setser, 138 Ky. 476, 128 S. W. 341—pp. 2418, 2420, 2477, 2784.
—— v. Setser, 149 Ky. 162, 147 S. W. 956—pp. 2623, 2624.
—— Sheffer v.
—— Shelbyville R. Co. v.
—— Shelton v.
—— v. Sherrod, pp. 1063, 1073.
—— Shinkle, etc., Co. v.
—— Shumate v.
—— v. Sickings, p. 2202.
—— Siler v.
—— v. Siler, p. 3494.
—— Sinnott v.
—— Smith v.
—— v. Smith, 135 Ky. 462, 122 S. W. 806—pp. 2402, 2500, 2507, 2538, 2872.
—— v. Smith (Ky.), 2 Duv. 556—pp. 2694, 2778, 3070.
—— v. Smith, 10 Ky. L. Rep. 497—p. 1937.
—— v. Smith, 13 Ky. L. Rep. 974—pp. 2126, 2178, 2242.
—— v. Smith, 14 Ky. L. Rep. 814—pp. 1303, 1321, 1419, 1458.
—— v. Smith, 123 Tenn. 678, 134 S. W. 866—pp. 1269, 1371, 1393, 1399, 1471, 3522.
—— Smitha v.
—— v. Smitha, pp. 1284, 1329, 1362, 1384, 1454, 1456, 1458, 1473, 1479, 1481, 1482, 1483.
—— v. Snead, p. 2643.
—— v. Snider, pp. 1711, 1713, 1715, 1739, 1810, 1840, 1847, 2371, 2671, 2673.
—— v. Southern Flour, etc., Co., pp. 326, 327, 336.
—— v. Sowell, pp. 1008, 1075, 1387, 1395, 1397, 1404.
—— v. Spalding, p. 494.
—— v. Spalding, etc., Co., pp. 1270, 1454, 1457, 1458.
—— v. Spaulding, p. 576.
—— v. Spinke, pp. 2562, 3041.
—— v. Stacker, pp. 2267, 2268, 2537.
Louisville, etc., R. Co., Stalcup v.
—— Starnes v.
—— State v.
—— v. State, p. 1946.
—— v. Steele, pp. 1107, 1422.
—— v. Steenberger, pp. 2060, 2958.
—— v. Stephen, p. 1625.
—— Stiles v.
—— v. Stiles, pp. 285, 287, 899, 1284, 1332, 1336.
—— v. Stillwell, pp. 2356, 2386, 2985.
—— Stony Fork Coal Co. v.
—— v. Storms, pp. 2562, 3094.
—— Strull v.
—— v. Stuber, p. 1580.
—— v. Sullivan, pp. 2488, 2490.
—— v. Summers, pp. 2773, 3089.
—— v. Sumner, p. 635.
—— Swan v.
—— Tanner v.
—— v. Tarter, p. 3353.
—— Tecumseh Mills v.
—— v. Tennessee Brewing Co., pp. 3305, 3395, 3396, 3403.
—— v. Tharpe, pp. 1056, 1057.
—— v. Thompson, 107 Ind. 442, 8 N. E. 18, 9 N. E. 357, 57 Am. Rep. 120, 27 Am. & Eng. R. Cas. 88—pp. 1542, 1543, 1715, 1739, 1740, 1810, 1844, 1981, 2613, 2673.
—— v. Thompson, 144 Ky. 765, 139 S. W. 939—pp. 1279, 1353, 1460, 1471.
—— v. Thompson, etc., Co., 13 Ky. L. Rep. 973—pp. 1038, 1386, 1389, 1448.
—— v. Thompson, 64 Miss. 584, 1 So. 840, 30 Am. & Eng. R. Cas. 541—p. 1790.
—— v. Thornton, p. 2523.
—— v. Tilleson, p. 3030.
—— v. Touart, pp. 246, 499, 603, 802, 1038, 1041, 3349.
—— v. Treadway, pp. 1773, 1797, 1799.
—— v. Trent, p. 1284.
—— Troutman v.
—— v. Tuggle, p. 2480.
—— v. Turner, 137 Ky. 730, 127 S. W. 372—pp. 1795, 1796, 1939.
—— v. Turner, 100 Tenn. (16 Pickle) 213, 47 S. W. 223, 43 S. W. 223, 43 L. R. A. 140—pp. 191, 195, 196, 198, 200, 203, 1622, 1631, 1632, 1633, 3094.
—— United States v.
—— v. United States, 108 C. C. A. 326, 186 Fed. 280—p. 3454.
—— v. United States, 197 Fed. 58—pp. 3649, 3679, 3836.
—— v. United States (U. S.), 39 Ct. Cl. 405—p. 884.
—— v. United States Fidelity, etc., Co., pp. 556, 559.
—— v. Vancleave, p. 75, 3425.
—— v. Venable, pp. 1071, 1075.
—— v. Vincent, pp. 2025, 2030.
—— Virginia Coal, etc., Co. v.
—— Virginia, etc., Iron Co. v.
—— Wald v.
—— Walker v.
—— v. Walker, 177 Ind. 38, 97 N. E. 151—pp. 1789, 1806.
—— v. Walker, 110 Ky. 961, 23 Ky. L. Rep. 453, 63 S. W. 209—p. 137.
—— Warfield v.
—— v. Warfield, 129 Ga. 473, 59 S. E. 234—pp. 727, 732, 748, 752, 765, 800, 806, 807.
—— v. Warfield, 3 Ga. App. 187, 59 S. E. 604—p. 806.
—— v. Warfield, 6 Ga. App. 550, 65 S. E. 308—pp. 1056, 1412, 1420.
—— v. Warfield, pp. 1338, 1453, 1464, 1471.

Louisville, etc., R. Co. v. Wathen, 22 Ky. L. Rep. 82, 49 S. W. 185—pp. 1436, 1438, 1439, 1450, 1455.
—— v. Wathen, 23 Ky. L. Rep. 2128, 66 S. W. 714—pp. 1473, 1479.
—— Watson v.
—— v. Weathers, p. 2601.
—— v. Weaver, 22 Ky. L. Rep. 30, 50 L. R. A. 381—p. 1834.
—— v. Weaver, 77 Tenn. (9 Lea), 38, 42 Am. Rep. 654, 16 Am. & Eng. R. Cas. 218—pp. 3139, 3175, 3176, 3177, 3178, 3180, 3182, 3257, 3291.
—— Weightman v.
—— v. Welsh, p. 2710.
—— West Coast Naval Stores Co. v.
—— v. West Coast Naval Stores Co., pp. 3248, 3258, 3268, 3729.
—— v. White, p. 3065.
—— v. Whitman, p. 2485.
—— Wicks v.
—— v. Widman, p. 1087.
—— Williams v.
—— v. Williams, 5 Ala. App. 615, 59 So. 865—p. 3363.
—— v. Williams, 95 Ky. 199, 15 Ky. L. Rep. 548, 24 S. W. 1, 44 Am. St. Rep. 214—p. 108.
—— Wilsey v.
—— v. Wilsey, 9 Ky. L. Rep. 1008—p. 3085.
—— v. Wilsey, 11 Ky. L. Rep. 419, 12 S. W. 275, 5 L. R. A. 855—pp. 2468, 3083, 3101.
—— Wilson v.
—— v. Wilson, 123 Ga. 62, 51 S. E. 24, 3 Am. & Eng. Ann. Cas. 128—p. 1254.
—— v. Wilson, 119 Ind. 352, 21 N. E. 341, 40 Am. & Eng. R. Cas. 85—pp. 333, 355.
—— v. Wilson, 124 Ky. 846, 30 Ky. L. Rep. 1055, 100 S. W. 290, 8 L. R. A., N. S., 1020—pp. 2515, 2539.
—— Wilson Sewing Mach. Co. v.
—— v. Wolfe, 128 Ind. 347, 27 N. E. 606, 25 Am. St. Rep. 436—pp. 2420, 3081, 3088.
—— v. Wolfe, 80 Ky. 82, 3 Ky. L. Rep. 576—pp. 2281, 2501.
—— Wood v.
—— v. Wood, pp. 1884, 2066, 2126, 2581, 2607, 2609.
—— Woolery v.
—— v. Wright, pp. 1613, 1628.
—— Wyler-Ackerland & Co. v.
—— Wyler, etc., Co. v.
—— v. Wynn, pp. 740, 750, 822, 828, 1075, 1076, 1080, 1268, 1406, 1454, 1456, 1457.
—— v. Yowell, p. 2171.
—— v. Yudelson, pp. 347, 406, 833, 837.
—— Zimmern's Coal Co. v.
Louisville, etc., Stove Co., Cleveland, etc., R. Co. v.
Louisville, etc., Tract. Co. v. Korbe, 175 Ind. 450, 93 N. E. 5, 94 N. E. 768—pp. 1682, 1721, 2599, 2992.
—— v. Korbe (Ind. App.), 90 N. E. 483—pp. 1901, 1903, 2599.
—— v. Leaf, p. 1890.
—— v. Snead, p. 2659.
—— v. Walker, pp. 1750, 2350, 3035, 3037.
—— v. Worrell, pp. 1709, 2701, 2702.
Lounsberry, Hudson River R. Co. v.
Louthan, Illinois Cent. R. Co. v.
Love, Atchison, etc., R. Co. v.
—— v. Atchison, etc., R. Co., pp. 123, 130.
—— Georgia Pac. R. Co. v.
Love, Indiana Union Tract. Co. v.
Kansas, etc., R. Co. v.
—— Missouri, etc., R. Co. v.
—— v. Ross, etc., Co., p. 1138.
Lovejoy, Spencer v.
Lovelady, St. Louis, etc., R. Co. v.
Loveland v. Burke, pp. 755, 788.
Lovell v. Davis, p. 3873.
—— Hentz & Co. v.
—— v. Hentz & Co., p. 362.
—— v. London, etc., R. Co., pp. 286, 3134, 3135.
—— v. Newman & Son, p. 362.
Lovely, Western Union Tel. Co. v.
Loverin, etc., Co. v. Travis, p. 3425.
Lovett v. Gulf, etc., R. Co., p. 2164.
—— v. Salem, etc., R. Co., p. 2535.
Loving, Texas, etc., R. Co. v.
Lovings v. Norfolk R. Co., pp. 1638, 2431.
Low v. Austin, p. 3549.
Lowber, Bangs v.
—— v. Bangs, pp. 3868, 3869, 3872, 3873.
Lowe v. Booth, p. 946.
—— v. East Tennessee, etc., R. Co., p. 611.
—— Lexington R. Co. v.
—— v. Moss, pp. 634, 635.
—— Pullman Palace Car Co. v.
—— Raleigh, etc., R. Co. v.
—— St. Louis, etc., R. Co. v.
—— v. Seaboard, etc., Railway, p. 3518.
—— Southern R. Co. v.
Lowell, Alger v.
—— Chicago, etc., R. Co. v.
Lowell Wire Fence Co. v. Sargent, p. 3256.
Lowell, etc., R. Co., Clark v.
Lowell, etc., St. R. Co., Beal v.
Lowenrosen, Chicago Union Tract. Co. v.
Lowenstein v. Lombard, etc., Co., pp. 454, 1000, 1006, 1017, 4027.
—— v. Wabash R. Co., pp. 1289, 1290.
Lowenthal v. Vicksburg, etc., R. Co., p. 1847.
Lowery, Mt. Adams, etc., R. Co. v.
Lowitz, Chicago City R. Co. v.
—— Parmelee v.
Lownsdale, Burrows v.
Lowry v. Atlantic Coast Line R. Co., p. 3396.
—— Jackson Elect. R., etc., Co. v.
—— Montague & Co. v.
Loy, Hodgson v.
—— v. Northern Pac. R. Co., pp. 1542, 2459, 2463, 2473, 2486.
Loyal, The.
Loyd, St. Louis, etc., R. Co. v.
L. S. & M. S. R. Co v. Hatchkiss, p. 2098.
—— v. Salzman, p. 1972.
Lucas v. Burlington, etc., R. Co., p. 1395.
—— v. Catskill Mountain R. Co., p. 2149.
—— Florida Cent. etc., R. Co. v.
—— Florida, etc., R. Co. v.
—— v. Herbert, pp. 112, 192.
—— Lake Erie, etc., R. Co. v.
—— Louisville, etc., R. Co. v.
—— v. Marquette, etc., R. Co., p. 2349.
—— v. Metropolitan St. R. Co., p. 1986.
—— v. Michigan Cent. R. Co., pp. 2412, 2414, 2433, 3084, 3088.
—— v. Milwaukee, etc., R. Co., pp. 1547, 1550, 2149, 2720.
—— v. New Bedford, etc., R. Co., pp. 2248, 2263, 2264, 2286, 2510, 2512, 2540, 2544.
—— v. Pennsylvania Co., pp. 1779, 2084.
Luce, Lake Shore, etc., R. Co. v.
Lucesco Oil Co. v. Pennsylvania R. Co., pp. 848, 855, 870.
Luck, Union Pac. R. Co. v.
Luckel v. Century Bldg. Co., pp. 2234, 2902.
Luckie, Americus, etc., Railroad v.
—— Americus, etc., R. Co. v.
Lucus v. Burlington, etc., R. Co., p. 1402.
Lucy v. Chicago, etc., R. Co., pp. 2021, 3077.
Ludden, Columbus, etc., R. Co. v.
Luddy v. Old Colony St. R. Co., p. 2885.
Ludeman v. Third Ave. R. Co., p. 2829.
Ludgate Hill Steamship Co., Rubens v.
Ludinsky v. New York City R. Co., p. 2808.
Ludlam, Texas, etc., R. Co. v.
Ludvig Halberg, The.
Ludwick, Lewis & Co. v.
Ludwig v. Meyre, pp. 580, 596.
Lugner v. Milwaukee Elect. R., etc., Co., pp. 1509, 1561, 1562, 1572, 2413, 2415.
Luken v. Lake Shore, etc., R. Co., pp. 3435, 3508, 3509.
Lukens, Washington, etc., R. Co. v.
Lumberman's Min. Co. v. Gilchrist, p. 470.
Lund, Stubbs v.
Lundahl, Chicago Union Tract. Co. v.
Lundberg, Chicago City R. Co. v.
Lundquist v. Grand Trunk Western R. Co., p. 3689.
Lundy v. Central Pac. R. Co., p. 1625.
Lunsford v. Louisville, etc., R. Co., p. 2237.
Lupe v. Atlantic, etc., R. Co., pp. 728, 740, 818.
Lupin v. Marie, p. 1229.
Lurman, Crossman v.
Lushy v. Atchison, etc., R. Co., pp. 1735, 1754, 2205, 2778.
Luse v. Union Pac. R. Co., pp. 1884, 1895, 1897, 1900.
Lustig v. New York, etc., R. Co., p. 2728.
Lutcher, etc., Lumber Co., Wade v.
Luther, Gulf, etc., R. Co. v.
Lutz, Illinois Cent. R. Co. v.
—— Pullman Co. v.
Luxton v. North River Bridge Co., pp. 3445, 3446, 3449.
Lycett v. Manhattan R. Co., pp. 2323, 2872.
Lydian Monarch, The.
Lydon v. Robert Smith Ale Brew. Co., p. 2642.
Lyle, Augusta R., etc., Co. v.
Lyles, Harrington v.
Lynch, Chesapeake, etc., R. Co. v.
—— Chicago, etc., Steamship Co. v.
—— Clark v.
—— v. Interurban, etc., R. Co., p. 2248.
—— v. Metropolitan St. R. Co., p. 2684.
—— v. Metropolitan, etc., R. Co., pp. 2062, 2070.
—— Randall v.
—— v. St. Louis Transit Co., p. 1703.
—— San Antonio, etc., R. Co. v.
—— Texas, etc., R. Co. v.
—— Union Refrigerator Trans. Co. v.
—— Western Maryland R. Co. v.
Lynch, etc., R. Co., Byron v.
Lynchburg, etc., R. Co., Tillett v.
Lynde v. Hough, p. 3877.
Lyndon v. Georgia R., etc., Co., p. 1952.

Lyne v. Delaware, etc., R. Co., p. 3709.
Lyng v. Michigan, pp. 3538, 3539.
Lynn v. Southern Pac. Co., pp. 1951, 1952, 1953, 1980, 1986, 2125.
—— Southern R. Co. v.
Lynn, etc., R. Co., Byron v.
—— Hudson v.
—— Kingman v.
—— Levi v.
—— Meesel v.
—— Mesel v.
—— Nichols v.
—— O'Neil v.
—— O'Neill v.
—— Spade v.
—— Spicer v.
—— Sweetland v.
—— Wilde v.
—— Wills v.
Lyon, Chattanooga, etc., R. Co. v.
—— Gody v.
—— Pittsburgh, etc., R. Co. v.
—— v. Union Pac. R. Co., p. 1827.
Lyon & Co., Southern Pac. R. Co. v.
Lyons v. Boston Elevated R. Co., pp. 1824, 1832.
—— v. Hill, p. 571.
—— Lexington, etc., R. Co. v.
—— v. New York, etc., R. Co., 119 N. Y. S. 703—pp. 561, 902, 916.
—— v. New York, etc., R. Co., 120 N. Y. S. 1132, 136 App. Div. 903—p. 917.
—— Pennsylvania R. Co. v.
—— Texas, etc., R. Co. v.
—— v. Texas, etc., R. Co., pp 2711, 2718.
Lytle v. Galveston, etc., R. Co., 100 Tex. 292, 99 S. W. 396—pp. 1617, 1618.
—— v. Galveston, etc., R. Co. (Tex. Civ. App.), 100 S. W. 199—p. 1618.
—— v. Southern R. Co., pp. 796, 801.
L. & N. R., Columbia Grocery Co. v.
—— Dillard Bros. v.
—— v. Levi, p. 850.

M.

Mabry, Ball v.
—— v. City Elect. R. Co., pp. 2409, 3083, 3084.
McAbsher v. Richmond, etc., R. Co., p. 452.
McAfee v. Huide Koper, p. 2221.
McAlan v. New York, etc., Bridge, p. 2249.
McAlister v. Chicago, etc., R. Co., pp. 241, 574, 578, 1285, 1357.
McAllister, Georgia R., etc., Co. v.
—— v. People's R. Co., pp. 2637, 2656.
—— v. Southern Pac. Co., p. 3912.
McAlpin, Ocean Steamship Co. v.
—— The Ocean Steamship Co. v.
McAndrew v. Whitlock, 52 N. Y. 40, 11 Am. Rep. 657—pp. 527, 531, 536, 545, 776, 896.
—— v. Whitlock, 32 N. Y. Super. Ct. 623—p. 892.
McAnellia, St. Louis, etc., R. Co. v.
McAnulty, Ft. Worth, etc., R. Co. v.
McArthur, Mobile, etc., R. Co. v.
—— v. New York City R. Co., p. 2724.
—— v. Sears, pp. 728, 730, 737, 749, 768.
McArthur Bros. Co. v. 622, 714 Feet of Lumber, p. 3953.
McAulay, Gulf, etc., R. Co. v.
McBeath v. Wabash, etc., R. Co., pp. 820, 1087, 1457.
McBee v. Cincinnati St. R. Co., p. 2113.
McBride v. Georgia R., etc., Co., p. 2947.
—— v. Milwaukee Elect. R., etc., Co., p. 2863.
—— v. St. Paul City R. Co., p. 3009.
—— Woodworth v.
McBrier, Pioneer Fuel Co. v.
McBurnie v. Stelsly, p. 4.
McCabe v. Atchison, etc., R. Co., p. 530.
McCafferty v. Pennsylvania R. Co., pp. 1812, 2681, 2909.
—— West Chicago St. R. Co. v.
McCaffery v. St. Louis, etc., R. Co., pp. 2658, 2990.
—— Pennsylvania Co. v.
McCaffrey & Co. v. Georgia Southern Railroad, pp. 542, 543, 875, 3284.
McCahan Sugar Refin. Co. v. Steamship Wildcroft, p. 3927.
McCahe v. Atchison, etc., R. Co., p. 653.
McCahill v. Detroit City Railway, p. 2535.
McCall v. Brock, pp. 729, 730, 733, 740, 749, 815, 822.
—— v. California, pp. 3418, 3419, 3420, 3421, 3435, 3471, 3473, 3550, 3551, 3570, 3573.
—— v. Central, etc., R. Co., p. 3387.
—— v. Forsyth, p. 2660.
—— Yazoo, etc., R. Co. v.
McCampbell, Gulf, etc., R. Co. v.
—— v. Louisville, etc., R. Co., pp. 1337, 1338, 1339, 1450, 1457.
McCann v. Baltimore, etc., R. Co., p. 773.
—— v. Eddy, p. 3334.
—— Kansas Pac. R. Co. v.
—— Missouri, etc., R. Co. v.
—— Newark, etc., R. Co. v.
—— v. Sixth Ave. R. Co., p. 2549.
McCants, Savannah Elect. Co. v.
McCardell v. Gulf, etc., R. Co., pp. 2018, 2019.
McCarn v. International, etc., R. Co., pp. 3331, 3337, 3377.
McCarter v. Greenville Tract. Co., p. 1545.
McCarthy v. Boston Elev. R. Co., pp. 2306, 2816.
—— v. Chicago, etc., R. Co., p. 2426.
—— Gulf, etc., R. Co. v.
—— Hibler v.
—— v. Louisville, etc., R. Co., pp. 741, 752, 755, 758, 759, 824, 1038, 3308.
—— Ohio, etc., R. Co. v.
—— Railway Co. v.
McCartney, Central R. Co. v.
—— Hibler v.
McCarty, Ft. Worth, etc., R. Co. v.
—— v. Galveston, etc., R. Co., p. 3331.
—— Gulf, etc., R. Co. v.
—— v. Gulf, etc., R. Co., pp. 158, 166, 418, 419, 441, 442, 443, 448, 456, 466, 1118, 1121, 1122, 1124, 1126.
—— Houston, etc., R. Co. v.
—— v. Houston, etc., R. Co., p. 1729.
—— Lincoln Tract. Co. v.
—— Louisville, etc., R. Co. v.
—— v. New York, etc., R. Co., pp. 897, 899.
—— v. St. Louis, etc., R. Co., p. 2683.
McCasland, Wabash, etc., R. Co. v.
McCaslin v. Lake Shore, etc., R. Co., pp. 1884, 2065, 2126, 2255, 2595.
McCaughan, Heirn v.
McCaughn v. Milliot, p. 3940.
McCaughna, Chicago City R. Co. v.
McCauley v. Davidson, 10 Minn. 418, Gil. 335—pp. 422, 806, 807.
—— v. Davidson, Gil. 150, 13 Minn. 162—p. 477.
—— v. Rhode Island Co., pp. 2613, 2617.
—— v. Springfield St. R. Co., p. 1994.
—— v. Tennessee, etc., R. Co., pp. 1543, 1544, 2122, 2177.
McCaulley, Loughin v.
McCherry v. Snare, etc., Co., p. 2000.
McChesney, Gabler v.
McChord v. Louisville, etc., R. Co., pp. 34, 39, 129.
McClain, Chicago, City R. Co. v.
—— Cincinnati, etc., R. Co. v.
—— Louisville, etc., R. Co. v.
McClanahan, Missouri Pac. R. Co. v.
—— v. St. Louis, etc., R. Co., pp. 1781, 2668.
McClary, Northern Transp. Co. v.
—— v. Sioux City, etc., R. Co., pp. 1673, 1674, 1765.
McCleave, South Covington, etc., St. R. Co. v.
McClellan, Illinois Cent. R. Co. v.
——Lincoln St. R. Co. v.
McClelland v. Burns, p. 2957.
—— v. Louisville, etc., R. Co., p. 2490.
McCleskey, Alabama Great Southern R. Co. v.
McClevy, Chicago Union Tract. Co v.
McClinchy v. Boston Elevated R. Co., pp. 1885, 2906.
—— O'Brien v.
McClintock, Louisville, etc., R. Co. v.
—— v. Pennsylvania R. Co., p 2248.
—— Welch v.
McCloskey, Pennsylvania R. Co. v.
McCluer v. Manchester, etc., Railroad, pp. 840, 3313.
McClung, Johnson v.
McClure v. Philadelphia, etc., R. Co., pp. 1529, 1973, 2476.
—— v. Richardson, p. 278.
McClure & Co. v. Cox, etc., Co., p. 1017.
McClures v. Hammond, pp. 729, 768.
McClurg v. Cleveland, etc., R. Co., p. 1802.
—— Pittsburg, etc., R. Co. v.
McCollin v. Railroad Co., p. 2131
McCollom v. Indianapolis, etc., R. Co., p. 1482.
—— v. Minneapolis, etc., R. Co., p. 547.
McCollum v. Southern Pac. Co., pp. 1612, 2340, 3317.
McComas, Great Western R. Co. v.
McComb v. Chicago, etc., R. Co., p. 247.
McCombs v. North Carolina R. Co., p. 912.
McConnell, Adams Exp. Co. v.
—— Bras v.
—— v. Norfolk, etc., R. Co., p 3289.
—— v. Pedigo, p. 101.
McConnell Bros. v. Southern R. Co., pp. 787, 872, 873, 947, 948, 1076.
McConnochie v. Kerr, p. 3884.
McCook, Averill v.

McCook v. Dublin, etc., R. Co., pp. 1596, 1597, 2467.
—— v. Northup, pp. 2466, 2478.
—— Turner v.
McCool, Cincinnati, etc., R. Co. v.
—— Louisville, etc., R. Co. v.
—— Memphis, etc., Packet Co. v.
McCord v. Atlanta, etc., R. Co., pp. 1682, 2203.
—— v. Atlantic, etc., R. Co., p. 822.
—— Gulf, etc., R. Co. v.
—— v. State, p. 3440.
—— v. Western Union Tel. Co., pp. 309, 313.
McCorkle v. Chicago, etc., R. Co., p. 2158.
McCormack v. Interborough Rapid Transit Co., pp. 1770, 2685.
—— State v.
McCormick, Gulf, etc., R. Co. v.
—— v. Hudson River R. Co., pp. 3123, 3129, 3179, 3182.
—— v. Joseph, p. 352.
—— Newport News, etc., Elect. Co. v.
—— v. Pennsylvania Cent. R. Co., 49 N. Y. 303—p. 596.
—— v. Pennsylvania Cent. R. Co., 80 N. Y. 353—pp. 733, 3144, 3197.
—— v. Pennsylvania Cent. R. Co., 99 N. Y. 65, 1 N. E. 99, 52 Am. Rep. 6—p. 3194.
—— Philadelphia, etc., R. Co. v.
—— v. Seattle Elect. Co., p. 2881.
McCotter v. Hooker, p. 428.
McCown, Gulf, etc., R. Co. v.
—— International, etc., R. Co. v.
McCoy v. Erie, etc., Transp. Co., p. 945.
—— v. Keokuk & D. M. R. Co., pp. 727, 740, 821, 828, 945, 1329, 1339, 1456.
—— Louisville, etc., R. Co. v.
—— v. Millville Tract. Co., pp. 2488, 2490, 2491, 2855.
—— Texas, etc., R. Co. v.
—— Western Union Tel. Co. v.
McCranie v. Wood, p. 749.
McCrary v. Missouri, etc., R. Co., pp. 285, 1303.
McCready v. Thorn, p. 3865.
McCreary-McClellan Live Stock Co., Felton v.
McCrory, Hosea v.
McCue v. Northern Pac. R. Co., pp. 38, 49.
McCullen v. New York, etc., R. Co., pp. 2482, 2485.
McCulloch v. McDonald, p. 562.
McCullom v. Atlantic, etc., R. Co., pp. 2355, 2908.
McCullough, Houston, etc., R. Co. v.
—— International, etc., R. Co. v.
—— St. Louis, etc., R. Co. v.
—— v. Wabash, etc., Co., p. 1383.
McCumber v. Boston Elev. R. Co., pp. 1951, 1980, 2767.
McCune v. Burlington, etc., R. Co., pp. 1075, 1357, 1396.
McCurdy, Birmingham R., etc., Co. v.
—— Georgia R., etc., Co. v.
McCurrie v. Southern Pac. Co., pp. 1720, 2338, 2890.
McCutchen v. Atlantic, etc., R. Co., p. 3425.
McCutcheon, Missouri, etc., R. Co. v.
McDade v. Norfolk, etc., R. Co., pp. 1524, 1537, 1538, 2054, 3066.
—— v. Philadelphia Rapid Transit Co., p. 2182.
McDaniel, Baugh v.
—— Birmingham R., etc., Co. v.
—— v. Chicago, etc., R. Co., pp. 430, 939, 943, 1275, 1490.
McDaniel v. Highland Ave., etc., R. Co., pp. 1584, 2224.
McDaniels, Wabash R. Co. v.
McDermon v. Southern Pac. Co., p. 2102.
McDermott v. Boston Elev. R. Co., pp. 2316, 2825.
—— Carter v.
—— Chicago, etc., R. Co. v.
—— v. Chicago, etc., R. Co., pp. 1767, 1914, 2372.
McDonald, Adams Exp. Co. v.
—— Baltimore, etc., R. Co. v.
—— v. Boston, etc., Railroad, p. 2266.
—— v. Central R. Co., pp. 1862, 3317.
—— v. Chicago, etc., R. Co., 26 Iowa 124, 96 Am. Dec. 114—pp. 1767, 1773, 1776, 1780, 1784.
—— v. Chicago, etc., R. Co., 29 Iowa 170—pp. 1776, 1784, 2733.
—— v. City Elect. R. Co., pp. 2396, 2986.
—— v. Clark, p. 2914.
—— Great Western R. Co. v.
—— v. Hovey, p. 3631.
—— v. Illinois Cent. R. Co., pp. 1782, 1871, 1928, 2244.
—— v. Kansas City, etc., R. Co., pp. 2065, 2275.
—— v. Long Island R. Co., pp. 1884, 2226.
—— v. Louisville, etc., R. Co., p. 2083.
—— McCulloch v.
—— v. Metropolitan St. R. Co., pp. 1698, 2590, 2694, 2911.
—— v. Montgomery St. Railway, pp. 2185, 2745, 2752, 2957.
—— Pullman Palace Car Co. v.
—— Reinhart v.
—— v. St. Louis, etc., R. Co., pp. 1572, 2851.
—— v. Savannah Elect. Co., p. 2903.
—— Schubach v.
—— Texas, etc., R. Co. v.
—— v. Unaka Timber Co., p. 652.
—— v. Western R. Corp., pp. 885, 901, 3263, 3264, 3301, 3302.
McDonald Brick Co.'s Assignee, Newport News, etc., Co. v.
McDongal v. Allen, p. 3123.
McDonnell v. Chicago R. Co., p. 2685.
McDonough, Adams Exp. Co. v.
—— Birmingham R., etc., Co. v.
—— v. Boston Elev. R. Co., 191 Mass. 509, 20 R. R. R. 641, 43 Am. & Eng. R. Cas., N. S., 641, 78 N. E. 141—pp. 199, 200, 202, 2122, 2176, 2178, 2310, 2906.
—— v. Boston Elev. R. Co., 208 Mass. 436, 94 N. E. 809—pp. 2677, 2684.
—— Chicago, etc., R. Co. v.
—— v. Metropolitan R. Co., pp. 1518, 2152, 2332.
—— Michigan, etc., R. Co. v.
—— Toledo, etc., R. Co. v.
McDowell, Lester v.
—— v. Louisville, etc., R. Co., pp. 1451, 1454.
McDuffee v. Portland, etc., Railroad, pp. 220, 222, 1176, 1178, 1180, 1182, 1183.
McDuffie v. Seaboard, etc., Railway, 145 N. C. 397, 59 S. E. 122—p. 159.
—— v. Seaboard, etc., Railway, 145 N. C. 399, 59 S. E. 123—p. 159.
McDurmitt Grain Co., St. Louis, etc., R. Co. v.
Mace v. Reed, p. 3066.
—— v. Southern R. Co., pp. 1608, 2451, 2456.
McEacheran v. Michigan Cent. R. Co., pp. 3327, 3341, 3358.
McElree, Missouri, etc., R. Co. v.
McElroy, Chicago, etc., R. Co. v.
—— v. Iowa Cent. R. Co., pp. 3110, 3121.
—— v. Nashua, etc., R. Corp., pp. 1720, 1813, 2077.
—— v. Railroad Co., p. 2631.
McElvain v. St. Louis, etc., R. Co., pp. 954, 971, 977, 980, 1029, 1084.
McElvane v. Central, etc., R. Co., pp. 1704, 1917, 2510, 2543.
McElveen v. Southern R. Co., pp. 320, 333, 335, 337, 962, 968, 1016, 3277, 3293, 3331, 3347, 3401.
McElvey, Savannah Elect. Co. v.
McElwain v. Erie R. Co., p. 2704.
—— Spurgeon v.
McElwee, West Chester, etc., R. Co. v.
—— Western, etc., Railroad v.
McEntee v. New Jersey Steamboat Co., p. 513.
Macer v. Third Ave. R. Co., p. 1704.
McEwan, Louisville, etc., R. Co. v.
—— McKinnon v.
McEwen v. Jeffersonville, etc., R. Co., pp. 560, 1150.
McFadden v. Chicago, etc., R. Co., pp. 1770, 2671.
—— Houston, etc., R. Co. v.
—— v. Metropolitan St. R. Co., pp. 1696, 1721, 2083, 2604.
—— Missouri Pac. R. Co. v.
—— v. Missouri Pac. R. Co., pp. 320, 334, 337, 340, 426, 451, 806, 975, 1043, 1061, 1074, 1333, 1375.
—— Missouri, etc., R. Co. v.
—— Morrison v.
—— v. Steamboat Niargara, pp. 3125, 3126.
McFaden, Cross v.
McFall, Toledo, etc., Tract. Co. v.
—— v. Wabash R. Co., pp. 818, 821, 1454, 1456.
McFarland v. Parr & Co., pp. 1143, 1147.
—— v. Wheeler, p. 1104.
Mac Feat v. Philadelphia, etc., R. Co. (Del.), 5 Pen. 52, 62 Atl. 898—pp. 2289, 2860.
—— v. Philadelphia, etc., R. Co. (Del.), 6 Pen. 513, 30 R. R. R. 254, 53 Am. & Eng. R. Cas., N. S., 254, 69 Atl. 744—pp. 1505, 1508, 1517, 1561, 2732.
McFee v. Vicksburg, etc., R. Co., p. 1812.
McFetridge, etc., Co. v. Piper, pp. 1228, 1232, 1234.
McFlynn, Fordyce v.
McGaffey, Alexander v.
McGahey, Kansas City, etc., R. Co. v.
McGann v. Boston Elev. R. Co., pp. 1988, 1997, 2805.
McGarry v. Boston Elevated R. Co., pp. 1903, 2348.
—— Colorado Mid. R. Co. v.
—— v. Holyoke St. R. Co., pp. 1592, 2482, 2782.
McGearty v. Manhatton R. Co., pp. 1797, 2731, 2874.
McGee v. Chicago, etc., R. Co., pp. 700, 701, 714.
—— v. Missouri Pac. R. Co., pp. 197, 198, 1544, 1547, 1752, 1755, 1874, 1928, 2126, 2228, 2747.
McGeehan v. Lehigh Valley R. Co., p. 2134.
McGeorge, Colorado, etc., R. Co. v.
McGhee, American Sugar Refin. Co. v.
—— v. Cashin, 130 Ala. 561, 30 So. 367—pp. 2621, 2647.
—— v. Cashin (Ala.), 40 So. 63—pp. 2470, 2710, 2713, 3083.

McGhee v. Drisdale, p. 2446.
—— v. Reynolds, 117 Ala. 413, 23 So. 68—pp. 2443, 2462, 2572.
—— v. Reynolds, 129 Ala. 540, 29 So. 961—pp. 2622, 2633.
McGill v. Central Crosstown R. Co., p. 2817.
—— v. Michigan Steamship Co., pp. 4055, 4081.
—— v. Rowand, pp. 3118, 3123, 3127, 3129, 3144, 3188, 3189, 3190.
McGilvary, Texas, etc., R. Co. v.
—— v. West End St. R. Co., pp. 2043, 2050.
McGinn, Commonwealth v.
—— v. New Orleans R., etc., Co., p. 2676.
McGinnis v. Missouri Pac. R. Co., p. 3100.
McGinty, Birmingham R., etc., Co. v.
McGivney, St. Louis, etc., R. Co. v.
McGlossom, Houston, etc., R. Co. v.
McGlynn v. Brooklyn Crosstown R. Co., p. 1970.
—— v. Nassau Elect. R. Co., pp. 2876, 2878.
McGovern v. Interurban R. Co., pp. 1807, 2239, 2350, 2387, 2987, 2997.
McGowan, G., C. & S. F. R. Co. v.
—— Gulf, etc., R. Co. v.
—— v. New York City R. Co., pp. 1647, 1648.
—— v. Wilmington, etc., R. Co., p. 500.
McGowen v. Morgan's, etc., Steamship Co., pp. 1597, 1598, 1602, 2467, 2468.
—— Rutherford v.
McGown, G. C. & S. F. R. Co. v.
—— Gulf, etc., R. Co. v.
McGrane v. Nassau Elect. R. Co., p. 2654.
McGrath v. Brooklyn, etc., R. Co., p. 2193.
—— v. St. Louis Trans. Co., p. 2594.
McGrath Bros. v. Charleston, etc., Railway, p. 797.
McGraw v. Baltimore, etc., R. Co., pp. 499, 512, 533, 614, 617, 729, 734, 735, 736, 741, 742, 744, 750, 753, 765.
—— v. Southern R. Co., pp. 1556, 1557.
McGregor v. Erie R. Co., 35 N. J. L. 89—pp. 1136, 1137, 1194, 1195.
—— v. Erie R. Co., 35 N. J. L. 115—pp. 145, 1136.
—— v. Gill, pp. 3, 4, 10.
—— Lawrence v.
—— Lengelsen v.
—— v. Oregon R., etc., Co., pp. 809, 872, 897, 901, 906, 961, 1000, 1001, 1003, 1027, 1030, 1044.
—— St. Paul Fire, etc., Ins. Co. v.
—— Thompson Towing, etc., Ass'n v.
McGregor & Co. v. Kilgore, pp. 728, 773, 788, 848, 887, 3901.
McGrell v. Buffalo Office Bldg Co., p. 1751.
McGrew v. Chicago, etc., R. Co., p. 2693.
—— v. Missouri Pac. R. Co., 109 Mo. 582, 19 S. W. 53—pp. 447, 467.
—— v. Missouri Pac. R. Co., 114 Mo. 210, 21 S. W. 463—p. 169.
—— v. Missouri Pac. R. Co., 177 Mo. 533, 76 S. W. 995—p. 71
McGrew v. Missouri Pac. R. Co., 230 Mo. 496, 132 S. W. 1076—pp. 73, 75, 120, 220, 1180, 1183, 1193.
McGucken v. Western, etc., R. Co., p. 1558.
McGugan, Philadelphia, etc., R. Co. v.
McQuinn v. Forbes, p. 1950.
McGuire v. Chicago, etc., R. Co., p. 3480.
—— v. Great Northern R. Co., 153 Fed. 434—p. 3329.
—— v. Great Northern R. Co., 118 N. W. 556, 106 Minn. 192—p. 2777.
—— v. Interborough Rapid Trans. Co., p. 2874.
—— Louisville, etc., R. Co. v.
McGuire & Co., Louisville, etc., R. Co. v.
McHaffie, Hydraulic Engineering Co. v.
McHenry v. Alford, p. 3559.
—— v. Philadelphia, etc., R. Co., pp. 529, 896, 910.
—— Wallen v.
Machine Co. v. Gage, pp. 3529, 3564, 3568.
Machlin v. Pennsylvania R. Co., p. 2880.
McHugh v. St. Louis Trans. Co., pp. 2903, 2987.
McIlroy v. Buckner, pp. 323, 984.
McIntee v. New Jersey Steamboat Co., p. 518.
McIntire, Eaton v.
McIntire R. Co. v. Bolton, p. 1530.
McIntosh v. Augusta, etc., R. Co., p. 3198.
—— v. Oregon R., etc., Co., pp. 208, 213, 236, 824, 931, 946, 948, 969, 971, 975, 977, 1030, 1043.
—— Savannah, etc., R. Co. v.
—— v. Sinclair, p. 709.
McIntyre v. Bowne, p. 3864.
—— v. New York Cent. R. Co., p. 2222.
—— St. Louis, etc., R. Co. v.
McIntyre Bros. & Co. v. South Atlantic Steamship Line, p. 3879.
McIver v. Florida, etc., R. Co., p. 2485.
—— Parker v.
McIwen v. Smith, p. 1225.
McJimpsey v. Southern Railway, p. 2860.
Mack v. Savannah, etc., R. Co., pp. 2186, 2575.
—— v. State, pp. 184, 185.
Mack, etc., Co. v. Great Western Despatch, pp. 956, 960, 981, 989, 991, 1003, 1032.
McKahan v. American Exp. Co., pp. 1026, 1353, 1356, 1405.
McKain v. Baltimore, etc., R. Co., p. 2075.
McKay v. Anderson Steamboat Co., p. 4000.
—— v. Ohio River R. Co., pp. 2425, 2457, 2458, 2463, 2564, 2566.
—— People v.
McKee, Lewis v.
—— v. Owen, pp. 3145, 3146, 3147.
—— v. St. Louis Transit Co., p. 2152.
—— St. Louis, etc., R. Co. v.
—— Wright v.
McKenna, Alabama, etc., R. Co. v.
—— Cooper v.
—— Louisville, etc., R. Co. v.
—— v. North Hudson County R. Co., pp. 1889, 2877.
McKenzie, Alabama, etc., R. Co. v.
—— Baltimore, etc., R. Co. v.
—— Detroit, etc., R. Co. v.
McKenzie, Louisville, etc., R. Co. v.
—— v. Michigan Cent. R. Co., pp. 1288, 1303, 1307.
—— Northwestern Transp. Co. v.
—— Pine Bluff, etc., R. Co. v.
—— Southern R. Co. v.
—— Texas, etc., R. Co. v.
McKeon v. Chicago, etc., R. Co., pp. 1720, 1909, 1910, 3211.
—— v. Citizens' R. Co., pp. 2116, 2191.
—— v. New York, etc., R. Co., pp. 2530, 2532, 2533.
McKerall v. Atlantic, etc., R. Co., pp. 526, 642, 645, 647, 654, 660.
McKernan, De Leon v.
—— v. Manhattan R. Co., pp. 2420, 2851.
Mackey, Central R. Co. v.
—— Missouri Pac. R. Co. v.
McKibbin v. Great Northern R. Co., pp. 3121, 3122, 3124, 3185, 3194.
—— v. Wisconsin Cent. R. Co., p. 3145.
Mackie, St. Louis, etc., R. Co. v.
McKimble v. Boston, etc., Railroad, pp. 1573, 1788, 2911.
—— v. Boston, etc., R. Co., pp. 1535, 1537, 1805.
McKinlay v. Morrish, pp. 3901, 3918, 3919.
McKinley v. Chicago, etc., R. Co., pp. 200, 2042, 2043, 3064.
—— v. Louisville, etc., R. Co., pp. 2425, 2456, 2457, 2477, 2481, 2483.
McKinney, Central, etc., R. Co. v.
—— Indiana Union Tract. Co. v.
—— v. Jewett, pp. 515, 728, 896.
—— Kentucky, etc., Bridge Co. v.
—— v. Neil, pp. 1749, 1837, 2692.
—— Pennsylvania R. Co. v.
McKinnon v. McEwan, p. 642.
McKinstrey v. Chicago, etc., R. Co., pp. 1084, 1087.
McKinstry v. St. Louis Trans. Co., p. 2597.
McKittrick v. Greenville Tract. Co., pp. 2669, 2673, 2678, 2688, 2862.
Macklin v. New Jersey Steamboat Co., p. 3146.
McKnight, Philanthropic Bldg. Ass'n v.
—— St. Louis, etc., R. Co. v.
McKoy v. Missouri Pac. R. Co., pp. 1736, 2117.
McLain, Allegheny Valley R. Co. v.
—— v. St. Louis, etc., R. Co., pp. 1936, 1954.
McLallen, Chicago, etc., R. Co. v.
McLanahan v. Universal Ins. Co., p. 3907.
McLane, Texas, etc., R. Co. v.
McLaren v. Alabama Mid. R. Co., p. 2158.
—— v. Boston Elevated R. Co., pp. 1769, 2872.
—— v. Detroit, etc., R. Co., pp. 624, 3250.
—— v. Standard Oil Co., p. 3893.
McLarin v. Atlantic, etc., R. Co., pp. 2249, 2540.
McLaughlin, Baltimore, etc., R. Co. v.
—— Boyle v.
—— Martin v.
—— v. Martin, p. 492.
—— Missouri, etc., R. Co. v.
—— Peixotti v.
—— v. Syracuse Rapid Trans. Co., p. 2818.
McLean v. Atlantic, etc., R. Co., pp. 2117, 2164, 2214, 2308, 2374, 2702, 2777.
—— v. Breithaupt, pp. 1218, 1219, 1228, 1232, 1242.

McLean v. Burbank, 11 Minn. 277, Gil. 189—p. 2693.
—— v. Burbank, 12 Minn. 530, Gil. 438—pp. 2561, 2608.
—— v. Charlotte, etc., R. Co., p 141.
—— v Chicago, etc., R. Co., p. 3102.
—— v. Fleming, p. 308.
—— Gulf, etc., R. Co. v.
—— v. Gulf, etc., R. Co., p. 786.
—— Missouri, etc., R. Co. v.
—— Toohy v.
McLendon, Gray v.
—— v. Wabash R. Co., pp. 3334, 3335, 3354.
MacLeod, Graven v.
—— v. Graven, p. 2276.
McLiney, Missouri Pac. R. Co. v.
McLoon, Atlantic Mut. Ins. Co. v.
—— v. Boston & Maine R. R., p 3666.
McMahon v. Chicago City R. Co., 88 N. E. 223, 239 Ill. 334—pp. 2056, 2958.
—— v. Chicago City R. Co., 143 Ill. App. 608—p 2057.
—— v. Interborough Rapid Transit Co., p. 2022.
—— v. Macy, pp. 321, 987.
—— v. New Orleans R., etc., Co., pp. 1986, 2166, 2177.
—— v. New York Elev. R. Co., p. 2789.
—— v. Third Ave. R. Co., p. 1665.
McManus v. Chicago, etc., R. Co., 138 Iowa 150, 115 N. W. 919, 128 Am. St. Rep. 180—pp. 1201, 1203, 1453, 1357, 3326, 3365, 3416.
—— v. Chicago, etc., R. Co., 156 Iowa 359, 136 N. W. 769—pp. 419, 1201, 1321, 1355, 1462, 3251, 3406, 3752.
—— v. Crickett, p. 2041.
—— v. Thing, pp. 3036, 3037.
McMasters v. Pennsylvania R. Co., pp. 531, 532, 960.
McMechen, Colt v.
McMeekin v. Southern Railway, 82 S. C. 468, 64 S. E. 413—pp. 341, 365, 379, 645, 675.
—— v. Southern Railway, 85 S. C. 381, 67 S. E. 745—pp. 164, 3327, 3393.
McMelon v. Illinois Cent. R. Co., p. 2240.
McMichael v. Illinois Cent. R. Co., pp. 2253, 2258.
McMillan v. American Exp. Co., pp. 27, 1009, 1391, 1409.
—— v. Chicago, etc., R. Co., pp. 690, 1377, 1378, 3264, 3270, 3271, 3406.
—— v. Federal, etc., R. Co., pp 201, 2420, 2422, 2482.
—— v. Michigan, etc., R. Co., pp 213, 301, 320, 323, 337, 432 896, 900, 913, 945, 979, 983, 984, 986, 1003, 1004, 1007, 1009, 1010, 1036, 3377, 3378, 3380.
McMillion, Illinois Cent. R. Co v.
McMonigal, Galveston, etc., R. Co. v.
McMurray v. Fargo, p. 1439.
—— v. Pullman's Palace Car Co., p. 3230.
McMurtry, Kentucky Cent. R. Co v.
—— v. Louisville, etc., R. Co., pp. 2156, 2158, 2159, 2856, 2857.
McNab, Central, etc., R. Co. v.
McNair, Bracket v.
McNairy, Texas, etc., R. Co. v.
McNally, Louisville, etc., R. Co. v.
—— v. Metropolitan St. R. Co., p. 2243.
McNamara v. Boston, etc., R. Co., p. 2702.
—— v. Great Northern R. Co., pp. 1548, 1552.
—— v. St. Louis Trans. Co., pp. 3071, 3075.
—— v. Washington Terminal Co., pp. 3449, 3469.
McNamare, St. Louis, etc., R. Co v.
McNaughter v. Cassally, p. 3875.
McNaughton v. Illinois Cent. R. Co., p. 1769.
McNealy v. State, p. 182.
McNear, Marshall v.
McNeeley, Southern R. Co. v.
McNeil, Emerson v.
—— v. Galveston, etc., R. Co., pp. 451, 452.
—— Graham v.
—— v. Hill, pp. 312, 369.
—— St. Louis, etc., R. Co. v.
McNeill v. Atlantic, etc., R. Co., pp. 424, 3348, 3392.
—— v. Durham, etc., R. Co., 130 N. C. 256, 41 S. E. 383—p. 2644.
—— v. Durham, etc., R. Co., 135 N. C. 682, 47 S. E. 765, 67 L. R A. 227—pp. 1503, 1564, 2096.
—— Graham v.
—— Southern R. Co. v.
—— v. Southern R. Co., pp. 129, 3423, 3481, 3491, 3517, 3518.
McNichol v. Pacific Exp. Co., p. 245.
McNulta, Chicago Deposit Vault Co. v.
—— v. Ensch, pp. 1877, 2089.
McNulty, Parmelee v.
—— v. Pennsylvania R. Co., pp. 1582, 1585.
—— West Chicago, etc., R. Co. v.
McNutt Cleveland, etc., R. Co. v.
Macomber, Hutchins v.
Macon v. Southern Railway, pp. 152, 153.
Macon Consolidated St. R. Co. v. Barnes, pp. 1747, 1748, 1749, 1817, 2955, 3001, 3007.
Macon Grocery Co., Atlantic, etc., R. Co. v.
—— v. Atlantic, etc., R. Co., 163 Fed. 738—p. 3819.
—— v. Atlantic, etc., R. Co., 215 U. S. 501, 54 L. Ed. 300, 30 S. Ct. 184—p. 3818.
Macon R., etc., Co. v. Castopulon, pp. 2357, 2860.
—— Myrick v.
—— Primus v.
—— v. Vining, p. 2997.
Macon, etc., R. Co. v. Anderson, pp. 2285, 2404, 2998.
—— v. Barnes, p. 1986.
—— Carswell v.
—— Graham v.
—— v. Graham, p. 102.
—— v. Holt, p. 1686.
—— v. Johnson, pp. 190, 198, 199, 1684, 2173, 2723.
—— King v.
—— v. Mayes, p. 2087.
—— v. Meador Bros., pp. 1228. 1229, 1232, 1235.
—— v. Moore, 99 Ga. 229, 25 S. E. 460—pp. 1989, 2404, 2974.
—— v. Moore, 108 Ga. 84, 33 S. E. 889—pp. 1748, 1749, 1757, 1768, 1894, 1895, 1989, 2118, 2169.
—— v. Moore, 125 Ga. 810, 54 S. E. 700—pp. 2491, 2624.
—— Owens v.
—— v. Walton, pp. 681, 684, 685.
—— Withers v.
—— Yesbik v.
Macon, etc., St. R. Co., Masterson v.
McPadden v. New York Cent. R Co. (N. Y), 47 Barb. 247—p 2900.
McPadden v. New York Cent. R. Co., 44 N. Y. 478, 4 Am. Rep. 705—pp. 1682, 1684, 1687, 1715, 1845, 2790.
McPeak v. Missouri, etc., R. Co., pp. 2068, 2126, 2256, 2868.
McQueen v. Central Branch, etc., R. Co., p. 1581.
McQuerry v. Metropolitan St. R. Co., pp. 2420, 2421, 2483.
McQuesten v. Sanford, pp. 267, 3183, 3188.
McQuilken v. Central Pac. Co., p. 2245.
—— v. Central Pac. R. Co., p. 2320.
McRackan v. Atlantic, etc., R. Co., pp. 148, 149.
McRae v. Bowers Dredging Co., Co., p. 3585.
—— International, etc., R. Co. v.
—— v. Metropolitan St. R. Co., pp. 2585, 2683.
—— v. Wilmington, etc., R. Co., pp. 191, 193, 1607, 1614, 1626.
McRea, International, etc., R. Co. v.
Macrow v. Great Western R. Co., pp. 3115, 3116, 3117, 3119, 3123, 3127, 3129, 3149.
McShane, Harrington v.
McSloop v. Richmond, etc., R. Co., pp. 1883, 1895, 2267.
McSwain, First Nat. Bank v.
McSwegan v. Pennsylvania R. Co., p. 563.
McSwyny v. Broadway, etc., R. Co., p. 2859.
McTeer v. Southern Exp. Co., pp. 3523, 3545.
Mactier v. Wirgman, p. 3865.
—— Steele v.
McVay v. Brooklyn, etc., R. Co., p. 1710.
MacVeagh v. Atchison, etc., R. Co., pp. 573, 577, 578, 744, 887, 895.
McVeety v. St. Paul, etc., R. Co., pp. 1550, 1572.
McVeigh, Southern Exp. Co. v.
McWhirter, Gulf, etc., R. Co. v.
—— St. Louis, etc., R. Co. v.
McWilliams v. Lake Shore, etc., R. Co., pp. 2021, 2871.
Macy, McMahon v.
—— v. New Bedford., etc., R. Co., p. 2889.
—— Parker v.
Madan v. Sherard, pp. 991, 1050, 3163, 3164, 3196.
Madara v. Shamokin, etc., R. Co., p. 2698.
Maday v. United States, p. 3967.
Madden, Central, etc., R. Co. v.
—— v. Missouri Pac. R. Co., pp. 2653, 2673.
—— v. Port Royal, etc., R. Co., 35 S. E. 381, 14 S. E. 713, 28 Am. St. Rep. 855, 52 Am. & Eng. R. Cas. 286—pp. 1767, 1867, 2596.
—— v. Port Royal, etc., R. Co., 41 S. C. 440, 19 S. E. 951, 20 S. E. 65, 2 Am. & Eng. R. Cas., N. S., 384—pp. 1767, 1867, 1911.
Madden, etc., Co., Atchison, etc., R. Co. v.
Maddock, American Sugar Refin. Co. v.
Maddox, Georgia R. Co. v.
—— Georgia R., etc., Co. v.
—— v. London, etc., Railway, p. 1971.
—— Southern R. Co. v.
Maddox & Co., Southern Pac. R. Co. v.
Maddry, St. Louis, etc., R. Co. v.
Madigan v. St. Louis Trans. Co, p. 2853.
Madison, Bearden v.
Madison Elect. R. Co., Vassau v.
Madison Mut. Ins. Co., Fuller v.

Madison, etc., R. Co., Gillenwater v.
—— v. Whitesel, pp. 477, 488, 491, 493, 494.
Madl v. Chicago, etc., R. Co., pp 1745, 1762, 1981.
Mad River, etc., R. Co. v. Fulton, pp. 3125, 3189, 3190.
Madsen v. Utah, etc., R. Co., p. 2777.
Maeller, Young v.
Maercker v. Brooklyn Heights R. Co., pp. 2192, 2285.
Maetze, G. C. & S. F. R. Co. v.
—— Gulf, etc., R. Co. v.
Magdeburg Ins. Co. v. Paulson, p. 853.
Mageau v. Great Northern R. Co., 113 N. W. 1016, 102 Minn. 399—p. 2777.
—— v. Great Northern R. Co., 119 N. W. 200, 106 Minn. 375—p. 2777.
Magee v. New York, etc., R. Co., pp. 1743, 2026, 2860.
Maggie Hammond, The.
Maghee v. Camden, etc., Transp. Co., pp. 3361, 3380.
Magill v. Seaboard, etc., Railway pp. 1491, 2717, 3028.
Magniac, Ellershaw v.
Magnin v. Dinsmore, 62 N. Y. 35 50 How. Prac. 457, 20 Am. Rep 442—pp. 753, 759, 764, 857.
—— v. Dinsmore, 70 N. Y. 410 26 Am. Rep. 608—pp. 514, 582, 663.
—— v. Dinsmore, 38 N. Y. Super. Ct. 248—pp. 759, 1047.
Magnus v. Platt, pp. 421, 1074, 1110, 1186.
Magnus Co., Louisville, etc., R Co. v.
Magoffin v. Missouri Pac. R. Co., p. 1576.
Magowan, Chesapeake, etc., R. Co. v.
Magrane v. St. Louis, etc., R. Co., pp. 2172, 2697, 2931, 2973.
Magrath, Patton v.
Maguire v. Middlesex R. Co., pp. 1953, 2121, 2174.
Mahaffey v. Wisconsin Cent. R. Co., p. 431.
Mahan, Louisville, etc., R. Co. v
Mahattan Delivery Co., Braus v.
Maher, Baker v.
—— v. Central Park, etc., R. Co., 67 N. Y. 52—pp. 1888, 2199.
—— v. Central Park, etc., R. Co., 39 N. Y. Super. Ct. 155—p. 2146.
—— Indiana Union Tract. Co. v.
—— v. Metropolitan St. R. Co., p. 2678.
Mahnke v. New Orleans, etc., R. Co., p. 2274.
Mahogany, Certain Logs of.
Mahon v. Blake, pp. 534, 545.
—— v. Oliver Branch, pp. 1457. 821.
Mahone, Baltimore, etc., R. Co. v.
Mahoney, Chicago Consol. Tract. Co. v.
—— v. Detroit City Railway, pp 1647, 2425, 2431.
—— v. Philadelphia Rapid Trans. Co., p. 2820.
Mahoning Valley R. Co. v. De Pascale, p. 3096.
—— v. O'Hara, p. 2903.
Mahony v. Cook, p. 1589.
—— Pittsburgh, etc., R. Co. v.
Mahula, International, etc., R. Co. v.
Maid of Orleans, Henderson v.
Maignan v. New Orleans, etc., R. Co., pp. 531, 896, 900.
Maillefert v. Interbrough Rapid Transit Co., p. 1707.
Mail Line Co. v. Carrollton Furniture Mfg. Co., p. 803.
Main v. Jarrett, p. 302.
—— Seaboard Air Line R. Co. v.
Maine v. Grand Trunk R. Co., pp. 3551, 3559, 3561, 3591, 3593.
—— The.
—— Toledo, etc., R. Co. v.
Maine Bank of Buffalo v. Barringer, p. 367.
Maine Cent. Railroad, Crawford v.
—— Eastman v.
Maine Cent. R. Co., Blumenthal v.
—— Crosby v.
—— Duncan v.
—— Hoar v.
—— Libby v.
—— Lord v.
—— New England Exp. Co. v.
—— Rodick v.
—— Sayles v.
—— State v.
—— Taylor v.
—— Wood v.
—— Woodbury v.
Maine Nat. Bank v. Barringer, p. 392.
Maine Stage Co. v. Longley, p 483.
Maine Steamship Co., Lindsey v.
—— Wells v.
Maine, etc., R. Co., Allen v.
—— Libby v.
—— Palmer v.
Mairs v. Manhattan Real Estate Ass'n, p. 855.
Majestic, Potter v.
—— The.
Majestic Coal, etc., Co. v. Illinois Cent. R. Co., p. 3644.
Major v. Oregon, etc., R. Co., pp. 1734, 2918, 2951.
Malarin, Perry v.
Malcom v. Richmond, etc., R. Co., pp. 1917, 2176, 2187.
Malcomb v. Louisville, etc., R. Co., p. 2563.
Malecek v. Tower Grove, etc., R. Co., p. 2769.
Malinowski v. Detroit United Railway, pp. 2825, 3005.
Mallard, St. Louis, etc., R. Co. v.
Mallette, Montgomery, etc., R. Co. v.
Mallory v. Burrett, pp. 1161, 3294.
—— v. Tioga R. Co., pp. 222, 728, 749, 775, 3283.
Mallory Steamship Co. v. Baha Diamond, etc., Co., pp. 3920, 3923, 3929, 3932, 4060.
Mallory, etc., Co., Shidlovsky v.
Malloy v. St. Louis, etc., R. Co., p. 2645.
Malone v. Boston, etc., R. Corp., pp. 1673, 3161, 3163, 3184, 3187, 3196.
—— Gulf, etc., R. Co. v.
—— v. Metropolitan Exp. Co., pp. 1006, 1068.
—— v. Pittsburgh, etc., R. Co., pp. 2410, 3081.
—— St. Louis, etc., R. Co. v.
—— v. Texas, etc., R. Co., p. 2295.
Maloney v. Metropolitan St. R. Co., p. 2314.
Malott v. Central Trust Co., p. 1575.
—— v. Hood, p. 3430.
—— Kelly v.
—— v. Sample, p. 2594.
—— v. Weston, p. 2094.
Mamie, The.
Manatt, Colorado, etc., R. Co. v.
Manchester Liners v. Virginia-Carolina Chemical Co., p. 3869.
Manchester Mfg. Co., Central, etc., R. Co. v.
Manchester Mills, Louisville, etc., R. Co. v.
Manchester Mills, Railway Co. v
Manchester, S. & L. R. Co. v Brown, p. 958.
—— Denaby Main Colliery Co. v
Manchester St. Railway, Harrington v.
—— Haskell v.
—— Lord v.
Manchester, etc., Railroad, Gordon v.
—— McCluer v.
Manchester, etc., R. Co. Gavett v.
—— Izlar v.
Manchester, etc., Railway, Swan v.
Mangum v. North Carolina, R Co., pp. 1769, 1786.
—— Texas, etc., R. Co. v.
Manhattan Co., Denny v.
Manhattan Delivery Co., Dressner v.
Manhattan Dist. Tel. Co., Tieber v.
Manhattan Oil Co. v. Camden, etc Transp. Co. (N. Y.), 52 Barb 72, 5 Alb. Prac., N. S., 289—pp 3377, 3380, 3381.
—— v. Camden, etc., Transp. Co., 54 N. Y. 197—pp. 3377, 3381.
Manhattan R. Co., Baker v.
—— Benson v.
—— Boyce v.
—— Brady v.
—— Brown v.
—— Buck v.
—— Cahn v.
—— Clark v.
—— Colwell v.
—— Connelly v.
—— De Soucey v.
—— Dlabola v.
—— Fahr v.
—— Ferry v.
—— Flagg v.
—— Graham v.
—— Hanrahan v.
—— Kelley v.
—— Koetter v.
—— Lauterer v.
—— Lycett v.
—— McGearty v.
—— McKernan v.
—— Merwin v.
—— Oppenheimer v.
—— Palmeri v.
—— Robinson v.
—— Rusk v.
—— Ryan v.
—— Schestauber v.
—— Shea v.
—— Smith v.
—— Solomon v.
—— Spaeth v.
—— Stein v.
—— Thomson v.
—— Timpson v.
Manhattan Real Estate Ass'n, Mairo v.
Manhattan Rubber Shoe Co. v. Chicago, etc., R. Co., pp. 565, 567.
Manheim v. Carr, p. 520.
Manice, Griffen v.
Manistee River Imp. Co., Sands v
Manistee, etc., R. Co., Perkett v.
—— Starks Co. v.
Manitoba, The.
Manitou, The.
Manitowoc v. Manitowoc, etc., Tract. Co., p. 77.
Manitowoc, etc., Tract. Co., Manitowoc v.
Mann v. Birchard, pp. 818, 822, 1008, 3414.
—— Chicago, etc., R. Co. v.
—— v. Philadelphia Tract. Co., p. 2188.
Nann Boudoir Car Co. v. Dupre, pp. 3080, 3206.
—— Searles v.
Mannheim Ins. Co. v. Erie, etc., Transp. Co., p. 3736.

Manning, Chicago, etc., R. Co. v.
—— v. Hoover, pp. 816, 818.
—— v. Louisville, etc., R. Co., p. 2434.
—— West Chicago St. R. Co. v.
—— v. West End St. R. Co., p. 2238.
Mannon v. Camden Interstate R. Co., pp. 2367, 2793.
Mansfield, Commonwealth v.
—— Miller v.
Mansfield R., etc., Co., Hanson v.
Manson, Cleveland, etc., R. Co. v.
—— v. New York, etc., R. Co., pp. 709, 717.
Manter v. Holmes, p. 3945.
Manuel, Fordyce v.
Manufacturers' Bldg. Co., Edwards v.
Manufacturers' Commercial Co. v. Rochester R. Co., 117 N. Y. S. 989—pp. 389, 390.
—— v. Rochester R. Co., 126 N. Y. S. 1051, 142 App. Div. 249—pp. 388, 389.
Manufacturers' Gas, etc., Co. v. Indiana Natural Gas, etc., Co., p. 3428.
Manufacturing Co., Railroad Co. v.
Manville v. Cleveland, etc., R. Co., pp. 1583, 1714.
Maples v. New York, etc., R. Co., p. 2429.
Marable v. Southern R. Co., pp. 1683, 1687, 1752.
Marande v. Texas, etc., R. Co., 42 C. C. A. 317, 102 Fed. 246—pp. 843, 873, 1040.
—— v. Texas, etc., R. Co., 184 U. S. 173, 46 L. Ed. 487, 22 S. Ct. 340—pp. 510, 869, 872, 873, 953.
Marbourge v. Seattle, etc., R. Co., pp. 1997, 2359.
Marbury v. Illinois Cent. R. Co., p. 2886.
Marcardier v. Chesapeake Ins. Co., p. 3864.
March v. Union Pac. R. Co., p. 520.
Marchman, Georgia, etc., R. Co. v.
Marcott v. Minneapolis St., etc., R. Co., pp. 1939, 3233.
Marcum, Commonwealth v.
Marcus, Cincinnati, etc., R. Co. v.
—— v. New Haven Steamboat Co., p. 1103.
—— v. Omaha, etc., Bridge Co., p. 3932.
Marcy v. Warner, p. 798.
Marechal Suchet, The.
Margaret, The.
Margo v. Pennsylvania R. Co., pp. 2752, 2821.
Marie, Lupin v.
Marietta, etc., R. Co., Campbell v.
—— First Nat. Bank v.
—— Peters, etc., Co. v.
Marigold, United States v.
Marin, Sullivan v.
Marine Bank v. Wright, pp. 353, 363.
Marine Fire Ins. Co. v. Burnett, p. 3911.
Marine Ins. Co., Gracie v.
—— v. St. Louis, etc., R. Co., pp. 246, 282.
Marine Nat. Bank v. Barringer, pp. 361, 362, 371.
Marinovich, Northern Pac. R. Co. v.
Marion v. Chicago, etc., R. Co., 59 Iowa 428, 13 N. W. 415, 44 Am. Rep. 687—pp. 2529, 2530.
—— v. Chicago, etc., R. Co., 64 Iowa 568, 21 N. W. 86—p. 2718.
—— Pennsylvania Co. v.
Marion St. R. Co. v. Shaffer, p. 2180.
—— Sirk v.
Maris, Leavenworth, etc., R. Co. v.
Marker, Mitchell v.
—— v. Mitchell, pp. 1722, 1750.
Market St. R. Co., Barrett v.
—— Cody v.
—— Houghton v.
—— Seller v.
Markham v. Houston District Nav. Co., pp. 2081, 2083.
Marks v. Alaska Steamship Co., pp. 2043, 3991.
—— Blum & Co. v.
—— West Chicago St. R. Co. v.
Marks, etc., Co., Southern Exp. Co. v.
Markwald, etc., Co. v. Creditors, pp. 1237, 1240.
Marlborough St. R. Co., Savage v.
Marlett, Illinois Cent. R. Co. v.
—— Vicksburg R., etc., Co. v.
Marlow v. Southern Pac. Co., pp. 1629, 2445.
Marmonstein v. Pennsylvania R. Co., pp. 3161, 3181.
Maroney v. Old Colony, etc., R. Co., pp. 197, 2453, 2714.
Marquette v. Chicago, etc., R. Co., pp. 1953, 2856.
—— v. Langton, pp. 817, 832, 851, 853.
Marquette, etc., R. Co., Condon v.
—— Frederick v.
—— v. Kirkwood, pp. 816, 817, 3249, 3267, 3274, 3395, 3397.
—— Lucas v.
Marr v. Boston, etc., Railroad, pp. 1798, 2026.
—— v. Western Union Tel. Co., pp. 9, 979.
Marriott v. London, etc., R. Co., pp. 193, 194.
Marrs, St. Louis, etc., R. Co. v.
—— Texas Cent. R. Co. v.
—— Texas, etc., R. Co. v.
Marsalis v. Louisiana, etc., R. Co., pp. 2262, 2676.
Marsden Co. v. Bullitt & Co., pp. 853, 3919.
Marsh, Evansville, etc., R. Co. v.
—— Frazer v.
—— v. Horne, p. 1037.
—— Lee v.
—— Price v.
—— Pullman Palace Car Co. v.
—— v. Rhode Island Co., pp. 2395, 2750.
—— v. Union Pac. R. Co., pp. 1156, 1166.
Marshall v. American Exp. Co., pp. 533, 534, 565, 566.
—— Barnes v.
—— v. Boardman, p. 3865.
—— v. Boston Elevated R. Co., p. 1515.
—— v. Boston, etc., R. Co., p. 3018.
—— v. Boston, etc., St. R. Co., 2969.
—— Green, etc., Nav. Co. v.
—— v. Kansas, etc., R. Co., p. 3335.
—— Kendall v.
—— Louisville, etc., R. Co. v.
—— v. McNear, p. 3954.
—— v. Nashville R., etc., Co., p. 1641.
—— v. New York Cent. R. Co. (N. Y.), 45 Barb. 502—pp. 236, 543, 851.
—— v. New York Cent. R. Co., 48 N. Y. 660—p. 615.
—— Norfolk, etc., R. Co. v.
—— Pennsylvania R. Co. v.
—— v. Pontiac, etc., R. Co., p. 3145.
—— St. Louis, etc., R. Co. v.
—— v. St. Louis, etc., R. Co., pp. 2573, 2575, 3061.
—— Southern R. Co. v.
—— v. Southwestern R. Co., p. 2320.
Marshall, Staten Island Rapid Transit Co. v.
—— v. Staten Island Rapid Transit R. Co. v.
—— Western Transp. Co. v.
Marshall Field & Co., Steiskal v.
Marshall Medicine Co. v. Chicago, etc., R. Co., p. 3335.
Marshall, etc., Grain Co. v. Kansas City, etc., R. Co., pp. 590, 3274, 3334, 3335, 3340.
Marshall, etc., R. Co. v. Kansas City, etc., R. Co., p. 342.
Marston, Union Pac. R. Co. v.
Martelle, Chicago, etc., R. Co. v.
Martha, The.
Martin v. American Exp. Co., pp. 797, 807, 3377, 3382.
—— Boggs v.
—— v. Boston Elev. R. Co., pp. 2798, 2877.
—— v. Boston, etc., St. R. Co., p. 2702.
—— Chicago, etc., R. Co. v.
—— Clark v.
—— v. Columbia, etc., R. Co., pp. 3043, 3049.
—— v. Delaware, etc., R. Co., p. 856.
—— Ft. Worth, etc., R. Co. v.
—— v. Ft. Worth, etc., R. Co., pp. 270, 274, 286, 292, 293, 805.
—— v. G. N. R. Co., p. 1780.
—— Grand Rapids, etc., R. Co. v.
—— v. Great Northern R. Co., p. 247.
—— Gulf, etc., R. Co. v.
—— Hannibal, etc., R. Co. v.
—— Louisville, etc., R. Co. v.
—— McLaughlin v.
—— v. McLaughlin, p. 484.
—— v. Missouri Pac. R. Co., pp. 1721, 2787.
—— v. New York, etc., R. Co., p. 2452.
—— v. Old Colony St. R. Co., pp. 1834, 2313, 2740.
—— Omaha, etc., R. Co. v.
—— v. Oregon R., etc., Co., p. 3487.
—— P. C. & St. L. R. Co v
—— Pittsburg, etc., R. Co. v.
—— v. Pittsburg, etc., R. Co., pp. 1576, 3507.
—— Pullman Palace Car Co. v.
—— v. Rhode Island Co., pp. 1602, 1603.
—— St. Louis, etc., R. Co. v.
—— v. St. Louis, etc., R. Co., 55 Ark. 510, 19 S. W. 314, 56 Am. & Eng. R. Cas. 112—pp. 283, 294, 296, 308, 315.
—— v. St. Louis, etc., R. Co. (Tex. Civ. App.), 56 S. W. 1011—pp. 1712, 1884.
—— v. Second Ave. R. Co., pp. 2228, 2688.
—— v. Southern R. Co., pp. 1522, 2251, 2853.
—— v. Southern Railway, 77 S. C. 370, 58 S. E. 3—pp. 1867, 1884, 1911, 2862, 2913.
—— v. Southern Railway, 89 S. C. 32, 71 S. E. 236—pp. 2575, 2626, 2627, 2773, 3016, 3051, 3052.
—— Texas, etc., R. Co. v.
—— The D. R.
—— United States v.
—— v. West, p. 3480.
—— West Chicago St. R. Co. v.
Martindale v. Kansas, etc., R. Co., p. 1861.
Martino, Missouri Pac. R. Co. v.
Martyn, State v.
Marx, Craig v.
—— v. Louisiana Western R. Co., pp. 2409, 2448, 3100.
—— v. The Britannia, p. 3906.
Marye v. Baltimore, etc., R. Co., pp. 3552, 3556, 3557, 3571, 3572.

Maryland, Baltimore, etc., R. Co. v.
—— Brown v.
—— Railroad Co. v.
—— v. Railroad Co., p. 3871.
—— Ward v.
Maryland Ins. Co. v. Ruden, pp. 336, 340, 348.
Maryland, etc., Railroad v. Tucker, pp. 2484, 2850, 2852, 2855, 3028, 3029, 3030, 3031, 3032, 3088.
Marysville, etc., St. R. Co., Nye v.
Mary Washington, The.
Mashen, etc., R. Co., Smith v.
Mask, Louisville, etc., R. Co. v.
Maslin v. Baltimore, etc., R. Co., pp. 5, 734, 741, 750, 815, 949, 1038, 1039, 1054, 1075, 1269, 1338, 1567, 1568, 2098.
Mason, Atchison, etc., R. Co. v.
—— Birmingham R., etc., Co. v.
—— v. Boston, etc., St. R. Co., pp. 1820, 2346.
—— Davey v.
—— v. Erie R. Co., p. 2997.
—— Hooe v.
—— Kent v.
—— Lewis v.
—— Lickbarrow v.
—— Louisville, etc., R. Co. v.
—— v. Missouri Pac. R. Co., pp 287, 1279.
—— v. Missouri, etc., R. Co., p 2300.
—— Montgomery St. R. Co. v.
—— Montgomery St. Railway v.
—— v. Nashville, etc., R. Co., pp. 2055, 2959.
—— v. Nelson Cotton Co., pp. 391, 392, 394, 395, 396, 397.
—— v. St. Louis, etc., R. Co., p. 2655.
—— v. Seaboard Air Line Railway, p. 2445.
—— v. Wilson, p. 1219.
Mason City, etc., Tract. Co., Fitch v.
Mason, etc., Co., Fitch v.
Mason, etc., Tract. Co., Fitch v.
Masonic Fraternity Temple Ass'n v. Collins, pp. 2353, 2901, 2983.
Massachusetts, Beer v.
—— Plumley v.
—— Thurlow v.
—— Western Union Tel. Co. v.
—— v. Western Union Tel. Co., pp. 3551, 3552, 3572, 3591.
Massachusetts Loan, etc., Co. v. Fitchburg R. Co., pp. 595, 597.
Massell v. Boston, etc., R. Co., pp. 2517, 2535.
Massengill, East Tennessee, etc., R. Co. v.
Massey, Illinois Cent. R. Co. v.
—— St. Louis, etc., R. Co. v.
Massie, Louisville, etc., R. Co. v.
Masters v. Barreda, p. 351.
—— Clark v.
Masterson v. Chicago, etc., R. Co., pp. 2480, 3099.
—— v. Crosstown St. R. Co., pp. 1888, 1890, 2687, 2908.
—— Ft. Worth, etc., R. Co. v.
—— Indiana, etc., R. Co. v.
—— v. Macon, etc., St. R. Co., pp. 2252, 2253.
Mateer, Ohio Cent. Tract. Co. v.
Math v. Chicago City R. Co., pp. 1750, 2192, 2193, 2895.
Mather v. American Exp. Co., p. 858.
Mather-McDowell Lumber Co. Southern R. Co., v.
Mathes, Galveston, etc., R. Co. v.
Matheson v. Southern R. Co., pp. 488, 491, 496, 640, 641, 677, 859, 860, 1063, 1072.
Mathew, Wabash R. Co. v.
—— v. Wabash R. Co., p. 1495.
Mathews v. Atchison, etc., R. Co., p. 2081.
Mathews, Chesapeake, etc., R. Co. v.
—— v. Great Northern R. Co., p. 2319.
—— Gulf, etc., R. Co. v.
—— Johnson v.
—— v. Metropolitan St. R. Co., pp. 1520, 1712, 1713, 2152.
Mathias v. O'Neill, p. 2714.
Mathis v. Southern Pac. Co., p. 2970.
—— v. Southern R. Co., pp. 219, 440, 449.
—— v. Thomas, p. 1166.
—— Weston, etc., Railroad v.
Matilda A. Lewis, The.
Matter of Heff, p. 3539.
Matteson v. New York Cent. R. Co., p. 2900.
—— v. New York, etc., R. Co. pp. 3140, 3160, 3170, 3188, 3184.
Matthews v. Board of Corp. Comm'rs, p. 72.
—— Illinois Cent. R. Co. v.
—— Kansas, etc., R. Co. v.
—— Lake Erie, etc., R. Co. v.
—— v. Pennsylvania R. Co., p. 2133.
—— v. Poythress, pp. 358, 375.
—— Pullman Palace Car Co. v.
—— Wallace v.
Matthieson v. Burlington, etc., R. Co., pp. 2131, 2132, 2379, 2380.
Mattison v. New York Cent. R. Co., pp. 3160, 3169.
Matula, Galveston, etc., R. Co. v.
Matz v. St. Paul, etc., R. Co., pp. 1830, 2174, 2187.
Matzdorf, Galveston, etc., R. Co. v.
Man & Co., Stuart v.
Mauch Chunk, The.
Maugans, Cumberland Valley R. Co. v.
—— Cumberland, etc., R. Co. v.
Maughon, Texas, etc., R. Co. v.
Mauldin v. Seaboard Air Line Railway, pp. 265, 499.
Maumee Valley R., etc., Co. v. Montgomery, p. 2088.
Mauran, Clark v.
Maurer v. Brooklyn Heights R. Co., p. 2830.
—— Indiana R. Co. v.
Mauritz v. New York, etc., R. Co., pp. 1031, 3116, 3119, 3123, 3128, 3129, 3130, 3131, 3163, 3165, 3177, 3178, 3179.
Mauro, Walker v.
Maury v. Talmadge, pp. 1749, 1951, 2757.
Mauser, Central R. Co. v.
Maverick v. Eighth Ave. R. Co., pp. 1726, 1735, 1804.
Maxson v. Pennsylvania R. Co., pp. 2447, 2462.
Maxwell, Bomar v.
—— Cleveland, etc., R. Co. v.
—— v. Fresno City R. Co., pp 1720, 2347, 2860.
—— Missouri, etc., R. Co. v.
—— Pecos, etc., R. Co. v.
May, Babcock v.
—— v. Babcock, p. 337.
—— Central Kentucky Tract. Co. v.
—— Chicago Union Tract. Co. v.
—— v. Harson, pp. 11, 768, 1682 1750, 2288.
—— v. Ontario, etc., R. Co., p 1581.
—— St. Louis, etc., R. Co. v.
—— v. Shreveport Tract. Co., pp. 2017, 2058.
May Queen, Merriman v.
Mayall v. Boston, etc., Railroad pp. 277, 1011.
Maybin, Louisville, etc., R. Co. v.
—— v. South Carolina R. Co., p. 3272.
Mayer, Dreyfus v.
—— Texas, etc., R. Co. v.
Mayer Bros., Co., St. Louis, etc., R. Co. v.
Mayes, Houston, etc., R. Co. v.
—— Kansas City, etc., R. Co. v.
—— Macon, etc., R. Co. v.
—— Texas, etc., R. Co. v.
Mayfield v. Southern Railway, pp. 1454, 1455, 1470, 1471, 3408.
—— Texas, etc., R. Co. v.
Maynard v. Oregon R., etc., Co, p. 2925.
Mayne v. Chicago, etc., R Co, p. 1699.
Mayo, Birmingham R., etc., Co. v.
—— v. Boston, etc., Railroad, p. 2274.
—— Hall v.
—— Lake Erie R. Co. v.
—— Lake Erie, etc., R. Co. v.
Mays, Texas, etc., R. Co. v.
Maysville Brick Co., Chesapeake, etc., R. Co. v.
Maysville, etc., R. Co. v. Herrick, p. 3068.
Mazursky v. Atlantic Coast Line R. Co., pp. 3396, 3397, 3404, 3523, 3545, 3546.
—— Atlantic, etc., R. Co. v.
Mazzie, Missouri, etc., R. Co. v.
Mazzie & Co., Missouri, etc., R. Co. v.
Meacham, Illinois Cent. R. Co. v.
—— Railroad v.
Mead, Chicago City R. Co. v.
Meade v. Boston Elev. R. Co., pp. 2351, 2352, 2907.
Meador v. Missouri, etc., R. Co., p. 2694.
Meador Bros., Macon, etc., R. Co. v.
Meadors & Co., Southern Pac. Co. v.
Meadows, Evansville St. R. Co. v.
Meadville, etc., St. R. Co., Beckman v.
Meagher & Co., Garey v.
Means, Atchison, etc., R. Co. v.
—— v. Bank, pp. 369, 373, 383, 387.
—— v. Carolina Cent. R. Co., p. 2756.
—— v. Central R. Co., 139 Fed. 543, 71 C. C. A. 331—p. 2259.
—— v. Central R. Co., 48 N. Y. S. 366, 23 App. Div. 298—p 2259.
—— Chicago, etc., R. Co. v.
—— Columbia, etc., R. Co. v.
Mearns v. Central R. Co., p. 2300.
Mears v. New York, etc., R. Co., pp. 345, 411, 799, 817, 820, 823, 828, 829, 832, 834, 835, 969, 973, 986, 1035, 1038, 1045, 3345, 3379.
—— Taillon v.
Mechanics' Bank v. New York, etc., R. Co., p. 372.
Medbery v. Sweet, p. 473.
Medbury v. Hopkins, p. 1489.
—— v. New York, etc., R. Co., p. 653.
Medea, The.
Media, etc., Elect. R. Co., Rea v.
Media, etc., R. Co., Bilotta v.
Mee, Chicago Union Tract. Co. v.
Meek v. Metropolitan St. R. Co., p. 2721.
—— Missouri, etc., R. Co. v.
Meeker, Lehigh Valley R. Co. v.
—— v. Lehigh Valley R. Co., pp. 3650, 3665, 3815, 3816.
Meeking, Union, etc., R. Co. v.
Meeks v. Atlantic, etc., R. Co., pp. 2155, 2156, 2331.
Meesel v. Lynn, etc., R. Co., p. 1951.
Meglemery, Louisville R. Co. v.
Mehalek v. Minneapolis, etc., R. Co., p. 1551.
Mehlsack, Chicago, etc., R. Co. v.

Meier v. Pennsylvania R. Co., pp. 1682, 1684, 1687, 1720, 1823, 1846, 2671, 2673.
Meigs v. Hagan, p. 494.
Meinhard, etc., Co., Atlantic, etc., R. Co. v.
Meirson v. Hope, p. 573.
Meisner v. Detroit, etc., Ferry Co., pp. 12, 1491, 1499.
Meixner, Cicero, etc., R. Co. v.
Melbourne v. Louisville, etc., R. Co., pp. 524, 531, 539, 3276.
Melendy v. Barbour, p. 801.
Melford v. Missouri, etc., R. Co., p. 2638.
Mellen, United States v.
Mellett, Calloway v.
Mellichamp, Adams Exp. Co. v.
Mellier v. St. Louis, etc., Transp. Co., p. 437.
Mellor, Crawford v.
—— v. Missouri Pac. R. Co., pp. 1575, 1580.
Meloche v. Chicago, etc., R. Co., pp. 285, 287, 292, 303.
Melody v. Great Northern R. Co., pp. 3750, 3759, 3760.
Melton v. Birmingham R., etc., Co., pp. 1536, 1868, 2317.
—— Southern R. Co. v.
Memphis, Iron Mountain R. Co. v.
Memphis Ins. Co., Garrison v.
Memphis News Pub. Co. v. Southern R. Co., pp. 208, 210, 222, 223, 224.
Memphis St. R. Co. v. Graves, pp. 1650, 2458, 2460.
—— v. Norris, p. 2978.
—— v. Shaw, pp. 1763, 1884, 1887, 2017, 2042, 2056, 2722, 2777.
Memphis, etc., Packet Co. v. Abell, p. 1302.
—— American Roofing Co. v.
—— v. Buckner, pp. 1567, 4003.
—— Greenwich Ins. Co. v.
—— Jones v.
—— v. McCool, pp. 2673, 2742.
—— v. Nagel, 15 Ky. L. Rep. 742—pp. 3047, 3051, 3057, 3058.
—— v. Nagel, 97 Ky. 9, 16 Ky. L. Rep. 748, 29 S. W. 743—pp. 3057, 3058.
—— v. Overman Carriage Co., pp. 3912, 3993.
—— Rankin v.
—— Sugg v.
—— Whittenton Mfg. Co. v.
Memphis, etc., R. Co. v. Benson, pp. 203, 1943, 1954, 1955, 2427, 2481, 2712.
—— Bloomingdale, etc., Co. v.
—— Brown v.
—— Bryan v.
—— Bussey v.
—— v. Chastine, p. 2438.
—— v. Copeland, p. 2279.
—— Evans v.
—— v. Freed, pp. 477, 478, 1215.
—— Furstenheim v.
—— German Fire Ins. Co. v.
—— Germania Fire Ins. Co. v.
—— Goodloe v.
—— v. Green, p. 3053.
—— Hall v.
—— Hobbs v.
—— v. Holloway, pp. 1087, 1107, 1108, 3183, 3298, 3299, 3330, 3377, 3383, 3395, 3396.
—— Logwood v.
—— v. Nolan, 14 Fed. 532—p. 3579.
—— v. Nolan, 27 Alb. L. J. 217, 4 Ky. L. Rep. 840—p. 3579.
—— v. Reeves, pp. 422, 737, 743, 744, 747, 748, 825, 1037, 1047.
—— Robinson v.
—— Robinson, etc., Co. v.
—— v. Salinger, p. 2190.
—— v. Southern Exp. Co., p. 103.
—— v. State, p. 29.
Memphis, etc., R. Co. v. Stockard, pp. 3257, 3258.
—— v. Stringfellow, pp. 1925, 1926.
—— Watson v.
—— v. Whitfield, pp. 1872, 1912, 1913, 2681.
Menacho v. Ward, pp. 220, 1179.
Menaugh v. Bedford Belt R. Co., pp. 1551, 1569.
Mencke v. Cargo of Java Sugar, p. 3949.
Mendell, Newport News, etc., R. Co. v.
Mendelsohn v. Anaheim Lighter Co., pp. 847, 860.
Mendenhall v. Atchison, etc., R. Co., pp. 1551, 1552.
—— Currie v.
—— Fewings v.
Mendoza v. Metropolitan St. R. Co., p. 2571.
Menner v. Delaware, etc., Canal Co., pp. 822, 826, 872.
Mensing v. Michigan, etc., R. Co., pp. 1790, 2126, 2230.
Menzell v. Chicago, etc., R. Co., p. 1012.
Mephams v. Biessel, pp. 3901, 3903.
Mepoter, The.
Mercantile Bank, Fry v.
Mercantile Banking Co. v. Landa, pp. 328, 370, 384, 387.
Mercantile Claim Co., Central, etc., R. Co. v.
Mercantile Mut. Ins. Co. v. Calebs, p. 790.
—— v. Chase, pp. 770, 946.
Mercantile Trust Co., Reagan v.
Mercantile & Exchange Bank v. Gladstone, p. 1248.
Mercer, Atkinson v.
—— v. Cincinnati, etc., R. Co., pp. 1912, 2352.
—— Louisville City R. Co. v.
—— Newport News, etc., R. Co. v.
Merchants' Bank, New Jersey Steam Nav. Co. v.
—— v. Union R., etc., Co., pp. 359, 370, 487.
Merchants' Coal Co. v. Fairmont Coal Co., p. 3841.
Merchants' Co., Bonar v.
Merchants' Cotton-Press Co., Lancaster Mills v.
Merchants' Cotton Press, etc., Co., Deming v.
Merchants' Despatch v. Smith, p. 841.
Merchants' Despatch Co. v. Smith, pp. 736, 739.
Merchants' Despatch Transp. Co., Bancroft & Co. v.
—— v. Bloch, pp. 7, 321, 322, 770, 782, 822, 828, 949, 953, 987, 1025, 3291, 3330, 3369.
—— Block v.
—— v. Bolles, pp. 762, 763, 3379.
—— Bracco v.
—— v. Chicago, etc., R. Co., p. 727.
—— Edmunds v.
—— v. Furthmann, pp. 430, 965 981, 996, 997, 1033.
—— v. Joesting, pp. 987, 994, 1033.
—— v. Kahn, pp. 732, 742, 748, 770, 773, 3297.
—— v. Leysor, pp. 945, 1032.
—— Robinson Bros. v.
—— Struching Co. v.
—— Talbott v.
—— v. Theilbar, pp. 980, 1049.
Merchants' Despatch, etc., Co. v. Merriam, pp. 534, 555, 559, 894, 908, 910, 911, 914.
—— Wilde v.
Merchants' Dispatch Transp. Co. v. Cownie Glove Co. v.
Merchants' Dispatch Transp. Co. v. Furthmann, pp. 320, 321, 324, 325, 328, 331, 332, 337, 409, 411, 451, 452, 996, 999.
—— Haase & Sons Fish Co. v.
—— v. Hallock, pp. 536, 894, 900.
—— v. Hoskins, 14 Ky. L. Rep. 927—p. 909.
—— v. Hoskins, 19 Ky. L. Rep. 799, 41 S. W. 31, 44 S. W. 362—p. 813.
—— Rand v.
—— Shelton v.
—— Singer v.
Merchants' Dispatch, etc., Co. v. Cornforth, pp. 770, 784, 786, 945.
—— v. Moore, p. 538.
Merchant's Elevator Co., Dickson v.
Merchants' Exp. Co., Gerhard Mennen Chemical Co. v.
Merchants' Exp., etc., Co., Forbes v.
Merchants' Mut. Ins. Co. v. Lacroix, p. 1118.
Merchants' Nat. Bank v. Baltimore, etc., Steamboat Co., p. 556.
—— v. Bangs, pp. 352, 362.
—— Chesapeake Steamship Co. v.
—— Cheek v.
—— National Bank v.
—— Shaw v.
Merchants' Steamboat Co., Boner v.
Merchants', etc., Ass'n, v. Wood, p. 744.
Merchants', etc., Bank, Albany, etc., R. Co. v.
Merchants', etc., Co., Lancaster Mills v.
Merchants', etc., Storage Co. v. Insurance Co., pp. 3705, 3708.
Merchants', etc., Transp. Co., Clark v.
—— v. Eichberg, pp. 330, 802, 1029, 1072, 1114, 1130.
—— French v.
—— v. Granger, pp. 131, 3863.
—— Lazard v.
—— v. Moore, pp. 714, 894, 1045, 3349, 3350.
—— v. Moore & Co., pp. 551, 553, 562, 1081, 1102.
—— North v.
—— Southern Cotton Oil Co. v.
—— v. Story, pp. 911, 915, 918.
—— United States v.
—— Weil v.
Mercher v. Texas Mid. R. Co., pp. 1526, 2251.
Mercier, Allen v.
Meredith v. Seaboard, etc., R. Co., pp. 613, 3276, 3277, 3393.
Merida, The.
Meriden, etc., Tramway Co., Hesse v.
Meridan R., etc., Co., Godfrey v.
Mering v. Southern Pac. Co., pp. 1064, 1071, 1389.
Meriwether v. Quincy, etc., R. Co., pp. 1294, 1295, 1296, 1315, 1423, 1425.
Merl, Citizens' St. R. Co. v.
Merriam v. Hartford, etc., R. Co., pp. 267, 271, 273, 274, 285, 3136.
—— Merchants' Despatch, etc., Co. v.
Merrick v. Brainard, pp. 483, 789.
—— v. Webster, p. 503.
Merrielees v. Wabash R. Co., pp. 2642, 2800, 2808.
Merrill v. American Exp. Co., pp 986, 1111, 1113, 3369, 3370.
—— v. Boston, etc., R. Co., p. 42.
—— Chicago, etc., R. Co. v.
—— v. Eastern R. Co., 139 Mass. 238, 1 N. E. 548, 52 Am. Rep. 705—p. 1521.
—— v. Eastern R. Co., 139 Mass. 252, 29 N. E. 666—p. 2749.

Merrill, Fordyce v.
—— v. Grinnell, pp. 728, 3118, 3125, 3126, 3129, 3130, 3131, 3132, 3141.
—— v. Metropolitan St. R. Co., p. 2759.
—— v. Michigan Cent. R. Co., pp. 1511, 1770, 2724.
—— v. Pacific Transfer Co., pp. 983, 984, 1050, 3192.
—— Sommerville v.
Merrill & Co., Central, etc., R. Co. v.
Merrimack, The.
Merriman v. Fulton, etc., Co., pp. 1295, 1864.
—— v. Great Northern Exp. Co., p. 578.
—— v. May Queen, pp. 960, 964, 980, 982, 994, 1003, 1004, 1008.
—— Toledo, etc., R. Co. v.
Merritt v. Earle, 29 N. Y. 115, 86 Am. Dec. 292—pp. 736, 737, 742, 749.
—— v. Earle (N. Y.), 31 Barb. 38—pp. 728, 730, 733, 734, 736, 812, 815, 822.
—— v. Lehigh Valley R. Co., p. 3151.
—— v. New York, etc., R. Co., pp. 1884, 2259.
—— v. Old Colony, etc., R. Co., pp. 285, 287, 291, 780.
—— Southern R. Co. v.
Merritt Creamery Co. v. Atchison, etc., R. Co., pp. 733, 749.
Merritt, etc., Wrecking Co. v. Vogeman, 127 Fed. 770—p. 3972.
—— v. Vogeman, 143 Fed. 142—p. 3957.
Merry, Slimmer v.
Merryman v. Chicago, etc., R. Co., pp. 1767, 1798, 1914, 2744, 2873.
Mershon v. Hobensack, pp. 1, 209, 211, 728, 730, 733, 737, 749, 781, 796, 804, 3914.
Merton v. Michigan Cent. R. Co., p. 1825.
Merwin v. Butler, p. 517.
—— v. Manhattan R. Co., 113 N. Y. 659, 21 N. E. 415—pp. 1952, 1953.
—— v. Manhattan R. Co., 48 Hun 608, 1 N. Y. S. 267, 16 N. Y. St. Rep. 20—pp. 1952, 2186.
Merz v. Chicago, etc., R. Co., pp. 481, 574, 577.
Meschneck v. Brooklyn, etc., R. Co., pp. 2664, 2673.
Mesel v. Lynn, etc., R. Co., p. 2173.
Messenger v. Pennsylvania R. Co., 36 N. J. L. 407, 13 Am. Rep. 457—pp. 220, 1135, 1180, 1181, 1184.
—— v. Pennsylvania R. Co., 37 N. J. L. 531, 18 Am. Rep 754—pp. 211, 212, 220, 221, 222, 1147, 1184, 1185, 1189.
—— v. Valley, etc., R. Co., pp. 1522, 1523, 1561, 1779, 1798.
Messino, N. & C. R. Co. v.
—— Nashville, etc., R. Co. v.
Metcalf, House v.
—— Hunt v.
—— v. St. Louis, etc., R. Co., pp. 2133, 2283, 2284.
—— Union Pac. R. Co. v.
—— v. Yazoo, etc., R. Co., pp. 1509, 1510, 1511, 1512.
Metropolitan Exp. Co., Goldbowitz v.
—— Malone v.
Metropolitan R. Co., Eads v.
—— v. Falvey, p. 2881.
—— Geddes v.
—— Guenther v.
—— Harbison v.
—— v. Jones, p. 2748.
—— Kight v.
—— v. Kowalski, p. 2889.
Metropolitan R. Co., McDonough v.
—— v. Quincy R. Co., p. 114.
—— Snashall v.
—— v. Snashall, pp. 2115, 2180, 2190.
Metropolitan Railway v. Jackson, p. 1971.
—— Richardson v.
Metropolitan Redwood Lumber Co., Boston Marine Ins. Co. v.
Metropolitan Steamship Co., Berwindwhite Coal Min. Co. v.
—— Bickford v.
Metropolitan St. R. Co., Alten v.
—— Altwein v.
—— Anderson v.
—— Andrews v.
—— Armstrong v.
—— Bante v.
—— Bartley v.
—— Baskett v.
—— Behen v.
—— Benjamin v.
—— Bente v.
—— Bessenger v.
—— Black v.
—— Bogardus v.
—— Bough v.
—— Bragg v.
—— Cattano v.
—— Cattans v.
—— Christensen v.
—— Coleman v.
—— Connor v.
—— Conway v.
—— Copeland v.
—— Coulahan v.
—— Crow v.
—— De Rozas v.
—— Detrich v.
—— Dowd v.
—— Doyle v.
—— Drogmund v.
—— Ehrhard v.
—— Elliott v.
—— Fay v.
—— Feary v.
—— Forrester v.
—— Fox v.
—— Frank v.
—— Freeman v.
—— Fremont v.
—— Fults v.
—— Gabriel v.
—— Gardner v.
—— Ghio v.
—— Goetz v.
—— Goldstein v.
—— Goodkind v.
—— Goodloe v.
—— Grabenstein v.
—— Grant v.
—— Green v.
—— Gunn v.
—— Hamilton v.
—— Hart v.
—— Haskell v.
—— Henderson v.
—— Hite v.
—— Hogan v.
—— Hollahan v.
—— Holland v.
—— Hooper v.
—— v. Hudson, p. 2926.
—— Hufford v.
—— Hunt v.
—— Hurley v.
—— Ingles v.
—— James v.
—— Joyce v.
—— Kay v.
—— Kennedy v.
—— Kinyoun v.
—— Kirkpatrick v.
—— Klass v.
—— Kohr v.
—— Koran v.
—— Koues v.
—— Kramer v.
—— Lange v.
—— Langley v.
Metropolitan St. R. Co., Latimer v.
—— Lehner v.
—— Leginsky v.
—— Lobner v.
—— Loftus v.
—— Logan v.
—— Lucas v.
—— Lynch v.
—— McDonold v.
—— McFadden v.
—— McNally v.
—— McQuerry v.
—— McRae v.
—— Maher v.
—— Maloney v.
—— Mathews v.
—— Meek v.
—— Mendoza v.
—— Merrill v.
—— Michelson v.
—— Miller v.
—— Monroe v.
—— Moore v.
—— v. Moore, pp. 1571, 1760, 1984.
—— Muller v.
—— Mulligan v.
—— Munroe v.
—— Murphy v.
—— Neuer v.
—— Ormond v.
—— Parker v.
—— Percy v.
—— Peterson v.
—— Pierce v.
—— Price v.
—— Quinn v.
—— Raming v.
—— Ramson v.
—— Redmon v.
—— Reidy v.
—— Richardson v.
—— Roedecker v.
—— Roscoe v.
—— v. Ryan, p. 2277.
—— Scott v.
—— Scroggins v.
—— Seelig v.
—— Setzler v.
—— Sexton v.
—— Shelby v.
—— Smith v.
—— Spaulding v.
—— Stauffer v.
—— Steinle v.
—— Sternfels v.
—— Sterrett v.
—— Suse v.
—— Thompson v.
—— Vessels v.
—— Walker v.
—— Ward v.
—— Warren, pp. 2859, 2860, 2885.
—— Wellman v.
—— Wible v.
—— Wilder v.
—— Willis v.
—— Witters v.
—— Wolf v.
—— Wood v.
—— Woods v.
Metropolitan Trust Co. v. Houston, etc., R. Co., pp. 35, 50, 56, 58, 60.
Metropolitan West Side Elev. R. Co., Plutschow v.
—— v. Sutherland, p. 1544.
Metropolitan, etc., Co., Friedman v.
Metropolitan, etc., R. Co., Beatty v.
—— Blackwell v.
—— Gascoigne v.
—— Gray v.
—— Kimber v.
—— Lynch v.
—— Moore v.
Mettler v. Delaware, etc., R. Co., p. 2585.

Mettlestadt v. Ninth Ave. R. Co., p. 2249.
Metz v. Buffalo, etc., R. Co., p. 2090.
—— v. California, etc., R. Co., pp. 3109, 3114, 3115, 3116, 3119, 3120.
Meuer v. Chicago, etc., R. Co., pp. 430, 431, 2099.
Mexican Cent. R. Co., Dalby & Co. v.
—— v. De Rosear, pp. 3115, 3123, 3125, 3129, 3142.
—— v. Goodman (Tex. Civ. App.), 43 S. W. 580—pp. 1606, 1614, 2441, 2572, 2623, 3721.
—— v. Goodman, 20 Tex. Civ. App. 109, 48 S. W. 778—p. 2444.
—— v. Goodman (Tex. Civ. App.), 55 S. W. 372—p. 2438.
—— v. Lauricella, 87 Tex. 277, 28 S. W. 277, 47 Am. St. R p. 103—pp. 1815, 2004, 2589, 2666, 2679, 2694, 2843, 3004.
—— v. Lauricella (Tex. Civ. App.), 26 S. W. 301, 303—pp. 1694, 1741, 1755, 1756, 2809.
—— v. Locke, p. 840.
—— v. Mitten, pp. 1589, 2633.
—— Pyman Steamship Co. v.
Mexican Gulf R. Co., Carmanty v.
Mexican Nat. R. Co. v. Crum, pp. 1762, 2523, 2544.
—— v. Garcia, pp. 1326, 1328, 1350.
—— v. Jackson, p. 2103.
—— v. Savage, pp. 1280, 3344.
—— v. Ware, pp. 937, 1491, 3114, 3115, 3123.
Mexican Prince, The.
Meyer v. Atlantic, etc., R. Co., pp. 3186, 3188.
—— Chesapeake, etc., R. Co. v.
—— Chicago, etc., R. Co. v.
—— v. Chicago, etc., R. Co., p. 515.
—— Dodge v.
—— v. Dresser, p. 308.
—— v. Harnden's Exp. Co., pp. 931, 994, 1018.
—— In re.
—— v. Lemcke, p. 570.
—— Louisville, etc., R. Co. v.
—— Missouri, etc., R. Co. v.
—— v. Pacific R. Co., p. 2856.
—— v. Peck, pp. 313, 337, 338, 339, 347, 3884.
—— Pecos, etc., R. Co. v.
—— v. St. Louis, etc., R. Co., pp. 1496, 1497, 1737, 2022, 3201, 3202, 3212.
—— Scharff v.
—— v. Second Ave. R. Co., pp. 2414, 2853, 2856.
—— v. Vicksburg, etc., R. Co., pp. 270, 273, 274, 778, 852.
—— v. Wells, Fargo & Co., pp. 3562, 3578.
—— Witherbee v.
Meyor Co., Southern Exp. Co. v.
Meyer-Schmid Grocer Co., St. Nicholas Hotel Co. v.
—— Wheless v.
Meyere v. Nashville, etc., Railway, pp. 2172, 2179, 2182.
Meyerle, Rothermel v.
Meyerowitz v. Interurban St. R. Co., p. 2816.
Meyers v. Missouri, etc., R. Co., pp. 1031, 1043, 1062.
—— v. Pullman Co., pp. 3217, 3218, 3219, 3220, 3221, 3224.
—— Southern R. Co. v.
—— v. Wabash, etc., R. Co., p. 1379.
—— Wolfe v.
Meyerstein v. Barber, pp. 378, 3274.
Meyre, Ludwig v.
Meyers, Michigan, etc., R. Co. v.
Miami Powder Co. v. Port Royal, etc., R. Co., 38 S. C. 78, 16 S. E. 339, 21 L. R. A. 123, 55 Am. & Eng. R. Cas. 688—pp. 522, 581, 683, 697, 798, 854.
—— v. Port Royal, etc., R. Co., 47 S. C. 324, 25 S. E. 153—p. 798.
Miami Steamship Co., Gulf, etc., R. Co. v.
Michael Transp. Co., Costigan v.
Michaels v. New York Cent. R. Co., pp. 619, 728, 734, 742, 743, 744, 775, 3282.
Michalitschke v. Wells, Fargo & Co., pp. 986, 1072.
Micheals v. Adams Exp. Co., p. 1047.
Michelson v. Metropolitan St. R. Co., p. 2876.
Michie, Chicago, etc, R. Co. v.
—— v. New York, etc., R. Co., p. 3706.
—— Railroad Co. v.
Michigan, Fargo v.
—— Lyng v.
Michigan Cent. R. Co., Armour v.
—— v. Boyd, pp. 325, 430, 996.
—— v. Burrows, pp. 236, 246, 611, 616, 621, 663, 734, 739, 744, 3276, 3277, 3410.
—— Cahn v.
—— v. Carrow, pp. 3121, 3123, 3124, 3149, 3152, 3153, 3154.
—— v. Chicago Elect. Vehicle Co., pp. 3326, 3330.
—— v. Chicago, etc., R. Co., p 579.
—— v. Coleman, pp. 1712, 1727, 1734, 1899, 1900, 2145, 2146.
—— v. Curtis, pp. 734, 741, 770, 3281.
—— Davies v.
—— Dobbin v.
—— Ferguson v.
—— Fox v.
—— Geer v.
—— v. Hale, pp. 433, 898, 932, 945, 962, 974, 1007, 1008.
—— v. Harville, p. 567.
—— Kelsey v.
—— Kibby v.
—— Kirby v.
—— Knudsen-Ferguson Fruit Co. v.
—— Kuter v.
—— v. Lantz, p. 898.
—— Lucas v.
—— McEacheran v.
—— McKenzie v.
—— Mensing v.
—— Merrill v.
—— Merton v.
—— v. Michigan Comm., pp. 124, 126.
—— Michigan R. Comm. v.
—— Mills v.
—— v. Mineral Springs Mfg. Co., pp. 417, 883, 885, 965, 982, 986, 1007, 1015, 1066, 1067, 3161, 3326, 3327, 3329.
—— Moore v.
—— v. Murphy, pp. 131, 134.
—— Myrick v.
—— O'Dea v.
—— v. Phillips, pp. 353, 361.
—— Pingree v.
—— Rothschild v.
—— Schulte v.
—— Smith v.
—— v. Smithson, p. 241.
—— Tubbs v.
—— United States v.
—— Van Camp v.
—— v. Ward, pp. 536, 900.
—— Whipple v.
Michigan Comm., Michigan Cent. R. Co. v.
Michigan R. Comm., Ann Arbor R. Co. v.
—— Detroit, etc., R. Co. v.
Michigan R. Comm., Grand Trunk R. Co. v.
—— v. Michigan Cent. R. Co., p. 3535.
Michigan R. Co. v. Boyd, p. 1489.
Michigan Southern, etc., R. Co., Baker v.
Michigan Steamship Co., In re.
—— McGill v.
Michigan Tract. Co., Hopkins v.
—— Snyder v.
Michigan United R. Co., Dorrance v.
—— Humphrey v.
—— Johnson v.
—— Ross Tp. v.
—— Schultz v.
Michigan United Railway, Fillingham v.
Michigan, etc., R. Co., Baker v.
—— Bissell v.
—— v. Bivens, pp. 536, 852.
—— Buffett v.
—— v. Caster, p. 471.
—— v. Coleman, p. 1788.
—— Davis v.
—— v. Day, pp. 614, 3276.
—— Feige v.
—— Heffron v.
—— Hunt v.
—— King v.
—— v. Lantz, pp. 2615, 2618.
—— v. McDonough, pp. 210, 242, 243, 247, 267, 285, 944, 1268, 1272, 1307, 1361.
—— McMillan v.
—— Mensing v.
—— v. Meyers, pp. 267, 3188.
—— v. Oehm, pp. 3118, 3124, 3152.
—— Richards v.
—— v. Shelton, p. 3023.
—— v. Shurtz, pp. 285, 291, 884, 912.
—— Whippel v.
Midd v. Wells, p. 586.
Middleport, Ætna Life Ins. Co. v.
Middlesex, The.
Middlesex R. Co., Feital v.
—— v. Lapointe v.
—— Maguire v.
—— Vinton v.
—— Wilton v.
Middlesex Valley R. Co., Green v.
Middlesex, etc., Tract. Co., Peterson v.
—— Rairitan River R. Co. v.
Middleton, Hayward v.
Mid. Great W. Ry. Co., Cannon v.
Midland Great Western R, Co., Wallen v.
Midland Nat. Bank, Dymock v.
—— v. Missouri Pac. R. Co., pp. 343, 356, 377, 378, 380, 384, 390, 532, 560, 561, 3274.
—— v. Missouri, etc., R. Co., 1 Mo. App. 417, 62 Mo. App. 531—p. 558.
—— v. Missouri, etc., R. Co., 62 Mo. App. 531, 1 Mo. App. Rep'r 417—p. 359.
Midland R. Co. v. Bromley, p. 3182.
—— Fitzgerald v.
—— Hudson v.
—— Johnson v.
—— Kent v.
—— Lord v.
—— Mutton v.
—— Mylton v.
—— Readhead v.
—— Runney v.
—— Shepherd v.
—— Thompson v.
Midland R. Terminal Co., Kaplan v.
Midland Valley R. Co. v. Adkins, pp. 3288, 3291.
—— v. Bailey, p. 2511.
—— v. Ezell, pp. 1409, 1430.

Midland Valley R. Co. v. Fay, etc., Co., pp. 559, 562.
—— v. George, p. 781.
—— v. Hale, p. 3395.
—— v. Hamilton, pp. 1998, 2121, 2687, 2973.
—— v. Hoffman Coal Co., pp. 216, 463, 464, 468, 469, 3840.
—— v. Page, pp. 1885, 2908.
—— v. Pugh, pp. 1348, 1439.
—— v. State, 24 Okla. 817, 104 Pac. 1086—p. 128.
—— v. State, 35 Okla. 672, 130 Pac. 803—pp. 31, 41.
—— Stratford v.
Midland, etc., R. Co., Doublin Whiskey Distillery Co. v.
Midvale Steel Co., Pennsylvania R. Co. v.
Mierson v. Hope (N. Y.), 2 Sweeney 56—p. 903.
—— v. Hope, 32 N. Y. Super. Ct. 561—p. 773.
Miculi v. New York, etc., R. Co., p. 2778.
Miko, Southern R. Co. v.
Milam v. Southern R. Co., pp. 1385, 1478, 3396, 3413, 3415.
Milburn v. Federal Sugar Refin. Co., p. 3891.
Mileham, West Chicago St. R. Co. v.
Miles, Central R., etc., Co. v.
—— Chicago, etc., R. Co. v.
—— v. Gorton, p. 1211.
—— v. Johnson, p. 1682.
—— v. King, p. 2892.
—— Little Rock, etc., R. Co. v.
—— Louisville, etc., R. Co. v.
—— v. St. Louis, etc., R. Co., pp. 2294, 2388, 2687, 2876, 2968.
—— West Chester, etc., R. Co. v.
Miles & Son, Cincinnati, etc., R. Co. v.
Miletus, Westray v.
Miley v. Northern Pac. R. Co., pp. 158, 2097.
Milford, etc., St. R. Co., Gilmore v.
Milhous v. Atlantic, etc., R. Co., p. 642.
—— v. Southern Railway, p. 2626.
Milhouse v. Southern Railway, pp. 1856, 3013, 3043, 3055.
Milk, American Merchants' Union Exp. Co. v.
Millar v. St. Louis Trans. Co., pp. 2656, 2825.
Millard v. Missouri, etc., R. Co., pp. 3124, 3149.
—— v. Webster, p. 1247.
Mill Bay, The.
Mill Elevator, etc., Co., Chicago, etc., R. Co. v.
Mill Transp. Co., Great Lakes Touring Co. v.
Millcreek v. Erie, etc., R. Co., p. 133.
Milledgeville R. Co., Central, etc., R. Co. v.
Miller, American Exp. Co. v.
—— Atchison, etc., R. Co. v.
—— v. Atlanta, etc., R. Co., 143 N. C. 115, 55 S. E. 439—pp. 2319, 2940, 2976.
—— v. Atlanta, etc., R. Co., 57 S. E. 345, 144 N. C. 545—p. 2160.
—— Atwell v.
—— Boston, etc., R. Co. v.
—— v. Brewster, p. 2883.
—— v. Brooklyn Heights R. Co., 108 N. Y. S. 960, 124 App. Div. 537—pp. 1527, 2042, 2049.
—— v. Brooklyn Heights R. Co., 111 N. Y. S. 47, 127 App. Div. 197—p. 2482.
—— v. Browarsky, p. 3886.
—— Chesapeake, etc., R. Co. v.
—— Chicago, etc., R. Co. v.
—— v. Chicago, etc., R. Co., 62 Mo. App. 252—pp. 449, 450.
Miller v. Chicago, etc., R. Co., 123 N. W. 449, 85 Neb. 458—pp. 1363, 3605.
—— v. Chicago, etc., R. Co., 115 N. W. 794, 135 Wis. 247, 17 L. R. A., N. S., 158—p. 2190.
—— v. Cincinnati, etc., R. Co., p. 992.
—— Connecting Terminal Co. v.
—— Connecting Terminal R. Co. v.
—— v. Detroit United Railway, p. 2550.
—— East Tennessee, etc., R. Co. v.
—— v. East Tennessee, etc., R. Co., pp. 1920, 1925, 2906.
—— v. Georgia R., etc., Co., pp. 699, 700, 701, 702, 703, 704, 705, 708, 709, 711, 714.
—— Great Western R. Co. v.
—— v. Hannibal, etc., R. Co., pp. 305, 331, 345.
—— Houston, etc., R. Co. v.
—— Illinois Cent. R. Co. v.
—— Indianapolis Tract., etc., Co v.
—— v. International R. Co., p 2731.
—— International, etc., R. Co. v.
—— v. Jannett, p. 862.
—— Kansas Pac. R. Co. v.
—— v. King, 166 N. Y. 394, 59 N. E. 1114—pp. 3017, 3025, 3032.
—— v. King, 84 Hun 308, 32 N. Y. S. 332, 65 N. Y. St. Rep. 490—p. 2567.
—— v. King, 53 N. Y. S. 123, 32 App. Div. 389—p. 2773.
—— Livingston v.
—— Louisville, etc., R. Co. v.
—— v. Mansfield, pp. 700, 701, 702, 714, 717.
—— v. Metropolitan St. R. Co., pp. 1892, 1894, 1904, 2688.
—— Missouri, etc., R. Co. v.
—— v. Missouri, etc., R. Co., pp. 3330, 3335, 3343.
—— v. New Jersey Steamboat Co., p. 1937.
—— New York, etc., R. Co. v.
—— Norfolk, etc., Tract. Co. v.
—— O'Brien v.
—— v. Ocean Steamship Co., 118 N. Y. 199, 23 N. E. 462—pp. 1847, 2955.
—— v. Ocean Steamship Co., 43 Hun 640, 6 N. Y. St. Rep. 664—p. 2682.
—— Ohio Tract. Co. v.
—— v. Pendleton, pp. 833, 1331, 3926.
—— Pennsylvania Co. v.
—— Pennsylvania R. Co. v.
—— v. Philadelphia Rapid Trans. Co., p. 2817.
—— Pittsburg, etc., R. Co. v.
—— Plotz v.
—— St Louis, etc., R. Co. v.
—— v. St. Paul City R. Co., pp. 1518, 1894, 2877.
—— Seward & Co. v.
—— v. South Carolina R. Co., p. 3292.
—— v. South Covington, etc., R. Co., p. 2908.
—— Southern R. Co. v.
—— v. Southern R. Co., pp. 1670, 1673, 1674, 2845, 3044, 3056.
—— v. Steam Nav. Co., pp. 523, 728, 730, 733, 739, 740, 749, 887, 888, 891, 896.
—— v. Sullivan & Co., p. 476.
—— Texas Cent. R. Co. v.
—— Texas, etc., R. Co. v.
—— v. Texas, etc., R. Co., pp. 3311, 3342, 3390.
—— Trice v.
—— v. United R. Co., p. 2697.
—— United States v.
Miller v. West Jersey, etc., R. Co., p. 2593.
Miller Coal Co., Little Rock, etc., R. Co. v.
Miller Grain, etc., Co. v. Union Pac. R. Co., pp. 455, 3292, 3336.
Miller Levee Dist. No. 2, St. Louis, etc., R. Co. v.
Millett v. New York, etc., R. Co., pp. 1532, 1794.
Milligan, Indianapolis, etc., R. Co. v.
—— v. Texas, etc., R. Co., p. 2637.
Milliman v. New York, etc., R. Co., 66 N. Y. 642—pp. 1498, 2121.
—— v. New York, etc., R. Co. (N. Y.), 4 Hun 409, 6 Thomp. & C. 585—p. 2121.
Milliot, McCaughn v.
Millmore v. Boston Elevated R. Co., p. 1902.
Mills v. Atlantic, etc., R. Co., p. 1721.
—— v. Ball, p. 1247.
—— v. Baltimore, etc., R. Co., pp. 3315, 3318.
—— Chicago, etc., R. Co. v.
—— Evansville, etc., R. Co. v.
—— Field v.
—— Fleming v.
—— v. Michigan Cent. R. Co., pp. 886, 896, 901, 3262, 3267.
—— Missouri, etc., R. Co. v.
—— v. Missouri, etc., R. Co., pp. 1493, 1596, 1599, 1600, 1602, 1766, 2114, 2151, 2250, 2251, 2301, 2319, 2331, 2467, 2468, 2750, 2866, 2912, 2941.
—— v. National Steamship Co., p. 852.
—— Powell v.
—— v. Seattle, etc., R. Co., pp. 1665, 2482, 2483, 2485, 2534 2855.
—— v. Southern Railway, 82 S. C. 242, 64 S. E. 238—pp. 152, 610.
—— v. Southern Railway, 90 S. C. 366, 73 S. E. 772—pp. 642, 645, 860.
—— Summers v.
—— Thomas v.
—— Vandewater v.
—— v. Weir, pp. 984, 987, 3349.
Millsaps, Yazoo, etc., R. Co. v.
Millville Gas Light Co. v. Sweeten p. 2584.
Millville Tract. Co., McCoy v.
Miln, New York v.
—— Rowland v.
Milne v. Chicago, etc., R. Co., pp. 278, 333, 338, 341.
—— Ross v.
Milnor v. New York, etc., R. Co., pp. 3175, 3177, 3182, 3317.
Milroy v. Chicago, etc., R. Co., p. 432.
Miltimore v. Chicago, etc., R. Co., pp. 753, 758.
Milwaukee, Milwaukee Elect. R., etc., Co. v.
—— Yates v.
Milwaukee City R. Co., Geitz v.
—— Grisim v.
—— Heuecke v.
—— Knowlton v.
—— Schoenfeld v.
—— White v.
Milwaukee Dock Co., Hale v.
Milwaukee Elect. R. etc., Co., Bailing v.
—— Bartholomaus v.
—— Dehsoy v.
—— Di Benedetto v.
—— Gay v.
—— Jirachek v.
—— Kline v.
—— Luger v.
—— Lugner v.
—— McBride v.

Milwaukee Elect. R., etc., Co. v. Milwaukee, p. 62.
—— Sure v.
Milwaukee Light, etc., Co., Karr v.
Milwaukee Malt Extract Co. v. Chicago, etc., R. Co., pp. 238, 257.
Milwaukee Mirror, etc., Works v. Chicago, etc., R. Co., pp. 3122, 3172, 3173.
Milwaukee Northern R. Co., Otto v.
Milwaukee St. R. Co., Hardy v.
—— Schmitt v.
Milwaukee, etc., R. Co., Abrams v.
—— Annas v.
—— v. Arms, pp. 3063, 3067.
—— Blair v.
—— Chamberlain v.
—— Conkey v.
—— Delamatyr v.
—— Dimmick v.
—— v. Fairchild, pp. 897, 907.
—— v. Finney, p. 1677.
—— Fitzsimmons v.
—— Green v.
—— Irish v.
—— Kirst v.
—— Lawrence v.
—— Lucas v.
—— Parker v.
—— Pierce v.
—— v. Smith, pp. 430, 3329.
—— Spencer v.
—— Stimson v.
—— Wood v.
—— Yorton v.
Milwaukee, etc., Trans. Co., United States v.
Mims v. Mitchell, p. 2696.
—— v. Seaboard, etc., Railway, pp. 1502, 2846.
Minahan v. Grand Trunk Western R. Co., pp. 2693, 2898.
Mindler, Birmingham R., etc., Co. v.
Minds v. Pennsylvania R. Co., pp. 88, 97, 136, 139.
Miner, Cutting v.
Mineral Springs Mfg. Co., Michigan Cent. R. Co. v.
Mineral Wells, etc., R. Co., First Nat. Bank v.
Miners' Co-op. Ass'n v. The Monarch, pp. 3933, 3936, 3937, 3945.
Minihan v. Boston Elev. R. Co., 197 Mass. 367, 83 N. E. 871—p. 2982.
—— v. Boston Elev. R. Co., 91 N. E. 414, 205 Mass. 402—p. 2806.
Mink, Louisville, etc., R. Co. v.
Minneapolis St. R. Co., Ahern v.
—— Dahlberg v.
—— Ford v.
—— Hill v.
—— Hoblit v.
—— Lacey v.
—— Morrill v.
—— v. Odegaard, pp. 1709, 2008, 2677.
—— Piper v.
—— Rhea v.
Minneapolis St., etc., R. Co., Marcott v.
Minneapolis, etc., R. Co. v. Beckwith, pp. 58, 60.
—— Benedict v.
—— Bresky v.
—— Brown v.
—— Burnside v.
—— Cain v.
—— Carver v.
—— Church v.
—— Clapp v.
—— Cole v.
—— v. Columbus Rolling-Mill, p. 3867.
—— Crandall v.
—— Drummy v.
Minneapolis, etc., R. Co., Eldridge v.
—— Farwell Farmers' Warehouse Ass'n v.
—— Galehouse v.
—— Gebus v.
—— Gillen v.
—— Gisleson v.
—— Gray v.
—— Grimes v.
—— Guthier v.
—— Haff v.
—— Harris v.
—— Hatch v.
—— v. Home Ins. Co., p. 333.
—— Hull v.
—— In re.
—— Jansen v.
—— Jones v.
—— Larson v.
—— McCollom v.
—— Marcott v.
—— Mehalek v.
—— v. Minnesota, 134 U. S. 467, 33 L. Ed. 985, 10 S. Ct. 473—pp. 63, 64.
—— v. Minnesota, 186 U. S. 257, 264, 46 L. Ed. 1151, 22 S. Ct. 900—pp. 34, 39, 46, 50, 52, 53 55, 58, 72, 75, 76, 120, 124, 126, 3486, 3647, 3669, 3674.
—— Mitchelson v.
—— Morris v.
—— Morse v.
—— Ortt v.
—— Patzke v.
—— v. Railroad Commr., pp. 44, 48, 114, 119, 125, 126.
—— Ramm v.
—— Sever v.
—— Shea v.
—— Southard v.
—— State v.
—— Steidl v.
—— Sullivan v.
—— Symonds v.
—— Wehmann v.
—— White v.
Minnesota v. Barber, p. 3529.
—— Cargill Co. v.
—— Chicago, etc., R. Co. v.
—— Gladson v.
—— Minneapolis, etc., R. Co. v.
—— United States Exp. Co. v.
Minnesota Min. Co. v. Chapman, pp. 728, 739, 888, 1145, 1146.
Minnesota Transfer R. Co., Cooley v.
—— Douglas Co. v.
Minnetonka, The.
Minnie E. Kelton, The.
Minnish v. Southern R. Co., p. 1253.
Minock v. Detroit, etc., R. Co., pp. 1920, 1926.
Minogue, Louisville, etc., R. Co v.
Minor v. Chicago, etc., R. Co., pp. 3172, 3174.
—— Illinois Cent. R. Co. v.
—— Illinois, etc., R. Co. v.
—— v. Lehigh Valley R. Co., p 2912.
Minot v. Philadelphia, etc., R. Co., Fed. Cas. No. 9, 645, 2 Abb. U. S. 323, 7 Phila. 555—p. 3574.
—— v. Philadelphia, etc., R. Co. (U. S.), 18 Wall. 206, 21 L. Ed. 888—p. 3593.
—— Roulo v.
Minter v. Chicago, etc., R. Co., p. 1306.
—— v. Pacific Railroad, pp. 277, 280, 3133, 3136, 3149.
Minter Bros. v. Southern Kansas R. Co., pp. 3347, 3348.
Minturn, Brooks v.
—— Lawrence v.
—— v. Warren Ins. Co., p. 3949.
Mires v. St. Louis, etc., R. Co., pp. 975, 1031, 1045, 1074, 3745, 3761.
Missimer v. Philadelphia, etc., R. Co., pp. 1829, 2579.
Mississippi, Louisville, etc., R. Co. v.
—— Mobile, etc., R. Co. v.
—— The.
Mississippi Cent. R. Co., Hunt v.
—— v. Kennedy, pp. 3115, 3116, 3119, 3124, 3199.
Mississippi Mills v. Union, etc., Bank, pp. 1212, 1219, 1220, 1229.
Mississippi R. Comm., Alabama, etc., R. Co. v.
—— v. Gulf, etc., R. Co., pp. 29, 62.
—— Illinois Cent. R. Co. v.
—— v. Illinois Cent. R. Co., pp. 129, 3513, 3514, 3515, 3516.
Mississippi River, etc., R. Co., Steffen v.
Mississippi Southern Exp. Co. v. Moon, pp. 1033, 1036.
Mississippi, etc., R. Co., Angle v.
—— Angle & Co. v.
—— v. Ayres, pp. 1715, 1735.
—— Chaffe v.
—— v. Gill, p. 3057.
—— v. Harrison, pp. 1897, 2988.
Missouri, Einert v.
—— Keokuk, etc., R. Co. v.
—— v. Webb, pp. 337, 339.
—— Welton v.
Missouri Coal, etc., R. Co. v. Hannibal, etc., R. Co., p. 283.
Missouri Nat. Bank, Eufaula Grocery Co. v.
Missouri Pac. Co. v. Fennell, p. 344.
Missouri Pac. R. Co., Adams v.
—— Anderson v.
—— Armstrong v.
—— Attorney General v.
—— v. Baden, p. 3334.
—— v. Baier, pp. 1764, 1765.
—— Baker v.
—— v. Beeson, pp. 324, 452, 1049, 3881.
—— Bennitt v.
—— Berry v.
—— Blackmore v.
—— v. Bolling, p. 175.
—— Bolton v.
—— v. Brazil, p. 3070.
—— v. Breeding, pp. 817, 819, 828, 840, 851, 860.
—— Brinkmeier v.
—— Bryan v.
—— Burke v.
—— Burriss v.
—— v. Callahan, pp. 1816, 2145, 2217, 2302, 2633, 2738.
—— Campbell v.
—— Carroll v.
—— Castanola v.
—— v. Castle, 172 Fed. 841—p. 3510.
—— v. Castle, 224 U. S. 541, 56 L. Ed. 875, 32 S. Ct. 606—p. 3507.
—— v. Childers (Tex. Civ. App.), 29 S. W. 559, 560,—pp. 1106, 1116, 1117.
—— v. Childers, 1 Tex. Civ. App. 302, 21 S. W. 76—pp. 1053, 1086, 1093, 1094, 1095, 1096, 1097, 1107, 1411, 1415, 1416.
—— v. China Mfg. Co., pp. 815, 822, 843, 937, 959, 1027, 1041, 1048, 1130.
—— Choate v.
—— Christie v.
—— Christl v.
—— v. Collier, p. 2736.
—— v. Cornwall, pp. 951, 1087, 1097, 1268, 1339, 1361, 1480, 1481, 1410.
—— v. Creath, pp. 805, 3331.
—— v. Crowell Lumber, etc., Co., pp. 1141, 3261.
—— v. Curtis, p. 1640.
—— Darlington v.
—— Darlington Lumber Co. v.

Missouri Pac. R. Co. v. Douglas & Sons, pp. 282, 293, 295, 816, 818, 847.
—— Drey, etc., Glass Co. v.
—— Duvenick v.
—— Eckles v.
—— v. Edwards, 75 Tex. 334, 12 S. W. 853—pp. 1083, 1405.
—— v. Edwards, 78 Tex. 307, 14 S. W. 607—pp. 457, 1077, 1336, 1346, 1349, 1396, 1443, 1469, 1477, 1480.
—— Ephland v.
—— Estes v.
—— v. Evans, p. 1763.
—— v. Fagan, 72 Tex. 127, 9 S. W. 749, 2 L. R. A. 75, 13 Am. St. Rep. 776—pp 213, 328, 654, 693, 740, 741, 833, 849, 932, 979, 1009, 1010, 1086, 1093, 1094, 1095, 1107, 1122, 1284, 1304, 1322, 1339, 1340, 1353, 1355, 1370, 1391, 1398, 1409, 1415, 1416, 3368.
—— v. Fagan (Tex. Civ. App.), 27 S. W. 887, 888—pp. 1271, 1357.
—— v. Fagan (Tex. Civ. App.), 29 S. W. 1110—p. 1341.
—— Farber v.
—— Ferguson v.
—— Foreman v.
—— v. Foreman, 73 Tex. 311, 11 S. W. 326, 15 Am. St. Rep. 785—pp. 1929, 1966, 2287, 2289.
—— v. Foreman (Tex. Civ. App.), 46 S. W. 834—pp. 1879, 1882, 1885, 1978, 1988, 2290, 2633.
—— Freeback v.
—— Furnish v.
—— v. Gernon, pp. 836, 863.
—— v. Goodholm, p. 683.
—— v. Graves, pp. 292, 293, 424, 1267, 1269, 1274, 1347, 1446.
—— Gress v.
—— Griffith v.
—— v. Groesbeck, p. 3241.
—— Hale v.
—— v. Hall, pp. 611, 1479, 1481, 1482.
—— Handley v.
—— Hanks v.
—— Hardin Grain Co. v.
—— v. Harmonson, pp. 448, 1276.
—— Harned v.
—— v. Harper Bros., pp. 426, 856.
—— v. Harris, 67 Tex. 166, 2 S. W. 574—pp. 4, 741, 809, 933, 937, 938, 940, 950, 951, 854, 977, 978, 1027, 1063, 1078, 1085, 1086, 1088, 1093, 1094, 1095, 1096, 1097, 1107, 1121, 1122, 1267, 1268, 1330, 1339, 1409, 1410, 1411, 1413, 1415, 1431, 1432, 3368.
—— v. Harris, 1 Tex. Civ. Cas., § 1257—pp. 210, 237, 238, 729, 769, 993, 934, 937, 938, 940, 946, 957, 1053, 1267, 1409.
—— Harrison v.
—— v. Haynes, pp. 512, 533, 537, 897, 901, 1299.
—— v. Heath, pp. 819, 1472.
—— Heck v.
—— v. Heidenheimer, pp. 349, 355, 356, 357, 361, 365, 369, 370, 371, 380, 381, 387, 389, 401, 513, 516, 549, 551, 553, 580, 1222, 1224.
—— Helm v.
—— v. Hennessey, pp. 2583, 2589, 2683, 2721.
—— Hess v.
—— v. Hewett, pp. 849, 855, 858.
—— Hickman v.
—— Hill v.
—— v. Holcomb, pp. 1746, 1755.
—— Hoskins v.
—— Hull & Co. v.
—— v. International Marine Ins. Co., pp. 790, 791, 793, 794, 937, 938, 993.
Missouri Pac. R. Co., Irvin v.
—— v. Irvin, p. 2357.
—— v. Ivy, 71 Tex. 409, 9 S. W. 346, 1 L. R. A. 500, 10 Am. St. Rep. 758—pp. 1567, 1578, 2092, 2098, 2099.
—— v. Ivy, 79 Tex. 444, 15 S. W. 692—pp. 344, 1468, 3618.
—— James v.
—— v. Jarrard, p. 1808.
—— v. Johnson, pp. 1680, 1684, 1689, 1690, 1691, 1725, 1808, 1812, 2735, 3068, 3069.
—— v. Kaiser, p. 3085.
—— v. Kingsbury, pp. 1272, 1284.
—— Kreis v.
—— Larabee Flour Mills Co. v.
—— v. Larabee Flour Mills Co., p. 26.
—— v. Lau, pp. 478, 479.
—— Lenix v.
—— Letts-Spencer Grocer Co. v.
—— v. Levi, pp. 628, 629, 630.
—— Ligon v.
—— Lincoln Tent, etc., Co. v.
—— v. Long, pp. 1730, 1766, 1783, 1927, 2230, 2934.
—— v. McClanahan, pp. 1600, 2468, 2469.
—— McFadden v.
—— v. McFadden, pp. 267, 281, 283, 284, 293, 306, 307, 308, 314, 331, 356, 357, 371, 373, 389, 3879.
—— McGee v.
—— McGinnis v.
—— McGrew v.
—— v. Mackey, p. 2034.
—— Mackoy v.
—— v. McLiney, p. 365.
—— McPeak v.
—— Madden v.
—— Magoffin v.
—— Martin v.
—— v. Martino, pp. 2444, 3075.
—— Mason v.
—— Mellor v.
—— Midland Nat. Bank v.
—— v. Mitchell, pp. 1680, 1808, 1812, 3069.
—— Moore v.
—— Morrow v.
—— Nathan v.
—— v. Nebraska, pp. 34, 61.
—— v. Neiswanger, pp. 1773, 1798, 2730.
—— v. Nevill, pp. 726, 751, 752, 896, 900.
—— v. Nevin, p. 811.
—— v. Newberger, pp. 920, 896.
—— v. Nicholson, pp. 405, 406, 424, 464, 829, 1027, 1272, 1303.
—— Otis Co. v.
—— Paddock v.
—— v. Paine, pp. 1035, 1089, 1094, 1095, 1096, 1107, 1309, 1411, 1414, 1415, 1416.
—— Partello v.
—— Patterson v.
—— v. Peru Van-Zandt Imp. Co., pp. 495, 521, 597, 641, 654, 678, 679, 681, 682, 683, 1153, 1154, 1166, 1167.
—— Pinkerton v.
—— v. Railroad Comm'rs, pp. 3484, 3486.
—— v. Relf, p. 1187.
—— Richmond v.
—— v. Riggs, pp. 285, 288, 884, 918.
—— Roark v.
—— Rodgers v.
—— Rucker v.
—— v. Rushin, pp. 802, 860.
—— v. Russell (Tex.), 15 S. W. 206—p. 1469.
—— v. Russell (Tex), 18 S. W. 594—pp. 1328, 1329, 1469.
—— v. Ryan, pp. 1051, 1078, 1079, 3289.
—— Sanderson v.
Missouri Pac. R. Co., Saxton v.
—— v. Scott, 4 Tex. Civ. App. 76, 26 S. W. 239—pp. 491, 815, 822, 1441, 1457.
—— v. Scott, 2 Texas App. Civ Cas., § 324—pp. 1111, 1115, 1428.
—— Shelby v.
—— v. Sherwood, pp. 861, 864 935, 936, 937, 938, 939, 958, 959, 1409.
—— v. Shuford, pp. 1688, 3069, 3070.
—— v. Slater, p. 3181.
—— Smith v.
—— v. Smith, 60 Ark. 221, 29 S. W. 752—pp. 140, 144, 170, 171, 175.
—— v. Smith (Tex.), 16 S. W. 803—p. 954.
—— v. Smith, 84 Tex. 348, 19 S. W. 509—pp. 485, 490, 802, 810, 831, 1441, 1460.
—— Spohn v.
—— Sprague v.
—— State v.
—— Tate v.
—— Taylor v.
—— v. Texas, etc., R. Co., 31 Fed. 862—pp. 3712, 3714, 3723.
—— v. Texas, etc., R. Co., 34 Fed. 92—p. 2150.
—— v. Texas, etc., R. Co., 36 Fed. 879—p. 2150.
—— v. Texas, etc., R. Co., 41 Fed. 913, 18 Am. & Eng. R Cas., N. S., 412—pp. 1456, 3624.
—— Thero v.
—— Tibby v.
—— v. Tietken, pp. 2098, 2099, 2365.
—— Todd v.
—— Tucker v.
—— v. Twiss, p. 3294.
—— United States v.
—— v. United States, 47 Ct. Cl. 266—p. 738.
—— v. United States, 189 U. S. 274, 47 L. Ed. 811, 23 S. Ct. 507—pp. 1134, 3769, 3808.
—— v. Vandeventer, pp. 1085, 1408.
—— Wagner v.
—— Walter v.
—— Walters v.
—— Ward v.
—— v. Watson, pp. 1773, 2142, 2148, 2630.
—— v. Weil, p. 546.
—— v. Weissman, pp. 520, 625.
—— White v.
—— v. Wichita Wholesale Grocery Co., pp. 530, 531, 769, 896, 898, 3282, 3283, 3299.
—— Willcox v.
—— Wilson v.
—— Wolfe v.
—— v. Wortham, pp. 1771, 1779, 1797, 1910, 1914, 2386, 2821, 2985.
—— v. Wright, p. 174.
—— v. York, p. 759, 3114, 3115, 3116, 3125, 3126, 3130, 3131, 3132.
—— Young v.
—— v. Young, p. 839.
—— Zuendt v.
Missouri K. Co., Carroll v.
—— Dougherty v.
Missouri River Packet Co., Gray v.
Missouri, etc., Railroad, Perkins v.
Missouri, etc., R. Co., Abbott Gin Co. v.
—— Adams v.
—— v. Allen, 39 Tex. Civ. App. 230, 239, 87 S. W. 168—pp. 1352, 1356, 1409.
—— v. Allen, 53 Tex. Civ. App. 433, 115 S. W. 1179—p. 2819
—— v. Avis, 100 Tex. 33, 93 S W. 424—pp. 2284, 2292, 2630.

Missouri, etc., R. Co. v. Avis, 41 Tex. Civ. App. 72, 91 S. W. 877—pp. 2164, 2207, 2215, 2725.
—— v. Ball, pp. 1942, 2028, 2649.
—— v. Beard, pp. 275, 286, 287, 288, 289, 290, 292, 293, 845, 866, 875, 880.
—— Belcher v.
—— v. Belcher, 88 Tex. 549, 32 S. W. 518—pp. 419, 420, 443, 859, 1296.
—— v. Belcher, 89 Tex. 428, 430, 35 S. W. 6—pp. 641, 646, 647, 648, 649, 676, 1316.
—— v. Belcher (Tex. Civ. App.), 41 S. W. 706—p. 1347.
—— Bergin v.
—— Bibb v.
—— v. Blalack, p. 1577.
—— Booth v.
—— v. Bowles, pp. 3425, 3751, 3760.
—— Bromschwig Tailors' Trimming Co. v.
—— Brown v.
—— v. Brown (Tex. Civ. App.), 39 S. W. 326—p. 2172.
—— v. Brown (Tex. Civ. App.), 156 S. W. 519—p. 2853.
—— v. Buchanan, pp. 1771, 1910, 1911, 1913.
—— v. Byrd, pp. 1522, 1938.
—— v. Byrne, 40 C. C. A. 402, 100 Fed. 359—p. 1335.
—— v. Byrne, 3 Ind. T. 740, 49 S. W. 41, 13 Am. & Eng. R. Cas., N. S., 17—pp. 287, 1436, 1438.
—— v. Capital Compress Co., p. 701.
—— v. Carpenter, pp. 654, 657, 3661, 3662, 3663, 3664.
—— v. Carter, 95 Tex. 461, 68 S. W. 159—pp. 932, 934, 935.
—— v. Carter, 9 Tex. Civ. App. 677, 690, 29 S. W. 565—pp. 207, 208, 232, 253, 405, 424, 425, 451, 453, 474, 937, 970, 971, 973, 976, 977, 978, 979, 980, 996, 1030, 1034, 1092, 1093, 1095, 1096, 1120.
—— v. Chilton, p. 2090.
—— v. Chittim (Tex. Civ. App.), 40 S. W. 23—pp. 1354, 1359.
—— v. Chittim, 60 S. W. 284, 24 Tex. Civ. App. 599—p. 1337.
—— Chorn v.
—— Claiborne v.
—— v. Clark, pp. 1285, 1288.
—— v. Clayton, pp. 863, 875, 3395.
—— v. Clifton, p. 674.
—— v. Cobb, p. 1323.
—— v. Cocreham, pp. 405, 943, 1028, 1120, 1121.
—— Cohen Bros. v.
—— v. Cook, 8 Tex. Civ. App. 376, 27 S. W. 769—pp. 849, 1352, 1688.
—— v. Cook, 12 Tex. Civ. App. 203, 33 S. W. 669—pp. 1959, 1967, 2116, 2725.
—— Cox v.
—— v. Cox & Co., pp. 569, 596.
—— v. Criswell, pp. 1784, 2988.
—— Cullar v.
—— v. Cumby Mercantile, etc., Co., p. 841.
—— v. Darlington (Tex. Civ. App.), 30 S. W. 251—p. 1323.
—— v. Darlington (Tex. Civ. App.), 40 S. W. 550—p. 474.
—— v. Davidson, pp. 745, 862, 866.
—— Davis v.
—— v. Davis, pp. 1126, 1418.
—— v. Dawson, pp. 1593, 1858, 1859, 2478.
—— v. Dowson Bros., p. 856.
—— v. Dement, pp. 674, 807, 831, 849, 857.
—— v. Dill, pp. 1766, 2866.
Missouri, etc., R. Co. v. Dilworth, 95 Tex. 327, 67 S. W. 88—p. 1359.
—— v. Dilworth (Tex. Civ. App.), 65 S. W. 502—p. 3281.
—— Doss v.
—— Dumas v.
—— v. Dunbar, 49 Tex. Civ. App. 12, 108 S. W. 500—pp. 1770, 2729, 2730, 2733.
—— v. Dunbar, 57 Tex. Civ. App. 411, 122 S. W. 574—p. 2733.
—— Dymock v.
—— Dysart v.
—— v. Early-Clement Grain Co., p. 622.
—— v. Edling, p. 2003.
—— Eichhorn v.
—— v. Elliott, pp. 3337, 3338.
—— v. Enos, pp. 1730, 1766, 2869.
—— Ephland v.
—— v. Evans, p. 2121.
—— Evans, etc., Cultivator Co. v.
—— v. Faulkner, p. 649.
—— Fielder v.
—— v. Flood, 35 Tex. Civ. App. 197, 79 S. W. 1106—pp. 1812, 1821, 1826, 1842, 2095, 2167.
—— v. Flood (Tex. Civ. App.), 70 S. W. 331—p. 2095.
—— v. Fookes, pp. 1639, 3499.
—— v. Foster, 97 Tex. 618, 80 S. W. 1197—pp. 3322, 3375, 3401.
—— v. Foster (Tex. Civ. App.), 87 S. W. 879—pp. 2630, 3401.
—— v. Frogley, p. 1420.
—— v. Fry, pp. 1321, 1325, 1355, 1419.
—— v. Garrett, 39 Tex. Civ. App. 246, 87 S. W. 172—pp. 1474, 1477.
—— v. Garrett (Tex. Civ. App.), 96 S. W. 53—p. 1359.
—— v. Gerren, pp. 2016, 2039.
—— Gillett v.
—— Ginnochio-Jones Fruit Co. v.
—— v. Gist, p. 1600.
—— v. Glass, pp. 1614, 1679, 1856.
—— v. Godair Comm. Co., pp. 943, 1120, 1121, 1122, 1129.
—— Gratiot St. Warehouse Co. v.
—— Green v.
—— v. Groce, p. 568.
—— v. Haber, pp. 3448, 3481, 3482, 3504, 3505, 3513, 3514, 3542.
—— v. Hancock, 26 Okla. 254, 109 Pac. 220—pp. 1119, 1121, 1123, 1395, 1397.
—— v. Hancock, 26 Okla. 256, 109 Pac. 223—p. 1408.
—— Harned v.
—— v. Harriman, pp. 3521, 3545, 3752, 3762, 3827.
—— v. Harris, p. 851.
—— Harrison v.
—— v. Harrison, 97 Tex. 611, 80 S. W. 1139—pp. 3322, 3375, 3401.
—— v. Harrison, 56 Tex. Civ. App. 17, 120 S. W. 254—p. 1700.
—— v. Harrison (Tex. Civ. App.), 77 S. W. 1036—pp. 2081, 2082.
—— v. Hawkins, pp. 1254, 1256.
—— v. Hay, pp. 1687, 1688.
—— Hayes v.
—— v. Hayes, p. 1333.
—— v. Hazlett, pp. 660, 670, 672.
—— v. Hibbitts, pp. 2064, 2510.
—— v. Hopkins, p. 639.
—— v. Huff, 98 Tex. 110, 13 R. R. R. 344, 36 Am. & Eng. R. Cas., N. S., 344, 81 S. W. 525—pp. 1547, 1549, 1552, 1555, 2665, 2720, 2780, 2783, 2865, 2948.
—— v. Huff (Tex. Civ. App.), 78 S. W. 249—pp. 202, 1555.
—— Hunt v.
—— Hunt Bros. v.
Missouri, etc., R. Co. v. Interstate Commerce Commissioner, pp. 3677, 3684, 3788, 3790, 3796, 3797.
—— v. Jahn, p. 1990.
—— v. Jarrell, pp. 851, 863.
—— v. Jenkens, pp. 565, 567, 599, 602, 603.
—— Johnson v.
—— Jones v.
—— v. Kahn, p. 809.
—— v. Kendrick, pp. 1768, 1906, 1908, 1909, 2034, 2058, 3211.
—— v. Kirkham, pp. 1408, 1428.
—— v. Kyser, 87 S. W. 389, 38 Tex. Civ. App. 355—pp. 441, 1293, 1294, 1355.
—— v. Kyser, 43 Tex. Civ. App. 322, 95 S. W. 747—pp. 608, 1269, 1304, 1345.
—— Leibengood v.
—— v. Leibold, pp. 504, 1096, 1288, 1334.
—— Levi v.
—— v. Levine, p. 572.
—— v. Lewellin Bros., p. 1269.
—— v. Linton, pp. 1254, 1255.
—— v. Love, pp. 46, 47, 51, 56, 57, 130.
—— v. McCann, pp. 3292, 3293, 3523, 3536.
—— McCrary v.
—— v. McCutcheon, p. 1776.
—— v. McElree, pp. 1884, 2252, 2598.
—— v. McFadden, 89 Tex. 138, 33 S. W. 853—pp. 525, 775, 1022.
—— v. McFadden (Tex. Civ. App.), 32 S. W. 18—p. 780.
—— v. McLaughlin, pp. 972, 1062.
—— v. McLean, pp. 574, 784, 786, 813, 845, 846, 859, 861.
—— McPeak v.
—— Mason v.
—— v. Maxwell, pp. 3226, 3227.
—— v. Mazzie, pp. 3342, 3395, 3396.
—— Meador v.
—— v. Meek, pp. 3109, 3113, 3114, 3115, 3116, 3117, 3127, 3128, 3130, 3131, 3132.
—— Melford v.
—— v. Meyer, p. 3558.
—— Meyers v.
—— Midland Nat. Bank v.
—— Millard v.
—— Miller v.
—— v. Miller, 8 Tex. Civ. App. 241, 27 S. W. 905—pp. 1768, 2512, 2514.
—— v. Miller, 15 Tex. Civ. App. 428, 39 S. W. 583—pp. 2509, 2515.
—— v. Miller, 20 Tex. Civ. App. 570, 50 S. W. 168—pp. 1907, 1909, 2846.
—— Mills v.
—— v. Mills, p. 1563.
—— v. Mitchell, 79 S. W. 94, 34 Tex. Civ. App. 394—pp. 1730, 1770, 1822, 1842, 2841.
—— v. Mitchell, 47 Tex. Civ. App. 307, 105 S. W. 827—pp. 2449 2458.
—— v. Mitchell (Tex. Civ. App.), 87 S. W. 841—p. 1999.
—— v. Moody, p. 2603.
—— v. Moore, pp. 831, 834, 852.
—— v. Morgan, 49 Tex. Civ. App. 212, 108 S. W. 724—pp. 1908, 2289, 2706.
—— v. Morgan (Tex. Civ. App.), 138 S. W. 216—p. 2481.
—— v. Murphy, pp. 1614, 1623, 1631, 1632.
—— Navin v.
—— v. New Era Milling Co., 79 Kan. 435, 100 Pac. 273—pp. 220, 1183, 1197.

Missouri, etc., R. Co. v. New Era Milling Co., 80 Kan. 141, 101 Pac. 1011—pp. 3434, 3537.
—— Och v.
—— v. Overfield, pp. 1525, 1526, 1527, 1924, 1964, 2162, 2599, 2613.
—— Patrick v.
—— v. Patrick, p. 995.
—— Patterson v.
—— v. Perry, 8 Tex. Civ. App. 78, 27 S. W. 496—pp. 1524, 1532, 1679, 1906, 1909, 2036, 2067.
—— v. Perry (Tex. Civ. App.), 95 S. W. 42—p. 1825.
—— v. Pope, pp. 1541, 2058, 2064.
—— v. Price, pp. 1525, 1526, 1964, 1966, 2064.
—— v. Pullen, pp. 539, 1289, 1386, 1418.
—— v. Quinn, p. 1328.
—— v. Raney, pp. 2063, 2064.
—— v. Redus, pp. 2648, 2654.
—— Riggins v.
—— v. Rines & Co., pp. 520, 569, 596, 1154.
—— v. Rodgers, p. 2319.
—— Rogers v.
—— Ross v.
—— Russell v.
—— v. Russell, 8 Tex. Civ. App. 578, 28 S. W. 1042—pp. 1524, 1738, 1865, 1866, 1918, 2018, 2024.
—— v. Russell, 40 Tex. Civ. App. 114, 88 S. W. 379—pp. 1268, 1269, 1330, 1339.
—— v. Sadler, p. 3509.
—— v. Scarborough, pp. 1713, 1732.
—— v. Schroeder, pp. 1752, 1755.
—— Schwartz v.
—— Sealy v.
—— v. Sealy, pp. 311, 313, 329.
—— v. Seley, pp. 551, 562.
—— v. Sherrill, pp. 1797, 2911.
—— Sickles v.
—— v. Simmons, pp. 1561, 1562, 1596, 1707.
—— v. Simonson, pp. 589, 3540.
—— v. Smith, 81 C. C. A. 598, 152 Fed. 608, 10 Am. & Eng. Ann. Cas. 939—pp. 1542, 2425, 2429, 2472, 2473, 2474, 3079.
—— v. Smith, 6 Ind. T. 99, 89 S. W. 668—pp. 3079, 3080, 3083, 3104.
—— v. Smith (Tex. Civ. App.), 133 S. W. 695—p. 1711.
—— v. Sneed, pp. 247, 1311, 1370.
—— v. Sproles, pp. 686, 687.
—— Spry v.
—— Spurlock v.
—— v. Stanfield Bros., p. 1306.
—— v. Stark Grain Co., pp. 618, 624, 625, 690, 1005, 3281, 3661.
—— v. State, p. 128.
—— Steckdaub v.
—— v. Stoner, pp. 207, 1135, 3755.
—— v. Farwater, p. 3084.
—— v. Thompson, pp. 320, 502, 506.
—— v. Trinity County Lumber Co., pp. 1139, 1141, 1176, 3753, 3755.
—— v. Tripis, pp. 754, 787, 811, 870, 871, 872.
—— Truel v.
—— v. Truskett, 44 C. C. A. 179, 104 Fed. 728—p. 662.
—— v. Truskett, 2 Ind. T. 633, 53 S. W. 444—pp. 1321, 1331, 1351.
—— v. Truskett (Ind. Terr. App.), 17 Am. & Eng. R. Cas., N. S., 273—p. 620.
—— v. Truskett, 22 S. Ct. 943, 186 U. S. 480, 46 L. Ed. 1259—pp. 1308, 1326, 3411.
Missouri, etc., R. Co. v. Turley, 85 Fed. 369, 29 C. C. A. 196—p. 2132.
—— v. Turley, 1 Ind. T. 275, 37 S. W. 52—pp. 2324, 2390.
—— v. Turner, p. 3509.
—— v. Union Ins. Co., pp. 274, 282, 338, 339.
—— v. United States, pp. 3623, 3624, 3626, 3629, 3630.
—— v. Vance, pp. 2583, 2637, 2721.
—— v. Vandiver, pp. 1255, 1257.
—— Waggoner v.
—— v. Walden, p. 1081.
—— Watkins Merchandise Co. v.
—— v. Watkins Merchandise Co., p. 868.
—— v. Weaver, p. 3104.
—— v. Webb, pp. 209, 643, 644, 654, 849, 851, 1305, 1316, 1323, 1326, 3410.
—— v. Welch, p. 3051.
—— v. Wells, pp. 1358, 1392, 3311.
—— v. White, pp. 1771, 1797, 1913, 2065.
—— v. Williams, 91 Tex. 255, 257, 42 S. W. 855—pp. 1502, 1556, 1562, 1596, 2543, 2665.
—— v. Williams (Tex. Civ. App.), 40 S. W. 350—pp. 1542, 1557.
—— Winfrey v.
—— Withers v.
—— v. Withers, pp. 424, 425, 451, 457, 937, 969, 996, 997, 1120, 1394, 1445.
—— v. Witherspoon, 18 Tex. Civ. App. 615, 45 S. W. 424—pp. 264, 472.
—— v. Witherspoon (Tex. Civ. App.), 38 S. W. 833—p. 472.
—— v. Wolf, pp. 1711, 1866.
—— v. Woods (Tex. Civ. App.), 31 S. W. 237—p. 1279.
—— v. Woods (Tex. Civ. App.), 117 S. W. 196—p. 1308.
—— v. Wright, pp. 2772, 2778.
—— v. Wylie (Tex. Civ. App.), 26 S. W. 85—p. 2250.
—— Wyrick v.
Missouri, etc., Railway v. Lightfoot, p. 2458.
Mitchell v. Augusta, etc., R. Co., pp. 1509, 1511, 1512.
—— Breed v.
—— Bried v.
—— v. Carolina Cent. R. Co., pp. 822, 1039, 1388.
—— Chicago, etc., R. Co. v.
—— v. Chicago, etc., R. Co., 138 Iowa 283, 114 N. W. 622—pp. 2696, 2763, 2895, 2896, 2897.
—— v. Chicago, etc., R. Co., 51 Mich. 236, 16 N. W. 388, 47 Am. Rep. 566, 18 Am. & Eng. R. Cas. 176—pp. 1687, 1927, 2119, 2667, 2673.
—— v. Chicago, etc., R. Co., 132 Mo. App. 143, 112 S. W. 291—pp. 1755, 2703, 2800.
—— v. Cincinnati, etc., R. Co., p. 1642.
—— v. Des Moines City R. Co., pp. 2866, 2906, 2996.
—— East Tennessee, etc., R. Co. v.
—— Ford v.
—— v. Georgia R. Co., pp. 1364, 1431, 1436, 1447.
—— Illinois Cent. R. Co. v.
—— v. Lancashire, etc., R., Co., p. 892.
—— Louisville R. Co. v.
—— Marker v.
—— v. Marker, pp. 1733, 1750.
—— Mims v.
—— Missouri Pac. R. Co. v.
—— Missouri, etc., R. Co. v.
—— v. New York, etc., R. Co., p. 2163.
Mitchell, Noble v.
—— Pittsburg, etc., R. Co. v.
—— Puget Sound Elect. Railway v.
—— Railroad v.
—— St. Louis, etc., R. Co. v.
—— v. Southern Pac. R. Co., pp. 1986, 2184, 2294, 2295, 2695, 2766.
—— Southern R. Co. v.
—— v. Southern R. Co., pp. 2447, 2463.
—— v. Steelman, p. 3565.
—— Texas, etc., R. Co. v.
—— Union Pac. R. Co. v.
—— v. United R. Co., p. 2054.
—— v. United States Exp. Co., pp. 821, 825, 1036, 1047.
—— v. Weir, p. 596.
—— Wells Fargo & Co's Exp. v.
—— v. Western, etc., R. Co., pp. 1686, 1916, 1965, 2666, 2667, 2788.
—— White v.
—— Yazoo, etc., R. Co. v.
Mitchell Coal, etc., Co. v. Pennsylvania R. Co., 181 Fed. 403—pp. 3687, 3701, 3709, 3710, 3732.
—— v. Pennsylvania R. Co., 183 Fed. 908—pp. 3773, 3812.
—— v. Pennsylvania R. Co., 33 S. Ct. 916, 230 U. S. 247, 57 L. Ed. 1472—pp. 3734, 3813, 3815.
Mitchell Crittenden Tie Co., St. Louis, etc., R. Co. v.
Mitchelson v. Minneapolis, etc., R. Co., p. 501.
Mitsui v. St. Paul Fire, etc., Ins. Co., p. 3940.
Mittleman v. Philadelphia Rapid Transit Co., pp. 2164, 2365.
Mitten, Mexican Cent. R. Co. v.
Mixon, Dittman, etc., Shoe Co. v.
Mizo, Atlanta Baggage, etc., Co. v.
M. K. & T. R. Co., Ryan & Co. v.
M. M. Chase, The.
Moakes v. Nicholson, p. 352.
Moakler v. Willamette Val. R. Co., p. 2201.
Moates, Small v.
Moberly, Northern Texas Tract Co. v.
Mobile, Battle v.
—— Bienville Water Supply Co. v.
—— Leloup v.
—— Osborne v.
—— Postal Telegraph-Cable Co. v.
—— Southern Exp. Co. v.
Mobile County, Ware, etc., Co. v.
Mobile St. R. Co. v. Watters, pp. 2628, 2709, 3020, 3023.
Mobile Trade Co., Grey v.
Mobile, etc., R. Co., Alabama Nat. Bank v.
—— Allen Co. v.
—— Anderson v.
—— v. Ashcraft, 48 Ala. 15—pp. 2294, 2726, 3068, 3069, 3070.
—— v. Ashcraft, 49 Ala. 305—p. 2739.
—— Ball v.
—— v. Barber, p. 2636.
—— Bardwell v.
—— Barron v.
—— v. Bay Shore Lumber Co., pp. 555, 562, 593.
—— v. Bell, p. 2611.
—— Bighee, etc., Packet Co. v.
—— Blackmer, etc., Pipe Co. v.
—— v. Blakely, p. 1738.
—— v. Bogle, pp. 1556, 1557, 2207.
—— v. Brandon, p. 165.
—— v. Bromber, p. 3430.
—— v. Brownsville, etc., Live Stock Co., pp. 946, 972, 977, 1412.

Mobile, etc., R. Co., Central American Steamship Co. v.
—— Commonwealth v.
—— Connell v.
—— v. Copeland, p. 3291.
—— Davis v.
—— v. Davis, p. 2090.
—— v. Dismukes, pp. 1159, 1160, 3654, 3853.
—— Dixon v.
—— Evans v.
—— v. Francis, pp. 1481, 3356.
—— v. Greenwald, p. 3546.
—— Grey v.
—— v. Hopkins, pp. 945, 3160, 3163, 3176, 3195.
—— Hubbard v.
—— Ireland v.
—— v. Jackson, pp. 2784, 3028.
—— v. Jarboe, pp. 1007, 1015.
—— v. Jurey, pp. 326, 332, 334, 422, 424, 848, 854, 1353, 3866, 3872.
—— Kennedy Bros. v.
—— v. Klein, p. 2127.
—— Laurel Mercantile Co. v.
—— Long v.
—— v. McArthur, p. 1855.
—— v. Mississippi, pp. 3484, 3485.
—— v. Mullins, p. 1477.
—— v. Phillips & Co., pp. 759, 762.
—— v. Prewitt, pp. 210, 773, 895.
—— v. Reeves, pp. 2814, 3043.
—— v. Robbins Cotton Co., p. 848.
—— Russell v.
—— v. Sessions, p. 41.
—— State v.
—— v. State, pp. 3484, 3485.
—— v. Steiner, etc., Co., pp. 67, 1195, 1197.
—— v. Tupelo Furniture Mfg. Co., pp. 1036, 3394.
—— v. United States, p. 3624.
—— v. Walsh, 146 Ala. 290, 40 So. 559—pp. 2348, 2906.
—— v. Walsh, 146 Ala. 295, 40 So. 560—pp. 2125, 2228, 2238, 2243, 2728, 2997.
—— v. Weiner, pp. 728, 733, 749, 945, 981, 1003, 1004, 1007.
—— v. Williams, 52 Ala. 278—p. p. 876.
—— v. Williams, 54 Ala. 168—pp. 493, 531, 589.
—— v. Wisdom, p. 1604.
—— Wooten v.
—— Zackery v.
—— Zeigler Bros. v.
Mock, Chicago, etc., R. Co. v.
Model Clothing Co. v. Columbia Transfer Co., p. 8.
Modern Match Co. v. Baltimore, etc., R. Co., pp. 843, 869.
Modesitt v. St. Joseph, etc., R. Co., p. 1473.
Moeller v. United R. Co., 242 Mo. 721, 147 S. W. 1009—p. 2874.
—— v. United R. Co., 133 Mo. App. 68, 112 S. W. 714—pp. 1865, 1998, 2599.
—— v. United R. Co. (Mo. App.), 147 S. W. 1009—pp. 1880, 2359.
—— Young v.
Moer v. Corrinth, p. 1172.
Moffatt v. Great Western R. Co., p. 287.
—— v. Long Island R. Co., p. 3157.
Moffatt Comm. Co. v. Union Pac. R. Co., p. 744.
Moffitt v. Connecticut Co., pp. 2142, 2144, 2747.
Mogi, Pennsylvania R. Co. v.
Mohaupt, Chicago, etc., R. Co. v.
Mohawk, Propeller.
Mohler, Atwood v.
Mohns v. Netherlands-American Steam Nav. Co., p. 3990.
Mohr v. Boston, etc., R. Co., pp. 1228, 1229, 1239, 1245.
Mohr v. Chicago, etc., R. Co., pp. 894, 899.
Molby v. Hay, p. 1215.
Moline Plow Co., Cleveland, etc., R. Co. v.
Moline, etc., R. Co., Coburn v.
Moll, Padgitt v.
Mollie Mohler, The.
Mollison v. Lockhart, p. 1243.
Molloy v. Hay, p. 1234.
—— v. New York, etc., R. Co., p. 2531.
—— Pioneer Fuel Co. v.
Moltrum, South Chicago City R. Co. v.
Mommsen, Chicago Union Tract. Co. v.
Monarch Fruit Co., Scheuermann v.
Monday v. St. Joseph R., etc., Co., pp. 2583, 2605.
Mondou v. New York, etc., R. Co., pp. 3421, 3441, 3447, 3450, 3462, 3463, 3464, 3465, 3466, 3506, 3507.
Monell v. Northern Cent. R. Co. (N. Y.), 16 Hun 585—p. 799.
—— v. Northern Cent. R. Co. (N. Y.), 67 Barb. 531—p. 3295.
Moneyhun, Cleveland, etc., R. Co. v.
Mongahela St. R. Co., Muhlhause v.
Moniter Mut. Fire Ins. Co. v. Buffum, p. 986.
Monmouthshire R., etc., Co., Pegler v.
Monongahela Bridge Co., United States v.
Monongahela Nav. Co. v. United States, pp. 3441, 3445, 3479.
Monongahela River Consol. Coal, etc., Co. v. Hurst, pp. 4056, 4080.
Monongahela St. R. Co., Muhlhause v.
Monongahela, etc., R. Co., Muhlhause v.
Monahan, Blum v.
Monatt, Colorado, etc., R. Co. v.
Monro v. The Baltic, p. 798.
Monroe v. Iowa, p. 940.
—— v. Metropolitan St. R. Co., p. 2877.
—— v. United R. Co., pp. 1890, 1903, 1919, 2228.
Monroe Nat. Bank, Varney v.
Monroe Progressive League v. St. L., etc., Ry., p. 3679.
Monta, Southern R. Co. v.
Montague v. Henry B. Hyde, p. 963.
—— v. The Isaac Reed, pp. 3905, 3922.
Montague & Co. v. Lowry, p. 3421.
Montana Cent. R. Co. v. United States, pp. 3619, 3623.
Montana Union R. Co., Hardman v.
—— v. Langlois, p. 101.
Montana, etc., R. Co. v. Morley, pp. 46, 50, 56, 247.
Monteath, Parsons v.
Montegudo v. Silva, p. 3892.
Monteith v. Kirkpatrick, pp. 1161, 1162.
Montelle, Kansas Pac. R. Co. v.
Montello, The.
Montford, Chicago, etc., R. Co. v.
Montfort, Chicago, etc., R. Co. v.
Montgomery v. Buffalo R. Co., 165 N. Y. 139, 58 N. E. 770—p. 2854.
—— v. Buffalo R. Co., 48 N. Y. S. 849, 24 App. Div. 454—p. 2422.
—— v. Colorado Springs, etc., R. Co., pp. 1901, 2115, 2117, 2233.
—— East Tennessee, etc., R. Co. v.
—— Kirtland v.
Montgomery, Lawrenceburgh, etc., R. Co. v.
—— Maumee Valley R., etc., Co. v.
—— St. Louis, etc., R. Co. v.
—— Taylor, etc., R. Co. v.
—— T. B. & H. R. Co. v.
Montgomery St. R. Co., Armstrong v.
—— v. Lewis, pp. 2589, 2812, 2976.
—— v. Mason, pp. 2230, 2282, 2591.
Montgomery St. Railway, McDonald v.
Montgomery Tract. Co. v. Fitzpatrick, pp. 2563, 2572, 2624.
—— v. Whatley, pp. 2015, 2016, 2020, 2023, 2871.
Montgomery, etc., R. Co. v. Boring, pp. 1965, 2941, 3040.
—— v. Culver, p. 3183.
—— Doughlass v.
—— v. Edmonds, pp. 583, 831, 833, 834, 837.
—— v. Kolb, pp. 271, 273, 274, 275, 277, 292, 303, 425, 845.
—— v. Mallette, pp. 1739, 2843, 2957.
—— v. Moore, pp. 828, 3285.
—— v. Stewart, pp. 1899, 1900, 2125, 2364, 2745.
—— v. Thompson, pp. 1590, 2271, 2499, 2502, 2507, 2509.
Montmollen, Central, etc., R. Co. v.
Monton v. Louisville, etc., R. Co., p. 820.
Montpelier v. Barre, etc., Power Co., p. 80.
Montpelier, etc., Railroad v. United States, p. 3073.
Mooar Lumber Co., Pittsburgh, etc., Railway v.
Mood v. Western Union Tel. Co., p. 643.
Moody, Gulf, etc., R. Co. v.
—— Harris v.
—— International, etc., R. Co. v.
—— Missouri, etc., R. Co. v.
—— Southern R. Co. v.
—— v. Southern R. Co., pp. 164, 636, 827, 874, 3336, 3353, 3354, 3359.
—— v. Springfield St. R. Co., pp. 2198, 2303, 2739.
—— State v.
Moon, Baltimore, etc., R. Co. v.
—— v. Interurban St. R. Co., pp. 1650, 2460.
—— Mississippi Southern Exp. Co. v.
—— St. Louis, etc., R. Co. v.
—— Southern Exp. Co. v.
Mooney v. Seattle, etc., Railway, p. 1983.
Moor, Veazie v.
Moore, American Transp. Co. v.
—— v. American Transp. Co., pp. 4036, 4038, 4039, 4040, 4054.
—— Atchison, etc., R. Co. v.
—— v. Atchison, etc., R. Co., pp. 2484, 2493.
—— v. Atlantic, etc., R. Co., pp. 487, 642.
—— v. Aurora, etc., R. Co., p. 2268.
—— v. Baltimore, etc., R. Co., pp. 518, 552, 553, 1272, 1276, 1277, 1313, 1449.
—— Birmingham v.
—— Birmingham R., etc., Co. v.
—— Brunswick, etc., R. Co. v.
—— v. Campbell, p. 112.
—— v. Central, etc., R. Co., pp. 1613, 1615, 2461, 2564.
—— Charleston, etc., R. Co. v.
—— v. Chicago, etc., R. Co., pp. 1347, 1456.
—— v. Columbia, etc., R. Co., pp. 1571, 2043, 2051, 2052, 2467, 2476, 2482.

Moore v. Des Moines, etc., R. Co., pp. 1717, 1721, 2918.
—— v. Edison Elect. Illuminating Co., p. 2204.
—— v. Evans (N. Y.), 14 Barb. 38—p. 822.
—— v. Evans (N. Y.), 14 Barb 524— pp. 946, 3161.
—— v. Evening Star, p. 3134.
—— v. Fitchburg R. Corp., pp 2411, 3024.
—— Fordyce v.
—— G., H. & H. R. Co. v.
—— Gray v.
—— v. Greenville Tract. Co., pp. 2674, 2702.
—— Gulf, etc., R. Co. v.
—— Houston, etc., R. Co. v.
—— Illinois Cent. R. Co. v.
—— Keep Mfg. Co. v.
—— v. Kennedy, p. 328.
—— Louisville, etc., R. Co. v.
—— Macon, etc., R. Co. v.
—— Merchants' Dispatch, etc., Co v.
—— Merchants', etc., Transp. Co. v.
—— Metropolitan St. R. Co. v.
—— v. Metropolitan, etc., R. Co., pp. 1805, 2603.
—— v. Michigan Cent. R. Co., 3 Mich. 23—p. 3287.
—— v. Michigan Cent. R. Co., 3 Mich. 371—p. 540.
—— v. Missouri Pac. R. Co., p. 2637.
—— Missouri, etc., R. Co. v.
—— Montgomery, etc., R. Co. v.
—— v. Nashville, etc., Railroad, pp. 2483, 2709, 2628, 2635.
—— Nashville, etc., Railway v.
—— New Orleans, etc., R. Co. v.
—— v. New York, etc., R. Co., 173 Mass. 335, 53 N. E. 816, 53 N. E. 816, 73 Am. St. Rep. 298—p. 3182.
—— v. New York, etc., R. Co., 126 N. Y. 671, 27 N. E. 791, 4 Silvernail Ct. App. 486—p. 855.
—— v. Northern Texas Tract. Co., pp. 1730, 2184, 2345, 2758.
—— Oakes v.
—— v. Ohio River R. Co., pp. 1615, 1643, 2437.
—— Patterson v.
—— Pittsburgh, etc., R. Co. v.
—— v. Saginaw, etc., R. Co., 115 Mich. 103, 72 N. W. 1112—pp. 1684, 1687, 1754, 2209, 2883, 2951.
—— v. Saginaw, etc., R. Co., 78 N. W. 666, 119 Mich. 613—pp. 2144, 2169, 2891.
—— v. St. Louis, etc., R. Co., p. 2494.
—— v. Sheridine, p. 488.
—— Southern Exp. Co. v.
—— Southern R. Co. v.
—— Texas, etc., R. Co. v.
—— Tysen v.
—— v. Woonsocket St. R. Co., p. 2747.
Moore & Co., Anderson v.
—— Merchants', etc., Transp. Co. v.
—— v. United States, p. 3965.
Moore & Son v. Henry, pp. 417, 418, 538.
Moorehouse v. Crangle, p. 2537.
Mooresville Cotton Mills, Southern R. Co. v.
Moorman v. Atchison, etc., R. Co., p. 2912.
—— Gulf, etc., R. Co. v.
Moorshead v. United R. Co., p. 2088.
Moose, Shenandoah Valley R. Co. v.
Morain, Lake Erie, etc., R. Co. v.
Moran, Chicago, etc., R. Co. v.
Moran v. New Orleans, pp. 3478, 3549, 3555, 3581, 3584.
—— v. Portland Steam Packet Co., p. 486.
—— v. Struges, p. 4078.
—— v. Versailles Tract. Co., pp. 1895, 2322.
Moran Bros. Co. v. Northern Pac. R. Co., p. 683.
Morarity v. Durham Tract. Co., pp. 1912, 2904.
Morasch, Erb v.
Moravian, The.
More, etc., Co. v. Lott, pp. 1214, 1219, 1220, 1229, 1242.
Morehead, Baltimore, etc., R. Co v.
Morehouse v. Texas Trunk R. Co., pp. 445, 465.
Morel v. Roe, p. 3911.
Moreland v. Boston, etc., R. Co., pp. 1717, 1728.
Morey v. Chicago, etc., R. Co., pp. 2043, 2785.
Morgan v. Bell, p. 855.
—— v. Camden, etc., R. Co., p. 2247.
—— Central, etc., R. Co. v.
—— Chesapeake, etc., R. Co. v.
—— v. Chesapeake, etc., R. Co., pp. 1841, 1850, 2683.
—— Dibble v.
—— v. Dibble, pp. 511, 512, 527 533, 743, 870, 1299, 3893, 3994, 3895.
—— v. Garfield, etc., Coal Co., p. 3950.
—— Gulf, etc., R. Co. v.
—— v. Insurance Co., pp. 718, 3939.
—— Jersey City, etc., R. Co. v.
—— Kennedy v.
—— v. Lake Shore, etc., R. Co., pp. 1953, 2181, 2612.
—— v. Los Angeles Pac. Co., pp. 1829, 2310.
—— v. Louisiana, pp. 63, 64.
—— Missouri, etc., R. Co. v.
—— v. Oregon Short Line R. Co., p. 2782.
—— v. Oregon, etc., R. Co., pp. 2516, 2517.
—— v. Parham, pp. 3474, 3571, 3581, 3584.
—— Peete v.
—— St. Louis, etc., R. Co. v.
—— v. Saks, pp. 1488, 2330.
—— v. Southern Pac. Co., p. 2352.
—— Stockard v.
—— The Styria v.
—— Williams & Sons v.
—— v. Woolverton, 96 N. E. 354, 203 N. Y. 52, 36 L. R. A., N. S., 640—p. 1058.
—— v. Woolverton, 120 N. Y. S. 1008, 136 App. Div. 351—pp. 1050, 1068.
Morgan Envelope Co. v. Bonstead, p. 1219.
Morgan, etc., Co. v. Railroad Comm., pp. 119, 124.
Morgan's Louisiana, etc., Co., Duvernet v.
—— Lehman, etc., Co. v.
Morgan's, etc., R. Co., Clerc v.
—— Coburn v.
—— Cumberland Tel., etc., Co. v.
Morgan's, etc., Steamship Co., Dave v.
—— DeMahy v.
—— Heaton v.
—— Lancon v.
—— Lehman, etc., Co. v.
—— v. Louisiana Board, pp. 3528, 3529, 3530.
—— McGowen v.
—— v. Railroad Comm., pp. 45, 47, 49, 54
Morganton Mfg. Co. v. Ohio, etc., R. Co., pp. 327, 777, 1016, 3395, 3399.
Morgolofski, People's Bank v.
Moriarty v. Boston, etc., Railroad, pp. 1786, 2874.
Moriata v. Harnden's Exp. Co., pp. 992, 994, 995.
Morison v. Gray, p. 1216.
Morit v. Adoue, pp. 376, 405.
—— v. Interurban St. R. Co., p. 2658.
Morlan, Howell v.
Morley, Cincinnati, etc., R. Co. v.
—— v. Eastern Exp. Co., pp. 824, 842.
—— Montana, etc., R. Co. v.
Morning Glory, Thomas v.
Morning Light, The.
Morningstar v. Louisville, etc., R. Co., p. 2448.
Morrill v. Minneapolis St. R. Co., pp. 1649, 1650, 1651, 1853, 2475, 2564, 3078, 3081.
Morris, Alabama, etc., R. Co. v.
—— Atchison, etc., R. Co. v.
—— v. Atlantic Ave. R. Co., pp. 2711, 2854.
—— Central, etc., R. Co. v.
—— v. Chesapeake, etc., Steamship Co., 125 Fed. 62—pp. 3871, 3873, 3877.
—— v. Chesapeake, etc., Steamship Co., 148 Fed. 11, 78 C. C. A. 179—pp. 3871, 3872.
—— Chicago, etc., R. Co. v.
—— v. Colorado Mid. R. Co., p. 3044.
—— Galveston, etc., R. Co. v.
—— v. Georgia R., etc., Co., pp. 1546, 1553, 1570.
—— Hunt v.
—— v. Illinois Cent. R. Co., pp. 1921, 1962, 2820.
—— Louisville, etc., R. Co. v.
—— v. Minneapolis, etc., R. Co., pp. 816, 817, 842, 867.
—— v. New York, etc., R. Co., p. 1687.
—— Norfolk, etc., Terminal Co. v.
—— v. O'Brien, p. 2638.
—— Prescott, etc., R. Co. v.
—— Richmond, etc., R. Co. v.
—— v. Shryock, pp. 1219, 1242.
—— Southern Kansas R. Co. v.
—— Texas Cent. R. Co. v.
—— v. Third Ave. R. Co., p. 3159.
—— v. Wier, p. 822.
—— v. Wilson Sons & Co., p. 3918.
Morris Bldg., Ass'n, Russo v.
Morris County Tract. Co., Trussell v.
Morris-Scarboro-Moffit Co. v. Southern Exp. Co., p. 3546.
Morris, etc., Exp. Co., Cohen v.
Morris, etc., R. Co. v. Ayres, pp. 534, 891, 896, 899, 2848.
—— v. Sussex R. Co., pp. 1147, 1189.
Morrisdale Coal Co. v. Pennsylvania R. Co., 176 Fed. 748—pp. 3770, 3774.
—— v. Pennsylvania R. Co., 10 C. C. A. 269, 183 Fed. 929—pp. 3774, 3813.
—— v. Pennsylvania R. Co., 23 U. S. 304, 33 S. Ct. 938—pp. 3811, 3813.
Morrish, McKinlay v.
Morrison v. Broadway, etc., R. Co., pp. 1880, 2153.
—— Carnegie v.
—— v. Charlotte Elect. R., etc., Co., pp. 1890, 2348.
—— v. Davis & Co., pp. 733, 734 738, 744, 1014.
—— v. Erie R. Co., pp. 1953 2250, 2255.
—— Galveston, etc., R. Co. v.
—— Illinois Cent. R. Co. v.
—— In re.
—— v. John L. Stephens, p. 2444
—— Kansas City, etc., R. Co. v.

Morrison v. McFadden, pp. 738, 746, 747, 778, 782.
—— North American Transp., etc., Co. v.
—— v. North American Transp., etc., Co., p. 3040.
—— v. Phillips, etc., Constr. Co., pp. 322, 323, 946, 984, 985, 987, 1044, 1274, 1370, 1393, 3161.
—— v. Seattle Elect. Co., p. 2934
—— Southern R. Co. v.
—— v. The John L. Stephens, p 1941.
Morrison's Adm'r, Hall v.
Morrison's Faust Co., Texas, etc., R. Co. v.
Morrissey v. Wiggins Ferry Co., pp. 1715, 2116.
Morro Castle, The.
Morrow v. Atlanta, etc., R. Co., pp. 2509, 2512, 2540, 2547.
—— v. Brooklyn Heights R. Co., pp. 2643, 2878.
—— v. Missouri Pac. R. Co., pp. 640, 641, 642, 649, 670, 671, 680, 681, 1080, 1101.
—— v. Pullman Palace Car Co., pp. 3205, 3214, 3217, 3219, 3223, 3224, 3225, 3237, 3238, 3239.
Morse v. Brainerd, pp. 417, 3260, 3294, 3327, 3328.
—— Campbell v.
—— v. Canadian Pac. R. Co., pp 1375, 1376.
—— Chicago City R. Co. v.
—— v. Connecticut River R. Co., p. 3191.
—— v. Duncan, p. 1852.
—— Gage v.
—— v. Minneapolis, etc., R. Co., pp. 2737, 2738.
—— v. Newton St. R. Co., p. 2858.
—— v. Southern R. Co., pp. 2443, 2564.
—— Texas, etc., R. Co. v.
—— Thomas v.
—— Waring v.
—— Wellman v.
Morse Ironworks, etc., Co., Price v.
Morsman, United States v.
Mortal, Lake Shore, etc., R. Co. v.
Mortland v. Philadelphia, etc., R. Co., p. 3169.
Morton, Chesapcake, etc., R. Co. v.
—— Pittsburg, etc., R. Co. v.
—— v. Tibbett, p. 211.
Moseley, United States v.
Mosely, Boyd v.
—— Wayland v.
Moses v. Boston, etc., R. Co., 24 N. H. 71, 55 Am. Dec. 222—pp. 270, 273, 274, 287, 289, 728, 882, 883, 884, 1004, 1005, 3309.
—— v. Boston, etc., R. Co., 32 N. H. 523, 64 Am. Dec. 381—pp. 511, 896, 900, 901, 904, 906, 1003, 1004, 1007.
—— Boyd v.
—— v. East Tennessee, etc., Railroad, pp. 1628, 1629, 2443, 3317.
—— v. Hamburg-American Packet Co., p. 4031.
—— v. Louisville, etc., R. Co., pp. 1509, 1795, 1798.
—— v. Norris, pp. 582, 728, 733, 749, 753, 796.
—— v. Port Townsend, etc., R. Co., p. 1477.
—— Southern R. Co. v.
Moses Taylor, The.
Mosher v. St. Louis, etc., R. Co., 23 Fed. 326—p. 2462.
—— v. St. Louis, etc., R. Co., 127 U. S. 390, 32 L. Ed. 249, 8 S. Ct. 1324—pp. 1616, 1627, 1628, 2496.
Mosher & Co. v. Southern Exp. Co., pp. 531, 550, 551, 574, 961, 962, 981, 3176, 3257, 3291, 3295, 3350, 3351.
Moskowit v. Brooklyn Heights R. Co., p. 2194.
Moss, Bell v.
—— v. Bettis, pp. 1, 2, 8, 11, 768, 771, 951, 1020.
—— Chicago, etc., R. Co. v.
—— Houston, etc., R. Co. v.
—— v. Johnson, p. 2208.
—— v. Lancaster, etc., St. R. Co., p. 3321.
—— Louisville, etc., R. Co. v.
—— Lowe v.
—— v. North Carolina R. Co., p. 2655.
—— St. Louis, etc., R. Co. v.
Mossbarger, Illinois Cent. R. Co. v.
Mosteler v. Iowa Cent. R. Co., pp. 1454, 1456, 1457, 1458.
Mote v. Chicago, etc., R. Co., pp. 3156, 3160, 3168, 3170, 3173, 3174.
Motes, Central, etc., R. Co. v.
Mother, Texas, etc., R. Co. v.
Mothershed, Louisville, etc., R. Co. v.
Motlow, Jenkins v.
Mott v. Consumers' Ice Co., p. 2041.
—— v. Jackson, p. 458.
—— v. Long Island R. Co., p. 539.
Mott & Bros., Brown & Co. v.
Mott & Co., Brown v.
Motteran v. Eastern Counties R. Co., p. 199.
Mottley, Louisville, etc., R. Co. v.
—— v. Louisville, etc., R. Co., 3695.
Mottram v. Heyer, pp. 1243, 1244, 1246, 1247.
Mouille, Hays v.
—— v. Hays, pp. 1220, 1245.
Moulthrop v. Hyett, pp. 659, 671.
Moulton v. St. Paul, etc., R. Co., pp. 728, 740, 948, 1074, 1363, 1400.
Mounot, Taylor v.
Mount, Louisville, etc., R. Co. v.
—— v. Louisville, etc., R. Co., pp. 1365, 1367.
Mt. Adams, etc., R. Co. v. Isaacs, pp. 1821, 1829, 2666.
—— v. Lowery, p. 2007.
—— v. Reul, pp. 1688, 1951.
Mountford v. Cunard Steamship Co., p. 4007.
Mt. Pleasant Mfg. Co. v. Cape Fear, etc., R. Co., pp. 234, 1194, 1195.
Mt. Pleasant Mill Co., First Nat. Bank v.
Mount Vernon Co., Alabama, etc., R. Co. v.
—— v. Alabama, etc., R. Co., 84 Ala. 173, 4 So. 356—p. 3286.
—— v. Alabama, etc., R. Co., 92 Ala. 296, 8 So. 687—pp. 285, 3265, 3286, 3302.
Mt. Washington R. Co., Kind llan v.
Mounts, Cincinnati, etc., R. Co. v.
Mouton v. Louisville, etc., R. Co., pp. 815, 866, 972, 986, 988, 989, 992, 1018, 1035, 1038, 3349.
Mowery, Iron R. Co. v.
—— What Cheer Sav. Bank v.
Mowinckel, Dewar v.
Mowrey v. Central City Railway, p. 2150.
Moyer v. Pennsylvania R. Co., pp. 897, 910, 917, 3174.
—— Union Pac. R. Co. v.
Moylan v. Second Ave. R. Co., p. 2006.
Mozely, West, End, etc., St. R. Co. v.
M. P. R. Co. v. Barnes & Co., pp. 724, 734, 735, 739, 742, 753, 765, 766, 767, 811, 815, 825, 849 854, 855, 1051, 1072, 1078, 10 9
—— v. Ryan, p. 3373.
Mrar v. Western Union Tel. Co., p. 949.
Muckenfuss Mfg. Co. v. Charleston, etc., R. Co., p. 152.
Muckle v. Rochester R. Co., pp. 1650, 2449, 2458, 2462.
Mudford, St. Louis, etc., R. Co. v.
Mudgett v. Bay State Steamboat Co., p. 3146.
Muehlhauser v. St. Louis R. Co., pp. 1559, 1564, 1760, 1829, 2120, 2233, 2802, 2889, 2969.
Mueller v. Chicago, etc., R. Co., p. 1633.
—— v. Washington Water Power Co., pp. 1743, 2595, 2657.
Murg, Texas, etc., R. Co. v.
Mugler v. Kansas, pp. 3538, 3539.
Muhlhause v. Mongahela St. R. Co., pp. 1796, 1986, 2875, 2878.
Muhling, Ohio, etc., R. Co. v.
Mulberry Hill Coal Co. v. Illinois Cent. R. Co., 257 Ill. 80, 100 N. E. 151—p. 3488.
—— v. Illinois Cent. R. Co., 161 Ill. App. 272—pp. 215, 229, 231, 247, 261.
Mulder, Louisville, etc., R. Co. v.
Muldoon v. Seattle City R. Co., 7 Wash. 528, 35 Pac. 422, 38 Am. St. Rep. 901, 22 L. R. A. 794—pp. 2095, 2103, 2174.
—— v. Seattle City R. Co., 10 Wash. 311, 38 Pac. 995, 45 Am. St. Rep. 787—pp. 2095, 2103.
Muldowney v. Pittsburg, etc., Tract. Co., pp. 191, 196, 1603, 2428, 2467, 2473.
Mulford, Chicago, etc., R. Co. v.
Mulford Co. v. Curry, p. 3554.
Mulhado v. Brooklyn City R. Co., pp. 1890, 2228, 2245, 2910.
Mullan v. Wisconsin Cent. R. Co., p. 2031.
Mullane v. New York City R. Co., p. 2195.
Mullarkey v. Interban St. R. Co., p. 2816.
—— v. P. W. & B. R. Co., p. 3285.
Mullen, Baltimore, etc., R. Co. v.
—— v. Chester Tract. Co., p. 2081.
—— v. Galveston, etc., R. Co., pp. 1752, 1755.
—— Lindsay, etc., Co. v.
Muller, Century Throwing Co. v.
—— v. Cincinnati, etc., R. Co., p. 424.
—— v. Metropolitan St. R. Co., p. 2829.
—— v. Second Ave. R. Co., p. 2803.
Mulligan v. Illinois Cent. R. Co., pp. 320, 321, 323, 984, 986, 3257, 3261, 3349.
—— v. Louisville, etc., Packet Co. v.
—— v. Metropolitan St. R. Co., pp. 2154, 2815.
—— v. New York, etc., R. Co., p. 2072.
—— v. Northern Pac. R. Co., pp. 565, 889.
—— v. Southern R. Co., pp. 1669, 2662, 2708, 2845, 2848, 3011, 3014.
Mulliken, International, etc., R. Co. v.
Mullin v. Bluementhal & Co., p. 2576.
—— v. Boston Elev. R. Co., pp. 2765, 2814.

Mullin v. Long Island R. Co., p. 2462.
—— State v.
Mullins, American Exp. Co. v.
—— v. Illinois Cent. R. Co., pp. 2473, 2474.
—— Mobile, etc., R. Co. v.
—— Texas Trunk R. Co. v.
Mumford, Chicago City R. Co. v.
—— Chicago, etc., R. Co. v.
Mundy, Indiana Cent. R. Co. v.
Munford, Telegraph Co. v.
Munn v. Baker, p. 1014.
—— v. Illinois, pp. 34, 37, 38, 59, 60, 1136, 3432, 3492, 3493, 3527, 3668.
Munoz Successors, Rio Grande R. Co. v.
Munro v. St. Louis, etc., R. Co., pp. 1769, 1781, 2617.
Munroe v. Metropolitan St. R. Co., p. 2154.
—— v. Philadelphia Warehouse Co., p. 3886.
—— v. Third Ave. R. Co., p. 2249.
Munsey v. Webb, pp. 1751, 2911.
Mumson Steamship Line v. Steiger & Co., p. 4022.
Munster v. Southeastern R. Co., pp. 3129, 3130.
Munzer v. Interurban St. R. Co., p. 2700.
Murch v. Concord R. Corp., pp. 1487, 1548, 2140.
Murden, Georgia R., etc., Co. v.
Murdock v. Boston, etc., R. Co., 133 Mass. 15, 43 Am. Rep. 480—p. 3042.
—— v. Boston, etc., R. Co., 137 Mass. 293, 50 Am. Rep. 307—pp. 1977, 2459, 2713.
—— Hall v.
Murgatroyd, Dusar v.
Murnahan v. Cincinnati, etc., R. Co., p. 2591.
Murphey, Central, etc., R. Co. v.
—— Eckel v.
Murphy, Arkansas Southern R. Co. v.
—— v. Atlanta, etc., R. Co., pp. 1687, 1689, 1970, 2669, 2840.
—— v. Central Park, etc., R. Co., p. 2413.
—— Chicago, etc., R. Co. v.
—— v. Coney Island, etc., R. Co., p. 2694.
—— v. Holbrook, pp. 2089, 20 0.
—— v. Interurban St. R. Co., p. 2892.
—— v. Metropolitan St. R. Co., pp. 1903, 1904, 1997, 2635.
—— Michigan Cent. R. Co. v.
—— Missouri, etc., R. Co. v.
—— v. New York Cent. R. Co., p. 2735.
—— v. New York, etc., R. Co., p. 2784.
—— v. North Jersey St. R. Co., 58 Atl. 1018, 71 N. J. L. 5—p. 2151.
—— v. North Jersey St. R. Co., 80 Atl. 331, 81 N. J. L. 706, 35 L. R. A., N. S., 592—pp. 1830, 1831, 2795, 2884.
—— St. Louis, etc., R. Co. v.
—— v. St. Louis, etc., R. Co., p. 1521.
—— v. Southern Pac. Co., pp. 1694, 1720, 2697.
—— v. Southern Railway, pp. 8 7, 899, 911.
—— Texas, etc., R. Co. v.
—— v. Union R. Co., pp. 1497, 2419, 2856.
—— v. Wells-Fargo & Co. Exp., pp. 931, 982, 1064.
—— v. Western, etc., Railroad, pp. 1944, 2020, 2417.
Murphy Hardware Co. v. Southern R. Co., p. 150.
Murphy, etc., Co. v. Staton, pp. 499, 512, 533, 729, 730, 734. 750, 753, 815, 822, 825, 826.
Murrah, Georgia R., etc., Co. v.
Murray v. Chicago, etc., R. Co., pp. 3494, 3665, 3840.
—— Cincinnati, etc., R. Co. v.
—— Georgia Southern, etc., R. Co. v.
—— v. Gulf, etc., R. Co., p. 70.
—— Indianapolis, etc., R. Co. v.
—— v. International Steamship Co., pp. 285, 287, 3135, 3174, 3188, 4008.
—— v. Jump Co., pp. 3891, 3948, 3953, 3962.
—— v. Lardner, pp. 358, 375.
—— v. Lehigh Val. R. Co., pp. 1746, 1749, 1939, 2077.
—— v. Pawtuxet Valley St. R. Co., p. 2841.
—— v. Postal Tel., etc., Co., pp. 9, 418, 549.
—— v. Rhode Island Co., p. 2315.
—— St. Louis, etc., R. Co. v.
—— v. Seattle Elect. Co., pp. 1779, 2231, 2350, 2911.
—— The D. C.
—— v. Warner, pp. 486, 570.
—— Wynantskill Knitting Co. v.
Murray & Bros. v. G., C. & S. F. R. Co., pp. 138, 1198.
Murrell v. Dixey, p. 854.
—— v. Pacific Exp. Co., pp. 637. 642, 653, 660, 677.
—— The.
Murtishaw, Texas, etc., R. Co. v.
Muschamp v. Lancaster R. Co., p. 3176.
Musco v. United Surety Co., p. 33.
Muscogee R. Co., Redd v.
Muser v. Holland, p. 945.
Musgrove, St. Louis, etc., R. Co. v.
Mushrush, New York, etc., R. Co. v.
Musick, St. Louis, etc., R. Co. v.
—— v. United K. Co., pp. 1996, 2658.
Muskegon Booming Co. v. U derhill, p. 1238.
Muskegon Tract., etc., Co., Cousineau v.
—— Hennessy v.
Musselcrag, The.
Mussellam v. Cincinnati, etc., R. Co., pp. 341, 837, 839, 3404, 3415.
Muster v. Chicago, etc., R. Co., p. 2078.
Muth, San Antonio St. R. Co. v.
—— San Antonio, etc., R. Co. v.
Mutton v. Midland R. Co., p. 3129.
Mutual Trans. Co. v. United States, p. 3730.
Myer, St. Louis, etc., R. Co. v.
Myers, Chicago, etc., R. Co. v.
—— v. Chicago, etc., R. Co., pp. 92, 137.
—— Cumberland Valley R. Co. v.
—— Powell v.
—— v. Pullman Co., p. 3237.
—— v. St. Louis, etc., R. Co., p. 1182.
—— v. Southern Railroad, pp. 2848, 3011.
—— Southern R. Co. v.
Myerson v. Woolverton, p. 3394.
Mykleby v. Chicago, etc., R. Co., p. 2653.
Mylton v. Midland R. Co., p. 3180
Mynard v. Syracuse, etc., R. Co., pp. 740, 1329.
Mynott, St. Louis, etc., R. Co. v.
Myres v. Diamond Joe Line, pp 438, 440.
Myrick v. Macon R., etc., Co., p. 2175.
—— v. Michigan Cent. R. Co., Fed. Cas. No. 10, 001, 9 Biss. 44—pp. 1278, 3302.
Myrick v. Michigan Cent. R. Co., 107 U. S. 102, 106, 27 L. Ed. 325, 1 S. Ct. 425—pp. 208, 424. 726, 1267, 3177, 3179, 3250. 3251, 3252, 3258, 3260, 3262 3273, 3285, 3296, 3327, 3414.
Myrtle, St. Louis, etc., R. Co. v.
Myzell, St. Louis, etc., R. Co. v.

N

Nagel, Memphis, etc., Packet Co. v.
—— v. United R. Co., pp. 2636. 2699.
Nagle v. California, etc., R. Co., pp. 1684, 1735, 2241.
Nail City, The.
Nailson, Southern R. Co. v.
Naive, Pennsylvania R. Co. v.
Najac v. Boston, etc., R. Co., pp. 3136, 3175, 3176.
Nance v. Carolina Cent. R. Co., p. 2226.
Nanson v. Jacobs, pp. 543, 545, 547, 555, 3247.
Nantucket Steamboat Co., Citizens' Bank v.
Napheys, Delaware, etc., R. Co. v.
Napier, Hollingsworth v.
Napolitan Prince, The.
Nappier, Southern R. Co. v.
Naranja, The.
Narragansett Pier R. Co., Podrat v.
Narragansett Steamship Co., Berg v.
—— Standish v.
Nash v. Towne, p. 326.
—— v. Yonkers R. Co., p. 2899.
Nashau Lock Co. v. Worcester, etc., R. Co., p. 3311.
Nashau St. Railway, Douyette v.
Nashua, etc., Railroad, Smith v.
Nashua, etc., R. Corp. McElroy v.
Nashville Grain Exch. v. United States, pp. 3791, 3800.
Nashville Railroad v. Howard, pp. 1811, 1817, 2163, 2737, 2952, 2970.
Nashville St. R. Co. v. Griffin, pp. 200, 201, 1595, 2466, 2470, 2480. 3105.
Nashville, etc., Railroad, Moore v.
Nashville, etc., R. Co. v. Alabama. 134 Ala. 414, 32 So. 731—pp. 29, 3574.
—— v. Alabama, 128 U. S. 96, 32 L. Ed. 352, 9 S. Ct. 28—pp. 3466, 3480, 3481, 3502, 3504. 3505.
—— Arrowsmith v.
—— v. Bates, p. 2628.
—— Brooke v.
—— v. Casey, pp. 1895, 1896.
—— v. Cody, p. 462.
—— v. David, pp. 729, 733, 747.
—— De Glopper v.
—— Drake v.
—— v. Dreyfuss-Weil Co., pp. 567, 3433.
—— v. Elliott, pp. 1683, 1693, 1714, 1721, 1848.
—— v. Estes, 54 Tenn. (7 Heisk.) 622, 24 Am. Rep. 289—pp. 750, 751, 752, 767.
—— v. Estes, 78 Tenn. (10 Lea) 749, 3 Am. & Eng. R. Cas. 210 —pp. 574, 767.
—— v. Flake, p. 2024.
—— v. Grayson County Nat. Bank, 93 S. W. 431, 100 Tex. 17—pp. 342, 478, 542, 546, 556. 3274.
—— v. Grayson County Nat. Bank (Tex. Civ. App.), 91 S. W. 1106—pp. 361, 371, 519, 558.
—— Hall v.
—— v. Heggie, pp. 1288, 3628, 3629.
—— Interstate Commerce Comm. v.

Nashville, etc., R. Co., Irvin v.
—— v. Jackson, pp. 7, 618, 729, 750, 931, 946, 949, 954, 1020.
—— v. Johnson, p. 2736.
—— v. Jones, pp. 1821, 1848.
—— v. King, pp. 733, 746.
—— Lamont & Co. v.
—— v. Lillie, pp. 729, 733, 750, 3142, 3143, 3146, 3147, 3201, 3202, 3226.
—— Marshall v.
—— Mason v.
—— v. Messino, 31 Tenn. (1 Sneed) 220—p. 1985.
—— v. Messino, 33 Tenn. (1 Sneed) 220—p. 1561.
—— Moore v.
—— v. Parker, pp. 820, 1035, 1285, 1438, 1445, 1446, 1459, 1483.
—— Parks v.
—— Payne v.
—— Peoria Packing Co. v.
—— v. Price, pp. 3212, 3226, 3227.
—— v. Sprayberry, 56 Tenn. (9 Heisk.) 852—pp. 3175, 3177, 3181, 3182, 3315, 3316, 3323.
—— v. Sprayberry, 67 Tenn. (8 Baxt.) 341, 35 Am. Rep. 705—pp. 3176, 3177, 3315, 3316, 3321.
—— v. Stone, pp. 729, 733, 750, 822, 973, 984, 1392, 1393, 1406, 3348, 3362.
—— Townsend v.
—— v. Walley, p. 482.
—— Washburn v.
—— Woodruff v.
Nashville, etc., Railway, American Lead Pencil Co. v.
—— v. Blackmon, p. 2862.
—— v. Casey, p. 2282.
—— v. Flournoy, p. 313.
—— Grayson County Nat. Bank v.
—— v. Hinds, pp. 945, 948.
—— v. Long & Son, pp. 1087, 1091.
—— Meyere v.
—— Moore v.
—— v. Moore, pp. 2417, 2418, 2419, 3020, 3022, 3023, 3028.
—— Thompson v.
Nassau Elect. R. Co., Brainard v.
—— Charbonneau v.
—— v. Corliss, p. 2747.
—— Gordon v.
—— Hassen v.
—— Henderson v.
—— King v.
—— Kohn v.
—— McGlynn v.
—— McGrane v.
—— Poulsen v.
—— Robson v.
—— Sheehan v.
—— Snediker v.
—— Stanbridge v.
—— Toylor v.
—— Walsh v.
Nassau, etc., R. Co., Hanna v.
Natchez, The.
Natchez, etc., R. Co., Jackson v.
—— v. Lambert, pp. 1695, 1869.
—— Snyder v.
—— Stone v.
Nathan v. Louisiana, pp. 3549, 3581.
—— v. Missouri Pac. R. Co., p. 492.
—— v. Shivers, p. 1169.
Nation, Atchison, etc., R. Co. v.
National Bank v. Atlanta, etc., R. Co., pp. 356, 378, 547, 559, 560, 561, 588, 600, 601, 3274.
—— v. Baltimore, etc., R. Co., pp. 329, 330, 360, 361, 363, 372, 380, 393, 1221, 1222.
—— v. Burkhardt, p. 245.
National Bank v. Chicago, etc., R. Co., pp. 294, 305, 306, 308, 309, 310, 313, 314, 337, 338, 358, 373, 516, 547.
—— v. Citizens' Nat. Bank, pp. 356, 365, 388.
—— Cox, etc., Grocery Co. v.
—— v. Everett, p. 385.
—— v. Merchants' Nat. Bank, pp. 355, 391, 3883.
—— v. Philadelphia, etc., R. Co., p. 559.
—— v. Southern R. Co., p. 528.
National Board v. Bowring & Co., p. 3939.
National City, San Diego Land, etc., Co. v.
—— The.
National City Bank, Hoffman v.
National Elevator, etc., Co., Chicago, etc., R. Co. v.
—— v. Chicago, etc., R. Co., p. 542.
National Exch. Bank, Dows v.
National Exp. Co., Farnsworth v.
—— Soumet v.
—— Winchell v.
National Life Ass'n, Wells v.
National Line Steamship Co. v. Smart, pp. 889, 897, 899, 3160, 3169, 3172, 3174, 3188.
National Live Stock Bank, Lake Shore, etc., R. Co. v.
National Lumber Dealers Association v. Atlantic Coast Line, p. 3630.
National Newark Banking Co. v. Delaware, etc., R. Co., pp. 372, 376, 377.
National Pole Co. v. Chicago, etc., R. Co., 200 Fed. 185—p. 3841.
—— v. Chicago, etc., R. Co., 211 Fed. 65—pp. 3812, 3826, 3841.
National Pressed Brick Co., Greenville Lumber Co. v.
National Rice Mill Co. v. New Orleans, etc., R. Co., pp. 746, 747, 825, 843.
National Steam Nav. Co., Tolano v.
National Steamship Co., Constable v.
—— Dyer v.
—— Gibbin v.
—— Lewisohn v.
—— Mills v.
—— Robertson v.
—— v. Tugman, pp. 1194, 1199, 1201.
National Tube Works Co. v. Baltimore, etc., R. Co., p. 68.
Naugatuck R. Co., Elmore v.
—— Fuller v.
—— Hickox v.
—— v. Waterbury Button Co., p. 3254.
Naumkeag Steam Cotton Co., Bulkley v.
Nave v. Pacific Exp. Co., pp. 819, 821, 828.
Navin, Indianapolis v.
—— v. Missouri, etc., R. Co., p. 1109.
Naylor v. Dennie, pp. 381, 382, 1229, 1232, 1242.
—— Shepherd v.
Naylor & Co. v. Lehigh Valley R. Co., p. 3789.
N. Castle, etc., R. Co., Wilson v.
Neal v. Pender-Hieyman Hardware Co., pp. 642, 654, 669, 675.
—— Rathbone.
—— St. Louis, etc., R. Co. v.
—— v. Saunderson, pp. 728, 733, 735, 750, 811.
—— v. Southern Railway, pp. 1802, 2162, 2328, 2872.
Neal & Co. v. Wilmington, etc., R. Co., pp. 894, 901, 909, 911.
Nealand v. Boston, etc., Railroad, pp. 3160, 3168, 3174, 3195.
Neale v. Springfield St. R. Co., p. 2141.
Neberzahl v. Fargo, p. 545.
Nebraska, Missouri Pac. R. Co. v.
Nebraska City v. Campbell, p. 3063.
Nebraska Meal Mills v. St. Louis, etc., R. Co., pp. 557, 559.
Nebraska Tel. Co. v. Cornell, p. 71.
Nebraska Transfer Co. v. Chicago, etc., R. Co., p. 717.
Nebraska, etc., Grain Co. v. First Nat. Bank, p. 399.
Nederland, The.
Needham, Pacific Exp. Co. v.
Needles, Clarke v.
Needy v. Western Maryland R. Co., p. 1457.
Neel, St. Louis, etc., R. Co. v.
Neely, Caveny v.
—— Norfolk, etc., R. Co. v.
—— St. Louis, etc., R. Co. v.
Neese, Gerhard v.
Neff v. Harrisburg Tract. Co., p. 2396.
—— International, etc., R. Co. v.
—— Jacksonville, etc., R. Co. v.
Neice v. Chicago, etc., R. Co., p. 1549.
Neidlinger, Indianapolis Abattoir Co. v.
Neil, McKinney v.
—— Peck v.
—— State v.
Neill v. Rogers Bros. Produce Co., pp. 391, 573.
Neilson v. Coal, etc., Supply Co., pp. 3907, 3909, 3928.
—— v. Jesup, pp. 712, 713, 1151.
Neimann, Chicago, etc., R. Co. v.
Neimeyer Lumber Co. v. Burlington, etc., R. Co., pp. 1208, 1209, 1215.
Neiswanger, Kansas City Transfer Co. v.
—— Missouri Pac. R. Co. v.
Nellie Floyd, The.
Nellis v. New York Cent. R. Co., pp. 168, 1599, 1601, 2466.
Nelson v. Atlantic, etc., R. Co., p. 2263.
—— Chicago Exch. Bldg. Co. v.
—— v. Chicago, etc., R. Co., 78 Neb. 57, 23 R. R. R. 613, 46 Am. & Eng. R. Cas., N. S., 613, 110 N. W. 741—pp. 285, 287, 1304, 1307, 1332, 1448, 1458.
—— v. Chicago, etc., R. Co., 109 N. W. 933, 130 Wis. 214—pp. 1908, 2323, 2912, 2913.
—— East Tennessee, etc., R. Co. v.
—— v. Great Northern R. Co., pp. 619, 745, 1036, 1113, 1404, 1436, 1437, 1438, 1441, 1445, 1456, 1465.
—— Gulf, etc., R. Co. v.
—— v. Helena, pp. 2285, 2286, 2288.
—— Houston Elect. Co. v.
—— v. Hudson River R. Co., p. 994.
—— Illinois Cent. R. Co. v.
—— v. Illinois Cent. R. Co., pp. 3208, 3225, 3226, 3228.
—— v. Lehigh Valley R. Co., p. 2893.
—— v. Leland, p. 4054.
—— Little Rock Tract., etc., Co. v.
—— v. Long Island R. Co., pp. 1542, 2444, 2449, 2493.
—— Pullman Palace Car Co. v.
—— St. Louis, etc., R. Co. v.
—— v. Southern Pac. R. Co., pp. 1816, 1959, 2296.
—— v. Stephenson, pp. 753, 757.
—— Texas, etc., R. Co. v.
—— Union Pac. R. Co. v.
—— v. Union R. Co., p. 2737.

Nelson v. Woodruff, Fed. Cas. No. 10, 117—pp. 741, 765, 766.
—— v. Woodruff (U. S.), 1 Black 156, 17 L. Ed. 97—pp. 336, 344, 1035, 3921.
Nelson Cotton Co., Mason v.
Nelson Grain Co. v. Ann. Arbor R. Co., pp. 543, 557.
Nenno v. St. Louis, etc., R. Co., pp. 3328, 3334.
Neslie v. Second, etc., R. Co., pp. 1767, 1805, 1831.
Nestor, Northern Commercial Co. v.
Netherland v. Charleston, etc., R. Co., p. 165.
Netherland Steamship Co., Laubheim v.
Netherlands-American Steam Nav. Co., Korzib v.
—— Mohns v.
Netherlands, etc., Nav. Co., Bruswitz v.
Nettie Quill, The.
Nettles v. South Carolina R. Co., pp. 607, 611, 636, 654, 660.
Neuer v. Metropolitan St. R. Co., pp. 2042, 2054, 2772.
Newmann v. St. Louis Trans. Co., p. 2802.
Neustadt v. Lehigh Valley R. Co., p. 3787.
Nevada, Crandall v.
Nevada County, etc., R. Co., Hoyt v.
Nevill, Missouri Pac. R. Co. v.
Neville v. Pennsylvania, etc., Co., p. 3943.
—— v. St. Louis, etc., R. Co., p. 2214.
Nevin, Missouri Pac. R. Co. v.
—— v. Pullman Palace Car Co., pp. 3203, 3207, 3208, 3212, 3228.
Nevins v. Bay State Steamboat Co., pp. 3117, 3118, 3159, 3169, 3170.
Nevius v. Chicago, etc., R. Co., p. 1475.
New Albany Box, etc., Co., Baltimore, etc., R. Co. v.
New Albany, etc., R. Co. v. Campbell, pp. 524, 773, 894.
—— Fitzpatrick v.
Newark, etc., R. Co. v. McCann, p. 2167.
New Bedford, etc., R. Co., Lucas v.
—— Macy v.
New Bedford, etc., Steamboat Co., Simmons v.
Newberger v. Howard & Co's Exp., p. 321.
—— Missouri Pac. R. Co. v.
Newberger Cotton Co. v. Illinois Cent. R. Co., pp. 1039, 1041.
Newberger & Bro., Missouri Pac. R. Co. v.
Newberry, Fitch v.
New Brunswick Steamboat, etc., v. Tiers, pp. 285, 728, 733, 734, 735, 736, 739, 742, 745, 749.
New Brunswick, etc., R. Re.
New Brunswick, etc., Steamboat Co., King v.
New Buffalo v. Iron Co., p. 3484.
Newburn, Chicago, etc., R. Co. v.
Newbury v. Great Northern R. Co., p. 2820.
—— v. Seaboard Air Line R. Co., p. 3133.
Newburyport, etc., R. Co., Quested v.
Newby v. Chicago, etc., R. Co., p. 1281.
—— Southern Exp. Co. v.
Newcomb v. Boston, etc., R. Corp., p. 486.
—— v. New York, etc., R. Co., 169 Mo. 409, 69 S. W. 348—pp. 2113, 2251, 2729, 2741, 2874.
Newcomb v. New York, etc., R. Co., 81 S. W. 1069, 182 Mo. 687—pp. 1698, 2361, 2382, 2729, 2925, 2938, 2959, 2965.
Newdigat, Lane v.
Newell, Chicago, etc., R. Co. v.
—— Cleveland, etc., R. Co. v.
—— v. Nixon, p. 589.
—— v. Smith, pp. 855, 2089, 3294.
New England, Porter v.
New England Briquette Coal Co., Eikrem v.
New England Exp. Co. v. Maine Cent. R. Co., pp. 109, 220, 222, 1135.
New England Mfg. Co. v. Starin, p. 463.
New England Nav. Co., Hirsch v.
New England Railroad, Dixon v.
New England R. Co., Dixon v.
New England, etc., Steamship Co., Jones v.
—— v. Paige, pp. 1337, 1365, 1367, 1390, 4023.
New Era Milling Co., Missouri, etc., R. Co. v.
Newhall v. Central Pac. R. Co., pp. 551, 1221.
—— Rhodes v.
—— Sheppard v.
—— v. Vargas, 13 Me. 93, 29 Am. Dec. 489—pp. 1210, 1211, 1215, 1216, 1218, 1219, 1229, 1241, 1245, 1247.
—— v. Vargas, 15 Me. 314, 33 Am. Dec. 617—p. 1165.
—— Western Transp. Co. v.
New Hanover Transit Co., Hodges v.
New Haven Rolling Mill Co., Kelyea v.
New Haven Steamboat Co., Dunn v.
—— Ely v.
—— Marcus v.
—— Russell Mfg. Co. v.
New Haven, etc., Co. v. Campbell, pp. 1153, 1166.
—— Gardner v.
—— State v.
—— v. State, p. 1857.
New Haven, etc., R. Co., Shepard v.
—— Smith v.
Newhouse Mill, etc., Chicago, etc., R. Co. v.
New Jersey Cent. R. Co., Harris v.
New Jersey R. Co. v. Kennard, p. 1829.
—— v. Palmer, p. 3074.
New Jersey R., etc., Co., Kennard v.
—— v. Pennsylvania R. Co., pp. 222, 240, 1029, 3283, 3284.
—— v. Pollard, pp. 1733, 2673.
—— Ripley v.
New Jersey Steamboat Co., Adams v.
—— Ball v.
—— Brand v.
—— v. Brockett, pp. 2015, 2034, 2039, 2043, 2045, 2053, 2122, 2123, 2124, 3023.
—— Caldwell v.
—— Cleveland v.
—— Horn v.
—— McEntee v.
—— Macklin v.
—— Miller v.
—— Ontario Bank v.
—— Swarthout v.
—— Way v.
—— Withers v.
—— Zinn v.
New Jersey Steam Nav. Co., Dorr v.
—— Hale v.
New Jersey Nav. Co. v. Merchants' Bank, pp. 208, 210, 213, 485, 726, 731, 739, 740, 930, 945, 947, 953, 958, 960, 961, 964, 980, 1003, 1004, 1006, 1007, 1035, 1037, 1153, 3906, 3917, 3919, 3937, 4024, 4025.
New Jersey Steamship Co., Cleveland v.
New Jersey Tract. Co. v. Dambech, p. 2524.
—— v. Gardner, 58 N. J. L. 176, 31 Atl. 893—p. 1684.
—— v. Gardner, 38 Atl. 669, 60 N. J. L. 571—p. 2249.
New Jersey, etc., Ferry Co., Duggan v.
—— Edwards v.
New Jersey, etc., R. Co., Stevens v.
Newlin, Cleveland, etc., R. Co. v.
—— v. Iowa Cent. R. Co., p. 2315
New London, etc., R. Co., Crocker v.
Newman v. Alabama, etc., R. Co., pp. 1812, 2808.
—— v. Chicago, etc., R. Co., pp. 2320, 2322, 2860.
—— Louisville, etc., R. Co. v.
—— v. New York, etc., R. Co., pp. 2062, 2063.
—— Northern Cent. R. Co. v.
—— San Antonio, etc., R. Co. v.
Newman & Co. v. Smoker, p. 995.
Newman & Son, Lovell v.
Newmark v. New York, etc., R. Co., p. 1666.
Newmeyer, Pennsylvania Co. v.
Newmiller, Chicago Union Tract. Co. v.
New Orleans, Cannon v.
—— v. Eclipse Tow-Boat Co., p. 3585.
—— Moran v.
—— The.
New Orleans Anchor Line, Prickett v.
New Orleans City R. Co., Wardle v.
New Orleans Mut. Ins. Co. v. New Orleans, etc., R. Co., pp. 958, 1007, 1037.
New Orleans R. Co., Chretien v.
New Orleans R., etc., Co., Alexander v.
—— Bommarius v.
—— Casper v.
—— Englert v.
—— Grant v.
—— McGinn v.
—— McMahon v.
—— Perkins v.
—— Pitard v.
—— Trenchard v.
New Orleans Transfer Co., Du Ponte v.
New Orleans, etc., Co., Leberman v.
New Orleans, etc., Railroad, Schneider v.
New Orleans, etc., R. Co. v. Albritton, p. 2697.
—— Bates v.
—— Bemiss v.
—— Boikens v.
—— v. Burke, pp. 2020, 3072.
—— Byrd v.
—— Carter v.
—— Chapman v.
—— Conway v.
—— Corso v.
—— Damont v.
—— De Lucas v.
—— Dobson v.
—— v. Faler, p. 787.
—— Flash, etc., Co. v.
—— Gardner v.
—— v. George & Co., pp. 704, 705, 706, 707, 708, 715.
—— Gilly v.
—— Gonthier v.

New Orleans, etc., R. Co., Gretzner v.
—— Harrison v.
—— v. Harrison, p. 2526.
—— Hart v.
—— Higgins v.
—— Hill v.
—— Holzab v.
—— Houze v.
—— Howze v.
—— v. Hurst, pp. 1868, 2568, 3058, 3062.
—— In re.
—— v. Jopes, pp. 2015, 2016, 2034, 2045, 2050, 2051, 2052, 2053, 2054, 2417, 2418.
—— Kird v.
—— Laffitte v.
—— Latta v.
—— Lee v.
—— Lott v.
—— Mahnke v.
—— Maigman v.
—— v. Moore, pp. 3115, 3116, 3151, 3186.
—— National Rice Mill Co. v.
—— New Orleans Mut. Ins. Co. v.
—— Peters v.
—— Randall v.
—— Reems v.
—— Rutledge v.
—— Santhur v.
—— v. Schneider, pp. 1818, 1829, 2894.
—— v. Shackelford, pp. 3121, 3149.
—— Shamblin v.
—— Simms & Sons v.
—— Smith v.
—— Smith Bros. & Co. v.
—— v. Statham, pp. 1495, 1496, 1899, 1910, 1911, 1914, 1972.
—— Stone v.
—— v. Thomas, pp. 2214, 2215.
—— Thompson v.
—— Threefoot v.
—— v. Tyson, p. 598.
—— Weber v.
—— Weeks v.
—— Wilson v.
Newport Dock Company v. Wilson, p. 645.
Newport News, etc., Co., Hernsheim v.
—— v. McDonald Brick Co.'s Assignee, pp. 439, 473.
—— v. Thomas, p. 3078.
—— v. United States, p. 3626.
Newport News, etc., Elect. Co. v. McCormick, pp. 2249, 2264, 2357.
Newport News, etc., R. Co. v. Mendell, p. 3407.
—— v. Mercer, pp. 210, 242, 446, 450, 467, 650, 1321, 1351.
—— v. Nixon, p. 485.
—— v. Reed, pp. 420, 621.
Newport, etc., R. Co., Elliott v.
New Quay Co., Sheridan v.
New Ruperra Steamship Co. v. 2,000 Tons of Coal, pp. 3955, 3960, 3969.
Newsom v. Thornton, pp. 1216, 1221.
Newsome, Georgia R. Co. v.
Newstadt v. Adams, p. 1036.
Newton, Berley v.
—— v. Central Vermont R. Co., pp. 2353, 2354, 2890.
—— Fisk v.
—— Freeman v.
—— Grant v.
—— Pearce v.
—— v. People's R. Co., p. 2587.
—— Seymour v.
—— Van Etten v.
Newton St. R. Co., Morse v.
—— Nolan v.
Newton, etc., Co., Wabash R. Co. v.
Newton, etc., St. R. Co., Partelow v.
—— Quinlan v.
New World, Fay v.
—— The.
New York, Barrett v.
—— v. Broadway, etc., R. Co., p. 27.
—— Budd v.
—— Duryee v.
—— Henderson v.
—— Langin v.
—— Miln, p. 3427.
—— New York, etc., R. Co. v.
—— Philadelphia Fire Ass'n v.
—— v. Roberts, pp. 3471, 3555.
—— v. Starin, p. 768.
—— The.
—— Weill v.
—— Workman v.
New York Cent. & H. R. Co. v. Deer Creek Lumber Co., p. 421.
New York Cent. R. Co., Alden v.
—— Avery v.
—— Barker v.
—— Bills v.
—— Bissell v.
—— Bowen v.
—— Briggs v.
—— Brown v.
—— Buel v.
—— Burnell v.
—— Chase v.
—— Coffin v.
—— Cragin v.
—— Denny v.
—— Deyo v.
—— Dickens v.
—— Downs v.
—— Dunson v.
—— Filer v.
—— Glasco v.
—— Grosvenor v.
—— Hamilton v.
—— Hempstead v.
—— Holden v.
—— Hulbert v.
—— Irwin v.
—— Jackson & Son v.
—— Johnson v.
—— Keith v.
—— Kessler v.
—— Lewis v.
—— v. Lockwood, pp. 790, 793, 945, 947, 948, 1567, 1711, 1714.
—— Long v.
—— McIntyre v.
—— McPadden v.
—— Marshall v.
—— Matteson v.
—— Mattison v.
—— Michaels v.
—— Murphy v.
—— Nellis v.
—— Odell v.
—— Page v.
—— Pemberton Co. v.
—— People v.
—— Perkins v.
—— Porter v.
—— Reed v.
—— Smith v.
—— Sprague v.
—— Squire v.
—— Thyll v.
—— Ward v.
—— Wells v.
New York Cent., etc., Co., Root v.
New York Cent., etc., R. Co., Abbey v.
—— Acheson v.
New York Cent., etc., R. Co. v. Bank, p. 553.
—— Brassell v.
—— v. Eby, pp. 822, 867.
—— Fisher v.
—— Frey v.
—— Glidden v.
—— Hinckley v.
—— Jackson & Son v.
—— Jones v.
New York Cent., etc., R. Co., Rintoul v.
—— Robinson v.
—— Sinsheimer v.
—— Wells v.
—— Winchell v.
—— Wolford v.
New York City R. Co., Adams v.
—— Baron v.
—— Baumstein v.
—— Bull v.
—— Butler v.
—— Depew v.
—— Dubnow v.
—— Ellis v.
—— Field v.
—— Fisher v.
—— Freeman v.
—— Gomez v.
—— Graham v.
—— Gregorio v.
—— Harker v.
—— Johnston v.
—— Kelly v.
—— Ketchum v.
—— Koch v.
—— Law v.
—— Levy v.
—— Lomas v.
—— Ludinsky v.
—— McArthur v.
—— McGowan v.
—— Mullane v.
—— Schwartz v.
—— Senior v.
—— Sheppard v.
—— Silber v.
—— Tauger v.
—— Wagner v.
—— Wasserman v.
—— Weiller v.
—— Wells v.
New York Elev. R. Co., McMahon v.
New York Ins. Co., Griswold v.
New York Mail Steamship Co., Spaids v.
New York Millinery, etc., Co. v. Hamburg, etc., Gesellschaft, p. 344.
New York R. Co., Green v.
New York Sleeping Car Co., Lewis v.
New York Steam Co., Francis v.
New York Transfer Co., Atkinson v.
New York Union Ins., Co., Ames v.
New York & E. R. Co., Harmon v.
New York, etc., Bridge, McAlan v.
—— Rogers v.
New York, etc., Co., Hamil v.
—— Robinson v.
—— v. Weiss, pp. 292, 296, 600.
New York, etc., Exp. Co., Easter v.
New York, etc., Ferry Co., Grabbler v.
New York, etc., Goods Co., In re.
New York, etc., Nav. Co., Gilhooly v.
—— v. Lamar v.
New York, etc., Railroad, De Rochemont v.
—— Johnson v.
New York, etc., R. Co., Abbey v.
—— Agulino v.
—— Allbrecht v.
—— Alden v.
—— Archer v.
—— Auerback v.
—— Avery v.
—— Baker v.
—— Baker & Co. v.
—— Baldwin v.
—— v. Ball, pp. 211, 1712, 1953, 1957, 2212.
—— Bank v.
—— Barnes v.
—— Bartholomew v.
—— Bartle v.

New York, etc., R. Co., Batavia Bank v.
—— Baum v.
—— Baumann v.
—— Baxter v.
—— Beardsley v.
—— Bellman v.
—— Bennett v.
—— v. Bennett, pp. 1632, 2462, 2481, 3319.
—— Bissell v.
—— Black v.
—— Blackstock v.
—— v. Blumenthal, pp. 1567, 1755, 1757, 1827, 2673.
—— v. Board, 74 N. J. L. 367, 65 Atl. 860—p. 3474.
—— v. Board, 76 N. J. L. 664, 74 Atl. 954, 16 Am. & Eng. Ann. Cas. 858—p. 3474.
—— v. Board, 227 U. S. 248, 33 S. Ct. 269—p. 3501.
—— Boetgen v.
—— v. Bork, p. 112.
—— Brassell v.
—— Breen v.
—— Brewer v.
—— Brewster v.
—— Bromley v.
—— Brooke v.
—— Brooks v.
—— Brown v.
—— Bucher v.
—— Buckland v.
—— Buckley v.
—— Burgevin v.
—— Burkett v.
—— v. Burns, pp. 1582, 1585, 1954.
—— Burritt Co. v.
—— Burton v.
—— v. Callahan, pp. 2584, 2604, 2605, 2645.
—— Candee v.
—— Carleton v.
—— Carpenter v.
—— Carrizzo v.
—— Casey v.
—— Cashman v.
—— Cass v.
—— Cassasa v.
—— Charles Schlesinger & Sons v.
—— Chave v.
—— Clark v.
—— Clement v.
—— Cody v.
—— Cohen v.
—— Coleman v.
—— Comerford v.
—— Commonwealth v.
—— v. Commonwealth, p. 3498.
—— Conklin v.
—— Connell v.
—— Connolly v.
—— v. Cooper, p. 2009.
—— Copson v.
—— Corcoran v.
—— Cormack v.
—— Cote v.
—— Crocker v.
—— Crommelin v.
—— Cromwell, pp. 219, 785.
—— Crossan v.
—— v. Daugherty, pp. 1721, 1813, 1982, 2695.
—— Davis v.
—— Denny v.
—— v. Difendaffer, p. 2104.
—— Dininny v.
—— v. Doane, pp. 1755, 1772, 1873, 1913.
—— Downs v.
—— Dunne v.
—— Dwinelle v.
—— Dwyer v.
—— Edgerton v.
—— Elliott v.
—— Enches v.
—— v. Enches, pp. 2248, 2377.
—— Estill v.
—— v. Estill, pp. 662, 848, 854, 855, 875, 1349, 1353, 1356, 1463.
New York, etc., R. Co., Fairfax v.
—— Falk v.
—— Fanizzi v.
—— Farnsworth v.
—— v. Feely, pp. 1593, 1635.
—— First Nat. Bank v.
—— Fitzmauriee v.
—— Flanagan v.
—— v. Flynn, p. 2645.
—— Fraloff v.
—— v. Fraloff, p. 1073.
—— Frazier v.
—— Freedon v.
—— v. Fremont, etc., R. Co. v.
—— v. Gallaher, pp. 91, 167, 168, 173, 176.
—— Gannon v.
—— Gardiner v.
—— Garvan v.
—— Gass v.
—— v. General Elect. Co., pp. 3608, 3732, 3742.
—— Geogagn v.
—— Godfrey v.
—— Goldberg v.
—— Gonzales v.
—— Gorman v.
—— Gould v.
—— Grieve v.
—— Griswold v.
—— Grzywacz v.
—— Guy v.
—— Hancock v.
—— v. Harber, p. 2113.
—— Harding v.
—— v. Haring, pp. 2412, 2413.
—— Harty v.
—— Hasbrouck v.
—— Hastings v.
—— Hauk v.
—— Hays v.
—— Herdman v.
—— Hibbard v.
—— Hinkley v.
—— Hodgdon v.
—— Hoffard v.
—— Hoffman v.
—— Hood v.
—— Howland v.
—— Hoyt v.
—— Huerstel v.
—— Hughes v.
—— Hunt v.
—— v. Interstate Commerce Commission, 168 Fed. 131—pp. 3672, 3673, 3709, 3710, 3777.
—— v. Interstate Commerce Commission, 200 U. S. 361, 50 L. Ed. 515, 26 S. Ct. 272—pp. 3601, 3602, 3604, 3605, 3606, 3631, 3684, 3685, 3686, 3698, 3707, 3750, 3753, 3754, 3758, 3759, 3765, 3786, 3818, 3821.
—— Ionnone v.
—— Isaacson v.
—— Jewell v.
—— Johnson v.
—— Jordan v.
—— Keating v.
—— Kelly v.
—— Kemp v.
—— Kenney v.
—— Kessler v.
—— v. Ketchum, p. 1643.
—— Killmer v.
—— Knieriem v.
—— Koehne v.
—— Kohne v.
—— Kunzmann v.
—— Kurzmann v.
—— Langdon v.
—— Langworthy v.
—— Lansing v.
—— Lawrence v.
—— Leach v.
—— Leech v.
—— Legge v.
—— Lemont v.
—— Lent v.
—— Levins v.
—— Lindenbaum v.
—— Livingston v.
New York, etc., R. Co. v. Lockwood, pp. 1694, 2045.
—— Lustig v.
—— Lyons v.
—— McCarty v.
—— McCullen v.
—— McKeon v.
—— McPadden v.
—— Magee v.
—— Manson v.
—— Maples v.
—— Martin v.
—— Matteson v.
—— Mawitz v.
—— Mears v.
—— Mechanics' Bank v.
—— v. Medbury v.
—— Merritt v.
—— Michie v.
—— Mieuli v.
—— v. Miller, 88 N. Y. S. 373, 94 App. Div. 587—p. 3563.
—— v. Miller, 26 S. Ct. 714, 202 U. S. 584, 50 L. Ed. 1155—p. 3555.
—— Millett v.
—— Milliman v.
—— Milnor v.
—— Mitchell v.
—— Molloy v.
—— Mondou v.
—— v. Moore v.
—— Morris v.
—— Mulligan v.
—— Murphy v.
—— v. Mushrush, pp. 2507, 2509, 2543, 2729.
—— Newcomb v.
—— Newman v.
—— Newmark v.
—— v. New York, pp. 1946, 3481, 3503, 3513.
—— v. New York, etc., R. Co., pp. 3657, 3658, 3660, 3777, 3792.
—— Nicholas v.
—— Nolan v.
—— Norfolk Hardwood Co. v.
—— O'Brien v.
—— Odell v.
—— O'Gorman v.
—— Olds v.
—— O'Neil v.
—— O'Neill v.
—— Parsons v.
—— Paulitsch v.
—— Peck v.
—— Peerless Mfg. Co. v.
—— Pemberton Co. v.
—— v. Pennsylvania, pp. 3549, 3551, 3552, 3553, 3559, 3560, 3571, 3572, 3573, 3592.
—— People v.
—— v. People, p. 255.
—— Perley v.
—— Piper v.
—— Porter v.
—— Potts v.
—— Poucher v.
—— Rathbone v.
—— Reed v.
—— v. Reilley, p. 2084.
—— Reimer v.
—— Renaud v.
—— Reynolds v.
—— Rich v.
—— Richardson v.
—— Robastelli v.
—— v. Robbins, p. 2605.
—— Roberts v.
—— Robertson v.
—— Robinson v.
—— Rowland v.
—— Saltsman v.
—— Sayles v.
—— v. Sayles, pp. 964, 1007.
—— Schiff v.
—— Schreiner v.
—— v. Scovill, p. 99.
—— Scully v.
—— v. Seiberling & Co., pp. 701, 704, 707.
—— Sessions v.
—— Seybolt v.

New York, etc., R. Co., Sheldon v.
—— Simpson v.
—— Smith v.
—— Squire v.
—— v. Standard Oil Co. (N. Y.), 20 Hun 39—p. 436.
—— v. Standard Oil Co., 87 N. Y. 486—p. 530.
—— State v.
—— Stowe v.
—— Straiton v.
—— Strough v.
—— Tanner v.
—— Taylor v.
—— Thorp v.
—— Thorpe v.
—— Thyll v.
—— Tierney v.
—— Townsend v.
—— Tracy v.
—— Trieber v.
—— Trimble v.
—— Tweedie Trading Co. v.
—— Ulrich v.
—— United States v.
—— v. United States, 165 Fed. 833, 91 C. C. A. 519—pp. 3622, 3629.
—— v. United States, 203 Fed. 953—pp. 3620, 3625, 3626.
—— v. United States, 212 U. S. 481, 53 L. Ed. 613, 29 S. Ct. 304—pp. 3603, 3604, 3684, 3701, 3843, 3846, 3847, 3849, 3852.
—— v. United States, 212 U. S. 500, 53 L. Ed. 624, 29 S. Ct. 309—pp. 3604, 3664, 3665, 3701, 3705, 3754, 3849.
—— Van Ostran v.
—— Vaughn v.
—— v. Vict. p. 1586.
—— Vrederburgh v.
—— Ward v.
—— Waterbury v.
—— Watkins v.
—— Watson v.
—— Weeks v.
—— Weinschenk v.
—— West v.
—— Weston v.
—— Whitney v.
—— Wibert v.
—— Wickwire Steel Co. v.
—— v. Williams, 199 N. Y. 108, 92 N. E. 404—p. 3507.
—— v. Williams, 120 N. Y. S. 1137, 136 App. Div. 904—p. 3507.
—— v. Williams, 118 N. Y. S. 785, 64 Misc. Rep. 15—p. 3507
—— v. Willing, pp. 2454, 2474, 2533.
—— Wing v.
—— Winship v.
—— v. Winter, pp. 1529, 1608, 1614, 1622, 1977, 2054, 2408, 2409, 2487.
—— Wood v.
—— v. Woods, p. 1917.
—— v. York, etc., Co., pp. 3753, 3756.
—— Young v.
—— Zimmer v.
New York, etc., Salt Co., Hunter v.
New York, etc., Steamship Co., Elkins & Co. v.
—— Evans v.
—— Gillum v.
—— Hyde v.
—— v. Island City Boating, etc., Ass'n, p. 812.
—— Judd v.
—— Lincoln v.
—— Ralli v.
—— Robinson v.
—— Savage v.
—— Union Steamship Co. v.
—— Viner v.
—— Waltham Mfg. Co. v.
—— v. Weiss, pp. 410, 862.
—— v. Wright, pp. 3348, 3367.
New York, etc., Transp. Co., Bartlett v.
—— United Fruit Co. v.
New York, etc., Transp. Line v. Baer & Co., pp. 840, 3388, 3396, 3405, 3415.
Ney, Houston, etc., R. Co. v.
Neyman v. Alabama, etc., R. Co., p. 1572.
Niagara v. Cordes, pp. 302, 332, 333, 724, 726, 732, 748, 752, 768, 1142.
—— The.
Nicaragua, Defrier v.
—— The.
Niceto, The.
Nichol, Jackson v.
Nicholai, Louisville, etc., R. Co. v.
Nicholas v. New York, etc., R. Co., p. 896.
—— Union Pac. R. Co. v.
Nichols v. Camden Interstate R. Co., p. 3038.
—— v. Chicago, etc., R. Co., 90 Mich. 203, 51 N. W. 361, 52 Am. & Eng. R. Cas. 304—pp. 1788, 1886, 1906, 1909.
—— v. Chicago, etc., R. Co., 94 Iowa 202, 62 N. W. 769—p. 1432.
—— Driscoll v.
—— v. Dubuque, etc., R. Co., pp 1782, 2249, 2729, 2750.
—— v. Eddy, p. 1257.
—— Fitchburg R. Co. v.
—— v. Lifeware, p. 382.
—— v. Lynn, etc., R. Co., pp. 2745, 2908.
—— v. Oregon, etc., R. Co., pp. 441, 448, 449.
—— v. Sixth Ave. R. Co., pp. 1880, 2357, 2803.
—— v. Smith, pp. 6, 272, 274, 277, 841, 918.
—— v. Southern Pac. Co., p. 1616.
—— Southern R. Co. v.
—— v. Union Pac. R. Co., p. 2480.
—— v. Washington, etc., R. Co., pp. 1775, 1776.
Nichols, etc., Co., Kansas Pac. R. Co. v.
Nichols, etc., Lumber Co. v. United States, pp. 3700, 3844, 3851, 3855.
Nicholson v. Brooklyn Heights R. Co., pp. 2450, 2458, 2462.
—— International, etc., R. Co. v.
—— v. Lancashire & Y. Ry. Co., pp. 1780, 1790.
—— Missouri Pac. R. Co. v.
—— Moakes v.
—— v. St. Louis, etc., R. Co., pp. 782, 1021.
—— Texas, etc., R. Co. v.
Nickerson, Hamilton v.
Nickey v. St. Louis, etc., R. Co., p. 574.
Nickles v. Seaboard Air Line Railway, pp. 2097, 2722.
Nickless, Ohio, etc., Co. v.
—— Ohio, etc., R. Co. v.
Nicolette Lumber Co. v. People's Coal Co., pp. 714, 715, 1160.
Nicoll v. East Tennessee, etc., R. Co., pp. 1430, 1436, 1437.
Nichoer v. Detroit Elect. Railway, p. 2125.
Niedzinski v. Bay City Tract., etc., Co., pp. 2980, 2898.
Niemann, Russell v.
Nies v. Brooklyn Heights R. Co., pp. 2637, 2893.
Nightingale v. Union Colliery Co., p. 1567.
Niland v. Boston Elev. R. Co., 203 Mass. 476, 94 N. E. 703—pp. 2006, 2007.
—— v. Boston Elev. R. Co., 100 N. E. 554, 213 Mass. 522—p. 2898.
Niles v. Culver, pp. 333, 335, 412.
Nilson v. Oakland Tract. Co., pp. 1515, 1720, 1880, 2306, 2596, 2657.
948 Pieces of Lumber, In re.
Nines v. St. Louis, etc., R. Co., p. 3343.
Ninetta, Knox v.
Ninfa, The.
Ninth Ave. R. Co., Hill v.
—— Mettlestadt v.
Niolon, Smyrl v.
Nirk v. Jersey City, etc., R. Co., pp. 1957, 1994, 2172, 2957.
Nith, The.
Nitro-Glycerine Case, pp. 236, 238.
—— The.
Nittany, etc., R. Co., Bald Eagle, etc., R. Co. v.
Niver Coal Co. v. Cheronea Steamship Co., pp. 3955, 3960, 3969.
Nix, Fordyce v.
—— South Carolina R. Co. v.
Nixon, Newell v.
—— Newport News, etc., R. Co. v.
Nobel's Explosives Co. v. Jenkins, p. 3874.
Noble v. Adams, p. 1241.
—— v. Atchison, etc., R. Co., pp. 198, 1857, 1858, 1862, 2454, 2651.
—— Chicago & A. R. Co. v.
—— Chicago, etc., R. Co. v.
—— v. Mitchell, p. 3570.
—— Robinson v.
—— v. St. Joseph, etc., R. Co., pp. 1817, 1833, 2114, 2175, 2743.
Nocita v. Omaha, etc., St. R. Co., pp. 1995, 2332.
Nock, Adams Exp. Co. v.
Noelke, Galveston, etc., R. Co. v.
Noell, Baltimore, etc., R. Co. v.
Nolan, Birmingham R., etc., Co. v.
—— v. Brooklyn, etc., R. Co., pp. 1953, 2174.
—— Louisville, etc., Ferry Co. v.
—— Memphis, etc., R. Co. v.
—— v. Newton St. R. Co., pp. 1992, 2759, 2797.
—— v. New York, etc., R. Co., p. 2451.
—— v. Ohio, etc., R. Co., pp. 3189, 3190.
—— Pullman Southern Car Co. v.
Nolte, Bernadon v.
Nolton v. Western R. Corp., pp. 1564, 1578, 1759.
Nonotuck Silk Co. v. Adams Exp. Co., 256 Ill. 66, 99 N. E. 893—pp. 477, 993, 1053.
—— v. Adams Exp. Co., 256 Ill. 76, 99 N. E. 897—pp. 477, 993.
—— v. Adams Exp. Co., 166 Ill. App. 519—pp. 821, 1053.
—— v. Adams Exp. Co., 166 Ill. App. 525—p. 1053.
Nonpariel, The.
Noonan v. Wells-Fargo & Co., pp. 983, 1064.
Norddeutscher Lloyd, Hohl v.
—— v. Insurance Co., pp. 3908, 4063.
Nordemeyer v. Loescher, pp. 3114, 3168.
Norfolk, Hingham, etc., Turnpike Corp. v.
Norfolk Hardwood Co. v. New York, etc., R. Co., p. 1243.
Norfolk R., etc., Co., Northington v.
Norfolk Southern R. Co. v. Barnes, pp. 484, 1163.
Norfolk-Virginia Peanut Co., Petersburg, etc., Steamboat Line v.
Norfolk, etc., Co., Foreman v.
Norfolk, etc., Railroad, Snipes v.
Norfolk, etc., R. Co. v. Adams, pp. 700, 701, 702, 704, 717.

Norfolk, etc., R. Co. v. Anderson, pp. 1629, 2445, 3091, 3101.
—— Basnight v.
—— v. Birchfield, pp. 2016, 2962.
—— Bragg v.
—— v. Brame, pp. 2042, 2052, 2054, 2482, 2483, 2484, 2485.
—— v. Burge, p. 2116.
—— v. Commonwealth, 114 Pa. 256, 6 Atl. 45—p. 3574.
—— v. Commonwealth, 103 Va. 289, 49 S. E. 39—pp. 42, 45, 125.
—— Credle v.
—— v. Crull, pp. 485, 1440, 3417.
—— Deming v.
—— v. Dixie Tobacco Co., p 3445.
—— Eckles v.
—— Everett v.
—— Farley v.
—— v. Ferguson, pp. 1985, 2167, 2210, 2756.
—— v. Gallihcr, pp. 211, 1492, 1501, 1510, 1517, 1561, 2059.
—— Graves v.
—— v. Groseclose, pp. 1561, 1562, 1881, 2723.
—— Hall v.
—— v. Harman, 91 Va. 601, 22 S. E. 490, 44 L. R. A. 289, 50 Am. St. Rep. 855—pp. 287, 949, 1280, 3290.
—— v. Harman, 104 Va. 501, 52 S. E. 368—pp. 327, 328, 1065.
—— Houston Coal, etc., Co. v.
—— Hurley & Son v.
—— v. Irvine, 84 Va. 553, 5 S. E. 532—p. 3111.
—— v. Irvine, 85 Va. 217, 7 S. E. 233, 1 L. R. A. 110—pp. 3011, 3111, 3196.
—— Knowles v.
—— v. Langdon, pp. 319, 327.
—— Lewark v.
—— v. Lipscomb, pp. 1673, 3054, 3060.
—— Liquid Carbonic Co. v.
—— Lovings v.
—— McConnell v.
—— McDade v.
—— v. Marshall, p. 1680.
—— v. Neely, pp. 3030, 3079, 3080, 3084, 3100.
—— Norton Board v.
—— v. Old Dominion Baggage Co., p. 102.
—— v. Pendleton, 156 U. S. 667, 673, 39 L. Ed. 574, 15 S. Ct. 413—pp. 34, 63, 64, 65.
—— v. Pendleton, 86 Va. 1004, 11 S. E. 1062—pp. 35, 62, 168.
—— v. Pennsylvania, pp. 3430, 3434, 3471, 3472, 3473, 3550, 3569, 3574.
—— v. Pinnacle Coal Co., p. 71.
—— v. Potter, pp. 521, 658.
—— v. Primnell, pp. 2354, 1865, 1884.
—— v. Read, pp. 797, 3300.
—— v. Reeves, pp. 750, 822, 1088, 1094, 1395, 1417, 2627, 3338, 3368.
—— v. Rhodes, pp. 1683, 1719, 1984, 2587, 2666, 2694, 2777, 2798.
—— v. Shipper's Compress Co., pp. 440, 632, 637.
—— v. Shott, p. 1575.
—— v. Sims, pp. 3539, 3570.
—— Smith v.
—— Spence v.
—— v. Stevens, p. 1816.
—— v. Stone, pp. 3014, 3016, 3050.
—— Story v.
—— v. Stuarts' Draft Mill. Co., pp. 897, 901, 905.
—— v. Sutherland, 89 Va. 703, 17 S. E. 127—p. 3290.
Norfolk, etc., R. Co. v. Sutherland, 105 Va. 545, 54 S. E. 465—pp. 455, 1284, 1442, 3389.
—— v. Tanner, pp. 1566, 1722, 2095, 2096.
—— Thacker Coal, etc., Co. v.
—— Tillett v.
—— United States v.
—— v. United States, 101 C. C. A. 249, 177 Fed. 623—p. 3454.
—— v. United States, 195 Fed. 953—pp. 3680, 3777, 3798.
—— Wall v.
—— White v.
—— v. Wilkinson, pp. 655, 661, 678, 690, 691, 3393.
—— v. Williams, pp. 1717, 1718.
—— v. Wood, p. 2502.
—— v. Wysor, pp. 191, 194, 195, 196, 198, 1627, 2442.
Norfolk, etc., Railway, Cincinnati, etc., Tract. Co. v.
Norfolk, etc., Steamboat Co., Ragland v.
Norfolk, etc., Terminal Co. v. Morris, pp. 1518, 1902.
—— v. Rotolo, 179 Fed. 639, 103 C. C. A. 197—p. 2054.
—— v. Rotolo, 112 C. C. A. 583, 191 Fed. 4—pp. 2115, 2156, 2320, 2587, 2858.
—— v. Rotolo, 115 C. C. A. 183, 195 Fed. 231—pp. 2115, 2160, 2295.
Norfolk, etc., Tract. Co., Adamson v.
—— Fanshaw v.
—— v. Miller, p. 2027.
—— v. Rephan, p. 2587.
—— Thompson v.
Norman v. East Carolina R. Co., pp. 2458, 2459.
—— Kerr v.
—— v. Southern R. Co., pp. 1631, 2852.
—— Weir v.
Norman Prince, The.
Normile v. Northern Pac. R. Co., pp. 252, 523, 528, 754, 776, 872, 902.
—— v. Oregon K., etc., Co., pp. 1363, 1376, 1397, 1450, 1477.
—— v. Wheeling Tract. Co., p. 2319.
Norrington v. Wright, pp. 3872, 3873.
Norris, Alabama, etc., R. Co. v.
—— Baltimore, etc., R. Co. v.
—— Birmingham, etc., R. Co. v.
—— Georgia R., etc., Co. v.
—— Goodrich v.
—— Houston, etc., R. Co. v.
—— Memphis St. R. Co. v.
—— Moses v.
—— v. St. Joseph, etc., R. Co., p. 489.
—— v. St. Louis, etc., R. Co., pp. 1808, 2671.
—— v. Savannah, etc., R. Co., pp. 620, 625, 653.
—— v. Southern Railway, p. 2028.
Norris, etc., Co., O'Brien v.
North, Burrill v.
—— v. Merchants', etc., Transp. Co., pp. 378, 3274.
North Alabama Tract. Co. v. Daniel, 158 Ala. 414, 48 So. 50—p. 3061.
—— v. Daniel, 3 Ala. App. 428, 57 So. 120—p. 2776.
Northam, The C. H.
North American Transp. Co., Smith v.
North American Transp., etc., Co., Morrison v.
—— v. Morrison, p. 3052.
—— Ransberry v.
—— Sloan v.
—— Smith v.
North Baltimore Pass. R. Co. v. Kaskell, pp. 2200, 2204, 2699.
North Beach, etc., R. Co., Turner v.
—— Wheaton v.
North Birmingham St. R. Co. v. Calderwood, pp. 1889, 2055.
—— v. Liddicoat, pp. 1772, 1876, 2600.
North British R. Co., Bellsdyke, etc., Co. v.
North British, etc., Ins. Co. v. Central Vermont R. Co., pp. 1118, 1123.
North Carolina, Caldwell v.
North Carolina Cent. R. Co., Hardy v.
North Carolina Corp. Comm., Atlantic, etc., R. Co. v.
—— v. Atlantic, etc., R. Co., pp. 103, 104.
—— v. Southern R. Co. (N. C.), 61 S. E. 271—p. 118.
—— v. Southern R. Co., 151 N. C. 447, 66 S. E. 427—pp. 3487, 3517.
North Carolina R. Co., Benbow v.
—— Denny v.
—— Lambeth v.
—— McCombs v.
—— Mangum v.
—— Moss v.
—— Patterson v.
—— Phillips v.
—— Smith v.
—— Zachary v.
—— v. Zachary, p. 3613.
North Chicago City R. Co. v. Gastka, p. 2534.
North Chicago St. R. Co. v. Bauer, 53 N. E. 568, 179 Ill. 126, 45 L. R. A. 108—p. 2174.
—— v. Bauer, 79 Ill. App. 121—pp. 2186, 2236.
—— v. Boyd, pp. 2698, 2811.
—— v. Brown, p. 2387.
—— Canfield v.
—— v. Canfield, p. 1702.
—— v. Cook, pp. 1746, 1888, 1898, 1901.
—— v. Cotton, pp. 2698, 2762.
—— v. Eldridge, pp. 2240, 2320.
—— v. Kaspers, 186 Ill. 246, 57 N. E. 849—pp. 2304, 2746.
—— v. Kaspers, 85 Ill. App. 316—p. 2333.
—— v. Lotz, p. 2313.
—— v. O'Donnell, p. 1710.
—— v. Polkey, pp. 2885, 2921.
—— Schaefer v.
—— Schneider v.
—— v. Schwartz, pp. 2594, 2692.
—— Strong v.
—— v. Thurston, p. 2525.
—— v. Williams, pp. 1521, 1819, 2158, 2385, 2391, 2950, 2957.
—— v. Wiswell, p. 2152.
—— v. Wrixon, p. 2156.
North Coast Lighterage Co. v. Greenwood, p. 3984.
—— v. Sullivan, p. 3984.
North Eastern R. Co., Andersen v.
—— Bethea v.
—— Coxon v.
—— Hammond v.
—— Interstate Commerce Comm. v.
—— McCartan v.
—— Oxlade v.
—— Porcher v.
—— Pounder v.
—— Robson v.
—— Rumsey v.
—— State v.
Northern v. Williams, etc., Co., p. 527.
Northern Alabama R. Co. v. Bidgood, p. 1269.
—— v. Feldman, p. 488.
Northern Belle, The.

Northern Cent. Railroad, Fredericks v.
Northern Cent. R. Co., Hersh v.
—— Monell v.
—— v. Newman, pp. 3071, 3072.
—— v. O'Connor, pp. 190, 193, 200, 1036, 1850, 1851.
—— Orem, etc., Produce Co. v.
—— Seibels v.
—— v. State, pp. 2115, 2116, 2118.
—— Tarbell v.
—— Tilburg v.
Northern Commercial Co. v. Lindblom, pp. 3911, 3918, 3925, 3933, 3934, 3978.
—— v. Nestor, pp. 3991, 3993.
Northern Eastern R. Co., Oxlade v.
Northern Indiana R. Co., Harris v.
Northern Indiana, etc., R. Co., Priestly v.
Northern Line Packet Co., Chicago, etc., R. Co. v.
—— v. Shearer, p. 490.
Northern Nav. Co., Van Anda v.
Northern Pac. Co., Farmers', etc., Trust Co. v.
Northern Pac. Exp. Co., Bennett v.
—— Hartwell v.
—— Pratt v.
—— State v.
—— Thomas v.
Northern Pac. R. Co. v. Adams, 116 Fed. 324, 54 C. C. A. 196, 3 K. R. R. 734, 26 Am. & Eng. R. Cas., N. S., 734—pp. 1936, 2223.
—— v. Adams, 192 U. S. 440, 48 L. Ed. 513, 24 S. Ct. 408—pp. 1565, 2092, 2094, 2096.
—— Alair v.
—— Allen v.
—— v. American Trading Co., pp. 451, 453, 607, 621, 1000, 3251, 3252, 3254, 3255, 3258, 3280, 3365, 3891, 4028.
—— Atkinson v.
—— v. Atkinson, pp. 3458, 3460.
—— Badovinac v.
—— v. Barnes, 2 N. Dak. 310, 51 N. W. 386—p. 3572.
—— v. Barnes, 2 N. Dak. 395, 51 N. W. 786—p. 3572.
—— Bonds-Foster Lumber Co. v.
—— Braun v.
—— v. Brewer, p. 3572.
—— Brooks v.
—— Bullard v.
—— Caldwell v.
—— Carsten v.
—— Carstens Packing Co. v.
—— Cooke v.
—— Cowley v.
—— Doherty v.
—— Duluth-Superior Mill. Co. v.
—— Dunlap v.
—— Farmers' Loan, etc., Co. v.
—— Farmers', etc., Trust Co. v.
—— First Nat. Bank v.
—— Fisher v.
—— Flaherty v.
—— Finch v.
—— Gamble Robinson Comm. Co. v.
—— Goss v.
—— Gregg v.
—— Hall v.
—— Hastings v.
—— v. Hess, pp. 1828, 2289, 2293, 2788.
—— Hoffman v.
—— Hoskins v.
—— Howe v.
—— Hudson v.
—— Interstate Commerce Comm. v.
—— Irish v.
—— Jenkins v.
—— John v.
Northern Pac. R. Co., Joliffe v.
—— Judge v.
—— Kaiser v.
—— v. Kempton, p. 1121.
—— v. Keyes, pp. 47, 54.
—— King County v.
—— Knapp v.
—— Le Beau v.
—— v. Lee, pp. 47, 48, 3490.
—— Leek v.
—— v. Lewis, p. 488.
—— Lilly Co. v.
—— Loy v.
—— McCue v.
—— v. Marinovich, pp. 2719, 2865.
—— Miley v.
—— Moran Bros. Co. v.
—— Mulligan v.
—— Normile v.
—— North Yakima Brewing, etc., Co. v.
—— Oakes v.
—— Ohage v.
—— Olson v.
—— Orcutt v.
—— Oregon Short Line, etc., R. Co. v.
—— Oregon, etc., R. Co. v.
—— Ostroot v.
—— v. Pacific Coast Lumber, etc., Ass'n, pp. 3820, 3821.
—— v. Pauson, pp. 1630, 2444.
—— Phettiplace v.
—— Pierson v.
—— Poole v.
—— v. Railroad Comm., 52 Wash. 440, 100 Pac. 987—p. 43.
—— v. Railroad Comm., 57 Wash. 134, 106 Pac. 611—p. 125.
—— Raworth v.
—— v. Raymond, p. 3572.
—— Rhodes v.
—— Richey, etc., Co. v.
—— Rose v.
—— Rothchild Bros. v.
—— Roy v.
—— Sager v.
—— Sanden v.
—— Serwe v.
—— Shaw v.
—— Shepard v.
—— Shumaker v.
—— Southern Flour, etc., Co. v.
—— Speck v.
—— State v.
—— v. Strong, p. 3572.
—— Switzler v.
—— Taugher v.
—— Treleven v.
—— v. Tressler, p. 3572.
—— Tudor v.
—— Valentine v.
—— Walch v.
—— Wells, Fargo & Co. v.
—— Whitlock v.
—— Wile v.
—— Wiles v.
—— Willison v.
—— Willson v.
—— Wilson v.
—— Windmiller v.
—— Wunsch v.
—— Wyman v.
—— Yegen v.
Northern Pac. Terminal Co., United States v.
—— v. United States, p. 3621.
Northern Railroad, First Nat. Bank v.
—— Ingledew v.
Northern R. Co., Dickson v.
—— v. Fitchburg R. Co., pp. 3270, 3290.
—— Ingledew v.
—— Leader v.
—— v. Page, pp. 1637, 2425.
—— Wylde v.
Northern Securities Co. v. United States, pp. 34, 3418, 3419, 3421, 3424, 3441, 3445, 3447, 3481, 3484.
Northern Steamship Co. v. Earn-Line Steamship Co., p. 3959.
Northern Texas Tract. Co. v. Danforth, p. 1721.
—— v. Hooper, p. 2846.
—— v. Moberly, p. 1990.
—— Moore v.
—— v. Roye, pp. 1823, 1825, 2120, 2867.
Northern Transp. Co., Falvey v.
—— Hoadley v.
—— v. McClary, pp. 259, 309, 595, 596, 848, 854, 3306.
—— v. Sellick, p. 521.
—— Van Schaach v.
—— Van Schaack v.
—— Van Schaak, v.
Northern, etc., Co., Bennett v.
Northey v. Field, p. 1228.
North German Lloyd v. Heule, p. 1151.
North German Lloyd Co., Insurance Co. v.
North German Lloyd Steamship Co., Brinck v.
—— v. Bullen, p. 4008.
—— Hart v.
—— Holmes v.
—— Parker v.
—— Pratt v.
—— Smith v.
—— Tewes v.
—— White v.
—— v. Wood, p. 3980.
Northhampton St. R. Co., Robinson v.
Northampton Tract. Co., Abel v.
Northampton, etc., R. Co., Wright v.
North Hudson County R. Co., Dusenbury v.
—— McKenna v.
North Hudson R. Co., Rochat v.
Northington v. Norfolk R., etc., Co., p. 2814.
North Jersey St. R. Co., Daggett v.
—— Daniel v.
—— Faul v.
—— Fenig v.
—— Fielders v.
—— Gottlob v.
—— Hansen v.
—— Herbich v.
—— Murphey v.
—— Murphy v.
—— Olsofrom v.
—— Pascell v.
—— v. Purdy, pp. 2670, 2858.
—— Rodman v.
—— Schmidt v.
—— Walsh v.
North London, etc., R. Co., Bridges v.
North Missouri R. Co. v. Akers, pp. 1352, 1480.
—— Ballentine v.
North Park St. R. Co., Rouser v.
North Pennsylvania R. Co. v. Commercial Bank, pp. 267, 355, 371, 373, 377, 389, 511, 512, 542, 543, 547, 558, 559, 561, 566, 1267, 1269, 2199, 1302, 3258, 3273.
North River Bridge Co., Luxton v.
Northrop v. Richmond, p. 1594.
—— v. Syracuse, etc., R. Co. (N. Y.), 3 Abb. Dec. 386—p. 901.
—— v. Syracuse, etc., R. Co. (N. Y.), 5 Abb. Prac., N. S., 425—p. 901.
Northrup v. Railway, etc., Assur. Co., p. 1514.
North Shore R. Co., Bonneau v.
North Staffordshire R. Co., Peck v.
—— Thomas v.
North Star, The.

North Texas Grain Co., Gulf, etc., R. Co. v.
Northup, McCook v.
Northwestern Elev. R. Co., Lapin v.
—— Visscher v.
Northwestern Fuel Co., Burlington, etc., Co. v.
—— Burlington, etc., R. Co. v.
—— v. Burlington, etc., R. Co., pp. 228, 448.
Northwestern Ins. Co. v. Phoenix, etc., Co., p. 1118.
Northwestern Pac. R. Co., Clare v.
Northwestern Railroad, Brown v.
Northwestern R. Co., Bradley v.
—— Daughty v.
Northwestern Steamship Co., Croft v.
—— v. Ransom, p. 3984.
Northwestern Transp. Co. v. Leiter, pp. 4020, 4023.
—— v. McKenzie, p. 325.
Northwestern Union Packet Co., Dant & Co. v.
Northwestern Warehouse Co. v. Oregon R., etc., Co., 159 Fed. 975—pp. 188, 189, 3602, 3631, 3632, 3633, 3639, 3647.
—— v. Oregon R., etc., Co., 32 Wash. 218, 73 Pac. 388—p. 88.
Northwestern, etc., Packet Co., Coger v.
North Yakima Brewing, etc., Co. v. Northern Pac. R. Co., pp. 901, 904, 905.
North, etc., Steamship Co., Holmes v.
North, etc., St. R. Co., Outen v.
Norton v. Adams Exp. Co., p. 1080.
—— v. Baxter, pp. 333, 335, 337, 339.
—— v. Columbia St. R., etc., Co., p. 2251.
—— v. Consolidated R. Co., pp. 1651, 2425, 2459, 2462, 2471, 2486.
—— v. Galveston, etc., R. Co., pp. 1813, 2640, 2653, 2696.
—— Hagerman v.
—— Hoart v.
—— Pullman Co. v.
—— v. St. Louis, etc., R. Co., p. 2702.
—— The E. M.
—— v. The Richard Winslow, p. 893.
—— v. Third Ave. R. Co., p. 2225.
—— v. Union R. Co., p. 1676.
—— Winslow v.
Norton Board v. Norfolk, etc., R. Co., pp. 105, 106.
Norvell v. Kanawha, etc., R. Co., pp. 1683, 1952, 1953, 2172, 2182, 2192, 2194, 2342, 2800.
Norway, Grand v.
—— Grant v.
Norway Plains Co. v. Boston, etc., Railroad, pp. 700, 773, 894, 899, 910, 3160, 3168.
Norwich, The City of.
Norwich Co. v. Wright, pp. 4036, 4038, 4039, 4040, 4048, 4049, 4050, 4052, 4053, 4071, 4072, 4073, 4075, 4084.
Norwich, etc., R. Co., Burroughs v.
Norwich, etc., Steamboat Co., Simkins v.
Norwich, etc., Transp. Co., Converse v.
—— Flint v.
—— Gore v.
—— Jones v.
Norwood v. Galveston, etc., R. Co., p. 1950.
—— St. Louis, etc., R. Co. v.
Nourse v. Snow, pp. 438, 471.
Nowaski, International, etc., R. Co. v.
Nowlen, Hollister v.
Nowlin, Southern R. Co. v.
Noyes, Woodruff v.
Noyes & Co. v. Rutland, etc., R. Co., pp. 211, 417.
Nudd v. Wells, pp. 499, 596, 632.
Nuesch, Chicago, etc., R. Co. v.
Nugent, Baltimore City Pass. R. Co. v.
—— Baltimore, etc., R. Co. v.
—— v. Boston, etc., Railroad, p. 1820.
—— v. Smith, 1 C. P. Div. 27—p. 209.
—— v. Smith, 1 C. P. Div. 423—p. 729.
Nunn v. Georgia Railroad, pp. 190, 1899, 1908, 1909, 1910.
Nunnelee v. St. Louis, etc., R. Co., p. 755.
Nussbaum v. Louisville R. Co., p. 2534.
Nuswanger, Missouri Pac. R. Co. v.
Nute v. Boston, etc., Railroad, pp. 2368, 2767, 2870.
Nutt, Hunt v.
—— Secomb, etc., Co. v.
Nutter v. Southern Railway, p. 2430.
—— v. Sydenstricker, p. 2560.
Nutting v. Connecticut River R. Co., p. 3259.
Nuzum, Pittsburgh, etc., R. Co. v.
Nye, Bowlin v.
—— v. Marysville, etc., St. R. Co., pp. 1603, 2420, 2424.
N. Y., N. H. & H. R. R., Frederich v.
N. & C. R. Co. v. Messino, pp. 3, 4, 1808, 1821.

O

Oakerson v. Atlantic, etc., Elect. R. Co., p. 2906.
Oakes, Bronson v.
—— Lake Erie, etc., R. Co. v.
—— v. Moore, p. 1164.
—— v. Northern Pac. R. Co., pp. 728, 730, 733, 749, 3114, 3124, 3128, 3132, 3149, 3150.
Oakey v. Russell, pp. 798, 851.
Oakford v. Drake, pp. 1215, 1216.
Oakland Consol. St. R. Co., Howland v.
Oakland Cotton Mfg. Co. v. Jennings, p. 3864.
Oakland Sugar Mill Co. v. Wolf Co., p. 3830.
Oakland Tract. Co., James v.
—— Nilson v.
Oakland Trans. Co., Boone v.
Oakland, etc., Elect. Railway, Siemsen v.
Oakland, etc., R. Co., Redfield v.
Oaklund, etc., R. Co., Johnsen v.
Oak Ties, Ten Thousand & Eighty Two.
O'Bannon v. Southern Exp. Co., pp. 273, 285.
Ober v. Cresent City R. Co., pp. 1807, 2617.
—— v. Indianapolis, etc., R. Co., p. 1228.
Oberlin Bldg., etc., Ass'n, Colburn v.
Oberndorfer v. Pabst, p. 2767.
O'Brien v. Boston, etc., R. Co., 138 Mass. 387, 52 Am. Rep. 279—p. 1581.
—— v. Boston, etc., R. Co. (Mass.), 15 Gray 20, 77 Am. Dec. 347—pp. 1542, 2473, 2474, 2493.
—— Brooke Iron Co. v.
—— v. Brooklyn Heights R. Co., p. 2367.
—— Chicago Union Tract. Co. v.
—— Chicago, etc., R. Co. v.
—— v. Chicago, etc., R. Co., p. 2101.
—— v. Cunard Steamship Co., pp. 2078, 4000.
O'Brien, Durgy Cement, etc., Co. v.
—— v. Gilchrist, pp. 331, 334, 337, 338, 339, 345, 346.
—— Lexington R. Co. v.
—— v. McClinchy, p. 744.
—— v. Miller, pp. 3894, 3917, 4047, 4048, 4050, 4051, 4052, 4053.
—— Morris v.
—— v. New York, etc., R. Co., p. 2472.
—— v. Norris, etc., Co., pp. 381, 382, 1210, 1211, 1212, 1214, 1219, 1221, 1240, 1249.
—— v. St. Louis Trans. Co., 84 S. W. 939, 185 Mo. 263, 105 Am. St. Rep. 592—p. 2959.
—— v. St. Louis Trans. Co., 110 S. W. 705, 212 Mo. 59, 15 Am. & Eng. Ann. Cas. 86—p. 2054.
—— Trinity, etc., R. Co. v.
—— Vicksburg, etc., R. Co. v.
O'Bryan v. Kinney, pp. 320, 333.
—— Southern R. Co. v.
O'Callaghan v. Dellwood Park Co., 89 N. E. 1005, 242 Ill. 336, 26 L. R. A., N. S., 1054, 17 Am. & Eng. Cas. 407—p. 2672.
—— v. Dellwood Park Co., 149 Ill. App. 34—p. 1488.
Occidental, etc., Steamship Co., Hampton v.
Ocean Ins. Co., Sun Mut. Ins. Co. v.
Ocean Steam Nav. Co., English v.
Ocean Steamship Co., Brantley Co. v.
—— v. Ehrlich, pp. 1223, 1225, 1226, 1228, 1231.
—— v. McAlpin, p. 1047.
—— Miller v.
—— v. Savannah, etc., Supply Co., pp. 212, 226, 227, 3862, 3863.
—— v. Way, p. 764.
—— v. Wilder, pp. 513, 816.
Oceana, The.
Oceanic Steam Nav. Co., Brauer v.
—— Carlson v.
—— Wheeler v.
Och v. Missouri, etc., R. Co., p. 2684.
Ochs v. Price, p. 478.
O'Clair v. Rhode Island Co., p. 2697.
O'Connell, Cheyenne v.
—— Pennsylvania Co. v.
—— v. St. Louis, etc., R. Co., pp. 1684, 1735.
O'Connell Lumber Co., Security State Bank v.
O'Conner, Adams v.
—— v. Forster, p. 471.
—— Northern Cent. R. Co. v.
—— v. Scranton Tract. Co., p. 2861.
O'Connor, Atchison, etc., R. Co. v.
—— v. Brooklyn Heights R. Co., pp. 1645, 1646.
—— Great Northern R. Co. v.
—— v. Great Northern R. Co., 118 Minn. 223, 136 N. W. 743, 41 L. R. A., N. S., 391—pp. 762, 1049, 3522.
—— v. Great Northern R. Co., 120 Minn. 359, 139 N. W. 618—p. 3520.
Ocracoke, The.
Oddy v. West End St. R. Co., pp. 1905, 2317.
O'Dea v. Michigan Cent. R. Co., pp. 2268, 2907.
Odegaard, Minneapolis St. R. Co. v.
Odell v. New York Cent. R. Co., pp. 1573, 1574.
—— v. New York, etc., R. Co., p. 2865.
Oden, Birmingham R., etc., Co. v.
—— Louisville, etc., R. Co. v.
Oderkirk v. Fargo, 58 Hun 347, 11 N. Y. S. 871, 34 N. Y. St. Rep. 166—pp. 523, 601.

Oderkirk v. Fargo, 61 Hun 418, 16 N. Y. S. 220, 41 N. Y. St. Rep. 9—p. 549.
Odgen, Gibbons v.
Odil, Railroad v.
Odom, Little Rock, etc., R. Co. v.
—— v. St. Louis, etc., R. Co., p. 2227.
O'Donnell v. Allegheny R. Co., p. 2719.
—— v. Allegheny Valley R. Co., pp. 1570, 1582, 1812, 2126, 2210.
—— Baltimore, etc., R. Co. v.
—— Chicago City R. Co. v.
—— v. Chicago, etc., R. Co., pp. 1501, 1504, 1505, 2863.
—— v. Kansas City, etc., R. Co., p. 1587.
—— v. Louisville, etc., R. Co., p. 2167.
—— North Chicago St. R. Co. v.
—— Railroad Co. v.
O'Dougherty v. Boston, etc., R. Co., p. 522.
Oechs, Krohn v.
Oehm, Michigan, etc., R. Co. v.
Offutt, Cleveland, etc., R. Co. v.
O'Field v. St. Louis, etc., R. Co., pp. 2325, 2873.
O'Gara v. St. Louis Transit Co., pp. 1699, 1736, 2694, 2901, 2981.
O'Gara, etc., Co., Chesapeake, etc., R. Co. v.
Ogden v. Coddington, p. 495.
—— Gibbons v.
—— v. Parsons, p. 3869.
Ogdensburg Trans. Co., Ginn v.
—— Rudell v.
Ogdensburg, etc., R. Co., Pratt v.
—— v. Pratt, pp. 417, 783, 3289, 3294, 3295, 3297, 3340, 3413.
Ogg v. Shuter, pp. 352, 353.
Ogles, American Exp. Co. v.
Oglesby, Chicago, etc., R. Co. v.
O'Gorman v. New York, etc., R. Co., pp. 196, 3112.
O'Gorman Co., Blackwell v.
Ohage v. Northern Pac. R. Co., pp. 1607, 1666, 1667, 1671, 1936.
O'Hanlan v. Great Western R. Co., p. 849.
O'Hara, Buffalo, etc., R. Co. v.
—— Mahoning Valley R. Co. v.
Ohio, Lake Shore, etc., R. Co. v.
—— Shields v.
Ohio Cent. Tract. Co. v. Mateer, p. 2151.
Ohio Dairy Co. v. Lake Shore, etc., R. Co., p. 227.
Ohio Oil Co., United States v.
Ohio River R. Co., Barker v.
—— Gillingham v.
—— McKay v.
—— Moore v.
—— Poling v.
—— Sheets v.
Ohio River, etc., R. Co. v. Dittey, p. 3558.
—— Morgantown Mfg. Co. v.
Ohio State Auditor, Adams Exp. Co. v.
Ohio Tract. Co. v. Miller, p. 2810.
Ohio Transp. Co. v. Davidson Steamship Co., p. 4048.
Ohio Valley R. Co. v. Lander, p. 3511.
—— v. Watson, pp. 1753, 1755, 1812, 2736.
Ohio Valley Tie Co., Louisville, etc., R. Co. v.
Ohio Valley Trust Co. v. Wernke, pp. 1488, 2617.
Ohio Valley, etc., Co., Western, etc., R. Co. v.
Ohio, etc., Co. v. Nickless, p. 1567.
Ohio, etc., R. Co. v. Allender p. 2189.
—— v. Applewhite, pp. 1858, 1860.
—— v. Beuris, pp. 2635, 2637, 2760, 2761.
—— v. Brown, p. 1872.
—— Brunk v.
—— v. Cope, p. 2461.
Ohio, etc., R. Co. v. Craucher, p. 2622.
—— v. Gullison, p. 2711.
—— v. Dickerson, p. 1550.
—— Drew Glass Co. v.
—— v. Dunbar, pp. 607, 608, 758, 765, 774, 1350.
—— Emison v.
—— v. Emrich, pp. 490, 491, 3291.
—— Falkner v.
—— Godfrey v.
—— v. Hatton, pp. 203, 1863, 2575.
—— Kentucky Wagon Mfg. Co. v.
—— King v.
—— v. Lander, pp. 1944, 1945, 1946.
—— v. McCarthy, p. 1171.
—— Morganton Mfg. Co. v.
—— v. Muhling, pp. 1561, 1564, 1755, 1760, 1761.
—— v. Nickless, pp. 798, 1447, 1460.
—— Nolan v.
—— v. People, p. 1865.
—— v. Schiebe, pp. 2124, 2258.
—— v. Selby, pp. 1567, 1760, 1761, 1987, 2098, 2586, 2593, 2632, 2666, 2721, 2726.
Ohio, etc., R. Co. v. Smith, p. 1884.
—— v. Stansberry, pp. 2118, 2269, 2378.
—— v. Stratton, p. 2248.
—— v. Swarthout, pp. 1858, 2575.
—— v. Tabor, pp. 821, 1396, 1408, 1456.
—— v. Voight, p. 3005.
—— v. Yohe, pp. 573, 574, 577, 583, 732, 748.
Ohleman, Union Exp. Co. v.
Ohlen v. Atlanta, etc., K. Co., pp. 727, 730, 732, 748, 752, 765, 800, 828, 867.
Ohne, Indiana Union Tract. Co. v.
Oil City, etc., R. Co., Kirchner v.
Oil Creek R. Co., Tanner v.
Oil Creek, etc., R. Co. v. Clark, pp. 1529, 1974.
O'Keefe, Illinois Cent. R. Co. v.
Oklahoma v. Atchison, etc., K. Co., p. 37.
—— v. Chicago, etc., R. Co., p. 37.
—— v. Oklahoma R. Co., p. 87.
Oklahoma City R. Co., Stephens v.
Oklahoma R. Co. v. Boles, p. 2357.
—— Oklahoma v.
—— v. Powell, p. 76.
—— v. St. Joseph's Parochial School, p. 68.
Oklahoma State Bank, Central Mercantile Co. v.
Olanta Coal Min. Co. v. Beech Creek R. Co., p. 239.
O'Laughlin v. Boston, etc., Railroad, p. 2417.
—— Texas Cent. R. Co. v.
Olcott v. Supervisors, p. 36.
Old Colony R. Co., Attorney General v.
—— Bates v.
—— Bethmann v.
—— Brady v.
—— Brooks v.
—— Chaffee v.
—— Debbins v.
—— Hosmer v.
—— Robertson v.
—— Sullivan v.
—— v. Tripp, pp. 101, 111, 192.
Old Colony St. R. Co., Cassady v.
—— Coneton v.
—— Egan v.
—— Foster v.
—— Galligan v.
—— Hebblethwaite v.
—— Hunt v.
—— Jackson v.
—— Jordan v.
—— Luddy v.
Old Colony St. R. Co., Martin v.
—— Pitcher v.
—— Powers v.
—— Spooner v.
—— Thayer v.
—— Timms v.
—— Webber v.
Old Colony St. Railway, Sullivan v.
Old Colony Trust Co., Atlanta v.
—— v. Atlanta, pp. 43, 76, 79.
Old Colony, etc., R. Co., Buckley v.
—— Gaynor v.
—— Kiff v.
—— Lane v.
—— Maroney v.
—— Merritt v.
—— Todd v.
Old Dominion Baggage Co., Norfolk, etc., R. Co. v.
Old Dominion Steamship Co. v. Commonwealth, p. 3583.
—— v. Flanary & Co., pp. 1090, 1106, 1108, 1115, 3663.
—— Howard v.
—— Patterson v.
—— v. Virginia, pp. 3572, 3583, 3584.
Oldham, Birmingham R., etc., Co. v.
Olds, Georgia R. Co. v.
—— v. New York, etc., R. Co., 172 Mass. 73, 51 N. E. 450—pp. 1746, 1752.
—— v. New York, etc., R. Co., 94 N. Y. S. 924, 107 App. Div. 26—pp. 1269, 1393, 1437, 1476.
Olfermann v. Union Depot K. Co., pp. 1888, 2390, 2397, 3005.
Olinger, Ft. Wayne, etc., Tract. Co. v.
Olive, Receivers v.
Oliver, Alton, etc., Tract. Co. v.
—— v. Columbia, etc., R. Co., 55 S. C. 541, 33 S. E. 584—p. 1969.
—— v. Columbia, etc., R. Co., 43 S. E. 307, 65 S. C. 1—pp. 2755. 2909, 3067, 3376.
—— v. Fort Smith Light, etc., Co., pp. 1682, 1742, 2113, 2195. 2892.
—— St. Louis, etc., K. Co. v.
—— United States, etc., Pump Co. v.
Oliver Branch, Mahon v.
Oliver & Son v. Chicago, etc., R. Co., pp. 158, 247.
Olivier v. Louisville, etc., R. Co., pp. 1980, 2126, 2178.
Oller, Alton, etc., Tract. Co. v.
Olopp v. Interborough Rapid Transit Co., p. 1717.
O'Loughlin, Texas Cent. R. Co. v.
Olsen, Chicago Union Tract. Co. v.
—— Chicago, etc., R. Co. v.
—— v. Citizens' R. Co., pp. 1687, 1739, 1999, 2007, 2699, 2765.
—— Jewett v.
—— v. Smith, p. 3532.
Olsofrom v. North Jersey St. R. Co., p. 1744.
Olson v. Chicago, etc., R. Co., pp. 2244, 2248, 2351.
—— v. Northern Pac. R. Co., pp. 191, 2122, 2437, 2459, 2460, 2784, 3082, 3098.
—— v. St. Paul, etc., R. Co., p. 2126.
Oluf, The.
Olund v. Worcester Consol. St. R. Co., pp. 1523, 1957, 2345, 2889, 2890.
Olympia, The.
Omaha Elevator Co., State v.
Omaha Horse R. Co., Haman v.
Omaha R. Co., Haman v.
Omaha St. R. Co. v. Baker, p. 2819.
—— Bocsen v.
—— v. Boesen, pp. 2678, 2842.
—— v. Craig, pp. 1712, 2249.
—— Frizzell v.

Omaha St. R. Co., Pray v.
Omaha, etc., Bridge Co. v. Levinston, pp. 1890, 1901.
—— Marcus v.
—— Patterson v.
—— State v.
Omaha, etc., R. Co., Burger v.
—— Chollette v.
—— v. Chollette, 33 Neb. 143, 49 N. W. 1114—pp. 1686, 2119.
—— v. Chollette, 41 Neb. 578, 59 N. W. 921—pp. 1764, 1766, 2173.
—— v. Crow, 47 Neb. 84, 66 N. W. 21—pp. 1568, 2215.
—— v. Crow, 54 Neb. 747, 74 N. W. 1066, 69 Am. St. Rep. 741—pp. 2327, 3316.
—— v. Interstate Commerce Comm., pp. 3604, 3612.
—— v. Martin, pp. 1888, 2152, 2158.
—— Shuler v.
—— Wait v.
—— Willfong v.
Omaha, etc., St. R. Co., Bendekovich v.
—— Burger v.
—— Coffey v.
—— v. Interstate Commerce Comm., 179 Fed. 243—p. 3614.
—— v. Interstate Commerce Comm., 222 U. S. 582, 56 L. Ed. 324, 32 S. Ct. 833—p. 3808.
—— v. Interstate Commerce Comm., 33 S. Ct. 890, 230 U. S. 324, 57 L. Ed. 1501, 46 L. R. A., N. S., 385—p. 3614.
—— Kruger v.
—— Nocita v.
O'Malley v. Great Northern R. Co., pp. 1044, 1407.
O'Mara v. St. Louis Transit Co., pp. 1501, 1515, 1516, 1517, 2333.
Omnibus Cable Co., Doolin v.
—— Finkeldey v.
—— Tobin v.
O'Neal v. Day, p. 889.
119,254 Bushels of Flaxseed, Davidson Steamship Co. v.
One Hundred and One Live Stock Co. v. Kansas, etc., R. Co., p. 1113.
One Hundred and Twelve Sticks of Timber, p. 713.
Oneida, The.
O'Neil v. Baltimore, etc., R. Co., pp. 1884, 2044, 2543, 2588.
—— v. Lynn, etc., R. Co., p. 2827.
—— v. New York, etc., R. Co., p. 1683.
—— v. Vermont, p. 3539.
O'Neill v. Dry-Dock, etc., R. Co., p. 2007.
—— v. Garrett, pp. 1219, 1238.
—— v. Great Western R. Co., p. 898.
—— v. Lynn, etc., R. Co., pp. 2297, 2298.
—— Mathias v.
—— v. New York, etc., R. Co., pp. 285, 289, 884.
—— Perishable Freight Transp. Co. v.
One Thousand Three Hundred and Ten Tons of Coal, Hawgood v.
Ontario, The.
Ontario Bank v. New Jersey Steamboat Co., p. 545.
Ontario Steamboat Co., Rice v.
Ontario, etc., R. Co., May v.
Oostanaula, etc., Steamboat Co. v. Hampton, p. 839.
Ophir Silver Min. Co., Perkins v.
Opinion of the Justices, In re.
Oppenheim v. Russell, pp. 233, 1248.
Oppenheimer v. Denver, etc., R. Co., p. 2712.
—— v. Edney, p. 863.
—— Little Rock, etc., R. Co. v.
—— v. Manhattan R. Co., pp. 2060, 2486.
Oppenheimer & Co. v. United States Exp. Co., pp. 760, 945, 1007, 1009.
Opsahl v. Judd, p. 1589.
O'Quin, Seaboard, etc., R. Co. v.
Orange County Bank v. Brown, pp. 3123, 3125, 3126.
Orange, etc., R. Co., Frair v.
—— Wright v.
Oranmore, The.
Orbison, Babcock v.
Oreadian, The.
Orcutt v. Century Bldg. Co., 99 S. W. 1062, 201 Mo. 424, 8 L. R. A., N. S., 929—pp. 1502, 1503, 2677, 2983.
—— v. Century Bldg. Co., 112 S. W. 532, 214 Mo. 35—pp. 2685, 2741, 2837.
—— v. Northern Pac. R. Co., pp. 1539, 2521.
Order v. Louisville, etc., R. Co., p. 3467.
Ordway, Boston, etc., Railroad v.
O'Regan v. Cunard Steamship Co., pp. 939, 1639, 2092.
Oregon, The.
Oregon Co. v. Roe, pp. 2331, 2742, 2883.
Oregon Coal, etc., Co., Pettyjohn v.
Oregon Iron Co., Delaware v.
Oregon Liquor Co., Frame v.
Oregon Pac. R. Co., Lakin v.
Oregon R. Co., Abbott v.
—— Rathbone v.
—— Simmons v.
Oregon R., etc., Co., Allen v.
—— v. Balfour, 90 Fed. 295, 33 C. C. A. 57—pp. 4076, 4084, 4085.
—— v. Balfour, 179 U. S. 55, 45 L. Ed. 82, 21 S. Ct. 28—pp. 4036, 4071, 4072.
—— Bartlet v.
—— Buck v.
—— v. Campbell, 173 Fed. 957—p. 3489.
—— v. Campbell, 177 Fed. 318—p. 65.
—— v. Coolidge, p. 3811.
—— v. Dumas, pp. 92, 450, 459.
—— v. Fairchild, pp. 103, 104, 3810.
—— Farmers' Loan, etc., Co. v.
—— Gomm v.
—— Goodman v.
—— Haase v.
—— Kearney v.
—— Lacey v.
—— McGregor v.
—— McIntosh v.
—— Martin v.
—— Maynard v.
—— Normile v.
—— Northwestern Warehouse Co. v.
—— Peabody v.
—— Prettyman v.
—— Sheble v.
—— Smith Meat Co. v.
—— Sullivan v.
—— Taffe v.
—— v. Thisler, p. 3749.
—— United States v.
—— Wells, Fargo & Co. v.
—— Wells, etc., Co. v.
Oregon Short Line R. Co., Brian v.
—— Morgan v.
Oregon Short Line, etc., R. Co. v. Northern Pac. R. Co., pp. 241, 253.
Oregon-Washington R., etc., Co., Brown v.
—— v. United States, pp. 3621, 3627, 3629.
Oregon, etc., Ass'n. Union Pac. R. Co. v.
Oregon, etc., R. Co., Benson v.
—— v. Blyth, pp. 729, 734, 750, 779, 810, 845, 949.
—— Brian v.
—— Christensen v.
Oregon, etc., R. Co. v. Davidson, pp. 99, 101, 112.
—— Davis v.
—— Dempster v.
—— Everett v.
—— Groot v.
—— Holmes v.
—— Homer v.
—— Honeyman v.
—— Hwaco R., etc., Co. v.
—— v. Hwaco R., etc., Co., p. 3656.
—— Klenk v.
—— Kozminsky v.
—— Larsen v.
—— Lindsay v.
—— Major v.
—— Morgan v.
—— Nichols v.
—— v. Northern Pac. R. Co., 71 Fed. 465—pp. 3318, 3648, 3656.
—— v. Northern Pac. R. Co., 9 C. C. A. 409, 61 Fed. 158—pp. 110, 3657, 3775.
—— Skottowe v.
—— Slatter v.
—— Tarr v.
—— United States v.
—— Wells v.
—— Williams v.
Oregon, etc., R. Nav. Co., Brown v.
O'Reilly v. Brooklyn Heights R. Co., 179 N. Y. 450, 72 N. E. 517—p. 77.
—— v. Brooklyn Heights R. Co., 95 App. Div. 253, 89 N. Y. S. 41—pp. 110, 147.
Orem, etc., Produce Co. v. North ern Cent. R. Co., pp. 787, 827.
—— Pennsylvania R. Co. v.
Organ Power Co., Alabama, etc., R. Co. v.
Oriental Oil Co., Baltimore, etc., R. Co. v.
Orient Mut. Ins. Co. v. Adams, 1 4021.
Oriflamme, The.
Ormandroyd v. Fitchburg, etc., St. R. Co., p. 2029.
Ormond v. Hayes, p. 1537.
—— I. & G. N. R. Co. v.
—— International, etc., R. Co. v.
—— v. Metropolitan St. R. Co., p. 2826.
Ormsby v. Union Pac. R. Co., pp. 614, 848, 945, 963, 964, 1003, 1007, 1087, 1107, 1311, 1413, 1422.
Orndorff, Lake Shore, etc., R. Co. v.
Orndorff & Co. v. Adams Exp. Co., pp. 1008, 1075.
Ornstine v. Cary, p. 3484.
O'Rouke v. Bates, p. 771.
—— v. Citizens' St. R. Co., pp. 2458, 2464.
—— v. Two Hundred and Twenty-One Tons of Coal, p. 332.
O'Rourke v. Chicago, etc., R. Co., pp. 252, 756.
—— v. Interborough Rapid Trans. Co., p. 2787.
—— v. Street R. Co., pp. 1602, 1612, 1613, 1648, 1649, 1650.
Orr v. Chicago, etc., R. Co., p. 3343.
—— v. Planters' Phosphate, etc., Co., pp. 361, 362, 365, 370, 383, 398.
—— Texas, etc., R. Co. v.
Orser, Sturtevant v.
Orth v. Saginaw Valley Tract Co., pp. 1892, 2153, 2333, 2710, 2814.
Orthwein's Sons v. Wichita Mill, etc., Co., pp. 349, 478.
Ortt v. Minneapolis, etc., R. Co., pp. 3258, 3279, 3289, 3294, 3327, 3402.
Osborn v. Koenigheim, pp. 355, 365.
—— St. Louis, etc., R. Co. v.
—— Thomas v.

Osborn v. Wabash R. Co., 123 Mich. 669, 82 N. W. 520—p. 3489.
—— v. Wabash R. Co., 126 Mich. 113, 85 N. W. 406—p. 54.
Osborne v. Alabama Steel, etc., Co., p. 2281.
—— Chicago, etc., R. Co. v.
—— v. Chicago, etc., R. Co., pp. 3712, 3719, 3720, 3723.
—— v. Florida, pp. 3570, 3571, 3579.
—— v. Mobile, 44 Ala. 493—p. 3577.
—— v. Mobile (U. S.), 16 Wall. 479, 21 L. Ed. 470—pp. 3549, 3561, 3566, 3571.
—— St. Louis, etc., R. Co. v.
—— v. State, p. 28.
—— v. Union Ferry Co., p. 1780.
Osceola, The.
Osgood v. Concord Railroad, pp. 74, 145.
—— v. Los Angeles Tract. Co., pp. 2696, 2979.
Oskamp v. Southern Exp. Co., 11 O. C. C. 543, 5 O. C. D. 145—p. 553.
—— v. Southern Exp. Co., 61 O. St. 341, 56 N. E. 13—pp. 511, 539, 542, 549, 551, 553, 554.
Oskamp, etc., Co., Southern Exp. Co. v.
Oslen v. Citizens' R. Co., p. 1709.
Osterhoudt v. Southern Pac. Co., pp. 1108, 1109, 1117.
Ostrander v. Brown, p. 527.
Ostroot v. Northern Pac. R. Co., p. 1063.
Oswego St. R. Co., Watson v.
Oswego, etc., R. Co., Howe v.
—— Price v.
Otis, State v.
Otis Co. v. Missouri Pac. R. Co., pp. 779, 780, 844, 1037.
O'Toole v. Faulkner, p. 2089.
—— v. Pittsburg, etc., R. Co., pp. 2161, 2248.
Otrich v. St. Louis, etc., R. Co., 154 Mo. App. 420, 134 S. W. 665—p. 1305.
—— v. St. Louis, etc., R. Co., 164 Mo. App. 444, 144 S. W. 1199—pp. 1267, 1304.
Ottawa v. Bodley, p. 111.
Ottinger v. Detroit United Railway, pp. 1893, 1993.
Otto, Chicago, etc., R. Co. v.
—— v. Chicago, etc., R. Co., pp. 1742, 1757, 1928, 2362.
—— v. Milwaukee Northern R. Co., pp. 1902, 1994, 2510, 2512, 2536, 2539.
Otts v. Shreveport Tract. Co., p. 2778.

Ouachita Packet Co. v. Aiken, pp. 3528, 3529, 3530, 3531, 3532.
Ouachita, etc., Packet Co. v. Aiken, p. 3586.
Ouellette v. Grand Trunk R. Co., pp. 1922, 2240.
Onilhot, Galveston, etc., R. Co. v.
Ouimit v. Henshaw, pp. 278, 897, 901, 3130, 3135, 3138, 3158, 3159, 3160, 3161, 3169, 3170, 3173, 3178.

Outen v. North, etc., St. R. Co., p. 2262.
Outerbridge, Downing v.
—— Lough v.
Outland v. Seaboard, etc., R. Co., pp. 445, 446, 447, 449, 467, 368, 470.

Overall, Texas, etc., R. Co. v.
Overcash v. Charlotte Elect. R., etc., Co., pp. 2761, 2981.
Overfield, Missouri, etc., R. Co. v.
Overman Carriage Co., Memphis, etc., Packet Co. v.
Overton, Gulf, etc., R. Co. v.
—— State v.

Oviatt v. Dakota Cent. R. Co., pp. 1548, 1723, 1743, 1752, 1755, 1827.
Owen, Chicago, etc., R. Co. v.
—— Day v.
—— Louisville, etc., R. Co. v.
—— v. Louisville, etc., R. Co., pp. 1110, 1111, 1408, 1428, 1448, 1477.
—— McKee v.
—— v. St. Louis, etc., R. Co., pp. 142, 700, 701.
—— Selma St., etc., R. Co. v.
—— v. Washington, etc., R. Co., pp. 2349, 2904.
Owens, Arpin v.
—— Atlantic, etc., R. Co. v.
—— v. Atlantic, etc., R. Co., 147 N. C. 357, 61 S. E. 198—pp. 2265, 2575, 2577, 2661.
—— v. Atlantic, etc., R. Co., 67 S. E. 993, 152 N. C. 439—pp. 2126, 2862.
—— Denver Tramway Co. v.
—— Harrell v.
—— Illinois Cent. R. Co. v.
—— v. Kansas City, etc., R. Co., pp. 2066, 2993.
—— Louisville R. Co. v.
—— Louisville, etc., R. Co. v.
—— v. Macon, etc., R. Co., p. 1497.
—— Southern Exp. Co. v.
—— Texas, etc., R. Co. v.
—— v. Wabash R. Co., p. 2243.
—— v. Wilmington, etc., R. Co., p. 2061.
Owens Bros. v. Chicago, etc., R. Co., pp. 1436, 1437, 1476.
Owings v. Hull, p. 3870.
Owman, Bedford-Bowling Green Stone Co. v.
Oxanna Land Co., Watson v.
Oxendine v. Louisiana R., etc., p. 2777.
Oxlade v. Northeastern R. Co., 9 W. R. 272, 3 L. T. 671—p. 211.
—— v. Northeastern R. Co., 1 C. B., N. S., 454, 3 Jur., N. S., 637, 26 L. J. C. P. 129—p. 242.
—— v. Northeastern R. Co. (Eng.), 15 C. B., N. S., 680, 109 E. C. L. 680—pp. 211, 241, 242, 253.
—— v. Northern Eastern R. Co., 1 Nev. & McN. Ry. Cas. 72—p. 1181.
Oxley v. St. Louis, etc., R. Co., pp. 945, 1386.
Oxsher v. Houston, etc., R. Co., p. 2511.
Oyster Bay, etc., Co., Barney v.
Oyster Bay, etc., Steamboat Co., Barney v.
Ozanne v. Illinois Cent. R. Co., pp. 1822, 1837.
Ozier, St. Louis, etc., R. Co. v.

P

Pabst, Oberndorfer v.
Pabst Brewing Co., State v.
Pace, Kansas City, etc., R. Co. v.
Pace Mule Co. v. Seaboard, etc., R. Co., 160 N. C. 252, 75 S. E. 994—p. 1477.
—— v. Seaboard, etc., R. Co., 160 N. C. 215, 76 S. E. 513—pp. 331, 948, 1076, 3522.
Pacey, Beedy v.
Pacific, Queen of the.
—— Seller v.
Pacific Aviation Co. v. Wells Fargo & Co., pp. 349, 572.
Pacific Clipper Line, Union Feed Co. v.
Pacific Coast Co. v. Reynolds, pp. 4050, 4051, 4053.
—— v. Yukon Independent Transp. Co., pp. 3880, 3882, 3889, 4027, 4028, 4029, 4030.
Pacific Coast Lumber, etc., Ass'n, Northern Pac. R. Co. v.
Pacific Coast R. Co. v. United States, p. 3451.
Pacific Coast Stage Co., Knight v.
Pacific Coast Steamship Co. v. Bancroft-Whitney Co., pp. 852, 1087, 1091, 1101, 3907, 3910, 3921, 3923, 3929, 4028.
—— Fowden v.
Pacific Coast, etc., Co., Cowden v.
Pacific Creosoting Co., Knohr v.
Pacific Elect. R. Co., Griffin v.
—— Reynolds v.
—— Wyatt v.
Pacific Exp. Co. v. Black, pp. 278, 279, 293, 295, 648, 663.
—— Cantwell v.
—— v. Critzer, p. 553.
—— v. Darnell, pp. 666, 670, 674, 687, 937, 938, 950, 954, 1088, 1091, 1121.
—— v. Darnell Bros., pp. 638, 642, 643, 686, 1086, 1096.
—— v. Emerson, p. 1480.
—— v. Foley, pp. 409, 1074.
—— Gathright v.
—— v. Gathwright, pp. 418, 465, 1252, 1255.
—— Green v.
—— Hance v.
—— Head v.
—— v. Hertzberg, pp. 553, 554, 555, 729, 849, 932, 933, 1054, 1055, 1076, 1078, 1080.
—— v. Jones, pp. 643, 645, 648, 690, 856, 859, 860.
—— v. Lothrop, pp. 1359, 1360.
—— McNichol v.
—— Murrell v.
—— Nave v.
—— v. Needham, 37 Tex. Civ. App. 129, 83 S. W. 22—pp. 419, 420, 457, 467, 470.
—— v. Needham (Tex. Civ. App.), 94 S. W. 1070—pp. 692, 694.
—— v. Pitman, pp. 759, 760, 933, 937, 940, 941, 1060.
—— Pittman v.
—— Pfaff v.
—— v. Redman, pp. 647, 651.
—— v. Rudman, pp. 991, 1029, 1044.
—— v. Seibert, 44 Fed. 310—p. 3578.
—— v. Seibert, 142 U. S. 339, 35 L. Ed. 1035, 12 S. Ct. 250—pp. 3551, 3577, 3578.
—— Shearer v.
—— v. Shearer, p. 555.
—— State v.
—— Thomas v.
—— United States v.
—— v. Wallace, p. 945.
Pacific Lumber Co., Green v.
Pacific Mail Steamship Co., Bunker v.
—— Hays v.
—— In re.
—— Spiegel v.
—— Swift v.
—— Yonge v.
Pacific Marine Co., Kerry v.
Pacific Railroad, Landes v.
—— Minter v.
—— Rankin v.
—— Thomson v.
—— Vail v.
Pacific R. Co., Clark v.
—— Graham v.
—— Hicks v.
—— Meyer v.
—— Tucker v.
Pacific R. Removal Cases, p. 3449.
Pacific Steam Whaling Co. v. Grismore, pp. 3980, 3981.
Pacific Transfer Co., Merrill v.
Pacific, etc., Nav. Co., United States v.
Packard v. Earle, pp. 532, 538.
—— v. Getman (N. Y.), 6 Cow. 757, 16 Am. Dec. 475—pp. 268, 271, 292, 581, 582.
—— v. Getman (N. Y.), 4 Wend. 613, 21 Am. Dec. 166—pp. 551, 553, 581, 582.
—— Kohn v.

Packard v. Taylor, etc., Co., pp. 726, 732, 748, 3179, 3284.
—— v. The Louisa, p. 3937.
Packer, The E. A.
Packet Co. v. Catlettsburg, pp. 3474, 3528, 3529, 3530, 3531, 3532.
—— v. Clough, pp. 1564, 3994.
—— v. Keokuk, pp. 3474, 3529, 3530, 3531.
—— v. St. Louis, pp. 3474, 3528, 3529, 3530, 3531.
Packwood, Dorsey v.
—— Harris v.
Paddock v. Atchison, etc., R. Co., pp. 2416, 2488, 2497, 3212.
—— v. Missouri Pac. R. Co., 155 Mo. 524, 56 S. W. 453—pp. 1391, 1452.
—— v. Missouri Pac. R. Co., 1 Mo. App. 87, 60 Mo. App. 328—p. 973.
—— v. Toledo, etc., R. Co., p 956.
Padgitt v. Moll, p. 1587.
Padley v. Catterlin, p. 855.
Paducah City Railway, Ford v.
—— Wynn v.
Paducah R., etc., Co., Davis v.
Paducah St. R. Co. v. Walsh, p. 2268.
Paducah Tract. Co. v. Baker, pp. 2590, 2672, 2688.
Paducah, etc., Ferry Co., Reasor v.
Paducah, etc., R. Co., Snellbaker v.
Page, Blanchard v.
—— v. Chicago, etc., R. Co., p. 3414.
—— v. Great Northern R. Co., p. 221.
—— v. Louisville, etc., R. Co., p. 2610.
—— Midland Valley R. Co. v.
—— v. New York Cent. R. Co., pp. 1968, 2451.
—— Northern R. Co. v.
Page & Co. v. Sandusky, etc., R. Co., pp. 267, 283, 331, 337, 355, 367, 370, 373, 380, 381, 384, 403, 457.
Paige, New England, etc., Steamship Co. v.
—— v. Smith, pp. 6, 760.
Paine v. Chicago, etc., R. Co., pp. 1605, 3092.
—— Cincinnati, etc., R. Co. v.
—— v. Geneva, etc., Tract. Co., pp. 1825, 2368, 2684.
—— Missouri Pac. R. Co. v.
Painkinsky v. Illinois Cent. R. Co., pp. 328, 965.
Painter, Chicago, etc., R. Co. v.
—— v. Chicago, etc., R. Co., pp. 2668, 2858.
—— v. London, etc., R. Co., p. 192.
Palfrey v. United K. Co., p. 1520.
Palmas, The.
Palmer, Ames v.
—— v. Atchison, etc., R. Co., pp. 619, 721, 3279.
—— v. Charlotte, etc., R. Co., pp. 1638, 2432.
—— v. Chicago, etc., R. Co., pp. 3263, 3286, 3314.
—— v. Delaware, etc., Canal Co., pp. 1715, 1720, 1826, 1844, 1847, 1850.
—— Gracie v.
—— v. Grand Junction R. Co., p. 211.
—— Haggerty v.
—— Kimball v.
—— v. London, etc., R. Co. (Eng.), L. R. 1 C. P. 588, 35 L. J. C. P. 289—p. 221.
—— v. London, etc., R. Co. (Eng.), L. R. 6 C. P. 194, 40 L. J. C. P. 133—p. 221.
—— v. Maine, etc., R. Co., pp. 2061, 2063, 2070.
Palmer, New Jersey R. Co. v.
—— Pennsylvania R. Co. v.
—— v. Pennsylvania R. Co., pp. 1684, 1687, 1831.
—— Southern Exp. Co. v.
—— v. Utah, etc., R. Co., p. 2079.
—— v. Warren St. R. Co., pp. 2698, 2701, 2897.
—— v. Winona R., etc., Co., p. 2667.
Palmer Transfer Co. v. Anderson, p. 100.
—— v. Smith, p. 2718.
Palmeri v. Manhattan R. Co., pp. 2056, 2059, 2071.
Palsey v. St. Louis, etc., R. Co., p. 2336.
Panama, The City of.
Panama R. Co., Harris v.
—— Lignante v.
—— Sanbern v.
—— Schwartz v.
—— Weed v.
Panther Lumber Co., Sanderson v.
Pape, St. Louis, etc., R. Co. v.
Para, The City of.
Paramore v. Western R. Co., pp. 244, 3306, 3309, 3394, 3398.
Pardee v. Drew, pp. 3114, 3124.
Pares v. St. Louis, etc., R. Co., p. 2291.
Parham, Morgan v.
—— Southern R. Co. v.
—— Woodruff v.
Paris, Chesapeake, etc., R. Co. v.
Paris Trans. Co. v. Alexander, p. 2657.
Paris, etc., R. Co. v. Robinson, pp. 1493, 1497, 1498, 2666, 2667, 2669.
Parish, International, etc., R. Co. v.
—— v. Ulster, etc., R. Co., 192 N. Y. 353, 85 N. E. 153—pp. 59, 1620, 2442.
—— v. Ulster, etc., R. Co., 90 N. Y. S. 1000, 99 App. Div. 10—pp. 2462, 2463.
Parish & Co. v. Yazoo, etc., R. Co., p. 249.
Park, Hostetter v.
—— Houston Elect. Co. v.
—— Houston, etc., R. Co. v.
—— Louisville R. Co. v.
—— v. Preston, pp. 433, 728, 822, 1000, 1001, 1030, 3880.
—— v. Southern Railway, pp. 268, 3134, 3139, 3140, 3185, 3301.
Parke, Dayton v.
Parker v. Atlantic, etc., R. Co., pp. 148, 822, 1040.
—— Birmingham R., etc., Co. v.
—— v. Boston, etc., Railroad, pp. 1683, 1736, 1762, 2695, 2760, 2761, 2898, 2930, 2980.
—— v. Byrnes, p. 1245.
—— v. Des Moines City R. Co., pp. 2012, 2561, 2763, 2895, 2976.
—— v. Elmira, etc., R. Co., pp. 72, 144.
—— v. Flagg, pp. 727, 732, 739, 749.
—— v. Great Western R. Co., p. 292.
—— Howe v.
—— v. McIver, pp. 1229, 1232, 1237, 1241.
—— v. Macy, p. 3300.
—— v. Metropolitan St. R. Co., p. 1750.
—— v. Milwaukee, etc., R. Co., pp. 531, 892, 897, 906.
—— Nashville, etc., R. Co. v.
—— v. North German Lloyd Steamship Co., p. 4010.
—— v. Railroad Co., p. 148.
—— v. St. Louis Transit Co., p. 1710.
—— Schulz v.
—— v. United R. Co., pp. 1903, 2248, 2614.
—— v. Washington, etc., R. Co., p. 2867.
Parker v. Winlow, p. 709.
Parker Buggy Corp. v. Atlantic, etc., R. Co., pp. 478, 493, 494.
Parkersburg, Parkersburg, etc., Transp. Co. v.
—— Transportation Co. v.
Parkersburg, etc., Transp. Co. v. Parkersburg, p. 3433.
Parkinson, Chicago, etc., R. Co. v.
Parkman, Lamb v.
Parks, Chicago, etc., R. Co. v.
—— Grand Trunk R. Co. v.
—— v. Gulf, etc., R. Co., pp. 456, 467, 634.
—— Illinois Cent. R. Co. v.
—— v. Kentucky Cent. R. Co., pp. 2512, 2539, 2540.
—— v. Nashville, etc., R. Co., pp. 1906, 1938.
—— v. St. Louis Transit Co., p. 1891.
—— St. Louis, etc., R. Co. v.
—— v. St. Louis, etc., R. Co., pp. 2113, 2197, 2279, 2280, 2283, 2416, 2884, 2940, 2971.
—— v. San Antonio Tract. Co., pp. 2114, 2381, 2382.
Parlier v. Southern R. Co., pp. 1884, 2908.
Parmalee, Jeffersonville, etc., R. Co. v.
Parmelee, Aguirre v.
—— v. Austin, p. 3189.
—— v. Fisher, pp. 3113, 3114, 3115, 3118, 3127, 3129, 3130.
—— v. Lowitz, p. 8.
—— v. McNulty, pp. 3189, 3190.
—— v. Western Transp. Co., p. 3416.
Parmelee Co. v. Wheelock, pp. 2010, 2950, 2953.
Parmer, St. Louis, etc., R. Co. v.
Parnell v. Atlantic Coast Line R. Co., pp. 3396, 3398, 3414, 3416.
Parr & Co., McFarland v.
Parramore, Southern R. Co. v.
Parrent v. Rhode Island Co., p. 2697.
Parrill v. Cleveland, etc., R. Co., pp. 1087, 1117.
Parris v. Atlanta, etc., R. Co., pp. 2174, 2186.
Parrish v. Pensacola, etc., R. Co., p. 2921.
Parrott v. Atlantic, etc., R. Co., pp. 2714, 2715, 2853.
—— Cincinnati, etc., R. Co. v.
Parry, Atchison, etc., R. Co. v.
—— Pennsylvania R. Co. v.
—— Walker v.
Parshley, State v.
Parsley, Galveston, etc., R. Co. v.
Parsons v. Chicago, etc., R. Co., 11 C. C. A. 489, 63 Fed. 903—pp. 3680, 3719.
—— v. Chicago, etc., R. Co., 167 U. S. 447, 42 L. Ed. 231, 17 S. Ct. 887—pp. 3631, 3684, 3708, 3711, 3718, 3719, 3735, 3741, 3748, 3775, 3827, 3829, 3830.
—— v. Empire Transp. Co., pp. 4044, 4045, 4046, 4062.
—— v. Hardy, pp. 541, 607, 609, 618, 619, 628, 634, 635, 728.
—— v. Monteath, p. 740.
—— v. New York, etc., R. Co. (N. Y.), 37 Hun 128—p. 2278.
—— v. New York, etc., R. Co., 113 N. Y. 355, 21 N. E. 145, 3 L. R. A. 683, 10 Am. St. Rep. 450—pp. 1526, 1964, 2275.
—— Ogden v.
—— v. United States Exp. Co., pp. 796, 851, 852.
Parsons-Applegate Co. v. Louisville, etc., R. Co., pp. 658, 698.
Parsons-Willis Lumber Co. v. Stuart, p. 3471.
Part of Cargo of Breinstone, Bertellote v.
Partee v. Georgia Railroad, pp. 66, 1494.
Partello v. Missouri Pac. R. Co., p. 2671.

Partelow v. Newton, etc., St. R. Co., pp. 1994, 2758, 2889, 2949.
Partridge, Atlantic, etc., R. Co. v.
—— v. Woodland Steamboat Co., p. 2024.
Pasadena, etc., R. Co., Holloway v.
Pascell v. North Jersey St. R. Co., p. 2690.
Passaic, The.
Passenger Cases, pp. 3421, 3474, 3564, 3565, 3566, 3571, 3581.
Passenger Railway v. Young, pp. 2038, 2064, 2411.
Pastore v. American Exp. Co., p. 1071.
Pate v. Columbia, etc., R. Co., pp. 3683, 2694, 2899.
—— v. Tar Heel Steamboat Co., p. 4004.
Paterson v. Central R., etc., Co., pp. 2185, 2250, 2259.
—— v. Chicago, etc., R. Co., pp. 817, 843, 851.
—— v. Philadelphia Rapid Trans. Co., p. 2690.
Paterson Co., In re.
Patillo, Galveston, etc., R. Co. v.
Patria, The.
Patrick v. Farmer's Ins. Co., pp. 1113, 1118.
—— Missouri, etc., R. Co. v.
—— v. Missouri, etc., R. Co., pp. 424, 426.
—— Shackelford v.
Patrick Henry, The.
Patridge v. Woodland Steamboat Co., p. 2927.
Patron v. Silva, p. 516.
Patry v. Chicago, etc., R. Co., 77 Wis. 218, 46 N. W. 56—p. 3092.
—— v. Chicago, etc., R. Co., 82 Wis. 408, 52 N. W. 312—p. 2478.
Patscheider v. Great Western K. Co., p. 3169.
Pattee v. Chicago, etc., R. Co., pp. 1812, 1813, 2734, 2736, 2918, 2942.
Patten v. Chicago, etc., R. Co., p. 1780.
—— v. Faithorn, p. 3509.
—— v. Johnson, p. 3159.
—— Kansas City, etc., R. Co. v.
—— v. Union Pac. R. Co., pp. 1155, 1156.
Patterson v. Augusta, etc., R. Co., p. 2562.
—— Baltimore Steam-Packet Co. v.
—— Cleveland, etc., R. Co. v.
—— v. Clyde, pp. 1037, 1047.
Patterson, Galveston, etc., R. Co. v.
—— v. Illinois Cent. R. Co., pp. 645, 671, 677.
—— Jordan v.
—— v. Kansas, etc., K. Co., pp. 320, 323, 984, 986.
—— Louisville, etc., R. Co. v.
—— v. Louisville, etc., R. Co., p. 2164.
—— v. Missouri Pac. R. Co., pp. 3422, 3482, 3487.
—— v. Missouri, etc., R. Co., pp. 822, 1385, 1420.
—— v. Moore, p. 517.
—— v. North Carolina R. Co., pp. 728, 749, 750.
—— v. Old Dominion Steamship Co., pp. 1611, 3981.
—— v. Omaha, etc., Bridge Co., pp. 1891, 1996.
—— v. San Francisco, etc., R. Co., pp. 2839, 3003.
—— Southern Pac. Co. v.
—— v. Southern Pac. Co., p. 2850.
—— Southern R. Co. v.
—— Toledo, etc., R. Co. v.
—— v. Wabash, etc., R. Co., pp. 1813, 2086.
—— Washington, etc., K. Co. v.
Patterson Tobacco Co., Richmond, etc., R. Co. v.
Patterson & Co., Gulf, etc., R. Co. v.
—— v. Gulf, etc., R. Co., pp. 831, 832.
Patterson, etc., Co., Richmond etc., R. Co. v.
Pattison v. Culton, pp. 355, 1225.
—— Georgia, etc., R. Co. v.
—— Lafayette, etc., R. Co. v.
Patton, Chevaillier v.
—— Cleveland, etc., R. Co. v.
—— v. Magrath, pp. 729, 730, 768, 1008.
—— v. Pickles, p. 2680.
—— v. Texas, etc., K. Co., p. 2670.
Patzke v. Minneapolis, etc., R. Co., p. 2820.
Paul, Pennsylvania Co. v.
—— v. Pennsylvania R. Co., p. 1076.
—— v. Salt Lake City R. Co., 83 Pac. 563, 30 Utah 41—pp. 2395, 2688.
—— v. Salt Lake City R. Co., 34 Utah 1, 95 Pac. 363—pp. 2671, 2687.
—— v. Virginia, pp. 3446, 3447.
Paul City R. Co., Pine v.
Paul, etc., R. Co., Smith v.
Paulitsch v. New York, etc., R. Co., pp. 1665, 1881.
Paulk, Southwestern R. Co. v.
Paulsen v. United States, p. 3441.
Paulson v. Brooklyn City R. Co., p. 2815.
Paulson, Magdeburg Ins. Co. v.
Pauson, Northern Pac. R. Co. v.
Pavey, Southern Kansas R. Co. v.
Pavitt v. Lehigh Valley Railroad, p. 1420.
Pawtucket St. R. Co., Cottrell v.
Pawtuxet Valley St. R. Co., Murray v.
Paxon, Fisher v.
—— Sharer v.
Paxson Bros. v. Warfield, pp. 390, 391.
Payne, Dallas Rapid Transit Co. v.
—— Danville St. Car Co. v.
—— v. Illinois Cent. R. Co., p. 1539.
—— Louisville, etc., R. Co. v.
—— v. Nashville, etc., R. Co., pp. 1921, 2188, 2923, 2987.
—— Richmond, etc., R. Co. v.
—— Sleade v.
—— v. Spokane St. R. Co., pp. 1716, 1750, 2950.
—— v. Springfield St. R. Co., pp. 1520, 2333, 2928, 2948.
—— Terre Haute Tract., etc., Co. v.
—— v. Terre Haute, etc., R. Co., p. 2094.
—— Texas, etc., R. Co. v.
Paynter v. Bridgeton, etc., Tract. Co., p. 2672.
Payton v. Gulf Line R. Co., pp. 1851, 2566.
P., C., C. & St. R. Co., Guy v.
P., C. & St. L. R. Co. v. Blakemore, pp. 322, 455, 981.
—— v. Martin, pp. 1537, 1714.
Peabody, Brower v.
—— v. Oregon R. etc., Co., p. 2663.
Peacock, Central R. Co. v.
—— Chicago, etc., R. Co. v.
—— Hodges v.
Peale, Philadelphia, etc., K. Co. v.
Pearce, Crenshawe v.
—— v. Newton, pp. 731, 746.
—— St. Louis, etc., R. Co. v.
—— Wabash R. Co. v.
Pearl, Texas, etc., R. Co. v.
Pearson, Alden v.
—— v. Duane, pp. 210, 1492, 1496, 1497, 2416, 2419, 3083, 3097, 3978.
Pearson, Illinois Cent. R. Co. v.
—— Kidd v.
—— St. Louis, etc., R. Co. v.
Pease v. Delaware, etc., R. Co. (N. Y.), 11 Daly 350—p. 2474.
—— v. Delaware, etc., R. Co., 101 N. Y. 367, 5 N. E. 37, 54 Am. Rep. 699—p. 2473.
—— v. Sloahec, p. 1223.
Peasemoore Mill. Co., Burrton State Bank v.
Peat v. Chicago, etc., R. Co., p. 2778.
Peavey & Co. v. Union Pac. R. Co., pp. 3679, 3732, 3733, 3734, 3791, 3798.
Peavy v. Georgia R. Co., pp. 2055, 2417, 2418, 2482.
Peck v. Atchison, etc., R. Co., pp. 1938, 2859.
—— Carter v.
—— v. Chicago, etc., R. Co., pp. 1285, 1298, 1362, 1363, 1477, 1478.
—— Clapp Bros. & Co. v.
—— Corse v.
—— v. Dinsmore, pp. 308, 333, 337, 838, 840.
—— Meyer v.
—— v. Neil, pp. 1749, 1999, 2036.
—— v. New York, etc., R. Co. (N. Y.), 8 Hun 286—pp. 2412, 2413.
—— v. New York, etc., R. Co., 70 N. Y. 587—pp. 191, 1943, 2485.
—— v. North Staffordshire R. Co., p. 790.
—— v. St. Louis Trans. Co., pp. 2384, 2403, 2687, 2985, 2990.
—— v. Springfield Tract. Co., pp. 1996, 2657.
—— v. United States, p. 3888.
—— v. Weeks, pp. 614, 746, 806, 1003, 1007.
Pecos River R. Co. v. Harrington, p. 507.
—— v. Latham, pp. 443, 448, 454, 462, 1319, 1342.
Pecos Valley, etc., R. Co. v. Harris, p. 3753.
Pecos, etc., R. Co. v. Cox, pp. 418, 1441.
—— v. Crews, p. 3332.
—— v. Evans-Snyder-Buel Co., 100 Tex. 190, 97 S. W. 466—pp. 757, 758, 947, 1099, 1101, 1102, 1417, 1420.
—— v. Evans-Snider-Buel Co., 42 Tex. Civ. App. 60, 93 S. W. 1024—pp. 447, 464, 971, 1277, 1290, 1305, 1318.
—— v. Hughes, pp. 503, 940, 947, 1078, 1080, 1363, 1381.
—— v. Maxwell, pp. 645, 696.
—— v. Meyer, p. 487.
—— v. Porter, pp. 521, 589, 598, 3729, 3750.
—— Runnells v.
—— v. Trower, pp. 1737, 1755.
—— Twichell v.
—— v. Twichell, pp. 1730, 2033.
—— Wallace v.
—— v. Williams, p. 1762.
Peden, Iron & Steel Co., Carbon Belt K. Co. v.
Pederson, Hartford Deposit Co. v.
—— v. Seattle Consol. St. R. Co., p. 2261.
Pedigo, Louisville, etc., R. Co. v.
—— McConnell v.
Peebles v. Boston, etc., R. Co., pp. 348, 580, 590, 595, 596, 1142, 1171.
Peele v. Atlantic, etc., R. Co., pp. 337, 338, 346, 501, 587.
Peeples v. Brunswick, etc., R. Co., pp. 2038, 2040, 2045, 2049, 2605, 2610.
Peerless Mfg. Co. v. New York, etc., R. Co., pp. 779, 833, 843.
Peet v. Chicago, etc., R. Co., 19 Wis. 118—p. 3253.

Peet v. Chicago, etc., R. Co., 20 Wis. 594, 91 Am. Dec. 446—pp. 236, 253, 607, 608, 610, 611, 615, 618, 654, 3258, 3401.
Peete v. Morgan, pp. 3530, 3581.
Pegler v. Monmouthshire R., etc., Co., p. 211.
Peik v. Chicago, etc., R. Co., pp. 34, 36, 37, 49, 63, 116, 122, 3492, 3493, 3497, 3668.
Peirce, Blackman v.
Peixotti v. McLaughlin, pp. 3142, 3192.
Pell v. Joliet, etc., R. Co., 238 Ill. 510, 87 N. E. 542—pp. 1742, 2079, 2311, 2641, 2882, 2894.
—— v. Joliet, etc., R. Co., 142 Ill. App. 362—pp. 2079, 2337.
Pelletier, Chicago City R. Co. v.
Pelot v. Atlantic, etc., R. Co., pp. 1735, 2039, 2575, 2580, 2606.
Pelton v. Kensselaer, etc., R. Co., pp. 896, 901, 902.
Pemberton Co. v. New York, etc., R. Co., pp. 782, 958.
Pembina Consol., etc., Mill. Co. v. Pennsylvania, pp. 58, 60, 3472, 3473, 3570.
Pence v. Louisville, etc., R. Co., p. 1857.
—— Toledo, etc., R. Co. v.
—— v. Wabash R. Co., pp. 2126, 2127, 2150, 2227, 2399.
Pendegast, Whitin v.
Pender v. Kobbins, p. 11.
Pendergast v. Adams Exp. Co., pp. 3254, 3353.
—— Chicago, etc., R. Co. v.
—— Grund v.
—— v. Union R. Co., p. 2174.
Pender-Heyman Hardware Co., Neal v.
Pendery, Gulf, etc., R. Co. v.
Pendleton, Cincinnati, etc., R. Co. v.
—— v. Kinsley, pp. 1684, 1693, 1750, 2045, 2047.
—— Miller v.
—— Norfolk, etc., R. Co. v.
—— Pleasants v.
—— v. Richmond, etc., R. Co., pp. 1509, 2114, 2117, 2131, 2136.
Penfield v. Cleveland, etc., R. Co., pp. 2077, 2422, 2494.
Peninsular R. Co., White v.
Peninsula, etc., Co. v. Shand, p. 1490.
Peniston v. Chicago, etc., Co., pp. 1767, 1793, 1798, 1964.
—— Railroad Co. v.
Penn, Albright v.
—— v. Buffalo, etc., R. Co., pp. 436, 728, 1269, 1280, 1375.
Penn Clothing Co. v. United States Exp. Co., pp. 946, 1029.
Penn Collieries Co., Sheridan v.
Penn R. Co., New Jersey R., etc., Co. v.
Penn Refin. Co., Western New York, etc., R. Co. v.
—— v. Western, etc., R. Co., pp. 3730, 3731.
Pennewill v. Cullen, pp. 2, 4, 11, 209, 727, 732, 748, 752, 868.
Penniman, Lane v.
—— Tinsley v.
Pennington v. Illinois Cent. R. Co., pp. 1623, 1624, 1634, 2447.
—— v. Philadelphia Co., etc., R. Co., pp. 1624, 2447.
—— Schneideau & Co. v.
Pennock, Pennsylvania R. Co. v.
Pennock, Pullman Co. v.
Pennsylvania, Cook v.
—— Erie R. Co. v.
—— Gloucester Ferry Co. v.
—— Lehigh Valley R. Co. v.
—— New York, etc., R. Co., v.
—— Norfolk, etc., R. Co. v.
—— Pembina Consol., etc., Mill. Co. v.
—— Philadelphia, etc., Steamship Co. v.
—— Pullman's Palace Car Co. v.
Pennsylvania, Reading Railroad v.
—— Schmidt v.
—— Schollenberger v.
—— Western Union Tel. Co. v.
—— v. Wheeling, etc., Bridge Co., p. 3477.
Pennsylvania Cent. R. Co., McCormick v.
—— v. Schwarzenberger, pp. 3165, 3178, 3373, 3375.
Pennsylvania Co. v. Bray, pp. 1635, 2461, 2463, 2470, 2471, 2708, 3025.
—— Brown, etc., Co. v.
—— v. Canadian Pac. R. Co., pp. 501, 730.
—— v. Chicago, p. 100.
—— v. Clark, pp. 1306, 1442.
—— Colgate v.
—— v. Coyer, p. 2703.
—— v. Dickson, p. 3289.
—— Donnovan v.
—— Donovan v.
—— v. Donovan, pp. 99, 132.
—— Edison v.
—— Edward Frohlich Glass Co. v.
—— Ellsworth v.
—— v. Fairchild, pp. 1489, 1490, 3400.
—— Fortier v.
—— Frohlich v.
—— Frohlich Glass Co. v.
—— Graham v.
—— v. Greso, 79 Ill. App. 127—pp. 2092, 2093.
—— v. Greso, 102 Ill. App. 252—pp. 1502, 1567.
—— Grimes v.
—— Hall v.
—— Hays & Co. v.
—— v. Hine, pp. 1625, 2425, 2437, 2447.
—— v. Hoagland, p. 1854.
—— v. Holderman, pp. 583, 584.
—— Jordan v.
—— v. Kenwood Bridge Co., pp. 291, 752, 754, 758, 830.
—— v. Kennard Glass, etc., Co., p. 969.
—— v. Lenhart, pp. 2446, 2468, 2709, 2718.
—— v. Liveright, pp. 815, 821, 3168, 3169.
—— v. Loftis, 72 O. St. 288, 74 N. E. 179, 106 Am. St. Rep. 597—pp. 3317, 3322.
—— v. Loftis, 72 O. St. 300, 74 N. E. 182—pp. 3317, 3322.
—— Lucas v.
—— v. McCaffrey, 173 Ill. 169, 50 N. E. 713—pp. 1537, 2246, 2275, 2746, 2747, 2857, 2879.
—— v. McCaffrey, 68 Ill. App. 635—p. 2247.
—— v. Marion, 104 Ind. 239, 3 N. E. 874—p. 2577.
—— v. Marion, 123 Ind. 415, 23 N. E. 973, 18 Am. St. Rep. 330, 7 L. R. A. 687—pp. 1767, 1779, 2296.
—— v. Miller, pp. 3117, 3121, 3124, 3142, 3151, 3153, 3154, 3174.
—— v. Newmeyer, pp. 1755, 1757, 1987, 2767, 2888.
—— v. O'Connell, p. 166.
Pennsylvania Co. v. Paul, pp. 1953, 2343, 2974.
—— Pierce v.
—— v. Poor, pp. 477, 479, 489, 492, 682.
—— v. Purvis, pp. 2095, 2696.
—— v. Roy, pp. 1714, 1718, 1719, 1722, 1735, 1738, 1821, 1837, 2770, 3235.
—— Scofield v.
—— v. Scofield, p. 2484.
—— v. Sheares, pp. 1083, 1084, 1087, 1090.
—— Siynfy v.
—— Stoner v.
—— Struble v.
Pennsylvania Co., Taylor v.
—— Toledo, etc., R. Co. v.
—— v. Toomey, p. 2530.
—— v. United States, p. 3654
—— v. Walker, p. 1450.
—— v. Wentz, pp. 1857, 1858, 1861, 2455.
—— v. Witte, p. 2605.
—— v. Yoder, pp. 822, 947, 949, 1076.
Pennsylvania Miller State Ass'n v. P. & Q. Ry. Co., p. 700.
Pennsylvania Railroad, Tobin v.
—— Weil v.
Pennsylvania R. Co., Aaronson v.
—— Alexander v.
—— Allam v.
—— v. American Oil Works, pp. 1162, 1163, 1248, 1249.
—— American Union Coal Co. v.
—— v. Anoka Nat. Bank, pp. 827, 828.
—— Arnold v.
—— v. Aspell, pp. 1722, 2113, 2263.
—— Banks v.
—— Barker-Bond Lumber Co. v.
—— Becker v.
—— Begley v.
—— v. Bell, p. 2133.
—— v. Berry, pp. 3251, 3252.
—— Bleiwise v.
—— Blount v.
—— Blue v.
—— v. Board, pp. 24, 31, 88, 3500.
—— v. Brooks, pp. 1542, 2615, 2676, 2762.
—— Brakman v.
—— Brennisen v.
—— Buck v.
—— v. Bulah Shaft Coal Co., p. 706.
—— Burnett v.
—— Burns v.
—— Burr v.
—— v. Burr, pp. 790, 792.
—— Buston v.
—— Camdee v.
—— Carr v.
—— Carter v.
—— Catanzaro v.
—— v. Clark, pp. 614, 690.
—— v. Coggins Co., pp. 3426, 3488.
—— Comly v.
—— v. Commonwealth, p. 3565.
—— v. Connell, 112 Ill. 295, 54 Am. Rep. 238—pp. 2462, 2482, 2487, 2495, 2496, 3079, 3080.
—— v. Connell, 127 Ill. 419, 20 N. E. 89—pp. 2856, 3079, 3080, 3083.
—— v. Connell, 26 Ill. App. 504—pp. 2855, 3105.
—— Conroy v.
—— Cooley v.
—— Cox v.
—— Creed v.
—— Cunningham v.
—— Dampman v.
—— Davenport Co. v.
—— Dietrich v.
—— Di Giorgio, Importing, etc., Co. v.
—— Donovan v.
—— Drake v.
—— Dunn v.
—— Eckert v.
—— Flower v.
—— Foreman v.
—— v. Fries, p. 745.
—— Gillis v.
—— Ginn v.
—— Glinn v.
—— v. Goetchius, pp. 765, 766.
—— Goldey v.
—— Greb v.
—— Green v.
—— v. Green, pp. 1757, 2871.
—— Gude v.
—— Hall v.
—— Harrison v.
—— Harrison Granite Co. v.
—— Hart v.

Pennsylvania R. Co., Hayman v.
—— v. Henderson, pp. 1567, 2098, 2131.
—— Hillsdale Coal, etc., Co. v.
—— Holmes v.
—— Home Ins. Co. v.
—— Hoover v.
—— Hoye v.
—— Hughes v.
—— v. Hughes, pp. 1073, 3443, 3481, 3482, 3502, 3504, 3519, 3600, 3650.
—— Hutchins v.
—— Hutkoff v.
—— v. International Coal Min. Co., 97 C. C. A. 383, 173 Fed. 1—pp. 3688, 3700, 3709, 3710, 3738.
—— v. International Coal Min. Co., 230 U. S. 184, 33 S. Ct. 893—p. 3814.
—— Jackson v.
—— v. John Anda Co., pp. 962, 981.
—— Jones v.
—— v. Jones, pp. 2087, 2089, 3252, 3258.
—— Joynes v.
—— v. Kennard Glass, etc., Co., pp. 939, 1036.
—— Kennedy v.
—— v. Kilgore, p. 1884.
—— Kilpatrick v.
—— v. Knight 58 N. J. L. 287, 33 Atl. 845—pp. 3119, 3120, 3185.
—— v. Knight, 192 U. S. 21, 48 L. Ed. 325, 24 S. Ct. 202—pp. 3572, 3589.
—— Kohler v.
—— Lang v.
—— Langdon v.
—— v. Langdon, p. 2211.
—— Lewis v.
—— Lindsey v.
—— Lippmann v.
—— Logan Coal Co. v.
—— Long v.
—— Lucesco Oil Co. v.
—— v. Lyons, pp. 1884, 1895, 2267.
—— McCafferty v.
—— v. McCaffrey, pp. 2667, 2858.
—— McClintock v.
—— v. McCloskey, pp. 2127, 2217.
—— Machlin v.
—— v. MacKinney, pp. 2669, 2781.
—— McMasters v.
—— McNulty v.
—— McSwegan v.
—— Margo v.
—— Marmonstein v.
—— v. Marshall, p. 699.
—— Matthews v.
—— Maxson v.
—— Meier v.
—— Messenger v.
—— v. Midvale Steel Co., pp. 700, 707, 708, 716, 717, 718, 1137.
—— v. Miller, 87 Pa. 395—p. 1038.
—— v. Miller, 87 Pa. 577, 13 Atl. 324, 4 Am. St. Rep. 670—p. 822.
—— Minds v.
—— Mitchell Coal, etc., Co. v.
—— v. Mogi, pp. 3753, 3758.
—— Morrisdale Coal Co. v.
—— Moyer v.
—— v. Naive, pp. 534, 565, 611, 612, 822, 894, 901, 903.
—— New Jersey R., etc., Co. v.
—— v. Orem, etc., Produce Co., pp. 835, 861, 3297.
—— Palmer v.
—— v. Palmer, p. 3105.
—— v. Parry, pp. 1612, 1620.
—— Paul v.
—— v. Pennock, p. 576.
—— v. Peoples, pp. 1789, 1881, 2562.
—— Perry v.
—— v. Peters, pp. 1884, 2360.
—— Petrie v.
Pennsylvania R. Co. v. Philadelphia County, pp. 35, 44, 48, 56, 62, 124.
—— Powell v.
—— Price v.
—— v. Price, pp. 1502, 1537, 1576, 2102.
—— Puritan Coal Min. Co. v.
—— Quinn v.
—— Rager v.
—— v. Raiordon, pp. 816, 820, 827, 1037, 1389, 1456.
—— Rathgebe v.
—— Rawson v.
—— Reed v.
—— v. Reed, pp. 2065, 2157.
—— Reese v.
—— Ridgway Grain Co. v.
—— Ritz v.
—— Rivers v.
—— Roberts v.
—— Rothstein v.
—— Rowdin v.
—— Rowland v.
—— Runyon v.
—— v. Russ, p. 1787.
—— Ryer v.
—— Salberg v.
—— v. Samuel, pp. 708, 712.
—— Schofield v.
—— v. Scroggins Co., p. 3501.
—— Sherman v.
—— Shipper v.
—— Shockley v.
—— Sleeper v.
—— v. Smith, p. 804.
—— v. Spiker, p. 1622.
—— Spofford v.
—— Staake v.
—— v. Stern, pp. 369, 371, 378, 532, 547, 556, 3274.
—— v. Stockton, pp. 1779, 1796, 2817, 2874, 2875.
—— Sutton v.
—— Taylor v.
—— Thomas v.
—— Trace v.
—— Tucker v.
—— Tuesco Oil Co. v.
—— Tyler v.
—— United States v.
—— v. Vandiver, pp. 2413, 2490.
—— Vankirk v.
—— v. Wabash, etc., R. Co., pp. 1627, 2497.
—— Walnut Coal Co. v.
—— Walthour v.
—— Watkins v.
—— Weaver v.
—— v. Weiller, p. 1074.
—— v. Wemple, 65 Hun 252, 20 N. Y. S. 287—p. 3573.
—— v. Wemple, 138 N. Y. 1, 33 N. E. 720, 19 L. R. A. 694—p. 3573.
—— Wertheimer v.
—— v. White, p. 2275.
—— Willock v.
—— v. Wilson, p. 809.
—— Wood v.
—— Wright v.
—— Young v.
—— v. Zebe, 33 Pa. 318—pp. 2113, 2246.
—— v. Zebe, 37 Pa. 420—p. 2246.
Pennsylvania R. Co's. Appeal, p. 3886.
Pennsylvania Steam Towing, etc., Co., Ashmore v.
Pennsylvania Steel Co. v. Georgia R., etc., Co., pp. 1248, 1249.
Pennsylvania Tract. Co., Bard v.
Pennsylvania, etc., Co., Neville v.
Pennsylvania, etc., Nav. Co. v. Dandridge, p. 769.
Pennsylvania, etc., R. Co., Dayton v.
—— v. Waltman, pp. 897, 898.
—— v. Woodworth, pp. 1577, 1578.
Penny v. Atlantic Coast Line R. Co., p. 2657.
—— v. Atlantic, etc., R. Co., pp. 1711, 1927, 2020, 2079, 2234.
Penobscot Bay, etc., Steamboat Co., Hutchins v.
Pensacola Elect. Co. v. Alexander, pp. 2777, 2860, 3003.
—— v. Bissett, p. 2861.
Pensacola Tel. Co. v. Western Union Tel. Co., pp. 3418, 3446, 3447, 3471.
Pensacola, etc., Co., Williams Co. v.
Pensacola, etc., R. Co. v. Haussman, pp. 2921, 2929.
—— Johnson v.
—— Parrish v.
—— State v.
—— v. State, pp. 61, 124, 1192.
—— Storrs v.
—— Wilkinson v.
Penton v. Grand Trunk R. Co., p. 3169.
People v. Albany, etc., R. Co., p. 255.
—— Allardt v.
—— Atchison, etc., R. Co. v.
—— v. Babcock, pp. 211, 236, 239.
—— v. Baltimore, etc., R. Co., p. 172.
—— v. Bishopp, 94 N. Y. S. 773, 106 App. Div. 266—p. 3541.
—— v. Bishopp, 89 N. Y. S. 709, 44 Misc. Rep. 12—p. 3541.
—— v. Boston, etc., R. Co., p. 255.
—— v. Brooklyn Heights R. Co., p. 70.
—— v. Brooks, p. 3582.
—— v. B. & B. Turnpike, p. 1501.
—— v. Caryl, pp. 2417, 2418.
—— Central Pac. R. Co. v.
—— Chicago, etc., R. Co. v.
—— v. Chicago, etc., R. Co., 55 Ill. 95, 8 Am. Rep. 631—pp. 541, 542.
—— v. Chicago, etc., R. Co., 223 Ill. 581, 79 N. E. 144, 7 Am. & Eng. Ann. Cas. 1—p. 3524.
—— Chilvers v.
—— v. Commissioners of Taxes and Assessments, p. 3582.
—— v. Compagnie Generale Transatlantique, pp. 3564, 3565.
—— v. Detroit United Railway, 154 Mich. 514, 118 N. W. 9, 32 R. R. R. 158, 55 Am. & Eng. R. Cas., N. S., 158—pp. 1646, 1647.
—— v. Detroit United Railway, 162 Mich. 460, 127 N. W. 748—p. 81.
—— v. Downer, p. 3565.
—— v. Duchess, etc., R. Co., p. 255.
—— v. Edye, p. 3565.
—— v. Erie R. Co., 198 N. Y. 369, 91 N. E. 849, 29 L. R. A., N. S., 240, 18 Am. & Eng. Ann. Cas. 811—pp. 3426, 3458.
—— v. Erie R. Co., 119 N. Y. S. 873, 135 App. Div. 767—pp. 3457, 3458.
—— v. Fisher, p. 3421.
—— v. Fishkill, etc., Road Co., p. 1501.
—— v. Halbustro, p. 2562.
—— v. Hillsdale, etc., Turnpike Road, p. 1501.
—— Illinois Cent. R. Co. v.
—— v. Illinois Cent. R. Co., p. 32.
—— Illinois, etc., R. Co. v.
—— v. Jillson, p. 2473.
—— v. K. & N. Turnpike, p. 1501.
—— v. McKay, p. 1499.
—— v. New York Cent. R. Co., p. 1501.
—— New York, etc., R. Co. v.
—— v. New York, etc., R. Co. (N. Y.), 22 Hun 533—p. 264.
—— v. New York, etc., R. Co. (N. Y.), 9 Am. & Eng. R. Cas. 1, 28 Hun 543, 2 Civ. Proc. R. 11, 2 McCarty Civ. Proc. 345—pp. 211, 212, 251, 255, 256, 257, 1500, 1501.

People v. New York, etc., R. Co., 104 N. Y. 58, 9 N. E. 856, 58 Am. Rep. 484—p. 117.
—— v. New York, etc., R. Co., 5 N. Y. S. 945—p. 1835.
—— v. New York, etc., R. Co., 8 N. Y. S. 672, 55 Hun 409, 608—p. 3481.
—— Ohio, etc., R. Co. v.
—— v. Prillen, p. 3583.
—— v. Roberts, p. 3586.
—— v. Rochester, etc., R. Co., p. 255.
—— v. State Board, p. 3555.
—— Wabash, etc., R. Co. v.
—— Walcott v.
—— Walling v.
—— v. Weaver, p. 3570.
—— Wilcox v.
Peoples, Pennsylvania R. Co. v.
People's Bank, Douglas v.
—— King v.
—— v. Morgolofski, p. 1750.
People's Coal Co., Nicolette Lumber Co. v.
People's Exp. Co., Commonwealth v.
People's Nat. Bank v. Brogden, 98 Tex. 360, 83 S. W. 1098—p. 400.
—— v. Brogden (Tex. Civ. App.), 84 S. W. 601, 602—p. 400.
People's Passenger R. Co. v. Green, pp. 1530, 1905, 2116, 2191.
—— v. Lauderbach, pp. 2203, 2913.
—— Baldwin v.
—— v. Baldwin, pp. 1682, 1694, 1695.
—— Bertram v.
—— Bischoff v.
—— Braunstein v.
—— Coye v.
—— Coyle v.
—— Kleiber v.
—— McAllister v.
—— Newton v.
People's Sav. Bank v. Waterloo, etc., Transit Co., p. 659.
People's Steamboat Co., Weems Steamboat Co. v.
People's St. R. Co., Jager v.
—— Pitcher v.
People's St. R., etc., Co., Buck v.
—— Van Natta v.
People's, etc., R. Co. v. Weiller, p. 1827.
Peoria Packing Co. v. Nashville, etc., R. Co., pp. 981, 1046.
Peoria, etc., R. Co., Chicago, etc., R. Co. v.
—— v. Chicago, etc., R. Co., pp. 209, 210, 236, 240, 1493, 3271, 3282, 3283, 3304.
—— Corning & Co. v.
—— v. Lane, p. 2210.
—— v. Reynolds, p. 2693.
—— Rosenfeld v.
—— Terre Haute, etc., R. Co. v.
—— v. United States, etc., Co., pp. 727, 732, 748, 819, 916, 3282, 3283.
Peoria, etc., Terminal Railway v. Hoerr, p. 2425.
Pepper, Hastings v.
Pepperell Mfg. Co., Gulf, etc., R. Co. v.
Pequeno v. Taylor, p. 1241.
Percy v. Fitchburg R. Co., p. 2504.
—— v. Metropolitan St. R. Co., pp. 1646, 1647, 2442.
—— Union Sulphur Co. v.
—— v. Union Sulphur Co., pp. 3952, 3968.
Perego v. Lake Shore, etc., R. Co., pp. 1775, 2272.
Pereira v. Central Pac. R. Co., pp. 337, 412, 1017, 3278.
Pere Marquette R. Co., Crosby v.
—— Dahrooge v.
—— Freeman v.
Pere Marquette R. Co. v. Strange, pp. 1508, 1512, 1514, 1713, 1768, 1797, 1799, 1800, 1918, 2137, 2873.
Pere Marquette R. Co., United States v.
—— Withey v.
Perishable Freight Transp. Co. v. O'Neill, p. 872.
Perishaw, Cleveland, etc., R. Co. v.
Perkett v. Manistee, etc., R. Co., pp. 483, 489.
Perkins, American Exp. Co. v.
—— v. Chautauqua Tract. Co., pp. 516, 517.
—— v. Chicago, etc., R. Co., p. 1758.
—— Cleveland, etc., R. Co. v.
—— Houston, etc., R. Co. v.
—— Irzo v.
—— Lake Shore, etc., R. Co. v.
—— Louisville, etc., R. Co. v.
—— v. Missouri, etc., Railroad, pp. 2474, 2715, 2718.
—— v. New Orleans R., etc., Co., p. 1905.
—— v. New York Cent. R. Co., pp. 1759, 2095, 2096.
—— v. Ophir Silver Min. Co., p. 436.
—— v. Portland, etc., R. Co., pp. 417, 418, 848, 3295, 3410.
—— v. Wright, pp. 3161, 3167.
Perkins Co. v. American Exp. Co., pp. 421, 440, 441, 456, 851, 1049.
Perley v. New York, etc., R. Co., pp. 3149, 3150.
Perrault v. Emporium Department Store Co., pp. 1488, 2331, 2901.
Perrin, Dows v.
—— v. United States Exp. Co., p. 990.
Perry v. Atlantic, etc., R. Co., pp. 1619, 2446.
—— v. Central Railroad, pp. 1514, 1791, 1916, 1917, 2966.
—— Central R., etc., Co. v.
—— Haddow v.
—— Humphreys v.
—— v. Malarin, p. 1985.
—— Missouri, etc., R. Co. v.
—— v. Pennsylvania R. Co., p. 2418.
—— v. Philadelphia, etc., R. Co., pp. 1578, 2105.
—— v. Pittsburgh, etc., R. Co., pp. 1603, 2434.
—— v. Spreckles' Sugar-Refin. Co., p. 3963.
—— v. Thompson, pp. 324, 966, 996.
—— v. Torrence, p. 3581.
—— Westcall v.
—— Wood v.
Perry Co., Donaldson v.
Pershing v. Chicago, etc., R. Co., pp. 1723, 1734, 1743, 1810, 2695, 2841.
Persiana, The.
Person, St. Louis, etc., R. Co. v.
Persse v. Cole, p. 594.
Peru-Van Zandt Imp. Co., Missouri Pac. R. Co. v.
Peters, Bancroft v.
—— Cincinnati, etc., R. Co. v.
—— v. Elliott, p. 1224.
—— Houston, etc., R. Co. v.
—— Huston v.
—— Loeb v.
—— v. New Orleans, etc., R. Co., p. 1273.
—— Pennsylvania R. Co. v.
—— v. Rylands, pp. 1721, 2086.
Peters, etc., Co. v. Marietta, etc., Co., pp. 26, 1135, 1136, 1195, 1196.
Petersburg R. Co., Daniel v.
Petersburg, etc., Steamboat Line v. Norfolk-Virginia Peanut Co., p. 3936.
Petersen v. Case, p. 3279.
—— v. Elgin, etc., Tract. Co., 87 N. E. 345, 238 Ill. 403—pp. 1507, 2346.
—— v. Elgin, etc., Tract. Co., 142 Ill. App. 34—pp. 1559, 1958, 2319, 2334, 2947.
Peterson v. Chicago Consol. Tract. Co., pp. 2350, 2388, 2906.
—— v. Chicago, etc., R. Co., 80 Iowa 92, 45 N. W. 573—pp. 3178, 3179, 3193.
—— v. Chicago, etc., R. Co., 19 S. Dak. 122, 102 N. W. 595, 18 R. R. R. 48, 41 Am. & Eng. R. Cas., N. S., 48—pp. 818, 1451, 1453, 1467, 1471, 1472.
—— v. Chicago, etc., R. Co., 95 N. W. 532, 119 Wis. 197, 100 Am. St. Rep. 879—p. 2100.
—— Cox, etc., Co. v.
—— Denver, etc., R. Co. v.
—— Dinnigan v.
—— v. Eight Hundred and Sixty-Nine Cedar Logs, p. 3942.
—— Illinois Cent. R. Co. v.
—— Lake Shore, etc., R. Co. v.
—— v. Metropolitan St. R. Co., 2596, 2751, 2924.
—— v. Middlesex, etc., Tract. Co., pp. 2771, 3087.
—— v. Schultze-Berge, p. 3915.
—— v. Seattle Tract. Co., p. 2100
—— v. State, p. 3512.
—— v. Tacoma, etc., R. Co., p. 81.
Petit, Colorado Springs, etc. R. Co. v.
Petitions of Patersen, In re.
Petitt & Co. v. First Nat. Bank, p. 388.
Petrie v. Heller, p. 3891.
—— v. Pennsylvania R. Co., pp. 1529, 2440.
Petties, St. Louis, etc., R. Co. v.
Pettigrew v. Barnum, pp. 3114, 3119, 3123, 3124, 3129.
Pettit, Dallas, etc., St. R. Co. v.
—— First Nat. Bank v.
—— Gulf, etc., R. Co. v.
—— Scott v.
Petty v. St. Louis, etc., R. Co., p. 2479.
Pettyjohn v. Oregon Coal, etc., Co., p. 4023.
Petuson v. Chicago, etc., R. Co., p. 1578.
Peverly v. Boston, p. 1838.
Pevey, International, etc., R. Co. v.
Peyroux v. Howard, p. 3584.
Peytavin, Williams v.
Peyton v. Texas, etc., R. Co., pp. 1826, 1986.
—— Wabash, etc., R. Co. v.
Peytona, The.
Pfaelzer v. Pullman Palace Car Co., pp. 3221, 3222.
Pfaffenback v. Lake Shore, etc., R. Co., p. 2931.
Pfeffer v. Buffalo R. Co., p. 2146.
Pfeifer & Bro., Chicago, etc., R. Co. v.
Pfeiffer, Commercial Bank v.
Pferdmenges, etc., R. Co., Louisville, etc., R. Co. v.
Pfister v. Central Pac. R. Co., pp. 108, 210, 236, 237, 238, 239, 240, 244, 1593, 3110, 3113, 3124, 3126.
Pharos, The.
Pharr v. Collins, pp. 520, 1160.
Phelps, Illinois Cent. R. Co. v.
—— v. Illinois Cent. R. Co., pp 230, 250.
—— v. London, etc., R. Co., pp. 3126, 3128.
—— St. Louis, etc., R. Co. v.
—— St. Louis, etc., Railway v.
—— v. Windsor Steamboat Co., p. 2089.
Phenix Ins. Co., Ex parte.
Phenix Ins. Co., In re.
—— Liverpool, etc., Steam Co. v.
Phettiplace v. Northern Pac. R. Co., pp. 1598, 2468, 2469, 2480.
Phifer v. Carolina Cent. R. Co., pp. 987, 3348.
Philadelphia, Atlantic, etc., Tel. Co. v.
—— Gilman v.

Philadelphia, Livery v.
—— v. Philadelphia Rapid Transit Co., 224 Pa. 544, 34 R. R. R. 590, 57 Am. & Eng. R. Cas., N. S., 590, 73 Atl. 923—p. 1644.
—— v. Philadelphia Rapid Transit Co., 228 Pa. 325, 77 Atl. 501—p. 78.
—— Sharpless v.
—— Wilcox v.
Philadelphia City Pass. R. Co. v. Hassard, pp. 2120, 2741.
Philadelphia County, Pennsylvania R. Co. v.
Philadelphia Fire Ass'n v. New York, pp. 3447, 3472.
Philadelphia R. Co., Hayman v.
Philadelphia Rapid Trans. Co., Blair v.
—— Blew v.
—— Bradley v.
—— Cohen v.
—— Fane v.
—— Harding v.
—— Kracker v.
—— McDade v.
—— Mahoney v.
—— Miller v.
—— Mittleman v.
—— Paterson v.
—— Philadelphia v.
—— Quinn v.
—— Rice v.
—— Rist v.
—— Sanson v.
—— Scanlon v.
—— Sligo v.
—— Snowden v.
—— Thomas v.
—— Thorne v.
—— Tilton v.
—— White v.
—— Widener v.
—— Wright v.
Philadelphia Steam Propeller Co., Shenk v.
Philadelphia Tract. Co., Buzby v.
—— Dixey v.
—— Farley v.
—— Jackson v.
—— Mann v.
—— Reddington v.
—— Walters v.
Philadelphia Warehouse Co., Munroe v.
Philadelphia, etc., Iron Co., Empire Transp. Co. v.
Philadelphia, etc., Co., Blair v.
Philadelphia, etc., R. Co. v. Allen, pp. 2583, 2584, 2585.
—— v. Alvord, p. 2819.
—— Andenried v.
—— v. Anderson, 72 Md. 519, 20 Atl. 2, 44 Am. & Eng. R. Cas. 345, 20 Am. St. Rep. 483, 8 L. R. A. 673—pp. 1746, 1923, 2680.
—— v. Anderson, 94 Pa. 351, 39 Am. Rep. 787, 6 Am. & Eng. R. Cas. 407—pp. 1809, 1834, 1850, 2671, 2681.
—— v. Barnard, p. 1151.
—— Beaumont v.
—— v. Beck, p. 3298.
—— Blatcher v.
—— Borda v.
—— v. Boyer, pp. 1715, 2009, 2014.
—— Boyle v.
—— Bricker v.
—— Brooks v.
—— Brown v.
—— Cambols v.
—— Clarke v.
—— Colburn v.
—— v. Crawford, pp. 1509, 2044, 2960, 3064.
—— Cressen v.
—— Cresson v.
—— Culbreth v.
—— v. Derby, pp. 1502, 1565, 1694, 1714, 1722, 1727, 1759, 1813, 1815, 2036, 2037, 2039, 2045, 2519, 2567.
Philadelphia, etc., R. Co. v. Diffendal, pp. 753, 766, 3303, 3396, 3406, 3411.
—— Downey v.
—— Dulaney v.
—— Duling v.
—— v. Edelstein, p. 1925.
—— Ellinger v.
—— Fairchild v.
—— Flanagan v.
—— Flinn v.
—— Franklin Trust Co. v.
—— Gilmore v.
—— Graeff v.
—— v. Green, pp. 1511, 1512, 2609, 2770, 2607.
—— Hagan v.
—— v. Hand, p. 2394.
—— v. Harper, pp. 749, 3139, 3183.
—— v. Hassard, p. 2254.
—— Hewes v.
—— v. Hoeflich, pp. 2434, 3071, 3087, 3090.
—— Hunter v.
—— Interstate Commerce Comm. v.
—— v. Interstate Commerce Commission, pp. 3687, 3788.
—— Johnson v.
—— Kantner v.
—— Kefauver v.
—— Klair v.
—— Knorr v.
—— v. Larkin, p. 2483.
—— Laughlin Bros. Co. v.
—— v. Lehman, pp. 210, 233, 242, 1316, 3282.
—— Levin v.
—— McClure v.
—— v. McCormick, p. 1925.
—— McFeat v.
—— v. McGugan, pp. 2327, 2872.
—— McHenry v.
—— Minot v.
—— Missimer v.
—— Mortland v.
—— National Bank v.
—— v. Peale, pp. 3890, 3891, 3942.
—— Pennington v.
—— Perry v.
—— v. Philadelphia, etc., Towboat Co., p. 1589.
—— Powell v.
—— Proud v.
—— v. Ramsey, p. 3413.
—— v. Rice, pp. 2461, 3089.
—— Schæffer v.
—— v. Schubert, pp. 3464, 3465.
—— Seibert v.
—— Shive v.
—— Smith v.
—— Spear v.
—— Sullivan v.
—— Swift v.
—— Reed v.
—— Ritter v.
—— Thomas v.
—— Truax v.
—— United States v.
—— v. Venable Bros., p. 805.
—— Watters v.
—— Weisman v.
—— Wernwag v.
—— Winkler v.
—— v. Wireman, pp. 476, 481, 1218, 1228.
—— Wood v.
—— Yates v.
—— v. Young, pp. 1787, 1826, 2131, 2902.
Philadelphia, etc., Steamboat Co., Solomon v.
Philadelphia, etc., Steamship Co. v. Commonwealth, p. 3582.
—— v. Pennsylvania, pp. 3423, 3427, 3446, 3471, 3473, 3480, 3551, 3553, 3555, 3559, 3560, 3562, 3582.
Philadelphia, etc., Towboat Co., Philadelphia, etc., R. Co. v.
Philadelphia, etc., Tract. Co., Ditchfield v.
Philanthropic Bldg. Ass'n v. McKnight, p. 1195.
Philippine Trading Co. v. United States, pp. 3950, 3951.
Philips v. Earle, p. 270.
—— International, etc., R. Co. v.
Philipson, Southern Pac. R. Co. v.
Philleo, Barrow v.
—— Houston, etc., R. Co. v.
—— v. Sanford, pp. 729, 730, 745, 746, 768, 782, 788.
Phillips, American Merchants' Union Exp. Co. v.
—— American, etc., Exp. Co. v.
—— v. Atlantic, etc., R. Co., pp. 201, 2493.
—— v. Bank, pp. 362, 363.
—— v. Brigham, etc., Co., p. 511.
—— Central R., etc., Co. v.
—— v. Earle, pp. 759, 763, 800, 3136.
—— Georgia R., etc., Co. v.
—— v. Georgia R., etc., Co., pp. 1619, 2092, 2093.
—— Gulf, etc., R. Co. v.
—— Gustine v.
—— International, etc., R. Co. v.
—— Michigan Cent. R. Co. v.
—— v. North Carolina R. Co., pp. 417, 3254, 3259, 3311.
—— v. Raynes, p. 3567.
—— v. Rensellaer, etc., R. Co., p. 2158.
—— v. St. Charles St. R. Co., pp. 1970, 2238.
—— St. Louis, etc., R. Co. v.
—— Seaboard, etc., Railway v.
—— v. Southern R. Co., 114 Ga. 284, 40 S. E. 268—pp. 90, 1596, 1597, 1599, 2466, 3468.
—— v. Southern R. Co., 124 N. C. 123, 32 S. E. 388, 45 L. R. A. 163—pp. 1513, 1561, 1802.
—— Vicksburg, etc., R. Co. v.
—— v. Western Union Tel. Co., p. 1105.
Phillips & Co., Mobile, etc., R. Co. v.
Phillipsburg Horse Car R. Co. v. State Board, p. 3576.
Phillips Co. v. Erie Railway, pp. 706, 716.
—— v. Pruitt, 82 S. W. 628, 26 Ky. L. Rep. 831—pp. 2330, 2902.
—— v. Pruitt, 83 S. W. 114, 26 Ky. L. Rep. 1105—p. 2902.
Phillips, etc., Constr. Co., Morrison v.
Phillipson, Southern Pac. Co. v.
Phillsbury, Chicago, etc., R. Co. v.
Phinazee, Central R., etc., Co. v.
Phoenicia, The.
Phœnix Cotton Oil Co., St. Louis, etc., R. Co. v.
Phœnix Ins. Co., Clement v.
—— v. Erie, etc., Transp. Co., Fed. Cas. No. 11, 112, 10 Biss. 18—pp. 790, 793.
—— v. Erie, etc., Transp. Co., 117 U. S. 312, 29 L. Ed. 873, 6 S. Ct. 750, 1176—pp. 481, 790, 791, 793, 930, 947, 953, 956, 958, 1083, 4025.
—— Johannes v.
—— Liverpool, etc., Co. v.
—— Liverpool, etc., Steam Co. v.
Phœnix Pot-Works v. Pittsburgh, etc., pp. 822, 844, 869.
Phœnix Powder Mfg. Co. v. Wabash R. Co., 101 Mo. App. 442, 74 S. W. 492—pp. 870, 976.
—— v. Wabash R. Co., 120 Mo. App. 566, 97 S. W. 256—pp. 975, 1062.
Phœnix, etc., Co., North Western Ins. Co. v.
Phœnix, etc., Oil Co., St. Louis, etc., R. Co. v.
Physioc, South Covington, etc., St. R. Co. v.
Piburn, St. Louis, etc., R. Co. v.
Picard v. Ridge Ave., etc., R. Co., p. 1880.

Pichard, I & G. N. R. Co. v.
Pickard v. Bayley, pp. 439, 723.
—— Denver, etc., R. Co. v.
—— v. Pullman Southern Car Co., pp. 3471, 3474, 3552, 3555, 3563, 3564, 3579, 3594.
Pickens v. Georgia R., etc., Co. pp. 2562, 2578.
—— Gulf, etc., R. Co. v.
—— v. Richmond, etc., R. Co., pp 2473, 2474, 2493.
—— v. South Carolina, etc., R. Co., pp. 2774, 2835, 2847.
Pickering v. Weld, pp. 1010, 3914.
Pickett, Central R. Co. v.
—— Central R., etc., Co. v.
—— v. Central, etc., Co., pp. 2113, 2747.
—— v. Downer, p. 512.
—— Jenkins v.
—— v. Southern R. Co., pp. 1881, 3068.
Pickford v. Boston Elev. R. Co., p. 2877.
—— v. Grand Junction R. Co. (Eng.), 8 M. & W. 372, 9 D. P. C. 766, 2 Railw. Cas. 592, 5 Jur. 731—p. 234.
—— v. Grand Junction R. Co., 12 M. & W. (Eng. Exch.) 766—p. 631.
—— Raphal v.
—— Rowe v.
—— Wyld v.
Pickles, Patton v.
Pickleseimer, Richmond, etc., R. Co. v.
Pickwick, Brooke v.
Pidgeon v. United R. Co., p. 2645.
Piedmont Mfg. Co. v. Columbia, etc., R. Co., pp. 209, 211, 238, 302, 997, 3259.
Piedmont R. Co. v. Reidsville, p. 3574.
Pier v. Finch, pp. 1612, 1625.
Pierce, Blackman v.
—— Dillingham v.
—— v. Georgia R., etc., Co., pp. 2250, 2253, 2688.
—— v. Great Falls, etc., R. Co., pp. 1982, 2635, 2694, 2809.
—— Lake Shore, etc., R. Co. v.
—— v. Metropolitan St. R. Co., p. 2830.
—— v. Milwaukee, etc., R. Co., pp. 725, 726.
—— v. Pennsylvania Co., p. 1974.
—— v. Southern Pac. Co., pp. 781, 1015, 1072.
—— Texas, etc., R. Co. v.
Pierce Co. v. Wells Fargo & Co., pp. 951, 1061, 1066, 3846.
Pierson, Chamberlain v.
—— v. Illinois Cent. R. Co., pp. 2709, 3079.
—— v. Northern Pac. R. Co., 52 Wash. 595, 100 Pac. 999—pp. 1284, 1287, 1476, 1477.
—— v. Northern Pac. R. Co., 61 Wash. 450, 112 Pac. 509—pp 1361, 1371, 1402, 1403, 1420, 1422.
Piggott v. Eastern Cos. R. Co., p. 2738.
Pike v. Boston Elev. R. Co., pp. 2122, 2190.
—— v. Chicago, etc., R. Co., pp. 909, 910, 3169, 3174.
—— Harvy v.
Pilburn, St. Louis, etc., R. Co. v.
Pilcher v. Central, etc., R. Co., pp. 647, 652, 656, 684.
Pilgrim, Denver, etc., R. Co. v.
Pillow, Pittsburgh, etc., R. Co. v.
Pillsbury, Chicago, etc., R. Co. v.
Pillsbury-Washburn Flour Mills Co., Lehigh Valley Transp. Co. v.
Pilot Boy, The.
Pim v. St. Louis Transit Co., p 2235.
Pincus v. Atlantic, etc., R. Co., pp. 1505, 1514, 1517, 1518.
Pindell v. St. Louis, etc., R. Co., 34 Mo. App. 675—p. 899.
—— v. St. Louis, etc., R. Co., 41 Mo. App. 84—pp. 894, 895, 899.
Pine v. St. Paul City R. Co., pp. 1644, 3089.
Pine Bluff Iron Works v. Bolling & Bro., p. 642.
Pine Bluff, etc., R. Co. v. McKenzie, pp. 276, 292.
Pine Bros. v. Chicago, etc., R. Co., p. 1310.
Pine Grove, Talcott v.
Pine River Logging Co. v. United States, p. 3873.
Pingree v. Detroit, etc., R. Co., pp. 573, 578, 1158.
—— v. Michigan Cent. R. Co., p. 38.
Pinkerton v. Missouri Pac. R. Co., pp. 742, 870.
Pinnacle Coal Co., Norfolk, etc., R. Co. v.
Pinney v. First Division, etc., R. Co., pp. 896, 899, 904.
Pinnix v. Charlotte, etc., R. Co., p. 476.
Pioche, etc., Co., Robinson v.
Pioneer Fuel Co. v. McBrier, 710, 715, 3962, 3972.
—— v. Molloy, p. 3547.
Piper v. Boston, etc., Railroad, p. 1589.
—— Galveston, etc., Co. v.
—— McFetridge, etc., Co. v.
—— v. Minneapolis St. R. Co., p. 1890.
—— v. New York, etc., R. Co., 89 Hun. 75, 34 N. Y. S. 1072, 68 N. Y. St. Rep. 835—p. 2219.
—— v. New York, etc., R. Co., 50 N. E. 851, 156 N. Y. 224, 41 L. R. A. 724, 66 Am. St. Rep. 560—pp. 2119, 3211.
—— St. Louis, etc., R. Co. v.
—— West, Chicago St. R. Co. v.
Piper Co., Galveston, etc., R. Co. v.
Pipkin, Atlantic, etc., R. Co. v.
Pisapia v. Hartford, etc., Transp. Co., pp. 343, 360.
Pitard v. New Orleans R., etc., Co., pp. 1875, 2152, 2281.
Pitcairn Coal Co., Baltimore, etc., R. Co. v.
—— v. Baltimore, etc., R. Co., 154 Fed. 108—pp. 3642, 3643, 3645, 3646.
—— v. Baltimore, etc., R. Co., 165 Fed. 113—pp. 3607, 3617, 3631, 3633, 3637, 3640, 3641, 3642, 3643, 3645, 3646, 3649, 3650, 3777.
Pitcher v. Lake Shore, etc., R. Co., 55 Hun 604, 8 N. Y. S. 389, 28 N. Y. St. Rep. 647—p. 1567.
—— v. Lake Shore, etc., R. Co., 61 Hun 623, 16 N. Y. S. 62, 40 N. Y. St. Rep. 896—p. 2147.
—— v. Old Colony St. R. Co., pp. 1743, 1824, 2756, 2885.
—— v. People's St. R. Co., 154 Pa. 560, 26 Atl. 559—pp. 1905, 2518.
—— v. People's St. R. Co., 174 Pa. 402, 34 Atl. 567—p. 1905.
Pitcher & Co., Jones v.
Pitch Pine Lumber Co., Tweedie Trading Co. v.
Pitcock, St. Louis, etc., R. Co. v.
Pitlock v. Welk, etc., Co., pp. 267, 268, 285, 434.
Pitman, Pacific Exp. Co. v.
Pitt, Fowle v.
—— Hanna v.
Pittman v. Pacific Exp. Co., pp. 931, 937, 940, 941, 1053, 1056, 3536.
—— Texas Cent. R. Co. v.
Pitts & Son, Gulf, etc., R. Co. v.
Pittsburg, C. & St. L. Ky. Co. v. Hennigh, p. 1638.
Pittsburg R. Co., Carothers v.
Pittsburg R. Co., Cline v.
—— Downey v.
—— Geiger v.
—— Golden v.
—— Lehner v.
—— Williams v.
Pittsburg Tract. Co., Laird v.
Pittsburg, etc., Coal Co. v. Bates, p. 3440.
—— Louisville, etc., R. Co. v.
Pittsburg, etc., Railroad, Bowers v.
Pittsburg, etc., R. Co. v. Aldridge, pp. 1831, 2245, 2670.
—— v. American Tobacco Co., pp. 270, 274, 275, 285, 295, 305, 338, 841.
—— v. Andrews, pp. 2200, 2201, 2202, 2204, 2336.
—— v. Barrett, pp. 286, 287, 289, 733, 749, 765, 882, 883, 884, 885, 946, 956, 966, 967, 981, 1009, 1032, 1039, 1045.
—— v. Bingham, pp. 208, 209, 210, 1492, 1493, 2502, 2528.
—— v. Brown, pp. 584, 1438, 1568, 2098, 2100, 2863.
—— v. Bryant, pp. 409, 411, 3327, 3330.
—— Central Trust Co. v.
—— v. Chicago, pp. 487, 483, 727, 732, 741, 743, 748, 752, 3270.
—— Clyde Coal Co. v.
—— Conrad Schoop Fruit Co. v.
—— Dennis v.
—— v. Donahue, pp. 2413, 2519.
—— Emigh v.
—— v. Gray, pp. 1531, 1532, 1540.
—— v. Grom, pp. 1491, 2669, 2679, 2698, 2915.
—— Hamilton v.
—— Harper v.
—— Harris v.
—— v. Hennigh, p. 3099.
—— v. Higgs, p. 2643.
—— v. Hollowell, pp. 727, 732, 748, 751, 752.
—— Keifner v.
—— Loraine v.
—— v. McClurg, pp. 1828, 2202.
—— Martin v.
—— v. Martin, pp. 1524, 1922.
—— v. Miller, p. 2259.
—— v. Mitchell, pp. 821, 825, 973, 978, 1051, 3255, 3327, 3459, 3604, 3688, 3840.
—— v. Morton, pp. 207, 210, 231, 247, 252, 253, 258, 263, 765, 766, 3258.
—— v. Nash, pp. 538, 539, 894, 899.
—— O'Toole v.
—— Phœnix Pot-Works v.
—— v. Pillow, p. 1497.
—— Powell v.
—— Robb v.
—— v. Ross, p. 2594.
—— v. Russ, pp. 2413, 1631, 2564, 3024, 3025, 3087.
—— v. Sheppard, p. 1142.
—— v. Slusser, p. 3022.
—— Smith v.
—— v. Thompson, pp. 1745, 2593.
—— Tucker v.
—— v. Viers, pp. 3343, 3387.
—— Wald v.
—— Welsh v.
—— v. Williams, pp. 1812, 2693, 2844.
Pittsburg, etc., St. R. Co., Green v.
Pittsburg, etc., Tract. Co., Muldowney v.
—— Reber v.
Pittsburgh, Hamilton v.
Pittsburgh R. Co. v. Bloomer, p. 2825.
—— Dougherty v.
—— Golden v.
—— Lehner v.
Pittsburgh Tract. Co., Clow v.
—— Laird v.
—— Linch v.

Pittsburgh, etc., Coal Co. v. Louisiana. p. 3482.
Pittsburgh, etc., Railroad, Bowers v.
Pittsburgh, etc., R. Co. v. Backus, 133 Ind. 625, 33 N. E. 432—p. 3575.
—— v. Backus, 154 U. S. 421, 38 L. Ed. 1031, 14 S. Ct. 1114—pp. 3552, 3575, 3591, 3592, 3593.
—— Bartlett v.
—— v. Berryman, p. 1668.
—— v. Blakemore, pp. 1033, 1035.
—— v. Board, pp. 3473, 3588.
—— v. Brigham, p. 1769.
—— Butler v.
—— v. Caldwell, p. 1962.
—— v. Coll, pp. 1628, 1629, 1630.
—— v. Dewin, p. 2434.
—— Fleming v.
—— v. Gray (Ind. App.), 59 N. E. 1000—pp. 2610, 2645, 2824.
—— v. Gray, 28 Ind. App. 588, 64 N. E. 39, 4 R. R. R. 120, 27 Am. & Eng. R. Cas., N. S., 120—pp. 2065, 2066, 2249.
—— v. Haislup, pp. 2621, 2622, 2623.
—— v. Hartford City, p. 3524.
—— v. Hays, p. 457.
—— v. Hazen, pp. 627, 628, 629.
—— v. Hennigh, p. 2432.
—— v. Higgs, pp. 2092, 2097, 2630, 2844, 2845.
—— v. Hinds, pp. 1687, 2024, 2033.
—— v. Hollowell, pp. 250, 608, 617, 627, 628, 629.
—— Huchel v.
—— v. Hunt, pp. 3535, 3659.
—— v. Klitch, p. 2847.
—— v. Knox, pp. 607, 653, 683, 685, 695.
—— v. Krouse, pp. 1534, 2113, 2127, 2257, 2303, 2520, 2537, 2545, 2549.
—— v. Lightcap, pp. 1666, 2451, 2453, 2457.
—— v. Lyon, pp. 193, 196, 197, 3113, 3197.
—— v. Mahony, pp. 214, 2105.
—— Malone v.
—— v. Moore, p. 143.
—— v. Nuzum, 50 Ind. 141, 19 Am. Rep. 703—pp. 204, 205, 1663, 1667, 1677, 1858, 3015.
—— v. Nuzum, 60 Ind. 533—p. 1608.
—— Perry v.
—— Phoenix Pot-Works v.
—— v. Pillow, pp. 200, 2024, 2845.
—— v. Racer, 5 Ind. App. 209, 31 N. E. 853—pp. 246, 445, 821, 1038, 1444.
—— v. Racer, 10 Ind. App. 503, 37 N. E. 280—p. 454.
—— Reynolds v.
—— v. Reynolds, pp. 2451, 2458.
—— v. Richardson, pp. 2022, 2602, 2610.
—— v. Russ, pp. 2487, 3080, 3096.
—— Russell v.
—— v. Schepman, 171 Ind. 71, 84 N. E. 988—pp. 1702, 1835, 2594, 2880.
—— v. Schepman (Ind. App.), 82 N. E. 998—p. 1834.
—— v. Sheppard, pp. 949, 1363, 1368, 1461, 1462, 1465.
—— v. Spencer, p. 2813.
—— v. State, pp. 3481, 3483, 3508.
—— v. Street, pp. 2444, 2445, 2468.
—— Tucker v.
—— United States v.
—— v. Vandyne, pp. 1497, 1498, 1602, 1636.
—— v. Van Houten, p. 2427.
—— Wald v.
—— Welsh v.
—— v. Wiegel, p. 2873.
—— v. Wood, pp. 253, 259, 260, 653, 660, 661, 3840.
Pittsburgh, etc., Railway v. Mooar Lumber Co., p. 714.
Pittsburgh, etc., Tract. Co., Muldowney v.
—— Schenkel v.
Pittsfield Elect. St. R. Co., Isbell v.
—— Tobin v.
Pittsfield, etc., R. Co., Ryan v.
Pitzer, Indianapolis, etc., R. Co. v.
Pixley, Baltimore, etc., R. Co. v.
—— v. Third Ave. R. Co., p. 2805.
Place v. Union Exp. Co., pp. 607, 615, 617, 618, 632, 770, 816.
Plaff v. Pacific Exp. Co., 251 Ill. 243, 95 N. E. 1089—pp. 848, 993, 1033.
—— v. Pacific Exp. Co., 159 Ill. App. 493—pp. 493, 848, 865, 3541.
Plant Inv. Co. v. Cook, p. 3995.
Plantation No. 4 v. Hall, p. 3256.
Planter, The.
Planters' Compress Co., Graham v.
—— Hooks Smelting Co. v.
Planters' Fertilizer Mfg. Co. v. Elder, pp. 338, 339, 346, 3893, 3920, 3942.
Planters' Gin, etc., Co., Chicago, etc., R. Co. v.
Planters' Phosphate, etc., Co., Orr v.
Planz v. Boston, etc., R. Co., pp. 2532, 2541.
Platt, Abrams v.
—— Cohn v.
—— Crescent Liquor Co. v.
—— Feld v.
—— v. Forty Second St., etc., R. Co., p. 2245.
—— Goodfield v.
—— v. Grand St., etc., R. Co., p. 1535.
—— v. LeCoeg, 150 Fed. 391—pp. 7, 25, 26.
—— v. Lecoeg, 85 C. C. A. 621, 158 Fed. 723, 15 L. R. A., N. S., 558—pp. 30, 33, 93, 187, 232, 233.
—— Magnus v.
—— v. Richmond, etc., R. Co., pp. 791, 793, 958, 1041.
—— Vigouroux v.
—— v. Wells, p. 563.
—— Wilson v.
Platte, etc., R. Co., Wheat v.
Platter v. Elkhart, p. 1166.
Plattor v. Seattle Elect. Co., p. 2860.
Player v. Burlington, etc., R. Co., p. 2216.
Pleasants v. Pendleton, pp. 1208, 1212.
Pledger v. Chicago, etc., R. Co., p. 2532.
Plefka v. Detroit United Railway, p. 1826.
Pleiss, Bremer v.
Plessy, Ex parte.
—— v. Ferguson, pp. 1945, 1946, 3511.
Plimpton, Van Camp Hardware, etc., Co. v.
Plott v. Chicago, etc., R. Co., pp. 191, 1857, 1859.
Plotz v. Miller, p. 801.
Plumley v. Massachusetts, pp. 3481, 3504.
Plummer v. Boston Elev. R. Co., pp. 1784, 2142, 2324, 2860, 2875, 2876, 2932, 2941, 2966.
—— v. Chesapeake, etc., R. Co., p. 3473.
—— Louisville, etc., R. Co. v.
Plunkett, Louisville, etc., R. Co. v.
Plutschow v. Metropolitan West Side Elevated R. Co., p. 2155.
Pockett's Bristol Channel, S. P. Co., Cahn v.
Podrat v. Narragansett River R. Co., pp. 3372, 3397.
Poe, Sanford v.
Pohle v. Second Ave. R. Co., p. 2304.
Pokanoket, The.
Polak, Ives v.
Poling v. Ohio River R. Co., p. 2078.
Polkey, North Chicago St. R. Co. v.
—— North Chicago, etc., R. Co. v.
Pollard, Heffron v.
—— New Jersey R., etc., Co. v.
—— Railroad Co. v.
—— v. Reardon, pp. 355, 3886.
—— Texas, etc., R. Co. v.
—— v. Vinton, pp. 267, 293, 301, 304, 305, 306, 307, 308, 331, 355, 356, 357, 371, 373, 388, 3879, 3936, 3937.
Pollock v. Brooklyn, etc., R. Co., p. 2807.
—— Chicago, etc., R. Co. v.
—— Pullman Palace Car Co. v.
—— St. Louis, etc., R. Co. v.
Pollock & Co. v. Gantt, p. 659.
Pomares, De Sola v.
Pomaski v. Grant, p. 2193.
Pomeroy v. Boston, etc., R. Co., pp. 2346, 2894.
—— v. Donaldson, p. 768.
—— Gulf, etc., R. Co. v.
Pomeroy, etc., Co. v. Will, pp. 357, 362, 367, 368.
Pomroy v. Bangor, etc., R. Co., pp. 1742, 2119, 2316, 2777.
Pond Creek Mill, etc., Co., Erie R. Co. v.
Pond-Decker Lumber Co. v. Spencer, pp. 1141, 3410, 3754.
Pondrom, Chicago, etc., R. Co. v.
Pontchartrain R. Co., Eclipse Towboat Co. v.
—— Knight v.
—— Logan v.
Pontiac, etc., R. Co., Brown v.
—— Marshall v.
—— Soper v.
Pontius, Cincinnati, etc., R. Co. v.
Pool, Caye v.
—— v. Columbia, etc., R. Co., pp 482, 593.
—— Gulf, etc., R. Co. v.
—— International, etc., R. Co. v.
—— Southern Pac. Co. v.
Pool Shipping Co. v. Samuel, p. 3961.
Poole, Atchison, etc., R. Co. v.
—— v. Consolidated St. R. Co., p. 1789.
—— v. Delaware, etc., R. Co., p. 3323.
—— v. Georgia R., etc., Co., pp. 1881, 1970.
—— Houston, etc., R. Co. v.
—— v. Houston, etc., R. Co., pp. 1239, 1240, 1247.
—— v. Northern Pac. R. Co., pp. 1597, 1599, 1602, 2467, 2468.
Pooling Freights, In re.
Poor, Pennsylvania Co. v.
Poore, Chicago, etc., R. Co. v.
Pope v. Chicago City R. Co., pp. 2150, 2151.
—— Filley v.
—— Missouri, etc., R. Co. v.
—— Southern Exp. Co. v.
—— v. Wisconsin Cent. R. Co., pp. 217, 444, 446, 462.
Popham v. Barnard, pp. 1087, 1088, 1090, 1107, 3340, 3354.
Popp, Louisville, etc., R. Co. v.
Poppe, Zerega v.
Popper, United States v.
Porcher v. Northeastern R. Co., pp. 729, 733, 749.
Portage County Mut. Fire Ins. Co. v. West, p. 1118.
Port Blakely Mill Co. v. Sharkey, p. 1317.
Port Huron, etc., R. Co., Dickinson v.
Port Jervis, etc., R. Co., Daley v.

Port Royal, etc., R. Co., Dunbar v.
—— Dunbar, etc., Co. v.
—— Madden v.
—— Miami Powder Co. v.
Port Townsend, etc., R. Co., Moses v.
Porteous v. Adams Exp. Co., 112 Minn. 31, 127 N. W. 429—pp. 764, 1054, 1055, 1056, 1074, 1075.
—— v. Adams Exp. Co., 115 Minn. 281, 132 N. W. 296—pp. 1034, 1059.
Porter v. Charleston, etc., R. Co., p. 3545.
—— v. Chicago, etc., R. Co., 20 Ill. 407, 71 Am. Dec. 286—pp. 566, 727, 730, 732, 739, 748, 894, 895, 899, 3170.
—— v. Chicago, etc., R. Co., 20 Iowa 73—pp. 799, 878, 879, 3168.
—— v. Chicago, etc., R. Co., 80 Mich. 156, 44 N. W. 1054, 20 Am. St. Rep. 511—pp. 1828, 1914.
—— v. Curray, pp. 848, 853.
—— Gulf, etc., R. Co. v.
—— v. Hildebrand, pp. 3116, 3118, 3127, 3128.
—— Illinois Cent. R. Co. v.
—— v. New England, p. 1865.
—— v. New York Cent. R. Co., pp. 1599, 1600, 2468.
—— v. New York, etc., R. Co., p. 2104.
—— Pecos, etc., R. Co. v.
—— v. Raleigh, etc., R. Co., p. 261.
—— v. St. Louis, etc., R. Co., p. 3540.
—— v. Southern Exp. Co., p. 1102.
—— Texas, etc., R. Co. v.
—— Union Pac. R. Co. v.
—— Voorhees v.
Porterfield v. Humphreys, pp. 1268, 1270.
Porteus v. Watney, p. 713.
Portland Bank v. Stubbs, p. 3944.
Portland Flouring Mills Co., British, etc., Marine Ins. Co. v.
—— v. Portland, etc., Steamship Co., pp. 3945, 3946, 3948.
Portland R. Co., Armstrong v.
—— Hebert v.
—— Herbert v.
—— Raymond v.
Portland R., etc., Co., Devroe v.
—— Lewis v.
—— v. Railroad Comm., 56 Ore. 468, 105 Pac. 709, 109 Pac. 273—pp. 62, 84, 88, 90, 95, 113, 178.
—— v. Railroad Comm., 57 Ore. 126, 105 Pac. 715—p. 90.
Portland Steam Packet Co., Dow v.
—— Moran v.
Portland, etc., Railroad, McDuffee v.
Portland, etc., R. Co., Knight v.
—— Perkins v.
—— Railroad Comm'rs, v.
—— Tobin v.
—— Watson v.
Portland, etc., Steamship Co., Balfour, etc., Co. v.
—— Portland Flouring Mills Co. v.
Portsmouth, The.
—— Willey v.
Portsmouth, etc., R. Co., Sager v.
Portsmouth, etc., Railway, Call v.
—— Haselton v.
Portsmouth, etc., Steampacket Co., p. 729.
Portwardens, Steamship Co. v.
Posch v. Southern Elect. R. Co., p. 2332.
Post v. Atlantic, etc., R. Co., pp. 1084, 1086, 1097, 1110, 1113.
—— v. Chicago, etc., R. Co., pp 1573, 1616, 2442.
Post v. Southern R. Co., pp. 503, 1135, 1147, 3248, 3250, 3268.
—— v. Texas, etc., R. Co., p. 2505.
Postal Telegraph-Cable Co. v. Adams, pp. 3472, 3551, 3552, 3553, 3571, 3572, 3591, 3803.
—— v. Charleston, pp. 3473, 3474, 3552, 3572.
—— v. Mobile, p. 3550.
—— Murray v.
—— Murray Co. v.
Postal Tel., etc., Co., White v.
Posten, Chicago, etc., R. Co. v.
—— v. Denver Consol. Tramway Co., p. 2358.
—— St. Louis, etc., R. Co. v.
Post Sugar Co., Lehigh Valley Transp. Co. v.
Poteet v. Western Union Tel. Co., p. 643.
Potlatch Lumber Co. v. Spokane Falls, etc., R. Co., p. 3819.
Potomac Ferry Co., Stewart v.
Potter v. Bunnell, p. 2089.
—— v. Chicago, etc., R. Co., pp. 2615, 2619.
—— Frink v.
—— v. Lansing, p. 490.
—— v. Majestic, p. 963.
—— Norfolk, etc., R. Co. v.
—— Wells Fargo & Co. v.
—— v. Wilmington, etc., R. Co., p. 1790.
Pottinger v. Heckscher, pp. 1236, 1237, 1243.
Potts, Atlanta, etc., R. Co. v.
—— v. Chicago City R. Co., p. 2810.
—— Cleveland, etc., R. Co. v.
—— v. New York, etc., R. Co., pp. 1153, 1154, 1162, 1163, 1166, 1248.
—— v. Wabash, etc., R. Co., pp. 209, 249, 782, 931, 945, 946.
Potts & Co., Cleveland, etc., R. Co. v.
Pottstown & R. St. R. Co., Ramsay v.
Pottsville Union Tract. Co., Brehony v.
Poucher v. New York, etc., R. Co., pp. 1567, 2099.
Poughkeepsie, etc., R. Co., Baruth v.
Pouilin v. Canadian Pac. R. Co., p. 2564.
Poulin v. Broadway, etc., R. Co., p. 2233.
—— v. Canadian Pac. R. Co., pp. 2440, 2453, 2462.
Poulsen v. Nassau Elect. R. Co., p. 2882.
Pouncey, Alabama, etc., R. Co. v.
Pound, Georgia, etc., R. Co. v.
Pounder v. Northeastern R. Co., p. 2032.
Pouppirt, Elder Dempster Shipping Co. v.
—— v. Elder Dempster Shipping, pp. 3976, 3988, 3996, 3998, 4001.
Powell, Atlantic, etc., R. Co. v.
—— Columbus, etc., R. Co. v.
—— Fellows v.
—— v. Hudson Valley R. Co., pp. 2656, 2658, 2685.
—— v. Kechnie, pp. 1228, 1232, 1233, 1234.
—— v. Mills, pp. 728, 733, 749, 769.
—— v. Myers, pp. 3159, 3160, 3165, 3169, 3170.
—— Oklahoma Ry. Co. v.
—— v. Pennsylvania R. Co., pp. 1275, 1380.
—— v. Philadelphia, etc., R. Co., pp. 1508, 1509, 1524, 1533, 1534, 1537, 1774.
—— v. Pittsburg, etc., R. Co., 5 O. Dec. 89, 2 Am. L. Rec. 403—pp. 1593, 2447, 2631, 2632.
—— v. Pittsburg, etc., R. Co., 25 O. St. 70—p. 1624.
—— Price v.
Powell v. St. Louis, etc., R. Co., pp. 1562, 2661, 2715, 2849, 2853.
—— Texas, etc., R. Co. v.
—— United States v.
Powell Coal Co., Brown v.
Powelson v. United Tract. Co., p. 2777.
Power, Commonwealth v.
—— Hall v.
—— St. Louis, etc., R. Co. v.
Powers v. Boston, etc., R. Co., pp. 2520, 2521.
—— Chicago v.
—— Chicago, etc., R. Co. v.
—— v. Chicago, etc., R. Co., 130 Iowa 615, 105 N. W. 345—pp. 828, 1367, 1456, 3395, 3408.
—— v. Chicago, etc., R. Co., 108 Minn. 319, 121 N. W. 897—p. 2858.
—— v. Connecticut Co., p. 1535.
—— v. Davenport, pp. 509, 510, 511, 727, 732, 748, 3888.
—— Galveston, etc., R. Co. v.
—— Gulf, etc., R. Co. v.
—— v. Inferior Court, pp. 209, 1493.
—— v. Old Colony St. R. Co., pp. 1806, 2341, 2755, 2872.
—— Richmond, etc., R. Co. v.
—— Wisconsin, etc., R. Co. v.
Powers Mercantile Co. v. Wells Fargo & Co., pp. 821, 939.
Powhatan Steamsboat Co. v. Appomattox R. Co., pp. 3258, 3266, 3308.
Pownall, Holst v.
Poythress v. Durham, etc., R. Co., pp. 528, 896, 901, 904, 907.
—— Matthews v.
Pozzi v. Shipton, p. 2565.
Prairie Oil, etc., Co. v. Ehrhardt, p. 3589.
—— v. United States, p. 3615.
Pratt, Chicago, etc., R. Co. v.
—— v. Chicago, etc., R. Co., p. 2011.
—— v. Freeman & Sons Mfg. Co., pp. 1206, 1212.
—— v. Grand Trunk R. Co., pp. 267, 269, 275, 285, 286, 291.
—— Harris v.
—— v. North German Lloyd Steamship Co., p. 3990.
—— v. Grand Trunk R. Co., pp. 3259, 3265, 3286, 3287, 3300, 3302.
—— v. Northern Pac. Exp. Co., p. 495.
—— Ogdensburg, etc., R. Co. v.
—— v. Ogdensburg, etc., R. Co., pp. 753, 783, 3311.
—— Railroad Co. v.
—— San Antonio, etc., R. Co. v.
—— Wabash, etc., R. Co. v.
Pray v. Omaha St. R. Co., pp. 1487, 1746, 1750, 1951, 1952, 1953, 2181, 2888.
—— The E. H.
P. R. Co. Indianapolis Freight Bureau v.
Prendergast v. Williamson, pp. 349, 350, 362, 383.
Prentice v. Decker, pp. 991, 1007, 3163, 3164, 3165.
—— Lake Shore, etc., R. Co. v.
—— v. United States, etc., Steamship Co., p. 3865.
Prentis v. Atlantic Coast Line Co., pp. 23, 119, 128, 129.
Prentiss, Barney v.
—— v. Savage, p. 1489.
Prescott, etc., R. Co. v. Atchison, etc., R. Co., p. 3660.
—— v. Morris, pp. 1978, 1999, 2314, 2368.
—— v. Smith, pp. 2344, 2345.
President, The.
President, etc., Ins. Co. v. St. Louis, etc., R. Co., p. 787.
Presley Co. v. Illinois Cent. R. Co., pp. 833, 843.
Presque Isle, The.

Pressed Steel Car Co. v. Eastern R. Co., p. 612.
Pressell, Indianapolis Tract., etc., Co. v.
Pressley v. State, pp. 184, 2425.
Pressley Co. v. Illinois Cent. R. Co., pp. 824, 3406.
Preston, Park v.
Brethrow v. West Jersey, etc., R. Co., p. 2895.
Prettyman v. Oregon R., etc., Co., p. 848.
Previsich v. Butte Elect. R. Co., pp. 2343, 2345, 2649, 2667.
Prevost v. Great Eastern R., pp. 1671, 1672.
Prewitt, Mobile, etc., R. Co. v.
Price, Bissel v.
—— Blue Ridge Light, etc., Co. v.
—— Central, etc., R. Co. v.
—— v. Charleston, etc., Co., pp. 162, 165.
—— v. Chesapeake, etc., R. Co., pp. 1637, 2425.
—— v. Denver, etc., R. Co., p. 1155.
—— v. Hartshorn, pp. 630, 734, 736, 3899.
—— Louisville, etc., R. Co. v.
—— v. Marsh, p. 633.
—— v. Metropolitan St. R. Co., pp. 2671, 2677, 2697, 2763, 2809, 2915, 2920, 3002.
—— Missouri, etc., R. Co. v.
—— v. Morse Ironworks, etc., Co., p. 3952.
—— Nashville, etc., R. Co. v.
—— Ochs v.
—— v. Oswego, etc., R. Co., p. 553.
—— Pennsylvania R. Co. v.
—— v. Pensylvania R. Co., p. 1576.
—— v. Powell, pp. 477, 479, 488, 493, 511, 531, 892, 901.
—— v. St. Louis Transit Co., p. 1824.
—— v. St. Louis, etc., R. Co., 88 S. W. 575, 75 Ark. 479, 112 Am. St. Rep. 79—pp. 1498, 2121, 2322, 2670, 2866.
—— v. St. Louis, etc., R. Co., 72 Mo. 414, 3 Am. & Eng. R. Cas. 365—pp. 1878, 2263.
—— Sams v.
—— Walker v.
Price, etc., Co. v. The Uriel, pp. 821, 848, 1037, 1457.
Prickett v. New Orleans Anchor Line, p. 1537.
Priddy, Wabash R. Co. v.
Pridgeon, United States v.
Priester, Jones v.
Priestly v. Northern Indiana, etc., R. Co., pp. 653, 657, 659, 666, 670.
Prillen, People v.
Primrose v. Western Union Tel. Co., pp. 9, 732, 748, 848, 854, 930, 947, 1073, 2092.
Primus v. Macon R., etc., Co., p. 2575.
Prince, International, etc., R. Co. v.
—— v. International, etc., R. Co., pp. 279, 1542, 1549, 1554, 1558, 1564, 1565, 1572, 1760.
—— Stannard v.
Prince Albert, The.
Prinnell, Norfolk, etc., R. Co. v.
Prinzess Irene, The.
Priscilla, The.
Pritchard, Savannah Elect. Co. v.
Pritchard, etc., Co., Savannah etc., R. Co. v.
Pritchett, Birmingham R., etc., Co. v.
Proctor v. California R. Co., p. 3086.
Proctor, etc., Co. v. United States 188 Fed. 221—pp. 3728, 3800, 3834, 3835.
Proctor, etc., Co. v. United States, 225 U. S. 282, 56 L. Ed. 1091, 32 S. Ct. 761—pp. 3770, 3795, 3797, 3810, 3811, 3833, 3834, 3835, 3836, 3837.
Proctor, Boston, etc., R. Co. v.
—— Illinois Cent. R. Co. v.
—— Landon v.
—— v. Southern California R. Co., pp. 3078, 3079, 3080.
—— Southern R. Co. v.
Prokop v. Gulf, etc., R. Co., pp. 1700, 1800, 2028, 2029.
Propeller Burlington, The.
Propeller Commerce, The.
Propeller Mohawk, pp. 1020, 3941, 4021, 4023.
Propeller Niargara v. Cordes, pp. 1, 10, 208, 1019, 1035, 3888, 3889, 3890, 3896, 3897, 3903, 3904, 3905, 3906, 3908, 3911, 3914, 3915, 4017, 4019, 4020, 4042, 4054.
Propst Lumber Co., Railway Co. v.
Prospect Park, etc., R. Co., Groll v.
Prospert v. Rhode Island Suburban R. Co., p. 2036.
Protection, The.
Prothero v. Citizens' St. R. Co., pp. 1721, 2377.
Proud v. Philadelphia, etc., R. Co., pp. 1832, 1843.
Providence Ins. Co., Wagner v.
Providence, etc., R. Co., Boss v.
—— Hagan v.
—— Knight v.
—— Randall v.
—— Vaughan
—— Washburn, etc., Mfg. Co. v.
Providence, etc., Steamship Co., Clare v.
—— v. Clare, pp. 2810, 2857, 2913.
—— Hill Mfg. Co. v.
—— v. Hill Mfg. Co., pp. 4036, 4037, 4038, 4045, 4049, 4053, 4071, 4072, 4073, 4075, 4077, 4078, 4079, 4083.
—— Levy v.
Province, Chicago, etc., R. Co. v.
Provine, Chicago, etc., R. Co. v.
Pruitt v. Hannibal, etc., R. Co., pp. 230, 277, 278, 287, 742, 1303, 1304.
—— Phillips Co. v.
—— St. Louis, etc., R. Co. v.
—— v. San Pedro, etc., R. Co., pp. 2173, 2342, 2356.
Prussia, The.
Public Service Comm., Cohoes R. Co. v.
—— v. Westchester St. R. Co., pp. 77, 131.
Public Service Corp., Brackney v.
—— Brower v.
—— Budner v.
—— Dunham v.
—— Whilt v.
Public Service R. Co. v. Board p. 87.
—— Donohue v.
—— Hess v.
—— Lehberger v.
—— Lerner v.
Publisher, etc., Co., Lee v.
Puckett, Freeman v.
—— St. Louis, etc., R. Co. v.
—— v. Southern R. Co., pp. 2458 2460.
Pudor v. Boston, etc., Railroad, pp. 3189, 3190.
Pueblo, etc., Refin. Co., Lord v.
Puet Sound Elect. Railway, Blomsness v.
—— v. Felt, pp. 2250, 2360.
—— Harris v.
—— v. Mitchell, p. 128.
—— v. Railroad Comm., pp. 45, 48, 56, 94, 117, 127.
Pugh, Midland Valley R. Co. v.
—— Sheriffs v.
—— United States v.
Pullen, Missouri, etc., R. Co. v.
Pulliam, Louisville R. Co. v.
Pullman Car Co., Indiana v.
—— Stearn v.
Pullman Co., Aplington v.
—— Applington v.
—— Arthur v.
—— Bacon v.
—— Calhoun v.
—— Coleman v.
—— Covington v.
—— Croll v.
—— v. Custer, pp. 3205, 3213, 3214, 3236.
—— v. Czintz, p. 3237.
—— v. Finley, p. 3211.
—— Godfrey v.
—— v. Green, pp. 3123, 3215, 3219, 3221.
—— v. Haight, pp. 3238, 3239.
—— Hill v.
—— v. Hoyle, pp. 2613, 3210, 3229, 3240.
—— Ingraham v.
—— Irving v.
—— v. Kelly, pp. 3201, 3208, 3210.
—— v. Krauss, pp. 3203, 3204, 3207, 3239, 3240.
—— v. Linke, p. 3544.
—— v. Lutz, pp. 1909, 3203, 3210 3240, 3243.
—— Meyers v.
—— Myers v.
—— v. Norton, pp. 3208, 3209, 3226, 3228, 3231.
—— v. Pennock, p. 3243.
—— v. Riley, pp. 3203, 3205, 3206, 3210, 3229, 3230.
—— v. Schaffner, pp. 3123, 3215, 3222, 3231.
—— v. Schober, pp. 3232, 3235, 3237, 3239.
—— Smith v.
—— Springer v.
—— v. Stern, p. 3209.
—— v. Vanderhoeven, pp. 3123, 3124, 3127, 3129, 3221, 3222, 3225, 3229, 3232, 3233, 3234.
—— Weingart v.
—— Wilkins v.
—— v. Willett, pp. 3041, 3205, 3242, 3243.
Pullman Palace Car Co. v. Adams, 120 Ala. 581, 24 So. 921, 45 L. R. A. 767, 74 Am. St. Rep. 53—pp. 3201, 3202, 3214, 3217, 3218, 3219, 3220, 3222, 3224, 3225, 3229, 3231, 3235, 3236.
—— v. Adams, 30 So. 757, 78 Miss. 814, 84 Am. St. Rep. 647—p. 3580.
—— Aircy v.
—— v. Arents, pp. 3217, 3230, 3234.
—— v. Bales, 80 Tex. 211, 15 S. W. 785—p. 3210.
—— v. Bales (Tex.), 14 S. W. 855—p. 3207.
—— v. Barker, pp. 1495, 1496, 3242.
—— Belden v.
—— v. Booth, pp. 2563, 3206, 3212, 3228, 3231, 3232, 3243.
—— v. Cain, pp. 3205, 3206, 3214, 3232.
—— Calhoun v.
—— Campbell v.
—— Cassedy v.
—— Chamberlain v.
—— Cooney v.
—— Dargan v.
—— Edmundson v.
—— Falls River, etc., Mach. Co. v.
—— Florida v.
—— v. Fowler, pp. 3206, 3240, 3242.
—— v. Freundenstein, p. 3231.
—— v. Gardner, pp. 3217, 3218.
—— v. Gavin, pp. 3202, 3215, 3218, 3220, 3228.
—— v. Gaylord, 6 Ky. L. Rep. 279—p. 3216.
—— v. Gaylord, 9 Ky. L. Rep. 58—pp. 3201, 3202, 3215, 3217, 3219, 3221, 3222, 3224, 3230.

Pullman Palace Car Co., Hampton v.
—— Heenrich v.
—— v. Hocker, pp. 3207, 3212, 3214, 3226, 3228, 3235, 3236, 3242, 3243.
—— v. Hunter, pp. 3222, 3238.
—— v. Lawrence, pp. 3201, 3202, 3203, 3210.
—— v. Lee, pp. 3204, 3212.
—— Lemon v.
—— v. Lowe, pp. 3202, 3215, 3223.
—— v. McDonald, pp. 3241, 3242.
—— v. Marsh, pp. 3204, 3207.
—— v. Martin, pp. 3215, 3217, 3229.
—— v. Matthews, pp. 3201, 3202, 3215, 3218, 3220, 3224, 3225, 3235.
—— Morrow v.
—— v. Nelson, pp. 3206, 3231, 3243.
—— Nevin v.
—— Pfaelzer v.
—— v. Pollock, pp. 3146, 3147, 3201, 3215, 3218, 3221, 3230.
—— v. Reed, pp. 3098, 3204, 3213, 3241, 3243.
—— Scaling v.
—— v. Smith, 73 Ill. 360, 24 Am. Rep. 258—pp. 3201, 3202, 3214, 3215, 3216.
—— v. Smith, 79 Tex. 468, 14 S. W. 993, 23 Am. St. Rep. 356, 13 L. R. A. 215—pp. 1910, 3211, 3230, 3231.
—— Stevenson v.
—— v. Taylor, p. 3205.
—— Tracy v.
—— Welch v.
—— Whitney v.
—— Williams v.
—— v. Woods, p. 3233.
Pullman Sleeping Car Co. v. Hatch, pp. 3215, 3216, 3235.
Pullman Southern Car Co. v. Gaines, p. 3580.
—— v. Nolan, p. 3580.
—— Pickard v.
—— Tennessee v.
—— Simms v.
Pullman, etc., Car Co., Chicago, etc., R. Co. v.
Pullman's Palace Car Co., Allen v.
—— Barrott v.
—— Central Transp. Co. v.
—— v. Commonwealth, No. 1, 107 Pa. 148—p. 3580.
—— v. Commonwealth, No. 2, 107 Pa. 156—p. 3580.
—— Duval v.
—— v. Ehrman, p. 3214.
—— v. Fielding, p. 3208.
—— v. Hall, pp. 3201, 3202, 3214, 3215, 3216, 3217.
—— v. Harvey, pp. 3215, 3220, 3231.
—— Hatch v.
—— v. Hayward, pp. 3556, 3680.
—— Hughes v.
—— Kates v.
—— v. King, pp. 3202, 3203, 3212, 3238, 3241.
—— Lawrence v.
—— McMurray v.
—— v. Martin, pp. 3220, 3221.
—— v. Pennsylvania, pp. 3551, 3552, 3555, 3556, 3557, 3559, 3571, 3572, 3580, 3584, 3590, 3591.
—— Rohrback v.
Pumphrey, Baltimore, etc., R. Co. v.
—— St. Louis, etc., R. Co. v.
Pural, Chicago City R. Co. v.
Purcell v. Richmond, etc., R. Co., pp. 1851, 1852, 2562, 3565, 3054, 3055.
—— v. St. Paul City R. Co., pp. 1697, 1981.
—— Southern Exp. Co. v.
Purcell v. Southern Exp. Co., pp. 412, 587, 775, 818, 820, 945, 948, 1003, 1026, 1043.
Purdy, Erie R. Co. v.
—— v. Erie R. Co., p. 3500.
—— North Jersey St. R. Co. v.
Purifoy, St. Louis, etc., R. Co. v.
Purington-Kimball Brick Co. v. Eckman, p. 2346.
Purinton, Van Buskirk v.
Puritan Coal Min. Co. v. Pennsylvania R. Co., pp. 225, 228, 3637, 3645, 3840.
Purnell, Alabama, etc., R. Co. v.
Purple v. Union Pac. R. Co., pp. 1543, 1546, 1551, 1553, 1554, 1569.
Purtell v. Ridge Ave. Pass. R. Co., p. 2255.
Purvis v. Atlanta, etc., R. Co., pp. 2052, 3021, 3022.
—— Pennsylvania Co. v.
Putnam v. Broadway, etc., R. Co., 36 N. Y. Super. Ct. 195—pp. 2417, 2420.
—— v. Broadway, etc., R. Co., 55 N. Y. 108, 15 Abb. Prac., N. S., 383, 14 Am. Rep. 190—pp. 1497, 1498, 2030.
—— v. Furnam, p. 3887.
—— v. Tillotson, p. 304.
—— Vicksburg, etc., R. Co. v.
Pym, Sweet v.
Pyman Steamship Co. v. Mexican Cent. R. Co., 164 Fed. 441—p. 3954.
—— v. Mexican Cent. R. Co., 169 Fed. 281, 94 C. C. A. 557—p. 3958.,
P. W. & B. R. Co., Mullarkey v.
P. & L. E. R. Co. v. Bishop, pp. 1490, 1576.
P. & O. Ry. Co., Pennsylvan a Millers State Ass'n v.
P. & R. R. Co., Hill v.

Q

Quackenbush v. Chicago, etc., R. Co., pp. 1755, 1990, 2168.
Quagliana v. Jersey, etc., St. R. Co., p. 2814.
Quaife v. Chicago, etc., R. Co., pp. 1798, 1871.
Quanah, etc., R. Co. v. Drummond, p. 700.
Quantz v. Southern R. Co., pp. 1538, 1539, 2506.
Quarles, Alabama, etc., R. Co. v.
Quarman v. Burnett, p. 2076.
Quarrier v. Baltimore, etc., R. Co., pp. 278, 839, 849.
Quayle, Washington, etc., R. Co. v.
Quebedeaux, Freeman v.
Queen, The.
Queen City Coal Co., Louisville, etc., R. Co. v.
Queen of the Pacific, pp. 326, 790, 852, 930, 945, 1012, 1013, 1073, 1083.
Queen of the Pacific, The.
Querini Stamphalia, The.
Quested v. Newburyport, etc., R. Co., p. 2089.
Quick, Louisville, etc., R. Co. v.
Quigley v. Central Pac. R. Co., Fed. Cas. No. 11, 510, 5 Sawy. 107—p. 1610.
—— v. Central Pac. R. Co., 11 Nev. 350, 21 Am. Rep. 757—pp. 2409, 2429, 2430, 3078, 3079, 3083, 3084.
Quilhot, Galveston, etc., R. Co. v.
Quimby v. Bee Bldg. Co., pp. 1722, 1750, 2165, 2983.
—— v. Boston, etc., R. Co., 69 Me. 340—p. 2680.
—— v. Boston, etc., R. Co., 150 Mass. 365, 23 N. E. 205, 40 Am. & Eng. R. Cas. 693, 5 L. R. A. 846—pp. 986, 1642, 2095, 2104.
—— v. Vanderbilt, pp. 1612, 3160, 3168, 3315, 3987.
Quinby v. Union Pac. R. Co., p. 1340.
Quincy R. Co., Metropolitan R. Co. v.
Quincy, etc., R. Co., Beck v.
—— Bussell v.
—— Gates v.
—— Knight v.
—— Leas v.
—— Meriwether v.
—— Ratcliff v.
—— Ratliff v.
—— Ratliff Bros. v.
—— Richmond v.
—— Shohoney v.
—— Thompson v.
—— Van Buskirk v.
—— Vencill v.
Quincy, etc., St. R. Co., Spaulding v.
Quinkert, Kentucky, etc., Bridge Co. v.
Quinlan v. Newton, etc., St. R. Co., p. 2230.
—— v. Utica, p. 2737.
Quinn v. Illinois Cent. R. Co., p. 2182.
—— Louisville, etc., R. Co. v.
—— v. Louisville, etc., R. Co., pp. 2025, 2030.
—— v. Metropolitan St. R. Co., pp. 2143, 2311, 2391, 2393, 2954.
—— Missouri, etc., R. Co. v.
—— v. Pennsylvania R. Co., pp. 1448, 1461.
—— v. Philadelphia Rapid Transit Co., p. 2153.
—— v. Shamokin, etc., R. Co., pp. 2128, 2261.
—— v. South Carolina R. Co., p. 2203.
—— South Covington, etc., R. Co. v.
Quisenberry, Lake Erie, etc., R Co. v.
Quo, Savannah, etc., R. Co. v.

R

Raben v. Central Iowa R. Co., 73 Iowa 579, 35 N. W. 645, 33 Am. & Eng. R. Cas. 520, 5 Am. St. Rep. 708—pp. 1899, 1911.
—— v. Central Iowa R. Co., 74 Iowa 732, 34 N. W. 621—pp. 2249, 2284, 2367.
Rabinowitz v. Cunard Steamship Co., pp. 3979, 3980.
Rabon v. Atlantic, etc., R. Co., p. 106.
Racer, Pittsburgh, etc., R. Co. v.
Racine Boat Co., Reed v.
Rackusin, Texas, etc., R. Co. v.
Radbourne, Chesapeake, etc., R. Co. v.
Radel Co. v. Borches, p. 2161.
Radetsky, Florence, etc., R. Co. v.
Radford, Chicago, etc., R. Co. v.
—— Illinois Cent. R. Co. v.
Radley v. Columbia Southern R. Co., pp. 1502, 1510, 1512, 1513, 1555, 1556, 1557, 1558, 2207.
Rae, Galena, etc., R. Co. v.
Ragan v. Aiken, pp. 74, 1136, 1180, 1183, 1189.
Rager v. Pennsylvania R. Co., pp. 2125, 2179.
Ragland v. Norfolk, etc., Steamboat Co., pp. 3991, 4006.
Ragsdale, Baltimore, etc., R. Co. v.
—— Railroad Co. v.
—— Railway v.
—— v. Southern R. Co., 46 S. E. 832, 119 Ga. 627—p. 1474.
—— v. Southern R. Co., 69 S. C. 429, 48 S. E. 466—p. 832.
—— v. Southern R. Co., 51 S. E. 540, 72 S. C. 120—p. 836.
—— Vicksburg, etc., R. Co. v.
Rahilly v. St. Paul, etc., R. Co., pp. 1617, 2438, 2492.
Rahrer, In re.

Railey Bros., Southern R. Co. v.
Railroad v. Bell, p. 630.
—— v. Craig, pp. 931, 946, 949, 977, 979, 997.
—— v. Dies, pp. 782, 783, 953, 1021, 1267, 1268, 1269, 1276.
—— v. Gilbert, etc., Co., pp. 931, 946, 949, 970, 972, 973, 978, 979, 980.
—— v. Hailey, pp. 1569, 2521.
—— Hart v.
—— v. Meacham, p. 2521.
—— v. Mitchell, 58 Tenn. (11 Heisk.) 400—pp. 822, 1684, 1687, 2666.
—— v. Mitchell, 98 Tenn. 27, 31, 40 S. W. 72—pp. 1763, 1887, 1895, 1896, 1972.
—— v. Odil, pp. 501, 503, 505, 506, 3298.
—— State v.
—— v. Stockard, p. 3329.
—— Warfield v.
Railroad Comm. v. Adams Exp. Co., pp. 156, 535, 536.
—— Alabama, etc., R. Co. v.
—— v. Ann Arbor R. Co., p. 699.
—— Black Diamond Coal, etc., Co. v.
—— Central, etc., R. Co. v.
—— v. Central, etc., R. Co., 159 Ala. 550, 49 So. 237—p. 92.
—— v. Central, etc., R. Co., 95 C. C. A. 117, 170 Fed. 225—p. 130.
—— Chicago, etc., R. Co. v.
—— Galveston Chamber of Commerce v.
—— v. Galveston Chamber of Commerce, pp. 56, 115, 124.
—— Great Northern R. Co. v.
—— Gulf, etc., R. Co. v.
—— v. Hucking Valley R. Co., 79 O. St. 419, 87 N. E. 548—pp. 127, 128.
—— v. Hucking Valley R. Co., 82 O. St. 25, 91 N. E. 865—pp. 91, 125.
—— Hocking Valley Railway v.
—— v. Houston, etc., R. Co., pp. 21, 24, 25, 121.
—— International, etc., R. Co. v.
—— Kansas, etc., R. Co. v.
—— v. Louisiana R., etc., Co. v.
—— Louisiana, etc., R. Co. v.
—— Louisville, etc., R. Co. v.
—— Minneapolis, etc., R. Co. v.
—— Morgan, etc., Co. v.
—— Morgan's, etc., Steamship Co. v.
—— Northern Pac. R. Co. v.
—— Portland R., etc., Co. v.
—— Puget Sound Elect. Railway v.
—— v. Rosenbaum Grain Co., pp. 129, 3498.
—— Seaboard Air Line R. Co. v.
—— Southern Indiana R. Co. v.
—— Southern Pac. Co. v.
—— Southern R. Co. v.
—— State v.
—— Texas, etc., R. Co. v.
—— v. Texas, etc., R. Co. (Tex. Civ. App.), 140 S. W. 829—pp. 23, 3524.
—— v. Texas, etc., R. Co., 229 U. S. 336, 33 S. Ct. 837—p. 3740.
—— Thompson v.
—— Vandalia R. Co. v.
—— v. Weld, 96 Tex. 394, 73 S. W. 529—pp. 45, 83, 227, 228.
—— v. Weld (Tex. Civ. App.), 68 S. W. 1117—pp. 45, 120.
—— Western Railway v.
—— v. Worthington, pp. 3491, 3492, 3495, 3740.
Railroad Comm. Cases, pp. 3480, 3481, 3482, 3491, 3497, 3498, 3503, 3511.
Railroad Commissioner v. Hocking Valley R. Co., p. 3643.
Railroad Comm'rs v. Atlantic, etc., R. Co., 56 Fla. 525, 47 So. 870—p. 138.
Railroad Comm'rs v. Atlantic, etc., R. Co., 59 Fla. 612, 52 So. 4—pp. 31, 67, 82, 501.
—— v. Atlantic, etc., R. Co., 61 Fla. 799, 54 So. 900—pp. 23, 33, 123, 3485.
—— v. Atlantic, etc., R. Co. (Fla.), 60 So. 186—p. 126.
—— v. Atlantic, etc., R. Co., 54 S. E. 224, 74 S. C. 80—pp. 3514, 3516.
—— v. Florida, etc., R. Co., 57 Fla. 522, 49 So. 43—pp. 20, 30, 104.
—— v. Florida, etc., R. Co., 58 Fla. 524, 50 So. 425—pp. 104, 117, 121, 123, 127, 219.
—— v. Florida, etc., R. Co., 64 Fla. 112, 59 So. 385—pp. 42, 85, 86, 126.
—— v. Louisville, etc., R. Co., 57 Fla. 526, 49 So. 39—pp. 23, 29.
—— v. Louisville, etc., R. Co., 62 Fla. 315, 57 So. 175—pp. 31, 32, 33, 57, 124, 3503.
—— v. Louisville, etc., R. Co. (Fla.), 57 So. 673—pp. 32, 123, 3502.
—— Missouri Pac. R. Co. v.
—— v. Portland, etc., R. Co., pp. 98, 210.
Railroad Co. v. Anderson, pp. 1683, 1726, 1769, 1799.
—— v. Androscoggins Mills, pp. 739, 1014.
—— Bennett v.
—— v. Brown, p. 1948.
—— Collett v.
—— Converse v.
—— Duncan v.
—— v. Fraloff, pp. 190, 193, 195, 197, 3113, 3115, 3116, 3123, 3129, 3130, 3132, 3152, 3153, 3161, 3162, 3167.
—— v. Fuller, pp. 35, 72, 3418, 3419, 3420, 3445, 3448, 3493, 3498, 3499, 3500.
—— v. Hanning, p. 2506.
—— v. Harris, p. 2091.
—— v. Hatch, p. 902.
—— Hatten v.
—— v. Hurst, p. 767.
—— v. Husen, pp. 3420, 3480, 3564.
—— Insurance Co. v.
—— v. Jones, pp. 1682, 2163, 2208.
—— v. Kassen, pp. 2113, 2116, 2117.
—— v. Lindsay, pp. 3871, 3948.
—— v. Lockwood, pp. 1, 2, 4, 214, 238, 244, 930, 931, 930, 952, 953, 977, 1089, 1756, 1757, 1761, 2092, 2098, 4024, 4057.
—— Longmire v.
—— McCollin v.
—— McElroy v.
—— v. Manufacturing Co., pp. 208, 930, 958, 960, 961, 964, 965, 1003, 1004, 1035, 3258, 3262, 3264, 3286, 4025.
—— Maryland v.
—— v. Maryland (U. S.), 20 Wall. 643, 22 L. Ed. 446—p. 3871.
—— v. Maryland (U. S.), 21 Wall. 456, 22 L. Ed. 678—pp. 34, 36, 120, 3484, 3497, 3563.
—— v. Michie, p. 1572.
—— v. O'Donnell, pp. 610, 624, 728, 733, 749, 753, 766.
—— Parker v.
—— v. Peniston, pp. 37, 3553.
—— Peters, etc., Co. v.
—— v. Pollard, pp. 1722, 2353, 2670.
—— v. Pratt, pp. 782, 783, 784, 930, 947, 952, 953, 960, 961, 3251, 3252, 3253, 3258, 3260, 3262.
—— v. Ragsdale, pp. 653, 666, 950.
—— v. Ray, p. 2932.
—— v. Reeves, p. 732.
Railroad Co. v. Richmond (U. S.), 19 Wall. 584, 22 L. Ed. 173—p. 3448.
—— v. Richmond, 96 U. S. 521, 24 L. Ed. 734—pp. 34, 59, 60, 3481, 3503.
—— Shaw v.
—— v. Skillman, pp. 1135, 2420, 2425, 2429, 2533.
—— v. Smith, p. 2516.
—— v. Varnell, pp. 726, 732, 748, 752.
—— v. Walbrath, p. 2685.
—— v. Wisner, p. 981.
Railroad Cos., Hall v.
Railroad Transfer Co., Heinz v.
Railroad, etc., Comm. v. Cargill Co., p. 3590.
—— Railway Transfer Co. v.
Railroads, Bird v.
Railway, Waller v.
—— Watson v.
—— Webber v.
Railway Co., Baxendale v.
—— v. B'Shears, p. 98.
—— v. Dorsey Fuel Co., p. 700.
—— Kelly v.
—— v. McCarthy, pp. 3251, 3294, 3297, 3830.
—— v. Manchester Mills, pp. 972, 977, 979, 1684, 1687.
—— v. Propst Lumber Co., p. 700.
—— v. Sheppard, p. 1076.
—— v. Simon, pp. 759, 760, 762, 1076.
—— v. Sowell, pp. 949, 974, 979, 1043, 1062, 1063, 1064, 1065, 1083.
—— v. Stevens, pp. 947, 952, 953, 2092, 2097, 2100.
—— v. Vallely, pp. 2417, 2420, 2480, 2489, 2533.
—— Walling v.
—— v. Wilson, p. 1569.
—— v. Wynn, pp. 7, 949.
Railway Comm'rs, Southeastern R. Co. v.
Railway Gross Receipts, State Tax on.
Railway Transfer Co. v. Railroad, etc., Comm., p. 120.
Railway, etc., Assur. Co., Northrup v.
Rainbolt, Bedford, etc., R. Co. v.
Raine, Cincinnati, etc., R. Co. v.
Raines v. Chesapeake, etc., R. Co., pp. 1522, 1876.
Rainey v. Grand Trunk R. Co., pp. 2689, 2816.
—— Lehigh Valley R. Co. v.
—— Seaboard Air Line Railway v.
—— Union Pac. R. Co. v.
—— Zimmerman v.
Rainier Mill, etc., Co., Washington Marine Co. v.
Kaiordon, Pennsylvania R. Co. v.
Raleigh Iron Works v. Southern R. Co., pp. 3495, 3545.
Raleigh, etc., R. Co., Browne v.
—— Burwell v.
—— Cooper v.
—— Currie v.
—— Grant v.
—— Hinshaw v.
—— Knott v.
—— Lee v.
—— v. Lowe, pp. 356, 357, 360, 371, 376, 548.
—— Porter v.
—— v. Swanson, pp. 3699, 3752.
—— Vaughan v.
—— Washington v.
—— Watkins v.
Ralli v. New York, etc., Steamship Co., pp. 3935, 4052, 4053, 4068.
—— v. Troop, pp. 4021, 4022.
Ralph v. Chicago, etc., R. Co., p. 489.
Ralston, Brown v.
—— Chicago, etc., R. Co. v.
Rambo, Arkansas Mid. R. Co. v.
—— Baltimore, etc., R. Co. v.

Ramey, Southern Exp. Co. v.
—— Tallulah Falls R. Co. v.
Raming v. Metropolitan St. R. Co., pp. 1504, 1587, 1588, 2164, 2535, 2536, 2648.
Ramjak v. Austro-American Steamship Co., pp. 1722, 1822, 3990.
Ramm v. Minneapolis, etc., R. Co., pp. 1510, 2863.
Ramsay v. Pottstown & K. St. R. Co., p. 2192.
Ramsden v. Boston, etc., R. Co., pp. 2043, 2048, 2049, 2064.
Ramsey, Philadelphia, etc., R. Co. v.
—— United States v.
Ramson v. Metropolitan St. R. Co., p. 2165.
Ranchau v. Rutland R. Co., pp. 3164, 3185.
Rand v. Boston Elevated R. Co., pp. 1888, 1892, 2329, 2816, 2878.
—— v. Butte Elect. R. Co., pp. 2770, 2867, 2914, 3010.
—— Houston, etc., R. Co. v.
—— v. Merchant's Dispatch Transportation Co., p. 958.
—— Shattuck v.
Randall, Augusta, etc., R. Co. v.
—— v. Brodhead, p. 3967.
—— v. Frankford, etc., R. Co., p. 2026.
—— v. Lynch, p. 717.
—— v. New Orleans, etc., R. Co., pp. 1626, 1634, 2444, 2451.
—— v. Providence, etc., R. Co., p. 2799.
—— v. Richmond, etc., R. Co., pp. 233, 234, 3272.
—— v. Sprague, p. 709.
—— v. Sterling, etc., R. Co., p. 2677.
Randell v. Chicago, etc., R. Co., pp. 1559, 2472, 2484, 2653, 2855, 2856.
—— Denison, etc., R. Co. v.
Randle, St. Louis, etc., R. Co. v.
—— Texas, etc., R. Co. v.
Randolph, Chicago, etc., R. Co. v.
—— Dallas Consol. Tract. R. Co. v.
—— v. Wiley, p. 3966.
Raney, Missouri, etc., R. Co. v.
Rangenier v. Seattle Elect. Co., pp. 2121, 2233, 2384.
Rankin, Cole v.
—— v. Memphis, etc., Packet Co., pp. 569, 889, 1151, 1154, 1168.
—— v. Pacific Railroad, pp. 894, 899.
Ranney v. St. Johnsbury, etc., R. Co., pp. 2294, 2295, 2728.
Ranous v. Seattle Elect. Co., pp. 1996, 1998, 2355.
Ransberry v. North American Transp., etc., Co., pp. 3045, 3046.
Ransom, Chicago, etc., R. Co. v.
—— Northwestern Steamship Co. v.
Ransome v. Eastern, etc., R. Co., p. 1181.
Raphal v. Pickford, p. 614.
Rapid R. Co., Brown v.
Rapid Trans. R. Co. v. Smith, pp. 2604, 2614.
—— v. Strong, pp. 1866, 1904, 1978, 1979, 1997, 2857.
Rapp, Relf v.
Rappahannock, The.
Rappaport v. Whites' Exp. Co., pp. 1019, 1067.
Raritan River R. Co. v. Middlesex, etc., Tract. Co., pp. 113, 115, 116.
Rash & Co., Louisville, etc., K. Co. v.
Rasmussen v. Home Industry Iron Works, p. 3950.
Rathbone, Baltimore, etc., Co. v.
—— Baltimore, etc., R. Co. v.
—— v. Neal, pp. 607, 848.
—— v. New York, etc., R. Co., pp. 956, 1020.
Rathbone v. Oregon R. Co., p. 1553.
—— v. Union R. Co., pp. 1880, 1891.
Rathbun v. Citizens' Steamboat Co. (N. Y.), 1 City Ct. R. 107—p. 571.
—— v. Citizens' Steamboat Co., 76 N. Y. 376, 32 Am. Rep. 321—p. 571.
Rather, Gulf, etc., R. Co. v.
—— Vincent v.
Rathgebe v. Pennsylvania R. Co., p. 2324.
Ratliff v. Quincy, etc., R. Co., pp. 1304, 1305, 1308, 3335.
Ratliff Bros. v. Quincy, etc., R. Co., p. 1301.
Ratley, St. Louis, etc., R. Co. v.
Ratner v. Chicago City R. Co., pp. 2895, 2924.
Rattan v. Central Elect. R. Co., p. 2682.
Ratterec v. Galveston, etc., R. Co., pp. 1534, 1695, 2646.
Ratterman v. Western Union Tel. Co., pp. 3551, 3559, 3566, 3567, 3568.
Ratzer v. Burlington, etc., R. Co., pp. 309, 355, 373, 377, 378, 379, 3273, 3275.
Rau v. Bosworth, pp. 522, 523, 888, 3259.
Raub v. Los Angeles Terminal R. Co., p. 1883.
Rauch v. Lloyd, p. 2607.
Ravensdale, The.
Rawitzky v. Louisville, etc., R. Co., pp. 1623, 1628, 2447.
Rawlings v. Wabash R. Co., pp. 1855, 1864, 2848, 2913.
Rawls v. Deshler, p. 1222.
Raworth v. Northern Pacific R. Co., p. 3679.
Rawson v. Holland (N. Y.), 47 How. Prac. 292, 5 Daly 155—p. 500.
—— v. Holland, 59 N. Y. 611, 17 Am. Rep. 394—pp. 886, 896, 901, 3345.
—— v. Kansas City Elev. R. Co., p. 2593.
—— v. Pennsylvania R. Co. (N. Y.), 2 Abb. Prac., N. S., 220—p. 3132.
—— v. Pennsylvania R. Co., 48 N. Y. 212, 8 Am. Rep. 543—pp. 1007, 1612, 3163, 3165.
Ray v. Aberdeen, etc., R. Co., p. 2363.
—— v. Chicago, etc., R. Co., pp. 1695, 1993.
—— v. Cortland, etc., Tract. Co., pp. 2460, 2475.
—— Indianapolis St. R. Co. v.
—— Louisville, etc., R. Co., v.
—— Railroad Co. v.
—— St. Louis, etc., K. Co. v.
—— v. Southern R. Co., p. 165.
—— State v.
—— v. United Tract. Co., pp. 196, 2620, 3112.
Ray Bros., Texas, etc., R. Co. v.
Rayburn, Chicago, etc., R. Co. v.
Raymer, South Covington, etc., R. Co. v.
Raymond v. Burlington, etc., R. Co., pp. 1718, 2285.
—— Northern Pac. R. Co. v.
—— v. Portland R. Co., p. 2956.
—— Schwinger v.
—— v. Tyson, pp. 3866, 3868, 3944, 3946, 3947.
Raynard, Chillicothe v.
Rayner, Harris v.
Raynes, Phillips v.
Raynor v. Wilmington, etc., R. Co., p. 2630.
Rea v. Media, etc., Elect. R. Co., pp. 2329, 2828.
—— Texas, etc., R. Co. v.
—— Illinois Cent. R. Co. v.
Rea v. St. Louis, etc., R. Co., pp. 281, 627, 728, 733, 734, 742, 746, 749, 828, 844, 1036, 1037, 1047.
—— v. Spaulding, 30 N. Y. 630, 86 Am. Dec. 426—pp. 619, 733, 742, 743, 749, 775.
—— v. Spaulding, 18 N. Y. Super. Ct. 395—pp. 738, 767.
Readhead v. Midland R. Co., pp. 1682, 1845.
Reading v. Chicago, etc., R. Co., p. 1335.
—— v. Donovan, pp. 469, 470.
—— v. United Tract. Co., p. 78.
Reading City Pass. R. Co., Barre v.
—— v. Eckert, p. 2694.
Reading Railroad v. Pennsylvania, p. 3561.
Reading, etc., St. R. Co., Harriman v.
Ready v. Steamboat Highland Mary, p. 3912.
Reagan, Adams Exp. Co. v.
—— v. Farmers' Loan, etc., Co., 154 U. S. 362, 38 L. Ed. 1014, 14 S. Ct. 1047—pp. 34, 39, 45, 48, 58, 60, 61, 115, 116, 119, 121, 122, 124, 129, 130, 133, 3668.
—— v. Farmers' Loan, etc., Co., 154 U. S. 420, 38 L. Ed. 1031, 14 S. Ct. 1062—pp. 34, 38, 39, 119, 124, 129, 133.
—— v. Mercantile Trust Co., 154 U. S. 413, 38 L. Ed. 1028, 14 S. Ct. 1060—pp. 119, 129, 3497, 3591.
—— v. Mercantile Trust Co., 154 U. S. 418, 38 L. Ed. 1030, 14 S. Ct. 1062—pp. 34, 37, 39, 119, 124, 129, 130, 133.
—— v. St. Louis Trans. Co., pp. 2928, 2996.
—— St. Louis, etc., R. Co. v.
Real Estate Trust, etc., Co. v. Gwyn, p. 2266.
Realm, Wentworth v.
Rearden v. St. Louis, etc., R. Co. (Mo.), 114 S. W. 961—pp. 1830, 1866, 1928, 2245.
—— v. St. Louis, etc., R. Co., 215 Mo. 105, 114 S. W. 961—pp. 2321, 2350, 2915, 2987, 2996.
Reardon, Hatch v.
—— Pollard v.
Reary v. Louisville, etc., R. Co., pp. 1548, 1552, 1981, 2502, 2520, 2541.
Reason v. Detroit, etc., R. Co., pp. 852, 881, 3284, 3285, 3394, 3414.
—— Houston, etc., R. Co. v.
Reasor v. Peducah, etc., Ferry Co., pp. 10, 1498, 1500, 2475, 2709, 3078.
Reaves v. Waterman, pp. 729, 733.
Rebecca, The.
Reber v. Bond, p. 1758.
—— v. Pittsburg, etc., Tract. Co., pp. 1987, 2126, 2179, 2888, 2889.
Receivers v. Armstrong, pp. 1277, 1967, 1990, 2217.
—— Dobson v.
—— v. Olive, p. 1314.
—— v. Wright, p. 1281.
Receivers, etc., R. Co. v. Graves, p. 448.
Record, Little Rock, etc., K. Co. v.
Rector, Wabash, etc., R. Co. v.
Red Bluff Hotel Co., Bierce v.
Red River, The.
Red River, etc., R. Co. v. Eastin, p. 228.
—— Long v.
Redburn, Daley v.
Redd v. Muscogee R. Co., p. 2560.
Redding v. South Carolina R. Co., pp. 2037, 2038, 2665.
—— Southern Pac. Co. v.
Reddington v. Philadelphia Tract. Co., p. 2158.

Redeker, Gulf, etc., R. Co. *v.*
Redeny, Spalding *v.*
Redfern, Arnott *v.*
Redfield *v.* Oakland, etc., R. Co., p. 1984.
—— Walrath *v.*
Redhing *v.* Central R. Co., pp. 2325, 2879.
Redigan *v.* Boston, etc., R. Co., pp. 2505, 2506.
Redin *v.* Alton, etc., Tract. Co., p. 2752.
Redington *v.* Harrisburg Tract. Co., p. 2875.
Redman, Pacific Exp. Co. *v.*
Redmon *v.* Chicago, etc., R. Co., pp. 796, 3340.
—— *v.* Metropolitan St. R. Co., pp. 1487, 2603, 2691, 2692, 2975.
—— State *v.*
Redmond *v.* Liverpool, etc., Steamboat Co., pp. 527, 566.
Redmond *v.* Liverpool, etc., Steamship Co., pp. 536, 545.
Redner *v.* Lehigh, etc., R. Co., p. 1514.
Redus, Missouri, etc., R. Co. *v.*
Reed, Ames *v.*
—— *v.* Axtell, p. 2270.
—— B. & O. R. Co. *v.*
—— Bell *v.*
—— *v.* Chicago, etc., R. Co., pp. 1643, 1667.
—— Denver Tramway Co. *v.*
—— *v.* Dick, p. 541.
—— *v.* Duluth, etc., R. Co., p. 1870.
—— *v.* Great Northern R. Co., pp. 2436, 2849.
—— Humphreys *v.*
—— *v.* Louisville, etc., R. Co., p. 1972.
—— Mace *v.*
—— Newport News, etc., R. Co. *v.*
—— *v.* New York Cent. R. Co., p. 2735.
—— *v.* New York, etc., R. Co., p. 2051.
—— Pennsylvania R. Co. *v.*
—— *v.* Pennsylvania R. Co., p. 2157.
—— *v.* Philadelphia, etc., R. Co., pp. 234, 284, 285, 288, 424, 752, 755, 776.
—— Pullman Palace Car Co. *v.*
—— *v.* Racine Boat Co., pp. 352, 372.
—— *v.* Richardson, pp. 532, 538.
—— *v.* Rome, etc., R. Co., pp. 1349, 1353, 1463.
—— Segura *v.*
——State *v.*
—— *v.* Texas, etc., R. Co., pp. 1628, 1634, 2441.
—— *v.* Trenton, pp. 66, 110.
—— *v.* United States, pp. 731, 736, 3865, 3877, 3898, 3939, 4017.
—— *v.* United States Exp. Co., p. 3359.
—— *v.* Weld, p. 712.
—— *v.* Wilmington Steamboat Co., pp. 727, 732, 748, 752, 765.
—— *v.* Yazoo, etc., R. Co., pp. 2114, 2117, 2299.
Reed Lumber Co. *v.* Lewis, p. 671.
Reeder, Boyle *v.*
—— Texas, etc., R. Co. *v.*
—— *v.* Wells Fargo & Co., pp. 1058, 1071, 1083.
Reem *v.* St. Paul City R. Co., 77 Minn. 503, 80 N. W. 638—pp. 1712, 1952.
—— *v.* St. Paul City R. Co., 84 N. W. 652, 82 Minn. 98—p. 3009.
Reeman, Dallas, etc., R. Co. *v.*
Reems *v.* New Orleans, etc., R. Co., pp. 2694, 2842.
Reese *v.* Detroit United Railway, p. 2890.
Reese *v.* Pennsylvania R. Co., pp. 191, 1597, 1598, 2467, 2468.
Reeside, The.
Reeve *v.* Davis, p. 3865.
Reeves, Brightman *v.*
—— Chesapeake, etc., R. Co. *v.*
—— *v.* Chicago, etc., R. Co., pp. 1708, 2694, 2697, 2763.
—— Georgia R., etc., Co. *v.*
—— Memphis, etc., R. Co. *v.*
—— Mobile, etc., R. Co. *v.*
—— Norfolk, etc., R. Co. *v.*
—— Railroad Co. *v.*
—— *v.* Seaboard, etc., R. Co., pp. 1664, 2777.
—— Southern R. Co. *v.*
—— *v.* Southern R. Co., pp. 2774, 3016.
—— Texas, etc., R. Co. *v.*
—— *v.* Texas, etc., R. Co., pp. 851, 1119, 1359.
Regan *v.* Adams Exp. Co., p. 1290.
—— *v.* Grand Trunk Railway, p. 3304.
—— *v.* St. Louis Trans. Co., p. 2688.
Regner *v.* Glens Falls, etc., St. R. Co., pp. 2408, 2421, 2708.
Rehkoph, Evansville, etc., Packet Co. *v.*
Reibel *v.* Cincinnati, etc., R. Co., pp. 2262, 2612.
Reich, Texas, etc., R. Co. *v.*
Reichmann Interstate Commerce Comm. *v.*
Reid, Denver Tramway Co. *v.*
—— *v.* Evansville, etc., R. Co., pp. 732, 748, 753.
—— Georgia R., etc., Co. *v.*
—— Illinois Cent. R. Co. *v.*
—— Sledge *v.*
—— Southern R. Co. *v.*
—— *v.* Southern R. Co., 149 N. C. 423, 63 S. E. 112—pp. 148, 252, 530, 3517.
—— *v.* Southern R. Co., 150 N. C. 753, 64 S. E. 874—pp. 151, 3517.
—— *v.* Southern R. Co., 153 N. C. 490, 69 S. E. 618—pp. 207, 3259, 3517, 3603, 3745.
—— Texas, etc., R. Co. *v.*
—— *v.* Yazoo, etc., R. Co., pp. 2210, 2380.
Reidman *v.* Brooklyn, etc., R. Co., p. 2836.
Reid Phosphate Co. *v.* Farmers' Fertilizer Co., p. 334.
Reidsville, Piedmont R. Co. *v.*
Reidy *v.* Metropolitan St. R. Co., p. 2815.
Reigle, Parish & Co. *v.*
Reilley, New York, etc., R. Co. *v.*
Reimer *v.* New York, etc., R. Co., p. 2789.
Reineman & Co. *v.* Covington, etc., R. Co., p. 1164.
Reinhart *v.* McDonald, p. 3575.
Reisenleiter *v.* United R. Co., p. 2835.
Reiss *v.* Joline, p. 2798.
—— Texas, etc., R. Co. *v.*
—— *v.* Texas, etc., R. Co., 98 Fed. 533, 39 C. C. A. 149—pp. 540, 3361.
—— *v.* Texas, etc., R. Co., 99 Fed. 1006, 39 C. C. A. 608—p. 3361.
—— *v.* Wilmington City R. Co., pp. 1683, 1874, 1888, 1889, 2248, 2667, 2668, 2778.
Relt, Missouri Pac. R. Co. *v.*
—— *v.* Rapp, pp. 759, 763.
Reliance Transp. Co., Atwood *v.*
Relyea *v.* New Haven Rolling Mill Co., pp. 305, 311, 337, 3879, 3884, 3943.
Remmy, Indianapolis, etc., R. Co. *v.*
Renaud *v.* New York, etc., R. Co., 201 Mass. 553, 38 L. R. A., N. S., 689, 44 R. R. R. 632, 67 Am. & Eng. R. Cas., N. S., 632, 97 N. E. 98—pp. 190, 197, 2293.
Renaud *v.* New York, etc., R. Co., 92 N. E. 710, 206 Mass. 557—pp. 2781, 2878.
—— *v.* New York, etc., R. Co., 210 Mass. 553, 97 N. E. 98, 38 L. R. A., N. S., 689, 67 Am & Eng. R. Cas., N. S., 632, 44 R. R. R. 632—pp. 1495, 1531, 1742, 2122, 2123, 2163, 2172, 2421.
Reneh, Burritt *v.*
Renders *v.* Grand Trunk R. Co., p. 2897.
Re New Brunswick, etc., R., p. 255.
Renfro *v.* Fresno City R. Co., p. 2688.
—— Hall & Co. *v.*
—— Louisville, etc., R. Co. *v.*
—— *v.* Texas Cent. R. Co., p. 1853.
Renfroe, St. Louis, etc., R. Co. *v.*
Renicker, Louisville, etc., R. Co. *v.*
Renneker *v.* South Carolina R Co., pp. 1684, 2113, 2378.
Renney *v.* Webster, M., B. & F. City St. Ry. Co., p. 1764.
Rensselaer, etc., R. Co., Brist e *v.*
—— Pelton *v.*
—— Phillips *v.*
Rensslaer, etc., R. Co., Hart *v.*
Rentz, Seaboard Air Line Railway *v.*
Renz, Augusta, etc., R. Co. *v.*
Rephan, Norfolk, etc., Tract. Co. *v.*
Republic, The.
Reschke *v.* Syracuse, etc., R. Co., pp. 2727, 2869, 2875.
Reul, Mt. Adams, etc., R. Co. *v.*
Reunis, Emerson Co. *v.*
Revalee, Cincinnati, etc., R. Co. *v.*
Revett *v.* Globe Nav. Co., pp. 3876, 3877, 3933.
Rex *v.* Barker, p. 255.
—— *v.* Severn, etc., R. Co., pp. 255, 256.
Rexroad, St. Louis, etc., R. Co. *v.*
Reyman, Chicago, etc., R. Co. *v.*
Reynolds, Bell *v.*
—— *v.* Boston, etc., R. Co., 121 Mass. 291—p. 3409.
—— *v.* Boston, etc., R. Co., 43 N. H. 580—pp. 1214, 1218, 1229, 1230, 1232, 1234, 1235, 1246, 1247, 1248, 1249.
—— *v.* Chicago, etc., R. Co., pp. 145, 170.
—— *v.* Great Northern R. Co., pp. 1110, 1300, 1366, 1376, 1424, 1425, 1430, 1444.
—— Kansas Pac. R. Co. *v.*
—— Louisville, etc., R. Co. *v.*
—— McGhee *v.*
—— *v.* New York, etc., R. Co., p. 593.
—— Pacific Coast Co. *v.*
—— *v.* Pacific Elect. R. Co., p. 1644.
—— Peoria, etc., R. Co. *v.*
—— Pittsburgh, etc., R. Co. *v.*
—— *v.* Pittsburgh, etc., R. Co., p. 2455.
—— *v.* Richmond, etc., R. Co., pp. 1687, 1720, 2159, 2669.
—— Robertson *v.*
—— *v.* St. Louis, etc., R. Co., pp. 1539, 2084.
—— *v.* Scott, p. 352.
—— *v.* Seaboard Air Line Railway, p. 1197.
Reynolds Bros., Western Union Tel. Co. *v.*
Rhea *v.* Minneapolis St. R. Co., pp. 2672, 2858.
Rhoades, International, etc., R. Co. *v.*

Rhoads *v.* Cornwall, etc., R. Co., pp. 1509, 1524, 2860.
—— South Florida R. Co. *v.*
Rhode Island Co., Arnold *v.*
—— Betz *v.*
—— Brunnchow *v.*
—— Canham *v.*
—— Fagan *v.*
—— Garvey *v.*
—— Lee *v.*
—— McCauley *v.*
—— Marsh *v.*
—— Martin *v.*
—— Murray *v.*
—— O'Clair *v.*
—— Parrent *v.*
—— Riley *v.*
—— Simone *v.*
—— Tilden *v.*
—— Tucker *v.*
—— Wilbour *v.*
—— Wilbur *v.*
—— Wilcox *v.*
Rhode Island Suburban R. Co., Enos *v.*
—— Prospert *v.*
—— Verrone *v.*
Rhode Island, etc., R. Co., Enos *v.*
—— Staples *v.*
Rhodes, Chicago, etc., R. Co. *v.*
—— *v.* Iowa, pp. 2423, 3538, 3539.
—— *v.* Louisville, etc., R. Co., pp. 945, 1377.
—— *v.* Newhall, pp. 338, 339, 347, 3884.
—— Norfolk, etc., R. Co. *v.*
—— *v.* Northern Pac. R. Co., p. 160.
—— Southern R. Co. *v.*
Rhodes, etc., Co. *v.* Continental Furniture Co., pp. 302, 477.
Rice, Atlantic, etc., R. Co. *v.*
—— *v.* Boston, etc., R. Corp., pp. 806, 894, 895, 899.
—— Brundred *v.*
—— Camden, etc., R. Co. *v.*
—— *v.* Chicago, etc., R. Co., pp. 1683, 1737, 1814, 2032, 2588, 2668, 2672, 2681, 2839, 2841.
—— *v.* Detroit, etc., R. Co., pp. 80, 1611.
—— *v.* Dwight Mfg. Co., pp. 323, 984.
—— *v.* Hart, pp. 894, 899.
—— *v.* Illinois Cent. R. Co., p. 3144.
—— *v.* Indianapolis, etc., R. Co., pp. 819, 821, 848.
—— *v.* Kansas Pac. Railway, pp. 1111, 1112, 1113, 1413, 1428, 1429.
—— *v.* Ontario Steamboat Co., pp. 598, 848, 853.
—— *v.* Philadelphia Rapid Transit Co., pp. 2192, 2195.
—— Philadelphia, etc., R. Co. *v.*
—— St. Louis, etc., R. Co. *v.*
—— Southern Kansas R. Co. *v.*
—— Stone *v.*
—— *v.* Wabash R. Co., pp. 969, 1398, 1407.
Rich, Bryant *v.*
—— Cameron *v.*
—— Georgia R., etc., Co. *v.*
—— *v.* Lambert, pp. 1035, 3896, 3903, 3921, 4019, 4023, 4031.
—— *v.* New York, etc., R. Co., p. 2567.
—— Richardson *v.*
Richard *v.* Detroit, etc., Railway, p. 3323.
Richards, Bloom *v.*
—— Clark *v.*
—— *v.* Doe, p. 337.
—— Ft. Worth, etc., R. Co. *v.*
—— Georgia Railroad *v.*
—— *v.* Gilbert, pp. 727, 768.
—— Houston, etc., R. Co. *v.*
—— King *v.*
—— *v.* London, etc., R. Co., pp. 211, 3125, 3147, 3148.
—— *v.* Michigan, etc., R. Co., pp. 894, 899, 900.
Richards *v.* Westcott, pp. 759, 764.
Richardson, Atchison, etc., R. Co. *v.*
—— *v.* Atlantic Coast Line Railroad, p. 3090.
—— Atlantic, etc., R. Co. *v.*
—— *v.* Augusta, etc., R. Co., p. 2875.
—— *v.* Canadian Pac. R. Co., pp. 892, 898, 901.
—— *v.* Chicago, etc., R. Co., 149 Mo. 311, 50 S. W. 782, 13 Am. & Eng. R. Cas., N. S., 170—pp. 969, 1013, 1061, 1110, 1119, 1403, 1426.
—— *v.* Chicago, etc., R. Co., 62 Mo. App. 1—pp. 1107, 1427.
—— *v.* Chicago, etc., R. Co., 61 Wis. 596, 21 N. W. 49—p. 1444.
—— Cincinnati, etc., R. Co. *v.*
—— Cairn, etc., Co. *v.*
—— *v.* Goddard, pp. 527, 531, 534, 536, 539, 540, 566, 891, 3894, 3895.
—— *v.* Goss, p. 1234.
—— Gulf, etc., Tel. Co. *v.*
—— Hall *v.*
—— *v.* Hardwick, p. 3867.
—— *v.* Harmon, pp. 4036, 4037, 4039, 4040, 4042, 4077.
—— McClure *v.*
—— *v.* Metropolitan Railway, p. 1971.
—— *v.* Metropolitan St. R. Co., pp. 1739, 1740.
—— *v.* New York, etc., R. Co., pp. 954, 1097, 1117.
—— Pittsburgh, etc., R. Co. *v.*
—— Reed *v.*
—— *v.* Rich, pp. 1154, 1160, 1171.
—— Richmond, etc., R. Co. *v.*
—— St. Louis, etc., R. Co. *v.*
—— Texas, etc., R. Co. *v.*
—— *v.* Whiting, pp. 3938, 3944, 3945.
Richardson Drug Co., Greek-American Sponge Co. *v.*
Richardson Fueling Co. *v.* Seymour, p. 4040.
Richelieu, Senecal *v.*
Richelieu Nav. Co., Dixon *v.*
Richelieu, etc., Nav. Co. *v.* Boston Marine Ins. Co., pp. 3907, 3909.
Riches, Coleman *v.*
—— *v.* Fargo, p. 600.
Richeson, Louisville, etc., R. Co. *v.*
Richey, Indianapolis Tract., etc., Co. *v.*
Richey, etc., Co. *v.* Northern Pac. R. Co., pp. 218, 229, 264.
Richmond *v.* Bronson, pp. 596, 599.
—— Del Valle *v.*
—— Georgia R., etc., Co. *v.*
—— *v.* Irons, p. 4075.
—— Louisville, etc., R. Co. *v.*
—— *v.* Missouri Pac. R. Co., p. 1989.
—— Northrop *v.*
—— *v.* Quincy, etc., R. Co., p. 2249.
—— Railroad Co. *v.*
—— *v.* Southern Pac. Co., pp. 1550, 2094, 2097.
—— Texas, etc., R. Co. *v.*
—— The.
—— *v.* Union Steamboat Co., 8 Abb. N. C. 66—p. 540.
—— *v.* Union Steamboat Co., 87 N. Y. 240—pp. 532, 598.
Richmond & D. R. Co., Crews *v.*
Richmond City R. Co. *v.* Scott, pp. 1718, 1798, 1804, 1805, 1914, 2576.
Richmond Passenger, etc., Co. *v.* Allen, p. 2294.
Richmond R., etc., Co. *v.* Bowles, p. 2743.
—— *v.* Brown, p. 1645.
—— *v.* Garthwright, p. 1952.
Richmond R., etc., Co. *v.* West, pp. 2569, 2635, 2647, 2655, 2721, 2795.
Richmond Tract. Co. *v.* Wilkinson, p. 2535.
—— *v.* Williams, pp. 1865, 2268.
Richmond, etc., R. Co. *v.* Ashby, pp. 1613, 1857, 1862, 1973, 1975, 3093.
—— Bedell *v.*
—— *v.* Bedell, p. 684.
—— *v.* Benson, pp. 406, 513, 515, 734, 741, 743, 856.
—— Bowers *v.*
—— *v.* Brown, p. 80.
—— Burgin *v.*
—— *v.* Burnsed, p. 1568.
—— Cadwell *v.*
—— *v.* Childress, pp. 1990, 2780.
—— Clyde *v.*
—— Conley *v.*
—— Dixon *v.*
—— Farrell *v.*
—— *v.* Greenwood, pp. 1721, 2010, 3069.
—— Gwyn, etc., Co. *v.*
—— Hughson *v.*
—— *v.* Jefferson, pp. 2017, 2018, 2020, 3077.
—— Johnson *v.*
—— Johnstone *v.*
—— Knopf *v.*
—— Kohn *v.*
—— *v.* Leathers, p. 2919.
—— Lewis *v.*
—— Lindley *v.*
—— Littlejohn *v.*
—— McAbsher *v.*
—— McSloop *v.*
—— Malcom *v.*
—— *v.* Morris, pp. 1798, 1884, 2254.
—— *v.* Patterson Tobacco, Co., pp. 3292, 3293, 3504, 3505, 3513, 3523, 3536.
—— *v.* Patterson, etc., Co., p. 35.
—— *v.* Payne, pp. 931, 946, 948, 1054, 1075.
—— Pendleton *v.*
—— Pickens *v.*
—— *v.* Pickleseimer, p. 2159.
—— *v.* Picklesimer, p. 2159.
—— Platt *v.*
—— *v.* Powers, 149 U. S. 43, 37 L. Ed. 642, 13 S. Ct. 748—pp. 2134, 2136, 2274, 2858, 2859.
—— *v.* Powers, 149 U. S. 209, 14 S. Ct. 281, 38 L. Ed. 131—p. 1792.
—— Purcell *v.*
—— Randall *v.*
—— Reynolds *v.*
—— *v.* Richardson, 43 S. W. 465, 19 Ky. L. Rep. 1495—p. 3279.
—— *v.* Richardson, 23 Ky. L. Rep. 2234, 66 S. W. 1035—p. 3350.
—— Rudd *v.*
—— Samuels *v.*
—— *v.* Scott, 86 Va. 902, 11 S. E. 404, 44 Am. & Eng. R. Cas. 418—p. 1928.
—— *v.* Scott, 88 Va. 958, 14 S. E. 763, 16 L. R. A. 91—pp. 2200, 2312, 2616, 2797.
—— *v.* Shomo, pp. 320, 323, 333, 335, 3250, 3326, 3347, 3354.
—— Smith *v.*
—— *v.* Smith, pp. 1922, 2242.
—— Spellman *v.*
—— *v.* Trousdale & Sons, pp. 820, 1311, 1457, 1459.
—— Turner *v.*
—— *v.* Vance, pp. 2636, 3069, 3070.
—— Van Lindley *v.*
—— Walsh *v.*
—— Waters *v.*
—— *v.* White, pp. 724, 730, 734, 739, 741, 743, 745, 747, 748, 818, 820, 825, 826, 871, 876, 877, 894, 898, 900, 903, 1038.
—— Whitney Mfg. Co. *v.*
—— Willcox *v.*

Richmond, etc., R. Co., Wood v.
Richter v. United R. Co., p. 2778.
Rick v. Wells Fargo Co., pp. 1330, 1456, 1476, 1483, 1484.
Rickerson Roller-Mill Co. v. Grand Rapids, etc., R. Co., pp. 3261, 3289, 3296, 3327.
Rickert v. Southern R. Co., pp. 2257, 2517.
Ricketts v. Baltimore, etc., R. Co. (N. Y.), 61 Barb. 18, 4 Lans. 446—pp. 3359, 3377.
—— Baltimore, etc., R. Co., 59 N. Y. 637—p. 3254.
—— v. Birmingham St. R. Co., pp. 2079, 2255.
—— v. Chesapeake, etc., R. Co., p 3066.
—— Louisville, etc., R. Co. v.
—— St. Louis, etc., R. Co. v.
Rickinson, American Sugar Refin. Co. v.
Ricks, Central, etc., R. Co. v.
—— v. Georgia, etc., R. Co., p. 2156.
Riddick v. Dunn, p. 3894.
Riddlebarger v. Hartford Ins. Co., p. 1118.
Ridenhour v. Kansas City Cable R. Co., pp. 1890, 1896, 2120, 2236, 2322, 2916, 2994.
Rider, Eddy v.
—— Louisiana, etc., R. Co. v.
—— v. Wabash, etc., R. Co., p. 3149.
Ridge Ave. Pass. R. Co., Purtell v.
—— Stager v.
Ridge Ave., etc., R. Co., Picard v.
Ridgeway Grain Co. v. Pennsylvania R. Co., pp. 589, 1102.
Ridley, Day Catlin & Co. v.
—— Day, etc., Co. v.
Riedel v. Wilmington City R. Co., p. 2587.
Riegel & Co., Union R., etc., Co. v.
Riegler, South Covington, etc., R. Co. v.
Rielly, Chicago, etc., R. Co. v.
Rifcowitz, Baltimore Consol. R. Co. v.
Riggins v. Missouri, etc., R. Co., p. 423
Riggs, Missouri Pac. R. Co. v.
Rigney, Laing v.
Riley, Chicago, etc., R. Co. v.
—— v. Chicago, etc., R. Co., p. 1568.
—— Ft. Worth, etc., R. Co. v.
—— v. Horne, p. 729.
—— Jeffersonville, etc., R. Co. v.
—— Kansas, etc., R. Co. v.
—— v. Louisville, etc., R. Co., p. 1189.
—— Pullman Co. v.
—— v. Rhode Island Co., pp. 1831, 1832, 2225.
—— Roberts v.
—— United R., etc., Co. v.
—— v. Vallejo Ferry Co., p. 1509.
—— v. Wrightsville, etc., R. Co., pp. 1621, 2579, 2593, 2610, 3389.
Rinard, Indianapolis, etc., R. Co. v.
Rines & Co., Missouri, etc., R. Co. v.
Riney, Gulf, etc., R. Co. v.
Ringgold v. Haven, pp. 816, 818, 819, 848, 3933.
Ringwalt v. Wabash R. Co., pp. 728, 733, 749, 3188.
Rintamaki v. Cunard Steamship Co., pp. 3925, 3926.
Rintoul v. New York Cent., etc., R. Co., 21 Blatchf. 439, 17 Fed. 905—pp. 790, 791, 824.
—— v. New York Cent., etc., R. Co., 20 Fed. 313—p. 793.
Rio Grande R. Co. v. Cross, 5 Tex. Civ. App. 454, 456, 23 S. W. 529—pp. 33, 855, 856, 935, 3384.
—— v. Cross (Tex. Civ. App.), 23 S. W. 1004—p. 856.
Rio Grande R. Co. v. Munoz Successors, p. 856.
—— Woodhouse v.
Rio Grande, etc., R. Co. v. Campbell, pp. 2726, 3454.
—— v. Kubenstein, p. 2693.
—— Rudy v.
Ripley v. Aetna Ins. Co., p. 1118.
—— v. New Jersey R., etc., Co., p. 1638.
Rippy & Co. v. Southern Railway, p. 165.
Risley, American Exp. Co. v.
Rist v. Philadelphia Rapid Trans. Co., pp. 2668, 2679.
Ritchel, Louisville, etc., R. Co. v.
Ritchey, Texas Mid. Railroad v.
Ritchie, International, etc., R. Co. v.
Ritter, Houston, etc., R. Co. v.
—— Louisville, etc., R. Co. v.
—— v. Philadelphia, etc., R. Co., p. 1597.
Ritz v. Pennsylvania R. Co., pp. 1267, 1281.
River, etc., Coke Co., Illinois Cent. R. Co. v.
Rivers v. Kansas, etc., R. Co., pp. 2467, 2468, 2849.
—— v. Pennsylvania R. Co., 80 N. J. L. 217, 76 Atl. 455—pp. 1744, 1830, 1836.
—— v. Pennsylvania R. Co., 83 N. J. L. 513, 83 Atl. 883—pp. 1744, 1835, 1836, 2180, 2884.
Riverside Mills, Atlantic, etc., R. Co. v.
—— v. Atlantic, etc., R. Co., pp. 3604, 3832.
Rives, Georgia R., etc., Co. v.
Rives, etc., Co., Knox v.
Rixford v. Smith, pp. 728, 740, 753, 757, 758, 765, 766.
Roach, Atchison, etc., R. Co. v.
—— v. Atchison, etc., R. Co., p. 3514.
—— Southern R. Co. v.
—— Virginia, etc., R. Co. v.
—— Wood v.
Roane, St. Louis, etc., R. Co. v.
Roanoke R., etc., Co. v. Sterrett, 108 Va. 533, 62 S. E. 385, 19 L. R. A., N. S., 316—pp. 2671, 3003.
—— v. Sterrett, 111 Va. 293, 68 S. E. 998—pp. 2667, 2673, 2838, 2970.
Roanoke, etc., Steamboat Co., Hornthal v.
Roark v. Missouri Pac. R. Co., pp. 1938, 1939.
Roasted v. Great Northern R. Co., p. 1669.
Robb v. Pittsburg, etc., R. Co., pp. 191, 1637, 2446.
Robbins, New York, etc., R. Co. v.
—— Pender v.
—— St. Louis, etc., R. Co. v.
—— v. Shelby County Taxing Dist., pp. 3455, 3471, 3555.
Robbins Cotton Co., Mobile, etc., R. Co. v.
Roberson v. Greenleaf Johnson Lumber Co., p. 1583.
Robert v. Chicago, etc., R. Co., pp. 979, 1489, 1491, 3166, 3522.
Robert Dollar, The.
Robert Smith Ale Brew. Co., Lydon v.
Roberts, Atchison, etc., R. Co. v.
—— v. Atlantic, etc., R. Co., pp. 1510, 1769, 1785, 1882, 2151, 2332, 2365, 2369, 2876.
—— Central R., etc., Co. v.
—— Chicago Union Tract. Co. v.
—— Chicago, etc., R. Co. v.
—— v. Chicago, etc., R. Co., p. 2693.
—— v. Chittenden, p. 587.
—— Denver, etc., R. Co. v.
—— v. Graham, pp. 2625, 2626.
—— Gulf, etc., R. Co. v.
—— Illinois Cent. R. Co. v.
—— v. Johnson, p. 2803.
Roberts v. Koehler, p. 1973.
—— New York v.
—— v. New York, etc., R. Co., pp. 2138, 2140.
—— v. Pennsylvania R. Co., p. 2349.
—— People v.
—— v. Riley, pp. 425, 428, 820, 821, 945, 1007.
—— v. St. Louis, etc., R. Co., pp. 139, 169.
—— v. Sierra R. Co., pp. 1746, 1758, 2165, 2309, 2677, 2806, 2920, 2982.
—— v. Smith, p. 2850.
—— v. Southern Pac. R. Co., p. 1557.
—— Toledo, etc., R. Co. v.
—— Tousey v.
—— v. Turner, p. 11.
—— v. Union Line Exp. Co., pp. 546, 891, 901, 902, 905, 912.
—— Van Buskirk v.
—— v. Wabash R. Co., p. 2077.
—— v. Yarboro, pp. 549, 553.
—— Yazoo, etc., R. Co. v.
Robertson v. Atlantic, etc., R. Co., pp. 152, 172, 582.
—— v. Boston, etc., R. Co., pp. 1505, 1506.
—— v. Commonwealth, p. 3582.
—— Edye v.
—— v. Hay, p. 3886.
—— v. Louisville, etc., R. Co., pp. 1663, 1969, 2774, 3012.
—— v. National Steamship Co., 60 N. Y. Super. Ct. 132, 17 N. Y. S. 459, 42 N. Y. St. Rep. 694—pp. 847, 851, 853, 856.
—— v. National Steamship Co., 1 App. Div. 61, 37 N. Y. S. 69, 72 N. Y. St. Rep. 223—pp. 430, 431.
—— v. New York, etc., R. Co., pp. 1558, 1572, 2665.
—— v. Old Colony R. Co., pp. 214, 244, 1574, 1575.
—— v. Reynolds, p. 396.
—— v. Southern R. Co., p. 954.
—— Texas, etc., R. Co. v.
—— v. Wabash R. Co., pp. 2874, 2930.
—— v. West Jersey, etc., Co., p. 1535.
Robertson & Co. v. Kennedy, pp. 8, 727.
Robertson, etc., Co., Voss & Co. v.
Robey, Kauffman v.
Robinett, Chesapeake, etc., R. Co. v.
—— Chesapeake, etc., Railway v.
Robinson, American Union Exp Co. v.
—— Arkansas Mid. R. Co. v.
—— Arkansas, etc., R. Co. v.
—— Atchison, etc., R. Co. v.
—— v. Austin, pp. 580, 681.
—— v. Baker, pp. 1142, 1155, 1156, 1158, 1159.
—— v. Baltimore, etc., R. Co., 64 C. C. A. 281, 129 Fed. 753—pp. 187, 188, 189.
—— v. Baltimore, etc., R. Co., 222 U. S. 506, 56 L. Ed. 288, 32 S. Ct. 114—pp. 3785, 3810.
—— v. Baltimore, etc., R. Co., 64 W. Va. 406, 63 S. E. 323—pp. 1194, 1198, 1201, 3824.
—— Chesapeake, etc., R. Co. v.
—— Chicago City R. Co. v.
—— Chicago, etc., R. Co. v.
—— v. Chicago, etc., R. Co., pp. 2804, 3228.
—— v. Chittenden, p. 892.
—— v. Cornish, pp. 728, 749.
—— v. Ezzell, p. 1195.
—— Georgia Pac. R. Co. v.
—— Gibbons v.
—— v. Harmon, p. 36.
—— v. Helena, etc., R. Co., pp. 1519, 1803, 1866, 1889, 2649.
—— Highland Ave., etc., R. Co. v.
—— v. Holst, p. 3889.
—— Houston, etc., R. Co. v.

Robinson v. Houston, etc., R. Co., pp. 479, 486, 493.
—— Indianapolis St. R. Co. v.
—— v. Kirkwood, p. 2089.
—— v. Lake Shore, etc., R. Co., p. 465.
—— Lambert v.
—— Lane v.
—— v. Lord Byron, p. 3658.
—— Louisville, etc., R. Co. v.
—— v. Manhattan R. Co., p. 2156.
—— v. Memphis, etc., R. Co., pp. 305, 306, 308, 314, 317, 573, 575, 577.
—— v. New York Cent., etc., R. Co., p. 1843.
—— v. New York, etc., Co., p. 3377.
—— v. New York, etc., R. Co., 203 N. Y. 627, 97 N. E. 1115—p. 3141.
—— v. New York, etc., R. Co., 129 N. Y. S. 1030, 145 App. Div. 391—pp. 3150, 3174.
—— v. New York, etc., Steamship Co., 69 N. E. 1130, 177 N. Y. 565—p. 3409.
—— v. New York, etc., Steamship Co., 63 App. Div. 211, 71 N. Y. S. 424—pp. 1036, 3384.
—— v. New York, etc., Steamship Co., 74 N. Y. S. 384, 36 Misc. Rep. 705—p. 4025.
—— v. Noble, pp. 1171, 3942.
—— v. Northhampton St. R. Co., p. 1907.
—— Paris, etc., R. Co. v.
—— v. Pioche, etc., Co., p. 1498.
—— v. Rockland St. R. Co., p. 2418.
—— v. St. Johnsbury, etc., R. Co., pp. 2104, 2105.
—— v. St. Louis, etc., R. Co., 75 Mo. 494—p. 424.
—— v. St. Louis, etc., R. Co., 103 Mo. App. 110, 77 S. W. 493—p. 2697.
—— San Antonio, etc., R. Co. v.
—— Shelden v.
—— Southern Pac. Co. v.
—— v. Southern Pac. Co., pp. 195, 1976.
—— v. Superior Rapid Trans. R. Co., p. 3087.
—— v. United States, p. 328.
—— Verrall v.
Robinson Bros. v. Merchants' Despatch Transp. Co., pp. 320, 429, 431, 432, 848, 854, 992, 1013, 1034.
Robinson, etc., Co. v. Memphis, etc., R. Co., 9 Fed. 129—pp. 293, 486, 3879.
—— v. Memphis, etc., R. Co., 16 Fed. 57—pp. 293, 3879.
Robostelli v. New York, etc., R. Co., pp. 1574, 1767, 1789.
Robson v. Nassau Elect. R. Co., p. 2884.
—— v. North Eastern R. Co., p. 1871.
—— The Northern Belle v.
Rochat v. North Hudson R. Co., p. 1995.
Rochester City, etc., R. Co., Birmingham v.
Rochester R. Co., Ayers v.
—— Manufacturers' Commercial Co. v.
—— Muckle v.
—— Sias v.
Rochester, etc., R. Co., Alexander v.
—— Birmingham v.
—— Clarke v.
—— Curtis v.
—— Ganiard v.
—— Gill v.
—— People v.
—— Weber v.
Rock Creek Steamboat Co. v. Boyd, p. 3017.
Rock Island, etc., R. Co. v. Stevens, pp. 1856, 1857.
Rock Island, etc., R. Co., Tibbits & Son v.
Rockford, etc., R. Co., Carter v.
—— v. Coultas, p. 2220.
Rockland St. R. Co., Robinson v.
Rockland, etc., St. Railway, Carleton v.
Rockwell, Horan v.
Rocky Mt. Mills v. Wilmington, etc., R. Co., pp. 641, 642, 654, 660, 662, 670, 675, 698, 3277, 3282.
Rodebaugh, Kansas, etc., R. Co. v.
Roderick v. Baltimore, etc., R. Co., pp. 753, 1344.
Rodger v. Comptoird' Escompt de Paris, p. 1224.
Rodgers, Atchison, etc., R. Co. v.
—— Central, etc., R. Co. v.
—— v. Choctaw, etc., R. Co., p. 2369.
—— v. Missouri Pac. R. Co., pp. 619, 744.
—— Missouri, etc., R. Co. v.
—— Yazoo, etc., R. Co. v.
Rodick v. Maine Cent. R. Co., pp. 1769, 1773, 1786.
Rodman v. North Jersey St. R. Co., p. 2898.
Rodocanachi, Soule v.
Roe, Morel v.
—— Oregon Co. v.
Roebuck, Cleveland City R. Co. v.
—— Southern R. Co. v.
Roedecker v. Metropolitan St. R. Co., p. 1710.
Roemer, Galveston, etc., R. Co. v.
Roeser, Union Pac. R. Co. v.
Rogan v. Wabash R. Co., p. 679.
Rogers v. Atlantic City R. Co., pp. 1637, 1638.
—— Barrett v.
—— Bingham v.
—— Central, etc., R. Co. v.
—— Cravens v.
—— East Tennessee, etc., R. Co. v.
—— Ft. Worth, etc., R. Co. v.
—— Houston, etc., R. Co. v.
—— Jackson v.
—— Jeffersonville R. Co. v.
—— v. Kennebec Steamboat Co., pp. 2094, 2103.
—— v. Long Island R. Co. (N. Y.), 38 How. Prac. 289—p. 278.
—— v. Long Island R. Co. (N. Y.), 2 Lans. 269—p. 3138.
—— Louisville, etc., Packet Co. v.
—— v. Missouri, etc., R. Co., pp. 3326, 3331.
—— v. New York, etc., Bridge, p. 2730.
—— St. Louis, etc., R. Co. v.
—— v. Schneider, pp. 1228, 1232, 1233, 1234.
—— Zerrill v.
—— v. Texas, etc., R. Co., pp. 1304, 1306, 1308, 1309.
—— v. Thomas, pp. 1207, 1214, 1221.
—— T. & P. R. Co. v.
—— v. Weir, p. 573.
—— v. West, p. 1143.
—— v. Western Union Tel. Co., p. 643.
—— v. Wheeler, 43 N. Y. 598—p. 769.
—— v. Wheeler, 52 N. Y. 262—pp. 278, 287, 884, 3286.
—— Whitney v.
Rogers Bros. Produce Co. v. Neill v.
Rogers' Sons, Central R., etc., Co. v.
Rogers & Sons, Central Railroad v.
—— Central R. Co. v.
Rogers, etc., Mach. Works v. Erie R. Co., pp. 66, 132, 211, 212, 240, 254, 255, 1136, 1190.
Rohrback v. Pullman's Palace Car Co., pp. 2039, 3210.
Rohrig v. Chicago, etc., R. Co., p. 147.
Rokeby, The.
Roland, etc., Co. v. Brown, pp. 401, 402.
Rolette v. Great Northern R. Co., pp. 2125, 2182, 2309, 2343.
Rolfe, Chotaw, etc., R. Co. v.
—— v. Lake Shore, etc., R. Co., pp. 3397, 3408.
Rolfs v. Atchison, etc., R. Co., p. 2463.
Roller, Denver, etc., R. Co. v.
Rollins v. Seaboard, etc., Railroad, pp. 151, 152, 154, 173.
Roman, Kennedy v.
Romans, Indianapolis Tract., etc., Co. v.
Rome R. Co. v. Sloan, pp. 595, 3303, 3397, 3414.
—— v. Sullivan, etc., Co., 14 Ga. 277—pp. 514, 539, 551, 553, 580, 894, 898, 1003, 1007.
—— v. Sullivan, etc., Co., 25 Ga. 228—pp. 533, 549, 607, 3250, 3251, 3257, 3272, 3275, 3277, 3278, 3279.
—— v. Sullivan, etc., Co., 32 Ga. 400—p. 3291.
—— v. Wimberly, pp. 3109, 3159, 3160, 3168, 3174, 3175, 3183, 3186, 3189, 3193.
Rome R., etc., Co. v. Keel, pp. 1879, 2332, 2589, 2602.
Rome, etc., R. Co., Bowles v.
—— City Bank v.
—— Hosapple v.
—— London, etc., Fire Ins. Co. v.
—— Reed v.
—— Simpson v.
—— Webster v.
Romer, Bush v.
Romine v. Evansville, etc., R. Co., pp. 1979, 2902.
Rommele, Louisville, etc., R. Co. v.
Roney v. Chase, etc., Co., pp. 3961, 3964.
—— Louisville, etc., R. Co. v.
Rood, Chicago City R. Co. v.
Koot v. Catskill Mountain R. Co., p. 2691.
—— Clinton v.
—— v. Des Moines City R. Co., pp. 2301, 2357, 2823, 3000.
—— v. Des Moines R. Co., pp. 2115, 2380, 2903.
—— Fremont, etc., R. Co. v.
—— v. Great Western R. Co. (N. Y.), 65 Barb. 619, 1 Thomp. & C. 10—p. 3401.
—— v. Great Western R. Co., 45 N. Y. 524—pp. 417, 3289, 3294.
—— v. Great Western R. Co., 55 N. Y. 636—p. 3302.
—— v. Long Island R. Co., pp. 220, 1135, 1179, 1183, 1184, 1185, 1188, 1193.
—— v. New York Cent. etc., Co., pp. 3214, 3216, 3219, 3220, 3221, 3223, 3224, 3225, 3230.
Kopes, Bearse v.
Roscoe v. Metropolitan St. R. Co., pp. 2637, 2882, 2883, 2886, 2938.
Rose, Baltimore, etc., R. Co. v.
—— v. Boston, etc., St. R. Co., p. 1803.
—— Burlington, etc., R. Co. v.
—— Central Pass. R. Co. v.
—— Central, etc., R. Co. v.
—— v. Des Moines Val. R. Co., pp. 1760, 2092, 2095, 2096.
—— Harvey v.
—— v. Louisville, etc., R. Co., p. 3029.
—— v. Northern Pac. R. Co., pp. 3161, 3164.
—— Pittsburg, etc., R. Co. v.
—— St. Louis, etc., R. Co. v.
—— Thompson v.
—— v. West Philadelphia R. Co., p. 2388.
—— v. Wilmington, etc., R. Co., pp. 2057, 2481.
Rosebrook-Josey Grain Co., Kansas, etc., R. Co. v.

Rosebrooks v. Dinsmore, p. 814.
Rose Co., Southern Exp. Co. v.
Rosedale, The.
Rose Innes, The.
Roseman v. Carolina Cent. R. Co., p. 2489.
Rosen v. Boston, p. 2781.
—— v. Dry Dock, etc., R. Co., p. 2196.
Rosenbaum v. St. Paul, etc., R. Co., pp. 1555, 1752.
Rosenbaum Grain Co. v. Chicago, etc., R. Co., pp. 129, 3498.
—— Railroad Comm. v.
Rosenberg v. Third Ave. R. Co., p. 1541.
Rosenberry, St. Louis, etc., R. Co. v.
Rosenblum v. Brooklyn Heights R. Co., p. 2007.
—— v. Weir, p. 779.
Rosenbush v. Bernheimer, p. 3545.
Rosencranz v. Swofford Bros. Dry Goods Co., p. 476.
Rosenfeld v. Central Vermont R. Co., pp. 420, 592.
—— v. Peoria, etc., R. Co., pp. 1012, 1061, 1065, 1075.
Rosenfield v. Express Co., pp. 517, 547, 573, 594.
Rosenfield & Son, Condict & Co. v.
Rosenheim & Sons, Southern R. Co. v.
Rosenkovitz v. United R., etc., Co., pp. 1587, 2044, 2666, 3018, 3019, 3020.
Rosenstein v. Vogemann, pp. 3887, 3893, 3913, 3926.
Rosenthal, Chicago Union Tract. Co. v.
—— v. Dessau, p. 1226.
—— Wallace v.
—— v. Weir, 170 N. Y. 148, 63 N. E. 65, 57 L. R. A. 527—pp. 582, 987.
—— v. Weir, 66 N. Y. S. 841, 54 App. Div. 275—pp. 1249, 1251.
Rosenthal Millinery Co., Ft. Worth, etc., R. Co. v.
Rosenzweig, Lake Shore, etc., R. Co. v.
Rosik, United R., etc., Co. v.
Rosnagle, Cincinnati Northern Tract. Co. v.
—— Cincinnati, etc., Tract. Co. v.
Ross, Baltimore, etc., R. Co. v.
—— v. Cargo of 3,408 Tons of Pocahontas Coal, pp. 3951, 3967.
Ross v. Charleston, etc., Transp. Co., pp. 3864, 3865.
—— Chicago, etc., R. Co. v.
—— v. Chicago, etc., R. Co., pp. 490, 899.
—— Houston City, etc., R. Co. v.
—— In re.
—— v. Kansas City St. R. Co., p. 70.
—— v. Milne, p. 2560.
—— v. Missouri, etc., R. Co., pp. 3124, 3149, 3160, 3168.
—— State v.
—— v. Troy, etc., R. Co., pp. 753, 758.
—— Water v.
Ross Tp. v. Michigan United R. Co., p. 80.
Ross, etc., Co., Love v.
Rossell, Elliott v.
Rossier v. Wabash R. Co., pp. 3149, 3174.
Rosted v. Great Northern R. Co., p. 1969.
Roth v. Buffalo, etc., R. Co., pp. 907, 3160, 3169, 3170, 3171, 3174.
Roth Mfg. Co., Doyle v.
Rothchild Bros. v. Northern Pac. R. Co., pp. 766, 772, 773, 779.
Rothchild & Co., Brunswick, etc., R. Co. v.
Rothermel v. Meyerle, p. 3567.
Rothschild, Illinois Cent. R. Co. v.
—— v. Michigan Cent. R. Co., pp. 894, 899.
Rothstein v. Brooklyn Heights R. Co., p. 2565.
—— v. Pennsylvania R. Co., pp. 2253, 2263.
Rotolo, Norfolk, etc., Terminal Co. v.
Rott v. Forty Second St., etc., R. Co., p. 2513.
Rotter Bros., Gulf, etc., R. Co. v.
Roulo v. Minot, pp. 2353, 2901.
Roulstone, Curry v.
Roundtree, Gulf, etc., R. Co. v.
Rountree v. Atlantic, etc., R. Co., pp. 135, 2776.
—— Weir v.
Rouser v. North Park St. R. Co., pp. 1627, 1650.
—— v. Washington, etc., R. Co., p. 2229.
Rousseau, Winona, etc., R. Co. v.
Rouston v. Detroit United Railway, pp. 1842, 2002, 2895, 2896, 2897.
Rowan v. Wells Fargo & Co., pp. 789, 1041.
Rowand, McGill v.
Rowden v. Fargo, p. 1036.
Rowdin v. Pennsylvania R. Co., pp. 1567, 2704.
Rowe v. Brooklyn Heights R. Co., 71 App. Div. 474, 75 N. Y. S. 893—pp. 191, 194.
—— v. Brooklyn Heights R. Co., 81 N. Y. S. 106, 80 App. Div. 477—pp. 2424, 2425.
—— v. Pickford, p. 1234.
Rowell, Chicago, etc., R. Co. v.
—— Eddy v.
—— Houston, etc., R. Co. v.
Rowen, Cole v.
Rowland, Gulf, etc., R. Co. v.
—— Henshaw v.
—— v. Miln, pp. 531, 892.
—— v. New York, etc., R. Co., pp. 1138, 1160.
—— v. Pennsylvania R. Co., p. 67.
Rowley v. Bigelow, pp. 317, 355, 369, 372, 1207, 1215, 1241, 1242, 3878.
Roxborough, etc., R. Co., Woodroffe v.
Roy v. Chesapeake, etc., R. Co., pp. 424, 3252, 3258, 3259, 3327.
—— v. Griffin, pp. 286, 292.
—— Harrison v.
—— v. Northern Pac. R. Co., pp. 306, 309, 315.
—— Pennsylvania Co. v.
—— St. Louis, etc., R. Co. v.
Royal Exch. Shipping Co., Tarbell v.
Royal Sceptre, The.
Roye, Northern Texas Tract. Co. v.
Royston v. Illinois Cent. R. Co., pp. 2020, 2962.
Rozwadosfskie v. International, etc., R. Co., pp. 1539, 1763, 1798, 1799.
Ruark, Fassett v.
Rubens v. Ludgate Hill Steamship Co., 49 Hun 608, 2 N. Y. S. 30, 21 Abb. N. C. 464, 17 N. Y. St. Rep. 17—p. 806.
—— v. Ludgate Hill Steamship Co., 65 Hun 625, 20 N. Y. S. 481, 48 N. Y. St. Rep. 732—pp. 292, 722, 1010.
Rubenstein, Rio Grande, etc., R. Co. v.
Rubin v. Interborough Rapid Transit Co., p. 1971.
—— v. Wells Fargo Exp. Co., p. 567.
Ruch, Aurora, etc., R. Co. v.
—— v. Aurora, etc., R. Co., pp. 1562, 1745, 1986, 2344, 2602.
Rucker v. Donovan, pp. 579, 1219, 1246, 1247, 1248.
—— v. Missouri Pac. R. Co., pp. 1551, 2163.
Rucker v. State, p. 1637.
—— Texas, etc., R. Co. v.
Ruckman, El Paso Elect. R. Co. v.
Rudd v. Richmond, etc., R. Co., p. 2116.
Ruddell v. Baltimore, etc., R. Co., p. 765.
Rudell v. Ogdensburg Transit Co., pp. 452, 997, 1000.
Ruden, Maryland Ins. Co. v.
Rudiger v. Chicago, etc., R. Co., p. 2772.
Rudman, Pacific Exp. Co. v.
Rudolf v. Brown, p. 4040.
Rudulph, Florida, etc., R. Co. v.
Rudy, Baltimore, etc., R. Co. v.
—— Cleveland, etc., R. Co. v.
—— Evans v.
—— v. Rio Grande, etc., R. Co., pp. 2450, 2476.
Ruebsam v. St. Louis Trans. Co., p. 2632.
Ruffin v. Atlantic, etc., R. Co., pp. 2370, 2911, 2963, 2964.
Rugee, Sherman v.
Ruggles v. Illinois, pp. 34, 43, 44, 63, 124, 3493, 3497.
Rumbell, The. J. E.
Rumfield, St. Louis, etc., R. Co. v.
Rumsey v. Northeastern R. Co., p. 3161.
Rundell v. La Campagnie Generale Transatlantique, p. 3977.
Runnells v. Pecos, etc., R. Co., p. 2164.
Runnels, Houston, etc., R. Co. v.
—— v. Houston, etc., R. Co., pp. 1989, 1990.
Runney v. Midland R. Co., p. 1577.
Runyan v. Central R. Co., 41 Atl. 367, 61 N. J. L. 537, 43 L. R. A. 284, 68 Am. St. Rep. 711—pp. 2705, 3110, 3112, 3115, 3116, 3123, 3124.
—— v. Central R. Co., 64 N. J. L. 67, 44 Atl. 985, 48 L. R. A. 744—pp. 3112, 3113.
—— v. Central R. Co., 65 N. J. L. 228 47 Atl. 422—pp. 3064, 3111, 3112.
Runyon v. Pennsylvania R. Co., p. 2455.
Ruppell v. Allegheny Valley R. Co., p. 848.
Rush, Denver Consol. Tramway Co. v.
—— St. Louis, etc., R. Co. v.
—— United States Exp. Co. v.
Rushin v. Central, etc., R. Co., pp. 2562, 2563, 2566.
—— Missouri Pac. R. Co. v.
Rushing, East Line, etc., R. Co. v.
Rusk v. Manhattan R. Co., pp. 2686, 2788.
—— Tootle v.
Russ, Pennsylvania R. Co. v.
—— Pittsburg, etc., R. Co. v.
—— Pittsburgh, etc., R. Co. v.
—— v. The War Eagle, pp. 1724, 1750.
Russ Lumber, etc., Co., Globe Nav. Co. v.
Russel v. Smith Grain Co., p. 397.
Russell v. Chicago, etc., R. Co., pp. 501, 1436, 1437, 1438, 1445, 1462, 1464, 1469, 1476, 1479.
—— Clark v.
—— Davis v.
—— Dilingham v.
—— Doane v.
—— v. Erie R. Co., pp. 931, 946, 994, 996, 1070.
—— v. Hudson River R. Co., p. 1586.
—— v. Livingston (N. Y.), 19 Barb. 346—pp. 1, 209.
—— v. Livingston, 16 N. Y. 515—p. 546.
—— Missouri Pac. R. Co. v.
—— Missouri, etc., R. Co. v.

Russell v. Missouri, etc., R. Co., p. 2443.
—— v. Mobile, etc., R. Co., p. 3397.
—— v. Niemann, p. 713.
—— Oakey v.
—— Oppenheim v.
—— v. Pittsburgh, etc., R. Co., pp. 1760, 1761, 2102, 2106.
—— St. Louis, etc., R. Co. v.
—— v. Seattle, etc., R. Co., pp. 2602, 2697.
—— Terrell v.
—— Texas, etc., R. Co. v.
—— Whitesides v.
Russell Grain Co. v. Wabash R. Co., pp. 537, 539.
Russell Mfg. Co. v. New Haven Steamboat Co., 50 N. Y. 121—pp. 531, 825, 891, 902, 917, 919.
—— v. New Haven Steamboat Co., 52 N. Y. 657—pp. 891, 902.
Russian Co., Lashinsky v.
Russo v. Morris Bldg., etc., Ass'n, p. 2838.
Rust, Houston, etc., R. Co. v.
Ruth v. St. Louis Tract. Co., p. 2428.
Ruth & Son, Southern Exp. Co. v.
Rutherford, Atchison, etc., R. Co. v.
—— Carew v.
—— Indianapolis, etc., R. Co. v.
—— v. McGowen, p. 1682.
—— v. St. Louis, etc., R. Co., pp. 1625, 1626, 2705.
—— v. Shreveport, etc., R. Co., p. 1812.
Rutland v. Southern Railway, pp. 643, 654, 658.
Rutland R. Co. v. Bellows Falls, etc., St. R. Co., p. 106.
—— v. Central Vermont R. Co., pp. 3558, 3559.
—— Holden v.
—— Ranchau v.
—— Sargent v.
—— Sprigg v.
—— Wiley v.
Rutland Trans. Co., Hood Rubber Co. v.
Rutland, etc., R. Co., Kimball v.
—— Noyes & Co. v.
Rutledge, Birmingham R., etc., Co. v.
—— v. New Orleans, etc., R. Co., p. 2358.
Ryan, Ashley v.
—— Chicago, etc., R. Co. v.
—— v. Cumberland Valley R. Co., p. 1581.
—— Gates v.
—— v. Gilmer, pp. 1742, 2693.
—— v. Great Northern R. Co., p. 483.
—— Gulf, etc., R. Co. v.
—— v. Hays, p. 2090.
—— v. Manhattan R. Co., p. 1783.
—— Metropolitan St. R. Co. v.
—— Missouri Pac. R. Co. v.
—— M. P. R. Co. v.
—— v. Pittsfield, etc., R. Co., pp. 2329, 2877.
—— St. Louis, etc., R. Co. v.
Ryan & Co. v. M. K. & T. R. Co., pp. 303, 321, 324, 430, 791, 815, 822, 823, 825, 934, 937, 943, 966, 985, 987, 988, 992, 993, 1003, 1006, 1008, 1027, 1039, 1041, 1042, 1130, 1154, 1158.
Ryberg v. Snell, pp. 1213, 1228.
Ryder v. Burlington, etc., R. Co., p. 544.
—— Craven v.
—— v. Hall, p. 339.
Ryer v. Pennsylvania R. Co., 54 N. Y. S. 583, 25 Misc. Rep. 289—p. 1249.
—— v. Pennsylvania R. Co., 26 Misc. Rep. 715, 56 N. Y. S. 1083—p. 996.
Ryland v. Chesapeake, etc., R. Co., pp. 515, 580, 664, 665.
Rylands, Peters v.
Ryman Steamboat Line Co. v. Commonwealth, p. 3542.
K. & D. R. Co., Farley v.

S

Sabine Tram Co., Texarkana, etc., R. Co. v.
—— v. Texarkana, etc., R. Co., p. 175.
—— Texas, etc., R. Co. v.
Sabine, etc., R. Co. v. Cruse, pp. 140, 169, 172.
Sabioncello, The.
Sachrowitz v. Atchison, etc., R. Co., p. 2655.
Sackrider, Allen v.
Sacramento Valley R. Co., Jackson v.
Sacramento, etc., Elect. Co., Basler v.
Sacremento Valley R. Co., Jackson v.
Sacremento, etc., Elect. Co., Basler v.
Sacrey v. Louisville R. Co., p. 2911.
Sadler, Missouri, etc., R. Co. v.
Saeger v. Wabash R. Co., pp. 2656, 2825.
Saffel, Standard Forging Co. v.
Saffer v. Dry-Dock, etc., R. Co., p. 2744.
Safford, San Antonio, etc., R. Co. v.
Sage v. Evansville, etc., R. Co., pp. 1596, 1597, 1599, 1602, 2467, 2468, 2711, 2715.
Sageman v. Weir, p. 1067.
Sager v. Northern Pac. R. Co., pp. 245, 2102, 2104.
—— v. Portsmouth, etc., R. Co., pp. 727, 733, 749, 781, 782, 1003, 1007, 1008, 1037, 1038, 1040, 1380.
Saginaw Valley Tract. Co., Dupuis v.
—— Orth v.
—— Spangler v.
Saginaw, etc., R. Co., Moore v.
Sahlgaard v. St. Paul City R. Co., pp. 1880, 1888, 2152, 2154.
Saiko v. St. Paul City R. Co., p. 2198.
Sain, Arkansas, etc., R. Co. v.
St. Anthony, Chouteau v.
St. Bernard, The.
St. Charles St. R. Co., Howell v.
—— Phillips v.
St. Clair v. Chicago, etc., R. Co., p. 821.
—— v. Interstate, etc., Transfer Co., pp. 3475, 3476, 3477, 3478.
—— v. Kansas City, etc., R. Co., 76 Miss. 473, 24 So. 904, 71 Am St. Rep. 534—pp. 1673, 1677.
—— v. Kansas City, etc., R. Co., 28 So. 957, 77 Miss. 789—pp. 1632, 3316.
St. Clair County v. Interstate Car Transfer Co., p. 3587.
St. Cuthbert, The.
St. Georg, The.
St. Hubert, The.
St. John, Gulf, etc., R. Co. v.
—— v. Gulf, etc., R. Co., pp. 1683, 2288, 2291.
—— v. Southern Exp. Co., p. 720.
—— Van Santvoord v.
—— v. Van Santvoord, pp. 1007, 3347.
St. John, etc., R. Co., Greene v.
St. Johnsbury, etc., R. Co., Ranney v.
—— Robinson v.
—— Wilder v.
St. Joseph, American Union Exp. Co. v.
St. Joseph R., etc., Co., Hermann v.
—— Johnson v.
—— Monday v.
—— Willis v.
St. Joseph Stock Yards Co., United States v.
—— v. United States, p. 3620.
St. Joseph, etc., R. Co., Elwood Grain Co. v.
—— v. Hedge, pp. 1764, 2128, 2289, 2293.
—— Modesitt v.
—— Noble v.
—— Norris v.
—— v. Wheeler, pp. 1548, 1552, 1761, 2523.
St. Joseph's Parochial School, Oklahoma R. Co. v.
St. Joze Indiano, The.
St. Laurent, The.
St. L., I. M. & S. R. Co. v. Bone, p. 772.
St. L., etc., Ry., Monroe Progressive League v.
St. Louis v. Consolidated Coal Co., p. 3585.
—— v. Eagle Packet Co., p. 3479.
—— v. Ferry Co., pp. 3475, 3584.
—— Packet Co. v.
—— v. St. Louis R. Co., p. 178.
—— v. Western Union Tel. Co., p. 3550.
St. Louis Drayage Co. v. Louisville, etc., R. Co., p. 3659.
St. Louis Hay, etc., Co., Southern R. Co. v.
St. Louis Ins. Co. v. St. Louis, etc., R. Co., pp. 930, 3249, 3260, 3288, 3311, 3327.
St. Louis Merchants' Bridge Terminal R. Co. v. Tassey, p. 1303.
St. Louis Nat. Bank, Allen v.
St. Louis R. Co., Grace v.
—— Haderlein v.
—— Hayes v.
—— v. Kennedy, p. 1885.
—— Muehlhausen v.
—— St. Louis v.
St. Louis Transit Co., Allen v.
—— Aston v.
—— Beave v.
—— Behen v.
—— Berry v.
—— Breen v.
—— Brewer v.
—— Brock v.
—— Brod v.
—— Carmody v.
—— Chadwick v.
—— Chlanda v.
—— Costello v.
—— Davidson v.
—— Dryden v.
—— Fillingham v.
—— Flaherty v.
—— Fry v.
—— Gage v.
—— Garrett v.
—— Gorman v.
—— Grady v.
—— Gracie v.
—— Haley v.
—— Hannon v.
—— Heyde v.
—— Ickenroth v.
—— Jacobson v.
—— Leonard v.
—— Leu v.
—— Lynch v.
—— Madigan v.
—— McGrath v.
—— McHugh v.
—— McKee v.
—— McKinstry v.
—— McNamara v.
—— Millar v.
—— Neumann v.
—— O'Brien v.
—— O'Gara v.
—— O'Mara v.
—— Parker v.
—— Parks v.

St. Louis Trans. Co., Peck v.
—— Pim v.
—— Price v.
—— Reagan v.
—— Regan v.
—— Ruebsam v.
—— Ruth v.
—— Scamell v.
—— Schloemer v.
—— Schmitt v.
—— Shanahan v.
—— Shareman v.
—— Simonton v.
—— Smith v.
—— Summerfield v.
—— v. Thompson, p. 2991.
—— Van Horn v.
—— Wegeschiede v.
—— Wellmeyer v.
—— Westervelt v.
—— Williamson v.
—— Woas v.
St. Louis, etc., Co., Austin v.
—— Doan v.
St. Louis, etc., Grain Co., Southern R. Co. v.
—— v. Southern R. Co., pp. 3666, 3692, 3729, 3799.
St. Louis, etc., Packet Co., Austin v.
St. Louis, etc., R. Co., Abelson v.
—— Adams v.
—— v. Adams, pp. 311, 312.
—— v. Adcock, pp. 190, 196, 1862.
—— v. Allen, 181 Fed. 710—p. 3518.
—— v. Allen, 31 Okla. 248, 120 Pac. 1090, 39 L. R. A., N. S., 309—pp. 486, 488.
—— Allison v.
—— v. Anderson, p. 1882.
—— v. Arkansas, pp. 3486, 3488.
—— v. Arkansas, etc., Grain Co., pp. 568, 569, 589, 3541.
—— Armentrout v.
—— v. Atchison, p. 1863.
—— Attorney General v.
—— Aufdenberg v.
—— Baker v.
—— v. Baker, pp. 1914, 2125, 2126, 2227, 2352, 2387.
—— v. Ball, pp. 1731, 1971, 2172, 2342, 2344.
—— v. Barnes, p. 1292.
—— v. Barnett, pp. 1781, 3001.
—— Barringer v.
—— Bartholomew v.
—— Barton v.
—— v. Battle, pp. 1797, 2084, 2270.
—— v. Baty, pp. 2458, 3095, 3099.
—— v. Beach, p. 839.
—— Beard v.
—— v. Beecher, pp. 1538, 1539.
—— v. Beets, pp. 1125, 1335.
—— Bell v.
—— v. Berger, pp. 2052, 2053, 2701, 2868.
—— v. Berry, 60 Ark. 433, 30 S. W. 764, 28 L. R. A. 501, 46 Am. St. Rep. 212—pp. 3116, 3125, 3126, 3132, 3133, 3148, 3150.
—— v. Berry, 4 Tex. App. Civ. Cas., § 166, 15 S. W. 48—p. 1673.
—— v. Berry, 42 Tex. Civ. App. 470, 93 S. W. 1107—p. 805.
—— v. Berryhill, p. 1853.
—— v. Bilby, p. 428.
—— v. Billingsley, pp. 2336, 2800.
—— v. Birdwell, pp. 820, 3395.
—— v. Birge-Forbes Co., p. 3490.
—— v. Blackburn, p. 3010.
—— v. Bland, pp. 511, 745, 746, 747.
—— Boling v.
—— Bolling v.
—— v. Bone, pp. 958, 1040.
—— v. Boshear, 102 Tex. 76, 113 S. W. 6—pp. 444, 466, 1459, 1475, 3251.
St. Louis, etc., R. Co. v. Boshear (Tex. Civ. App.), 108 S. W. 1032—pp. 1099, 1116, 1373, 1432, 1453, 3542.
—— v. Boyer, pp. 1812, 1979.
—— v. Brabbzson, pp. 1755, 2352, 2820, 2890.
—— Bradford v.
—— v. Bragg, pp. 3051, 3103.
—— v. Branch, 45 Ark. 524—pp. 2478, 3082.
—— v. Branch, 106 Ark. 269, 153 S. W. 118—p. 3083.
—— v. Brass, pp. 779, 780, 789, 809.
—— Brezewitz v.
—— v. Briggs, pp. 1797, 1870, 2727, 2824, 2991, 2994.
—— v. Britton, p. 2807.
—— v. Brosius, pp. 973, 1030, 1039, 1062, 1268, 1274, 1339, 1373, 1388, 1470.
—— v. Brown, 62 Ark. 254, 35 S. W. 225—p. 2710.
—— v. Brown, 93 Ark. 35, 123 S. W. 763—p. 2446.
—— v. Brown, 97 Ark. 505, 134 S. W. 1194—pp. 3080, 3083.
—— v. Bryan Fruit Co., p. 1105.
—— v. Bryant (Tex. Civ. App.), 92 S. W. 813—p. 1532.
—— v. Bryant, 46 Tex. Civ. App. 601, 103 S. W. 237—pp. 1693, 1704, 2254.
—— v. Bryce, pp. 943, 1035, 1120, 1414, 1415.
—— v. Burgin, pp. 956, 1123, 1383.
—— v. Burke, p. 2778.
—— v. Burns, 71 Tex. 479, 9 S. W. 467—pp. 1896, 2666, 2668, 2689, 2831.
—— v. Burns (Tex. Civ. App.), 80 S. W. 104—pp. 1352, 1354.
—— v. Burrow & Co., pp. 285, 292, 833, 836, 846.
—— v. Burrows, pp. 2336, 2670.
—— Buch v.
—— v. Butler, pp. 1124, 1376.
—— v. Byers, pp. 1885, 1886.
—— v. Byrne, pp. 2316, 2825.
—— v. Caldwell, 89 Ark. 218, 116 S. W. 210—pp. 504, 975, 3356.
—— v. Caldwell, 93 Ark. 286, 124 S. W. 1034—pp. 1773, 1774, 1776, 2085, 2350.
—— v. Campbell, pp. 1731, 1861, 1938, 1956.
—— v. Cannington, pp. 445, 1298.
—— v. Cannon, pp. 2114, 2116.
—— v. Cannon & Son, pp. 121, 127.
—— Cantrell v.
—— v. Cantrell, pp. 1878, 2125, 2255.
—— v. Carlile, pp. 3289, 3396.
—— v. Carlisle, pp. 693, 1312.
—— v. Caseday, pp. 1700, 1780.
—— Casey v.
—— v. Cash Grain Co., pp. 427, 687.
—— v. Casseday, 92 Tex. 525, 50 S. W. 125—pp. 2114, 2386, 2391.
—— v. Casseday (Tex. Civ. App.), 48 S. W. 6—p. 1792.
—— v. Cassidy, etc., Comm. Co., p. 1358.
—— v. Cates, 87 Ark. 162, 112 S. W. 202—p. 3043.
—— v. Cates, 15 Tex. Civ. App. 135, 38 S. W. 648—pp. 405, 664, 678.
—— Cathey v.
—— v. Cavender, pp. 285, 288, 290, 291, 779, 780, 1012, 1025, 1278, 1384, 1387, 1388, 1436, 1438, 1445, 1446, 1452, 1477.
—— Chilton v.
—— Chitty v.
—— v. Citizens' Bank, pp. 302, 304, 305, 306, 307, 308, 317, 331, 332, 333, 336, 337, 359, 379, 403, 882, 884.
St. Louis, etc., R. Co., Clark v.
—— v. Clark, pp. 869, 879, 1049, 1393, 1480, 1481, 1482.
—— v. Clay Gin Co., pp. 88, 93, 95.
—— v. Cleary, pp. 320, 333, 985, 1361, 1460.
—— v. Cleere, pp. 2363, 2537, 2551, 2984, 2998.
—— Clegg v.
—— Cobb v.
—— v. Cobb, pp. 1742, 1752, 1755.
—— Cohen v.
—— v. Cohen, pp. 3355, 3367, 3395.
—— Cohn v.
—— v. Commercial Union Ins. Co., pp. 283, 293, 294, 296, 306, 307, 308, 318.
—— v. Coolidge, pp. 615, 617, 640, 653, 658, 820, 969, 3267, 3277, 3394.
—— v. Copeland, pp. 1289, 1298, 1362, 1364, 1421.
—— Cossitt v.
—— Coudy v.
—— v. Coulson, p. 1525.
—— Council v.
—— Cowherd v.
—— v. Cox, 60 Ark. 106, 29 S. W. 38—p. 2271.
—— v. Cox, 26 Okla. 331, 109 Pac. 511—p. 1997.
—— v. Crawford, p. 544.
—— Creason v.
—— Crockett v.
—— Cronan v.
—— v. Crowder, pp. 1449, 1462, 1464, 1466, 1477.
—— v. Culver, p. 1664.
—— Cumbie v.
—— v. Cumbie, pp. 657, 663, 683, 1027, 1105, 1116, 1117.
—— v. Cunningham, pp. 2509, 2515, 2551, 2552.
—— v. Dalby, pp. 1596, 1599, 2467, 2468, 2497, 2564.
—— v. Dallas, pp. 2488, 2491, 2784.
—— v. Dare, p. 3042.
—— v. Davenport, p. 1312.
—— v. Davis, 56 Ark. 51, 19 S. W. 107—p. 3088.
—— v. Davis, 132 Fed. 629—p. 3592.
—— Dawson v.
—— v. Day, pp. 3020, 3105.
—— Delk v.
—— v. Delk, p. 3456.
—— v. Deshong, p. 3410.
—— v. Dickerson, p. 3198.
—— Dillender v.
—— Doan v.
—— v. Dodd, p. 913.
—— v. Dodson, p. 1469.
—— v. Dolan (Tex. Civ. App.), 77 S. W. 415—p. 1478.
—— v. Dolan (Tex. Civ. App.), 84 S. W. 393—p. 1350.
—— v. Dorman, pp. 210, 242, 704, 1272.
—— v. Dowgiallo, p. 2042.
—— v. Dreyfus, pp. 568, 569.
—— Duck v.
—— v. Duck, pp. 1706, 1938.
—— v. Dunham, pp. 513, 581, 857.
—— v. Dunn, pp. 1395, 1410, 1411, 1417.
—— Dunne v.
—— Eaton v.
—— v. Edwards, 94 Ark. 394, 127 S. W. 713—pp. 155, 3501.
—— v. Edwards, 78 Fed. 745, 24 C. C. A. 300—p. 3278.
—— v. Edwards, 227 U. S. 265, 33 S. Ct. 262—p. 3501.
—— Eells v.
—— Elam v.
—— Elder, etc., Co. v.
—— v. Elgin Condensed Milk Co., 175 Ill. 557, 51 N. E. 911, 67 Am. St. Rep. 238—pp. 320, 334, 336, 452, 454, 462.

St. Louis, etc., R. Co. v. Elgin Condensed Milk Co., 74 Ill. App. 619, 13 Am. & Eng. R. Cas., N. S., 112—pp. 452, 454, 462, 997, 3272, 3365.
—— Ellet v.
—— v. Elrod, p. 2635.
—— Ely v.
—— Emerson v.
—— Equitable Powder Mfg. Co. v.
—— Evans v.
—— v. Evans, 94 Ark. 324, 126 S. W. 1058—pp. 3048, 3062.
—— v. Evans, 99 Ark. 69, 137 S. W. 568—pp. 2224, 2375, 2400, 2760, 2777.
—— v. Evans, 78 Tex. 369, 14 S. W. 798—p. 465.
—— v. Evens, p. 3068.
—— v. Fairbairn, pp. 2500, 2503.
—— v. Fambro, pp. 2357, 2676.
—— Fanning v.
—— v. Farmers' Union Gin Co., pp. 607, 642, 647, 650, 659, 667.
—— v. Farr, p. 2242.
—— v. Faulkner, p. 3761.
—— v. Fenley, p. 3664.
—— v. Ferguson, p. 1762.
—— Fielder v.
—— v. Finley, pp. 1729, 1732, 1762, 1766, 1767, 1865, 1866, 1911, 2114, 2117, 2118, 2378.
—— v. Fire Ass'n, pp. 274, 754.
—— Flucks v.
—— Flynn v.
—— v. Foster (Tex. Civ. App.), 89 S. W. 450—pp. 857, 1351, 1352.
——v. Foster, 46 Tex. Civ. App. 517, 103 S. W. 194—pp. 2118, 2234, 2753, 2832, 2847.
—— v. Foster (Tex. Civ. App.), 112 S. W. 797—pp. 1524, 1531, 1532.
—— v. Fowler, pp. 1558, 2861, 2863.
—— Franklin v.
—— v. Franklin, pp. 1510, 1513, 2037, 2040, 2059.
—— v. Franks, p. 2846.
—— v. Frazar, p. 3331.
—— Freeman v.
—— v. Freeman, p. 140.
—— v. French, p. 1256.
—— v. Frisby, pp. 140, 143.
—— Fulks v.
—— v. Furlow, 81 Ark. 496, 99 S. W. 689—pp. 2448, 3100.
—— v. Furlow, 89 Ark. 404, 117 S. W. 517—pp. 972, 1090, 1097, 1099, 1104.
—— v. Fussell, pp. 1562, 1571, 2057, 2429, 2529.
—— v. Gammage, p. 2630.
—— v. Gans, p. 578.
—— Garner v.
—— v. Garner, pp. 1853, 3055.
—— George v.
—— v. Germany, pp. 1883, 1966.
—— v. Gibson, p. 141.
—— v. Gilbreath, 87 Ark. 572, 113 S. W. 200—pp. 1991, 2288, 2293, 2335.
—— v. Gilbreath (Tex. Civ. App.), 144 S. W. 1051—pp. 557, 558.
—— v. Gill, 54 Ark. 101, 15 S. W. 18, 11 L. R. A. 452—pp. 140, 144.
—— v. Gill, 156 U. S. 649, 39 L. Ed. 567, 15 S. Ct. 484—pp. 34, 46, 53, 58, 60, 64, 115, 119, 3668.
—— v. Glossup, pp. 2162, 2242.
—— v. Gorman, pp. 1372, 1393.
—— v. Gosnell, pp. 1756, 1993.
—— v. Gramling, pp. 3272, 3442.
—— Gratiot St. Warehouse Co. v.
—— Gray v.
—— v. Grayson, pp. 1427, 1430, 3332, 3840.
—— Greason v.
St. Louis, etc., R. Co. v. Green, 85 Ark. 117, 107 S. W. 168, 14 L. R. A., N. S., 1148—pp. 1720, 1910.
—— v. Green, 99 Ark. 572, 139 S. W. 307—p. 2410.
—— v. Green, 44 Tex. Civ. App. 13, 97 S. W. 531—p. 3149.
—— v. Greenthal, p. 2022.
—— v. Gresham, p. 1830.
—— Grier v.
—— v. Griffith, pp. 1513, 1531, 2047, 3373.
—— v. Grimsley, pp. 1776, 2280, 2323, 2508.
—— v. Groce, pp. 3042, 3051.
—— v. Gunter, 39 Tex. Civ. App. 129, 86 S. W. 938—pp. 1303, 1320, 1325.
—— v. Gunter, 44 Tex. Civ. App. 480, 99 S. W. 152—pp. 1306, 1310.
—— Haas v.
—— v. Hadley, pp. 38, 46, 48, 49, 57, 3490.
—— Hafer v.
—— Hahn v.
—— v. Hall, etc., Mach. Co., pp. 556, 563, 593, 603.
—— Holliday v.
—— v. Hambrick, pp. 940, 943, 1053, 1120, 1409.
—— v. Hammett, pp. 1563, 1636, 2468, 3083.
—— v. Hardway, pp. 3114, 3123, 3160, 3168.
—— v. Hardy, pp. 1940, 3204, 3212, 3239.
—— v. Harmon, pp. 1580, 2168.
—— v. Harper, pp. 1532, 1546, 2478, 3102.
—— v. Harrison, 89 S. W. 53, 76 Ark. 430—p. 2768.
—— v. Harrison, 32 Tex. Civ. App. 368, 73 S. W. 38—pp. 1683, 1712, 1731.
—— Hart v.
—— Hartley v.
—— v. Hartung, pp. 1755, 1756, 2142, 2329, 2336.
—— v. Hatch, pp. 3208, 3209, 3234, 3236.
—— v. Hawkins, p. 3139.
—— v. Haynes, p. 1887.
—— v. Hays, pp. 1035, 1088, 1092, 1095, 1116, 1117.
—— Heil v.
—— v. Henderson, pp. 1472, 3308, 3404.
—— v. Hendricks, pp. 2717, 2718.
—— Hennessy v.
—— v. Henry, pp. 851, 852.
—— v. Heyser, pp. 1106, 3469.
—— v. Highnote, p. 2265.
—— Hill v.
—— v. Hill, 14 Ill. App. 579—pp. 89, 235.
—— v. Hill, 97 Tex. 506, 80 S. W. 368—p. 88.
—— v. Hill (Tex. Civ. App.), 103 S. W. 227—pp. 1506, 1643.
—— v. Hindsman, p. 666.
—— Hoffman, etc., Stave Co. v.
—— Holland v.
—— v. Holmes, pp. 1991, 2319, 2892.
—— v. Honea, pp. 1092, 1117, 1358.
—— v. Hook, pp. 1699, 1777.
—— Hopkins v.
—— Huddleston v.
—— v. Humphreys, pp. 1526, 1964, 1966, 1978, 1988.
—— v. Hunt, pp. 1303, 1305, 1358.
—— Hunter v.
—— v. Hurst, pp. 1030, 1107.
—— Hurt v.
—— v. Hutchinson, pp. 1514, 1792, 2135, 2136, 2286, 2325.
—— Inman & Co. v.
—— Insurance Co. v.
—— Jackson v.
St. Louis, etc., R. Co. v. Jackson, pp. 1757, 2860, 2928.
—— v. Jackson & Co., pp. 782, 787, 844.
—— v. Jacobs, pp. 1111, 1112, 1428.
—— v. James, pp. 1119, 1427, 1475.
—— v. Jamieson, pp. 344, 3399
—— Johnson v.
—— v. Johnson, 53 Ark. 282, 13 S. W. 1096—p. 156.
—— v. Johnson, 59 Ark. 122, 26 S. W. 593—pp. 1792, 2272, 2274.
—— v. Johnson, 25 Okla. 833, 108 Pac. 378, 36 R. R. R. 165, 59 Am. & Eng. R. Cas., N. S., 165—pp. 191, 1623, 2420, 2447.
—— v. Johnson, 100 Tex. 237, 97 S. W. 1039—pp. 1766, 1779, 1780, 1797, 2654, 2913, 2941.
—— v. Johnson, 29 Tex. Civ. App. 184, 68 S. W. 58—pp. 1679, 2042, 2051, 2484.
—— Johnston v.
—— Jones v.
—— v. Jones, 93 Ark. 537, 125 S. W. 1025—pp. 335, 948, 970, 1271, 1303, 1365, 1375.
—— v. Jones (Tex. Civ. App.), 29 S. W. 695—pp. 505, 1314.
—— Jorden v.
—— Keen v.
—— v. Keitt, pp. 1701, 1826, 2273.
—— v. Keller, pp. 1083, 1084, 1098, 1100.
—— v. Kennedy, pp. 1712, 1911, 1913, 2592, 2595.
—— Keyes-Marshall Bros. Livery Co. v.
—— v. Keys, pp. 1476, 1477, 3393.
—— v. Kilberry, pp. 539, 1462, 1463, 1464, 3284, 3352.
—— v. Kilpatrick (Ark.), 17 Am. & Eng. R. Cas., N. S., 212—p. 1563.
—— v. Kilpatrick, 67 Ark. 47, 54 S. W. 971—pp. 2412, 2414, 2486, 2530.
—— Kirby v.
—— v. Kitchen, pp. 1588, 2335, 2935.
—— Knight v.
—— v. Knight, 81 Ark. 429, 99 S. W. 684—pp. 3038, 3047, 3048, 3063.
—— v. Knight, 122 U. S. 79, 30 L. Ed. 1077, 7 S. Ct. 1132—pp. 267, 281, 282, 284, 285, 288, 290, 305, 306, 307, 308, 331, 339, 343, 344, 811, 814, 878, 919.
—— Krumm v.
—— Kruse v.
—— v. Ladd, pp. 1371, 1413, 1416, 1427, 1475.
—— v. Lamb, p. 673.
—— v. Larned, pp. 309, 559, 560.
—— Latimer v.
—— v. Laurence, p. 2661.
—— v. Law, pp. 752, 1087, 1345, 1419.
—— v. Lawrence, pp. 1492, 2865.
—— Leach v.
—— v. Leamons, pp. 2364, 2365, 2824, 2905, 2988.
—— v. Leder Bros., 79 Ark. 59, 95 S. W. 170—p. 95.
—— v. Leder Bros., 87 Ark. 298, 112 S. W. 744— pp. 229, 264.
—— Le Duc v.
—— Lee v.
—— v. Lee, p. 259.
—— v. Lellar, pp. 1842, 2673, 2693, 2808, 2919.
—— v. Leftwich, pp. 2163, 2172, 2338.
—— v. Leigh, pp. 1953, 1955, 2427.
—— v. Lesser, pp. 1399, 1404, 3377.

St. Louis, etc., R. Co. v. Lewellen Bros., 192 Fed. 540, 113 C. C. A. 414—p. 3745.
—— v. Lewellen Bros. (Tex. Civ. App.), 116 S. W. 116—p. 1337.
—— v. Lewis, pp. 1869, 1875, 2476, 2478.
—— Libby v.
—— v. Lieurance, p. 3410.
—— Lightfoot & Son v.
—— Lillis v.
—— Lilly v.
—— v. Linam, p. 2495.
—— Little Rock, etc., R. Co. v.
—— v. Louisiana, etc., Lumber Co., pp. 503, 506.
—— v. Lovelady, p. 1482.
—— v. Lowe, pp. 1778, 2561.
—— v. Loyd, pp. 1567, 2320, 2685.
—— v. McAnellia, pp. 2034, 2037, 2410, 2413, 2783.
—— McCaffery v.
—— McCarty v.
—— McClanahan v.
—— v. McCullough (Tex. Civ. App.), 33 S. W. 285—pp. 1907, 1908, 1915, 1970.
—— v. McCullough, 18 Tex. Civ. App.), 534, 45 S. W. 324—pp. 1666, 1683, 1685, 1738, 1908, 1969, 2706.
—— McDonald v.
—— v. McDurmitt Grain Co., p. 861.
—— McElvain v.
—— v. McGivney, pp. 3259, 3292, 3387, 3394.
—— v. McIntyre, pp. 822, 836, 940, 954, 977, 980, 994, 1039, 1053, 1056, 1062, 1063, 1065, 1077, 1079, 1398.
—— v. McKee, p. 156.
—— v. Mackie, pp. 1609, 1613, 1942, 2017, 2033.
—— v. McKnight, pp. 3387, 3388.
—— McLain v.
—— v. McNamare, p. 3483.
—— v. McNeil, p. 1419.
—— v. McWhirter, p. 3510.
—— v. Maddry, pp. 2122, 2129.
—— Magrane v.
—— v. Mallard, p. 3074.
—— Malloy v.
—— v. Malone, pp. 1881, 2824.
—— Marine Ins. Co. v.
—— v. Marrs, p. 3263.
—— Marshall v.
—— v. Marshall, 81 Pac. 169, 71 Kan. 866—p. 2964.
—— v. Marshall, 74 Ark. 597, 86 S. W. 802—pp. 782, 783, 3290.
—— Martin v.
—— v. Martin (Tex. Civ. App.), 35 S. W. 28—pp. 270, 917.
—— v. Martin, 26 Tex. Civ. App. 231, 63 S. W. 1089—pp. 1532, 1533, 2287.
—— v. Martin (Tex. Civ. App.), 87 S. W. 387—p. 1712.
—— Mason v.
—— v. Massey, p. 2267.
—— v. May, pp. 595, 646.
—— v. Mayer Bros. Co., p. 558.
—— Metcalf v.
—— Meyer v.
—— Miles v.
—— v. Miller, pp. 1139, 1141, 1182, 3148, 3151, 3155.
—— v. Miller Levee Dist. No. 2, p. 3533.
—— Mires v.
—— v. Mitchell (Ark.), 43 R. R. R. 673, 66 Am. & Eng. R. Cas., N. S., 673—p. 287.
—— v. Mitchell, 57 Ark. 418, 21 S. W. 883—pp. 694, 1738, 1740, 1840, 2693.
—— v. Mitchell, 101 Ark. 289, 142 S. W. 168, 37 L. R. A., N. S., 546—pp. 1285, 1290, 1311, 1332, 1361, 1362, 1366.
St. Louis, etc., R. Co. v. Mitchell Crittenden Tie Co., pp. 1642, 1643.
—— v. Montgomery, pp. 285, 288, 291, 884.
—— v. Moon, pp. 940, 954, 1053, 1062, 1072, 1075, 1349, 1409, 3382, 3542.
—— Moore v.
—— v. Morgan, pp. 1554, 2164, 2334.
—— Mosher v.
—— v. Moss, p. 218.
—— v. Mudford, 44 Ark. 439—p. 636.
—— v. Mudford, 48 Ark. 502, 3 S. W. 814—pp. 642, 645, 653, 658.
—— Munro v.
—— Murphy v.
—— v. Murphy, pp. 271, 276, 285, 288, 292.
—— v. Murray, pp. 2129, 2294.
—— v. Musgrove, pp. 817, 842.
—— v. Musick, pp. 1316, 1324, 1326, 1394.
—— v. Myer, p. 3303.
—— Myers v.
—— v. Mynott, pp. 2410, 3106.
—— v. Myrtle, pp. 2435, 3101.
—— v. Myzell, p. 3068.
—— v. Neal, pp. 1872, 3038.
—— Nebraska Meal Mills v.
—— v. Neel, pp. 262, 263, 285, 292, 661, 778, 3249, 3313.
—— v. Neely, pp. 2219, 2860.
—— v. Nelson, pp. 2098, 2099.
—— Nenno v.
—— Neville v.
—— Nicholson v.
—— Nickey v.
—— Nines v.
—— Norris v.
—— Norton v.
—— v. Norwood, pp. 3554, 3571.
—— Nunnelee v.
—— O'Connell v.
—— Odom v.
—— O'Field v.
—— v. Oliver, pp. 1835, 1836, 2225, 2884.
—— v. Osborn, pp. 2421, 2484, 3082.
—— v. Osborne, p. 2696.
—— Otrich v.
—— Owen v.
—— Oxley v.
—— v. Ozier, pp. 229, 231, 1351.
—— Palsey v.
—— v. Pape, pp. 826, 1052.
—— Pares v.
—— Parks v.
—— v. Parks, 76 S. W. 740, 97 Tex. 131—pp. 1822, 1826, 2289, 2666, 2678, 2694, 3008.
—— v. Parks (Tex. Civ. App.), 73 S. W. 439—pp. 1822, 2643.
—— v. Parks, 40 Tex. Civ. App. 480, 90 S. W. 343—pp. 1713, 1826, 2684.
—— v. Parmer, p. 1455.
—— v. Pearce, 159 Ala. 141, 49 So. 249—p. 2582.
—— v. Pearce, 82 Ark. 339, 101 S. W. 763—pp. 1123, 1124.
—— v. Pearce, 82 Ark. 353, 101 S. W. 760, 12 Am. & Eng. Ann. Cas. 125—pp. 607, 969, 970, 974, 1413, 1432, 3394, 3395.
—— v. Pearson, pp. 3045, 3056.
—— v. Person, pp. 1883, 2125, 2255, 2374.
—— v. Petties, p. 1956.
—— Petty v.
—— v. Phelps, pp. 645, 653, 658, 662.
—— v. Phillips, pp. 931, 946, 1084, 1087, 1096, 1410, 1412, 1425.
—— v. Phoenix, etc., Oil Co., pp. 851, 622, 973.
—— v. Pilburn, pp. 1354, 1473, 3623.
St. Louis, etc., R. Co., Pindell v.
—— v. Piper, pp. 3257, 3343.
—— v. Pitcock, pp. 2095, 2096.
—— v. Pollock, pp. 1697, 2220, 2338, 2890, 2933.
—— Porter v.
—— v. Posten, p. 2695.
—— Powell v.
—— v. Power, pp. 2773, 2776.
—— President, etc., Ins. Co. v.
—— Price v.
—— v. Pruitt, 80 S. W. 72, 97 Tex. 487—pp. 1978, 3014.
—— v. Pruitt (Tex. Civ. App.), 79 S. W. 598—pp. 1544, 1977, 1978, 2452.
—— v. Puckett, pp. 1419, 1425.
—— v. Pumphrey, p. 687.
—— v. Purifoy, pp. 1744, 1745.
—— v. Randle, pp. 3287, 3297.
—— v. Ratley, p. 2357.
—— v. Ray, 13 Tex. Civ. App. 628, 35 S. W. 951—p. 3157.
—— v. Ray (Tex. Civ. App.), 127 S. W. 281—pp. 762, 3661, 3662.
—— Read v.
—— v. Reagan, pp. 2485, 2532.
—— Rearden v.
—— v. Renfroe, pp. 219, 784, 785, 3396.
—— v. Rexroad, p. 1971.
—— Reynolds v.
—— v. Rice, pp. 1816, 2164, 2213, 2214.
—— v. Richardson, 87 Ark. 101, 112 S. W. 212—pp. 2338, 2892.
—— v. Richardson, 87 Ark. 602, 113 S. W. 794—pp. 2933, 2954.
—— v. Ricketts, 96 Tex. 68, 70 S. W. 315—pp. 2117, 2118, 2234, 2319, 2341, 3053.
—— v. Ricketts, 22 Tex. Civ. App. 515, 54 S. W. 1090—pp. 1532, 1541, 1908.
—— v. Roane, pp. 2495, 3090, 3104.
—— v. Robbins, pp. 1073, 1076, 1078.
—— Roberts v.
—— Robinson v.
—— v. Rogers, pp. 430, 1062, 1063.
—— v. Rose, 20 Ill. App. 670—pp. 539, 551.
—— v. Rose (Tex. Civ. App.), 93 S. W. 1105—p. 1887.
—— Rosenbaum v.
—— v. Rosenberry, 45 Ark. 256—pp. 2266, 2706.
—— v. Rosenberry (Ark.), 11 S. W. 212—p. 2252.
—— v. Rumfield, p. 1778.
—— v. Rush, 86 Ark. 325, 111 S. W. 263—pp. 2331, 2357, 2375.
—— v. Rush, 93 Ark. 631, 123 S. W. 804—pp. 2316, 2397.
—— v. Russell, p. 2820.
—— Rutherford v.
—— v. Ryan, p. 2070.
—— St. Louis Ins. Co. v.
—— v. Samuels & Co., p. 3784.
—— v. Sanderson, pp. 1562, 2045, 2864.
—— v. Sandiage, p. 694.
—— Sargent v.
—— v. Savage, pp. 1985, 2694, 2758, 2761.
—— Schaefer v.
—— Scott County Milling Co. v.
—— Segal v.
—— Senf v.
—— Seyfarth v.
—— v. Sharrock, p. 1403.
—— v. Shaw, pp. 1698, 2027, 2376, 2958.
—— Shelton v.
—— v. Sherlock, pp. 727, 1402.
—— Shoptaugh v.
—— Short v.
—— Shular v.
—— Silverman v.
—— Simmons Hardware Co. v.

St. Louis, etc., R. Co., Skiles v.
—— Sloan & Co. v.
—— Smeltzer v.
—— Smith v.
—— v. Smith, 11 Tex. Civ. App. 550, 32 S. W. 828—p. 851.
—— v. Smith, 29 Tex. Civ. App. 451, 49 S. W. 627—p. 1299.
—— v. Smith, 33 Tex. Civ. App. 520, 77 S. W. 28—p. 1349.
—— v. Smith, 34 Tex. Civ. App. 612, 79 S. W. 340—p. 2301.
—— v. Smith, 38 Tex. Civ. App. 507, 86 S. W. 943—p. 2171.
—— v. Smuck, pp. 945, 978, 1012, 1013, 3166.
—— v. Sneed, p. 1419.
—— v. Snell, p. 2883.
—— v. Sommerland, p. 2004.
—— v. South, pp. 1596, 1600, 2467, 2468.
—— Southern Exp. Co. v.
—— v. Spann, pp. 1372, 3378.
—— v. Spring River Stone Co., p. 3754.
—— Sproule v.
—— v. State, 84 Ark. 150, 104 S. W. 1106—pp. 30, 149, 150, 216, 607.
—— v. State, 85 Ark. 284, 107 S. W. 989—p. 3516.
—— v. State, 85 Ark. 311, 107 S. W. 1180, 122 Am. St. Rep. 33—pp. 161, 3486, 3488.
—— v. State, 87 Ark. 562, 113 S. W. 203—p. 3423.
—— v. State, 97 Ark. 473, 134 S. W. 970—p. 3483.
—— v. State, 99 Ark. 1, 136 S. W. 938—pp. 20, 23, 3483.
—— v. State, 24 Okla. 805, 105 Pac. 351—pp. 118, 128.
—— v. State, 26 Okla. 62, 107 Pac. 929, 30 L. R. A., N. S., 137—pp. 3482, 3502, 3517.
—— v. State, 26 Okla. 764, 110 Pac. 759—p. 127.
—— v. State, 27 Okla. 426, 112 Pac. 1121—p. 84.
—— v. Stell, p. 2688.
—— Sterling v.
—— v. Stevenson, 54 Ark. 116, 15 S. W. 22—p. 70.
—— v. Stevenson, 156 U. S. 667, 39 L. Ed. 573, 15 S. Ct. 491—pp. 34, 53, 144.
—— v. Stewart, pp. 1986, 2004.
—— v. Stokes, pp. 3355, 3368.
—— v. Stone, 78 Ark. 318, 95 S. W. 470—pp. 3139, 3196.
—— v. Stone, 78 Kan. 510, 104 Pac. 1067—p. 491.
—— v. Stonecypher, p. 457.
—— Sturgeon v.
—— Sutton v.
—— v. Sweet, 57 Ark. 287, 21 S. W. 587—pp. 1728, 1754.
—— v. Sweet, 60 Ark. 550, 31 S. W. 571—pp. 1719, 1727, 1732.
—— v. Sweet, 40 S. W. 463, 63 Ark. 563—p. 2926.
—— Tarrant v.
—— v. Taylor, 84 S. W. 1035, 74 Ark. 31—p. 2777.
—— v. Taylor, 87 Ark. 331, 112 S. W. 745—pp. 257, 1294, 1295, 1433.
—— v. Taylor, 210 U. S. 281, 52 L. Ed. 1061, 28 S. Ct. 616—pp. 3450, 3452, 3456.
—— Thayer v.
—— v. Thomas, pp. 1495, 2571.
—— Thompson v.
—— v. Thompson, pp. 608, 609, 696.
—— Tickell v.
—— Tinkle v.
—— v. Tittle, pp. 1789, 1866, 1956.
St. Louis, etc., R. Co. v. Tomlinson, pp. 2501, 2537, 2538, 2546, 2550, 2551.
—— v. Townes, p. 688.
—— v. Townsend, p. 1860.
—— v. Tribbey, pp. 1298, 1402.
—— Trigg v.
—— v. Trimble, p. 3086.
—— v. Trotter, p. 1880.
—— v. Tucker, pp. 1643, 2440.
—— Tuggle v.
—— Turner v.
—— v. Turner, 1 Tex. Civ. App. 625, 20 S. W. 1008—pp. 684, 1096, 1313, 1329, 1411, 1414, 1416.
—— v. Turner (Tex. Civ. App.), 84 S. W. 1094—pp. 1885, 1886, 2825.
—— v. Tyler Coffin Co., pp. 515, 580, 664, 665.
—— United States v.
—— v. United States, 94 C. C. A. 437, 169 Fed. 69—p. 3621.
—— v. United States, 209 Fed 600—pp. 3621, 3625.
—— Van Cleve v.
—— v. Vaughan, 84 Ark. 311, 105 S. W. 573—pp. 1304, 1460, 1461.
—— v. Vaughan, 88 Ark. 238, 113 S. W. 1035—pp. 1272, 1307, 1308, 1332, 1382, 1408.
—— v. Waggoner, pp. 1585, 1760. 1308, 1332, 1382, 1408.
—— v. Wainwright, p. 2876.
—— v. Waldert Grocery Co., p. 863.
—— v. Waldrup, p. 144.
—— v. Walker, p. 2860.
—— v. Wallace, 90 Ark. 138, 118 S. W. 412, 22 L. R. A., N. S., 379—pp. 694, 947, 948, 3294.
—— v. Wallace, 32 Tex. Civ. App. 312, 74 S. W. 581—pp. 1537, 1700, 1778.
—— v. Warren, p. 970.
—— v. Waters, pp. 2411, 2412, 2419, 3027.
—— v. Watkins, pp. 402, 836, 837, 838, 840.
—— v. Watson, pp. 2294, 2857.
—— Wayne v.
—— v. Weakly, pp. 320, 323, 819, 945, 986, 988, 1073, 1399, 1457, 3377.
—— v. Wells, pp. 975, 1372.
—— Wernick v.
—— West v.
—— v. Wester, p. 3542.
—— Wheeler v.
—— White v.
—— v. White, 48 Ark. 495, 4 S. W. 52, 30 Am. & Eng. R. Cas. 545—p. 1797.
—— v. White, 99 Tex. 359, 89 S. W. 746, 2 L. R. A., N. S., 110, 122 Am. St. Rep 631—pp. 1608, 1668, 3320.
—— v. White (Tex. Civ. App.), 34 S. W. 1042—pp. 1544, 1549, 1551.
—— v. White (Tex. Civ. App.), 86 S. W. 71—p. 2573.
—— v. White (Tex. Civ. App.) 103 S. W. 673—pp. 614, 638.
—— Whitehead v.
—— v. Whittle, p. 2140.
—— v. Wiggam, pp. 1580, 2536.
—— Wilburn v.
—— v. Wilhelm, pp. 1318, 1320.
—— v. Williams, 100 Ark. 356, 140 S. W. 141—pp. 2416, 3029, 3082.
—— v. Williams (Tex. Civ. App.), 32 S. W. 225, 2 Am. & Eng. R. Cas., N. S., 541—p. 1120.
—— v. Williams (Tex. Civ. App.), 37 S. W. 992—p. 2490.
—— Williamson v.
—— Wilson v.
St. Louis, etc., R. Co. v. Wilson, 70 Ark. 136, 66 S. W. 661, 91 Am. St. Rep. 74—pp. 2027, 2033, 2961, 2964, 3010.
—— v. Wilson, 85 Ark. 257, 107 S. W. 978—pp. 1386, 1436, 1437, 1444, 1452.
—— Winter v.
—— Witting v.
—— v. Woldert Grocery Co., p. 755.
—— v. Wolf, pp. 1139, 3754, 3758.
—— v. Woodruff, pp. 2416, 2488, 2495.
—— v. Woodruff Mills, pp. 317, 318.
—— v. Woods, pp. 1768, 2889, 2932.
—— v. Wright, 105 Ark. 269, 150 S. W. 706—pp. 1881, 2579, 2878.
—— v. Wright, 75 S. W. 565, 33 Tex. Civ. App. 80—pp. 2606, 2607, 2701.
—— v. Wynne Hoop, etc., Co., pp. 216, 217, 247, 259, 260, 263, 265.
—— v. Young, pp. 1412, 1413, 1423.
—— v. Yount, pp. 2568, 3084, 3085.
St. Louis, etc., Railway v. Gilbreath, pp. 321, 485.
—— v. Heath, pp. 614, 690.
—— v. Lesser, pp. 726, 732, 740, 748, 1035.
—— v. Phelps, p. 854.
St. Louis, etc., Transp. Co., Hibernia Ins. Co. v.
—— Mellier v.
St. Marc v. La Chapella, p. 595.
St. Nicholas Hotel Co. v. Meyer-Schmid Grocer Co., p. 1229.
St. Patrick, The.
St. Paul City R. Co., Appleby v.
—— Berg v.
—— Bishop v.
—— Blondel v.
—— Cooper v.
—— Edlund v.
—— Fonda v.
—— Gaffney v.
—— Herbert v.
—— Jackson v.
—— Joyce v.
—— Koenig v.
—— Konkle v.
—— McBride v.
—— Miller v.
—— Pine v.
—— Purcell v.
—— Reem v.
—— Sahlgaard v.
—— Saiko v.
—— Schacherl v.
—— Schmeltzer v.
—— Smith v.
—— Steeg v.
—— Wick v.
—— Willard v.
—— Winchell v.
St. Paul Fire, etc., Ins. Co. v. McGregor, p. 1129.
—— Mitsui v.
St. Paul Roller Mill Co. v. Great Western Despatch Co., pp. 353, 1221, 1223, 1224.
St. Paul Union Depot Co., Dickerman v.
—— Godbout v.
St. Paul, etc., R. Co., Ahlbeck v.
—— Arthur v.
—— Bishop v.
—— Brusch v.
—— Buenemann v.
—— Butler v.
—— Conger v.
—— Edlund v.
—— Estes v.
—— Gradin v.
—— Hardenbergh v.
—— Jackson v.

St. Paul, etc., R. Co., Jacobus v.
—— Jellett v.
—— Leo v.
—— McVeety v.
—— Matz v.
—— Moulton v.
—— Olson v.
—— Purcell v.
—— Rahilly v.
—— Rosenbaum v.
—— Secord v.
—— Smith v.
—— Watson v.
St. Quentin, The.
Saitta, Liverpool, etc., Co. v.
Saks, Morgan v.
—— Southern Exp. Co. v.
Salberg v. Pennsylvania R. Co., p. 593.
Saleeby v. Central R. Co., 184 N. Y. 597, 77 N. E. 1196—pp. 3167, 3186.
—— v. Central R. Co., 90 N. Y. S. 1042, 99 App. Div. 163, 15 N. Y. Ann. Cas. 353—pp. 3149, 3150.
Salem, etc., R. Co., Lovett v.
Salena, etc., R. Co., Lewis v.
Sales v. Western Stage Co., pp. 1715, 1724, 1837.
Salinger, Memphis, etc., R. Co. v.
—— v. Simmons, pp. 268, 272, 292, 525, 537, 566, 568.
Salley v. Seaboard, etc., Railway, pp. 155, 3278.
Sally Magee, The.
Salmon v. City Elect. R. Co., p. 2177.
—— Kansas Pac. R. Co. v.
Salmon Falls Mfg. Co. v. The Tangier, Fed. Cas. No. 12, 266, 1 Cliff. 396—pp. 527, 892.
—— v. The Tangier, Fed. Cas. 12, 267, 3 Ware 110—pp. 527, 892, 893.
Salt Lake City R. Co., Paul v.
Salter v. Kirkbride, p. 626.
—— Lee v.
Saltmarsh v. Tuthill, p. 358.
Saltonstall v. Stockton, pp. 210, 1492, 2562, 2692.
—— Stokes v.
Saltsman v. New York, etc., R. Co., p. 838.
Saltzman v. Brooklyn City R. Co., p. 2888.
Salzman, Lake Shore, etc., R. Co. v.
—— L. S. & M. R. Co. v.
Saltus v. Everett, pp. 361, 371, 373.
Sambuck v. Southern Pac. Co., p. 2696.
Sammon, International, etc., R. Co. v.
Samms v. Stewart, pp. 2, 4, 208, 233, 726, 731, 771.
Sample, Malott v.
Samples, Southern Kansas R. Co. v.
Sampley, Alabama, etc., R. Co. v.
Sampsell, Colbeck v.
Sampson, International, etc., R. Co. v.
Sams v. Price, p. 2568.
—— Southern R. Co. v.
Samuel v. Cheney, pp. 553, 554.
—— Pennsylvania R. Co. v.
—— Pool Shipping Co. v.
Samuel E. Spring, The.
Samuel F. Houseman, The.
Samuels, Baltimore, etc., R. Co. v.
—— v. California St. Cable R. Co., pp. 1986, 2638, 2802.
—— Ingrafia v.
—— v. Louisville R. Co., pp. 1888, 2876, 2931.
—— v. Richmond, etc., R. Co., pp. 1867, 3058.
—— Wells Fargo Exp. Co. v.
Samuels & Co., St. Louis, etc., R. Co. v.
Samuelson v. State, p. 21.
San Antonio Gas Co., Broadway v.
San Antonio St. R. Co. v. Muth, pp. 7, 1978, 1979, 2584, 2589.
San Antonio Tract. Co. v. Bryant, pp. 1556, 1808, 1811, 1812, 1819.
San Antonio Tract. Co., Contreras v.
—— v. Crawford, p. 2056.
—— v. Davis, pp. 2039, 2057, 2059, 2768, 2769, 2771.
—— Flory v.
—— v. Flory, pp. 1766, 1830, 1913, 1928, 2749, 2904.
—— Haralson v.
—— v. Lambkin, pp. 2056, 2057, 2059, 2768, 2769.
—— Parks v.
—— v. Williams, pp. 2588, 2634.
—— Necker v.
San Antonio, etc., Co. v. Bryant, p. 2174.
San Antonio, etc., R. Co. v. Adams, pp. 1577, 2614.
—— v. Addison, p. 855.
—— v. Bailey, p. 158.
—— v. Barnett (Tex. Civ. App.), 27 S. W. 676—p. 1309.
—— v. Barnett, 12 Tex. Civ. App. 321, 322, 34 S. W. 139—pp. 960, 970, 972, 1318.
—— v. Barnett, 27 Tex. Civ. App. 498, 66 S. W. 474—pp. 451, 453, 454, 1018, 1296, 3342, 3366.
—— v. Botts, p. 1050.
—— Cane Hill Cold Storage, etc., Co. v.
—— Cane Hill, etc., Co. v.
—— Cane Hill, etc., Orchard Co. v.
—— Choate v.
—— v. Choate (Tex. Civ. App.), 35 S. W. 180—p. 2801.
—— v. Choate, 22 Tex. Civ. App. 618, 619, 56 S. W. 214—pp. 1991, 1992, 2222, 2804, 2890.
—— v. Dolan, pp. 814, 978, 1394.
—— v. Dykes, pp. 1614, 1856, 1878, 1885, 2662.
—— First Nat. Bank v.
—— v. Fisher, p. 1361.
—— v. Graves, pp. 6871, 3387.
—— v. Griffin, p. 3416.
—— v. Griffith, p. 688.
—— v. Jackson, pp. 2287, 2618.
—— v. Josey, pp. 607, 637, 660, 693.
—— v. Lester, p. 2381.
—— v. Long, 4 Tex. Civ. App. 497, 22 S. W. 499—p. 1767.
—— v. Long (Tex. Civ. App.), 26 S. W. 114, 116—pp. 1694, 1744.
—— v. Lynch (Tex. Civ. App.), 40 S. W. 631—pp. 1544, 1550, 1554, 1569, 2720.
—— v. Lynch (Tex. Civ. App.), 55 S. W. 517—pp. 202, 1680, 1684, 1738, 1810, 2090, 2299, 2335, 2665, 2720.
—— v. Muth, pp. 1812, 1817, 1821.
—— v. Newman, pp. 1632, 2444, 2465.
—— v. Pratt, 89 Tex. 310, 34 S. W. 445—pp. 1321, 1323.
—— v. Pratt (Tex. Civ. App.), 32 S. W. 705, 706—p. 1323.
—— v. Robinson, 73 Tex. 277, 285, 11 S. W. 327—pp. 2669, 2679, 2758.
—— v. Robinson, 79 Tex. 608, 15 S. W. 584—pp. 1752, 1766.
—— v. Safford, pp. 1852, 2573.
—— Sanchez v.
—— v. Stribling, p. 142.
—— Swank v.
—— Thompson v.
San Antonio, etc., R. Co. v. Thompson, pp. 616, 655, 657, 3355.
—— v. Timon, 45 Tex. Civ. App. 47, 99 S. W. 418—pp. 216, 217, 418, 424, 425, 426, 442, 444, 1295, 1318, 1320.
—— v. Timon (Tex. Civ. App.), 110 S. W. 82—pp. 1294, 1318.
—— v. Trigo (Tex. Civ. App.), 101 S. W. 254—p. 2159.
—— v. Trigo, 108 S. W. 1193, 49 Tex. Civ. App. 523—p. 1966.
—— v. Turner, pp. 232, 608, 1304, 1310, 1354, 3336, 3337.
—— v. Turney, pp. 1518, 1770, 1771, 2327, 2873.
—— v. Wallace, p. 2163.
—— Wilcox v.
—— v. Williams, pp. 419, 424, 425, 451, 1002, 1003, 3337.
—— v. Wright, pp. 451, 851, 971, 984, 997, 1373, 3348, 3365.
Sanbern v. Panama R. Co., pp. 3927, 3935.
—— v. Wright, etc., Lighterage Co., pp. 3909, 3918, 3923, 4065.
San Bernardino v. Southern Pac. Co., p. 3568.
Sanchez, Galveston, etc., R. Co. v.
—— v. San Antonio, etc., R. Co., 88 Tex. 117, 30 S. W. 431—p. 2276.
—— v. San Antonio, etc., R. Co., 3 Tex. Civ. App. 89, 22 S. W. 242—pp. 1792, 2318.
—— v. San Antonio, etc., R. Co. (Tex. Civ. App.), 27 S. W. 922—p. 1526.
Sanden v. Northern Pac. R. Co., pp. 1613, 1621, 1631, 1632, 1634, 2439.
Sanders v. Atlantic, etc., R. Co., pp. 1462, 1477, 1479.
—— Central R. Co. v.
—— v. Chicago, etc., R. Co., p. 2199.
—— Cincinnati, etc., R. Co. v.
—— Kansas, etc., R. Co. v.
—— v. Southern R. Co., pp. 1884, 2126, 2250, 2252, 2253, 2257, 2403, 2676, 2924.
—— v. Southern Railway, pp. 864, 878.
—— Wallace v.
—— v. Young, pp. 11, 768, 1750, 1839.
Sanderson v. Boston Elev. R. Co., pp. 1687, 1994, 2892.
—— v. Frazier, pp. 1735, 1749, 1838, 2204, 2288, 2289, 2692, 2757.
—— v. Lamberton, p. 3387.
—— v. Missouri Pac. R. Co., p. 2249.
—— v. Panther Lumber Co., pp. 1582, 1585.
—— St. Louis, etc., R. Co. v.
Sandfield, The.
Sandford v. Catawissa, etc., R. Co., pp. 213, 220, 222.
—— Commonwealth v.
—— Covington, etc., Turnpike Road Co. v.
—— v. Hestonville, etc., R. Co., 136 Pa. 84, 20 Atl. 799—pp. 1958, 1960, 2805.
—— v. Hestonville, etc., R. Co., 153 Pa. 300, 25 Atl. 833—p. 2785.
—— v. Seaboard, etc., Railway, pp. 155, 173, 176, 341, 348.
Sandhoval, The Willie D.
Sandiage, St. Louis, etc., R. Co. v.
San Diego Land, etc., Co. v. National City, p. 116.
Sandlin v. Lexington R. Co., pp. 1879, 2353, 2357, 2359.
—— Louisville, etc., R. Co. v.
Sandquist v. Fort Dodge, etc., R. Co., p. 2875.
Sands, American Exp. Co.

Sands, Elmore v.
—— v. Manistee River Imp. Co., p. 3479.
Sandusky, Illinois Cent. R. Co. v.
Sandusky-Portland Cement Co. v. Baltimore, etc., R. Co., p. 3812.
Sandusky, etc., R. Co., Page & Co. v.
Sandy, Lake St. Elev. R. Co. v.
—— v. Lake St. Elev. R. Co., pp. 1680, 1743, 2809, 2933.
Sanford, Covington, etc., Turnpike Co. v.
—— v. Eighth Ave. R. Co., 23 N. Y. 343, 80 Am. Dec. 286—pp. 2414, 2483.
—— v. Eighth Ave. R. Co., 20 N. Y. Super. Ct. 122—p. 2487.
—— v. Housatonic R. Co., pp. 484, 488, 1087, 1089, 1097, 1098.
—— McQuesten v.
—— Philleo v.
—— v. Poe, p. 3576.
—— Southern Kansas R. Co. v.
San Francisco, etc., R. Co., Falls v.
—— Fogel v.
—— Patterson v.
—— Wheeler v.
Sangamon, etc., R. Co. v. Henry, p. 653.
Sanger, Chandler v.
—— v. Jesse French Piano, etc., Co., pp. 940, 1063.
—— Virginia Cent. R. Co. v.
Sanitary Dist., Streeter v.
San Jose-Los Gatos, etc., R. Co., Kimic v.
San Jose, etc., R. Co., Jamison v.
San Paulo, The.
San Pedro, The.
San Pedro, etc., R. Co., Bingham v.
—— Dearden v.
—— Pruitt v.
—— Thomas v.
—— v. Thomas, p. 2386.
San Rafael, The.
Sansom v. Southern R. Co., p. 1836.
Sanson v. Philadelphia Rapid Trans. Co., pp. 2691, 2861.
Santa Barbara Consol. R. Co., Kline v.
Santa Clara v. Southern Pac. R. Co., pp. 58, 60.
Santa Fe, etc., R. Co. v. Grant Bros. Constr. Co., 13 Ariz. 186, 108 Pac. 467—pp. 2, 4, 5, 434, 723, 870, 945, 969, 1038, 1040.
—— v. Grant Bros. Constr. Co., 33 S. Ct. 474, 228 U. S. 177, 46 L. R. A., N. S., 148—pp. 440, 3846.
Santee, The.
Santhur v. New Orleans, etc., R. Co., p. 753.
Santissima Trinidad, The.
Sappington v. Atlanta, etc., R. Co., pp. 3046, 3047, 3051.
Saragossa, Hussey v.
Saratoga, etc., R. Co., Beekman v.
—— Brintnall v.
—— Weed v.
Sargent v. Birchard, p. 815.
—— v. Boston, etc., R. Corp., pp. 109, 253, 1179, 1182.
—— Cleveland, etc., R. Co. v.
—— Dowell Wire Fence Co. v.
—— v. Rutland R. Co., pp. 3470, 3501.
—— v. St. Louis, etc., R. Co., pp. 1785, 1798, 1799, 2130, 2269, 2270, 2271.
Sarjeant v. Blunt, p. 1169.
Satterlee v. Groat, p. 771.
Satterwhite, International, etc., R. Co. v.
Sattler, Chicago, etc., R. Co. v.
—— v. Chicago, etc., R. Co., p. 2318.
Sauer, Sawyer v.
Saul, United States v.
Saulsberry, Chesapeake, etc., R. Co. v.
Saunders v. Adams Exp. Co., 76 N. J. L. 228, 69 Atl. 206—p. 1054.
—— v. Adams Exp. Co., 78 N. J. L. 441, 74 Atl. 670—pp. 417, 440.
—— v. Chicago, etc., R. Co., p. 2691.
—— Fort v.
—— v. Southern Pac. Co., pp. 1567, 1816, 2098.
—— v. Southern R. Co., pp. 726, 981, 3114, 3115, 3124, 3128, 3148, 3152, 3161, 3162, 3166.
—— v. Southern Railway, p. 754.
Saunderson, Neal v.
Sauter v. Atchison, etc., R. Co., pp. 632, 732.
Sauvan v. Citizens' Elect. St. R. Co., p. 1894.
Savage v. Marlborough St. R. Co., p. 2697.
—— Mexican Nat. R. Co. v.
—— v. New York, etc., Steamship Co., p. 3990.
—— Prentiss v.
—— St. Louis, etc., R. Co. v.
—— Wabash R. Co. v.
Savageau v. Boston, etc., Railroad, pp. 1769, 2132, 2680, 2873.
Savannah Elect. Co. v. Badenhoop, p. 2708.
—— v. Bennett, p. 2919.
—— Hester v.
—— v. Hodges, pp. 2039, 2045.
—— v. McCants, pp. 1524, 2047, 2048, 2868.
—— McDonald v.
—— v. McElvey, pp. 2751, 3010.
—— v. Pritchard, pp. 2923, 2924.
—— v. Wheeler, pp. 1750, 2042, 2607.
Savannah Mut. Ins. Co., Brown v.
Savannah St., etc., R. Co. v. Bryan, pp. 2040, 2047, 3075.
Savannah, etc., R. Co. v. Austin, pp. 3293, 3354.
—— v. Bonaud, pp. 1670, 1671, 1673, 3042, 3044.
—— v. Boyle, pp. 1577, 2016, 2022, 2031.
—— v. Bundick, p. 1160.
—— Central Trust Co. v.
—— Chicago Packing, etc., Co. v.
—— v. Coleman, p. 544.
—— v. Collins, pp. 412, 760, 761, 861, 880, 3251, 3366.
—— v. Commercial Guano Co., pp. 492, 681, 732, 741, 742, 745, 825, 3248, 3252, 3257, 3291, 3296.
—— Cotchett v.
—— v. Elder, pp. 501, 3402.
—— v. Flaherty, pp. 2145, 2323, 2676.
—— v. Florida Fruit Exch., pp. 3631, 3664, 3667, 3668, 3669, 3675, 3684, 3711, 3724, 3729, 3735, 3747, 3748, 3764, 3767, 3769, 3770, 3777, 3784, 3785, 3817.
—— v. Godkin, p. 2046.
—— v. Hardin, p. 3389.
—— v. Harris, pp. 816, 820, 828, 3394, 3395.
—— Heins v.
—— v. Hoffmayer, pp. 819, 863, 1035, 3399.
—— v. McIntosh, pp. 3139, 3179.
—— Mack v.
—— Norris v.
—— v. Pritchard, etc., Co., pp. 406, 637, 638, 642, 653, 660, 674, 677, 680, 3278, 3410.
—— v. Quo, pp. 2040, 2041, 2047.
—— Sellers v.
Savannah, etc., R. Co. v. Sloat, pp. 551, 948, 1079, 1080, 1364.
—— Smoak v.
—— v. Steininger, p. 839.
—— v. Talbot, pp. 521, 547, 1157.
—— v. Wall, pp. 1696, 2067, 2258, 2608.
—— Wenz v.
—— v. Wilcox, etc., Co., pp. 573, 574, 576, 577, 578, 727, 748.
Savannah, etc., Supply Co., Ocean Steamship Co. v.
Sawin v. Connecticut Valley St. R. Co., pp. 1742, 1817.
Sawyer, Birmingham R., etc., Co. v.
—— Chicago, etc., R. Co. v.
—— v. Chicago, etc., R. Co., p. 550.
—— v. Cleveland Iron Min. Co., p. 347.
—— v. Dulany, pp. 1698, 2034
—— v. El Paso, etc., R. Co., pp. 2562, 2563.
—— v. Hannibal, etc., R. Co., pp. 1681, 1687, 1724, 1727, 1738, 1981.
—— v. Joslin, pp. 1229, 1230.
—— v. Lamar, p. 3069.
—— v. Sauer, pp. 1726, 2115.
Saxon, Dalzell v.
—— Watts & Co. v.
Saxton v. Missouri Pac. R. Co., pp. 2511, 2542, 2547, 2552.
Sayers, Virginia, etc., R. Co. v.
Sayles v. Maine Cent. R. Co., p. 2777.
—— New York, etc., R. Co. v.
—— v. New York, etc., R. Co., p. 1049.
Sayre v. Louisville Union Benev. Ass'n, p. 113.
Sayward, Stevens v.
—— v. Stevens, p. 854.
Scalf, Louisville, etc., R. Co. v.
Scaling v. Pullman Palace Car Co., pp. 3201, 3215, 3217.
Scamell v. St. Louis Transit Co., pp. 1704, 2316.
Scammon v. Wells, Fargo & Co., pp. 516, 748, 760.
Scandinavian-American Bank, Clark v.
Scanlan, Vicksburg, etc., R. Co. v.
Scanlon v. Philadelphia Rapid Transit Co., p. 2238.
Scarboro, Brown v.
Scarborough, Missouri, etc., R. Co. v.
—— Seaboard, etc., R. Co. v.
Scarbrough v. Alabama Mid. R. Co., p. 2074.
Scarritt Estate Co., Howard v.
Scates, Chicago, etc., R. Co. v.
Schacherl v. St. Paul City R. Co., p. 2152.
Schaefer v. Central Crosstown R. Co., pp. 2229, 2909.
—— Cleveland, etc., R. Co. v.
—— v. North Chicago St. R. Co., p. 2484.
—— v. St. Louis, etc., R. Co., pp. 1501, 1505, 1506, 2152, 2372, 2686.
—— v. Union R. Co., pp. 1953, 2347.
Schaeffer v. Philadelphia, etc., R. Co., pp. 1036, 1387, 1454.
Schaettle, Benedict v.
Schafer, Carr v.
—— v. Gilmer, pp. 2312, 3005, 3074.
Schafermeyer, Galveston, etc., R. Co. v.
Schaffner, Pullman Co. v.
Schaller v. Chicago, etc., R. Co., pp. 970, 987, 1030, 1031, 1046.
Schalscha v. Third Ave. R. Co., pp. 2877, 3144.
Scharadin, Fisher v.

Scharbauer, Texas, etc., R. Co. v.
Scharff v. Meyer, pp. 349, 351, 352, 362, 363, 365, 367, 368, 387.
Scharnagl, Tolchester Beach Imp. Co. v.
Schartz, Illinois Cent. R. Co. v.
Schaufler, South, etc., R. Co. v.
Schaun, Western Maryland R. Co. v.
Scheiber v. Chicago, etc., R. Co., p. 2350.
Scheir, American Merchants' Union Exp. Co. v.
Schenberger v. Union Pac. R. Co., p. 3754.
Schenkel v. Pittsburgh, etc., Tract. Co., pp. 1983, 2886.
Schepeler, Gossler v.
Schepers v. Union Depot R. Co., pp. 1501, 1520, 2151.
Schepman, Pittsburgh, etc., R. Co. v.
Schestauber v. Manhattan R. Co., pp. 2144, 2806.
Scheu v. Benedict, pp. 564, 799.
—— v. Erie R. Co., p. 553.
—— v. Union R. Co., p. 2654.
Scheuermann v. Monarch Fruit Co., pp. 369, 387.
Schiebe, Ohio, etc., R. Co. v.
Schieffelin v. Harvey, pp. 728, 751.
Schiff v. New York, etc., R. Co., pp. 452, 3353, 3377.
Schilling v. Union R. Co., p. 2908.
—— v. Winona, etc., R. Co., pp. 1740, 1752, 1755.
Schilling & Co., United Steamship Co. v.
Schindler v. Smith, etc., Co., pp. 477, 478.
Schirmer, Atlantic, etc., R. Co. v.
Schlag v. Chicago, etc., R. Co., p. 2739.
Schlauder v. Chicago, etc., Tract. Co., pp. 1709, 2083, 2654, 2897.
Schlemmer v. Buffalo, etc., R. Co., p. 3461.
Schlett, Heidenheimer & Co. v.
Schley v. Susquehanna, etc., R. Co., pp. 1532, 1533.
Schlichting v. Chicago, etc., R. Co., pp. 519, 558.
Schlittler, Southern R. Co. v.
Schloemer v. St. Louis Transit Co., pp. 6, 1736, 2860.
Schloss v. Atchison, etc., R. Co., pp. 138, 156, 158, 331.
—— v. Wood, pp. 209, 868.
Schlosser v. Great Northern R. Co., pp. 485, 1401.
Schmelling, Chicago Terminal R. Co. v.
—— Chicago, etc., R. Co. v.
Schmeltzer v. St. Paul City R. Co., p. 2819.
Schmidt v. Blood, pp. 714, 822.
—— Chicago City R. Co. v.
—— v. Chicago City R. Co., 239 Ill. 494, 88 N. E. 275—pp. 2083, 2764, 2779.
—— v. Chicago City R. Co., 144 Ill. App. 512—pp. 2012, 2897.
—— v. Chicago, etc., R. Co., pp. 286, 289, 884.
—— v. Cleveland, etc., R. Co., pp. 1664, 2440, 3041.
—— First Nat. Bank v.
—— Galveston, etc., R. Co. v.
—— Indianapolis St. R. Co. v.
—— v. Keyser, p. 3955.
—— v. North Jersey St. R. Co., 66 N. J. L. 424, 49 Atl. 438—pp. 1520, 1880, 2157, 2875.
—— v. North Jersey St. R. Co., (N. J.), 58 Atl. 72—pp. 2152, 2153, 2157.
—— v. Pennsylvania, p. 1226.
—— The.
Schmitt v. Dry Dock, etc., R. Co., p. 2756.
Schmitt v. Milwaukee St. R. Co., pp. 3082, 3086.
—— v. St. Louis Trans. Co., pp. 2816, 2818.
Schneider v. Evans, pp. 1147, 1154, 1155, 1156, 1157, 1161, 3341.
—— v. Leibs Bros. & Co., pp. 1226, 1236.
—— v. New Orleans, etc., Railroad, p. 2200.
—— New Orleans, etc., R. Co. v.
—— Rogers v.
—— v. North Chicago St. R. Co., p. 2322.
—— v. Second Ave. R. Co., 133 N. Y. 583, 30 N. E. 752, 4 Silvernail Ct. App. 232—pp. 2009, 2011.
—— v. Second Ave. R. Co., 15 N. Y. S. 556, 39 N. Y. St. Rep. 370, 59 N. Y. Super. Ct. 536—pp. 2083, 2896.
—— T. & P. R. Co. v.
—— Texas, etc., R. Co. v.
Schneier v. Brooklyn Heights R. Co., pp. 2664, 2673.
Schober, Pullman Co. v.
Schoenfeld v. Louisville, etc., R. Co., p. 1331.
—— v. Milwaukee City R. Co., p. 2197.
Schoer, Southern Pac. Co. v.
Schofield v. Pennsylvania R. Co., p. 1638.
Scholes v. Ackerland, pp. 589, 592.
Scholey, Anderson v.
Scholfield v. Bell, p. 1242.
Schollenberger v. Pennsylvania, pp. 3427, 3428, 3440, 3445, 3539.
Scholtz v. Interborough Rapid Trans. Co., p. 2680.
School Dist. v. Boston, etc., R. Co., p. 806.
Schoolher v. Hutchins, p. 862.
Schooner Freeman v. Buckingham, pp. 3866, 3873, 3879, 3917, 3936, 3937, 3945.
—— The.
Schooner John Bell, De Villers v.
Schopman v. Boston, etc., R. Corp., pp. 1560, 2080, 3180, 3323.
Schotten, Symns v.
Schottler, Spring Valley Water Works v.
Schreiner v. New York, etc., R. Co., p. 2322.
Schritter, Chicago Consol. Tract. Co. v.
Schriver, Atchison, etc., R. Co. v.
Schroeder v. Hudson River R. Co., pp. 417, 534, 580, 587.
—— Missouri, etc., R. Co. v.
Schroeder Lumber Co. v. Chicago, etc., R. Co., pp. 1268, 1274, 1475.
Schubach v. McDonald, pp. 1616, 1617, 1634.
Schubert, Philadelphia, etc., R. Co. v.
Schuldt, Chicago, etc., R. Co. v.
Schulte v. Michigan Cent. R. Co., p. 2898.
Schultz v. Michigan United R. Co., pp. 1997, 2353, 2603.
—— v. Second Ave. R. Co., p. 1704.
—— v. Southern Pacific, p. 3630.
—— Springer v.
—— v. Third Ave. R. Co., 89 N. Y. 242—p. 3105.
—— v. Third Ave. R. Co., 46 N. Y. Super. Ct. 211—p. 2414.
Schultze-Berge, Peterson v.
Schulz v. Parker, p. 21.
Schulze v. Great Eastern R. Co., p. 665.
Schumacher, Baltimore, etc., R. Co. v.
Schumacher v. Chicago, etc., R. Co., pp. 700, 707, 714, 715, 894.
—— v. Eby, pp. 353, 373, 1222
Schurr v. Houston, pp. 1504, 2266.
Schurtz, Michigan, etc., Co. v.
Schuster v. Carson, pp. 1212, 1219.
Schutte v. Weir, pp. 1051, 1053.
Schuttee, Houston, etc., R. Co. v.
Schutter v. Adams Exp. Co., pp. 836, 1036.
Schuyler, Southern Pac. Co. v.
—— v. Southern Pac. Co., pp. 1502, 1503, 1575, 2649, 2652, 2665, 2863, 3695, 3696.
—— Witbeck v.
Schuylkill Valley Tract. Co., Skean v.
Schwab, Express Co. v.
Schwabacher v. Kane, pp. 1214, 1247.
Schwaner, Kerr v.
Schwartz v. Cincinnati, etc., St. R. Co., pp. 2197, 2198.
—— Illinois Cent. R. Co. v.
—— v. Interborough Rapid Transit Co., p. 2567.
—— v. Missouri, etc., R. Co., pp. 2094, 2416.
—— v. New York City R. Co., p. 1889.
—— North Chicago St. R. Co. v.
—— v. Panama R. Co., pp. 3251, 3260, 3333.
Schwartz & Co. v. Erie R. Co., pp. 765, 785.
Schwarzenberger, Pennsylvania Cent. R. Co. v.
Schweitzer, White v.
Schwinding, Baltimore, etc., R. Co. v.
Schwinger v. Raymond, pp. 781, 799.
Scioto Valley Tract. Co. v. Craybill, pp. 2419, 2481.
Scofield, Lake Shore, etc., R. Co. v.
—— v. Lake Shore, etc., R. Co., pp. 5, 20, 221, 227, 1181, 1184, 1188, 1189, 3819.
—— Pennsylvania Co. v.
—— v. Pennsylvania Co., pp. 1975, 2259, 2432.
Scopman v. Boston, etc., R. Corp., p. 1508.
Scorenson v. Illinois Cent. R. Co., p. 1510.
Scotland, The.
Scott, Adams v.
—— Adams Exp. Co. v.
—— v. Allegheny Val. R. Co., pp. 779, 958, 1022.
—— v. Baltimore, etc., Steamboat Co., pp. 744, 778.
—— v. Bergen County Tract. Co., 63 N. J. L. 407, 43 Atl. 1060—pp. 1715, 1957, 1991.
—— v. Bergen County Tract. Co., 48 Atl. 1118, 64 N. J. L. 320—pp. 2174, 2344, 2688.
—— v. Boston Steamship Co., pp. 638, 653.
—— Chicago, etc., R. Co. v.
—— Cleveland, etc., R. Co. v.
—— v. Cleveland, etc., R. Co., pp. 2077, 2476, 2496, 2574.
—— v. Donald, pp. 3538, 3539.
—— Galveston, etc., R. Co. v.
—— Gulf, etc., R. Co. v.
—— Hill v.
—— Houston, etc., R. Co. v.
—— Kansas, etc., R. Co. v.
—— Leask v.
—— Louisville, etc., R. Co. v.
—— v. Metropolitan St. R. Co., pp. 1504, 1701, 2144, 2577.
—— Missouri Pac. R. Co. v.
—— v. Pettit, p. 1234.
—— Reynolds v.

Scott, Richmond City R. Co. v.
—— Richmond, etc., R. Co. v.
—— Texas Exp. Co. v.
—— Texas, etc., R. Co. v.
—— v. United States, p. 3869.
Scott Bros. v. Chicago, etc., R. Co., p. 520.
—— v. Grimes Dry Goods Co., pp. 1237, 1238.
Scott & Co., Texas, etc., R. Co. v.
Scott County Milling Co. v. St. Louis, etc., R. Co., pp. 970, 1110.
Scotthorn v. South Staffodshire R. Co., p. 1217.
Scovell, Tanner v.
Scovill v. Griffith, pp. 515, 591, 636, 638, 663.
—— New York, etc., R. Co. v.
Scrammon v. Wells Fargo & Co., pp. 727, 732.
Scranton v. Wheeler, pp. 3420, 3440, 3441.
Scranton Tract. Co., Keator v.
—— O'Conner v.
—— Thane v.
—— Thayne v.
Screven, Hawley v.
Scribner, Indiana Union Tract. Co. v.
Scritter, Chicago Consol. Tract. Co. v.
Scrivener, Texas, etc., R. Co. v.
Scroggins v. Metropolitan St. R. Co., p. 2252.
Scroggins Co., Pennsylvania R. Co. v.
Scruggs v. Davis, p. 1501.
—— Illinois Cent. R. Co. v.
Scudder, Calais Steamboat Co. v.
Scull & Co. v. Atlantic, etc., R. Co., p. 141.
Scully v. New York, etc., R. Co., p. 2263.
Scurr, Chicago R. Co. v.
Scutt, Thomas v.
Seaboard, The.
Seaboard Air Line R. Co. v. Main, p. 2104.
—— Newbury v.
—— v. Railroad Comm., pp. 46, 54, 58.
Seaboard Air Line Railway, Baldwin v.
—— v. Bradley, pp. 2511, 2512, 2513, 2546, 2917.
—— Cooper v.
—— Davis v.
—— v. Friedman, pp. 810, 1332, 3265, 3267.
—— Hull v.
—— Mason v.
—— Nickles v.
—— v. Rainey, pp. 1907, 1909.
—— v. Kentz, pp. 608, 609, 621, 685, 688, 1448.
—— Reynolds v.
—— Simmons v.
—— Skipper v.
—— v. Smith, p. 2625.
Seaboard R. Co., United States v.
Seaboard, etc., Railroad, Rollins v.
Seaboard, etc., R. Co., Capehart v.
—— v. Cauthen, pp. 1018, 1378, 1384, 1433, 2950.
—— Charlotte Trouser Co. v.
—— Cullen v.
—— Currie v.
—— Dun v.
—— Horton v.
—— Inman & Co. v.
—— Kearney v.
—— Meredith v.
—— v. O'Quin, pp. 2408, 2409, 2417, 3089.
—— Outland v.
—— Pace Mule Co. v.
—— Reeves v.
Seaboard, etc., R. Co. v. Scarborough, pp. 2429, 2621, 2851, 3025.
—— Smith v.
—— Taylor v.
—— v. Thompson, p. 2676.
—— v. Western, etc., R. Co., p. 3249.
Seaboard, etc., Railway v. Atlantic Exp. Co., pp. 961, 963.
—— Baldwin v.
—— Berley v.
—— Best v.
—— Bolen v.
—— v. Bostock, pp. 2369, 2370.
—— Campbell v.
—— Crosby v.
—— Dexter v.
—— v. Ellis, pp. 40, 47, 52, 53, 54, 55, 124, 126.
—— Entzminger v.
—— Fretwell v.
—— Johnson v.
—— Kaufman v.
—— La Floridienne v.
—— Lowe v.
—— McDuffie v.
—— Magill v.
—— Mauldin v.
—— Mims v.
—— Nickles v.
—— v. Phillips, pp. 551, 556, 583, 588, 591, 600.
—— Salley v.
—— Sandford v.
—— Sanford v.
—— Singletary v.
—— v. Smith, pp. 1789, 2490.
—— State v.
—— Summerlin v.
—— Taber v.
Seaborn, Birmingham R., etc., Co. v.
Sea Coast Lumber Co. v. Clyde Steamship Co., p. 3893.
Seago, Argo Steamship Co. v.
Seagraves, State v.
Seale v. Boston Elev. R. Co., p. 2749.
—— Louisville, etc., R. Co. v.
—— v. State, p. 3512.
Seals v. Augusta, etc., R. Co., p. 2566.
Sealy, Missouri, etc., R. Co. v.
—— v. Missouri, etc., R. Co., pp. 304, 317, 358, 359, 364.
Searcy, Eddy v.
Searle v. Kanawha, etc., R. Co., pp. 1715, 1719, 1726, 2586, 2588.
—— Kansas Pac. R. Co. v.
Searles, Alabama, etc., R. Co. v.
—— v. Alabama, etc., R. Co., p. 827.
—— v. Mann Boudoir Car Co., p. 3203.
—— Yazoo, etc., R. Co. v.
Sears v. Eastern R. Co., pp. 1670, 1671, 1672.
—— v. Louisville, etc., R. Co., p. 1667.
—— McArthur v.
—— v. Seattle Consol. St. R. Co., pp. 1725, 1732, 1999, 2006.
—— Teall v.
—— v. Wills, p. 1162.
—— v. Wingate, pp. 305, 306, 309, 337, 3884.
Seasongood v. Tennessee, etc., Transp. Co., pp. 213, 214, 231, 277, 279, 283, 3248, 3249, 3262, 3862, 3863.
Seattle v. Seattle Elect. Co., pp. 68, 81.
Seattle City R. Co., Brown v.
—— Muldoon v.
Seattle Consol. St. R. Co., Pederson v.
—— Sears v.
Seattle Elect. Co., Bennett v.
—— Blakney v.
—— Bugge v.
—— Caywood v.
Seattle Elect. Co., Clukey v.
—— De Yoe v.
—— Firebaugh v.
—— Foster v.
—— Gilcher v.
—— Halverson v.
—— Harkins v.
—— Hyde v.
—— Kirk v.
—— Kroeger v.
—— McCormick v.
—— Morrison v.
—— Murray v.
—— Plattor v.
—— Rangenier v.
—— Ranous v.
—— Seattle v.
—— Sullivan v.
—— Weir v.
Seattle Elect. R., etc., Co., Cunningham v.
—— Woo Dan v.
Seattle-Tacoma, etc., R. Co., Anderson v.
Seattle Tract. Co., Peterson v.
Seattle, etc., Nav. Co., White v.
Seattle, etc., R. Co., Bailey v.
—— Braymer v.
—— Breeden v.
—— Connell v.
—— Conner v.
—— Dennison v.
—— Elliott v.
—— Gilmore v.
—— Harris v.
—— Johnstone v.
—— Jordan v.
—— Lawson v.
—— Linhoff v.
—— Lobb v.
—— Marbourg v.
—— Mills v.
—— Russell v.
—— Walters v.
Seattle, etc., Railway, Mooney v.
Seaver v. Bradley, p. 1488.
Seawell v. Carolina Cent. R. Co., pp. 1514, 2871.
—— v. Greenway Bro. & Co., p. 3114.
—— v. Kansas City, etc., R. Co., p. 94.
Secomb, etc., Co. v. Nutt, pp. 1213, 1229, 1231, 1232, 1234, 1240.
Second Ave. R. Co., Akersloot v.
—— Black v.
—— Bradley v.
—— Coleman v.
—— Ebling v.
—— Ginna v.
—— Hadercamp v.
—— Jackson v.
—— Martin v.
—— Meyer v.
—— Moylan v.
—— Muller v.
—— Pohle v.
—— Schneider v.
—— Schultz v.
Second Ave. Tract. Co., Willis v.
Second Nat. Bank, American Exp. Co. v.
—— v. Bank, p. 398.
—— Sutherland v.
—— v. Walbridge, p. 370.
Second, etc., R. Co., Neslie v.
Secor v. Toledo, etc., R. Co., p. 2248.
Secord v. St. Paul, etc., R. Co., pp. 1547, 1561, 2078.
Security State Bank v. O'Connell Lumber Co., p. 352.
Security Trust Co. v. Wells, Fargo & Co.'s Exp., pp. 549, 551, 554.
Sedalia Elect. R., etc., Co., Hansberger v.
Seddon v. Bickley, pp. 1858, 2686.
Sedoff v. Chicago City R. Co., p. 2697.
Seefahrer, The.

Seelig v. Metropolitan St. R. Co., p. 1986.
Seeligson & Co., Adove v.
Seelye, Dickerson v.
Segal v. St. Louis, etc., R. Co., pp. 2025, 2031, 2871.
Segari & Co., Illinois Cent. R. Co. v.
Segelman v. Interborough Rapid Trans. R. Co., p. 2792.
Segura v. Reed, pp. 527, 531, 896.
Schneideau & Co. v. Pennington, p. 587.
Seibels v. Northern Cent. R. Co., p. 3544.
Seiberling & Co., New York, etc., R. Co. v.
Seibert, Pacific Exp. Co. v.
—— v. Philadelphia, etc., R. Co., p. 553.
Seide, Southern Exp. Co. v.
Seiders, Texas, Tel., etc., Co. v.
Seidlinger v. Brooklyn City R. Co., p. 2895.
Seigel v. Eisen, pp. 2204, 2811, 2894.
Seigfried v. Chicago, etc., R. Co., pp. 341, 1213.
Seinour, Deford v.
Seitz v. Brewers', etc., Mach. Co., p. 3871.
—— v. Dry Dock, etc., R. Co., p. 2307.
—— Illinois Cent. R. Co. v.
Sejalon v. Woolverton, p. 822.
Selby v. Detroit Railway, p. 2241.
—— Ohio, etc., R. Co. v.
—— v. Wilmington, etc., R. Co., pp. 1273, 1408, 1412.
Seley, Missouri, etc., R. Co. v.
Self v. Adel Lumber Co., p. 1489.
—— v. Dunn, p. 768.
Selhorst, Birmingham R., etc., Co. v.
Seligman v. Armijo, pp. 578, 751.
—— Greif & Bro. v.
Seller v. Market St. R. Co., pp. 2322, 2894.
—— v. Pacific, pp. 411, 818, 829, 945, 997, 998, 1007, 1033.
Sellers, Alabama, etc., R. Co. v.
—— v. Atlantic, etc., R. Co., p. 1628.
—— v. Cleveland, etc., R. Co., pp. 1858, 1863.
—— v. Savannah, etc., R. Co., pp. 301, 518, 519, 553, 603.
Sellick, Northern Transp. Co. v.
Selliger, Commonwealth v.
Sellman, Steele v.
Selma St., etc., R. Co. v. Owen, pp. 2014, 2127, 2129, 2234, 2260, 2261, 2262, 2606.
Selma, etc., R. Co. v. Butts, pp. 210, 726, 732, 748, 3270, 3302.
—— v. Campbell, pp. 2582, 2598.
Selman v. Gulf, etc., R. Co., pp. 2287, 2288, 2289, 2348.
Selsor, Chesapeake, etc., R. Co. v.
—— v. Chesapeake, etc., R. Co., p. 3090.
Selway v. Holloway, p. 3136.
Semple, Little v.
Seneca, The.
Senecal v. Richelieu, p. 3136.
Senf v. St. Louis, etc., R. Co., pp. 2649, 2657.
Senior v. New York City R. Co., 187 N. Y. 559, 80 N. E. 1120—p. 68.
—— v. New York City R. Co., 111 App. Div. 39, 97 N. Y. S. 645—p. 27.
Senn, Central R. Co. v.
S. E. Railway Co., Collard v.
Serrains v. Campbell, 1 Q. B. 283—p. 713.
—— v. Campbell, 25 Q. B. Div. 501—p. 713.
Server, I. & G. N. R. Co. v.
Server, International, etc., R. Co. v.
Serviss v. Ann Arbor R. Co., pp. 1526, 1789, 1880, 2686, 2858.
Serwe v. Northern Pac. R. Co., p. 3081.
Sessions, Mobile, etc., R. Co. v.
—— v. New York, etc., R. Co., pp. 3214, 3216.
—— v. Southern Pac. Co., pp. 1572, 2810.
—— v. Western R. Corp., pp. 602, 872, 894, 907.
Setser, Louisville, etc., R. Co. v.
Setzler v. Metropolitan St. R. Co., pp. 2356, 2759, 2798, 2937.
Seven Bros. No. 1, The.
725 Tons of Coal, Holland v.
Sever v. Minneapolis, etc., R. Co., p. 2691.
Severn River Glass Sand Co., Donaldson v.
Severn, etc., R. Co., Rex v.
Sevier v. Southern Railway, pp. 2357, 2359.
—— v. Vicksburg, etc., R. Co., pp. 1909, 1912.
Sewall, Allen v.
—— v. Allen, pp. 759, 763, 770, 3145.
—— Wood v.
Seward, Smith v.
Seward & Co. v. Miller, pp. 364, 372, 377, 385, 390.
Sewell v. Atchison, etc., R. Co., p. 1579.
—— v. Burdick, L. R. 10 App. 74—p. 365.
—— v. Burdick, 10 App. Cas. 79, 105—p. 3881.
—— v. Detroit United Railway, pp. 2679, 2696, 2979.
Sexton v. Metropolitan St. R. Co., pp. 2152, 2876.
Seybolt v. New York, etc., R. Co., pp. 1575, 1576, 2101.
Seyfarth v. St. Louis, etc., R. Co., p. 830.
Seymour v. Chicago, etc., R. Co., pp. 1741, 1786, 2113, 2226.
—— v. Citizens' R. Co., pp. 1819, 2008, 2126, 2127, 2192, 2197, 2894.
—— v. Newton, pp. 1215, 1218, 1219, 1229, 1232.
—— Richardson Fueling Co. v.
Shackelford v. Patrick, p. 861.
Shackleford, New Orleans, etc., R. Co. v.
—— v. Wilcox, p. 3905.
Shacklet, Union R., etc., Co. v.
—— Wabash, etc., R. Co. v.
Shackt v. Illinois Cent. R. Co., pp. 759, 760.
Shaffer, Marion St. R. Co. v.
Shaffer & Co. v. C. H. & D. R. Co., p. 336.
Shamblin v. New Orleans, etc., R. Co., p. 2308.
Shamokin, etc., R. Co., Madara v.
—— Quinn v.
Shanahan v. Chicago, etc., R. Co., p. 2999.
—— v. St. Louis Trans. Co., pp. 2332, 2590.
Shane v. Butte Elect. R. Co., p. 2976.
Shand, Peninsula, etc., Co. v.
—— The.
Shands, International, etc., R. Co. v.
Shanley, Ft. Worth, etc., R. Co. v.
Shanly, Boston, etc., R. Co. v.
Shannon v. Boston, etc., R. Co., pp. 1512, 1776.
—— v. Chesapeake, etc., R. Co., pp. 1578, 2101.
—— Chicago, etc., R. Co. v.
—— v. Comstock, p. 653.
—— Kaskaskia Bridge Co. v.
Shapiro v. Boston, etc., Railroad, p. 3406.
Shareman v. St. Louis Trans. Co., p. 2657.
Sharkey, Port Blakely Mill Co. v.
Sharp v. Clark, pp. 436, 461, 531, 540, 1452.
—— Dobiecki v.
—— v. Grey, pp. 1681, 1682, 1845.
—— v. Kansas City Cable R. Co., pp. 1834, 2683, 2945.
—— Kansas City, etc., R. Co. v.
Sharpe v. Southern R. Co., pp. 642, 654, 673, 689.
—— Wabash R. Co. v.
Sharpless v. Philadelphia, p. 213.
Sharpless & Sons, Adams Exp. Co. v.
Sharer v. Paxson, pp. 1521, 2066, 2157.
Sharrock, St. Louis, etc., R. Co. v.
Sharvey, Lewis v.
Shattuck v. Rand, p. 1684.
Shaw, Bailey v.
—— Chicago City R. Co. v.
—— v. Chicago, etc., R. Co., 173 Ill. App. 107—pp. 2695, 2843.
—— v. Chicago, etc., R. Co. (Iowa), 113 N. W. 478—p. 1639.
—— Daggett v.
—— First Nat. Bank v.
—— v. Gardner, pp. 335, 540.
—— v. Grand Trunk R. Co., p. 3125.
—— Lake St., etc., R. Co. v.
—— Memphis St. R. Co. v.
—— v. Merchants' Nat. Bank, p. 333.
—— v. Northern Pac. R. Co., p. 3138.
—— v. Railroad Co., pp. 355, 356, 358, 359, 371, 373, 374, 375, 376, 389, 3877, 3886.
—— St. Louis, etc., R. Co. v.
—— v. South Carolina R. Co., pp. 663, 849, 850.
—— The John K.
—— v. United States, p. 3864.
—— Wilson v.
Shawcross, Kirkman v.
—— v. Camden, etc., R. Co., pp. 2699, 2978.
Shea, Chicago, etc., R. Co. v.
—— v. Chicago, etc., R. Co., p. 3302.
—— v. Manhattan R. Co., p. 2059.
—— v. Minneapolis, etc., R. Co., p. 1038.
—— Southern Exp. Co. v.
—— United States v.
Shealey v. South Carolina, etc., R. Co., p. 2382.
Shean, Atchison, etc., R. Co. v.
Shearer, Northern Line Packet Co v.
—— Pacific Exp. Co. v.
—— v. Pacific Exp. Co., p. 554.
Sheares, Pennsylvania Co. v.
Sheble v. Oregon R., etc., Co., pp. 3182, 3395.
Sheboygan, etc., R. Co., Tolleman v.
Shedd v. Troy, etc., R. Co., pp. 1620, 1632, 1973.
Sheehan, Louisville R. Co. v.
—— v. Nassau Elect. R. Co., pp. 2156, 2819.
Sheeks, Terre Haute, etc., R. Co. v.
Sheeron v. Coney Island, etc., R. Co., pp. 2193, 2890.
Sheets v. Ohio River R. Co., p. 2465.
Sheffer v. Louisville, etc., R. Co., p. 1894.
Shelby v. Metropolitan St. R. Co., p. 2045.
—— v. Missouri Pac. R. Co., p. 439.
—— Yazoo, etc., R. Co. v.
Shelby County Taxing Dist., Ficklen v.

Shelby County Taxing Dist., Robbins v.
Shelby Ice, etc., Co. v. Southern R. Co., 147 N. C. 61, 60 S. E. 723—pp. 176, 3422.
—— v. Southern R. Co., 147 N. C. 66, 60 S. E. 721—p. 176.
Shelbyville R. Co. v. Louisville, etc., R. Co., pp. 102, 105.
Shelden v. Robinson, pp. 588, 821, 823, 832.
Sheldon v. New York, etc., R. Co., pp. 379, 1102.
—— v. The Uncle Sam, p. 2563.
—— v. Wabash R. Co., p. 3539.
Shellenberg v. Fremont, etc., R. Co., p. 513.
Shellnut v. Central, etc., R. Co., pp. 208, 236, 482, 547.
Shelton, Brenan v.
—— Brennan v.
—— v. Canadian Northern R. Co., pp. 1081, 1082, 1489, 2094, 2790.
—— v. Erie R. Co., pp. 38, 2447, 2450, 2459, 2462, 2463.
—— Gulf, etc., R. Co. v.
—— v. Lake Shore, etc., R. Co., 7 O. Dec. 161, 1 W. L. Bull. 190—p. 191.
—— v. Lake Shore, etc., R. Co., 29 O. St. 214—pp. 1638, 2425, 2431.
—— v. Louisville, etc., R. Co., p. 2205.
—— v. Merchants' Dispatch Transportation Co., 59 N. Y. 258, 48 How. Prac. 257—pp. 286, 432, 776, 958, 992, 993.
—— v. Merchants' Dispatch Transportation Co., 36 N. Y. Super. Ct. 527—pp. 292, 425.
—— Michigan, etc., R. Co. v.
—— v. St. Louis, etc., R. Co., pp. 1372, 1413.
—— v. Southern Railway, pp. 2673, 2761, 2912, 2981.
Shenandoah Valley R. Co. v. Moose, p. 2935.
Shenk v. Philadelphia Steam Propeller Co., pp. 545, 897, 899.
Shepard v. Chicago, etc., R. Co., p. 3031.
—— v. De Barnales, p. 1148.
—— v. Heinken, p. 519.
—— v. New Haven, etc., R. Co., p. 2655.
—— v. Northern Pac. R. Co., pp. 3489, 3490, 3491, 3693.
—— Simpson v.
Shepard, etc., Lumber Co., v. Burroughs, pp. 1221, 1223, 1224, 1226, 1229.
Sheperd, Great Northern R. Co. v.
Shepherd, Citizens' St. R. Co. v.
—— Great Northern R. Co. v.
—— v. Harrison, p. 352.
—— King v.
—— Lincoln Tract. Co. v.
—— v. Midland R. Co., p. 1786.
—— v. Naylor, pp. 306, 337, 338, 339, 3882, 3884, 3885.
Sheppard v. Brooklyn Heights R. Co., p. 1714.
—— v. New York City R. Co., p. 2036.
—— v. Newhall, 47 Fed. 468—p. 1222.
—— v. Newhall, 54 Fed. 306, 4 C. C. A. 352—pp. 1226, 1244.
—— Pittsburg, etc., R. Co. v.
—— Pittsburgh, etc., R. Co. v.
—— Railway Co. v.
—— v. State, p. 3519.
Sherard, Madan v.
Sherbert, Texas, etc., R. Co. v.
Sheridan, Baltimore, etc., R. Co. v.
—— v. Brooklyn, etc., R. Co., pp. 1495, 1698, 1951, 1961, 2026, 2118.
—— Frisby v.
—— v. New Quay Co., p. 573.
Sheridan v. Penn Collieries Co., p. 3963.
Sheridine, Moore v.
Sheriffs v. Pugh, p. 3864.
Sherley v. Billings, pp. 1739, 2048, 2049, 2064, 3070.
Sherlock v. Alling, pp. 2078, 3445, 3482, 3504, 3505, 3551.
—— v. Chicago, etc., R. Co., pp. 3133, 3149.
—— St. Louis, etc., R. Co. v.
Sherman v. Chicago, etc., R. Co., pp. 1636, 1977.
—— v. Hannibal, etc., R. Co., pp. 200, 1507, 1559, 1564, 1760, 1953, 2036, 2069, 2178, 2209, 2526.
—— v. Hudson River R. Co., pp. 511, 901, 902, 3275, 3281, 3406.
—— v. Inman Steamship Co., pp. 847, 854.
—— v. Pennsylvania R. Co., p. 627.
—— v. Rugee, pp. 1219, 1220.
—— v. Southern Pac. Co., pp. 1740, 2583, 2603, 2694, 2842, 2861.
—— v. Wells, pp. 595, 596, 728, 733, 749, 767, 770, 848, 855.
Sherman, etc., R. Co., Conley v.
—— v. Conly, p. 151.
—— Goldstein v.
Sherrad, Woodruff v.
Sherrard, Woodruff v.
Sherratt, Edwards v.
Sherrill, Missouri, etc., R. Co. v.
Sherrod, Louisville, etc., R. Co. v.
—— Texas, etc., R. Co. v.
Sherwood v. Chicago, etc., R. Co., 82 Mich. 374, 46 N. W. 773, 44 Am. & Eng. R. Cas. 337—pp. 1876, 1877, 2405.
—— v. Chicago, etc., R. Co., 88 Mich. 108, 50 N. W. 101—p. 2750.
—— General Mut. Ins. Co. v.
—— King v.
—— Missouri Pac. R. Co. v.
—— Terre Haute, etc., R. Co. v.
Shidlovsky v. Mallory, etc., Co., pp. 665, 936.
Shieder, Gulf, etc., R. Co. v.
—— v. Southern Railway, p. 645.
Shields, Gulf, etc., R. Co. v.
—— v. Ohio, pp. 34, 65, 3484.
—— v. State, pp. 35, 1857.
Shinkle, etc., Co. v. Louisville, etc., R. Co., p. 3801.
Ship Howard, The.
—— v. Wissman, p. 3901.
Ship John Fraser, Brig James Gray v.
Shipman, Texas, etc., R. Co. v.
Shipper, Decan v.
—— v. Pennsylvania R. Co., pp. 220, 1179, 1186.
Shippers' Compress Co., Norfolk, etc., R. Co. v.
Shipton, Pozzi v.
Shirk, Western Maryland R. Co. v.
Shive v. Philadelphia, etc., R. Co., p. 2171.
Shivel, Texarkana, etc., R. Co. v.
Shivers, Nathan v.
—— Western Maryland R. Co. v.
Shockley v. Pennsylvania R. Co., pp. 3259, 3393, 3415.
Shoemaker, City Council v.
—— v. Kingsbury, pp. 4, 1492, 1714, 1717, 1718, 1740.
Shohoney v. Quincy, etc., R. Co., p. 3483.
Shomo, Richmond, etc., R. Co. v.
Shoninger v. Day, p. 889.
Shoop, Union Exp. Co. v.
Shoot v. Cleveland, etc., R. Co., pp. 607, 608, 690.
Shoptaugh v. St. Louis, etc., R. Co., pp. 247, 258, 260, 262.
Shore & Bro. v. Baltimore, etc., R. Co., p. 3544.
Shores Lumber Co. v. Starke, pp. 459, 472.
Short, Callender, etc., Co. v.
—— Galveston, etc., R. Co. v.
—— Gulf, etc., R. Co. v.
—— v. St. Louis, etc., R. Co., pp. 1560, 2474, 2852, 2853.
—— v. Simpson, p. 365.
Shortsleeves v. Capital Tract. Co., pp. 1648, 2442, 2493, 2708.
Shott, Norfolk, etc., R. Co. v.
Shoulder, Wahl v.
Shouse, Beckham v.
Shrader, Kentucky, etc., R. Co. v.
Shreve, Chicago City R. Co. v.
Shreveport Belt R. Co., Leveret v.
Shreveport Tract. Co., Buccola v.
—— May v.
—— Otts v.
—— Spurlock v.
Shreveport, etc., R. Co., Armistead v.
—— Rutherford v.
Shriver, Atchison, etc., R. Co. v.
—— v. Sioux City, etc., R. Co., pp. 757, 821, 945, 1036, 1038, 3183, 3396.
Shropshire, City Elect. R. Co. v.
Shrum v. Cincinnati, etc., R. Co., pp. 2174, 2611.
Shryock, Morris v.
Shuford, Missouri Pac. R. Co. v.
Shular v. St. Louis, etc., R. Co., p. 2425.
Shuler v. Omaha, etc., R. Co., p. 2604.
Shumaker v. Northern Pac. R. Co., p. 1433.
Shumate v. Louisville, etc., R. Co., p. 2173.
Shurr v. Houston, pp. 1545, 1546.
Shurtz, Michigan, etc., R. Co. v.
Shuter, Ogg v.
Shutt v. Cumberland Valley R. Co., p. 2386.
Shwartz v. Fargo, p. 1068.
Sias v. Rochester R. Co., p. 2189.
Siceloff, Union Tract. Co. v.
Sickings, Louisville, etc., R. Co. v.
Sickles v. Brooklyn Heights R. Co., p. 1595.
—— v. Missouri, etc., R. Co., pp. 1706, 2128, 2220, 2221, 2224, 2296.
Siddons, Illinois Cent. R. Co. v.
Sidekum v. Wabash, etc., R. Co., p. 2736.
Sidonian, The.
Siegel-Cooper Co., Frahm v.
Siemonsma v. Chicago, etc., R. Co., pp. 1303, 1361, 1370, 1468.
Siemsen v. Oakland, etc., Elect. Railway, p. 1850.
Sierra R. Co., Roberts v.
—— Valente v.
—— Valenti v.
Sieveking, Smith v.
Sievers v. Dallas, etc., Nav. Co., pp. 3061, 3987.
Siffken v. Wray, p. 1217.
Sigl v. Green Bay Tract. Co., p. 2155.
Siglin, Coos Bay, etc., Nav. Co. v.
Sigma Lumber Co., Central, etc., R. Co. v.
Sikh, The.
Silber v. New York City R. Co., p. 2877.
Silegman, Galveston, etc., R. Co. v.
Siler v. Illinois Cent. R. Co., p. 42.
—— Louisville, etc., R. Co. v.
—— v. Louisville, etc., R. Co., p. 42.
Silliman, Dauchy v.
Silsbee, Barreda v.
Silva v. Boston, etc., Railroad, pp. 1717, 2348, 2885.
—— Fernandez v.

Silva, Montegudo v.
—— Patron v.
Silver v. Kent, pp. 586, 594, 653, 666.
—— v. Tobin, p. 3586.
Silverman v. St. Louis, etc., R. Co., pp. 789, 816, 817, 821, 851, 852.
—— v. Weir, p. 3054.
Silvia, The.
Simkins v. Norwich, etc., Steamboat Co., p. 3268.
Simmonds, The Ship Freedom v.
Simmons, Gulf, etc., R. Co. v.
—— Illinois Cent. R. Co. v.
—— v. Law, 4 Abb. Dec. 241, 42 N. Y. 217—p. 3257.
—— v. Law, 21 N. Y. Super. Ct. (8 Bosw.) 213—pp. 726, 887.
—— Missouri, etc., R. Co. v.
—— v. New Bedford, etc., Steamboat Co., 97 Mass. 361, 93 Am. Dec. 99—pp. 1723, 1746, 1839, 3988, 3989, 3991, 3999, 4002, 4003.
—— v. New Bedford, etc., Steamboat Co., 100 Mass. 34—pp. 2740, 4005.
—— v. Oregon R. Co., pp. 1548, 1561, 1584, 1585, 2743.
—— Salinger v.
—— v. Seaboard Air-Line Railway, pp. 218, 2115, 2357, 3047.
—— The Huron v.
Simmons Hardware Co. v. St. Louis, etc., R. Co., pp. 330, 969, 3335, 3338, 3348.
Simms, Chicago, etc., R. Co. v.
—— v. Pullman, etc., Car Co., pp. 2629, 3206.
—— v. South Carolina R. Co., 26 S. C. 490, 2 S. E. 486—p. 2280.
—— v. South Carolina R. Co., 27 S. C. 268, 3 S. E. 301, 30 Am. & Eng. R. Cas. 571—pp. 1815, 1910, 1913.
Simms & Sons v. New Orleans, etc., R. Co., pp. 1372, 1375.
Simon, C. C. C. & St. L. R. Co. v.
—— Chicago, etc., R. Co. v.
—— Railway Co. v.
—— v. Steamship Fung Shuey, p. 945.
—— Thompson-Houston Elect. Co. v.
Simonds, Goodman v.
Simone v. Rhode Island Co., pp. 2698, 2861.
Simonson, Missouri, etc., R. Co. v.
Simonton v. St. Louis Trans. Co., p. 2393.
—— Winter v.
Simpson, Berkley St. R. Co. v.
—— Byington v.
—— Chicago, etc., R. Co. v.
—— v. Chicago, etc., R. Co., pp. 21, 38.
—— v. Dufour, pp. 576, 727.
—— v. Hand, p. 728.
—— Illinois Cent. R. Co. v.
—— Kansas City, etc., R. Co. v.
—— v. London, etc., R. Co., p. 653.
—— v. New York, etc., R. Co., pp. 3121, 3124.
—— v. Rome, etc., R. Co., p. 2826.
—— v. Shepard, p. 3693.
—— Short v.
Simpson-Crawford Co. v. Borough, p. 3589.
Sims, Central, etc., R. Co. v.
—— Jones v.
—— Lafayette, etc., R. Co. v.
—— Norfolk, etc., R. Co. v.
—— Texas, etc., R. Co. v.
Sinclair, Citizens' R. Co. v.
—— McIntosh v.
—— Southern Exp. Co. v.
Singer v. Merchants' Despatch Transp. Co., pp. 409, 549, 555.
Singletary v. Seaboard, etc., Railway, pp. 2347, 2348, 2911, 2926.
Singleton v. Hilliard, pp. 729, 739, 982.
—— Southwestern Railroad v.
—— v. Southwestern Railroad, p. 2087.
Siniard, Alabama, etc., R. Co. v.
Sinking Fund Cases, p. 36.
Sinnot v. Davenport, pp. 3478, 3569.
Sinnott v. Louisville, etc., R. Co., pp. 1628, 2443.
Sinsheimer v. New York Cent., etc., R. Co., p. 553.
Sioux City Stock Yards Co., United States v.
Sioux City St. R. Co., Douglas v.
Sioux City Tract. Co., Bloom v.
—— Cohen v.
—— Jaques v.
Sioux City, etc., Co. v. First Nat. Bank, pp. 312, 3879.
—— Jaques v.
Sioux City, etc., R. Co., McClary v.
—— Shriver v.
—— State v.
Sioux Falls Tract. System, Wright v.
Sioux, etc., R. Co., Blair v.
—— Curtis v.
—— Keller v.
Sira v. Wabash R. Co., pp. 2032, 2454, 2786.
Sirk v. Marion St. R. Co., p. 2236.
Sisson v. Cleveland, etc., R. Co., pp. 633, 638, 653, 655, 656, 1316, 1382, 3404.
Sites, Cleveland, etc., Railway v.
622,714 Feet of Lumber, McArthur Bros. Co. v.
Sixth Ave. R. Co., Drew v.
—— Hoyt v.
—— McCann v.
—— Nichols v.
—— Wolfkiel v.
Siyufy v. Pennsylvania Co., p. 601.
Sizer, Bowen v.
Sizer & Co., Georgia, etc., R. Co. v.
Skantze v. Keyser, p. 3954.
Skean v. Schuylkill Valley Tract. Co., p. 2827.
Skeels, Baltimore, etc., R. Co. v.
Skelding, Hollingsworth v.
Skellie, Central K. etc., Co. v.
—— v. Central R., etc., Co., p. 633.
Skiles v. St. Louis, etc., R. Co., p. 2594.
—— Wabash R. Co. v.
Skilling v. Bollman, 73 Mo. 665, 39 Am. Rep. 537—pp. 351, 369, 380, 381, 387, 401.
—— v. Bollman, 6 Mo. App. 76—p. 365.
Skillman, Blue Grass Tract. Co. v.
—— Cincinnati, etc., R. Co. v.
—— Railroad Co. v.
Skinner v. Chicago, etc., R. Co., 12 Iowa 191—pp. 518, 585.
—— v. Chicago, etc., R. Co., 12 Tex. 707, 709, 7 S. W. 504—p. 518.
—— v. Hall, p. 3284.
—— Kansas, etc., R. Co. v.
—— Southern R. Co. v.
—— v. Wilmington, etc., R. Co., pp. 1877, 1970.
Skipper v. Seaboard Air Line Railway, p. 3537.
Skipwith, Walker v.
Skivington, George v.
Skottowe v. Oregon, etc., R. Co., p. 2143.
Skow v. Green Bay, etc., R. Co., pp. 1779, 1798, 2910.
Skylark, The.
Slark v. Broom, p. 3864.
Slater v. Jewett, p. 1672.
—— Missouri Pac. R. Co. v.
—— v. South Carolina R. Co., pp. 729, 733, 737, 749, 1036.
Slator, Austin, etc., R. Co. v.
—— Texas, etc., R. Co. v.
Slatter v. Oregon, etc., R. Co., pp. 2784, 3020.
Slattery, Chicago, etc., R. Co. v.
Slatton, Illinois Cent. R. Co. v.
Slaughter, Chicago, etc., R. Co. v.
—— v. Denmead, p. 878.
Slayton, Ex parte.
Sleade v. Payne, pp. 511, 527, 531, 900, 906.
Sledge v. Reid, p. 675.
Sleeper, Cincinnati, etc., R. Co. v.
—— v. Pennsylvania R. Co., pp. 1560, 2439.
Sleepy Eye Milling Co. v. Chicago, etc., R. Co., p. 494.
Sligo v. Philadelphia Rapid Transit Co., p. 1803.
Slimmer v. Merry, p. 768.
Sloahee, Pease v.
Sloan v. Carolina Cent. R. Co., p. 396.
—— v. Detroit United Railway, pp. 2809, 2898.
—— v. Little Rock R., etc., Co., pp. 2695, 2843, 2899.
—— v. North American Transp., etc., Co., pp. 3015, 3987.
—— Rome R. Co. v.
Sloan & Co. v. St. Louis, etc., R. Co., p. 782.
Sloane v. Southern Cal. R. Co., pp. 1638, 1715, 1718, 2432, 3027, 3078, 3082, 3086, 3098.
Sloat, Savannah, etc., R. Co. v.
Slocum, Fairchild v.
—— v. Fairchild, pp. 946, 1003, 1007.
Sloga, The.
Sloman v. Great Western R. Co., pp. 3149, 3150, 3154, 3184.
Sloop, Wabash R. Co. v.
—— v. Wabash R. Co., 93 Mo. App. 605, 67 S. W. 956—p. 1479.
—— v. Wabash R. Co., 117 Mo. App. 204, 84 S. W. 111—pp. 969, 1479.
Slusser, Pittsburg, etc., R. Co. v.
Sly v. Union Depot R. Co., pp. 2120, 2159.
Slyfield, Dennis v.
Small v. Moates, p. 1225.
Small & Co., Lewis, etc., Co. v.
Smalley v. Detroit, etc., R. Co., pp. 2186, 2892, 2099.
Smaoska v. Chicago City R. Co., p. 2858.
Smart, National Line Steamship Co. v.
Smedley v. Hestonville, etc., R. Co., pp. 1715, 1811, 1817.
Smeltzer v. St. Louis, etc., R. Co., pp. 3341, 3604.
Smiley v. Kansas, p. 3775.
Smissen, Texas, etc., R. Co. v.
Smith v. Alabama, pp. 3445, 3466, 3473, 3478, 3480, 3481, 3482, 3483, 3502, 3503, 3504, 3505, 3551, 3570.
—— American Exp. Co. v.
—— v. American Exp. Co., pp. 986, 1074, 3326.
—— v. Atchison, etc., R. Co., pp. 1491, 2100.
—— v. Atlantic, etc., R. Co., p. 2676.
—— Augusta R., etc., Co. v.
—— v. Austro-American Steamship Co., p. 587.
—— Aylward v.
—— Baltimore Steam Packet Co. v.
—— v. Baltimore, etc., R. Co., pp. 846, 870, 880.
—— v. Barker, p. 1209.

Smith v. Birmingham R., etc., Co., pp. 2145, 2150, 2158, 2752.
—— Birmingham Union R. Co. v.
—— v. Booth, 110 Fed. 680—p. 4055.
—— v. Booth, 122 Fed. 626, 58 C. C. A. 479—p. 3917.
—— Boston Elev. R. Co. v.
—— v. Boston, etc., Railroad, pp. 3114, 3122, 3124, 3129, 3151, 3194.
—— v. Britain Steamship Co., pp. 3887, 3913.
—— v. British, etc., Packet Co., pp. 1696, 1838.
—— Brunswick, etc., R. Co. v.
—— Butler v.
—— Central Railroad v.
—— Central R. Co. v.
—— Central R., etc., Co.
—— v. Central R., etc., Co., pp. 1755, 1874, 2964.
—— v. Chamberlain, pp. 1944, 1950.
—— Chesapeake, etc., R. Co. v.
—— Chicago City R. Co. v.
—— v. Chicago City R. Co., p. 2725.
—— Chicago, etc., R. Co. v.
—— v. Chicago, etc., R. Co., 163 Ill. App. 476—p. 2087.
—— v. Chicago, etc., R. Co., 55 Iowa 33, 7 N. W. 398—p. 2538.
—— v. Chicago, etc., R. Co., 108 Mo. 243, 18 S. W. 971, 52 Am. & Eng. R. Cas. 483—pp. 1732, 1886, 1991, 2952.
—— v. Chicago, etc., R. Co., 119 Mo. 246, 23 S. W. 784—p. 2886.
—— v. Chicago, etc., R. Co., 43 Wis. 686—pp. 139, 1197.
—— v. C. H. & D. R. Co., pp. 3114, 3115, 3124.
—— Clark v.
—— Clayton v.
—— v. Cleveland, etc., R. Co., p. 609.
—— Commonwealth v.
—— Cook v.
—— v. Day, p. 3992.
—— Delaware Bank v.
—— v. Detroit United Railway, pp. 2362, 2909.
—— v. Dinsmore, p. 1103.
—— Dorsey v.
—— East Line, etc., R. Co. v.
—— Edwards v.
—— v. Farr, p. 3549.
—— v. Findley, p. 1141.
—— Frazer v.
—— v. Gail, pp. 1228, 1230.
—— Galveston, etc., R. Co. v.
—— Georgetown, etc., R. Co. v.
—— v. Georgia Pac. R. Co., pp. 1717, 1922, 1923, 2240, 2253.
—— Georgia R. Co. v.
—— Georgia R., etc., Co. v.
—— Georgia, etc., R. Co. v.
—— v. Goss, pp. 1218, 1219.
—— v. Great Northern R. Co., 92 Minn. 11, 99 N. W. 47—pp. 1442, 1456.
—— v. Great Northern R. Co., 15 N. Dak. 195, 107 N. W. 56—pp. 3749, 3753.
—— v. Griffith, p. 852.
—— Guilford v.
—— Gulf, etc., R. Co. v.
—— H. & T. C. R. Co. v.
—— Haille v.
—— Harrison v.
—— Houston, etc., R. Co. v.
—— v. Hughes, p. 1068.
—— Illinois Cent. R. Co. v.
—— v. Indianapolis St. R. Co., p. 2663.
—— International Mercantile Marine Co. v.
—— International, etc., R. Co. v.
—— v. International, etc., R. Co., p. 1092.
Smith, Ives v.
—— Jennings v.
—— v. Jefferson Bank, pp. 375, 382.
—— Jerome v.
—— Kansas, etc., R. Co. v.
—— Kellogg v.
—— v. King's Mountain R. Co., p. 877.
—— v. Kingston City R. Co., p. 2232.
—— Lake Shore, etc., R. Co. v.
—— v. Lake Shore, etc., R. Co., pp. 22, 59, 60, 3500.
—— v. Danda, pp. 342, 343, 407.
—— v. Lee, p. 540.
—— Leigh v.
—— Lewis v.
—— v. Lewis, pp. 493, 494, 682.
—— v. Linden Oil Co., pp. 478, 480, 481, 547.
—— Logan v.
—— Louisville, etc., Packet Co. v.
—— Louisville, etc., R. Co. v.
—— v. Louisville, etc., R. Co., 124 Ind. 394, 24 N. E. 753—pp. 1549, 1553, 1569, 2577, 2608.
—— v. Louisville, etc., R. Co., 95 Ky. 11, 15 Ky. L. Rep. 390, 23 S. W. 652, 22 L. R. A. 72—pp. 2530, 2532, 2533, 2632.
—— McIwen v.
—— v. Manhattan R. Co., pp. 201, 2422.
—— v. Mashen, etc., R. Co., p. 511.
—— Merchants' Despatch v.
—— Merchants' Despatch Co. v.
—— v. Metropolitan St. R. Co., 69 N. Y. S. 176, 59 App. Div. 60—p. 2895.
—— v. Metropolitan St. R. Co., 86 N. Y. S. 1087, 92 App. Div. 213—p. 2809.
—— v. Michigan Cent. R. Co., pp. 1289, 1451.
—— Milwaukee, etc., R. Co. v.
—— Missouri Pac. R. Co. v.
—— v. Missouri Pac. R. Co., pp. 296, 304.
—— Missouri, etc., R. Co. v.
—— v. Nashua, etc., Railroad, pp. 529, 896, 901, 912.
—— Newell v.
—— v. New Haven, etc., R. Co., pp. 728, 733, 740, 1273, 1321, 1353.
—— v. New Orleans, etc., R. Co., p. 500.
—— v. New York Cent. R. Co. (N. Y.), 43 Barb. 225—pp. 817, 828, 3183, 3304, 3396.
—— v. New York Cent. R. Co., 24 N. Y. 222—pp. 1567, 2098, 2099.
—— v. New York Cent. R. Co., 41 N. Y. 620—p. 3394.
—— v. New York, etc., R. Co., 46 N. J. L. 7, 18 Am. & Eng. R. Cas. 399—p. 1816.
—— v. New York, etc., R. Co. (N. Y.), 29 Barb. 132—p. 1578.
—— v. New York, etc., R. Co., 149 Pa. 249, 24 Atl. 304—pp. 112, 192.
—— Nichols v.
—— v. Norfolk, etc., R. Co., p. 2042.
—— v. North American Transp. Co., pp. 734, 3985, 3986.
—— v. North Carolina R. Co., 60 N. C. 202—p. 3191.
—— v. North Carolina R. Co., 64 N. C. 235—pp. 1008, 1039, 1042, 3162, 3163.
—— v. North Carolina R. Co., 68 N. C. 107—p. 833.
—— v. North Carolina R. Co., 147 N. C. 448, 61 S. E. 266, 17 L. R. A., N. S., 179—pp. 1790, 2860.
Smith v. North German Lloyd Steamship Co., 142 Fed. 1932—pp. 4011, 4032.
—— v. North German Lloyd Steamship Co., 151 Fed. 222, 80 C. C. A. 574—p. 4033.
—— Nugent v.
—— Ohio, etc., R. Co. v.
—— Olsen v.
—— Paige v.
—— Palmer Transfer Co. v.
—— v. Paul, etc., R. Co., p. 2117.
—— Pennsylvania R. Co. v.
—— v. Philadelphia, etc., R. Co., 87 Md. 48, 38 Atl. 1072—p. 3072.
—— v. Philadelphia, etc., R. Co., 11 Pa. Co. Ct. Rep. 555—p. 1679.
—— v. Pittsburg, etc., R. Co., pp. 2470, 3084.
—— Prescott, etc., R. Co. v.
—— v. Pullman Co., pp. 3205, 3230, 3241, 3242.
—— Pullman Palace Car Co. v.
—— Railroad Co. v.
—— Rapid Trans. R. Co. v.
—— Richmond, etc., R. Co. v.
—— v. Richmond, etc., R. Co., p. 2168.
—— Rixford v.
—— Roberts v.
—— v. St. Louis Transit Co., pp. 1820, 2337.
—— St. Louis, etc., R. Co. v.
—— v. St. Louis, etc., R. Co., 96 Ark. 647, 132 S. W. 926—p. 841.
—— v. St. Louis, etc., R. Co., 85 Mo. 418, 55 Am. Rep. 380—p. 2079.
—— v. St. Louis, etc., R. Co., 9 Mo. App. 598—p. 2079.
—— v. St. Louis, etc., R. Co., 181 U. S. 248, 45 L. Ed. 847, 21 S. Ct. 603—p. 3539.
—— v. St. Paul City R. Co., pp. 1515, 1517, 1746, 1749, 1750, 2002, 2696, 2697, 2698, 2845.
—— v. St. Paul, etc., R. Co., p. 2639.
—— Seaboard Air Line Railway v.
—— v. Seaboard, etc., R. Co., pp. 1512, 1513, 2593.
—— Seaboard, etc., Railway v.
—— v. Seward, pp. 11, 768, 790.
—— v. Sieveking (Eng.), 4 El. & Bl. 945—p. 713.
—— v. Sieveking (Eng.), 5 El. & B. 589—p. 701.
—— South Covington, etc., St. R. Co. v.
—— v. Southern Exp. Co., pp. 412, 421, 570.
—— Southern R. Co. v.
—— v. Southern Railway, 80 S. C. 1, 61 S. E. 205—p. 2251.
—— v. Southern Railway, 70 S. E. 1057, 88 S. C. 421, 34 L. R. A., N. S., 708—pp. 1606, 1607, 1609, 1632, 1634, 2463, 3089, 3091.
—— v. Southern Railway, 88 S. C. 541, 71 S. E. 47—p. 1639.
—— v. Southern Railway, 89 S. C. 415, 71 S. E. 989, 36 L. R. A., N. S., 230—pp. 165, 311, 1460, 1461, 3273, 3396, 3403.
—— Sprague v.
—— Springer Transp. Co. v.
—— v. State, 20 Tenn. (7 Humph.) 43—p. 2062.
—— v. State, 46 S. W. 566, 100 Tenn. (16 Pickle) 494, 41 L. R. A. 432—pp. 21, 1945, 1946, 1947, 3511.
—— v. State (Tex. Cr. App.), 146 S. W. 900—p. 3508.
—— Stephen v.
—— Texas, etc., R. Co. v.
—— v. Texas, etc., R. Co., pp. 2501, 2503, 2504.

Smith v. The Wall, p. 861.
—— v. Turner, p. 3565.
—— v. Union Trunk Line, pp. 1805, 2279.
—— Wegener v.
—— Wegner v.
—— v. Western Railway, pp. 732, 738, 746.
—— v. Western Union Tel. Co., 83 Ky. 104, 7 Ky. L. Rep. 22, 4 Am. St. Rep. 126—p. 1119.
—— v. Western Union Tel. Co., 72 S. C. 116, 51 S. E. 537—p. 643.
—— v. Wilmington, etc., R. Co., pp. 2832, 3049.
—— v. Wrightsville, etc., R. Co., p. 2130.
—— Yazoo, etc., R. Co. v.
—— Young v.
Smith Bros. & Co. v. New Orleans, etc., R. Co., p. 3310.
Smith Co. v. Louisville, etc., R. Co., pp. 1210, 1211, 1214, 1229.
Smith Grain Co., Russel v.
Smith Meat Co. v. Oregon R., etc., Co., p. 1413.
Smith & Co. v. Southern R. Co., pp. 162, 163.
Smith, etc., Co., Schindler v.
Smitha, Central, etc., R. Co. v.
—— Louisville, etc., R. Co. v.
—— v. Louisville, etc., R. Co., pp. 1087, 1097, 1098, 1411, 1412, 1413.
Smithers v. Wilmington City R. Co., pp. 1744, 1821, 1840, 1865, 2667.
Smithson, Michigan Cent. R. Co. v.
Smitson v. Southern Pac. Co., pp. 1895, 1921, 1926, 2360, 2907, 2910, 2987, 2995.
Smoak v. Savannah, etc., R. Co., pp. 2500, 2508, 2733.
Smokeless Fuel Co., Davis v.
Smoat v. Kentucky, etc., R. Co., p. 1948.
Smurthwaite v. Wilkins, p. 365.
Smyrl v. Niolon, pp. 729, 733, 737, 749, 815, 822.
Smyser, Illinois Cent. R. Co. v.
Smyth v. Ames, pp. 34, 36, 37, 44, 46, 47, 49, 50, 54, 58, 60, 61, 115, 116, 129, 130, 3447, 3491, 3497.
Smythe, Atchison, etc., R. Co. v.
Smoker, Newman & Co. v.
Smoker Merchandise Co., Arkadelphia Mill. Co. v.
Smuck, St. Louis, etc., R. Co. v.
Snap, The.
Snare, etc., Co., McCherry v.
Snashall, Metropolitan R. Co. v.
Snashall v. Metropolitan R. Co., pp. 2180, 2668.
Snead, Galveston, etc., R. Co. v.
—— Louisville, etc., R. Co. v.
—— Louisville, etc., Tract. Co. v.
Snediker v. Nassau Elect. R. Co., p. 2813.
Sneed, Backhouse v.
—— Missouri, etc., R. Co. v.
—— St. Louis, etc., R. Co. v.
Snell, Cincinnati St. R. Co. v.
—— Ryberg v.
—— Wright v.
Snellbaker v. Paducah, etc., R. Co., pp. 1600, 2467, 2663, 3096.
Snelling v. Yetter, p. 883.
Snider v. Adams Exp. Co., pp. 982, 984, 986, 1007, 3326, 3346.
—— Augusta, etc., R. Co. v.
—— v. Chicago, etc., R. Co., p. 2812.
—— Louisville, etc., R. Co. v.
Snipes v. Norfolk, etc., Railroad, pp. 1518, 1561, 1902.
Snow v. Carruth, pp. 292, 3935.
—— v. Chatfield, p. 2629.
—— Cowing v.
Snow v. Eastern R. Co., p. 3191.
—— v. Fitchburg R. Co., pp. 1787, 2078.
—— v. Indiana, etc., R. Co., pp. 335, 812, 814, 3268.
—— Nourse v.
—— v. The Inca, p. 528.
Snowden v. Boston, etc., R. Co., p. 2222.
—— v. Philadelphia Rapid Trans. Co., p. 2860.
Snyder v. Colorado Springs, etc., R. Co., p. 2031.
—— v. Hannibal, etc., R. Co., p. 1569.
—— v. Michigan Tract. Co., p. 2821.
—— v. Natchez, etc., R. Co., p. 2506.
—— Southern R. Co. v.
—— v. Supreme Ruler, p. 3830.
—— Texas, etc., R. Co. v.
—— v. Union Depot Co., p. 193.
Societe, The.
Soder, House v.
Sohmer & Co., Clapp Bros. & Co. v.
Solan, Chicago, etc., R. Co. v.
—— v. Chicago, etc., R. Co., p. 2098.
Sollitt, Hartford Deposit Co. v.
Soloman v. Adams Exp. Co., pp. 796, 949, 1069.
Solomon v. Central Park, etc., R. Co., pp. 2191, 2199, 2263.
—— v. Manhattan R. Co., p. 2155.
—— v. Philadelphia, etc., Steamboat Co., pp. 891, 892, 896, 901, 904.
Soly, Jesson v.
Somer v. Boston, etc., R. Co., p. 1983.
Somerset Tract. Co., Withee v.
Somerville Mercantile Agency, Gulf, etc., R. Co. v.
Sommer v. Cate, p. 723.
Sommerland, St. Louis, etc., R. Co. v.
Sommerville v. Merrill, p. 805.
Sondheim, Johanson v.
Sonia Cotton Oil Co. v. Steamer Red River, pp. 332, 333, 337, 340, 342, 349, 683, 1016, 1142, 1153, 1154.
Sonier v. Boston, etc., R. Co., pp. 2878, 2879.
Sonneborn & Co. v. Southern R. Co., pp. 742, 3142, 3143, 3144.
Sootsma, Kalamazoo Hack, etc., Co. v.
Soper, Central Vermont R. Co. v.
—— v. Pontiac, etc., R. Co., pp. 1110, 1111, 1114.
—— v. Tyler, p. 435.
Sorensen v. Keyser, p. 3954.
Sorenson v. Illinois Cent. R. Co., pp. 1762, 1866.
Sorrell v. Central Railroad, p. 124.
Sottile Bros., Southern Exp. Co. v.
Souders, Illinois Cent. R. Co. v.
Soule v. Rodocanachi, p. 828.
Soumet v. National Exp. Co., pp. 321, 409, 990, 994, 995.
South, St. Louis, etc., R. Co. v.
South Amboy, Susquehanna Coal Co. v.
South Atlantic Steamship Line, McIntyre Bros. & Co. v.
South Bend v. Turner, p. 2634.
South Boston R. Co., Bradshaw v.
—— Wakefield v.
South Bound R. Co., Heath v.
South Carolina Ins. Co., Spring v.
South Carolina R. Co., Avinger v.
—— Bamberg v.
—— Bradford v.
—— v. Bradford, p. 841.
South Carolina R. Co., Dill v.
—— Faust v.
—— Hall v.
—— Inman v.
—— Knox v.
—— Maybin v.
—— Miller v.
—— Nettles v.
—— v. Nix, pp. 2411, 2415, 2472, 2473, 2480, 2482, 2493.
—— Quinn v.
—— Redding v.
—— Renneker v.
—— Shaw v.
—— Simms v.
—— Slater v.
—— Van Winkle & Co. v.
—— Wardlaw v.
South Carolina, etc., R. Co., Anderson v.
—— Appleby v.
—— Davis v.
—— Iseman v.
—— Pickens v.
South Chicago City R. Co. v. Dufresne, 65 N. E. 1075, 200 Ill. 456—pp. 1702, 2151, 2890, 2966.
—— v. Dufresne, 102 Ill. App. 493—pp. 2295, 2332.
—— v. Moltrum, pp. 2577, 2586.
—— v. Zerler, pp. 2595, 2632.
South Chicago, etc., R. Co. v. Calumet Elect. R. Co., p. 113.
South Covington, etc., R. Co. v. Beatty, p. 1536.
—— v. Covington, p. 3525.
—— v. Hossfeld, p. 2321.
—— Miller v.
—— v. Quinn, pp. 1644, 1762, 3060.
—— v. Raymer, p. 2967.
—— v. Riegler, pp. 2950, 2972.
—— Taylor v.
—— v. Ware, pp. 2127, 2260.
—— White v.
—— Wise v.
South Covington, etc., St. R. Co. v. Barr, pp. 1846, 1988.
—— Brice v.
—— v. Burns, p. 2784.
—— v. Core, p. 1904.
—— v. Crutcher, pp. 2005, 2127, 2219.
—— Dierig v.
—— v. Geis, p. 2825.
—— v. Hardy, pp. 2194, 2300.
—— v. McCleave, pp. 1959, 2203.
—— v. Physioc, p. 2198.
—— v. Smith, pp. 2320, 2684, 2882, 2956.
South Dakota Cent. R. Co., Hess v.
South Devon R. Co., Beal v.
South Eastern R. Co., Barbour v.
South Florida R. Co. v. Rhoads, pp. 193, 194, 196, 2122, 2420, 2421, 2423, 2479, 2625, 3106.
South Orange, etc., Tract. Co., Wheeler v.
South Pac. Railroad, Faulkner v.
South Side Elevated R. Co., Lakin v.
South Side Pass. R. Co. v. Trich, p. 3001.
South Staffodshire R. Co., Scotthorn v.
South, etc., R. Co., Batton v.
—— v. Henlein, 52 Ala. 606, 23 Am. Rep. 578—pp 210, 242, 726, 732, 740, 748, 828, 945, 1038, 1329, 1339, 1396, 1399, 1405.
—— v. Henlein, 56 Ala. 368—p. 1073.
—— v. Huffman, pp. 1862, 2067, 2451.
—— v. Schaufler, pp. 2114, 2126, 2255, 2257, 2364, 2648.
—— v. Thompson, p. 2636.
—— v. Wilson, pp. 663, 810, 820, 823.

South, etc., R. Co. v. Wood, 66 Ala. 167, 41 Am. Rep. 749, 9 Am. & Eng. R. Cas. 419—pp. 530, 536, 537, 726, 732, 748, 819, 820, 899, 900, 960.
—— v. Wood, 71 Ala. 215, 46 Am. Rep. 309, 16 Am. & Eng. R. Cas. 267—pp. 818, 819.
—— v. Wood, 72 Ala. 451, 18 Am. & Eng. R. Cas. 634—pp. 494, 599, 848.
Southard v. Minneapolis, etc., R. Co., pp. 325, 958, 969, 970, 996, 1032, 1038, 1041, 3312, 3363.
Southard Exp. Co. v. Moore, pp. 969, 970.
Southeastern R. Co., Munster v.
—— v. Railway Comm'rs, p. 221.
Southerland v. Atlantic, etc., R. Co., p. 1424, 1462, 1479.
—— v. Texas, etc., R. Co., pp. 1502, 2517, 2696.
Southern Bank, Illinois Cent. R. Co. v.
Southern Bldg., etc., Ass'n v. Lawson, pp. 1721, 1751.
Southern California Motor Road Co., Franklin v.
Southern California R. Co., Proctor v.
—— Sloane v.
Southern Cotton Oil Co. v. Merchants', etc., Transp. Co., p. 3915.
Southern Elect. R. Co., Posch v.
Southern Exp. Co., Alslop v.
—— v. Armstead, pp. 493, 535, 802, 896, 982, 1007, 1010, 1066.
—— v. Ashford, pp. 767, 769, 1332, 1473, 1483.
—— v. Bailey, pp. 765, 807, 826.
—— Bank v.
—— v. Bank, pp. 751, 1087, 1091.
—— v. Barnes, pp. 945, 962, 963, 981, 1005, 1043, 3347.
—— v. B. R. Elect. Co., p. 582.
—— v. Briggs, pp. 354, 653, 658, 665, 1061.
—— Bruhl v.
—— Broadwood v.
—— Caldwell v.
—— v. Caldwell, pp. 1083, 1084, 1087, 1090, 1091, 1100, 1101.
—— v. Caperton, pp. 485, 489, 982, 1007, 1066, 1067, 1087, 1091.
—— Carroll v.
—— Cigar Co. v.
—— Cohen v.
—— v. Craft, pp. 296, 490.
—— v. Crook, pp. 582, 767, 769, 1006, 1007, 1060, 1097.
—— v. Dickson, pp. 335, 542, 543, 545, 546, 551.
—— Dixie Cigar Co. v.
—— Eiswald v.
—— v. Ensley, p. 3576.
—— Everett v.
—— v. Everett, pp. 531, 544, 545, 547, 550, 759.
—— v. Fant Fish Co., pp. 478, 513, 542, 546, 787, 789.
—— Fine & Bro. v.
—— Fitzsimmons v.
—— v. Fox, pp. 760, 809, 1051, 1273, 1329, 1331, 1466, 1467.
—— v. Gibbs, pp. 431, 1077.
—— Girardeau v.
—— v. Glenn, pp. 733, 734, 750, 955, 956, 1087, 1090, 1106.
—— v. Goldberg, p. 3539.
—— v. Hanaw, pp. 430, 431, 568, 652, 653, 655, 660, 664, 680, 940, 948, 950, 954, 968, 1052, 1057, 1068, 1075.
—— Harper Furniture Co. v.
—— v. Hess, pp. 767, 770, 3179, 3183, 3394, 3395, 3403.
—— v. Hill, 81 Ark. 1, 98 S. W. 371—p. 1062.
—— v. Hill, 84 Ark. 362, 368, 105 S. W. 877—p. 846.
Southern Exp. Co. v. Holland, pp. 535, 889.
—— v. Hood, p. 3578.
—— v. Hunnicutt, pp. 945, 1087, 1088, 1099.
—— v. Jacobs, pp. 851, 1462, 1463, 3410.
—— v. Kaufman, pp. 753, 756, 894.
—— v. Keeler, pp. 762, 936, 1051, 1057, 1059.
—— Kember v.
—— Kremer v.
—— Lambert-Murry Co. v.
—— Lasky v.
—— Levy v.
—— v. Long, p. 3815.
—— McTeer v.
—— v. McVeigh, pp. 7, 267, 268, 269, 272, 273, 284, 286, 771, 796, 804, 883, 2563.
—— v. Marks, etc., Co., p. 3369.
—— Memphis, etc., R. Co. v.
—— v. Meyer Co., pp. 980, 3332.
—— v. Mobile, p. 3577.
—— v. Moon, pp. 210, 213, 728, 948, 977, 978, 979, 981, 1039.
—— Morris-Scarboro-Moffitt Co. v.
—— Mosher v.
—— Mosher & Co. v.
—— v. Newby, pp. 7, 269, 270, 285, 727, 732, 748, 767, 962, 968, 969, 1035, 1040, 1061, 3257, 3291, 3300.
—— O'Bannon v.
—— Oskamp v.
—— v. Oskamp, etc., Co., pp. 539, 543.
—— v. Owens, p. 862.
—— v. Palmer, pp. 482, 582, 586, 727, 962, 1019, 3300, 3377.
—— v. Pope, pp. 763, 802.
—— Porter v.
—— Purcell v.
—— v. Purcell, pp. 727, 871, 879, 948, 961, 962, 967, 981, 1003, 1050, 3257, 3291, 3300.
—— v. Ramey, pp. 1370, 1454, 1456.
—— v. Rose Co., pp. 187, 208, 236, 239.
—— v. Ruth & Son, pp. 1102, 1105.
—— St. John v.
—— v. St. Louis, etc., R. Co., 10 Fed. 869—p. 7.
—— v. St. Louis, etc., R. Co., 5 Myers Fed. Dec., § 1511—p. 210.
—— v. Saks, pp. 3305, 3310, 3395, 3398.
—— v. Seide, pp. 821, 1039, 1075.
—— v. Shea, pp. 727, 962, 3257, 3291, 3295, 3300.
—— v. Sinclair, pp. 514, 551.
—— Smith v.
—— v. Sottile Bros., pp. 578, 579.
—— v. State, pp. 7, 239.
—— v. Stevenson, pp. 1071, 1105, 1107, 1108, 1110, 1112.
—— Thompson v.
—— v. Thornton, pp. 876, 3299.
—— United States Watch Case Co. v.
—— v. Urquhart, pp. 3367, 3393.
—— v. Van Meter, pp. 554, 3275.
—— Virginia-Carolina Chemical Co. v.
—— Visanska v.
—— v. Williams, p. 544.
—— v. Womack, pp. 729, 750, 751, 752, 761, 777, 811, 822, 957, 962, 992, 1020.
—— Wood v.
—— v. Wood, p. 761.
Southern Flour, etc., Co., Louisville, etc., R. Co. v.
—— v. Northern Pac. R. Co., p. 3543.
Southern Indiana Exp. Co., American Exp. Co. v.
Southern Indiana Exp. Co. v. United States Exp. Co., pp. 27, 3431, 3614.
Southern Indiana R. Co., First Trust, etc., Bank v.
—— v. Railroad Comm., pp. 35, 44, 76.
Southern Kansas R. Co. v. Burgess Co., pp. 950, 954, 1120, 1121, 1194, 1284, 1322, 3761, 3853.
—— v. Butler, p. 2707.
—— v. Caylor, p. 1778.
—— Cherokee Nation v.
—— v. Clark, pp. 3121, 3151.
—— v. Cox, 95 S. W. 1124, 43 Tex. Civ. App. 79—pp. 1293, 1335, 1343, 1344, 3650.
—— v. Cox, 47 Tex. Civ. App. 84, 103 S. W. 1122—pp. 218, 443, 1296.
—— v. Crump, pp. 1322, 3405, 3416, 3417.
—— v. Curtis Bros., pp. 1028, 1086, 1902, 1096, 1097, 1102.
—— v. Emmett, pp. 1706, 1929.
—— v. Hinsdale, pp. 198, 199, 2122, 2435, 2436, 2467, 3085, 3086.
—— Minter Bros. v.
—— v. Morris, 100 Tex. 611, 612, 102 S. W. 396—pp. 485, 490, 1441.
—— v. Morris (Tex. Civ. App.), 99 S. W. 433—pp. 450, 1314.
—— v. Pavey, pp. 1923, 2239, 2747.
—— v. Rice, pp. 2409, 2411, 2412, 3078, 3079, 3083, 3085, 3093, 3096.
—— v. Samples, pp. 248, 1319.
—— v. Sanford, p. 2856.
—— v. State, p. 3511.
—— v. Wallace, pp. 2478, 2711, 2849.
—— v. Walsh, pp. 1715, 1813, 2694.
—— v. Yarbrough, p. 1331.
Southern Pacific, Schultz v.
Southern Pac. Co., Ames v.
—— v. Anderson, pp. 451, 971, 978, 997, 1028, 1054, 1055, 1076, 1297, 1326, 1350, 1374, 1398.
—— Arlington Heights Fruit Co. v.
—— v. Arnett, 50 C. C. A. 17, 111 Fed. 849—pp. 458, 1353, 1444, 1461, 1462, 1465.
—— v. Arnett, 126 Fed. 75, 61 C. C. A. 131—pp. 1305, 1345.
—— Bader v.
—— v. Bailey, pp. 1606, 2769, 2776.
—— v. Bartine, pp. 35, 39, 44, 45, 48, 50.
—— Beckman v.
—— v. Bender, p. 2532.
—— Bertonneau v.
—— Blackwell v.
—— v. Board, 78 Fed. 236—pp. 26, 44, 47, 52.
—— v. Board, 87 Fed. 21—p. 51.
—— v. Booth, p. 506.
—— Braunton v.
—— Brigham v.
—— Brooks v.
—— Buswell v.
—— v. Campbell, pp. 3536, 3537.
—— Carstens Packing Co. v.
—— v. Cavin, p. 2670.
—— Colfax Mountain Fruit Co. v.
—— v. Colorado Fuel, etc., Co., pp. 3668, 3674, 3788, 3832.
—— v. Crenshaw, pp. 3332, 3440, 3054, 3840.
—— Darnell-Taenzer Lumber Co. v.
—— Delmonte v.
—— Donlon Bros. v.
—— Drummond v.
—— Edson v.

Southern Pac. Co., Elliott v.
—— Esler v.
—— Evans v.
—— Fitzgerald v.
—— Frank Simpson Fruit Co. v.
—— Gass v.
—— Gorman v.
—— v. Hall, p. 2731.
—— v. Hamilton, p. 3024.
—— v. Hogan, pp. 1744, 2604, 2693, 2696, 2945.
—— Hoskins v.
—— Interstate Commerce Comm. v.
—— v. Interstate Commerce Comm., 177 Fed. 963—p. 3798.
—— v. Interstate Commerce Comm., 188 Fed. 241—pp. 536, 3728, 3793.
—— v. Interstate Commerce Comm., 200 U. S. 536, 50 L. Ed. 585, 26 S. Ct. 330—pp. 3258, 3267, 3600, 3601, 3604, 3605, 3634, 3667, 3724, 3725, 3729, 3741, 3751, 3752, 3757, 3786, 3787, 3796.
—— v. Interstate Commerce Comm., 219 U. S. 433, 55 L. Ed. 283, 31 S. Ct. 288—pp. 3670, 3671, 3672, 3677, 3797, 3799, 3803, 3804, 3805.
—— Johnson v.
—— Judice v.
—— Ketcheson v.
—— Leonard v.
—— Lynn v.
—— McAllister v.
—— McCollum v.
—— McCurrie v.
—— McDermon v.
—— Marlow v.
—— Mathis v.
—— v. Meadors & Co., pp. 3606, 3661, 3663.
—— Mering v.
—— Morgan v.
—— Murphy v.
—— Nelson v.
—— Nichols v.
—— Osterhoudt v.
—— Patterson v.
—— v. Patterson, pp. 1605, 2472.
—— v. Phillipson, pp. 640, 1078.
—— Pierce v.
—— v. Pool, p. 3792.
—— v. Railroad Comm., p. 3496.
—— v. Redding, pp. 1152, 3678, 3730, 3753, 3755.
—— Richmond v.
—— Robinson v.
—— v. Robinson, p. 146.
—— Sambuck v.
—— San Bernardino v.
—— Saunders v.
—— v. Schoer, pp. 745, 746.
—— Schuyler v.
—— v. Schuyler, p. 3005.
—— Sessions v.
—— Sherman v.
—— Smitson v.
—— State v.
—— v. Tarin, pp. 1982, 2899.
—— Teale v.
—— Thompson v.
—— Tower Co. v.
—— United States v.
—— v. United States, pp. 3679, 3793.
—— Walther v.
—— Wedekind v.
—— Wieland v.
—— Woods v.
Southern Pac. R. Co., Bland v.
—— v. D'Arcais, p. 763, 828, 849, 1077, 1079.
—— v. Duncan, p. 864.
—— Fisher v.
—— v. Haas (Tex.), 17 S. W. 600—p. 1146.
—— v. Haas (Tex. Civ. App.), 21 S. W. 1021—p. 1146.
Southern Pac. R. Co., Houck v.
—— Hunter v.
—— Irelson v.
—— v. Johnson, pp. 628, 629, 1314.
—— v. Kennedy, p. 2484.
—— Kerrigan v.
—— Knight & Co. v.
—— v. Lyon & Co., 99 Miss. 186, 54 So. 728, 34 L. R. A., N. S., 234, Ann. Cas. 1913D, 800—p. 3332.
—— v. Lyon & Co. (Miss.), 54 So. 784—p. 3332.
—— v. Maddox & Co., pp. 724, 763, 863, 931, 954, 1051, 1054, 1055, 1069, 1072, 1073, 1076, 1077, 1078, 1079, 1137, 1322, 1398, 3368.
—— v. Meadors & Co., p. 3302.
—— Mitchell v.
—— Nelson v.
—— v. Philipson, pp. 816, 1130, 1131.
—— Roberts v.
—— Santa Clara v.
—— Saunders v.
—— Texas, etc., R. Co. v.
—— Wilson v.
Southern Pac. Terminal Co. v. Interstate Commerce Comm., pp. 3608, 3638, 3639, 3655, 3740.
Southern Pullman Palace Car Co., Blum v.
Southern Railroad, Fort v.
—— Kibler v.
—— Myers v.
Southern R. Ass'n, Crawford v.
—— Summer v.
Southern R. Co. v. Adams, 115 Ga. 705, 42 S. E. 35—pp. 1408, 1412.
—— v. Adams, 52 Ind. App. 322, 100 N. E. 773—pp. 2585, 2645, 2693, 2696.
—— v. Adams Mach. Co., pp. 528, 529, 839, 849, 872, 874, 880, 904, 906, 959.
—— Aiken v.
—— v. Aldredge, pp. 907, 910, 913, 917, 918, 919, 920.
—— Aldrich v.
—— Allen-Fleming Co. v.
—— v. Allison, pp. 587, 590, 591, 816.
—— Ammons v.
—— Anniston v.
—— v. Anniston Foundry, etc., Co., p. 135.
—— Ashehoro, etc., Mfg. Co. v.
—— v. Asheville, p. 3559.
—— Askew & Co. v.
—— Atkinson v.
—— v. Atlanta Nat. Bank, pp. 549, 584.
—— v. Atlanta Sand, etc., Co., pp. 96, 115, 159, 160, 161, 173, 247.
—— v. Atlanta Stove Works, p. 55.
—— Auld v.
—— Austin-Stephenson Co. v.
—— v. Bandy, pp. 2125, 2137, 2255, 2820.
—— Barbour v.
—— v. Barfield, p. 2118.
—— v. Barlow, pp. 1628, 1629, 2092, 2093, 2465, 3083.
—— Bell v.
—— Berry v.
—— v. Bickley, etc., Co., pp. 286, 3134, 3137, 3301.
—— Bird v.
—— v. Bivings, pp. 269, 1346.
—— Blue Ridge Collection Agency v.
—— Bluthenthal v.
—— Bohannon v.
—— v. Born Steel Range Co., p. 529.
—— Bowen v.
—— Branan v.
Southern R. Co. v. Brewer, 32 Ky. L. Rep. 43, 105 S. W. 160—pp. 2696, 3069.
—— v. Brewer, 32 Ky. L. Rep. 1374, 108 S. W. 936—pp. 2673, 2702, 3068, 3069.
—— v. Brooks, pp. 1683, 1721, 1992.
—— Brooks Mfg. Co. v.
—— v. Brown, p. 3543.
—— v. Bryant, pp. 2775, 3047, 3061.
—— Bryce v.
—— v. Bunnell, pp. 2410, 2460, 2709, 2710, 2713.
—— v. Burgess, pp. 1754, 1919, 1928, 2362, 2570, 2641, 2954.
—— Burlington Lumber Co. v.
—— v. Burlington Lumber Co., pp. 3492, 3494.
—— Cable v.
—— Calder v.
—— Callaway v.
—— Canandiagua Nat. Bank v.
—— Cardwell v.
—— Carter v.
—— Carter & Co. v.
—— v. Cassell, pp. 1629, 3103.
—— Chattanooga Board of Trade v.
—— Chiles v.
—— v. Christian, p. 2433.
—— Citizens', etc., Bank v.
—— Clanton v.
—— v. Clariday, pp. 2251, 2357.
—— v. Clay, pp. 2544, 2820.
—— Clegg v.
—— v. Cofer, pp. 640, 692, 695.
—— Coleman v.
—— v. Coleman, pp. 652, 661, 667, 670, 671, 673, 680.
—— Collins v.
—— v. Commonwealth, 33 Ky. L. Rep. 430, 110 S. W. 372—pp. 177, 181.
—— v. Commonwealth, 98 Va. 758, 37 S. E. 294—pp. 105, 118, 122, 127.
—— v. Commonwealth, 107 Va. 771, 60 S. E. 70, 17 L. R. A., N. S., 364—p. 3487.
—— Cook v.
—— Corporation Comm. v.
—— Coursey v.
—— v. Coursey, pp. 2291, 2399.
—— Cousar Mercantile Co. v.
—— Coyle v.
—— Crawford v.
—— v. Crone, pp. 2056, 2608, 2644, 2770.
—— v. Crowder, 130 Ala. 256, 30 So. 592—p. 1754.
—— v. Crowder, 135 Ala. 417, 33 So. 335—pp. 2602, 2893.
—— v. Cullen, 221 Ill. 392, 24 R. R. R. 195, 47 Am. & Eng. R. Cas., N. S., 195, 77 N. E. 470—pp. 1503, 1567, 2947.
—— v. Cullen, 122 Ill. App. 293—p. 1569.
—— v. Cunningham, 152 Ala. 147, 44 So. 658—pp. 1742, 2975.
—— v. Cunningham, 123 Ga. 90, 50 S. E. 979—pp. 2118, 2119, 2160, 2378, 2682.
—— Curtis v.
—— Dagnall v.
—— v. Daughdrill, pp. 1607, 1669.
—— Davidson Development Co. v.
—— Davis v.
—— v. Davis, p. 3009.
—— v. Dawson, pp. 2697, 2703.
—— v. Deakins, pp. 489, 494.
—— v. Dean, pp. 1866, 1881, 2777.
—— Deaver-Jeter Co. v.
—— v. Decker, pp. 1760, 2092.
—— v. DeSaussure, pp. 1618, 1638.
—— Doolittle v.
—— Durden v.

Southern R. Co. v. Dyson, pp. 2578, 2623.
—— Easler v.
—— v. Edmundson, pp. 3186, 3188.
—— Edwards v.
—— Efland v.
—— Eidson v.
—— Elliott v.
—— Fain v.
—— Faust v.
—— v. Flanigan, pp. 1612, 1613, 1626, 1664, 1666, 2453.
—— v. Fleming, pp. 1579, 1601, 2467.
—— v. Forrest, pp. 1420, 1438, 1447, 1481, 1532.
—— Forrester & Co. v.
—— Fortune v.
—— Fowlers v.
—— v. Frank & Co., pp. 330, 3356.
—— Fritz v.
—— Fulmer v.
—— Gardner v.
—— v. Gardner, pp. 776, 3390.
—— Garland v.
—— Garrison v.
—— Gaskins v.
—— Gilliland v.
—— v. Goldstein Bros., p. 3359.
—— Goodin v.
—— v. Gore, p. 2403.
—— v. Greene, p. 3554.
—— v. Greensboro, etc., Coal Co., p. 3518.
—— v. Gresham, p. 2062.
—— Griffin v.
—— v. Grizzle, p. 3525.
—— Hamrick Bros. & Co. v.
—— Harley v.
—— Hardaway v.
—— v. Hardin, 101 Ga. 263, 28 S. E. 847—p. 2775.
—— v. Hardin, 107 Ga. 379, 33 S. E. 436—p. 2225.
—— Harp v.
—— Harrill Bros. v.
—— v. Harrington, pp. 1503, 1575, 1577, 1938, 1939, 2162, 2280, 2536, 2754.
—— v. Harrison, pp. 303, 1159, 3605, 3654, 3752, 3760.
—— Harzburg & Co. v.
—— v. Hatter & Sons, p. 848.
—— Hawes v.
—— v. Hawkins, pp. 2447, 2462, 2652, 2709, 3083, 3094, 3099.
—— Heyman v.
—— v. Heymann, p. 573.
—— Hickey Marble, etc., Co. v.
—— Higgins v.
—— Hinkle v.
—— Hipp v.
—— v. Hobbs, 118 Ga. 227, 45 S. E. 23, 63 L. R. A. 68—pp. 1895, 1910, 1915, 2706, 3012, 3047.
—— v. Hobbs, 49 S. E. 294, 121 Ga. 428—p. 2820.
—— Hockfield v.
—— Hodges v.
—— Holcombe v.
—— Holly v.
—— v. Horner, pp. 802, 1048, 1061, 1407.
—— Horton v.
—— v. Horton, p. 2995.
—— v. Howard, pp. 1872, 2446.
—— v. Howell, p. 2641.
—— v. Hubbard Bros. Co., p. 3414.
—— v. Hubbard Bros. & Co., p. 3301.
—— v. Humphries, pp. 3047, 3048, 3061.
—— v. Hundley, pp. 2282, 2356, 2603, 2616, 2654.
—— Hunt v.
—— v. Hunt, pp. 3488, 3489.
—— v. Hunter, p. 2531.
—— Hutchison v.
Southern R. Co., Interstate Commerce Comm. v.
—— Jenkins v.
—— Johnson v.
—— v. Johnson, 39 So. 376, 144 Ala. 361, 113 Am. St. Rep. 48—p. 2815.
—— v. Johnson, 2 Ga. App. 36, 58 S. E. 333—pp. 292, 296, 303, 484, 486, 490, 491, 868.
—— v. Johnson, 70 S. E. 69, 8 Ga. App. 654—p. 1611.
—— v. Jones, 132 Ala. 437, 31 So. 501—pp. 1399, 2572.
—— v. Jones, 8 Ga. App. 225, 68 S. E. 1011—pp. 1596, 2466.
—— v. Jones, 33 Ind. App. 333, 71 N. E. 275—pp. 2605, 2611.
—— Jones Bros. v.
—— v. Jones Cotton Co., pp. 491, 780.
—— v. Jordan, p. 2634.
—— Kavanaugh & Co. v.
—— v. Kendrick, pp. 1684, 1720, 1868, 1883, 1884, 1885, 1899, 1906, 1907, 3049, 3053.
—— Kennedy v.
—— Kime v.
—— v. Kinchen, pp. 563, 570, 586.
—— King v.
—— v. King, 87 C. C. A. 284, 160 Fed. 332—p. 3525.
—— v. King, 217 U. S. 524, 54 L. Ed. 868, 30 S. Ct. 594—pp. 3503, 3524.
—— v. Lanning, pp. 3014, 3015, 3055.
—— Latta Martin Pump Co. v.
—— v. Lee, 167 Ala. 268, 52 So. 648—pp. 2017, 2033, 2651.
—— v. Lee, 30 Ky. L. Rep. 1360, 26 R. R. R. 285, 49 Am. & Eng. R. Cas., N. S., 285, 10 L. R. A., N. S., 837, 101 S. W. 307—pp. 1566, 2780.
—— v. Levy, pp. 726, 732, 748, 752, 815, 996, 998, 3294, 3349, 3392.
—— v. Lewis, pp. 648, 661, 692, 3950.
—— Lexington Grocery Co. v.
—— Lindsay v.
—— v. Lockwood Mfg. Co., pp. 700, 707, 714, 715, 1152.
—— v. Lollar, p. 2652.
—— v. Lowe, 170 Ala. 598, 54 So. 51—pp. 71, 1195.
—— v. Lowe, 139 Ga. 362, 77 S. E. 44—p. 161.
—— v. Lynn, pp. 2416, 2629, 2630, 2710.
—— Lytle v.
—— McConnell Bros. v.
—— Mace v.
—— McElveen v.
—— McGraw v.
—— v. McKenzie, pp. 2443, 2564.
—— v. McNeeley, p. 2582.
—— McNeil v.
—— v. McNeill, pp. 47, 71.
—— v. Maddox, pp. 490, 491.
—— Marable v.
—— v. Marshall, pp. 1641, 1673, 1674, 3041, 3044, 3060.
—— Martin v.
—— v. Mather-McDowell Lumber Co., p. 218.
—— Matheson v.
—— Mathis v.
—— v. Melton, 158 Ala. 404, 47 So. 1008—pp. 2574, 2650.
—— v. Melton, 133 Ga. 277, 65 S. E. 665—pp. 22, 35, 39, 3487, 3950.
—— Memphis News Pub. Co. v.
—— v. Merritt, pp. 2485, 2784.
—— v. Meyers, p. 2676.
—— v. Miko, p. 495.
—— Milam v.
—— Miller v.
Southern R. Co. v. Miller, 33 Ky. L. Rep. 505, 30 R. R. R. 311, 53 Am. & Eng. R. Cas., N. S., 311, 110 S. W. 351—pp. 1674, 1853, 3016.
—— v. Miller (Ky.), 120 S. W. 278—p. 2845.
—— Minnish v.
—— Mitchell v.
—— v. Mitchell, 139 Ala. 629, 37 So. 85—p. 3588.
—— v. Mitchell, 98 Tenn. (14 Pickle) 27, 40 S. W. 72—pp. 1884, 2361.
—— v. Montag, pp. 817, 821, 1038.
—— Moody v.
—— v. Moody, 151 Ala. 374, 44 So. 94—pp. 663, 664.
—— v. Moody, 169 Ala. 292, 53 So. 1016—p. 665.
—— v. Moore, pp. 218, 229, 258.
—— v. Mooresville Cotton Mills, pp. 795, 809.
—— v. Morgan, 171 Ala. 294, 54 So. 626—p. 2357.
—— v. Morgan (Ala.), 59 So. 432—pp. 2379, 2380.
—— v. Morrison, p. 582.
—— Morse v.
—— v. Moses, pp. 2561, 3093.
—— Mulligan v.
—— Murphy Hardware Co. v.
—— v. Myers, p. 3052.
—— v. Nailon, p. 828.
—— v. Nappier, pp. 1951, 2175, 2180, 2181, 2343, 2649, 2887, 2921, 3009, 3072.
—— National Bank v.
—— v. Nicholas, 135 Ga. 11, 68 S. E. 789—pp. 2155, 2464.
—— v. Nichols, 74 S. E. 268, 137 Ga. 670—p. 2915.
—— Norman v.
—— North Carolina Corp. Comm. v.
—— v. Nowlin, pp. 1608, 2068, 3059.
—— v. O'Bryan, 37 S. E. 161, 112 Ga. 127—pp. 2707, 2767.
—— v. O'Bryan, 115 Ga. 659, 42 S. E. 42—p. 1907.
—— v. O'Bryan, 119 Ga. 147, 45 S. E. 1000—pp. 3009, 3058.
—— v. Parham, pp. 2249, 2357, 2510, 2820.
—— Parlier v.
—— v. Parramore, p. 1447.
—— v. Patterson, p. 2513.
—— Phillips v.
—— Pickett v.
—— Post v.
—— v. Proctor, 3 Ala. App. 413, 57 So. 513—pp. 479, 488, 1284.
—— Puckett v.
—— Quantz v.
—— Ragsdale v.
—— v. Railey Bros., p. 1303, 1307.
—— v. Railroad Comm., pp. 3429, 3454, 3508, 3509.
—— Raleigh Iron Works v.
—— Ray v.
—— Reeves v.
—— v. Reeves, pp. 1747, 1768, 1797, 1910, 1912, 1913, 2904.
—— Reid v.
—— v. Reid, 222 U. S. 424, 56 L. Ed. 257, 32 S. Ct. 140—pp. 3492, 3607, 3810.
—— v. Reid, 222 U. S. 444, 56 L. Ed. 263, 32 S. Ct. 145—p. 3492.
—— v. Rhodes, p. 1787.
—— Rickert v.
—— v. Roach (Ind. App.), 77 N. E. 606—p. 2613.
—— v. Roach, 78 N. E. 201, 38 Ind. App. 211—pp. 2590, 2613, 2632.
—— Robertson v.
—— v. Roebuck, pp. 2236, 2954.

Southern R. Co. v. Rosenheim & Sons, pp. 1508, 3110, 3134, 3141, 3142, 3143, 3174.
—— v. St. Louis Hay, etc., Co., pp. 1152, 1217.
—— St. Louis, etc., Grain Co. v.
—— v. St. Louis, etc., Grain Co., pp. 3680, 3729, 3785, 3793, 3802.
—— v. Sams, p. 2404.
—— Sanders v.
—— Sansom v.
—— Saunders v.
—— v. Schlitter, pp. 1194, 1199.
—— Sharpe v.
—— Shelby Ice, etc., Co. v.
—— v. Skinner, pp. 1540, 2996.
—— v. Smith, 30 C. C. A. 58, 86 Fed. 292, 40 L. R. A. 746—pp. 1502, 1504, 1505.
—— v. Smith, 125 Ky. 656, 31 Ky. L. Rep. 243, 25 R. R. R. 652, 48 Am. & Eng. R. Cas., N. S., 652, 102 S. W. 232—pp. 287, 288, 741, 873, 884.
—— v. Smith, 28 S. E. 173, 95 Va. 187—pp. 2163, 2187.
—— Smith & Co. v.
—— v. Snyder, p. 3453.
—— Sonneborn & Co. v.
—— Speaks v.
—— Sprague v.
—— Stafsky v.
—— Stallings v.
—— Stanley v.
—— State v.
—— Steele v.
—— Stembridge v.
—— Story Lumber Co. v.
—— v. Strickland, pp. 2220, 2237, 2309.
—— Stringfield v.
—— v. Strozier, pp. 391, 559.
—— Summers v.
—— Suttle v.
—— Teague v.
—— Terry v.
—— Thomas v.
—— v. Thomas, pp. 1353, 3405.
—— v. Thurman, 121 Ky. 716, 28 Ky. L. Rep. 699, 679, 90 S. W. 240, 2 L. R. A., N. S., 1108—p. 2410.
—— v. Thurman, 25 Ky. L. Rep. 804, 76 S. W. 499—p. 2574.
—— Tift v.
—— v. Tift, pp. 3810, 3818, 3824, 3825, 3831, 3832.
—— v. Tollerson, 129 Ga. 647, 59 S. E. 799—pp. 1412, 1425.
—— v. Tollerson, 135 Ga. 74, 68 S. E. 798—p. 1285.
—— Twitty v.
—— United States v.
—— v. United States, 193 Fed. 664—p. 3836.
—— v. United States, 204 Fed. 465—p. 3693.
—— v. United States, 222 U. S. 20, 56 L. Ed. 72, 32 S. Ct. 2—pp. 3450, 3451, 3452, 3457, 3458.
—— v. Vandergriff, pp. 1989, 1992.
—— v. Vaughn, p. 3289.
—— Virginia, etc., Training Ass'n v.
—— Walker v.
—— v. Walker, p. 3076.
—— Walker Bros. v.
—— v. Wallace, pp. 1437, 3268, 3269.
—— Wall-Huske Co. v.
—— v. Wallis, pp. 1852, 2569, 2570, 2574, 3059.
—— v. Walton, p. 3089.
—— v. Waters & Co., pp. 3306, 3397.
—— Watson v.
—— v. Watson, pp. 190, 193, 196, 1612, 1622, 1623, 2092, 2093, 2408, 2420, 2446.
—— Waxelbaum v.
—— Way v.
Southern R. Co., Weaver v.
—— v. Webb, 143 Ala. 304, 39 So. 262, 111 Am. St. Rep. 45, 5 Am. & Eng. Ann. Cas. 97—pp. 3027, 1357, 1405, 1421.
—— v. Webb, 148 Ala. 661, 41 So. 420—p. 1302.
—— v. Weeb, 116 Ga. 152, 42 S. E. 395, 59 L. R. A. 109—pp. 2082, 2804.
—— Weber v.
—— Weisinger v.
—— Welborn v.
—— v. West, pp. 1582, 1718, 1840, 1841.
—— v. White, pp. 3176, 3178, 3192, 3373, 3374.
—— Whitley v.
—— v. Wideman, pp. 2412, 2532, 3032.
—— v. Wilcox, p. 423, 437, 458, 459, 460, 462, 463, 1138, 1139, 3758, 3760.
—— Willett v.
—— Williams v.
—— v. Williams, 139 Ga. 357, 77 S. E. 153—pp. 722, 786, 807, 879.
—— v. Williams, 139 Ga. 339, 77 S. E. 168—p. 876.
—— Withrow v.
—— Wood v.
—— v. Wood, 114 Ga. 140, 39 S. E. 894, 55 L. R. A. 536—pp. 1630, 2444, 2561, 3089, 3093, 3101.
—— v. Wood, 114 Ga. 159, 39 S. E. 922, 23 Am. & Eng. R. Cas., N. S., 611—pp. 1941, 1942, 3144.
—— v. Wooley, pp. 2706, 2847, 2848, 3056.
—— v. Wright, pp. 1532, 1679, 1911, 1912.
—— Yorke Furniture Co. v.
—— Young v.
Southern Railway, Aaron v.
—— Bell v.
—— Brackett v.
—— Brice v.
—— Brown v.
—— Calder v.
—— Carter v.
—— Chartrand v.
—— v. Commonwealth, p. 97.
—— Cone v.
—— Copeland v.
—— Corley v.
—— Des Portes v.
—— Ferguson v.
—— Fleischman, etc., Co. v.
—— Ford v.
—— General Elect. Co. v.
—— Goldstein v.
—— v. Graddy, pp. 1321, 1353, 1470.
—— Guess v.
—— Gyles v.
—— Hall v.
—— Hasseltine v.
—— Hunter v.
—— Hutto v.
—— Jonesville Mfg. Co. v.
—— Kelly v.
—— Kibler v.
—— Knight v.
—— Kolb v.
—— Ladshaw v.
—— Lancaster v.
—— Latour v.
—— McJimpsey v.
—— McMeekin v.
—— Macon v.
—— Martin v.
—— Mayfield v.
—— Milhous v.
—— Milhouse v.
—— Mills v.
—— Moody v.
—— Mulligan v.
—— Murphy v.
—— Neal v.
—— Norris v.
Southern Railway, Nutter v.
—— Park v.
—— Rippy & Co. v.
—— Rutland v.
—— Sanders v.
—— Sevier v.
—— Shelton v.
—— Shieder v.
—— Smith v.
—— Sullivan v.
—— Sutton v.
—— Tant v.
—— Talleson v.
—— Trapp v.
—— Traywick v.
—— Turner v.
—— Wehman v.
—— Whittle v.
—— Wilcox v.
—— Williford v.
—— Yarborough v.
Southern Railway Co., Moody v.
Southern Seating, etc., Co., Illinois Cent. R. Co. v.
Southern Seating, etc., R. Co., Illinois Cent. R. Co. v.
Southern Supply Co., Florida, etc., R. Co. v.
Southern Transp. Co. v. Harper, p. 3989.
Southern Wisconsin Power Co., In re.
Southern, etc., R. Co. v. Curtis Bros., pp. 1410, 1420.
—— Kelly v.
—— v. Walsh, p. 1744.
Southern, etc., Tract. Co. v. Compton, p. 3088.
Southside, The.
Southwark, The.
Southwest Missouri R. Co., Ely v.
Southwest, etc., Elect. R. Co., Tanger v.
Southwest, etc., R. Co., Wilbur v.
Southwestern, Lessassier v.
Southwestern Railroad v. Bryant, p. 3391.
—— Singleton v.
—— v. Singleton, 66 Ga. 252—pp. 1494, 1543, 1546, 2126.
—— v. Singleton, 67 Ga. 306—pp. 2125, 2126, 2249, 2257, 2550, 2941.
—— v. Thornton, pp. 1365, 1367, 1377, 1378, 1384, 3300.
Southwestern R. Co. v. Bentley, p. 3170.
—— Bryant v.
—— v. Felder, pp. 700, 893, 898, 900.
—— v. Hankerson, p. 2300.
—— Marshall v.
—— v. Paulk, pp. 2127, 2260.
—— v. Webb, pp. 210, 267, 271, 274.
Southwick, Gulf, etc., R. Co. v.
Southworth, Jacksonville, etc., R. Co. v.
Soviero v. Westcott Exp. Co., p. 3139.
Sowash v. Consolidated Tract. Co., p. 1804.
Sowell, Louisville, etc., R. Co. v.
—— Railway Co. v.
Soyo Maru, The.
Spade v. Hudson River R. Co., pp. 285, 289, 290, 587.
—— v. Lynn, etc., R. Co., p. 1690.
Spaeth v. Manhattan R. Co., p. 2686.
Spahr, Citizens' St. R. Co. v.
Spaids v. New York Mail Steamship Co., pp. 749, 3143.
Spalding, Board v.
—— v. Chicago, etc., R. Co., pp. 1313, 1437.
—— Hart v.
—— Louisville, etc., R. Co. v.
—— v. Redeny, p. 1224.

Spalding, etc., Co., Louisville, etc., R. Co. v.
Spanlger v. Saginaw Valley Tract. Co., pp. 1803, 2350, 2820.
Spanish-American Light, etc., Co., Compania, etc., Navegacion v.
Spann v. Erie Boatman's Transp. Co., pp. 437, 473, 634.
—— Kansas City, etc., R. Co. v.
—— St. Louis, etc., R. Co. v.
Spannagle v. Chicago, etc., R. Co., pp. 1501, 1504, 1505, 1665, 2154.
Sparger, Gulf, etc., R. Co. v.
Sparks, Alabama, etc., R. Co. v.
—— Ft. Scott, etc., R. Co. v.
—— v. The Sonora, p. 1940.
Sparta Gas, etc., Co. v. Illinois So. R. Co., p. 67.
Spartansburg, etc., R. Co., Spears v.
Spaulding, Louisville, etc., R. Co. v.
—— v. Metropolitan St. R. Co., p. 2646.
—— Read v.
—— v. Quincy, etc., R. Co., p. 1905.
Spavin v. Lake Shore, etc., R. Co., p. 2133.
Speaks v. Southern R. Co., p. 3240.
Spear, Ft. Worth, etc., R. Co. v.
—— Kitchen v.
—— v. Philadelphia, etc., R. Co., 119 Pa. 61, 12 Atl. 824—p. 2861.
—— v. Philadelphia, etc., R. Co., 3 Pa. Co. Ct. Rep. 472—p. 2669.
—— v. Philadelphia, etc., R. Co., 5 Pa. Co. Ct. Rep. 393—p. 2684.
Spearman v. California St. Co., p. 2816.
—— v. California St. R. Co., pp. 1901, 1991.
Spears, Chicago, etc., R. Co. v.
—— Georgia Railroad v.
—— v. Lake Shore, etc., R. Co., pp. 1, 209, 725.
—— v. Spartansburg, etc., R. Co., pp. 897, 899.
Speck v. International R. Co., pp. 1803, 1805.
—— v. Northern Pac. R. Co., p. 2271.
Speed, American Steel, etc., Co. v.
Speer v. West Jersey, etc., R. Co., p. 1902.
Spellman, American Exp. Co. v.
—— v. Lincoln Rapid Transit Co., pp. 1487, 1716, 1720, 1750, 1766, 2994.
—— v. Richmond, etc., R. Co., pp. 2708, 3094.
Spence v. Chicago, etc., R. Co., p. 1555.
—— v. Norfolk, etc., R. Co., p. 492.
Spencer, Boyd v.
—— v. Chicago, etc., R. Co., pp. 2675, 2734.
—— v. Daggett, p. 768.
—— Denver, etc., R. Co. v.
—— v. Erie R. Co., p. 2821.
—— v. Lovejoy, pp. 1615, 1616, 1622, 1976, 3319.
—— v. Milwaukee, etc., R. Co., p. 2203.
—— Pittsburgh, etc., R. Co. v.
—— Pond-Decker Lumber Co. v.
—— v. White, pp. 1148, 1149.
—— Wright v.
Sperber & Co., Baltimore, etc., R. Co. v.
Sperry v. Consolidated R. Co., pp. 3145, 3146, 3147, 3188, 3193.
Speyer v. The Mary Belle Roberts, p. 3935.
Spicer v. Chicago, etc., R. Co., p. 3074.
—— v. Lynn, etc., R. Co., p. 2775.
Spicker, Dallas, etc., R. Co. v.
Spiegel v. Pacific Mail Steamship Co., p. 577.
Spiess v. Erie R. Co., pp. 2851, 3374.
Spiker, Pennsylvania R. Co. v.
Spinks, Louisville, etc., R. Co. v.
Spires, Atlantic, etc., R. Co. v.
—— v. Atlantic, etc., R. Co., pp. 2016, 2022.
Spirk, Chicago, etc., R. Co. v.
—— v. Chicago, etc., R. Co., p. 2852.
Spivey v. Farmer, p. 1488.
Spofford, Bassett v.
—— v. Boston, etc., Railroad, p. 93.
—— v. Pennsylvania R. Co., pp. 267, 268, 269, 270, 272.
Spohn v. Missouri Pac. R. Co., 87 Mo. 74, 26 Am. & Eng. R. Cas. 252—pp 2020, 2785.
—— v. Missouri Pac. R. Co., 101 Mo. 417, 14 S. W. 880—pp. 2020, 2918, 2945.
—— v. Missouri Pac. R. Co., 116 Mo. 617, 22 S. W. 690—p. 2020.
Spokane Falls, etc., R. Co., Lane v.
—— Potlatch Lumber Co. v.
—— Williams v.
Spokane Grain Co. v. Great Northern Exp. Co., p. 1314.
Spokane St. R. Co., Payne v.
—— State v.
—— Washington v.
Spokane Tract. Co., Grant v.
Spokane, etc., R. Co., Field v.
—— Taylor v.
Spooner v. Brooklyn City R. Co., p. 2193.
—— v. Hannibal, etc., R. Co., pp. 3115, 3116, 3124, 3127, 3130, 3131.
—— v. Old Colony St. R. Co., pp. 1994, 2165, 2318.
Spotford v. Boston, etc., Railroad, p. 1179.
Spragins, Latham v.
Sprague, Chandler v.
—— v. Missouri Pac. R. Co., pp. 1408, 1412.
—— v. New York Cent. R. Co., pp. 896, 901, 3302.
—— Randall v.
—— v. Smith, pp. 1685, 1719, 2081, 2082.
—— v. Southern R. Co., pp. 1754, 2670, 2671, 2890.
—— v. West, p. 712.
Spratt, Cincinnati, etc., R. Co. v.
Sprayberry, Nashville, etc., R. Co. v.
Spreckels & Bros. Co., Corsar v.
Spreckles' Sugar-Refin. Co., Perry v.
Sprigg v. Rutland R. Co., pp. 1294, 2098.
Spring v. Gray, p. 3864.
—— v. Haskell, pp. 595, 596, 855.
—— v. South Carolina Ins. Co., pp. 1225, 1226.
Spring River Stone Co., St. Louis, etc., R. Co. v.
Spring Valley Water Works v. Schottler, pp. 59, 60.
Springer v. Ford, 189 Ill. 430, 59 N. E. 953, 52 L. R. A. 930, 82 Am. St. Rep. 464—pp. 1488, 2104, 2685, 2864.
—— v. Ford, 88 Ill. App. 529—p. 1750.
—— Jakobsen v.
—— v. Pullman Co., pp. 3142, 3143, 3216.
—— v. Schultz, pp. 1488, 2671.
—— v. Westcott, pp. 987, 1067.
Springer Transp. Co. v. Smith, pp. 2038, 2046, 3071.
Springfield Consol. R. Co. v. Hoeffner, pp. 2397, 2834.
Springfield St. R. Co., Gurley v.
—— Lacour v.
—— Lemay v.
—— McCauley v.
Springfield, St. R. Co., Moody v.
—— Neale v.
—— Payne v.
Springfield Tract. Co., Brady v.
—— Brown v.
—— Cooke v.
—— Cramer v.
—— Jones v.
—— Peck v.
—— Wolven v.
Sproat v. Donnell, p. 3865.
Sproles, Missouri, etc., R. Co. v.
Sproule v. St. Louis, etc., R. Co., pp. 1575, 1692, 1698.
Sprowl v. Kellar, pp. 732, 734, 735, 747.
Spry v. Missouri, etc., R. Co., p. 2561.
Spurgeon v. McElwain, p. 1861.
Spurlock v. Missouri, etc., R. Co., p. 1170.
—— v. Shreveport Tract. Co., p. 2683.
Spuyten Duyvil, etc., R. Co., Detchett v.
Spuyten, etc., Mill Co., Booth v.
Spyzchalski, Hammond, etc., R. Co. v.
Spyzchalski, Hammond, etc., R. Co. v.
Squire v. New York, etc., R. Co., pp. 323, 945, 958, 984, 994, 1074, 1368, 1369, 1370, 1371, 1397.
Staake v. Pennsylvania R. Co., p. 514.
Stacey, Alabama, etc., R. Co. v.
Stack, American Exp. Co. v.
Stacker, Louisville, etc., R. Co. v.
Stadhecker v. Combs & Co., pp. 593, 768, 829, 840, 841, 864.
Stafford v. Watson, p. 712.
Stafsky v. Southern R. Co., p. 567.
Stager v. Ridge Ave. Pass. R. Co., pp. 2152, 2689.
Staincliffe, The.
Staines v. Central R. Co., pp. 2364, 2366.
Stakes v. Saltonstall, p. 1722.
Stalcup v. Louisville, etc., R. Co., pp. 1549, 1569.
Stallard v. Great Western R. Co., p. 3158.
Stallings, Birmingham, etc., Co. v.
—— Birmingham R., etc., Co. v.
—— v. Southern R. Co., p. 140.
Stanbridge v. Nassau Elect. R. Co., p. 2699.
Stanbro, Chicago, etc., R. Co. v.
Standard Forging Co. v. Saffel, p. 2602.
Standard Lumber Co., Chesapeake, etc., R. Co. v.
Standard Milling Co. v. White Line Cent. Transit Co., pp. 429, 812, 894, 910, 916, 1012, 1015, 1041.
Standard Oil Co., Donovan v.
—— James v.
—— McLaren v.
—— New York, etc., R. Co. v.
—— Steamship Den v.
—— United States v.
—— v. United States, pp. 302, 3762.
—— Van Santen v.
—— Village Steamship Co. v.
Standard, etc., Ins. Co., Sutherland v.
Standefer v. Aultman, etc., Machinery Co., p. 693.
Standish v. Narragansett Steamship Co., pp. 1637, 1638, 2062, 3979.
Stanfield, Birmingham R., etc., Co. v.
Stanfield Bros., Missouri, etc., R. Co. v.
Stanford, Choctaw, etc., R. Co. v.
Stanley, Gulf, etc., R. Co. v.
—— v. Southern R. Co., pp. 2017, 2870.
—— Western Maryland R. Co. v.

Stanley Dollar, The.
Stannard v. Prince, pp. 3289, 3369, 3370.
Stansberry, Ohio, etc., R. Co. v.
Stanton, Bates v.
—— v. Eager, pp. 355, 1227.
Stanton Tanning Co., Vaughan Mach. Co. v.
Staples v. Rhode Island, etc., R. Co., p. 1820.
Stapleton v. Grand Trunk R. Co., pp. 285, 288, 885, 888, 3301.
Stappers v. Interurban St. R. Co., pp. 1830, 2161, 2882.
Star Grain, etc., Co. v. Atchison, etc., R. Co., p. 166.
Star of Hope, The.
Star Union Transp. Co., French v.
Star, etc., Mill. Co., Erie R. Co. v.
Starbird v. Barrons, p. 473.
Starbuck v. Chesapeake, etc., R. Co., pp. 619, 3902, 3903.
Starin, Hill v.
—— Levidow v.
—— New England Mfg. Co. v.
—— New York v.
Stark, Flint, etc., R. Co. v.
Stark Grain Co., Missouri, etc., R. Co. v.
Starke, Shores Lumber Co. v.
Starkey v. Cleveland, etc., R. Co., p. 3544.
Starks Co. v. Grand Rapids, etc., R. Co., p. 3675.
—— v. Manistee, etc., R. Co., p. 3276.
Starnes v. Louisville, etc., R. Co., p. 1075.
Starr v. Chicago, etc., R. Co., p. 2023.
—— v. Great Northern R. Co., p. 2102.
Starr & Co., Galgate Ship Co., p. 3865.
Startz, International, etc., R. Co. v.
State, Adams Exp. Co. v.
—— v. Adams Exp. Co., 171 Ind. 138, 85 N. E. 337, 19 L. R. A., N. S., 93—pp. 3433, 3526, 3633, 3707.
—— v. Adams Exp. Co., 85 Neb. 25, 122 N. W. 691—pp. 117, 119, 126.
—— v. American Book Co., p. 3557.
—— American Exp. Co. v.
—— Atchison, etc., R. Co. v.
—— v. Atchison, etc., R. Co., pp. 245, 1153.
—— v. Atlantic Coast Line R. Co., 52 Fla. 578, 40 So. 875—p. 95.
—— v. Atlantic Coast Line R. Co., 52 Fla. 646, 41 So. 705—p. 95.
—— Atlantic, etc, R. Co. v.
—— v. Atlantic, etc., R. Co., 48 Fla. 146, 37 So. 657—p. 116.
—— v. Atlantic, etc., R. Co., 51 Fla. 578, 646, 40 So. 875—p. 430.
—— v. Atlantic, etc., R. Co., 56 Fla. 601, 47 So. 387—p. 170.
—— v. Atlantic, etc., R. Co., 56 Fla. 617, 47 So. 969, 32 L. R. A., N. S., 639—pp. 20, 23, 152, 3524.
—— Austin v.
—— Baltimore Tract. Co. v.
—— Baltimore, etc., R. Co. v.
—— v. Baltimore, etc., R. Co., p. 3565.
—— Barnaby v.
—— Berger v.
—— Bogart v.
—— v. Bollam, pp. 1612, 3499.
—— v. Boston, etc., Railroad, 75 N. H. 327, 74 Atl. 542—pp. 114, 122, 131, 134.
—— v. Boston, etc., Railroad, 76 N. H. 146, 80 Atl. 858—p. 26.
State, Brady v.
—— Bray v.
—— Brazzell v.
—— Burke v.
—— v. Campbell, pp. 1542, 2493.
—— v. Central Vermont R. Co., pp. 35, 44, 86, 93, 1175, 1179, 1180, 1182, 1183, 1185, 1188, 1189, 1191, 1199.
—— Chicago, etc., R. Co. v.
—— v. Chicago, etc., R. Co., 86 Iowa 641, 53 N. W. 323—p. 123.
—— v. Chicago, etc., R. Co., 90 Iowa 594, 58 N. W. 1060—p. 42.
—— v. Chicago, etc., R. Co., 38 Minn. 281, 37 N. W. 782—pp. 121, 125, 1191.
—— v. Chicago, etc., R. Co., 68 Minn. 381, 71 N. W. 400, 38 L. R. A. 672, 64 Am. St. Rep. 482—p. 21.
—— v. Chicago, etc., R. Co., 239 Mo. 196, 143 S. W. 785—pp. 3485, 3488, 3512.
—— v. Chicago, etc., R. Co., 71 Neb. 593, 99 N. W. 309—pp. 216, 248.
—— v. Chicago, etc., R. Co., 136 Wis. 407, 117 N. W. 686, 19 L. R. A., N. S., 326—p. 3510.
—— v. Chicago, etc., R. Co., 152 Wis. 341, 140 N. W. 70—p. 3527.
—— Choctaw, etc., R. Co. v.
—— v. Chovin, pp. 190, 193, 194, 210, 1492, 1596, 1597, 2122, 2467.
—— v. Cincinnati, etc., R. Co., pp. 117, 220, 235, 782, 1189, 1190.
—— v. Clark, p. 1612.
—— v. Corson, p. 3586.
—— v. Corvallis, etc., R. Co., pp. 35, 36.
—— Craven v.
—— v. Creeden, pp. 773, 895.
—— Cumberland, etc., R. Co. v.
—— v. Cumberland, etc., R. Co., p. 3495.
—— Darnell v.
—— Daugherty v.
—— v. Delaware, etc., R. Co., 30 N. J. L. 473—p. 3565.
—— v. Delaware, etc., R. Co., 48 N. J. L. 55, 57 Am. Rep. 543—pp. 220, 1184.
—— Detroit, etc., R. Co. v.
—— Detroit, etc., Railway v.
—— Dorsey v.
—— Dugan v.
—— Erie R. Co. v.
—— v. Farmer's Loan, etc., Co., p. 38.
—— Fears v.
—— v. Findley, p. 1861.
—— v. Fremont, etc., R. Co., 22 Neb. 313, 35 N. W. 118—p. 120.
—— v. Fremont, etc., R. Co., 23 Neb. 117, 36 N. W. 305—p. 1192.
—— v. Fry, p. 1612.
—— v. Fullerton, p. 3563.
—— v. Galveston, etc., R. Co., p. 3560.
—— v. Gladson, p. 98.
—— v. Goold, pp. 199, 1597, 2425, 2467.
—— v. Goss, p. 238.
—— v. Grand Trunk R. Co., pp. 179, 1526, 1964, 1965.
—— v. Great Northern R. Co., p. 3484.
—— v. Green, p. 2837.
—— Gulf, etc., R. Co. v.
—— v. Gulf, etc., R. Co., p. 937.
—— H. & T. C. R. Co. v.
—— Hall v.
—— Hart v.
—— v. Hartford, etc., R. Co., pp. 255, 1500, 1501.
State, Heard v.
—— Helena-Glendale Steam Ferry Co. v.
—— Horn Silver Min. Co. v.
—— Howard v.
—— v. Hungerford, pp. 1596, 1600, 2467.
—— v. Illinois Cent. R. Co., pp. 124, 1184, 3553, 3563.
—— Indianapolis, etc., R. Co. v.
—— v. Intoxicating Liquors, 83 Me. 158, 21 Atl. 840—p. 480.
—— v. Intoxicating Liquors, 105 Me. 138, 76 Atl. 265, 29 L. R. A., N. S., 745, 20 Am. & Eng. Ann. Cas. 668—p. 525.
—— Jackson v.
—— v. Jacksonville Terminal Co., pp. 105, 117, 3483, 3534.
—— v. Jacksonville, etc., R. Co. p. 116.
—— Jannin v.
—— Kane v.
—— Kansas, etc., R. Co. v.
—— v. Kimber, p. 1493.
—— v. Lake Roland, etc., R. Co., pp. 2122, 2123, 2356.
—— Landrigan v.
—— Louisville, etc., R. Co. v.
—— v. Louisville, etc., R. Co., 177 Ind. 553, 96 N. E. 340—p. 3483.
—— v. Louisville, etc., R. Co., 97 Miss. 35, 51 So. 918, 53 So. 454, Ann. Cas. 1912C, 1150—p. 3545.
—— McCord v.
—— v. McCormack, p. 258.
—— Mack v.
—— McNealy v.
—— v. Maine Cent. R. Co., pp. 179, 182, 183.
—— v. Martyn, pp. 83, 184.
—— Memphis, etc., R. Co. v.
—— Midland Valley R. Co. v.
—— v. Minneapolis, etc., R. Co., 40 Minn. 156, 41 N. W. 465—p. 125.
—— v. Minneapolis, etc., R. Co., 80 Minn. 191, 83 N. W. 60, 89 Am. St. Rep. 514—pp. 50, 52, 55, 75, 76, 120, 124, 126.
—— v. Missouri Pac. R. Co. (Mo.), 144 S. W. 863—p. 225.
—— v. Missouri Pac. R. Co., 71 Mo. App. 385, 7 Am. & Eng. R. Cas., N. S., 66—pp. 3113, 3115, 3117, 3127.
—— v. Missouri Pac. R. Co., 64 Neb. 679, 90 N. W. 877—pp. 181, 182.
—— Missouri, etc., R. Co. v.
—— Mobile, etc., R. Co. v.
—— v. Mobile, etc., R. Co., pp. 120, 123.
—— v. Moody, p. 3540.
—— v. Mullin, p. 478.
—— v. Neil, p. 3565.
—— New Haven, etc., Co. v.
—— v. New Haven, etc., Co., 37 Conn. 153—p. 255.
—— v. New Haven, etc., Co., 43 Conn. 351—p. 1857.
—— v. New York, etc., R. Co., pp. 3572, 3574.
—— v. Northeastern R. Co., p. 255.
—— Northern Cent. R. Co. v.
—— v. Northern Pac. Exp. Co., p. 3577.
—— v. Northern Pac. R. Co., pp. 124, 126.
—— v. Omaha Elevator Co., p. 3528.
—— v. Omaha, etc., Bridge Co., p. 3525.
—— Osborne v.
—— v. Otis, p. 1288.
—— v. Overton, pp. 193, 1529, 1973, 1974, 1975, 2425, 2427.
—— v. Pabst Brewing Co., p. 3549.
—— v. Pacific Exp. Co., pp. 22, 131.

State v. Parshley, p. 890.
—— Pensacola, etc., R. Co. v.
—— v. Pensacola, etc., R. Co., p. 72, 114.
—— Peterson v.
—— Pittsburgh, etc., R. Co. v.
—— Pressley v.
—— v. Railroad, p. 2715.
—— v. Ray, p. 1612.
—— v. Redmon, p. 3203.
—— v. Reed, p. 100.
—— v. Ross, p. 2483.
—— Rucker v.
—— St. Louis, etc., R. Co. v.
—— Samuelson v.
—— v. Seaboard, etc., Railway, 48 Fla. 129, 37 So. 314—pp. 40, 54.
—— v. Seaboard, etc., Railway, 48 Fla. 150, 37 So. 658—p. 126.
—— v. Seaboard, etc., Railway, 48 Fla. 152, 37 So. 658—pp. 40, 54.
—— v. Seaboard, etc., Railway, 56 Fla. 670, 47 So. 986—p. 170.
—— v. Seagraves, p. 3435.
—— Seale v.
—— Sheppard v.
—— Shields v.
—— v. Sioux City, etc., R. Co., p. 255.
—— Smith v.
—— Southern Exp. Co. v.
—— Southern Kansas R. Co. v.
—— v. Southern Pac. Co., p. 126.
—— v. Southern R. Co., 119 N. C. 814, 25 S. E. 862, 56 Am. St. Rep. 689—p. 3512.
—— v. Southern R. Co., 122 N. C. 1052, 30 S. E. 133, 41 L. R. A. 246—p. 93.
—— v. Southern R. Co., 125 N. C. 666, 34 S. E. 527—pp. 180, 181.
—— v. Spokane St. R. Co., 53 Pac. 719, 19 Wash. 518, 41 L. R. A. 515, 67 Am. St. Rep. 739—p. 1487.
—— v. Spokane St. R. Co. (Wash.), 11 Am. & Eng. R. Cas., N. S., 62—p. 255.
—— Sternberg v.
—— Summitt v.
—— v. Sutton, p. 113.
—— v. Telegraph Co., p. 3577.
—— v. Texas, etc., R. Co., pp. 3459, 3510.
—— v. Thompson, 20 N. H. 250—p. 1637.
—— v. Thompson, 84 Pac. 476, 47 Ore. 492, 4 L. R. A., N. S., 480—pp. 1612, 3499.
—— Turnpike Co. v.
—— v. Union Depot Co., pp. 100, 192, 193.
—— v. Union Pac. R. Co., 67 Neb. 141, 93 N. W. 222—pp. 181, 182.
—— v. Union Pac. R. Co., 87 Neb. 29, 126 N. W. 859—pp. 83, 90, 95.
—— United Exp. Co. v.
—— v. United R., etc., Co., p. 2890.
—— United States Co. v.
—— United States Exp. Co. v.
—— v. United States Exp. Co., 81 Minn. 87, 83 N. W. 465, 50 L. R. A. 667, 83 Am St. Rep. 366—p 29.
—— v. United States Exp. Co., 114 Minn. 346, 131 N. W. 489, 37 L. R. A., N. S., 1127—pp. 3526, 3572, 3576, 3578.
—— Vaughan v.
—— v. Wabash R. Co., p. 3510.
—— Wadley Southern R. Co. v.
—— v. Warfield, p. 166.
—— v. Wells, Fargo & Co., 80 Neb. 838, 115 N. W. 625—p. 22.
State v. Wells, Fargo & Co., 85 Neb. 42, 122 N. W. 697—pp. 119, 126.
—— Wells Fargo Exp. Co. v.
—— Western Maryland R. Co. v.
—— v. Western Union Tel. Co., p. 3550.
—— Western, etc., R. Co. v.
—— v. Western, etc., R. Co., pp. 3494, 3496.
—— v. White Oak R. Co., pp. 187, 255.
—— v. Winona, etc., R. Co., p. 138.
—— v. Woodruff, etc., Coach Co., p. 3580.
—— v. Wrightsville, etc., R. Co., pp. 25, 3250, 3257, 3291.
State Board, American Exp. Co. v.
—— Central R. Co. v.
—— Hudson, etc., R. Co. v.
—— Kirk v.
—— People v.
—— Phillipsburg Horse Car R. Co. v.
—— Tide Water Pipe Co. v.
State Nat. Bank v. Chicago, etc., R. Co., pp. 3334, 3354
State Freight Tax, Case of the.
State Railroad Tax Cases, pp. 3556, 3573, 3590, 3591, 3593.
State Steamship Co., Allan v.
State Tax on Railway Gross Receipts, pp. 3549, 3552, 3553, 3558, 3561, 3567, 3568.
State Tonnage Tax Cases, pp. 3418, 3420, 3445, 3468, 3531, 3549, 3569, 3581.
Staten Island R. Co., Carrol v.
—— Carroll v.
—— Landers v.
Staten Island Rapid Transit Co. v. Marshall, pp. 705, 710.
Staten Island Rapid Transit R. Co. v. Marshall, pp. 705, 710.
Staten Island, etc., R. Co., American Grocery Co. v.
—— Whitaker v.
Statham, New Orleans, etc., R. Co. v.
Staton, Gulf, etc., R. Co. v.
—— Murphy, etc., Co. v.
—— Murphy, etc., R. Co. v.
Staub v. Kendrick, pp. 3122, 3127.
Stauffer v. Metropolitan St. R. Co., pp. 1679, 1683, 2583, 2590, 2895, 2951, 2953.
Steam Nav. Co., Miller v.
Steamboat Albatross v. Wayne, p. 532.
Steamboat Baltimore v. Levi, p. 1143.
Steamboat Castle Garden, Atkisson v.
Steamboat Co. v. Atkins & Co., pp. 487, 490.
Steamboat General Pike, Wayne v.
Steamboat Highland Mary, Ready v.
Steamboat John Owen v. Johnson, pp. 511, 512, 542, 570.
Steamboat Jones Powell v. Thompson, p. 3251.
Steamboat Lynx v. King, pp. 733, 748, 749, 788.
Steamboat New World v. King, pp. 1564, 1711, 1714, 2670, 3067.
Steamboat Niargara, McFadden v.
Steamboat Quaker City, Hirsch v.
Steamboat Reliance, Dunlap v.
Steamboat St. Anthony, Chouteau v.
Steamboat Thames, Erskine v.
Steamboat W. G. Woodsides, Chicago, etc., R. Co. v.
Steamer Contra Costa, Agnew v.
Steamer Red River, Sonio Cotton Oil Co. v.
Steamer Webb, The.
Steamship Co., Calderon v.
Steamship Co. v. Joliffe, pp. 3418, 3420, 3445.
—— Lord v.
—— v. Portwardens, pp. 3530, 3531, 3549.
Steamship Den v. Standard Oil Co., pp. 3941, 3943.
Steamship Fung Shuey Simon v.
Steamship Kensington, Kelham v.
Steamship Rutherglen Co. v. Houlder, p. 3962.
Steamship Wellesley Co. v. Hooper & Co., pp. 789, 3910, 3923, 3924, 3933, 4068.
Steamship Wildcroft, McCahan Sugar Refin. Co. v.
Stearn v. Pullman Car Co., p. 3230.
Stearns v. Grand Trunk R. Co., p. 589.
Stearns, etc., Lumber Co., United States v.
Steckdaub v. Missouri, etc., R. Co., pp. 3335, 3343.
Stecar, Chicago, etc., R. Co. v.
Steeg v. St. Paul City R. Co., pp. 1888, 1896.
Steel v. Lester, p. 3865.
Steele, Cincinnati, etc., R. Co. v.
—— Louisville, etc., R. Co. v.
—— v. McTyer, pp 734, 737, 771, 3926.
—— v. Sellman, p. 361.
—— v. Southern R. Co., pp. 1754, 1755, 2697, 2914.
—— v. Townsend, pp. 333, 828, 834, 986, 1007, 1038.
Steelman, Mitchell v.
Steenberger, Louisville, etc., R. Co. v.
Steenerson v. Great Northern R. Co., pp. 41, 49, 50, 115, 116, 124.
Steers v. Liverpool, etc., Steamship Co., pp. 822, 987, 3163, 3164, 4032, 4034.
Steever v. Illinois Cent. R. Co., p. 140.
Steffen v. Mississippi River, etc., R. Co., pp. 423, 469, 679.
Steidl v. Minneapolis, etc., R. Co., pp. 3268, 3405
Steiger v. Erie R. Co., pp. 1300, 1362, 1370.
Steiger & Co., Munson Steamship Line v.
Stein v. Manhattan R. Co., p. 2791.
Steinberger, Western Union Tel. Co. v.
Steiner, etc., Co., Mobile, etc., R. Co. v.
Steininger, Savannah, etc., R. Co. v.
Steinle v. Metropolitan St. R. Co., p. 2908.
Steinman v. Wilkins, p. 714.
Steinway R. Co., Butler v.
—— Grotsch v.
—— Wells v.
Steinway, etc., R. Co., Lehr v.
Steinwender v. The Mexican Prince, p. 3909.
Steiskal v. Marshall Field & Co., 238 Ill. 92, 87 N. E. 117—pp. 1750, 2685.
—— v. Marshall Field & Co., 142 Ill. App. 154—p. 2578.
Stell, Houston, etc., R. Co. v.
—— St. Louis, etc., R. Co. v.
Stelsly, McBurnie v.
Stembridge v. Southern R. Co., p. 2886.
Stephan v. Daniels, p. 1195.
Stephen, Louisville, etc., R. Co. v.
—— v. Smith, p. 2480.
Stephens v. Central, etc., R. Co., p. 147.
—— v. Oklahoma City R. Co., p. 1696.
—— Texas, etc., R. Co. v.

Stephens, etc., Transp. Co., Tuckerman v.
—— v. Tuckerman, etc., Co., pp. 340, 433, 1038.
Stephenson, Gooch v.
—— Nelson v.
—— v. United States Exp. Co., p. 592.
Stepp, Chicago, etc., R. Co. v.
Sterling, Fowler v.
—— v. St. Louis, etc., R. Co., pp. 630, 689, 1304, 1313.
Sterling Amusement Co. v. La Compagnie Generale Transatlantique, pp. 4032, 4033, 4034, 4035.
Sterling Salt Co., United States v.
Sterling, etc., R. Co., Randall v.
—— v. Wise, p. 2309.
Stern, Pennsylvania R. Co. v.
—— Pullman Co. v.
—— v. Westchester Elect. R. Co., pp. 2681, 2882.
Sternberg v. State, p. 1611.
Sternfels v. Metropolitan St. R. Co., pp. 2082.
Sterrett v. Metropolitan St. R. Co., pp. 2677, 2927.
—— Roanoke R., etc., Co. v.
Stettaners, Adams Exp. Co. v.
Steuart, Texas Cent. R. Co. v.
Steubing, Louisville R. Co. v.
Stevenot v. Eastern R. Co., p. 579.
Stevens v. Atchison, etc., R. Co., p. 2479.
—— v. Boston Elev. R. Co., pp. 2243, 2745, 2820.
—— v. Boston, etc., Railroad, p. 515.
—— v. Boston, etc., R. Corp., pp. 1154, 1158.
—— Central Pass. R. Co. v.
—— v. Central R., etc., Co., pp. 1517, 1747, 1748, 1767, 1917, 1918, 1936.
—— Delaware, etc., R. Co. v.
—— v. European, etc., R. Co., p. 2695.
—— Gibson v.
—— Grand Trunk R. Co. v.
—— Harris v.
—— Illinois Cent. R. Co. v.
—— v. Kansas City Elev. R. Co., pp. 1869, 1890, 1907, 2639.
—— v. Lake Shore, etc., R. Co., pp. 322, 1016, 3251, 3331, 3340.
—— v. New Jersey, etc., R. Co., pp. 1708, 2009.
—— Norfolk, etc., R. Co. v.
—— Railway Co. v.
—— Rock Island, etc., R. Co. v.
—— Sayward v.
—— v. Sayward (Mass.), 3 Gray 108—pp. 797, 798, 853.
—— v. Sayward (Mass.), 8 Gray 215—p. 854.
—— v. Wheeler, pp. 1212, 1222, 1229, 1231, 1232, 1234, 1236, 1239.
—— v. Wichita Valley R. Co., pp. 1625, 1679.
Stevenson v. Joline, p. 1892.
—— v. Pullman Palace Car Co. (Tex. Civ. App.), 26 S. W. 112—pp. 3201, 3202, 3215, 3223, 3237.
—— v. Pullman Palace Car Co. (Tex. Civ. App.), 32 S. W. 335—pp. 1028, 3202, 3215.
—— St. Louis, etc., R. Co. v.
—— Southern Exp. Co. v.
—— Toledo, etc., R. Co. v.
—— v. Wells Fargo & Co., 52 O. St. 687, 44 N. E. 1148—p. 981.
—— v. Wells Fargo & Co. (S. Ct.), 33 W. L. Bull. 247—p. 949.
—— v. West Seattle Land, etc., Co., p. 2705.
Steverman v. Boston Elev. R. Co., pp. 1697, 1744, 2129, 2368, 2639.
Steward, Harrison v.
—— Montgomery, etc., R. Co. v.
Stewart, Atchison, etc., R. Co. v.
Stewart v. Baltimore R. Co., pp. 1477, 1479.
—— v. Baltimore, etc., R. Co., p. 1639.
—— v. Boston, etc., R. Co., p. 2222.
—— v. Bremer, p. 438.
—— v. Brooklyn, etc., R. Co., pp. 2042, 2045, 2567.
—— v. Central, etc., R. Co., p. 773.
—— v. Chicago, etc., R. Co. v.
—— Cleveland, etc., R. Co. v.
—— v. Cleveland, etc., R. Co., pp. 462, 969, 984, 997, 1016.
—— Comer v.
—— v. Comer, pp. 141, 436, 1134, 1194, 1203.
—— Danville, etc., Road Co. v.
—— v. Erie, etc., Transp. Co., pp. 417, 418, 3248.
—— v. Everets, p. 2737.
—— First Nat. Bank v.
—— Ft. Worth, etc., R. Co. v.
—— Goodman v.
—— Gracy, pp. 267, 268, 269, 276, 280, 284, 778.
—— Gulf, etc., R. Co. v.
—— Harrison v.
—— v. Harvard College, pp. 2331, 2864.
—— Houston, etc., R. Co. v.
—— v. International, etc., R. Co., pp. 1767, 1768, 1770, 1771, 1773, 1779, 1780, 1798, 1800, 2593.
—— Kehrer v.
—— v. Lehigh Valley R. Co., pp. 1180, 1181.
—— Montgomery, etc., R. Co. v.
—— v. Potomac Ferry Co., p. 1170.
—— St. Louis, etc., R. Co. v.
—— Samms v.
—— v. Terre Haute, etc., R. Co., p. 3284.
—— Texas Cent. R. Co. v.
—— Texas, etc., R. Co. v.
—— Thompson v.
—— Trinity Valley R. Co. v.
Stewart & Co., H. & T. C. R. Co. v.
Stewart Taxi Service Co. v. Getz, pp. 2647, 2810.
Stibbs, Chicago, etc., R. Co. v.
Stickney, Interstate Commerce Commission v.
—— v. Interstate Commerce Commission, pp. 3727, 3728, 3741, 3797.
Stierle v. Union R. Co., p. 1726.
Stiles v. Atlanta, etc., Railroad, pp. 1747, 1748, 2539, 2839, 2941.
—— v. Davis, p. 573, 575.
—— Louisville, etc., R. Co. v.
—— v. Louisville, etc., R. Co., pp. 727, 749, 765, 1329.
Still, Eddy v.
Stillman, Abercrombie v.
Stillwell, Louisville, etc., R. Co. v.
—— v. The J. D. Hall, p. 3935.
Stimpson v. Gilchrist, p. 460.
Stimson v. Connecticut River R. Co., pp. 3117, 3121, 3124, 3151, 3182, 3192.
—— v. Jackson, pp. 531, 538, 562, 753, 756.
—— v. Milwaukee, etc., R. Co., pp. 1824, 2161.
—— Tucker v.
Stingle, Ft. Worth, etc., R. Co. v.
Stix, Ilensler v.
—— Langstaff v.
Stock & Sons, Chesapeake, etc., R. Co. v.
Stockard, Memphis, etc., R. Co. v.
—— v. Morgan, pp. 3552, 3560, 3570.
—— Railroad v.
Stockdell, Citizens' St. R. Co. v.
Stocking, Vicksburg, etc., R. Co. v.
Stocksdale, Western Maryland R. Co. v.
Stockton, Bishop v.
—— v. Bishop, p. 2634.
—— v. Frey, pp. 1687, 2693.
—— Pennsylvania R. Co. v.
—— Saltonstall v.
Stockton Lumber Co. v. California Nav., etc., Co., pp. 752, 3914.
Stockton Mill. Co., California Nav., etc., Co. v.
—— v. California Nav., etc., Co., pp. 3903, 3911, 3914, 3915.
Stockwell, Boston, etc., R. Co. v.
Stockyards Terminal Co., United States v.
Stockyards Terminal R. Co., United States v.
Stoddard, Johnson v.
—— v. Long Island R. Co., p. 946.
Stoeser, Brass v.
Stokes, St. Louis, etc., R. Co. v.
—— v. Saltonstall, pp. 1501, 1684, 1685, 1687, 1691, 1749, 2128, 2670.
Stotze v. Ann Arbor R. Co., pp. 3396, 3399, 3408.
Stone v. Adams Exp. Co., pp. 611, 639, 641, 642, 644, 651, 670, 671, 851.
—— v. Chicago, etc., R. Co., 47 Iowa 82, 17 Am. R. Rep. 461, 29 Am. Rep. 458—pp. 1529, 1973, 1977, 2425, 2429, 2434, 2439, 2635.
—— v. Chicago, etc., R. Co., 149 Iowa 240, 128 N. W. 354—pp. 1460, 1466.
—— v. Chicago, etc., R. Co., 66 Mich. 76, 33 N. W. 24, 30 Am. & Eng. R. Cas. 600—p. 1884.
—— v. Chicago, etc., R. Co., 8 S. Dak. 1, 65 N. W. 29—pp. 1318, 1349.
—— v. Chicago, etc., R. Co., 88 Wis. 98, 59 N. W. 457—p. 2413.
—— v. Clyde Steamship Co., pp. 3887, 3914.
—— v. Farmers' Loan, etc., Co., pp. 34, 37, 39, 58, 59, 60, 61, 62, 63, 64, 115, 116, 129, 1592.
—— Ft. Worth, etc., R. Co. v.
—— v. Illinois Cent. R. Co., pp. 63, 65.
—— Johnson v.
—— v. Lewiston, etc., St. Railway, pp. 1820, 2754.
—— Nashville, etc., R. Co. v.
—— v. Natchez, etc., R. Co., pp. 115, 125.
—— v. New Orleans, etc., R. Co., p. 63.
—— Norfolk, etc., R. Co. v.
—— v. Rice, pp. 538, 539.
—— St. Louis, etc., R. Co. v.
—— v. Swift, pp. 404, 549.
—— v. Wabash, etc., R. Co., pp. 305, 356.
—— v. Waitt, pp. 524, 540, 546.
—— v. Wisconsin, pp. 34, 36, 116.
Stone & Co. v. Atlantic, etc., R. Co., pp. 98, 152.
Stonecipher, Chicago, etc., R. Co. v.
Stonecypher, St. Louis, etc., R. Co. v.
Stoneman v. Erie R. Co., 52 N. Y. 429—p. 3149, 3150.
—— v. Erie R. Co. (N. Y.), 1 Sheld. 286—p. 3132.
Stoner v. Chicago, etc., R. Co., pp. 412, 998.
—— Kansas, etc., R. Co. v.
—— Missouri, etc., R. Co. v.
—— v. Pennsylvania Co., p. 2146.
Stony Brook R. Corp., Gillshannon v.
Stony Fork Coal Co. v. Louisville, etc., R. Co., pp. 3688, 3833.
Stoody v. Detroit, etc., R. Co., pp. 1990, 2645, 2703.
Stoomvart Maatschaffy Nederlandsche Lloyd v. Lind, p. 3958.

Storer, Tracy v.
Storey, Houston, etc., R. Co. v.
—— Texas, etc., R. Co. v.
Storment, Chicago, etc., R. Co. v.
Storms, Louisville, etc., R. Co. v.
Storrs, Central, etc., R. Co. v.
—— v. Pensacola, etc., R. Co., pp. 122, 124.
Story, Harris v.
—— Merchants', etc., Transp. Co. v.
—— v. Norfolk, etc., R. Co., pp. 1497, 1499, 3012, 3051, 3052, 3056.
Story Lumber Co. v. Southern R. Co., pp. 640, 641, 642, 689, 694.
Stothard v. Louisiana R., etc., Co., p. 164.
Stout, Cincinnati, etc., R. Co. v.
—— v. Coffin, pp. 812, 814.
Stoutenburgh v. Hennick, p. 3472.
Stovall, G., H. & S. A. R. Co. v.
—— Galveston, etc., R. Co. v.
Stowe, Burgess v.
—— v. New York, etc., R. Co., pp. 894, 899, 917, 918.
Strachan, Burton v.
Strader, Johnson v.
Straham, Chevallier v.
Strahorn v. Union Stock Yard, etc., Co., p. 482.
Straight Creek Coal Min. Co., Straight Creek Coal, etc., Co. v.
Straight Creek Coal, etc., Co. v. Straight Creek Coal Min. Co., pp. 6, 225, 226, 1194.
Strain, Indianapolis, etc., R. Co. v.
—— v. Vicksburg, etc., R. Co., pp. 1511, 1785.
Straiton v. New York, etc., R. Co., pp. 3177, 3181.
Stranahan, Buttfield v.
Strand v. Chicago, etc., R. Co., p. 2233.
Strang, Berndston v.
Strange v. Atlantic, etc., R. Co., pp. 642, 645, 677, 3191, 3199.
—— Pere Marquette R. Co. v.
Stratford v. Midland Valley R. Co., p. 2412.
Strathairly, The.
Strathdon, The.
Stratton, Chicago, etc., R. Co. v.
—— Ohio, etc., R. Co. v.
Straud, Chicago Union Tract. Co. v.
Straus v. Kansas, etc., R. Co., 75 Mo. 185, 6 Am. & Eng. R. Cas. 384—pp. 1884, 1899, 1900, 2248.
—— v. Kansas, etc., R. Co., 86 Mo. 421, 27 Am. & Eng. R. Cas. 170—pp. 1899, 1900.
Straus & Bro. v. Wessel & Co., p. 479.
Strauss, Illinois Cent. R. Co. v.
—— v. United R., etc., Co., p. 2319.
—— v. Wilson, p. 916.
Strawn v. Cogswell, p. 659.
Street, Ewart v.
—— Pittsburgh, etc., R. Co. v.
Street Railroad v. Boddy, pp. 1514, 1535.
Street R. Co., Britton v.
—— O'Rouke v.
Streeter v. Chicago, etc., R. Co., p. 140.
—— v. Sanitary Dist., p. 3802.
Stribling, San Antonio, etc., R. Co. v.
—— Texas, etc., R. Co. v.
Stricker v. Leathers, p. 594.
—— Southern R. Co. v.
Strickland, Central R., etc., Co. v.
Stricklin, Gulf, etc., R. Co. v.
Stringfellow, Memphis, etc., R. Co. v.
Stringfield v. Louisville R. Co., pp. 2418, 2420, 2490.
—— v. Southern R. Co., pp. 948, 1076.
Strohn v. Detroit, etc., R. Co., 21 Wis. 554, 94 Am. Dec. 564—pp. 322, 325, 412, 987, 1044, 3881.
—— v. Detroit, etc., R. Co., 23 Wis. 126, 99 Am. Dec. 114—pp. 631, 632, 634, 729, 734.
Strong v. Burlington Tract. Co., pp. 2005, 2006, 2895, 2897.
—— Doty v.
—— Dutton v.
—— v. Long Island R. Co., pp. 822, 987.
—— v. North Chicago St. R. Co., p. 2502.
—— Northern Pac. R. Co. v.
—— Rapid Transit R. Co. v.
—— v. United States, p. 3875.
Strong, etc., Co., Tweedie Trading Co. v.
Strosnider, Cincinnati, etc., R. Co. v.
Strother v. Aberdeen, etc., R. Co., pp. 2059, 3073.
Strough v. New York Cent. R. Co., p. 236.
—— v. New York, etc., R. Co., pp. 248, 262, 617.
Strouss v. Wabash, etc., R. Co., pp. 277, 726, 731, 737, 746, 853, 3121, 3124, 3132, 3133, 3143, 3144, 3148, 3149, 3151.
Strozier, Southern R. Co. v.
Struble v. Pennsylvania Co., pp. 2131, 2137, 2274, 2326.
—— Terre Haute, etc., R. Co. v.
Struebing Co. v. Merchants' Despatch Transp. Co., pp. 822, 823, 843.
Struges, Moran v.
Strull v. Louisville, etc., R. Co., p. 3050.
Strutt v. Brooklyn, etc., R. Co., p. 3995.
Stryker, Heyman v.
Stuart v. Man & Co., pp. 1212, 1213, 1214, 1219, 1220, 1229, 1230, 1231, 1232, 1233, 1235, 1237.
—— Parsons-Willis Lumber Co. v.
Stuart's Draft Mill. Co., Norfolk, etc., R. Co. v.
Stubbs, Ilsley v.
—— v. Lund, pp. 1210, 1211, 1241, 1242.
—— Portland Bank v.
Stuber, Louisville, etc., R. Co. v.
Stuckey v. Atlantic, etc., R. Co., p. 2570.
Stumore v. Breen, p. 3879.
Stump v. Hutchinson, p. 814.
Stupeck, Union Pac. R. Co. v.
Sturdevant v. Tuttle, pp. 267, 294, 296.
Sturdivant v. Fort Worth, etc., R. Co., pp. 1823, 1825, 1828, 2172.
Sturgeon, Hill v.
Sturges v. Detroit, etc., R. Co., pp. 848, 1318, 1320, 1352.
—— v. St. Louis, etc., R. Co., pp. 420, 542, 559, 3602.
Sturgess v. Bissell, p. 848.
Sturgis v. Detroit, etc., R. Co., pp. 1775, 2271.
—— v. Fifth Ave. Coach Co., pp. 2724, 2725.
Sturgis Nat. Bank, Gregory v.
Sturtevant, Bean v.
—— v. Orser, p. 1242.
Stutler, Fairmount, etc., R. Co. v.
Stutsky v. Brooklyn Heights R. Co., p. 2870.
Stutz v. Chicago, etc., R. Co., pp. 1874, 3050.
Styles v. Chesapeake, etc., R. Co., p. 2485.
Styria, The.
Suber v. Georgia, etc., R. Co., pp. 2175, 2249, 2251, 2540.
Sublett, Taylor, etc., R. Co. v.
Suburban R. Co. Finseth v.
Sue, The.
Sue, Union Pac. R. Co. v.
Suesskind-Schatz Co. v. Loria, p. 592.
Suffern, Chicago, etc., R. Co. v.
Suffolk, etc., R. Co., Kellogg v.
Sugg v. Memphis, etc., Packet Co., p. 3192.
Suggs, Texas, etc., R. Co. v.
Suitter, Liverpool, etc., Co. v.
Sulakowski v. Flint, p. 770.
Sullivan v. Boston Elevated R. Co., p. 1495.
—— Boston, etc., R. Co. v.
—— v. Brooklyn Heights R. Co., p. 1648.
—— Brown v.
—— v. Capital Tract. Co., pp. 2672, 2677.
—— v. Charleston, etc., R. Co., p. 2673.
—— v. Delaware, etc., Canal Co., pp. 2729, 2872, 4003.
—— Florida, etc., R. Co. v.
—— v. Jefferson Ave. R. Co., pp. 1690, 1744, 1750.
—— Louisville, etc., R. Co. v.
—— v. Marin, pp. 2331, 2901.
—— v. Minneapolis, etc., R. Co., p. 2508.
—— North Coast Lighterage Co. v.
—— v. Old Colony R. Co., p. 2060.
—— v. Old Colony St. Railway, p. 1494.
—— v. Oregon R., etc., Co., pp. 2663, 3087.
—— v. Philadelphia, etc., R. Co., pp. 1814, 1986, 2682.
—— v. Seattle Elect. Co., 86 Pac. 786, 44 Wash. 53—pp. 2121, 2867.
—— v. Seattle Elect. Co., 97 Pac. 1109, 51 Wash. 71—p. 2756.
—— v. Southern Railway, pp. 3140, 3157, 3197.
—— v. Thompson, pp. 532, 535.
—— v. Union R. Co., p. 2833.
—— v. Union Tract. Co. v.
—— v. Vicksburg, etc., R. Co., p. 2501.
Sullivan-Sanford Lumber Co. v. Watson, p. 2092.
Sullivan Lumber Co., Baldwin v.
Sullivan & Co., Miller v.
Sullivan, etc., Co., Rome R. Co. v.
Sultan R., etc., Co. v. Great Northern R. Co., pp. 71, 95, 435, 465.
Sultana v. Chapman, pp. 511, 540.
Summerfield v. St. Louis Trans. Co., p. 2664.
Summeril v. Elder, p. 1210.
Summerlin v. Seaboard, etc., Railway, pp. 1267, 1339, 1361, 1375.
Summerour, Western, etc., R. Co. v.
Summers v. Crescent City R. Co., pp. 1820, 2199, 2202.
—— Houston, etc., R. Co. v.
—— Louisville, etc., R. Co. v.
—— v. Mills, p. 1207.
—— v. Southern R. Co., pp. 25, 148.
Summitt v. State, pp. 111, 191, 192, 194, 205.
Sumner v. Coswell, p. 3862.
—— v. Charlotte, etc., R. Co., pp. 267, 284, 286, 289, 438, 464.
—— Louisville, etc., R. Co. v.
—— v. Southern R. Ass'n, pp. 1147, 1158.
Sumrell v. Atlantic, etc., R. Co., pp. 345, 874.
Sumter Pine, etc., Co. v. Atlantic, etc., R. Co., p. 162.
Sunbeam, The.
Sun Co. v. Healy, p. 4067.
Sun Mut. Ins. Co., Clastrier v.
—— v. Ocean Ins. Co., p. 3908.
Sunday Creek Co., United States v.

Sunny Creek Co. v. United States, pp. 3604, 3706, 3846.
Sunderland v. Westcott, pp. 526, 946, 1007.
Sunderland Bros. Co. v. Chicago, etc., R. Co., pp. 728, 733, 743, 746, 749, 1203.
Superior Court, United Tanners Timber Co. v.
—— Webster v.
Superior Rapid Trans. R. Co., Robinson v.
Superior Refin. Co., Atchison, etc., R. Co. v.
Supervisors, Olcott v.
Supreme Ruler, Snyder v.
Sure v. Milwaukee Elect. R., etc., Co., p. 2028.
Suse v. Metropolitan St. R. Co., p. 2895.
Susong v. Florida, etc., R. Co., pp. 1348, 1365, 1367, 1384, 1386, 1451, 1454, 3377, 3397.
Susquehanna Coal Co. v. South Amboy, p. 3568.
Susquehanna, etc., R. Co., Schley v.
Sussex R. Co., Morris, etc., R. Co. v.
Sutherland, Cleveland, etc., R. Co. v.
—— Harbor Master v.
—— Metropolitan West Side Elev. R. Co. v.
—— Norfolk, etc., R. Co. v.
—— v. Second Nat. Bank, pp. 482, 576.
—— v. Standard, etc., Ins. Co., p. 2173.
Sutherlin, Underwriters' Agency v.
Sutro v. Fargo, pp. 1037, 1041.
Sutro R. Co., Bosqui v.
Sutter St. R. Co., Harrison v.
Suttle v. Southern R. Co., pp. 1756, 2120, 2219, 2335.
Sutton v. Chicago, etc., R. Co., p. 3292.
—— Great Western R. Co. v.
—— Illinois Cent R. Co. v.
—— v. Kettell, pp. 337, 338.
—— v. Pennsylvania R. Co., pp. 1824, 2674, 2686, 2885.
—— v. St. Louis, etc., R. Co., p. 3751.
—— v. Southern Railway, pp. 1743, 2080, 2645, 2673, 2674, 3000.
—— State v.
Svedberg, City, etc., R. Co. v.
Sverd, The.
Swafford, Indiana Union Tract. Co. v.
Swan, In re.
—— Joyce v.
—— v. Louisville, etc., R. Co., pp. 700, 707, 711.
—— v. Manchester, etc., Railway, pp. 94, 2467, 2468, 2493.
—— v. Wiley, etc., Co., p. 3967.
Swancey, Houston, etc., R. Co. v.
Swanger, Chicago, etc., R. Co. v.
Swank v. San Antonio, etc., R. Co., p. 340.
Swann, Baltimore, etc., R. Co. v.
Swanson v. Duluth St. R. Co., p. 2833.
—— Illinois Cent. R. Co. v.
—— Raleigh, etc., R. Co. v.
Swarthout v. New Jersey Steamboat Co., p. 1839.
—— Ohio, etc., R. Co. v.
Swedish-American Nat. Bank v. Chicago, etc., R. Co., pp. 309, 314.
Sweeden v. Atkinson Improvement Co., pp. 1751, 2036, 2037.
Sweeney v. Frank Waterhouse & Co., p. 488.
—— Jameson v.
—— v. Kansas City Cable R. Co., pp. 2005, 2006, 2130, 2236, 2401, 2402, 2671, 2896, 2927, 2978.
—— v. Union R. Co., p. 2328.
Sweeney v. Union Tract. Co., p. 1991.
Sweet v. Barney, pp. 522, 541, 542, 543, 544.
—— v. Birmingham R., etc., Co., 136 Ala. 166, 33 So. 886—pp. 2355, 2907.
—— v. Birmingham R., etc., Co., 39 So. 767, 145 Ala. 667—pp. 2115, 2250, 2258, 2988, 2990.
—— Le Blanc v.
—— v. Louisville R. Co., p. 2911.
—— Medbery v.
—— v. Pym, p. 1217.
—— St. Louis, etc., R. Co. v.
Sweeten, Millville Gas Light Co. v.
Sweetland v. Lynn, etc., R. Co., pp. 201, 202, 204, 205, 2122, 2177, 2342, 2344.
Sweetzer, West Virginia Transp. Co. v.
Sweitzer, Verner v.
Swetland v. Boston, etc., R. Co., pp. 615, 728, 733, 741, 777, 3416.
Swift v. Brownell, p. 4047.
—— Hannibal R. Co. v.
—— Hannibal, etc., R. Co. v.
—— Jeffersonville R. Co. v.
—— v. Pacific Mail Steamship Co, pp. 325, 454, 486, 802, 996, 3251, 3313.
—— v. Philadelphia, etc., R. Co., pp. 3494, 3665.
—— Stone v.
—— v. Tatner, pp. 3864, 3865.
Swift River Co. v. Fitchburg R. Co., pp. 638, 642, 647, 651, 660, 681.
Swift & Co. v. Furness, etc., Co., p. 3888.
—— v. United States, p. 3686.
Swigelsky v. Interurban St. R. Co., p. 2843.
Swigert v. Hannibal, etc., R. Co., pp. 1881, 1900, 2152.
Swindle, Douglas, etc., R. Co. v.
Swindlehurst, Chicago, etc., R. Co. v.
Swindler v. Hilliard, pp. 10, 946, 1036, 1039.
Swiney v. American Exp. Co., pp. 727, 732, 748, 842, 1340, 1443, 1451, 1454, 1456, 1470, 1481.
Swinney, Collier v.
Switzer, Grieff v.
Switzler v. Northern Pac. R. Co., p. 1215.
Swofford Bros. Dry Goods Co., Rosencranz v.
Sword v. Young, pp. 554, 731.
Sybil, The.
Sydenstricker, Nutter v.
Sykes, Chicago, etc., R. Co. v.
Sylvester, Everleigh v.
—— Tufts v.
Symns v. Schotten, pp. 1219, 1229, 1232, 1233.
Symonds v. Minneapolis, etc., R. Co., pp. 2333, 2777.
Symons v. 10,466 Barrels of Cement, pp. 3885, 3945.
Syracuse Rapid Trans. Co., McLaughlin v.
Syracuse Rapid Trans. R. Co., Eddy v.
Syracuse, etc., R. Co., Dexter v.
—— Dobbins v.
—— Hill v.
—— Mynard v.
—— Northrop v.
—— Reschke v.
Syracuse, etc., Railway, Dow v.
Szczech v. Chicago City R. Co., p. 2811.
Szczepanski v. Chicago, etc., R. Co., pp. 1564, 1990.

T

Taber v. Delaware, etc., R. Co. (N. Y.), 4 Hun 765—pp. 2240, 2748.
Taber v. Delaware, etc., R. Co., 71 N. Y. 489—pp. 1876, 1877, 1925, 2362.
—— Labar v.
—— v. Seaboard, etc., Railway, 81 S. C. 317, 62 S. E. 311—pp. 1669, 1677, 2662, 2783, 2799, 3050, 3226.
—— v. Seaboard, etc., Railway, 66 S. E. 292, 84 S. C. 291, 19 Am. & Eng. Ann. Cas. 1132—pp. 1669, 2662, 2846, 3226.
Tabor, Ohio, etc., R. Co. v.
Taborn, Consolidated Tract. Co. v.
Tacoma R., etc., Co., Benson v.
—— Lawshe v.
—— Leclaire v.
—— v. Turner, p. 3009.
Tacoma Tract. Co., Bailey v.
Tacoma, etc., R. Co., Peterson v.
Taenzer & Co. v. Chicago, etc., R. Co., 95 C. C. A. 436, 170 Fed. 240—pp. 6, 447, 3247.
—— v. Chicago, etc., R. Co., 191 Fed. 543—pp. 3753, 3754, 3757, 3759, 3830.
Taffe v. Oregon R., etc., Co., pp. 3327, 3328, 3329.
Taff Vale R. Co., Davis v.
Taft v. Brooklyn Heights R. Co., p. 2184.
Taft Co. v. American Exp. Co., pp. 724, 818, 843.
Taggard v. Loring, p. 3864.
Taggart, Union Pac. R. Co. v.
—— Western Union Tel. Co. v.
Taillon v. Mears, pp. 1707, 2287, 2289, 2667, 2860.
Talbert v. Charleston, etc., R. Co., pp. 1599, 2322, 2876.
Talbot, American Brewing Ass'n v.
—— In re.
—— Little Rock, etc., R. Co. v.
—— Savannah, etc., R. Co. v.
—— Tuller v.
Talbot & Co., Little Rock, etc., R. Co. v.
Tallbott v. Merchants' Despatch Transp. Co., pp. 940, 941.
Talcott v. Pine Grove, pp. 255, 1501.
—— v. Wabash R. Co., 159 N. Y. 461, 54 N. E. 1—p. 3154.
—— v. Wabash R. Co., 50 N. Y. St. Rep. 423, 66 Hun 456, 21 N. Y. S. 318—pp. 3121, 3152, 3176, 3178.
Taliaferro, Gulf, etc., R. Co. v.
Talk, Austin v.
Tall v. Baltimore Steam-Packet Co., pp. 2032, 2033, 2724.
Tallassee Falls Mfg. Co. v. Western Railway, 117 Ala. 520, 23 So. 139, 67 Am. St. Rep. 179—pp. 332, 333, 1016.
—— v. Western Railway, 128 Ala. 167, 29 So. 203—pp. 726, 773, 905.
Tallassee, etc., R. Co., Baxley v.
Talley v. Great Western R. Co., pp. 3146, 3156.
—— Texas, etc., R. Co. v.
Tallman v. Chicago, etc., R. Co., pp. 3170, 3172.
Talluah Falls R. Co. v. Harris, pp. 1885, 2249, 2777.
—— v. Ramey, p. 2090.
Talmadge, Maury v.
—— v. Zanesville, etc., Road Co., pp. 1694, 1714.
Tampico, The.
Tanger v. Southwest, etc., Elect. R. Co., p. 2414.
Tannehill v. Birmingham R., etc., Co., pp. 2252, 2383, 2640.
Tanner v. Louisville, etc., R. Co., p. 1738.
—— v. New York, etc., R. Co., p. 870.
—— Norfolk, etc., R. Co. v.

Tanner v. Oil Creek R. Co., p. 903.
—— v. Scovell, pp. 1231, 1232.
Tant v. Southern Railway, p. 1606.
Tapia, Alabama, etc., R. Co. v.
Tapp, Toledo, etc., R. Co. v.
Tarbell v. Central Pac. R. Co., pp. 210, 1491, 1559, 1604, 2428, 2571, 3061.
—— v. Northern Cent. R. Co., pp. 1529, 2440.
—— v. Royal Exch. Shipping Co., 110 N. Y. 170, 17 N. E. 721, 6 Am. St. Rep. 350—pp. 904, 915.
—— v. Royal Exch. Shipping Co., 53 N. Y. Super. Ct. 190—p. 904.
Tarbox v. Eastern Steamboat Co., pp. 281, 337, 815, 816, 817, 829.
Tardos v. Toulon, pp. 821, 823, 828.
Tar Heel Steamboat Co., Pate v.
Tarin, Southern Pac. Co. v.
Tarkington, Texas, etc., R. Co. v.
Tarr v. Oregon, etc., R. Co., pp. 147, 2427.
—— Wooster v.
Tarrant v. St. Louis, etc., R. Co., p. 2425.
Tarter, Louisville, etc., R. Co. v.
Tartt, Ellsworth v.
Tarvin v. Texas, etc., R. Co., p. 3144.
Tarwater, Missouri, etc., R. Co. v.
Tasby, International, etc., R. Co. v.
Tassey, St. Louis Merchants' Bridge Terminal R. Co. v.
Tate, Birmingham R., etc., Co. v.
—— v. Illinois Cent. R. Co., p. 2870.
—— v. Missouri Pac. R. Co., p. 1033.
—— v. Wabash R. Co., p. 2635.
—— v. Yazoo, etc., R. Co., pp. 267, 277, 284, 285, 303.
Tatner, Swift v.
Tauger v. New York City R. Co., p. 2777.
Taugher v. Northern Pac. R. Co., pp. 514, 577, 580, 600, 842.
Taxicab Co. v. Grant, pp. 1669, 2628, 2631.
Taxing Dist., Ficklen v.
—— Lightburne v.
Tayloe, Willard v.
Taylor v. Atlantic, etc., R. Co., pp. 1537, 2019, 2831.
—— Birmingham R., etc., Co. v.
—— Bradford v.
—— v. Brigham, p. 3916.
—— Cincinnati, etc., R. Co. v.
—— Conway v.
—— v. Day, p. 2722.
—— v. Dry Dock, etc., R. Co., pp. 2253, 2304.
—— v. Fall River Ironworks, pp. 3956, 3972.
—— v. Florida, etc., R. Co., pp. 30, 222, 223.
—— Goodsell v.
—— v. Grand Ave. R. Co., 137 Mo. 363, 39 S. W. 88—p. 2083.
—— v. Grand Ave. R. Co., 185 Mo. 239, 84 S. W. 873—p. 2656.
—— v. Grand Trunk R. Co., pp. 1716, 1720, 1725, 1735, 1736, 1812.
—— Gulf, etc., R. Co. v.
—— Illinois Cent. R. Co. v.
—— v. Maine Cent. R. Co., pp. 818, 3260, 3327.
—— v. Missouri Pac. R. Co., 76 Kan. 467, 92 Pac. 606—pp. 3484, 3486, 3511.
—— v. Missouri Pac. R. Co., 26 Mo. App. 336—p. 2249.
—— v. Mounot, p. 3125.
—— v. Nassau Elect. R. Co., pp. 1649, 1678.
—— v. New York, etc., R. Co., p. 2731.
Taylor v. Pennsylvania Co., pp. 1796, 2820.
—— v. Pennsylvania R. Co., pp. 953, 977.
—— Pequeno v.
—— Pullman Palace Car Co. v.
—— St. Louis, etc., R. Co. v.
—— v. Seaboard, etc., R. Co., p. 1634.
—— v. South Covington, etc., R. Co., p. 2542.
—— v. Spokane, etc., R. Co., p. 2776.
—— v. Taylor, p. 420.
—— Texas, etc., R. Co. v.
—— v. The Robert Campbell, p. 440.
—— Tindall v.
—— Trindall v.
—— Van Hern v.
—— v. Wabash R. Co. (Mo.), 38 S. W. 304, 42 L. R. A. 110—pp. 1938, 2340, 2886.
—— v. Wabash R. Co., 130 Mo. App. 582, 109 S. W. 1059—pp. 3212, 3228, 3229.
—— v. Weir, p. 1067.
Taylor & Co. v. Collier, pp. 595, 596, 848, 853.
—— v. Little Rock, etc., R. Co., pp. 970, 3377, 3383.
Taylor, etc., Co., Little Rock, etc., R. Co. v. pp. 945, 3330.
—— Packard v.
Taylor, etc., R. Co. v. Sublett, p. 1397.
T. B. & H. R. Co. v. Montgomery, pp. 849, 1079, 1270, 1397.
Teague v. Southern R. Co., pp. 594, 599.
Teal v. Walker, p. 947.
Teale v. Southern Pac. Co., p. 2270.
Team, Bowman v.
—— v. Sears, p. 3370.
Teams, Illinois Cent. R. Co. v.
Tebbs v. Cleveland, etc., R. Co., pp. 436, 459, 477, 478.
Tecumseh Mills v. Louisville, etc., R. Co., pp. 941, 944.
Teel v. Coal, etc., R. Co., pp. 2053, 2054, 2868, 2959.
Teeling, Dillingham v.
Teeters, Lake Shore, etc., R. Co v.
Telegraph Co. v. Griswold, pp. 9, 949.
—— v. Munford, pp. 9, 3330, 3340. 949.
—— State v.
—— v. Texas, pp. 3447, 3471, 3549, 3550, 3552, 3564, 3566, 3568, 3572.
Tempel v. Dodge, p. 1028.
Tempfer v. Joplin, etc., R. Co., pp. 2117, 2384.
Temple, Atchison, etc., R. Co. v.
Templeton, Van Horn v.
Tems, Texas, etc., R. Co. v.
Tenedos, The.
Ten Eyck v. Harris, p. 588.
Tenhet v. Atlanta, etc., R. Co., p. 869.
Tennant, Gulf, etc., R. Co. v.
Tenner, Indianapolis St. R. Co. v.
Tennessee, Austin v.
—— v. Pullman Southern Car Co., p. 3579.
Tennessee Brewing Co., Louisville, etc., R. Co. v.
Tennessee Cent. R. Co. v. Brasher, pp. 1854, 2820, 3045, 3050, 3054.
Tennessee, etc., R. Co., McCauley v.
Tennessee, etc., Transp. Co., Seasongood v.
Tenney, Harris v.
Ten Thousand & Eighty-Two Oak Ties, pp. 3965, 3971.
10,466 Barrels of Cement, Symons v.
Ten Winkel, Adams Exp. Co. v.
Terhune, Bedford v.
Terminal R. Ass'n Kinnavey v.
Terre Haute Elect. Co., Hall v.
Terre Haute Tract., etc., Co. v. Payne, pp. 1721, 1901, 1922, 2599.
Terre Haute, etc., Railroad, Lin v.
Terre Haute, etc., R. Co. v. Buck, pp. 1715, 1922, 2243, 2831.
—— v. Chicago, etc., R. Co., p. 3283.
—— v. Crews, p. 782.
—— Everhart v.
—— v. Fitzgerald, pp. 1619, 2411, 2457.
—— Harvey v.
—— v. Jackson, pp. 2037, 2068.
—— v. Ketcham, p. 22.
—— Payne v.
—— v. Peoria, etc., R. Co., p. 105.
—— v. Sheeks, pp. 1813, 2126, 2604, 2644, 2673, 2808.
—— v. Sherwood, pp. 1036, 1361, 1362, 1380, 1386.
—— Stewart v.
—— v. Struble, p. 1301.
—— v. Vanatta, pp. 2437, 3096.
Terrell v. Russell, p. 3416.
Terril v. Rogers, p. 1164.
Territory, Chicago, etc., R. Co. v.
Terry v. Brightman, p. 3865.
—— Ex parte.
—— v. Flushing, etc., R. Co., pp. 1529, 1973.
—— Gulf, etc., R. Co. v.
—— v. Gulf, etc., R. Co., p. 1359.
—— International, etc., R. Co. v.
—— v. Jewett, pp. 1792, 1886, 2138.
—— v. Southern R. Co., p. 959.
—— Texas Mid. R. Co. v.
Tewes v. North German Lloyd Steamship Co., 186 N. Y. 151, 78 N. E. 864, 8 L. R. A., N. S., 199—pp. 4032, 4033, 4035.
—— v. North German Lloyd Steamship Co., 78 N. E. 1113, 186 N. Y. 525—pp. 4033, 4035.
Texarkana St. R. Co. v. Hart, p. 1983.
Texarkana, etc., R. Co. v. Anderson, p. 3046.
—— Kizer v.
—— Sabine Tram Co. v.
—— v. Sabine Tram Co., pp. 175, 3491.
—— v. Shivel, pp. 857, 3542.
Texas, Asher v.
—— Galveston, etc., R. Co. v.
—— Gulf, etc., R. Co. v.
—— Louisiana v.
—— Telegraph Co. v.
—— The.
—— Waters-Pierce Oil Co. v.
—— Western Union Tel. Co. v.
Texas Cent. R. Co. v. Burnett, pp. 1721, 1729, 2619, 3008.
—— v. Cameron, pp. 1737, 2036.
—— v. Dorsey, pp. 353, 461, 500, 787, 803, 879.
—— v. Fisher, p. 971.
—— v. Flanary (Tex. Civ. App.), 45 S. W. 214—p. 912.
—— v. Flanary (Tex. Civ. App.), 50 S. W. 726—pp. 844, 908, 910, 912, 915.
—— v. Fowler, pp. 405, 406.
—— v. Hannay-Frerichs & Co., pp. 152, 154, 171, 172, 173, 487, 653, 662.
—— Huchingson v.
—— v. Hunter & Co., pp. 729, 734, 750, 765, 1269, 1330, 1339, 1340, 1349, 1353.
—— v. Hutchingson, p. 2514.
—— Johnson v.
—— v. Marrs, pp. 3321, 3388.
—— v. Miller, pp. 632, 1319, 1321.

Texas Cent. R. Co. v. Morris, pp. 1104, 1408, 1413.
—— v. O'Laughlin, pp. 1275, 1347.
—— v. O'Loughlin, pp. 3357, 3358, 3368.
—— v. Pittman, p. 1293.
—— Renfro v.
—— v. Stewart, pp. 1715, 2120, 2167.
—— v. Watson, pp. 851, 875.
—— v. Wheeler, pp. 2744, 2873.
Texas Exp. Co. v. Dupree, pp. 759, 760, 933, 935, 1009, 1010, 3331, 3337.
—— v. Scott, pp. 753, 759, 763, 933.
—— v. Texas, etc., R. Co., p. 65.
Texas Grate Co., Atlanta, etc., R. Co. v.
Texas Mex. R. Co. v. Gallagher, pp. 1002, 1003, 1297, 3337.
—— v. Willis, p. 3141.
—— v. Wilson, p. 1755.
Texas Mid. Railroad v. Brown, pp. 1518, 1781, 1798, 1881, 2729.
—— v. Edwards & Co., pp. 281, 846, 1001.
—— v. Ellison, p. 1526.
—— v. Griggs, pp. 1510, 1513, 1721, 1778, 1779.
—— v. Little, pp. 1778, 1779.
—— Mercher v.
—— v. Ritchey, pp. 1886, 2268.
Texas Mid. R. Co. v. Dean, pp. 2018, 2019, 2035, 2061.
—— Edwards & Co. v.
—— v. Frey, pp. 1773, 1782, 2679.
—— v. Geraldon, pp. 2412, 2849.
—— v. Johnson, pp. 1823, 2792.
—— v. Jumper, pp. 1822, 1826, 2684.
—— Mercher v.
—— v. Terry, pp. 1763, 1906, 1907, 2707, 2832.
Texas Pac. R. Co. v. Davidson, pp. 1881, 1882, 1883, 2289, 2291, 2968.
—— v. James, pp. 1858, 1869, 2425, 2457, 2472, 2483.
Texas Star Flour Mills, Gulf, etc., R. Co. v.
Texas Steamship Co. v. Dupree Comm. Co., p. 491.
Texas Tel., etc., Co. v. Seiders, p. 1117.
Texas Trunk R. Co. v. Ayres, p. 2721.
—— v. Johnson, p. 1985.
—— Morehouse v.
—— v. Mullins, p. 1966.
Texas & P. Ry. Co. v. Langhehn, pp. 1120, 1124.
Texas, etc., Co. v. Nicholson, p. 1291.
Texas, etc., Railroad v. Fort, pp. 3179, 3181.
Texas, etc., R. Co., Abilene Cotton Oil Co. v.
—— v. Abilene Cotton Oil Co., pp. 716, 3470, 3601, 3631, 3664, 3674, 3684, 3708, 3709, 3735, 3737, 3741, 3747, 3750, 3752, 3757, 3760, 3764, 3766, 3769, 3770, 3785, 3806, 3809, 3810, 3822, 3824, 3840, 3841.
—— v. Adams, 78 Tex. 372, 14 S. W. 666, 22 Am. St. Rep. 56—pp. 1096, 1107, 3331, 3337, 3367, 3377, 3395, 3396.
—— v. Adams, 72 S. W. 81, 32 Tex. Civ. App. 112—pp. 2163, 2170.
—— v. Alexander, pp. 1118, 1906, 1909.
—— Allen v.
—— v. Allen, pp. 171, 230, 261, 1276.
—— v. American, etc., Timber Co., p. 3814.
—— v. Andrews, p. 1441.
—— v. Armstrong, 51 S. W. 835, 93 Tex. 31—p. 3050.
Texas, etc., R. Co. v. Armstrong (Tex. Civ. App.), 41 S. W. 833—pp. 1609, 1664.
—— v. Arnett, 88 S. W. 448, 40 Tex. Civ. App. 76—pp. 445, 457, 462.
—— v. Arnett (Tex. Civ. App.), 101 S. W. 834—p. 1320.
—— v. Arnold, pp. 820, 851, 1355, 1390, 1470.
—— Arrington v.
—— Arthur v.
—— v. Atchison, p. 1693.
—— Arthur v.
—— v. Avey (Tex. Civ. App.), 33 S. W. 704—pp. 466, 851, 1355.
—— v. Avery, 19 Tex. Civ. App. 235, 46 S. W. 897—pp. 451, 452, 970, 971, 976, 1031, 1373, 1374, 2098, 2099.
—— v. Bagwell, p. 2314.
—— v. Barber, pp. 862, 863, 1096, 1359, 1360, 1416.
—— v. Barron, 78 Tex. 421, 14 S. W. 698—pp. 1680, 1808, 1809.
—— v. Barron, 4 Tex. Civ. App. 546, 23 S. W. 557—p. 1808.
—— v. Barrow, 33 Tex. Civ. App. 611, 77 S. W. 643—pp. 158, 448, 1273.
—— v. Barrow (Tex. Civ. App.), 94 S. W. 176—p. 171.
—— v. Beckworth, pp. 1704, 1886.
—— v. Beezley, p. 2065.
—— v. Bell, pp. 1858, 1860.
—— v. Berchfield, p. 851.
—— Berje v.
—— v. Berry, p. 3337.
—— v. Best, pp. 2499, 2503, 2507.
—— v. Bigham, 90 Tex. 223, 38 S. W. 162—pp. 1332, 1336.
—— v. Bigham (Tex. Civ. App.), 47 S. W. 814—pp 3336, 3413.
—— v. Bigham (Tex. Civ. App.), 67 S. W. 522—p 686.
—— v. Birchfield, p. 3357.
—— v. Black, 87 Tex. 160, 27 S. W. 118—pp. 1544, 1547, 1549, 1551, 1552, 2665, 2702.
—— v. Black, 23 Tex. Civ. App. 119, 57 S. W. 330—pp. 2550, 2551, 2783.
—— v. Bloom, 85 Tex. 279, 20 S. W. 133—p. 2090.
—— v. Bloom, 164 U. S. 636, 41 L. Ed. 580, 17 S. Ct. 216—p. 2090.
—— v. Boggs, pp. 1328, 3356.
—— v. Boleman, p. 2614.
—— v. Bond, pp. 2429, 2473.
—— v. Boren, p. 2037.
—— v. Born, pp. 1896, 1897, 1900.
—— v. Bowlin, p. 2075.
—— v. Boyd, pp. 2090, 2163, 2164, 2207.
—— Boyles v.
—— v. Bratcher, p. 2870.
—— Breen v.
—— v. Brown, pp. 1780, 1784, 1798, 2963.
—— v. Bryant, p. 1886.
—— v. Buckalew, pp. 1729, 1730, 1826, 1846.
—— v. Buckelew, pp. 1685, 1728, 1729, 2666, 2667.
—— v. Buckworth, p. 1693.
—— v. Bump, pp. 1752, 2777.
—— v. Byers Bros. (Tex. Civ. App.), 73 S. W. 427—pp. 1285, 1377, 3337, 3338.
—— v. Byers Bros. (Tex. Civ. App.), 84 S. W. 1087—pp. 1002, 1289.
—— v. Callendar, pp. 3359, 3361.
—— v. Callender, pp. 1014, 3262, 3264, 3266, 3936.
—— v. Capper, pp. 816, 817, 826, 3385.
—— v. Capps, pp. 897, 3114, 3115, 3121, 3124, 3125, 3149, 3169.
—— v. Carlton, pp. 241, 1712.
—— Caruth v.
Texas, etc., R. Co. v. Casey, pp. 2425, 2480, 2529, 2624, 3105.
—— Cassady v.
—— v. Cassidy, p. 1540.
—— Cau v.
—— Cavallaro v.
—— Charnock v.
—— v. Cisco Oil Mill, pp. 3735, 3741, 3745, 3746, 3747, 3757, 3824, 3853.
—— v. Clark, p. 3753
—— v. Clayton, pp. 886, 3265, 3288, 3361.
Texas, etc., R. Co. v. Clippenger, pp. 1813, 1986, 2681, 2761, 2900.
—— Cockrell v.
—— v. Coggin, 90 S. W. 523, 40 Tex. Civ. App. 583—p. 1325.
—— v. Coggin, 44 Tex. Civ. App. 423, 99 S. W. 1052—pp. 741, 1309, 1338.
—— v. Cole, pp. 1978, 2114, 2117.
—— Collins v.
—— v. Cook, p. 857.
—— v. Cornelius, pp. 1777, 1799.
—— v. Coutourie, p. 917.
—— v. Crockett, pp. 2287, 2302, 2545.
—— v. Crowley, pp. 692, 1116.
—— Cumberland Tel., etc., Co. v.
—— v. Currie, pp. 31, 187, 189, 194, 1310.
—— v. Curry, 64 Tex. 85—p. 2626.
—— v. Curry, 2 Tex. App. Civ. Cas., § 453—p. 596.
—— v. Davidson, pp. 1688, 1712, 1731, 1738.
—— Davis v.
—— v. Davis, 93 Tex. 378, 54 S. W. 381, 55 S. W. 562—pp. 487, 1441.
—— v. Davis, 2 Tex. App. Civ. Cas., § 191—pp. 430, 431, 849, 931, 937, 940, 941, 942, 946, 950, 954, 1385, 3364, 3382.
—— v. Davis-Fowler Co., p. 785.
—— v. Dawson, pp. 1341, 1342.
—— Demilley v.
—— v. De Milley, 60 Tex. 194—pp. 1808, 2736, 2941.
—— v. Demilley (Tex. Civ. App.), 41 S. W. 147—pp. 1625, 2447, 3099.
—— v. Dennis, pp. 1624, 2409, 2450, 2463.
—— v. Dick, pp. 1537, 2019.
—— v. Diefenbach, pp. 1571, 2421, 2482, 2529, 3026.
—— v. Dishman, 38 Tex. Civ. App. 277, 85 S. W. 319—pp. 862, 1355.
—— v. Dishman, 41 Tex. Civ. App. 250, 251, 91 S. W. 828—p 1359.
—— Donovan v.
—— v. Dorsey, p. 812.
—— v. Driskell, p. 540.
—— v. Dye, p. 2496.
—— Eames v.
—— v. Eastin, pp. 502, 503, 505, 507, 509, 1283, 1334, 1335, 1337.
—— v. Edins, pp. 1347, 1365.
—— v. Edmond, p. 2042.
—— v. Ellerd, pp. 1359, 1360.
—— v. Elliott, 22 Tex. Civ. App. 31, 54 S. W. 410—pp. 202, 1610.
—— v. Elliott, 26 Tex. Civ. App. 106, 61 S. W. 726—p. 1879.
—— v. Fambrough, pp. 1279, 1335, 1354, 1359.
—— v. Felker, 40 Tex. Civ. App. 604, 90 S. W. 530—pp. 621, 624, 630, 729, 733, 836, 1272, 1279, 1280, 1300, 1311.
—— v. Felker 99 S. W. 439, 44 Tex. Civ. App. 420—pp. 1278, 1300, 1301, 1339, 3364.
—— v. Fenwick, pp. 30, 932, 934, 935, 1502, 1504, 1558, 1575, 1577, 2102.

Texas, etc., R. Co. v. Ferguson, pp. 3130, 3175, 3179, 3181.
—— v. First Nat. Bank, pp. 549, 550.
—— v. Fisher, p. 693.
—— Friedlander v.
—— v. Funderburk, pp. 2509, 2514.
—— v. Gallagher, pp. 426, 443.
—— v. Garcia, pp. 1550, 1569, 1871, 1919, 1920, 1922, 1923, 2906.
—— v. Gardner, pp. 2288, 2291, 2671.
—— v. Gilmore, pp. 843, 872, 901.
—— v. Goldman, pp. 1526, 1885, 1887.
—— v. Graves, pp. 2051, 3075.
—— v. Gray (Tex. Civ. App.), 71 S. W. 316—pp. 1866, 1882.
—— v. Gray, 45 Tex. Civ. App. 208, 99 S. W. 1125—pp. 3337, 3344, 3366, 3367.
—— Grigsby v.
—— Gulf, etc., R. Co. v.
—— v. Gulf, etc., R. Co., pp. 107, 3247, 3271.
—— Haite v.
—— v. Hall, p. 3412.
—— Hamilton v.
—— v. Hamilton, pp. 1823, 1827, 1843, 1845, 1985, 2807.
—— v. Hamm, pp. 293, 304, 425, 441, 460, 462, 932, 934, 937, 951, 957, 3369.
—— v. Hardin, pp. 1808, 1812, 1846.
—— Harkey v.
—— v. Harrington, pp. 1972, 1973.
—— v. Hassell, pp. 659, 666, 668, 671, 672, 694.
—— v. Hawkins, pp. 1118, 1122, 3331, 3344.
—— v. Hayden, pp. 191, 1544, 1549, 1550, 1551, 1552, 2720.
—— v. Hays, pp. 235, 259, 1142.
—— Hobbs v.
—— v. Hoffecker, pp. 849, 853, 854.
—— v. Hornbeck, p. 801.
—— v. Hudman, pp. 1771, 1779, 1780, 1795.
—— v. Huffman, p. 1771.
—— v. Hughes, 99 Tex. 533, 91 S. W. 567—pp. 158, 159, 1276.
—— v. Hughes (Tex. Civ. App.), 41 S. W. 821—p. 2017,
—— v. Humble, pp. 1776, 2872.
—— v. Humphries, pp. 2065, 2066.
—— Interstate Commerce Comm. v.
—— v. Interstate Commerce Commission, pp. 3600, 3601, 3602, 3607, 3609, 3617, 3631, 3632, 3633, 3637, 3638, 3664, 3665, 3667, 3668, 3676, 3684, 3686, 3687, 3692, 3698, 3711, 3712, 3714, 3721, 3722, 3725, 3730, 3749, 3767, 3768, 3769, 3770, 3773, 3775, 3776, 3783, 3784, 3785, 3786, 3790, 3806, 3807, 3816, 3841.
—— v. Isenhower, p. 1278.
—— v. Jackson, pp. 1083, 1086, 1093, 1104, 1105, 1408.
—— v. James, pp. 3082, 3084.
—— v. Johnson, 76 Tex. 421, 13 S. W. 463, 18 Am. St. Rep. 60—p. 2090.
—— v. Johnson, 2 Texas App. Civ. Cas., § 185—pp. 1941, 1943, 2017.
—— Jones v.
—— v. Jones, pp. 1504, 1510, 1513, 2018, 2020, 2033.
—— v. Kelly (Tex. Civ. App.), 47 S. W. 809—p. 2237.
—— v. Kelly (Tex. Civ. App.), 74 S. W. 343—pp. 402, 3338.
—— v. King, p. 1394.
Texas, etc., R. Co. v. Kingston, pp. 1938, 1941, 2019, 2033, 2048, 2070, 2120, 2707, 2786, 2796.
—— v. Kirk, p. 2649.
—— Kirkland v.
—— v. Klepper (Tex. Civ. App.), 24 S. W. 567—pp. 487, 490, 802, 851, 1123, 1347, 1352, 1353, 1441.
—— v. Klepper, 29 Tex. Civ. App. 590, 69 S. W. 426—pp. 520, 1154, 1162, 1169.
—— v. Kolp, pp. 624, 661.
—— v. Kuteman, pp. 75, 1187.
—— v. Lacey, pp. 2091, 2342.
—— v. Langbehn, pp. 607, 614, 617, 1092.
—— v. Lawrence, pp. 3125, 3130.
—— v. Leakey, pp. 1825.
—— v. Lee, pp. 1798, 1884.
—— Levinson v.
—— Lewis v.
—— Lindley v.
—— v. Llano Live Stock Co., p. 819.
—— v. Logan, pp. 405, 838, 3331.
—— Lone Star Co. v.
—— Lord, etc., Co. v.
—— v. Loving, p. 158.
—— v. Ludlam, 52 Fed. 94, 2 C. C. A. 633—pp. 3012, 3017.
—— v. Ludlam, 57 Fed. 481, 6 C. C. A. 454—pp. 1854, 1857, 1858, 1860, 1861, 2453.
—— v. Lynch, 97 Tex. 25, 75 S. W. 486—pp. 3336, 3388, 3392.
—— v. Lynch (Tex. Civ. App.), 73 S. W. 65—p. 2464.
—— v. Lynch, 43 Tex. Civ. App. 121, 94 S. W. 1093—p. 2458.
—— Lyons v.
—— v. Lyons, pp. 2035, 2480.
—— v. McCoy, p. 2115.
—— v. McDonald, pp. 1624, 2437, 2477, 2529.
—— v. McGilvary, pp. 1881, 2514.
—— v. McKenzie (Tex.), 2 Posey 307, 308—pp. 1779, 1799, 2790.
—— v. McKenzie, 30 Tex. Civ. App. 293, 70 S. W. 237—p. 1887.
—— v. McLane, pp. 1767, 1768, 1779.
—— v. McNairy, p. 3413.
—— Malone v.
—— v. Mangum, pp. 1779, 1794.
—— Marande v.
—— v. Martin, pp. 540, 664, 849, 855.
—— v. Maughon, p. 1738.
—— v. Mayer, pp. 2230, 2270, 2341, 2873.
—— v. Mayfield, pp. 1518, 1785, 1885, 1917, 1964, 1965, 2162.
—— v. Mays, pp. 1768, 1777, 1778.
—— Miller v.
—— v. Miller, 79 Tex. 78, 82, 15 S. W. 264, 11 L. R. A. 395, 23 Am. St. Rep. 308—pp. 7, 1532, 1730, 1731, 1737, 1766, 1817, 1821, 1865, 1884, 1886, 1910, 1913, 2114, 2396, 2569, 2938, 2992, 2993.
—— v. Miller (Tex. Civ. App.), 88 S. W. 499—p. 467.
—— Milligan v.
—— Missouri Pac. R. Co. v.
—— v. Mitchell, pp. 1885, 1887, 1917.
—— v. Moore, pp. 1700, 1778.
—— v. Morrison's Faust Co., pp. 278, 3115, 3127, 3128.
—— v. Morse, pp. 885, 910, 916, 1047.
—— v. Mother, p. 2532.
—— v. Mugg, 98 Tex. 352, 83 S. W. 800, 107 Am. St. Rep. 632—pp. 1141, 1142.
—— v. Mugg, 202 U. S. 242, 50 L. Ed. 1011, 26 S. Ct. 628—pp. 1153, 3668, 3750, 3753, 3754, 3755, 3760.
Texas, etc., R. Co. v. Murphy, pp. 31, 189, 190, 1766, 1767, 2091, 2615, 2940.
—— v. Murtishaw, pp. 1326, 1350.
—— v. Nelson, pp. 630, 1326.
—— v. Nicholson, pp. 211, 242, 268, 286, 292, 293, 294, 304, 418, 424, 425, 437, 446, 448, 449, 450, 654, 655, 656, 657, 687, 729, 767, 849, 1318, 1321, 1323, 1328.
—— v. Orr, pp. 1731, 1738.
—— v. Overall, pp. 2114, 2116, 2117, 2171, 2172, 2290, 2672.
—— v. Owens, pp. 932, 934, 935.
—— Patton v.
—— v. Payne, 99 Tex. 46, 87 S. W. 330, 70 L. R. A. 946, 122 Am. St. Rep. 603—p. 2471.
—— v. Payne, 15 Tex. Civ. App. 58, 38 S. W. 366—pp. 597, 833, 849, 850, 855, 858, 862, 936, 938, 959, 1041, 1042.
—— v. Payne (Tex. Civ. App.), 156 S. W. 1126—p. 615.
—— v. Pearl, pp. 191, 2065, 2421, 2484.
—— Peyton v.
—— v. Pierce, p. 2722.
—— v. Pollard, pp. 1704, 1869, 1906.
—— v. Porter, pp. 1871, 2239.
—— Post v.
—— v. Powell, 13 Tex. Civ. App. 212, 35 S. W. 841—pp. 1623, 1625.
—— v. Powell, 34 Tex. Civ. App. 575, 79 S. W. 86—pp. 175, 176, 1277, 1319.
—— v. Rackusin, p. 813.
—— Railroad Comm. v.
—— v. Railroad Comm., 183 Fed. 1005—p. 3442.
—— v. Railroad Comm., 112 C. C. A. 538, 192 Fed. 280—p. 134.
—— v. Railroad Comm. (Tex.), 150 S. W. 878—pp. 23, 25.
—— v. Randle, pp. 1357, 1359, 1360, 3336.
—— v. Ray Bros., pp. 443, 463, 466, 467.
—— v. Rea, pp. 1954, 2340.
—— Reed v.
—— v. Reed, p. 2287.
—— v. Reeder, 76 Fed. 550, 22 C. C. A. 314—p. 2999.
—— v. Reeder, 170 U. S. 530, 42 L. Ed. 1134, 18 S. Ct. 705—p. 2124.
—— Reeves v.
—— v. Reeves, pp. 1116, 1122.
—— v. Reich, pp. 1778, 1779, 1798, 1799, 1800.
—— v. Reid, p. 1768.
—— Reiss v.
—— v. Reiss, 99 Fed. 1006, 39 C. C. A. 680—p. 540.
—— v. Reiss, 183 U. S. 621, 626, 46 L. Ed. 358, 22 S. Ct. 253—pp. 326, 327, 429, 540, 1014, 3258, 3262, 3264, 3266, 3286, 3302.
—— v. Richardson, pp. 1906, 1907.
—— v. Richmond, pp. 866, 869, 937, 938, 941, 949, 954, 959, 1039, 1041, 1050.
—— v. Robertson, p. 889.
—— Rogers v.
—— v. Rucker, p. 1172.
—— v. Russell, pp. 3127, 3131.
—— v. Sabine Trans. Co. (Tex. Civ. App.), 121 S. W. 256—p. 3426.
—— v. Sabine Tram. Co., 227 U. S. 111, 33 S. Ct. 229—pp. 3490, 3740.
—— v. Scharbauer, p. 1483.
—— v. Schneider, pp. 897, 910.
—— v. Scott, pp. 2718, 2863.
—— v. Scott & Co., p. 248.

Texas, etc., R. Co. v. Scrivener, pp. 323, 426, 753, 933, 987, 1327, 1408, 3331, 3339.
—— v. Sherbert, p. 3077.
—— v. Sherrod, 99 Tex. 382, 384, 89 S. W. 956—pp. 1359, 1443.
—— v. Sherrod (Tex. Civ. App.), 87 S. W. 363—pp. 1355, 1359, 1443.
—— v. Shipman, pp. 1276, 1324.
—— v. Sims, pp. 866, 877, 1352.
—— v. Slator, p. 1480.
—— v. Smissen, pp. 738, 785, 1303, 1309, 1326.
—— Smith v.
—— v. Smith (Tex. Civ. App.), 24 S. W. 565—p. 3326.
—— v. Smith, 34 Tex. Civ. App. 571, 79 S. W. 614—pp. 174, 1277, 1319, 1459.
—— v. Smith, 38 Tex. Civ. App. 4, 84 S. W. 852—pp. 1607, 2425, 2428, 2430.
—— v. Snyder, pp. 1339, 1352.
—— Southerland v.
—— v. Southerland Pac. R. Co., p. 113.
—— State v.
—— v. Stephens, pp. 1359, 3357.
—— v. Stewart, 38 Tex. Civ. App. 595, 86 S. W. 631—p. 1325.
—— v. Stewart, 43 Tex. Civ. App. 399, 96 S. W. 106—pp. 1303, 1323.
—— v. Stewart, 52 Tex. Civ. App. 514, 114 S. W. 413—p. 1269.
—— v. Stewart, 228 U. S. 357, 33 S. Ct. 548—pp. 2270, 2341.
—— v. Storey, 68 S. W. 534, 29 Tex. Civ. App. 483—pp. 1827, 1828, 2031, 2871.
—— v. Storey, 37 Tex. Civ. App. 156, 83 S. W. 852—pp. 1691, 2016, 2028.
—— v. Stribling, pp. 932, 1285, 3362, 3628.
—— v. Suggs, pp. 1823, 1841, 1843, 2695.
—— v. Talley, p. 844.
—— v. Tankersley, p. 849.
—— v. Tarkington, pp. 2056, 2057.
—— Tarvin v.
—— v. Taylor, 3 Texas App. Civ. Cas., § 192—p. 849.
—— v. Taylor (Tex. Civ. App.), 58 S. W. 166—pp. 2398, 2731.
—— v. Taylor, 31 Tex. Civ. App. 617, 73 S. W. 1081—p. 2075.
—— v. Tems, p. 2849.
—— Texas Exp. Co. v.
—— v. Texas, etc., R. Co., pp. 422, 1137, 1139.
—— Townsend v.
—— v. Townsend, pp. 784, 865, 881.
—— v. Tracy, p. 1326.
—— v. Truesdell, pp. 851, 1322, 1326, 1328, 1350.
—— v. Turner (Tex. Civ. App.), 37 S. W. 643—pp. 729, 730, 1278, 1330, 1335.
—— v. Turner, 43 Tex. Civ. App. 608, 97 S. W. 509—p. 493.
—— Tyler v.
—— United States v.
—— v. United States, pp. 3605, 3693.
—— v. Wagley, p. 2879.
—— v. Walker, p. 937.
—— v. Warner, pp. 837, 3284, 3290.
—— v. Weatherby, p. 3140.
—— v. Weisman & Co., p. 3338.
—— v. Wever, pp. 889, 915.
—— v. Wheat, pp. 268, 293, 295, 405, 425, 464, 802, 829, 830, 882.
—— v. White, 101 Fed. 928, 42 C. C. A. 86, 62 L. R. A. 90—p. 2891.
—— v. White, 4 Texas Civ. App. Cas., § 259, 17 S. W. 419—pp. 1545, 1857, 1860.
Texas, etc., R. Co. v. White, 35 Tex. Civ. App. 521, 80 S. W. 641—pp. 1347, 3410.
—— Whitehurst v.
—— v. Whiteley, pp. 1920, 2067, 2824.
—— v. Williams, pp. 2043, 2048.
—— Williamson & Co. v.
—— v. Wilson, p. 461.
—— v. Wilson Hack Line, pp. 849, 857, 862, 864, 880.
—— v. Wood, p. 303.
—— v. Woods, 8 Tex. Civ. App. 462, 28 S. W. 416—pp. 1693, 1695, 1876, 1884, 1919.
—— v. Woods, 15 Tex. Civ. App. 612, 40 S. W. 846—pp. 1684, 1769, 1771, 1918, 1920, 2904.
—— Wren v.
—— v. Wright, p. 662.
—— v. Wynn, pp. 1610, 1663.
—— Young v.
Thacker v. Illinois Cent. R. Co., p. 1758.
Thacker Coal, etc., Co. v. Norfolk, etc., R. Co., pp. 3669, 3675, 3840.
Thalheimer, Consolidated Tract. Co. v.
Thames, Erskine v.
—— The.
Thames Iron Works, Cory v.
Thane v. Scranton Tract. Co., p. 2190.
Tharpe, Louisville, etc., R. Co. v.
Thayer v. Burchard, pp. 216, 240, 621, 623, 3944.
—— v. Old Colony St. R. Co., pp. 2417, 2419, 2755, 2859, 2955.
—— v. St. Louis, etc., R. Co., p. 945.
Thayne v. Scranton Tract. Co., p. 2174.
The Abbazia, pp. 3928, 3929.
The Aggi, 93 Fed. 484—p. 3924.
The Aggi, 107 Fed. 300, 46 C. C. A. 276—pp. 3927, 4023.
The Albert Dumois, pp. 4006, 4041, 4042, 4043, 4070, 4076.
The Aline, pp. 746, 747.
The Alnwick, p. 3914.
The Alpin, p. 3911.
The Alvah, p. 3874.
The Alvena, 74 Fed. 252—p. 4064.
The Alvena, 79 Fed. 973, 25 C. C. A. 261—p. 4024.
The Amos D. Carver, p. 4037.
The A. M. Bliss, p. 3866.
The America, p. 3924.
The Anchoria, 77 Fed. 994—p. 3988.
The Anchoria, 83 Fed. 847, 27 C. C. A. 650—p. 3989.
The Annie Faxon, pp. 4037, 4047.
The Annie L. Vansciver, p. 3989.
The Apollon, p. 701.
The Artic Bird, pp. 997, 1087, 3880, 3881, 3923, 3933.
The Argyle v. Worthington, p. 1148.
The Arrow, Butler v.
The Arthur B., pp. 3949, 3987.
The Asiatic Prince, 103 Fed. 676—pp. 3921, 3945.
The Asiatic Prince, 108 Fed. 287, 47 C. C. A. 325—p. 3895.
The Asiatic Prince, Herbst v.
The Ask, p. 3918.
The Apasia, pp. 3904, 3906, 3907.
The Assyria, pp. 3959, 3969.
The Atlantic, Cole v.
The Atlas, pp. 3917, 4040, 4043.
The Baltic, Monro v.
The Baltimore, pp. 4040, 4041.
The Baralong, p. 3922.
The Barge John M. Welch, Broock v.
The Bark Edwin, p. 291.
The Beaconsfield, p. 483.
The Belfast, 40 Ala. 184, 88 Am. Dec. 761—pp. 3882, 3926.
The Belfast (U. S.), 7 Wall. 624, 19 L. Ed. 266—pp. 3917, 3936, 4054.
—— Boon & Co. v.
—— v. Boon & Co., p. 751.
The Belgenland, p. 4024.
The Belvidere, p. 3903.
The Benefactor, pp. 4036, 4048, 4049, 4050, 4071, 4072, 4073, 4074, 4076, 4078, 4079, 4080, 4082, 4084.
The Berengere, p. 3934.
The Bermuda, p. 1151.
The Bird of Paradise, pp. 3936, 3944, 3945, 3946, 3947, 3949.
The B. J. Willard, p. 1170.
The Bobolink, pp. 893, 912, 3896.
The Brantford City, p. 430.
The Brig Collenberg, p. 3902.
The Brilliant, pp. 4021, 4064.
The Britannia, 87 Fed. 495—p. 3892.
The Britannia, 153 U. S. 130, 38 L. Ed. 660, 14 S. Ct. 795—p. 3908.
—— Marx v.
The British King, pp. 3909, 3928, 4067.
The Buffalo, pp. 4046, 4048.
The Caddo, Blum v.
The Caledonia, 43 Fed. 681, 50 Fed. 567—pp. 335, 451, 3881.
The Caledonia, 157 U. S. 124, 39 L. Ed. 644, 15 S. Ct. 537—pp. 637, 1318, 3897, 3907, 3908, 3921, 4017, 4018, 4019, 4023, 4026.
The California, p. 829.
The Campbell, Dunwody v.
The Cape Charles, p. 4.
The Capt. Jack, p. 4046.
The Caracas, p. 3988.
The Careb Prince, pp. 4019, 4023.
The Cargo, pp. 3952, 3971, 3972.
The Carib Prince, p. 4058, 4061, 4071.
The Carlos F. Roses, pp. 355, 356, 371, 373, 388, 479.
The Carlton Hall, p. 4023.
The Cayuga, pp. 4040, 4041.
The Centennial, 7 Fed. 601—p. 4030.
The Centennial, 131 Fed. 816—pp. 3982, 3984.
The Charles Nelson, p. 4012.
The Chattahoochee, pp. 4041, 4042, 4043, 4049, 4056, 4061, 4066, 4070, 4071.
The C. H. Northam, p. 4055.
The Citta Di Messina, pp. 3888, 3890, 3902, 3922.
The Citta Di Palermo, pp. 3876, 3880, 3881, 3883, 3944.
The City of Boston, p. 3993.
The City of Hartford, p. 1037.
The City of Kingston, p. 3998.
The City of Lincoln, pp. 891, 893, 908.
The City of Norwich, pp. 4036, 4048, 4049, 4050, 4052, 4053, 4055, 4072, 4084.
The City of Panama, pp. 1502, 1685, 1694, 1714, 1821, 1823.
The City of Para, p. 3911.
The City of Portsmouth, p. 3994.
The Colima, pp. 3908, 3910.
The Collenberg, p. 3942.
The Colombia, p. 3950.
The Colombo, p. 829.
The Columbia, Williams v.
The Commander-in-chief, pp. 483, 499, 522, 726, 768.
The Commerce, p. 4054.
The Commercen, p. 3938.
The Compta, p. 4030.
The Conqueror, p. 3950.
The Convoy's Wheat, pp. 3871, 3896.
The C. W. Elphicke, 117 Fed. 279—pp. 3908, 4063, 4080.
The C. W. Elphicke, 122 Fed. 439, 58 C. C. A. 421—pp. 3928, 4061.

The Dan, p. 3862.
The Dana, pp. 3910, 3914.
The Daniel Ball, pp. 3429, 3434, 3440, 3445, 4054.
The David & Caroline, pp. 752, 757.
The D. C. Murray, pp. 1941, 3983.
The Delaware (U. S.), 14 Wall. 579, 600, 20 L. Ed. 779—pp. 301, 302, 303, 304, 307, 308, 318, 319, 328, 329, 331, 332, 334, 336, 339, 499, 732, 743, 748, 752, 930, 3866, 3867, 3878, 3879, 3882, 3890, 3893, 3897, 3903, 3904, 3905, 3906, 3926, 3936, 3938, 3945, 4017, 4019.
The Delaware, 161 U. S. 459, 40 L. Ed. 771, 16 S. Ct. 516—pp. 4041, 4056, 4057, 4058, 4070.
The Del Norte, p. 3546.
The Denmark, p. 1151.
The D. Harvey, pp. 3898, 3903.
The Diadem, p. 3905.
The Downer, pp. 3992, 3997.
The D. R. Martin, p. 1500.
The Eagle, p. 4054.
The E. A. Packer, p. 3871.
The Earnwood, pp. 3903, 3906, 3934.
The E. Benjamin, p. 3937.
The Eddy, pp. 318, 520, 536, 566, 567, 891, 1167, 3917, 3919, 3936, 3939, 3941, 3944, 3945, 3946, 3947.
The Edward T. Stotesbury, p. 3971.
The Edwin I. Morrison, pp. 948, 3897, 3907, 3908, 3909, 3910, 3921, 3923, 4017, 4023, 4030, 4031, 4065.
The E. H. Pray, pp. 1210, 1223, 1250.
The Eliza, p. 1170.
The Eliza Lines, 102 Fed. 184—p. 3943.
The Eliza Lines, 114 Fed. 307, 52 C. C. O. 195—pp. 3934, 3941.
The Eliza Lines, 199 U. S. 119, 26 S. Ct. 8, 50 L. Ed. 115, 4 Am. & Eng. Ann. Cas. 406—pp. 3876, 3939.
The Elmira Shepherd, p. 799.
The Elvira Harbeck, pp. 1016, 3167.
The Emily, p. 10.
—— Bridgman v.
The E. M. Norton, pp. 815, 818, 3920.
The Employers' Liability Cases, p. 3847.
The Erastus Corning, p. 3993.
The Erie, p. 3864.
The Etona, Doherr v.
The Eugene, p. 3979.
The European, pp. 3977, 3983.
The Eva D. Rose, 151 Fed. 704—pp. 3883, 3894.
The Eva D. Rose, 153 Fed. 912—p. 3892.
The Falcon, pp. 587, 817.
The Fanny, p. 3938.
The Fanny Fostick, Cranwell v.
The Fanny Skolfield, Crooks v.
The Farmer, p. 483.
The Felix, p. 365.
The Figlia Maggiore, p. 365.
The Folmina, 143 Fed. 630—p. 4026.
The Folmina, 153 Fed. 364, 82 C. C. A. 440—pp. 3921, 3929.
The Folmina, 212 U. S. 354, 53 L. Ed. 546, 29 S. Ct. 363, 15 Am. & Eng. Ann. Cas. 748—pp. 3897, 3898, 3899, 4017, 4020, 4021, 4030, 4031.
The Francis Wright, pp. 3792, 3873, 3909.
The Frey, 92 Fed. 667—p. 4071.
The Frey, 106 Fed. 319, 45 C. C. A. 309—pp. 3921, 3930, 3031.
The Fri, 140 Fed. 123—p. 4080.
The Fri, 154 Fed. 333, 83 C. C. A. 205—pp. 3862, 3883, 4058.
The Friendschaft, pp. 349, 350.
The Friesland, pp. 3924, 3929.
The Furnessia, Behrens v.
The Galam, p. 4076.
The Galena v. Beals, p. 808.
The Gazelle, pp. 1170, 3940.
The G. B. Boren, pp. 3910, 3937.
The Gieser, p. 494.
The General Smith, p. 3584.
The Genesee Chief v. Fitzhugh, p. 4054.
The Gentleman, p. 4044.
The George L. Garlick, p. 4050.
The George W. Roby, p. 4049.
The Germanic, 107 Fed. 294—pp. 4060, 4069.
The Germanic, 124 Fed. 1, 59 C. C. A. 521—pp. 4056, 4060.
The Germanic, 196 U. S. 589, 599, 49 L. Ed. 610, 25 S. Ct. 317—pp. 790, 4057, 4059, 4071.
The Ghazee, pp. 3920, 4027.
The Gladys, p. 3911.
The Gold Hunter, pp. 595, 596.
The Good Hope, 190 Fed. 597—p. 3893.
The Good Hope, 197 Fed. 149, 116 C. C. A. 573—pp. 3922, 3928, 4026.
The Gordon Campbell, pp. 3890, 3928.
The Governor Carey, p. 3906.
The Grafton, pp. 527, 536, 538.
The Gran Canaria, pp. 3900, 3905.
The G. R. Booth, 91 Fed. 164, 33 C. C. A. 430—p. 4019.
The G. R. Booth, 19 S. Ct. 9, 171 U. S. 450, 43 L. Ed. 234—pp. 4020, 4021, 4022, 4023, 4030.
The Great Western, pp. 947, 4049, 4050, 4053, 4075.
The Guadeloupe, p. 3924.
The Gualala, pp. 3898, 3906.
The Guardian, p. 3980.
The Guiding Star, 53 Fed. 936—pp. 789, 3916.
The Guiding Star, 62 Fed. 497—p. 337.
The Guildhall, 58 Fed. 796—pp. 1033, 1046.
The Guildhall, 12 C. C. A. 445, 64 Fed. 867—p. 3915.
The Gutenfels, p. 3890.
The Habil, pp. 3917, 3918, 3919.
The Hamilton, 146 Fed. 724, 77 C. C. A. 150—pp. 4042, 4043, 4080.
The Hamilton, 207 U. S. 398, 52 L. Ed. 264, 28 S. Ct. 133—pp. 4042, 4043, 4070, 4076.
The Harriman, pp. 3869, 3875, 3940, 4017.
The Harrisburg, p. 4024.
The Hattie Palmer, p. 514.
The Heathdene, p. 3891.
The Helene, p. 365.
The Henry B. Hyde, 82 Fed. 681—pp. 939, 986, 3870, 3878, 3880, 3882, 4017.
The Henry B. Hyde, 32 C. C. A. 534, 90 Fed. 114—pp. 3921, 3922, 4030.
The Henry Grinnell, Lanata v.
The Henry Hood, Howland v.
The H. F. Dimock, pp. 4084, 4085.
The Hine, p. 4054.
The Hiram, pp. 3902, 3936, 3937.
The Hoffmans, pp. 4037, 4055.
The Howard, p. 765.
The Hudson, Brosseau & Co. v.
The Humbolt, pp. 3145, 4008.
The Huntress, pp. 549, 752, 756.
The Huron v. Simmons, p. 3916.
The Hyades, 118 Fed. 85—pp. 3929, 3930.
The Hyades, 124 Fed. 58, 59 C. C. A. 424—p. 4082.
The Idaho, pp. 317, 318, 351, 375, 376, 516, 547, 573, 3878.
The Illinois, p. 3937.
—— Warner v.
The Inca, Snow v.
The India, p. 3864.
The Indrani, pp. 4066, 4067.
The Indrapura, 171 Fed. 929—pp. 3888, 3889, 3890, 3902.
The Indrapura, 178 Fed. 591—pp. 3907, 3909.
The Indrapura, 190 Fed. 711—pp. 3907, 3923, 3929.
The Ionic, pp. 3117, 3124, 3153.
The Iroquois, p. 3993.
The Irrawaddy, pp. 3907, 4024, 4056, 4057, 4061, 4070.
The Isaac Reed, Montague v.
The Isola Di Procida, pp. 305, 306, 339, 3879.
The Italia, 184 Fed. 366—pp. 3921, 3929.
The Italia, 187 Fed. 113, 109 C. C. A. 33—p. 3913.
The James Baird, pp. 3960, 3965.
The James Martin, p. 3941.
The Jane Grey, pp. 4040, 4044, 4053.
The Jason, pp. 4057, 4070, 4071.
The J. D. Hall, Stillwell v.
The Jefferson, p. 1037.
The J. E. Kumbell, p. 4076.
The John Brooks, pp. 3155, 3156.
The John H. Pearson, p. 3871.
The John H. Starin, pp. 4082, 4083.
The John K. Shaw, p. 352.
The John L. Stephens, Morrison v.
The John M. Welch, p. 3586.
The Joseph Grant, p. 336.
The Joshua Barker, p. 514.
The J. P. Donaldson, pp. 10, 12.
The J. W. Brown, p. 330.
The Kansas, p. 3902.
The Kate Dale, White v.
The Kensington, 88 Fed. 331—pp. 3921, 4018, 4070.
The Kensington, 94 Fed. 885, 36 C. C. A. 533—pp. 4011, 4059.
The Kensington, 183 U. S. 263, 269, 46 L. Ed. 190, 22 S. Ct. 102—pp. 942, 947, 1073, 3162, 3163, 3186, 4018, 4024, 4032, 4047, 4058, 4059.
The Keokuk, pp. 3936, 3937.
The Keystone, p. 566.
The Kimball, pp. 3944, 3946, 3947, 3949.
The Kongin Luise, 173 Fed. 811—p. 3949.
The Konigin Luise, 185 Fed. 478, 107 C. C. A. 578—p. 3922.
The Lady Franklin, pp. 267, 306, 307, 308, 331, 332, 336, 338, 3936, 3937, 3945.
The Lady Pike pp. 10, 3897, 3898, 3899, 3901, 3911, 4017.
The La Kroma, p. 3920.
The Lanashire, etc., R. Co., Wilson v.
The Langfond, p. 3898.
The Laura, p. 3977.
The Lennox, pp. 3922, 4030.
The Listie, pp. 3908, 3923.
The Lockport, pp. 3907, 3921.
The London & N. W. R. W. Co., Hales v.
The Longfellow, pp. 3928, 3978.
The Loon, p. 3879.
The Lottawanna, pp. 4024, 4036, 4053.
The Louisa, Packard v.
The Lowndes, Evart v.
The Lovett Peacock, Field v.
The Loyal, 198 Fed. 591—p. 4040.
The Loyal, 204 Fed. 930, 123 C. C. A. 252—p. 4040.
The L. P. Dayton, p. 12.
The Ludvig Holberg, p. 1037.
The Lydian Monarch, p. 4030.
The Maggie Hammond, pp. 726, 731, 768, 3888, 3890, 3896, 3897, 3908, 3915, 3917, 3936, 3937, 3938, 3945, 3946.
The Magnolia, Jackson v.
The Main v. Williams, pp. 4037, 4045, 4047, 4050.

The Maine, p. 4017.
The Majestic, 56 Fed. 244—p. 3161.
The Majestic, 166 U. S. 375, 41 L. Ed. 1039, 17 S. Ct. 597—pp. 735, 736, 825, 960, 961, 963, 964, 3162, 3163, 3898, 3921, 4009, 4017, 4018, 4020.
The Mamie, p. 4078.
The Manitoba, 104 Fed. 145—pp. 3909, 3928, 4063.
The Manitoba, 122 U. S. 97, 30 L. Ed. 1095, 7 S. Ct. 1158—p. 4041.
The Manitou, 116 Fed. 60—pp. 4019, 4063, 4081.
The Manitou, 127 Fed. 554, 63 C. C. A. 109—p. 3926.
The Marechal Suchet, pp. 3929, 3930.
The Margaret, p. 12.
The Marlborough, Bursley *v.*
The Martha, pp. 820, 828, 829.
The Mary Ann, White *v.*
The Mary Belle Roberts, Speyer *v.*
The Mary Washington, pp. 530, 891, 893, 903.
The Matilda A. Lewis, p. 3901.
The Mauch Chunk, p. 4085.
The M. C. Currie, pp. 3887, 3900, 3901.
The Medea, pp. 3907, 3910, 3921, 3928, 3929.
The Memphis, Haughton *v.*
The Mepoter, p. 365.
The Mercantile, etc., Co. *v.* Chase, p. 3879.
The Merida, p. 4067.
The Merrimack, pp. 1207, 1209.
The Mexican Prince, 82 Fed. 484—p. 4067.
The Mexican Prince, 91 Fed. 1003, 34 C. C. A. 168—p. 3909.
—— Steinwender *v.*
The Middlesex, pp. 527, 892, 3894.
The Mid-Kent Railway Co., Attorney General *v.*
The Mill Bay, p. 532.
The Minnetonka, 132 Fed. 52—pp. 4010, 4011, 4032.
The Minnetonka, 146 Fed. 509, 77 C. C. A. 217—pp. 4090, 4033, 4035, 4038.
The Minnie E. Kelton, p. 3930.
The Mississippi, 76 Fed. 375—p. 3913.
The Mississippi, 120 Fed. 1020, 56 C. C. A. 525—pp. 3904, 4025, 4062, 4069.
The M. M. Chase, pp. 573, 574, 576, 577, 746.
The Mollie Mohler, p. 3911.
The Monarch, Miners' Co-op. Ass'n *v.*
The Montello, p. 4054.
The Moravian, pp. 757, 829.
The Morning Light, pp. 3899, 4017.
The Morro Castle, pp. 4032, 4033.
The Moses Taylor, p. 3979.
The Murrell, p. 4069.
The Musselcrag, pp. 3905, 3923, 3935.
The Nail City, p. 891.
The Napolitan Prince, p. 3993.
The Naranja, pp. 1087, 1089.
The Natchez, p. 1228.
The National City, p. 3985.
The Nederland, pp. 1846, 2667.
The Nellie Floyd, pp. 3907, 3908, 3928, 4021, 4025.
The Nettie Quill, pp. 3866, 3867.
The New Orleans, p. 818.
The New York Central & Hudson R. R., Denny *v.*
The New World, pp. 1725, 1759, 3990.
The New York, p. 4054.
The Niagara, p. 4064.
The Nicaragua, p. 3982.
—— Defrier *v.*
The Niceto, p. 3901.
The Ninfa, p. 3923.
The Nith, 36 Fed. 86, 13 Sawy. 368—p. 3933.
The Nith, 36 Fed. 383, 13 Sawy. 481—pp. 3906, 3911.
The Nitro-Glycerine Case, p. 766.
The Nonpariel, p. 3917.
The Norman Prince, pp. 3868, 3938.
The North Star, 169 Fed. 711—pp. 4001, 4006.
The North Star, 106 U. S. 17, 27 L. Ed. 91, 1 S. Ct. 41—pp. 4036, 4041, 4042, 4049, 4077, 4080.
The Northern Belle, pp. 3897, 3907, 3908, 3909, 3910.
—— *v.* Robson, p. 782.
The Ocean Steamship Co. *v.* McAlpin, p. 828.
The Oceana, p. 3923.
The Ocracoke, p. 3994.
The Olive Branch, Mahon *v.*
The Oluf, p. 612.
The Olympia, pp. 3866, 3872, 3934.
The Oneida, pp. 3908, 3923, 3935, 3936, 4069.
The Ontario, pp. 3929, 3930, 4024, 4067.
—— Grubnan *v.*
The Oranmore, p. 3870.
The Orcadian, pp. 3904, 3905.
The Oregon, 133 Fed. 609, 68 C. C. A. 603—pp. 3980, 3982, 3983, 3988, 4031.
The Oregon, 1 Deady, 179 Fed. Cas. No. 10,553—pp. 286, 291.
The Oriflamme, pp. 1737, 1941.
The Osceola, p. 4043.
The Palmas, pp. 3908, 4069.
The Passaic, 190 Fed. 644—p. 4073.
The Passaic, 204 Fed. 266, 122 C. C. A. 466—p. 4037.
The Patria, 118 Fed. 109—p. 3930.
The Patria, 132 Fed. 971, 68 C. C. A. 397—pp. 3921, 3922, 4030.
The Patrick Henry, p. 598.
The Persiana, 156 Fed. 1019—p. 3904.
The Persiana, 185 Fed. 396, 107 C. C. A. 416—pp. 4029, 4060.
The Peytona, Fed. Cas. No. 11,058, 2 Curt. 21—pp. 826, 3878.
The Peytona, Fed. Cas. No. 11,059, 1 Ware 541—p. 3905.
The Pharos, p. 3903.
The Philadelphia, Bartlett *v.*
The Phoenicia, 90 Fed. 116—p. 4031.
The Phoenicia, 99 Fed. 1005, 40 C. C. A. 221—pp. 3923, 3927.
The Pilgrim, Adams *v.*
The Pilot Boy, p. 1839.
The Pokanoket, p. 3936.
The Portsmouth, Fed. Cas. No. 11,295, 2 Biss. 56—p. 3900.
The Portsmouth (U. S.), 9 Wall. 682, 19 L. Ed. 754—pp. 3912, 3915, 4021, 4022, 4023.
The Planter, p. 3937.
The President, pp. 1941, 3982, 3985, 3987.
The Presque Isle, pp. 3917, 3921, 4031.
The Prince Albert, p. 588.
The Prinzess Irene, p. 3988.
The Priscilla, p. 4011.
The Propeller Burlington, p. 12.
The Propeller Commerce, pp. 483, 3897, 3898, 3899.
The Protection, pp. 439, 3934.
The Prussia, 88 Fed. 531—pp. 4019, 4026.
The Prussia, 93 Fed. 837, 35 C. C. A. 625—pp. 4026, 4059.
The Prussia, 100 Fed. 484—pp. 3877, 3883, 3890.
The Queen, pp. 820, 823, 852, 3907, 3921, 3923, 3929, 4018, 4028, 4030.
The Queen of the Pacific, pp. 3921, 3923, 3929, 4028, 4029.
The Querini Stamphalia, p. 339.
The Rappahannock, 173 Fed. 829—pp. 3907, 3921.
The Rappahannock, 184 Fed. 291, 107 C. C. A. 74—p. 3930.
The Ravensdale, pp. 3894, 3947.
The Rebecca, pp. 3900, 3905, 3906, 3937.
The Red River, pp. 477, 492, 513, 566.
The Reeside, p. 1009.
The R. E. Lee, pp. 3145, 3147.
The Republic, pp. 4037, 4045.
The Reveille, Gray *v.*
The R. G. Winslow, p. 3903.
The Richmond, pp. 531, 538.
The Richard Winslow, Norton *v.*
The Robert Campbell, Taylor *v.*
The Robert Dollar, p. 3546.
The Robert F. Stockton, Edwards *v.*
The Rokeby, p. 3923.
The Rosedale, p. 4070.
The Rose Innes, p. 3930.
The Royal Sceptre, p. 3910.
The Sabioncello, p. 3903.
The St. Anthony, Chouteau *v.*
The St. Bernard, pp. 711, 3962.
The St. Cuthbert, p. 3901.
The St. Georg, p. 3913.
The St. Hubert, 102 Fed. 362—p. 1108.
The St. Hubert, 46 C. C. A. 603, 107 Fed. 727—pp. 1087, 1100, 1108, 1109, 3897, 4029.
The St. Joze Indiano, pp. 352, 1209, 1210.
The St. Laurent, p. 891.
The St. Patrick, p. 3903.
The St. Quentin, pp. 4027, 4031.
The Sally Magee, pp. 349, 350.
The Samuel E. Spring, p. 820.
The Samuel F. Houseman, p. 3929.
The Sandfield, 79 Fed. 371—pp. 3921, 3930, 4019, 4021, 4065.
The Sandfield, 92 Fed. 663, 34 C. C. A. 612—pp. 3924, 4023, 4061, 4066.
The San Paulo, p. 3926.
The San Pedro, pp. 4039, 4043, 4077, 4078, 4079.
The San Rafael, p. 4048.
The Santee, Fed. Cas. No. 12,328, 2 Ben. 519—pp. 527, 552, 553.
The Santee, Fed. Cas. No. 12,330, 17 Blatchf. 186—p. 892.
The Santissima Trinidad, p. 3874.
The Sarah E. Brown, Hovey *v.*
The Schmidt, p. 712.
The Schooner Freeman, pp. 304, 305, 306, 308, 331.
The Scotland, 105 U. S. 24, 26 L. Ed. 1001—pp. 4024, 4036, 4049, 4050, 4053, 4054, 4071, 4072, 4073, 4075, 4083.
The Scotland, 118 U. S. 507, 30 L. Ed. 153, 6 S. Ct. 1174—pp. 4036, 4042, 4049, 4050, 4053, 4072, 4075.
—— Gilkinson *v.*
The Seaboard, p. 3937.
The Seefahrer, p. 3885.
The Seneca, 163 Fed. 591—p. 3892.
The Seneca, 172 Fed. 370, 97 C. C. A. 68—p. 3920.
The Seven Bros. No. 1, p. 3917.
The Shand, p. 3935.
The Ship Freedom *v.* Simmonds, p. 365.
The Ship Howard, p. 337.
The Sidonian, p. 3880.
The Sikh, p. 3893.
The Silvia, pp. 3907, 3908, 3909, 4060, 4061, 4062, 4068, 4071, 4083.
The Skylark, p. 3878.
The Sloga, p. 4030.
The S. L. Watson, p. 3865.
The Snap, p. 726.

The Societe, pp. 3941, 3945.
The Sonora, Bailey v.
—— Sparks v.
The Southside, p. 3995.
The Southwark, 108 Fed. 880, 48 C. C. A. 123—pp. 4058, 4065, 4081.
The Southwark, 191 U. S. 1, 48 L. Ed. 65, 24 S. Ct. 1—pp. 3907, 3923, 3924, 4056, 4057, 4058, 4059, 4060, 4061, 4063, 4065, 4066.
The Soyo Maru, p. 3904.
The Staincliffe, p. 820.
The Stanley Dollar, p. 3040.
The Star of Hope, Fed. Cas. No. 13,313, 2 Sawy. 15—p. 3926.
The Star of Hope (U. S.), 9 Wall. 203, 19 L. Ed. 638—p. 4022.
The Star of Hope (U. S.), 17 Wall. 651, 21 L. Ed. 719—pp. 3903, 3905.
The Steamboat Arrow, Butler v.
The Steamer Webb, p. 12.
The Strathairly, pp. 3977, 3978.
The Strathdon, 89 Fed. 374—pp. 3891, 3896.
The Strathdon, 101 Fed. 600, 41 C. C. A. 515—p. 3927.
The Styria, 93 Fed. 474—pp. 3894, 3895.
The Styria, 95 Fed. 698—p. 3933.
The Styria, 101 Fed. 728, 41 C. C. A. 639—pp. 3874, 4027, 4028.
—— v. Morgan, p. 3874.
The Success, Lewis v.
The Sue, pp. 1944, 1949.
The Sunbeam, pp. 4048, 4054.
The Svend, p. 4030.
The Swallow, Barker v.
The Sybil, p. 3948.
The T. A. Goddard, pp. 3865, 3916, 3937.
The Tampico, p. 3919.
The Tangier, Salmon Falls Mfg. Co. v.
The Tenedos, 137 Fed. 443—p. 3910.
The Tenedos, 151 Fed. 1022, 82 C. C. A. 671—pp. 4062, 4065.
The Texas, p. 3978.
The Thames (U. S.), 14 Wall. 98, 20 L. Ed. 804—pp. 319, 355, 370, 377, 378, 403, 547, 566, 3274, 3867, 3895.
The Thames, Fed. Cas. No. 13,859, 7 Blatchf. 226—pp. 486, 558, 559.
The Thomas Ewing, Van Syckel v.
The Titania, 124 Fed. 975—pp. 893, 910.
The Titania, 65 C. C. A. 215, 131 Fed. 229—pp. 295, 3883, 3894.
The Titanic, p. 4079.
The Tjomo, pp. 3924, 3929.
The Tommy, p. 4047.
The Tornado, pp. 3939, 3940, 4017.
The Toronto, pp. 3931, 4019, 4027.
The Tribune, p. 3866.
The Tusker, pp. 338, 339.
The Tybee, p. 527.
The Uncle Sam, Sheldon v.
The Uriel, Price, etc., Co. v.
The Valencia, pp. 3980, 3981, 4031, 4034.
The Vaughan, p. 3933.
The Victorio, p. 3906.
The Victory, pp. 1037, 3922, 4084.
The Vincenzo, p. 817.
The Viola, pp. 3963, 3965.
The Vueltabajo, pp. 3981, 3984.
The Wall, Smith v.
The Wanata, pp. 4040, 4042, 4049.
The War Eagle, Russ v.
The Water Witch, pp. 3906, 3915, 3918.
The Wellington, pp. 336, 3900.
The Western States, 151 Fed. 929—pp. 3990, 3991.
The Western States, 159 Fed. 354, 86 C. C. A. 354—p. 4009.
The Westminister, 102 Fed. 366—pp. 1108, 1109.
The Westminister, 116 Fed. 123—pp. 1116, 1117.
The Westminister, 62 C. C. A. 406, 127 Fed. 680—pp. 818, 820, 3920, 3921, 4029, 4030.
The Wilderoft, 126 Fed. 229—p. 820.
The Wilderoft, 130 Fed. 521, 65 C. C. A. 145—pp. 3927, 4067, 4081.
The Wilderoft, 201 U. S. 378, 50 L. Ed. 794, 26 S. Ct. 467—pp. 4061, 4065, 4066, 4080.
The Wildenfels, pp. 3862, 3930.
The William Marshall, p. 712.
The William Power, p. 3928.
The William Taber, pp. 820, 828.
The Willie, p. 3908.
The Willie D. Sandhoval, pp. 295, 305, 306, 338, 587, 816.
The Winnebago, p. 3546.
The Witch Queen, p. 3937.
The Zenobia, pp. 726, 741.
The Zone, pp. 820, 4030.
Theilbar, Merchants' Despatch Transp. Co. v.
Thero v. Missouri Pac. R. Co., p. 1309.
Thing, McManus v.
Third Ave. R. Co., Barrett v.
—— v. Barton, p. 2127.
—— Block v.
—— Buckbee v.
—— Deutschmann v.
—— Hamilton v.
—— Hansen v.
—— Hoffman v.
—— Isaacs v.
—— Jacobs v.
—— Keegan v.
—— Lasker v.
—— Ludeman v.
—— Macer v.
—— McMahon v.
—— Morris v.
—— Munroe v.
—— Norton v.
—— Rixley v.
—— Rosenberg v.
—— Schalscha v.
—— Schultz v.
—— Wallace v.
—— Zimmer v.
Third Nat. Bank v. Hays, pp. 371, 384, 385, 391.
Thirteenth, etc., R. Co. v. Boudrou, pp. 2002, 2183.
Thisler, Oregon R., etc., Co. v.
Thomas, Alabama, etc., R. Co. v.
—— v. Altoona, etc., Elect. Co., p. 2876.
Thomas v. Atlantic, etc., R. Co., pp. 311, 313, 331, 488.
—— v. Boston Elev. R. Co., p. 2672.
—— v. Boston, etc., R. Corp., pp. 210, 894, 910.
—— v. Carlotte, etc., R. Co., pp. 1856, 1878.
—— v. Chicago, etc., R. Co., pp. 1667, 2436, 2652.
—— v. Frankfort, etc., R. Co., p. 3289.
—— v. Gay, p. 3571.
—— v. Kansas, p. 3539.
—— Kansas, etc., R. Co. v.
—— Kentucky Cent. R. Co. v.
—— v. Lancaster Mills, pp. 744, 775, 778.
—— v. Le Baron, p. 3944.
—— Mathis v.
—— v. Mills, p. 2496.
—— v. Morning Glory, pp. 727, 732, 749, 945.
—— v. Morse, p. 400.
—— New Orleans, etc., R. Co. v.
—— Newport News, etc., Co. v.
—— v. North Staffordshire R. Co., pp. 211, 236, 237.
Thomas v. Northern Pac. Exp. Co., p. 579.
—— v. Osborn, pp. 3865, 3866, 3867.
—— v. Pacific Exp. Co., p. 519.
—— v. Pennsylvania R. Co., p. 583.
—— v. Philadelphia Rapid Trans. Co., p. 2860.
—— v. Philadelphia, etc., R. Co., pp. 1824, 2674, 2781.
—— Rogers v.
—— St. Louis, etc., R. Co. v.
—— San Pedro, etc., R. Co. v.
—— v. San Pedro, etc., R. Co., pp. 2342, 2356.
—— v. Scutt, p. 3871.
—— Southern R. Co. v.
—— v. Southern R. Co., 122 N. C. 1005, 30 S. E. 343—pp. 3042, 3043, 3055.
—— v. Southern R. Co., 131 N. C. 590, 42 S. E. 964, 6 R. R. R. 860, 29 Am. & Eng. R. Cas., N. S., 860—pp. 728, 730, 749, 3186, 3194.
—— Wabash R. Co. v.
—— v. Wabash, etc., R. Co., p. 246.
—— Wells v.
—— v. Wells-Fargo Exp. Co., p. 1339.
—— Western R. Co. v.
Thomas, etc., Mfg. Co. v. Wabash, etc., R. Co., pp. 853, 854, 855.
Thompkins v. Boston, etc., R. Co., p. 190.
Thompson, Alabama Mid. R. Co. v.
—— Arbuckle v.
—— Central Railroad v.
—— Central R. Co. v.
—— Charleston, etc., R. Co. v.
—— Chattanooga Southern R. Co. v.
—— Chicago, etc., R. Co. v.
—— v. Chicago, etc., R. Co., 189 Fed. 723, 111 C. C. A. 261—pp. 2348, 2884.
—— v. Chicago, etc., R. Co., 27 Iowa, appx., 561—pp. 757, 781.
—— v. Chicago, etc., R. Co., 22 Mo. App. 321—pp. 1118, 1119, 1122, 1124, 1125.
—— Cumberland, etc., R. Co. v.
—— v. Darden, p. 3532.
—— Duffy v.
—— v. Duncan, p. 2372.
—— v. Fargo (N. Y.), 4 Thomp. & C. 665, 2 Hun 379—pp. 476, 477.
—— v. Fargo, 49 N. Y. 188, 44 How. Prac. 176, 10 Am. Rep. 342—pp. 484, 490.
—— v. Fargo, 63 N. Y. 479—p. 489.
—— Fulton, etc., Co. v.
—— Galveston, etc., R. Co. v.
—— v. Gardner, etc., St. R. Co., pp. 1803, 1927.
—— Georgia R., etc., Co. v.
—— Goodrich v.
—— v. Green, pp. 1736, 2386.
—— Gulf, etc., R. Co. v.
—— Hoyt v.
—— v. Insurance Co., p. 3871.
—— International, etc., R. Co. v.
—— Louisville, etc., R. Co. v.
—— v. Metropolitan St. R. Co., pp. 1833, 2968.
—— v. Midland R. Co., pp. 1670, 1672.
—— Missouri, etc., R. Co. v.
—— Montgomery, etc., R. Co. v.
—— v. Nashville, etc., Railway, pp. 1569, 2577.
—— v. New Orleans, etc., R. Co., p. 1864.
—— v. Norfolk, etc., Tract. Co., pp. 2357, 2912.
—— Perry v.
—— Pittsburg, etc., R. Co. v.

Thompson v. Quincy, etc., R. Co., pp. 624, 1303, 1309.
—— v. Railroad Comm., p. 45.
—— v. Rose, p. 579.
—— St. Louis Trans. Co. v.
—— St. Louis, etc., R. Co. v.
—— v. St. Louis, etc., R. Co., p. 2683.
—— San Antonio, etc., R. Co. v.
—— v. San Antonio, etc., R. Co., pp. 423, 457, 458, 463, 1138, 1139, 1195.
—— Seaboard, etc., R. Co. v.
—— South, etc., R. Co. v.
—— v. Southern Exp. Co., p. 163.
—— v. Southern Pac. Co., p. 3306.
—— State v.
—— Steamboat Jonas Powell v.
—— v. Stewart, p. 1241.
—— Sullivan v.
—— Toledo, etc., R. Co. v.
—— Travis v.
—— v. Truesdale, pp. 1636, 2443.
—— Union Pac. R. Co. v.
—— Ward v.
—— Winslow v.
—— v. Winslow, 128 Fed. 73—p. 3917.
—— v. Winslow, 130 Fed. 1001—p. 3960.
—— v. Yazoo, etc., R. Co., pp. 1564, 1566, 1828.
Thompson-Houston Elect. Co. v. Simon, p. 211.
Thompson Towing, etc., Ass'n v. McGregor, pp. 4048, 4082.
Thompson, etc., Co., Louisville, etc., R. Co. v.
Thomsen & Co., Tweedie Trading Co. v.
Thomson, Gleadell v.
—— v. Manhattan R. Co., p. 2030.
—— v. Pacific Railroad, pp. 37, 3553.
Thorn, McCready v.
Thorne v. California Stage Co., p. 2835.
—— v. Philadelphia Rapid Transit Co., p. 2328.
Thornsberry, Galveston, etc., R. Co. v.
Thornton, Baltimore, etc., R. Co. v.
—— International, etc., R. Co. v.
—— Louisville, etc., R. Co. v.
—— Newsom v.
—— Southern Exp. Co. v.
—— Southwestern Railroad v.
—— Western R. Co. v.
Thorp v. Brookfield, p. 2300.
—— v. Concord R. Co., pp. 1636, 2453.
—— v. Durham Tract. Co., pp. 2357, 2375, 2907.
—— v. Hammond, pp. 3865, 3932.
—— v. New York, etc., R. Co., pp. 1953, 1955, 2074, 3204, 3213, 3226, 3227.
Thorson v. Groton, etc., St. R. Co., pp. 1682, 1739, 2561, 2562, 2793.
Threefoot v. New Orleans, etc., R. Co., p. 3398.
Three Hundred & Eighteen & One-Half Tons of Coal, Johnson v.
Three Hundred Sixty-Seven Tons of Coal, Carleton v.
Thurlkill, Whitesides v.
Thurlow, Chicago, etc., R. Co. v.
—— v. Massachusetts, p. 3427.
Thurman, Southern R. Co. v.
—— v. Wells, Fargo & Co., pp. 231, 869.
Thurston v. Detroit United R. Co., pp. 1709, 2666, 2895.
—— v. Foster, p. 3875.
—— North Chicago St. R. Co. v.
—— v. Union Pac. R. Co., pp. 1492, 1495, 1498, 1499.
Thweatt v. Houston, etc., R. Co., pp. 2028, 2031.
Thwing, Insurance Co. v.
Thyll v. New York, etc., R. Co., pp. 817, 829, 1038.
Tibbett, Morton v.
Tibbits, Hoover v.
Tibbits & Son v. Rock Island, etc., R. Co., p. 346.
Tibby v. Missouri Pac. R. Co., pp. 1580, 2092, 2098, 2296.
Tice, Georgia R., etc., Co. v.
Tickell v. St. Louis, etc., R. Co., pp. 1752, 1755.
Tide Water Pipe Co. v. State Board, p. 3589.
Tiedeman v. Knox, pp. 359, 1221.
Tierney v. New York, etc., R. Co., pp. 211, 236, 615, 616, 744.
—— Willard Mfg. Co. v.
Tiers, New Brunswick Steamboat, etc., Co. v.
—— New Brunswick, etc., Co. v.
Tietken, Missouri Pac. R. Co. v.
Tietz v. International R. Co., p. 1957.
Tift, Southern R. Co. v.
—— v. Southern R. Co., 123 Fed. 789—pp. 3666, 3821, 3841.
—— v. Southern R. Co., 138 Fed. 753—pp. 1190, 1193, 1201, 3674, 3792, 3793, 3795, 3797.
Tiis v. Byers, p. 717.
Tilburg v. Northern Cent. R. Co., 217 Pa. 618, 66 Atl. 846, 12 L. R. A., N. S., 359—pp. 2852, 2855, 3078.
—— v. Northern Cent. R. Co., 221 Pa. 245, 70 Atl. 723—p. 2364.
Tilden v. Rhode Island Co., p. 2822.
Tiller v. Chicago, etc., R. Co., (Iowa), 24 R. R. R. 581, 47 Am. & Eng. R. Cas., N. S., 581, 112 N. W. 631—pp. 821, 1458.
—— v. Chicago, etc., R. Co., 142 Iowa 309, 120 N. W. 672—pp. 1303, 1304, 1305, 1310, 1468, 1473, 1479.
Tilleson, Louisville, etc., R. Co. v.
Tillett v. Lynchburg, etc., R. Co., p. 2125.
—— v. Norfolk, etc., R. Co., pp. 1990, 2169.
Tilley v. County of Cook, pp. 245, 3867.
—— v. Norfolk, etc., R. Co., p. 244.
Tillman, Columbus, etc., R. Co. v.
—— v. Kansas City Distillery Co., p. 1233.
—— Yazoo, etc., R. Co. v.
Tillotson, Putnam v.
Tilton v. Philadelphia Rapid Trans. Co., pp. 2691, 2893.
Timmons, Eureka Springs R. Co. v.
Timms v. Old Colony St. R. Co., pp. 1994, 2804.
Timon, San Antonio, etc., R. Co. v.
Timpson, Fenn v.
—— v. Manhattan R. Co., p. 1786.
Tindall v. Taylor, p. 3274.
Tingle, Adams Express Co. v.
Tingley v. Long Island R. Co., p. 2096.
Tinker, Inman Steamship Co. v.
Tinkle v. St. Louis, etc., R. Co., pp. 1502, 1755.
Tinsley v. Penniman, p. 2696.
Tioga R. Co., Mallory v.
Tippecanoe Loan, etc., Co. v. Jester, pp. 1488, 2620, 2982.
Tipton v. Topeka R. Co., p. 2739.
Tirrell, Gage v.
—— v. Gage, p. 618.
Tirelli, Alabama, etc., R. Co. v.
Tisdale, International, etc., R. Co. v.
Tison v. Howard, pp. 355, 356, 357, 360, 361, 362, 367, 375.
Titania, The.
Tittabawassee Boom Co. v. Cunning, p. 3428.
Tittle, St. Louis, etc., R. Co. v.
Titusville, Brennan v.
Tjomo, The.
Toberman v. Toledo, etc., R. Co., p. 1033.
Tobin v. Omnibus Cable Co., p. 2992.
—— v. Pennsylvania Railroad, p. 2814.
—— v. Pittsfield Elect. St. R. Co., pp. 2659, 2898, 2938.
—— v. Portland, etc., R. Co., p. 2505.
—— Silver v.
—— Vicksburg v.
Todd, Bates v.
—— Chicago, etc., R. Co. v.
—— v. Missouri Pac. R. Co., pp. 1995, 2637, 2691.
—— v. Old Colony, etc., R. Co. (Mass.), 3 Allen 18, 80 Am. Dec. 49—pp. 1564, 1566, 1759, 2201.
—— v. Old Colony, etc., R. Co. (Mass.), 7 Allen 207, 83 Am. Dec. 679—pp. 1759, 2203.
Tolano v. National Steam Nav. Co., p. 3145.
Tolchester Beach Imp. Co. v. Scharnagl, pp. 2044, 2867.
Toledo Consol. St. R. Co. v. Fuller, pp. 1541, 2083, 2699.
Toledo R., etc., Co. v. Ketrow, p. 2657.
Toledo Tract. Co., Carr v.
Toledo, etc., R. Co. v. Ambach, pp. 728, 749, 765, 1039, 3122, 3133, 3141, 3144, 3184.
—— v. Baddeley, pp. 1718, 1719, 2950, 2993.
—— Bansemer v.
—— v. Beery, p. 1305.
—— v. Beggs, pp. 1572, 1573, 2096, 2097, 2683.
—— v. Boaz, p. 1371.
—— Bowler, etc., Co. v.
—— v. Bowler, etc., Co., pp. 7, 1076, 3109, 3124, 3133, 3149, 3150, 3151, 3153, 3155.
—— v. Brooks, 81 Ill. 245—pp. 1550, 1572.
—— v. Brooks, 81 Ill. 292—p. 1572.
—— Collins v.
—— v. Dages, pp. 3124, 3149, 3150, 3151, 3153, 3154.
—— v. Durkin, p. 1456.
—— v. Eastburn, p. 1467.
—— v. Elliott, pp. 91, 1180.
—— v. Foss, p. 2637.
—— Funsten Dried Fruit, etc., Co. v.
—— v. Gilvin, pp. 288, 292.
—— v. Grush, pp. 2500, 2501.
—— v. Hamilton, pp. 1036, 1291, 1330, 1388.
—— v. Hammond, pp. 3115, 3116, 3117, 3125, 3127.
—— Johnson v.
—— v. Kichler, p. 864.
—— v. Kickler, p. 865.
—— v. Levy, pp. 1018, 1460.
—— v. Lockhart, pp. 694, 3278, 3279.
—— v. McDonough, pp. 2461, 2565, 3103.
—— v. Maine, p. 2501.
—— v. Merriman, p. 3253.
—— Paddock v.
—— v. Patterson, pp. 2435, 3091.
—— v. Pence, pp. 210, 1492.
—— v. Pennsylvania Co., 54 Fed. 730, 53 Am. & Eng. R. Cas. 307, 19 L. R. A. 387—pp. 255, 3819, 3823.
—— v. Pennsylvania Co., 54 Fed. 746, 53 Am. & Eng. R. Cas. 293, 19 L. R. A. 395—pp. 254, 3658.
—— v. Roberts, pp. 455, 458, 474.
—— Secor v.
—— v. Stevenson, pp. 1767, 1768, 1800.

Toledo, etc., R. Co. v. Tapp, pp. 727, 732, 748, 752, 821, 3157.
—— v. Thompson, pp. 1291, 1345.
—— Toberman v.
—— v. Williams, pp. 190, 2420, 2423.
—— v. Wingate, pp. 1782, 1878, 1884, 1911, 2615.
—— v. Wren, pp. 224, 227, 228.
—— v. Wright, pp. 1596, 1597, 2425, 2467, 2479.
Toledo, etc., Tract. Co. v. McFall, pp. 1762, 1763, 1890, 1896.
Toler v. Yazoo, etc., R. Co., p. 2909.
Tolerton, etc., Co. v. Anglo-California Bank, pp. 394, 396, 399.
Tolleman v. Sheboygan, etc., R. Co., pp. 1695, 1958, 1959, 2309, 2800.
Tollerson, Southern R. Co. v.
Tolleson v. Southern Railway, pp. 2081, 2949.
Tolman v. Abbot, pp. 3327, 3353.
Tolson, Inland, etc., Coasting Co. v.
Tombigbee Valley R. Co., Fairford Lumber Co. v.
Tomlin, Belt Elect. Line Co. v.
Tomlinson, St. Louis, etc., R. Co. v.
—— v. Wilmington, etc., R. Co., p. 3089.
Tommy, The.
Tompkins v. Augusta, etc., R. Co., p. 2494.
—— v. Boston Elev. R. Co., pp. 1528, 1682, 1719, 2122, 2176.
—— Chicago, etc., R. Co. v.
—— v. Clay Street R. Co., p. 2083.
—— v. Dutchess, pp. 726, 734, 735, 736, 741, 768.
Toncray, White v.
Tonn, Kansas, etc., R. Co. v.
Toohy v. McLean, pp. 1707, 1839, 2150, 2636.
Tooker v. Brooklyn Heights R. Co., p. 2798.
—— v. Gormer, pp. 570, 572.
Toomey, Pennsylvania Co. v.
Tootle v. Rusk, p. 477.
Topeka City R. Co. v. Higgs, pp. 1725, 1749, 1951, 1980, 2009, 2194.
Topeka R. Co., Tipton v.
Topp v. United R., etc., Co., pp. 2117, 2118, 2228, 2317.
Topping Chesapeake, etc., R. Co. v.
Torgorm, Chamberlain v.
Tornado, The.
Toronto, The.
Toronto St. R. Co., Blackmore v.
Toronto, etc., R. Co., Blackmore v.
Torpe, West Chicago St. R. Co. v.
Torpey v. Williams, pp. 3123, 3125, 3126, 3129, 3168.
Torrence, Perry v.
Torrey v. Boston, etc., R. Co., p. 2173.
—— v. Kelly, pp. 3985, 3986, 3987.
Touart, Louisville, etc., R. Co. v.
Toulon, Tardos v.
Tousey v. Roberts, p. 1750.
Tower v. Utica, etc., K. Co., pp. 3146, 3148.
Tower Co. v. Southern Pac. Co., 184 Mass. 472, 69 N. E. 348—pp. 3923, 3925, 3932.
—— v. Southern Pac. Co., 195 Mass. 157, 80 N. E. 809—pp. 3925, 4025.
Tower Grove, etc., R. Co., Malecek v.
Tower Hill Steamship Co., Goldsmith v.
Towles v. Atlantic, etc., R. Co., p. 646.
Towne, Nash v.
Townes, St. Louis, etc., R. Co. v.
Townsend v. Binghamton R. Co., p. 2183.
—— v. Boston, p. 2320.
—— v. Houston Elect. Co., p. 2589.
—— v. Nashville, etc., R. Co., pp. 2260, 2616.
—— v. New York, etc., R. Co., pp. 2431, 3086.
—— St. Louis, etc., R. Co. v.
—— Steele v.
—— Texas, etc., R. Co. v.
—— v. Texas, etc., R. Co., p. 2627.
Townsend Brick, etc., Co. v. Central Trust Co., p. 108.
Townsend, etc., Dry Goods Co. v. United States Exp. Co., pp. 431, 1059, 1074.
Tozer, United States v.
Tozer v. United States, pp. 3719, 3842.
Tozier v. Haverhill, etc., St. R. Co., p. 2971.
Trabing v. California Nav., etc., Co., 121 Cal. 137, 53 Pac. 644, 8 Am. & Eng. Corp. Cas., N. S., 695—pp. 2038, 2059, 2070.
—— v. California Nav., etc., Co., 133 Cal. XX, 65 Pac. 478—pp. 3102, 4004, 4007.
Trace v. Pennsylvania R. Co., pp. 827, 1453, 1454, 1455, 1470.
Tracey, Chicago, etc., K. Co. v.
Tracy v. Chicago, etc., R. Co., p. 1335.
—— v. New York, etc., R. Co., p. 188.
—— v. Pullman Palace Car Co., p. 3230.
—— v. Storer, p. 517.
—— Texas, etc., R. Co. v.
Trade Mark Cases, p. 3420.
Trader, Baltimore, etc., R. Co. v.
Tradewell v. Chicago, etc., R. Co., pp. 493, 842, 3398.
Traffic Bureau Merchants' Exch. v. Chicago, etc., R. Co., p. 3734.
Trafton, Boston, etc., R. Co. v.
Trail, Illinois Cent. R. Co. v.
Trainer, Little Rock, etc., R. Co. v.
Trakas v. Charleston, etc., R. Co., pp. 614, 616, 617, 766, 3398.
Trammel v. Dinsmore, pp. 35, 39, 115, 116, 128, 129.
Trammell, Houston, etc., K. Co. v.
Trankersley, Texas, etc., R. Co. v.
Transcontinental Freight Co., Garberson v.
Transfer Co. v. Kelly, pp. 728, 733, 749, 1684, 2081.
Transit Co. v. Venable, pp. 203, 1561, 2097.
Trans-Missouri Freight Ass'n, United States v.
Transportation Co. v. Downer, pp. 1020, 1037, 3921, 4017, 4020, 4031.
—— v. Parkersburg, pp. 3468, 3474, 3528, 3529, 3530, 3531, 3532.
—— Walker v.
—— v. Wheeling, pp. 3474, 3581, 3583, 3584.
Transportation Line v. Cooper, p. 3977.
Traphagen v. Erie R. Co., pp. 1822, 1823.
Trapp v. Southern Railway, pp. 1862, 3057.
Traube, Union R., etc., Co. v.
Trautwein, Delaware, etc., R. Co. v.
Travelers' Ins. Co. v. Austin, pp. 1502, 1581, 1584.
Travers v. Kansas Pac. R. Co., pp. 2411, 2412, 2414.
Travis, Loverin, etc., Co. v.
—— v. Thompson, pp. 1154, 1155, 1158.
Travis v. Wells Fargo & Co., p. 1051.
Trawick, Gulf, etc., R. Co. v.
Traynham v. Charleston, etc., R. Co., p. 3524.
Traywick v. Southern Railway, p. 677.
Treadway, Louisville, etc., R. Co. v.
Treadwell v. Aydlett, etc., Co., pp. 1228, 1229, 1231, 1242, 1245.
—— v. Whittier, pp. 1488, 1735, 1750, 1839, 1843, 1845, 1850.
Treat v. Boston, etc., R. Corp., pp. 1878, 1951, 2360.
—— Illinois Cent. K. Co. v.
Tredegar Co., Ewan v.
Tregear v. Dry Dock, etc., R. Co., p. 2186.
Treleven v. Northern Pac. R. Co., p. 500.
Trenchard v. New Orleans R., etc., Co., p. 2810.
Trent, Block v.
—— Louisville, etc., K. Co. v.
Trent, etc., Nav. Co. v. Wood, p. 729.
Trenton, Reed v.
Trenton Horse R. Co., Breese v.
Tressler, Northern Pac. R. Co. v.
Trexler v. Baltimore, etc., R. Co., pp. 1343, 1457, 1478.
Trezona v. Chicago, etc., R. Co., pp. 1624, 1638, 2446, 2447, 2622.
Tribbey, St. Louis, etc., R. Co. v.
Tribune, The.
Trice v. Chesapeake, etc., R. Co., pp. 1609, 2449, 2458, 2463.
—— v. Miller, pp. 522, 533, 549, 552, 1009.
Trich, South Side Pass. K. Co. v.
Tri-City R. Co., Conwell v.
—— v. Gould, p. 2952.
Trieber v. New York, etc., R. Co., p. 1889.
Trigg v. St. Louis, etc., R. Co., pp. 3048, 3049, 3061.
Trigo, San Antonio, etc., R. Co. v.
Trimble v. New York, etc., R. Co., 56 N. E. 532, 162 N. Y. 84, 48 L. R. A. 115—pp. 3111, 3144, 3150, 3154, 3184.
—— v. New York, etc., R. Co., 39 App. Div. 403, 57 N. Y. S. 437—pp. 822, 3149, 3162.
—— St. Louis, etc., R. Co. v.
Trimyer, Washington, etc., R. Co. v.
Trindall v. Taylor, pp. 377, 378.
Trinity County Lumber Co., Missouri, etc., R. Co. v.
Trinity Valley R. Co. v. Stewart, pp. 1588, 1752, 1755, 1756, 1985, 2004, 2208.
Trinity, etc., K. Co. v. Bradshaw, p. 2769.
—— Carpenter v.
—— v. Geppert, p. 3518.
—— Haberzettle v.
—— v. O'Brien, pp. 1769, 2903.
—— Walling v.
Tripis, Missouri, etc., R. Co. v.
Tripp, Old Colony R. Co. v.
Trippe & Co, Hot Springs R. Co. v.
Troop, Ralli v.
Trotlinger v. East Tennessee, etc., R. Co., pp. 191, 194, 198, 199, 203, 1550, 1592, 1858, 1863.
Trotter, Chicago, etc., R. Co. v.
—— St. Louis, etc., R. Co. v.
Trousdale & Sons, Richmond, etc., R. Co. v.
Troustine, Illinois Cent. R. Co. v.
Trout v. Gulf, etc., R. Co., pp. 1304, 1368.
—— v. Watkins Livery, etc., Co., p. 1489.
Troutman v. Louisville, etc., K. Co., p. 2860.
Trowbridge v. Chapin, pp. 267, 279, 285.

Trowbridge v. Charleston, etc., R. Co., p. 824.
Trowell v. Youmans, pp. 551, 553, 581.
Trower, Pecos, etc., R. Co. v.
Troy, Cincinnati, etc., R. Co. v.
—— Wilson v.
Troy, etc., R. Co., Buffett v.
—— Foy v.
—— Francisco v.
—— Ross v.
—— Shedd v.
Troyer, Chicago, etc., R. Co. v.
Truax, Ferguson v.
—— v. Philadelphia, etc., R. Co., pp. 246, 267, 277, 284, 285, 727, 732, 748, 765, 3265.
True, International, etc., R. Co. v.
—— Keokuk Northern Line Packet Co. v.
—— Keokuk, etc., Packet Co. v.
Truel v. Missouri, etc., R. Co., pp. 1612, 1613.
Truesdale, Thompson v.
Truesdell v. Erie R. Co., 99 N. Y. S., 694, 114 App. Div. 34—pp. 2229, 2231, 2822.
—— v. Erie R. Co., 104 N. Y. S. 243, 119 App. Div. 371—pp. 2349, 2911.
—— Texas, etc., R. Co. v.
Truex v. Erie R. Co., pp. 2080, 2171.
Trumbull v. Donahue, p. 2758.
—— v. Erickson, pp. 1736, 1953, 1954, 2115, 2120, 2121, 2169, 2180.
Truskett, Missouri, etc., R. Co. v.
Trussell v. Morris County Tract. Co., pp. 1744, 2345, 2889.
Trust Co. v. Chicago, etc., R. Co., pp. 45, 57.
Truxel, Estey v.
Tryon Co. v. Hutchinson Lumber, etc., Co., p. 816.
Tubbs v. Michigan Cent. R. Co., p. 2504.
Tucker v. Brooklyn Heights R. Co., p. 2005.
—— v. Buffalo R. Co., pp. 2199, 2311.
—— v. Central, etc., R. Co., pp. 2226, 2348, 2394.
—— Crumbacker v.
—— Eppes v.
—— Hagan v.
—— v. Housatonic R. Co., p. 514.
—— v. Humphrey, pp. 1215, 1216, 1232.
—— Indianapolis Southern R. Co. v.
—— Kimball v.
—— Maryland, etc., Railroad v.
—— v. Missouri Pac. R. Co., pp. 45, 67.
—— v. Pacific R. Co., p. 1311.
—— v. Pennsylvania R. Co., p. 777.
—— v. Pittsburgh, etc., R. Co., pp. 2364, 2779, 2860.
—— v. Rhode Island Co., p. 1828.
—— St. Louis, etc., R. Co. v.
—— v. Stimson, p. 3865.
Tuckerman v. Brown, p. 3916.
—— Clendaniel v.
—— v. Stephens, etc., Transp. Co., p. 2.
Tuckerman, etc., Co., Stephens, etc., Transp. Co. v.
Tuckett, Galveston, etc., R. Co. v.
Tudor v. Northern Pac. R. Co., p. 1836.
Tudor Co., Janney v.
Tuerk, West Chicago St. R. Co. v.
Tuesco Oil Co. v. Pennsylvania R. Co., p. 853.
Tufts v. Sylvester, p. 1227.
Tuggle, Louisville, etc., R. Co. v.
—— v. St. Louis, etc., R. Co., p. 1442.
Tugman, National Steamship Co. v.
Tuley v. Chicago, etc., R. Co., p. 2215.
Tuller v. Talbot, pp. 1723, 1728, 1744, 1745, 2076.
Tunnicliffe v. Bay Cities Consol. R. Co., p. 1832.
Tupelo Furniture Mfg. Co., Mobile, etc., R. Co. v.
Tupelo, etc., Mfg. Co., Mobile, etc., R. Co. v.
Tupman, Burnside, etc., R. Co. v.
Tupper v. Boston Elev. R. Co., pp. 1994, 2799.
Turley v. Atlanta, etc., R. Co., pp. 2175, 2263, 2264, 2360, 2540.
—— Missouri, etc., R. Co. v.
Turner, Birmingham R., etc., Co. v.
—— v. Black Warrior, pp. 820, 829.
—— v. City Elect. R. Co., pp. 1747, 1803, 1804, 2385, 2404, 2996.
—— Galveston, etc., R. Co. v.
—— v. Great Northern R. Co., pp. 1608, 1677, 3044, 3051.
—— Gulf, etc., R. Co. v.
—— Haight v.
—— v. Huff, pp. 532, 538, 903.
—— v. Liverpool Dock, pp. 1215, 1216.
—— Louisville, etc., R. Co. v.
—— v. McCook, pp. 2454, 2621, 2647, 2648.
—— Missouri, etc., R. Co. v.
—— v. North Beach, etc., R. Co., pp. 2411, 2414, 3087, 3097.
—— v. Richmond, etc., R. Co., p. 1643.
—— Roberts v.
—— St. Louis, etc., R. Co. v.
—— v. St. Louis, etc., R. Co., pp. 333, 451.
—— San Antonio, etc., R. Co. v.
—— Smith v.
—— South Bend v.
—— v. Southern Railway, p. 3198.
—— Tacoma R., etc., Co. v.
—— Texas, etc., R. Co. v.
—— v. Vicksburg, etc., R. Co., pp. 1782, 1892.
—— Western, etc., Railroad v.
—— Western, etc., R. Co. v.
—— v. Western, etc., Railroad, pp. 1561, 2040, 2633.
Turney, Huron Barge Co. v.
—— San Antonio, etc., R. Co. v.
—— v. Wilson, pp. 11, 488, 729, 730, 731, 733, 737, 750, 768, 822, 1009, 1020.
Turnpike Co. v. State, p. 1501.
Turrentine v. Wilmington, etc., R. Co., p. 894.
Tusker, The.
Tuten v. Atlantic, etc., R. Co., pp. 1524, 1767.
Tuthill, Saltmarsh v.
Tutt, Jacobs v.
Tuttle v. Becker, p. 364.
—— v. Chicago, etc., R. Co., p. 2683.
—— v. Cincinnati, etc., R. Co., pp. 2488, 2491, 2784.
—— Sturdevant v.
Tweedie Trading Co. v. Barry, 194 Fed. 286—pp. 3967, 3973.
—— v. Barry, 205 Fed. 721, 124 C. C. A. 15—pp. 3967, 3973.
—— v. Craig, pp. 3957, 3959.
—— Glasgow Steam Shipping Co. v.
—— Herr v.
—— v. New York, etc., R. Co., 166 Fed. 993—pp. 3959, 3973.
—— v. New York, etc., R. Co., 194 Fed. 281—p. 3962.
—— v. Pitch Pine Lumber Co., 146 Fed. 612—p. 3953.
—— v. Pitch Pine Lumber Co., 156 Fed. 88—p. 3963.
Tweedie Trading Co. v. Strong, etc., Co., pp. 3952, 3966, 3967.
—— v. Thomsen & Co., pp. 3957, 3974.
Twenty-Third St. R. Co., Corbett v.
Twichell, Pecos, etc., R. Co. v.
—— v. Pecos, etc., R. Co., p. 2019.
Twiname, Citizens' St. R. Co. v.
—— Citizens', etc., R. Co. v.
Twiss v. Boston Elev. R. Co., pp. 204, 1557, 2193, 2195.
—— Missouri Pac. R. Co. v.
Twitty v. Southern R. Co., p. 149.
Two Hundred & Sixteen Loads & Six Hundred & Seventy-Eight Barrels of Fertilizer, p. 3972.
Two Hundred and Twenty-One Tons of Coal, O'Rouke v.
Twomley v. Central Park, etc., R. Co., pp. 2128, 2766.
2,098 Tons of Coal, In re.
—— Ionia Transp. Co. v.
Two Thousand Tons of Coal, pp. 3953, 3961.
—— New Ruperra Steamship Co. v.
T. W. & W. R. Co. v. Baddeley, p. 1884.
Tybee, The.
Tyler, Gulzoni v.
—— v. London & S. W. R. Co., p. 573.
—— v. Pennsylvania R. Co., p. 2834.
—— Soper v.
—— v. Texas, etc., R. Co., pp. 1731, 2796.
—— v. Western Union Tel. Co., p. 1049.
Tyler Coffin Co., St. Louis, etc., R. Co. v.
Tyroler v. Warden of City Prison, pp. 20, 21, 184.
Tyrrell v. Lincoln Tract. Co., p. 51.
Tysen v. Moore, p. 879.
Tyson, New Orleans, etc., R. Co. v.
—— Raymond v.
T. & P. R. Co. v. Rogers, p. 3330.
—— v. Schneider, pp. 528, 533, 935.
—— Williams v.

U

Uber v. Chicago, etc., R. Co., pp. 593, 602, 754, 779, 822.
Udell v. Citizens' St. R. Co., pp. 1556, 2198, 2536.
—— v. Illinois Cent. R. Co., pp. 786, 870.
Uessel v. Bath, p. 308.
Ullman v. Chicago, etc., R. Co., pp. 987, 1066.
—— v. Flintshire, p. 1037.
—— Grand Tower Mfg., etc., Co. v.
Ulman, etc., Co. v. Babcock, p. 1229.
Ulmer v. Farnsworth, p. 245.
Ulrich v. New York, etc., R. Co., pp. 2095, 2097.
Ulster, Clark, etc., R. Co. v.
Ulster, etc., R. Co., Boice v.
—— Bramley v.
—— Parish v.
Umbenhauer, Bayonne Knife Co. v.
Unaka Timber Co., McDonald v.
Underhill, Muskegon Booming Co. v.
Underwood, Ft. Worth, etc., R. Co. v.
—— Georgia Pac. R. Co. v.
—— Georgia, etc., R. Co. v.
—— International, etc., R. Co. v.
Underwriters' Agency v. Sutherlin, pp. 798, 799.

Unger v. Forty-Second St., etc., R. Co., p. 1750.
Union Bridge Co. v. United States, p. 3468.
Union Colliery Co., Nightingale v.
Union Compress Co., California Ins. Co. v.
Union Depot Co., Snyder v.
—— State v.
Union Depot R. Co., Drolshagen v.
—— Olfermann v.
—— Schepers v.
—— Sly v.
Union Dray Line Co. v. Hurt, pp. 3262, 3264, 3269, 3301.
Union Elect. Co., Blumenthal v.
—— La Barge v.
Union Exp. Co. v. Graham, 26 O. St. 362—p. 1039.
—— v. Graham, 26 O. St. 595—pp. 243, 753, 757, 824, 826, 948, 953, 1792.
—— v. Ohleman, pp. 511, 535, 891.
—— Place v.
—— v. Shoop, p. 521.
Union Feed Co. v. Pacific Clipper Line, p. 466.
Union Ferry Co., Loftus v.
—— Asborne v.
Union Freight R. Co. v. Winkley, pp. 1148, 1150.
Union Ins. Co., Missouri, etc., R. Co. v.
Union Line Exp. Co., Roberts v.
Union Locomotive, etc., Co. v. Erie R. Co., p. 212.
Union Mut. Ins. Co. v. Indianapolis, etc., R. Co., pp. 730, 739, 822, 953, 1007, 1013, 1019, 1039, 1041.
Union Oil Co., Crowell v.
Union Pac. R. Co., Ames v.
—— Andrist v.
—— v. Beardwell, pp. 684, 1002.
—— v. Botsford, pp. 1837, 2773.
—— Bowlin v.
—— Brown v.
—— Coeur D'Alene, etc., R. Co. v.
—— v. Cooke, p. 700.
—— Durfee v.
—— v. Evans, pp. 1699, 2324, 2873.
—— Falina v.
—— Furman v.
—— Gerstle v.
—— v. Goodridge, pp. 34, 82, 97, 135, 145, 171, 3750.
—— Hall v.
—— v. Hall, p. 255.
—— v. Hand, pp. 1726, 2696, 2734, 2736.
—— Harris v.
—— v. Harris, pp. 1813, 1815.
—— v. Hepner, p. 816.
—— Hoffman v.
—— Houtz v.
—— Interstate Commerce Comm. v.
—— Jevons v.
—— Johnson v.
—— v. Johnston, pp. 356, 361, 369, 370, 377, 378, 384, 547, 556.
—— Kalina v.
—— Kearney Mill, etc., Co. v.
—— Kirby v.
—— Kirkendall v.
—— v. Langan, p. 1385.
—— v. Luck, p. 2820.
—— Luse v.
—— Lyon v.
—— March v.
—— Marsh v.
—— v. Marston, pp. 996, 999, 3351.
—— v. Metcalf, p. 489.
—— Miller Grain, etc., Co., v.
—— v. Mitchell, p. 2547.
—— Moffatt Comm. Co. v.
—— v. Moyer, pp. 515, 914, 918.
—— v. Nelson, pp. 1305, 1471.
—— v. Nicholas, pp. 1572, 1577.
Union Pac. R. Co., Nichols v.
—— v. Oregon, etc., Ass'n, pp. 3820, 3821.
—— Ormsby v.
—— Patten v.
—— v. Porter, pp. 1764, 2249.
—— Peavey & Co. v.
—— Purple v.
—— Quinby v.
—— v. Rainey, pp. 752, 1343, 1368.
—— v. Roeser, pp. 2199, 2201.
—— Schenberger v.
—— State v.
—— v. Stupeck, 50 Colo. 151, 114 Pac. 646—pp. 820, 1035, 1057.
—— v. Stupeck (Colo.), 144 Pac. 646—p. 977.
—— v. Sue, pp. 1773, 1779, 2147, 2952, 2953.
—— v. Taggart, pp. 97, 135, 145, 171.
—— v. Thompson, pp. 1085, 1408, 1473, 1479.
—— Thurston v.
—— United States v.
—— v. United States, 59 Fed. 813, 8 C. C. A. 282—p. 3814.
—— v. United States, 99 U. S. 402, 25 L. Ed. 274, 14 Ct. Cl. 587—p. 3677.
—— v. United States, 117 U. S. 355, 29 L. Ed. 920, 6 S. Ct. 772, 21 Ct. Cl. 502—pp. 72, 1179.
—— v. Updike Grain Co., 101 C. C. A. 583, 178 Fed. 223—pp. 3632, 3733, 3734, 3826.
—— v. Updike Grain Co., 222 U. S. 215, 56 L. Ed. 171, 32 S. Ct. 39—pp. 3433, 3607, 3634, 3731, 3732, 3733.
—— v. Vincent, pp. 806, 3247.
—— Webster v.
—— Wentz-Bates Mercantile Co. v.
—— v. Whitney, p. 2961.
—— v. Wolf, pp. 1596, 1597.
Union Passenger R. Co., Clutzbeher v.
Union R. Co., Adams v.
—— Barry v.
—— Bishop v.
—— Braun v.
—— Brierly v.
—— Cheetham v.
—— Fleck v.
—— Harris v.
—— Heltzen v.
—— Hirsch v.
—— Kriedermacher v.
—— Murphy v.
—— Nelson v.
—— Norton v.
—— Pendergast v.
—— Rathbone v.
—— Schaefer v.
—— Scheu v.
—— Schilling v.
—— Stierle v.
—— Sullivan v.
—— Sweeny v.
—— Weir v.
—— Wright v.
Union R. Transp. Co., Lietch v.
Union R., etc., Co., Choutcau v.
—— v. Kallaher, 114 Ill. 325, 2 N. E. 77—p. 2077.
—— v. Kallaher, 12 Ill. App. 400, p. 2497.
—— Merchants' Bank v.
—— v. Riegel & Co., pp. 410, 1018.
—— v. Shacklet, pp. 1999, 2000.
—— v. Traube, p. 848.
—— v. Yeager, pp. 305, 317, 524.
Union Refrigerator Trans. Co. v. Lynch, 177 U. S. 149, 44 L. Ed. 708, 20 S. Ct. 631—pp. 3556, 3557, 3581.
—— v. Lynch, 55 Pac. 639, 18 Utah 378, 48 L. R. A. 790—p. 3575.
Union Steamboat Co., Blitz v.
—— Burnside v.
—— v. Chaffin, pp. 4075, 4083.
—— Green Bay, etc., R. Co. v.
—— v. Knapp, p. 528.
—— Richmond v.
Union Steamship Co. v. New York, etc., Steamship Co., pp. 3899, 4017.
Union Stock Yard Co. v. Westcott, p. 561.
Union Stock Yard, etc., Co., Attorney General v.
—— Strahorn v.
—— United States v.
Union Stock Yards Co., United States v.
—— Winnett v.
Union Stock Yards, etc., Co., United States v.
—— v. Western Land, etc., Co., p. 3871.
Union St. R. Co., Briggs v.
—— Brightman v.
—— Edgerly v.
—— Greer v.
—— Holman v.
Union Sulphur Co., Percy v.
—— v. Percy, p. 3967.
Union Tank Line Co., In re.
Union Tract. Co., Bainbridge v.
—— Barry v.
—— Bendon v.
—— Buehler v.
—— Foster v.
—— Gaffney v.
—— Howard v.
—— Howell v.
—— Hunterson v.
—— Jennings v.
—— v. Keiter, p. 2285.
—— v. Siceloff, p. 2595.
—— v. Sullivan, p. 2346.
—— Sweeney v.
Union Transfer, etc., Co., Carleton v.
Union Transp. Co., Gaines v.
Union Transp., etc., Co., Levering v.
Union Trunk Line, Cameron v.
—— Smith v.
Union, etc., Bank, Mississippi Mills v.
Union, etc., Ins. Co., Gaines v.
Union, etc., R. Co., Ætna Nat. Bank v.
—— Lackman v.
—— v. Londoner, pp. 1772, 2085, 2507.
—— v. Meeking, p. 99.
Unionville Produce Co. v. Chicago, etc., R. Co., pp. 619, 690, 695.
Unique Shipping Co. v. Guffey Petroleum Co., p. 4022.
United Carriage Co., Budd v.
United Exp. Co. v. State, p. 3525.
United Fruit Co., American Banana Co. v.
—— v. New York, etc., Transp. Co., pp. 889, 900, 904.
United R. Co., Bobbitt v.
—— Canaday v.
—— Chalmers v.
—— Coyne v.
—— Groshong v.
—— Harmon v.
—— Jerome v.
—— Logan v.
—— Miller v.
—— Mitchell v.
—— Moeller v.
—— Monroe v.
—— Moorshead v.
—— Musick v.
—— Nagel v.
—— Palfrey v.
—— Parker v.
—— Pidgeon v.
—— Reisenleiter v.
—— Richter v.
United R., etc., Co. v. Beidelman, pp. 2397, 2688, 2830.

United R., etc., Co., Charles v.
—— v. Dean, p. 2898.
—— v. Deane, p. 2023.
—— v. Dulaney v.
—— v. Egner v.
—— v. Garrison v.
—— v. Hardesty, p. 2443.
—— v. Hertel, p. 2753.
—— v. Jones v.
—— v. Riley, pp. 2113, 2166, 2376.
—— v. Rosenkovitz v.
—— v. Rosik, pp. 2357, 2359, 2906, 2989, 2990.
—— v. State v.
—— v. Strauss v.
—— v. Topp v.
—— v. Weir, pp. 2358, 2825.
—— v. Woodbridge, pp. 2146, 2243, 2688.
United Railroads, Waniorek v.
United Railways, Hornstein v.
United States, Adair v.
—— v. Adair, pp. 3466, 3467.
—— v. Addyston Pipe, etc., Co. v.
—— v. Ambrosini v.
—— v. American Exp. Co. v.
—— v. American Exp. Co., p. 3614.
—— v. Ames, p. 4049.
—— v. Anderson v.
—— v. Arjona, pp. 3428, 3439.
—— v. Arkansas Fertilizer Co. v.
—— v. Armour Packing Co. v.
—— v. Atchison, etc., R. Co. v.
—— v. Atchison, etc., R. Co., 142 Fed. 176—pp. 3811, 3821, 3825.
—— v. Atchison, etc., R. Co., 163 Fed. 111—pp. 3843, 3844, 3849.
—— v. Atchison, etc., R. Co., 166 Fed. 160—pp. 3621, 3622, 3627.
—— v. Atchison, etc., R. Co., 185 Fed. 105—p. 3618.
—— v. Atchison, etc., R. Co., 220 U. S. 37, 55 L. Ed. 361, 31 S. Ct. 362—p. 3459.
—— v. Atchison, etc., R. Co., 234 U. S. 476, 34 S. Ct. 986—pp. 3711, 3713, 3723, 3837.
—— v. Athanasaw v.
—— v. Atlantic, etc., R. Co., p. 3623.
—— v. Baltimore, etc., R. Co. v.
—— v. Baltimore, etc., R. Co., 153 Fed. 997—p. 3843.
—— v. Baltimore, etc., R. Co., 159 Fed. 33, 86 C. C. A. 223—p. 3622.
—— v. Baltimore, etc., R. Co., 170 Fed. 456—p. 3454.
—— v. Baltimore, etc., R. Co., 225 U. S. 306, 56 L. Ed. 1100, 32 S. Ct. 817—pp. 3795, 3800, 3801, 3808, 3834, 3836, 3837, 3838, 3839.
—— v. Baltimore, etc., R. Co., 231 U. S. 274, 34 S. Ct. 75—pp. 3638, 3731, 3735, 3804.
—— v. Bennett v.
—— v. Boston, etc., R. Co., p. 3622.
—— v. Boyer, p. 3469.
—— v. Brawley v.
—— v. Bunch, p. 3856.
—— v. Butler County R. Co., p. 3660.
—— v. Camden Iron Works, pp. 3855, 3857, 3858.
—— v. Chamber of Commerce v.
—— v. Chicago Junction R. Co., p. 3625.
—— v. Chicago, etc., R. Co. v.
—— v. Chicago, etc., R. Co., 81 Fed. 783—p. 3424.
—— v. Chicago, etc., R. Co., 62 C. C. A. 465, 127 Fed. 785—p. 3726.
—— v. Chicago, etc., R. Co., 143 Fed. 353—p. 3430.
—— v. Chicago, etc., R. Co., 148 Fed. 646—pp. 3608, 3700, 3701, 3702.
United States v. Chicago, etc., R. Co., 149 Fed. 486—p. 3431.
—— v. Chicago, etc., R. Co., 151 Fed. 84—pp. 3702, 3843, 3844, 3850.
—— v. Chicago, etc., R. Co., 184 Fed. 984—p. 3628.
—— v. Chicago, etc., R. Co., 211 Fed. 770—p. 3627.
—— v. Colorado, etc., R. Co., 157 Fed. 321—p. 3425.
—— v. Colorado, etc., R. Co., 157 Fed. 342—p. 3434.
—— Connors v.
—— Cox v.
—— Crane Iron Works v.
—— v. De Coursey, pp. 3848, 3852.
—— v. Delaware, etc., Co., 164 Fed. 315—pp. 3651, 3652.
—— v. Delaware, etc., Co., 213 U. S. 366, 53 L. Ed. 836, 29 S. Ct. 527—p. 3443.
—— Delaware, etc., R. Co. v.
—— v. Delaware, etc., R. Co., 40 Fed. 101—pp. 3699, 3816.
—— v. Delaware, etc., R. Co., 152 Fed. 269—pp. 3607, 3610, 3845.
—— v. Delaware, etc., R. Co., 213 Fed. 240—pp. 3653, 3654.
—— v. Dodge, pp. 1944, 1948.
—— v. East Tennessee, etc., R. Co., p. 3619.
—— Erie R. Co. v.
—— v. Erie R. Co., 166 Fed. 352—pp. 3453, 3454.
—— v. Erie R. Co., 191 Fed. 941—p. 3628.
—— Fairbank v.
—— v. First Nat. Bank, p. 3519.
—— Florida, etc., R. Co. v.
—— v. Geddes, 131 Fed. 452, 65 C. C. A. 320—p. 3424.
—— v. Geddes, 180 Fed. 480—p. 3453.
—— Grand Rapids, etc., R. Co. v.
—— Grand Trunk R. Co. v.
—— Great Northern R. Co. v.
—— v. Great Northern R. Co., p. 3430.
—— v. Green, p. 3427.
—— v. Hamburg-Amerikanische, etc., Gesellschaft, p. 3440.
—— v. Hanley, pp. 3843, 3849, 3850.
—— Harris v.
—— v. Harris, p. 3619.
—— Heike v.
—— Hocking Valley R. Co. v.
—— v. Hocking Valley R. Co., pp. 3706, 3846, 3848.
—— Hoffeld v.
—— Hoke v.
—— v. Holliday, pp. 3418, 3420.
—— Hopkins v.
—— v. Hopkins, pp. 3432, 3555.
—— Houston, etc., R. Co. v.
—— v. Howell, pp. 3746, 3854.
—— v. Illinois Terminal R. Co., pp. 3442, 3744, 3845.
—— v. International, etc., R. Co., p. 3451.
—— v. Interstate Commerce Commission, p. 3773.
—— v. Joint Traffic Ass'n, 32 C. C. A. 491, 89 Fed. 1020—p. 3724.
—— v. Joint Traffic Ass'n, 171 U. S. 505, 43 L. Ed. 259, 19 S. Ct. 25—pp. 3436, 3440, 3441, 3447.
—— Kalen v.
—— v. Kane, p. 2487.
—— Kansas, etc., R. Co. v.
—— v. Kimbal, pp. 303, 3867.
—— v. Knight Co., pp. 3418, 3420, 3421, 3424, 3445.
—— v. Lavarrello, p. 4013.
—— Leary v.
—— Lehigh Valley R. Co. v.
—— v. Lehigh Valley R. Co., 115 Fed. 373—pp. 3423, 3610.
United States v. Lehigh Valley R. Co., 184 Fed. 546—pp. 3744, 3761.
—— v. Lehigh Valley R. Co., 184 Fed. 971—pp. 3620, 3623, 3625.
—— v. Lehigh Valley R. Co., 204 Fed. 705, 123 C. C. A. 9—p. 3621.
—— v. Lehigh Valley R. Co., 220 U. S. 257, 55 L. Ed. 458, 31 S. Ct. 387—pp. 3651, 3653.
—— Leovy v.
—— Lind v.
—— Louisiana, etc., R. Co. v.
—— v. Louisiana, etc., R. Co., pp. 3660, 3673.
—— Louisville, etc., R. Co. v.
—— v. Louisville, etc., R. Co., pp. 3619, 3629, 3630.
—— Maday v.
—— v. Marigold, p. 3445.
—— v. Martin, p. 3697.
—— v. Mellen, pp. 3718, 3852.
—— v. Merchants', etc., Transp. Co., pp. 3748, 3751.
—— v. Michigan Cent. R. Co., 43 Fed. 26—pp. 3845, 3852.
—— v. Michigan Cent. R. Co., 122 Fed. 544—pp. 3815, 3825, 3827.
—— v. Miller, pp. 3735, 3745, 3746, 3747, 3844, 3853.
—— v. Milwaukee, etc., Trans. Co., 142 Fed. 247—pp. 3809, 3829.
—— v. Milwaukee, etc., Trans. Co., 145 Fed. 1007—pp. 3705, 3827, 3832, 3855.
—— Missouri Pac. R. Co. v.
—— v. Missouri Pac. R. Co., p. 3813.
—— Missouri, etc., R. Co. v.
—— Mobile, etc., R. Co. v.
—— v. Monongahela Bridge Co., p. 3468.
—— Monongahela Nav. Co. v.
—— Montana Cent. R. Co. v.
—— Montpelier, etc., Railroad v.
—— Moore & Co. v.
—— v. Morsman, pp. 3614, 3851.
—— v. Moseley, p. 3768.
—— Mutual Trans. Co. v.
—— Nashville Grain Exch. v.
—— Newport News, etc., Co. v.
—— New York, etc., R. Co. v.
—— v. New York, etc., R. Co., 146 Fed. 298—pp. 3705, 3846, 3850.
—— v. New York, etc., R. Co., 153 Fed. 630—pp. 3606, 3737, 3744, 3848.
—— v. New York, etc., R. Co., 156 Fed. 249—pp. 3619, 3624.
—— v. New York, etc., R. Co., 157 Fed. 293—p. 3844.
—— v. New York, etc., R. Co., 168 Fed. 699, 94 C. C. A. 76—p. 3622.
—— v. New York, etc., R. Co., 186 Fed. 541—p. 3628.
—— v. New York, etc., R. Co., 191 Fed. 938—pp. 3622, 3628.
—— v. New York, etc., R. Co., 212 U. S. 509, 53 L. Ed. 629, 29 S. Ct. 313—pp. 3420, 3686, 3842, 3843.
—— Nichols, etc., Lumber Co. v.
—— Norfolk, etc., R. Co. v.
—— v. Norfolk, etc., R. Co., 109 Fed. 831—pp. 3639, 3641, 3642, 3643, 3818, 3830.
—— v. Norfolk, etc., R. Co., 138 Fed. 849—p. 3816.
—— v. Norfolk, etc., R. Co., 74 C. C. A. 406, 143 Fed. 266—pp. 3631, 3640, 3816.
—— Northern Pac. Terminal Co. v.
—— v. Northern Pac. Terminal Co., 144 Fed. 861—pp. 3432, 3616.
—— v. Northern Pac. Terminal Co., 181 Fed. 879—p. 3626.

United States v. Northern Pac. Terminal Co., 186 Fed. 947—pp. 3619, 3620, 3625.
—— Northern Securities Co. v.
—— v. Ohio Oil Co., p. 3615.
—— v. Oregon R., etc., Co., p. 3622.
—— Oregon-Washington R., etc., Co. v.
—— v. Oregon, etc., R. Co., pp. 3621, 3624, 3626, 3627.
—— Pacific Coast R. Co. v.
—— v. Pacific Exp. Co., pp. 816, 820.
—— v. Pacific, etc., Nav. Co., p. 3813.
—— Paulsen v.
—— Peck v.
—— Pennsylvania Co. v.
—— v. Pennsylvania R. Co., pp. 3737, 3750, 3849, 3851.
—— v. Pere Marquette R. Co., pp. 3619, 3624.
—— v. Philadelphia, etc., R. Co., 184 Fed. 543—pp. 3744, 3761.
—— v. Philadelphia, etc., R. Co., 188 Fed. 484—p. 3440.
—— Philippine Trading Co. v.
—— Pine River Logging Co. v.
—— v. Pittsburgh, etc., R. Co., p. 3430.
—— v. Popper, pp. 3468, 3857.
—— v. Powell, p. 3266.
—— Prairie Oil, etc., Co. v.
—— v. Prideon, p. 3467.
—— Proctor, etc., Co. v.
—— v. Pugh, p. 3908.
—— v. Ramsey, pp. 1, 5.
—— Reed v.
—— Robinson v.
—— St. Joseph Stock Yards Co. v.
—— v. St. Joseph Stock Yards Co., pp. 3469, 3609, 3621.
—— St. Louis, etc., R. Co. v.
—— v. St. Louis, etc., R. Co., 107 Fed. 870—pp. 3622, 3629.
—— v. St. Louis, etc., R. Co., 177 Fed. 205, 101 C. C. A. 375—p. 3623.
—— v. St. Louis, etc., R. Co., 189 Fed. 954—p. 3460.
—— v. Saul, pp. 1835, 3428.
—— Scott v.
—— v. Seaboard R. Co., p. 3611.
—— Shaw v.
—— v. Shea, pp. 3864, 3866.
—— v. Sioux City Stock Yards Co., pp. 1, 5, 3619, 3620, 3622, 3625.
—— Southern Pac. Co. v.
—— v. Southern Pac. Co., 157 Fed. 459—pp. 3619, 3622, 3626, 3630.
—— v. Southern Pac. Co., 162 Fed. 412—pp. 3622, 3623, 3825.
—— Southern R. Co. v.
—— v. Southern R. Co., 135 Fed. 122—p. 3434.
—— v. Southern R. Co., 164 Fed. 347—pp. 3439, 3451, 3453.
—— Standard Oil Co. v.
—— v. Standard Oil Co., 148 Fed. 719—pp. 3607, 3700, 3703, 3850, 3855.
—— v. Standard Oil Co., 155 Fed. 305—pp. 3434, 3442, 3762, 3854, 3855, 3856.
—— v. Standard Oil Co., 170 Fed. 988—pp. 3736, 3855, 3856, 3857.
—— v. Standard Oil Co., 183 Fed. 223—p. 3752.
—— v. Standard Oil Co., 192 Fed. 438—p. 3848.
—— v. Stearns, etc., Lumber Co., p. 3856.
—— v. Sterling Salt Co., p. 3856.
—— v. Stockyards Terminal Co., 172 Fed. 452—p. 3626.
—— v. Stockyards Terminal R. Co., 178 Fed. 19, 101 C. C. A. 147—pp. 3608, 3620.
United States, Strong v.
—— Sunday Creek Co. v.
—— v. Sunday Creek Co., p. 3765.
—— Swift & Co. v.
—— Texas, etc., R. Co. v.
—— v. Texas, etc., R. Co., pp. 712, 3667, 3752, 3846.
—— Tozer v.
—— v. Tozer, 37 Fed. 635, 2 L. R. A. 444—pp. 3845, 3848, 3852.
—— v. Tozer, 39 Fed. 369—pp. 3634, 3635, 3692, 3698.
—— v. Tozer, 39 Fed. 904—pp. 3685, 3692, 3698.
—— v. Trans-Missouri Freight Ass'n, pp. 3447, 3600, 3601, 3602, 3617, 3650, 3684, 3711, 3724, 3735.
—— Union Bridge Co. v.
—— Union Pac. R. Co. v.
—— v. Union Pac. R. Co., 94 C. C. A. 433, 169 Fed. 65—pp. 3621, 3627.
—— v. Union Pac. R. Co., 188 Fed. 102—p. 3659.
—— v. Union Pac. R. Co., 213 Fed. 332—pp. 3619, 3623.
—— v. Union Pac. R. Co., 160 U. S. 1, 40 L. Ed. 319, 16 S. Ct. 190—p. 3449.
—— v. Union Pac. R. Co., 234 U. S. 495, 34 S. Ct. 995—pp. 3711, 3713, 3723, 3837.
—— v. Union Stockyard, etc., Co., pp. 3613, 3616, 3631, 3690, 3736, 3777, 3835.
—— v. Union Stockyards Co., pp. 3432, 3456.
—— United States Shipping Co. v.
—— v. Vacuum Oil Co., 153 Fed. 598—pp. 3756, 3842, 3850, 3852, 3857.
—— v. Vacuum Oil Co., 158 Fed. 536—p. 3442.
—— Van Schaick v.
—— v. Vermilye, p. 483.
—— Wabash R. Co. v.
—— v. Wabash R. Co., p. 3626.
—— v. Washington, p. 1948.
—— v. Wells, Fargo Exp. Co., pp. 3614, 3632, 3636, 3690, 3695, 3697.
—— West Virginia Northern R. Co. v.
—— v. West Virginia Northern R. Co., pp. 3641, 3644, 3645.
—— White v.
—— Wight v.
—— v. Williams, p. 3697.
—— Wilson v.
—— Wisconsin Cent. R. Co. v.
—— v. Wood, pp. 3433, 3611, 3703, 3739, 3844, 3855.
—— Yturbide v.
United States Dist. Court, Dowdell v.
United States Exp. Co. v. Allen, p. 3576.
—— Armstrong v.
—— v. Bachman, pp. 822, 948, 953, 956, 960, 982, 1003, 1032, 1036, 1039, 1076.
—— v. Backman, pp. 1, 7, 768, 770, 947, 1076, 1792.
—— Block v.
—— Brunswick & Co. v.
—— Burke v.
—— Caldwell v.
—— Carpenter v.
—— Coates v.
—— Cohen v.
—— v. Council, pp. 1332, 1436, 1439.
—— Deake v.
—— Delaney v.
—— Farmen v.
—— Fockens v.
—— Gatton v.
—— Geyer v.
—— v. Haines, pp. 985, 988.
—— v. Hammer, p. 546.
United States Exp. Co. v. Harris, pp. 1087, 1106.
—— v. Hemmingway, p. 3579.
—— Higgins v.
—— v. Hutchins, pp. 727, 732, 748, 770.
—— Hutchinson v.
—— v. Joyce, pp. 1404, 1406.
—— Kallman v.
—— v. Keefer, pp. 245, 492, 493, 570.
—— v. Koerner, p. 1141.
—— v. Minnesota, pp. 3551, 3552, 3562, 3578.
—— Mitchell v.
—— Oppenheimer & Co. v.
—— Parsons v.
—— Penn Clothing Co. v.
—— Perrin v.
—— Reed v.
—— v. Rush, pp. 767, 770, 3289.
—— Southern Indiana Exp. Co. v.
—— State v.
—— v. State, pp. 22, 179.
—— Stephenson v.
—— Townsend, etc., Dry Goods Co. v.
—— Vicksburg, etc., Co. v.
—— Wichern v.
United States Fidelity, etc., Co. v. Board, p. 3792.
—— v. Commonwealth, p. 3426.
—— Louisville, etc., R. Co. v.
United States Glue Co., Diamond Glue Co. v.
United States Mail Line Co. v. Carrollton Furniture Mfg. Co., p. 3299.
United States Mail, etc., Co., Higgins v.
—— Van Winkle v.
United States Metals Refin. Co. v. Jacobus, p. 3924.
United States R. Co., Moeller v.
United States Shipping Co. v. United States, pp. 3952, 3966.
United States Surety Co., Benvega v.
United States Watch Case Co. v. Southern Exp. Co., pp. 1091, 1097, 1098, 1111.
United States, etc., Co., Peoria, etc., R. Co. v.
United States, etc., Exp. Co., Hadd v.
United States, etc., Pump Co. v. Oliver, p. 1226.
United States, etc., Steamship Co., Burn Line v.
—— Crisp v.
—— Knell v.
—— Prentice v.
United Steamship Co. v. Haskins, pp. 3926, 3934.
—— v. Schilling & Co., p. 3934.
United Surety Co., Musco v.
United Tanners Timber Co. v. Superior Court, p. 1181.
United Tract. Co., Allen v.
—— Boulfrois v.
—— Bumbear v.
—— Klinger v.
—— Powelson v.
—— Ray v.
—— Reading v.
United, etc., German Congregation, Huber v.
Universal Ins. Co., McLanahan v.
Unnevehr v. Hindoo, pp. 892, 3894.
Unterkircher, Burlington v.
Updike Grain Co., Union Pac. R. Co. v.
Upham v. Detroit City R. Co., pp. 2174, 2180.
Uptegrove v. Central R. Co., p. 422.
Urann v. Fletcher, pp. 3864, 3865.
Urbana, etc., St. R. Co., Hanson v.
Uren v. Hagar, p. 3959.

Urquhart, Southern Exp. Co. v.
Usborne, Jenkyns v.
Usher v. Chicago, etc., R. Co., p. 1665.
Usherwood, Ingles v.
Usry, Georgia R., etc., Co. v.
Ussery v. Augusta-Aiken R. Co., p. 2848.
Usury v. Watkins, pp. 1752, 1994.
Utah, etc., R. Co., Madsen v.
—— Palmer v.
Utica, Quinlan v.
Utica, etc., R. Co., Griffin v.
—— Holbrook v.
—— Holdridge v.
—— Tower v.
Utica, etc., St. R. Co., Berry v.
Utley, Herring v.

V

Vaccaro, Dean v.
Vacuum Oil Co., United States v.
Vail v. Broadway R. Co., 147 N. Y. 377, 42 N. E. 4, 30 L. R. A. 626—pp. 1953, 2177, 2281.
—— v. Broadway R. Co., 6 Misc. Rep. 20, 26 N. Y. S. 59, 31 Abb. N. C. 56, 58 N. Y. St. Rep. 124—p. 2859.
—— v. Pacific Railroad, pp. 738, 741.
Valdosta St. R. Co. v. Fenn, pp. 1531, 1747, 1762.
Valencia, The.
Valente v. Sierra R. Co., pp. 1822, 2953, 3002.
Valenti v. Sierra R. Co., pp. 1747, 2916.
Valentine v. Broadway, etc., R. Co., p. 2152.
—— Collier v.
—— v. Long Island R. Co., pp. 516, 588.
—— v. Northern Pac. R. Co., pp. 1743, 1798, 2778, 3239.
Valk v. Erie R. Co., p. 942.
Valle v. Cerre, pp. 359, 363, 365.
Vallejo Ferry Co., Riley v.
Valleley, Railway Co. v.
Vallette v. Bennett, p. 895.
Valley City St., etc., R. Co., Messenger v.
Valley, etc., R. Co., Finn v.
—— Messenger v.
Valpy v. Gibson, p. 1231.
Vanadar, Kitchell v.
Van Anda v. Northern Nav. Co., p. 3996.
Vanatta, Terre Haute, etc., R. Co. v.
Van Buren, Gibbs v.
Van Buskirk, Green v.
—— v. Purinton, pp. 1158, 1159.
—— v. Quincy, etc., R. Co., 131 Mo. pp. 357, 111 S. W. 832—p. 1441.
—— v. Quincy, etc., R. Co., 143 Mo. App. 707, 128 S. W. 216—pp. 1398, 1399.
—— v. Roberts, pp. 1612, 1673, 1676, 2712, 3044, 3317.
Van Camp v. Michigan Cent. R. Co., pp. 146, 1671.
Van Camp Hardware, etc., Co. v. Plimpton, p. 579.
Van Casteel v. Booker, p. 352.
Vance, Dupont de Memours & Co. v.
—— Dupont, etc., Co. v.
—— Ex parte.
—— v. Great Northern R. Co., pp. 2324, 2658, 2874.
—— Missouri, etc., R. Co. v.
—— Richmond, etc., R. Co. v.
—— v. Vandercook Co., pp. 3538, 3539.
Vancleave, Louisville, etc., R. Co. v.
Van Cleve v. St. Louis, etc., R. Co., p. 1885.
Vandalia R. Co., Brown v.
Vandalia R. Co., Davis Bros. v.
—— East Side Packing Co. v.
—— v. Keys, pp. 2089, 2090.
—— v. Railroad Comm., p. 3506.
Vanderbilt, Bonsteel v.
—— Quimby v.
—— Whitman v.
—— Williams v.
Vandercook v. Detroit, etc., R. Co., p. 1708.
Vandercook Co., Vance v.
Vandergriff, Southern R. Co. v.
Vanderhoeven, Pullman Co. v.
Vanderpool, Crystal Palace v.
Van de Venter v. Chicago City R. Co., pp. 1488, 1738, 1741, 1749.
—— International, etc., R. Co. v.
—— Missouri Pac. R. Co. v.
Vandewater v. Mills, pp. 3864, 3867, 3936, 3945.
Vandiver, Missouri, etc., R. Co. v.
—— Pennsylvania R. Co. v.
Van Dresar, Chicago, etc., R. Co. v.
Van Dusan v. Grand Trunk R. Co., pp. 1636, 2462, 2463, 3078, 3079.
Vandyne, Pittsburgh, etc., R. Co. v.
Vandyne, etc., R. Co., Pittsburgh v.
Van Etten v. Newton, pp. 319, 331, 332, 333, 337, 354, 355.
Van Gilder v. Chicago, etc., R. Co., pp. 285, 288, 3134, 3168, 3174.
Van Hern v. Taylor, p. 727.
Van Horn, Central R. Co. v.
—— v. Kermit, pp. 773, 3115, 3127, 3130, 3146, 3167.
—— v. St. Louis Trans. Co., p. 2398.
—— v. Templeton, pp. 1675, 3044.
Van Houten, Pittsburgh, etc., R. Co. v.
Vankirk v. Pennsylvania R. Co., p. 2855.
—— White v.
Van Lindley v. Richmond, etc., R. Co., p. 3352.
Van Meter, Southern Exp. Co. v.
Vann, White v.
Van Natta v. People's St. R., etc., Co., pp. 2888, 2889.
Van Orman v. Lake Shore, etc., R. Co., pp. 1992, 2010, 2765, 2809, 2896.
Van Ostran v. New York, etc., R. Co., p. 2251.
Van Patten v. Chicago, etc., R. Co., pp. 3665, 3751.
Van Santen v. Standard Oil Co., pp. 310, 338, 339.
Van Santvoord, John v.
—— St. John v.
—— v. St. John, pp. 731, 3268, 3290.
Van Schaach v. Northern Transp. Co., pp. 958, 994, 1037.
Van Schaick v. Hudson River R. Co., p. 2271.
—— v. United States, pp. 4012, 4013.
Van Studdiford v. Hazlett, p. 1640.
Van Syckel v. The Thomas Ewing, p. 3899.
Van Volkenburgh, Compton v.
Van Vranken v. Kansas City Elev. R. Co., pp. 2798, 2989.
Van Winkle v. Brooklyn City R. Co., p. 1824.
—— v. Crowell, p. 3871.
—— v. United States Mail, etc., Co., pp. 573, 574, 576, 597.
Van Winkle & Co., G. H. & A. R. Co. v.
—— v. South Carolina R. Co., pp. 821, 825.
Varble v. Bigley, pp. 2, 12.
Vargas, Newhall v.
Varnell, Railroad Co. v.
Varnell, Washington, etc., R. Co. v.
Varney v. Monroe Nat. Bank, p. 397.
Vasele v. Grant St. Elect. R. Co., pp. 1804, 2327.
Vassau v. Madison Elect. R. Co., p. 3087.
Vassor v. Atlantic, etc., R. Co., p. 1587.
Vaughan v. Providence, etc., R. Co., pp. 1155, 1156.
—— v. Raleigh, etc., R. Co., p. 831.
—— St. Louis, etc., R. Co. v.
—— v. State, p. 177.
—— The.
—— Washington, etc., R. Co. v.
Vaughan Mach. Co. v. Stanton Tanning Co., pp. 478, 493.
Vaughn, Gulf, etc., R. Co. v.
—— Laurent v.
—— v. New York, etc., R. Co., p. 888.
—— Southern R. Co. v.
Veale & Co., Atchison, etc., R. Co. v.
Veazie v. Moor, pp. 3418, 3420, 3445, 3479.
Vedder v. Fellows, pp. 188, 1637, 2854.
Vega Steamship Co. v. Consolidated Elevator Co., p. 348.
Veitch v. Atkins Grocery, etc., Co., p. 398.
Velasco, etc., R. Co., Carlton Produce Co. v.
Venable, Chattanooga Rapid Transit Co. v.
—— Louisville, etc., R. Co. v.
—— Transit Co. v.
Venable Bros., Philadelphia, etc., R. Co. v.
Vencill v. Quincy, etc., R. Co., pp. 1308, 1309.
Vendryes, Everett v.
Venning v. Atlantic, etc., R. Co., pp. 3284, 3537.
Ventress, Alabama, etc., R. Co. v.
Vermilye v. Adams Exp. Co., p. 483.
—— United States v.
Vermont, O'Neil v.
Vermont Cent. R. Co., Vermont, etc., R. Co. v.
—— Waterman v.
Vermont Copper Min. Co., Humphreysville Copper Co. v.
Vermont Mut. Fire Ins. Co., Williams v.
Vermont, etc., R. Co., Commonwealth v.
—— v. Fitchburg R. Co., pp. 222, 3283.
—— v. Vermont Cent. R. Co., p. 3575.
—— Winslow v.
—— Winslow, etc., Co. v.
Verner v. Sweitzer, pp. 324, 728, 730, 733, 749, 1003, 1006, 1008, 1035, 1036, 1487, 3164, 3165, 3189.
Verrall v. Robinson, p. 573.
Verrone v. Rhode Island Suburban R. Co., pp. 2193, 2194, 2195, 2884.
Versailles Tract. Co., Moran v.
Vessels v. Metropolitan St. R. Co., p. 2860.
Vibbard, Ware River R. Co. v.
Vicksburg v. Tobin, pp. 3474, 3529, 3530.
Vicksburg R., etc., Co. v. Marlett, p. 3095.
—— Waldauer v.
Vicksburg, etc., Co. v. United States Exp. Co., pp. 211, 236, 244.
Vicksburg, etc., R. Co., Hardie & Co. v.
—— Lampkins v.
—— Lowenthal v.

Vicksburg, etc., R. Co., McFee v.
—— Meyer v.
—— v. O'Brien, p. 2773.
—— v. Phillips, p. 2547.
—— v. Putnam, pp. 1812, 2734, 2738, 3060.
—— v. Ragsdale, pp. 246, 469, 621, 635, 645, 848.
—— v. Scanlan, p. 2774.
—— Sevier v.
—— v. Stocking, p. 3403.
—— Strain v.
—— Sullivan v.
—— Turner v.
—— Walker v.
Vict, New York, etc., K. Co. v.
Victoria, The.
Victorson v. Interborough Rapid Transit Co., p. 2028.
Victory, The.
Viers, Pittsburg, etc., R. Co. v.
—— Pittsburgh, etc., R. Co. v.
Vigouroux v. Platt, pp. 1052, 1091.
Vigus, Wallace v.
Village Steamship Co. v. Standard Oil Co., p. 3948.
Vimont v. Chicago, etc., R. Co., pp. 2256, 2364.
Vincent v. Chicago, etc., R. Co., pp. 536, 541, 894, 1180, 1183.
—— v. Hogan, p. 3913.
—— Louisville, etc., R. Co. v.
—— v. Rather, pp. 657, 775.
—— Union Pac. R. Co. v.
—— v. Yazoo, etc., R. Co., p. 3303.
Vincenzo, The.
Vine v. Berkshire St. K. Co., pp. 1902, 2228, 2352, 2906.
Vineburg v. Grand Trunk R. Co., pp. 3161, 3169, 3170, 3171.
Viner v. New York, etc., Steamship Co., p. 544.
Viney, Ft. Worth, etc., R. Co. v.
Vining v. Detroit, etc., Railway, 80 N. W. 1080, 122 Mich. 248—p. 2461.
—— v. Detroit, etc., Railway, 133 Mich. 539, 95 N. W. 542—p. 79.
—— Macon R., etc., Co. v.
Vinson, Gulf, etc., R. Co. v.
—— Illinois Cent. R. Co. v.
Vinton v. Baldwin, p. 1166.
—— v. Middlesex R. Co., pp. 1497, 1498, 2419.
—— Pollard v.
Virginia, Old Dominion Steamship Co. v.
—— Paul v.
—— Webber v.
Virginia Bibber, Croswell v.
Virginia-Carolina Chemical Co., Manchester Liners v.
—— v. Southern Exp. Co., pp. 1090, 1098, 1106, 1115.
—— West Hartlepool Steam Nav. Co. v.
Virginia-Carolina Peanut Co. v. Atlantic, etc., R. Co., 155 N. C. 148, 71 S. E. 71—p. 669.
—— v. Atlantic, etc., R. Co. (N. C), 82 S. E. 1—pp. 3749, 3753.
Virginia Cent. R. Co. v. Sanger, pp. 1715, 1720, 1814, 1816, 2073, 2901.
Virginia Coal, etc., Co. v. Louisville, etc., R. Co., p. 1197.
Virginia Mid. R. Co. v. Barksdale, p. 2116.
—— Dye v.
—— Gleeson v.
Virginia Passenger, etc., Co. v. Commonwealth, p. 80.
Virginia, etc., Iron Co. v. Louisville, etc., K. Co., pp. 3740, 3755.
Virginia, etc., R. Co. v. Hill, pp. 1609, 2425, 2463, 2565, 2855, 3018, 3019.
—— v. Roach, pp. 1544, 1558.
—— v. Sayers, pp. 765, 949, 1008, 1363, 1369.
Virginia, etc., R. Co. v. White, p. 2116.
Virginia, etc., Training Ass'n v. Southern R. Co., p. 1404.
Visalia Elect. R. Co., Franklin v.
Visanska v. Southern Exp. Co., pp. 761, 1082.
Vischer v. Northwestern Elev. R. Co., pp. 2667, 2673.
Vitelli v. Cunard Steamship Co., p. 3913.
Vivion, Cincinnati, etc., R. Co. v.
Vlasservitch v. Augusta, etc., R. Co., pp. 1500, 3112, 3116, 3127, 3130, 3131, 3198.
Vlasto, Barber v.
Voelker v. Chicago, etc., R. Co., p. 3430.
Vogel v. Bahr, p. 2700.
Vogeman, Merritt, etc., Wrecking Co. v.
Vogemann, Rosenstein v.
Vogler v. Central Crosstown R. Co., pp. 2172, 2803.
Voight, Allis v.
—— Baltimore, etc., K. Co. v.
—— v. Baltimore, etc., R. Co., pp. 1577, 2104, 2105.
—— Ohio, etc., R. Co. v.
Voils, Western, etc., R. Co. v.
Von Lehe v. Atlantic Coast Line R. Co., pp. 3397, 3404, 3523, 3545, 3546.
Von Linen, Davison v.
Von Schoeler, Frere v.
Voorhees v. Chicago, etc., R. Co., p. 634.
—— Heighway v.
—— Jones v.
—— v. Kings County, etc., R. Co., p. 2201.
—— v. Porter, p. 2568.
Vosburg v. Atchison, etc., R. Co., p. 158.
Vose v. Allen, p. 891.
—— Holbrook v.
Vosler v. Delaware, etc., R. Co., p. 2873.
Voss v. Cleveland, etc., R. Co., pp. 3201, 3214, 3215, 3220, 3223.
Voss & Co. v. Robertson, etc., Co., p. 355.
Vredenburgh v. New York, etc., K. Co., p. 2232.
V. S. & P. R. Co., Central Yellow Pine Ass'n v.
Vueltabajo, The.

W

Wabash R. Co., Adrian Knitting Co. v.
—— American Silver Mfg. Co. v.
—— American Storage, etc., Co. v.
—— Amory v.
—— Atkinson v.
—— Bowring v.
—— Breese-Trenton Mining Co. v.
—— v. Brown, pp. 795, 1111, 1113.
—— Burgher v.
—— Bushnell v.
—— v. Campbell, pp. 1353, 1354, 1463.
—— Cash v.
—— Craig v.
—— Cronk v.
—— Cunningham v.
—— v. Curtis, pp. 981, 992, 1031.
—— Davis v.
—— Deierling v.
—— Drew v.
—— Ficklin v.
—— v. Foster, pp. 653, 948.
—— Fulbright v.
—— Gerber v.
—— Goodbar v.
—— Gray v.
—— Gregory v.
—— Griffin v.
—— Hammett v.
Wabash R. Co., Hapgood Plow Co. v.
—— v. Harris & Co., pp. 662, 1033, 3330.
—— Hayes v.
—— Haynes v.
—— Hays v.
—— Hendrix v.
—— Hicks v.
—— Huston Bros. v.
—— v. Jellison, pp. 1524, 1558, 2667.
—— Johnson-Brinkman Comm. Co. v.
—— v. Kingsley, pp. 2531, 2532.
—— Klass Comm. Co. v.
—— v. Lannum, pp. 451, 996, 1371.
—— Lee v.
—— Letts v.
—— Lindsay v.
—— Lindsey v.
—— Loeb v.
—— Lowenstein v.
—— v. McDaniels, pp. 1714.
—— McFall v.
—— McLendon v.
—— Mathew v.
—— v. Mathew, p. 2971.
—— Merrielees v.
—— v. Newton, etc., Co., pp. 687, 688.
—— Osborn v.
—— Owens v.
—— v. Pearce, pp. 208, 1153, 1160, 1161, 1162.
—— Pence v.
—— Phoenix Powder Mfg. Co. v.
—— v. Priddy, pp. 3494, 3521, 3756, 3761.
—— Rawlings v.
—— Rice v.
—— Ringwalt v.
—— Roberts v.
—— Robertson v.
—— Rogan v.
—— Rossier v.
—— Russell Grain Co. v.
—— Saeger v.
—— v. Savage, pp. 2045, 2047, 2412.
—— v. Sharpe, pp. 619, 728, 742, 743, 746, 749, 932.
—— Sheldon v.
—— Sira v.
—— v. Skiles, p. 1792.
—— Sloop v.
—— v. Sloop, p. 3746.
—— State v.
—— Talcott v.
—— Tate v.
—— Taylor v.
—— v. Thomas, 222 Ill. 337, 78 N. E. 777, 7 L. R. A., N. S., 1041—pp. 981, 1033, 1421, 3257.
—— v. Thomas, 122 Ill. App. 569—p. 1362.
—— United States v.
—— v. United States, 168 Fed. 1—p. 3451.
—— v. United States, 178 Fed. 5, 101 C. C. A. 133, 21 Am. & Eng. Ann. Cas. 819—pp. 3623, 3624.
—— West Side Belt R. Co., p. 3483.
—— Wise v.
—— v. Wright, p. 437.
—— Youmans v.
—— Yount v.
Wabash River Tract. Co. v. Baker, pp. 2356, 2956.
Wabash, etc., Co., McCullough v.
Wabash, etc., R. Co., Anderson v.
—— Ball v.
—— Beers v.
—— Birney v.
—— Black v.
—— v. Black, pp. 210, 242, 1413.
—— Bond v.
—— Brown v.
—— Buddy v.
—— Burnham v.

Wabash, etc., R. Co., Central Trust Co. v.
—— Cole v.
—— Coup v.
—— Davis v.
—— East St. Louis Connecting R. Co. v.
—— East St. Louis, etc., R. Co. v.
—— v. Friedman, p. 2681.
—— Gashweiler v.
—— Hance v.
—— v. Illinois, pp. 34, 73, 3420, 3422, 3439, 3440, 3447, 3480, 3491, 3493, 3497, 3498, 3511, 3513, 3527, 3566, 3567, 3568, 3579.
—— v. Jaggerman, pp. 538, 539.
—— Jones v.
—— Leslie v.
—— Loomis v.
—— McBeath v.
—— v. McCasland, p. 1479.
—— Meyers v.
—— Patterson v.
—— Pennsylvania R. Co. v.
—— v. People, p. 90.
—— v. Peyton, pp. 945, 2077.
—— Potts v.
—— v. Pratt, p. 1289.
—— v. Rector, pp. 2917, 2938, 3066.
—— Rider v.
—— v. Shacklet, p. 2083.
—— Sidekum v.
—— Stone v.
—— Strouss v.
—— Thomas v.
—— Thomas, etc., Mfg. Co. v.
—— Walker v.
—— Wilt v.
—— v. Wolff, p. 3320.
Wachsler v. Interborough Rapid Transit Co., p. 2023.
Wasco, etc., Water Co. v. Cauble, p. 1352.
Wade, Citizens' R. Co. v.
—— v. Columbia Elect. St. R. etc., Co., pp. 1687, 2128, 2262, 2382.
—— Dunseth v.
—— Florida, etc., R. Co. v.
—— Gibbons v.
—— v. Illinois Cent. R. Co., p. 2820.
—— v. Leroy, p. 3063.
—— v. Lutcher, etc., Lumber Co., p. 1847.
—— v. Wheeler (N. Y.), 3 Lans. 201—p. 884.
—— v. Wheeler, 47 N. Y. 658—p. 285.
Wadley Southern R. Co., Hill v.
—— v. Kennedy, p. 1747.
—— v. State, pp. 22, 25, 84, 110, 138.
Wadley, etc., R. Co., Kent v.
Wadsworth v. Boston, etc., R. Co., p. 2672.
—— Cleveland Elect. R. Co. v.
Waggoner v. Missouri, etc., R. Co., p. 1269.
—— St. Louis, etc., R. Co. v.
Waggoner Nat. Bank, Ft. Worth, etc., R. Co. v.
Wagley, Gulf, etc., R. Co. v.
—— Texas, etc., R. Co. v.
Wagner v. Atlantic, etc., R. Co., pp. 1798, 2192, 2242, 2342, 2940, 2944.
—— Citizens' St. R. Co. v.
—— v. Farmers', etc., Ins. Co., p. 2689.
—— Missouri Pac. R. Co., pp. 1544, 1545, 1561, 1667, 1752, 1755, 1953, 2209, 2899.
—— v. New York City R. Co., pp. 1897.
—— v. Providence Ins. Co., p. 793.
—— Welding v.
Wagner Palace Car Co., Dowley v.
—— Efron v.
Wahl v. Holt, p. 3255.
—— v. Shoulder, pp. 2285, 2615.
Wahle v. Great Northern R. Co., pp. 1048, 1304, 1338, 1349, 1391, 1469.
Wainwright v. Interurban St. R. Co., p. 2655.
—— St. Louis, etc., R. Co. v.
Wait v. Baker, p. 352.
—— v. Omaha, etc., R. Co., pp. 1752, 1992.
Waite, Erie R. Co. v.
—— Gilbert, pp. 638, 660.
Waitt, Stone v.
Wakefield v. Chicago, etc., R. Co., pp. 1313, 3390.
—— Holmes v.
—— v. South Boston R. Co., pp. 1569, 1647.
Wakelee, Davis v.
Walbridge, Second Nat. Bank v.
Walcott v. Canfield, p. 2704.
—— v. People, p. 3577.
Wald v. Louisville, etc., R. Co., pp. 896, 3160, 3168, 3173, 3174.
—— v. Pittsburgh, etc., R. Co., 162 Ill. 545, 44 N. E. 888, 35 L. R. A., 356, 53 Am. St. Rep. 332—pp. 619, 735, 736, 738, 741, 743, 746, 770, 3143, 3144.
—— v. Pittsburg, etc., R. Co., 60 Ill. App. 460—p. 3141.
Waldauer v. Vicksburg R., etc., Co., pp. 2409, 2716.
Walden, Missouri, etc., R. Co. v.
Waldert Grocery Co., St. Louis, etc., R. Co. v.
Waldman v. Brooklyn, etc., R. Co., p. 2086.
Waldo, Galveston, etc., R. Co. v.
Waldron v. Canadian Pac. R. Co., p. 429.
—— v. Chicago, etc., R. Co., pp. 210, 277, 285, 1492, 3133, 3140, 3148, 3159.
—— v. Fargo, pp. 728, 733, 749, 1474, 1478, 1479.
Waldrop, East, etc., R. Co. v.
—— St. Louis, etc., R. Co. v.
Waldrup v. Central, etc., R. Co., p. 2593.
Walger v. Jersey City, etc., St. R. Co., pp. 1517, 1969, 2878.
Walker, Adams Exp. Co. v.
—— v. Atlantic Ave. R. Co., p. 2801.
—— v. Beaumont Land, etc., Co., p. 2673.
—— Bosworth v.
—— Brown v.
—— v. Cassaway, pp. 520, 1154, 1155, 1159.
—— Chicago & A. R. Co. v.
—— Chicago, etc., R. Co. v.
—— Choctaw, etc., R. Co. v.
—— v. Detroit, etc., R. Co., pp. 370, 384, 579.
—— v. Dry Dock, etc., R. Co., p. 1627.
—— v. Eikleberry, p. 909.
—— v. Erie R. Co., p. 2699.
—— Forsythe v.
—— Ft. Worth, etc., R. Co. v.
—— Galveston, etc., R. Co. v.
—— v. Georgia R., etc., Co., pp. 2259, 2264.
—— Grand Trunk R. Co. v.
—— v. Green, p. 2218.
—— Illinois Cent. R. Co. v.
—— v. Jackson, p. 3154.
—— Jones v.
—— v. Keenan, pp. 1301, 3742.
—— Little Rock Tract., etc., Co. v.
—— Louisville & N. R. Co. v.
—— Louisville, etc., R. Co. v.
—— v. Louisville, etc., R. Co., p. 484.
—— Louisville, etc., Tract. Co. v.
—— v. Mauro, pp. 359, 364.
—— v. Metropolitan St. R. Co., p. 1988.
Walker v. Parry, p. 2921.
—— Pennsylvania Co. v.
—— v. Price, p. 2463.
—— St. Louis, etc., R. Co. v.
—— v. Skipwith, pp. 1008, 1011, 3164, 3165.
—— Southern R. Co. v.
—— v. Southern R. Co., pp. 1424, 1456, 3415.
—— Teal v.
—— Texas, etc., R. Co. v.
—— v. Transportation Co., pp. 947, 4036, 4038, 4054, 4055.
—— v. Vicksburg, etc., R. Co., p. 2263.
—— v. Wabash, etc., R. Co., pp. 1573, 1621.
—— Western R. Co. v.
—— Wilmington Steamboat Co. v.
Walker Bros. v. Southern R. Co., p. 153.
Walker-Edmond Co. v. Adams Exp. Co., p. 1070.
Wall, Andrews v.
—— v. Atlantic, etc., Railroad, p. 3198.
—— v. Cameron, pp. 3068, 3069.
—— v. Helena St. R. Co., p. 2286.
—— Illinois Cent. R. Co. v.
—— Indianapolis Southern R. Co. v.
—— Indianapolis, etc., R. Co. v.
—— v. Livezay, p. 2692.
—— v. Norfolk, etc., R. Co., p. 3543.
—— Savannah, etc., R. Co. v.
Wall-Huske Co. v. Southern R. Co., pp. 151, 153, 154, 155, 176, 901.
Wallace v. Ann Arbor, etc., R. Co., p. 1642.
—— v. Arkansas Cent. R. Co., p. 130.
—— Chicago, etc., R. Co. v.
—— v. Clayton, pp. 724, 738, 746, 871.
—— Davis v.
—— Eddy v.
—— Empire Transp. Co. v.
—— Galveston, etc., R. Co. v.
—— v. Lake Shore, etc., R. Co., pp. 821, 1111, 1114, 1379, 1429, 1477, 1479, 3407.
—— v. Loomis, p. 3484.
—— v. Matthews, pp. 208, 257, 481, 573, 962, 967, 968, 969, 1046.
—— Pacific Exp. Co. v.
—— v. Pecos, etc., R. Co., p. 1379.
—— Rosenthal, p. 3269.
—— St. Louis, etc., R. Co. v.
—— San Antonio, etc., R. Co. v.
—— v. Sanders, 43 Ga. 486—pp. 825, 826, 962, 1048, 1049.
—— v. Sanders, 50 Ga. 134—pp. 825, 841.
—— Southern Kansas R. Co. v.
—— Southern R. Co. v.
—— v. Third Ave. R. Co., pp. 152, 2249, 2307.
—— v. Vigus, pp. 837, 848, 850, 853, 3892.
—— v. Western, etc., R. Co., 98 N. C. 494, 4 S. E. 503, 34 Am. & Eng. R. Cas. 553, 2 Am. St. Rep. 346—pp. 1752, 1755, 2168.
—— v. Western, etc., R. Co., 101 N. C. 454, 8 S. E. 166, 37 Am. & Eng. R. Cas. 159—pp. 1992, 2803.
—— v. Wilmington, etc., R. Co., pp. 1773, 1774.
Wallen, Gulf, etc., R. Co. v.
—— v. McHenry, pp. 1492, 2559.
Waller v. Hannibal, etc., R. Co., pp. 2249, 2295.
—— Houston, etc., R. Co. v.
—— v. Midland Great Western R. Co., p. 849.
—— v. Railway, p. 859.
—— v. Wilmington City R. Co., pp. 1518, 2150, 2653.

Walley, Nashville, etc., R. Co. v.
Walling, Germantown Passenger R. Co. v.
—— v. People, pp. 3419, 3421, 3538, 3539.
—— v. Railway Co., p. 2180.
—— v. Trinity, etc., R. Co., pp. 2164, 2184, 2191, 2199, 2293, 2741.
Wallingford v. Columbia, etc., R. Co., pp. 783, 822, 849, 868, 946, 1036.
Wallis, Southern R. Co. v.
Walnut Coal Co. v. Pennsylvania R. Co., p. 135.
Walpole v. Bridges, pp. 732, 735, 748.
Walrath, Cleveland, etc., R. Co. v.
—— Railroad Co. v.
—— v. Redfield, p. 855.
Walsh v. Adams Exp. Co., p. 602.
—— v. Blakely, pp. 1209, 1239, 1240.
—— v. Chicago, etc., Co., p. 3041.
—— v. Cullen, pp. 1583, 1584, 1750, 2578.
—— Delaware, etc., R. Co. v.
—— Indianapolis, etc., Rapid Transit Co. v.
—— Indianapolis, etc., Trans. Co. v.
—— v. Interurban St. R. Co., pp. 2196, 2894.
—— Mobile, etc., R. Co. v.
—— v. Nassau Elect. R. Co., p. 2654.
—— v. North Jersey St. R. Co., pp. 2895, 2931.
—— Paducah St. R. Co. v.
—— v. Richmond, etc., R. Co., p. 2727.
—— Southern Kansas R. Co. v.
—— Southern, etc., R. Co. v.
—— West Chicago St. R. Co. v.
—— Williams v.
—— v. Wright, pp. 3129, 3141.
Walsh, etc., Co., First Nat. Bank v.
—— v. First Nat. Bank, p. 391.
Walter v. Alabama, etc., R. Co., pp. 486, 3309, 3353, 3389, 3395, 3412.
—— v. C. D. & M. R. Co., pp. 2125, 2227.
—— v. Missouri Pac. R. Co., p. 1441.
Walters v. Chicago, etc., R. Co., pp. 2248, 2361, 2909.
—— v. Detroit United R. Co., p. 900.
—— Gulf, etc., R. Co. v.
—— v. Missouri Pac. R. Co., pp. 1865, 2366, 2820.
—— v. Philadelphia Tract. Co., p. 1888.
—— v. Seattle, etc., R. Co., pp. 2004, 2701.
—— v. Western, etc., R. Co., p. 314.
Waltham Mfg. Co. v. New York, etc., Steamship Co., p. 3364.
Walther v. Southern Pac. Co., pp. 1559, 1565, 2095, 2096, 2097.
Walthers v. Chicago, etc., R. Co., p. 2150.
Walthour v. Pennsylvania R. Co., pp. 1866, 1887, 2225.
Waltman, Pennsylvania, etc., R. Co. v.
Walton, Hendrick v.
—— Macon, etc., R. Co. v.
—— Southern R. Co. v.
Wampum Cotton Mills v. Carolina, etc., R. Co., pp. 150, 151, 175.
Wamsley v. Atlas Steamship Co., 168 N. Y. 533, 61 N. E. 896, 85 Am. St. Rep. 699—pp. 663, 3931.
—— v. Atlas Steamship Co., 56 N. Y. S. 284, 37 App. Div. 553—p. 3931.
Wamsutta Oil Refin., etc., Co., Empire Transp. Co. v.
Wanaque Lumber Co., Erie R. Co. v.
Wanata, The.
Wandell v. Corbin (N. Y.), 38 Hun 391—p. 2341.
—— v. Corbin, 49 Hun 608, 1 N. Y. S. 795, 17 N. Y. St. Rep. 718—pp. 1525, 2163.
Waniorek v. United Railroads, pp. 2303, 2648, 2766.
Wanzer v. Chippewa Valley Elect. R. Co., pp. 1724, 1727, 1736, 1745, 2129, 2889, 3034.
Ward, Atlantic, etc., R. Co. v.
—— v. Central Park, etc., R. Co., p. 2187.
—— v. Chicago City R. Co., p. 1890.
—— v. Chicago, etc., R. Co., 165 Ill. 462, 46 N. E. 365—pp. 1922, 2577.
—— v. Chicago, etc., R. Co., 87 Kan. 824, 126 Pac. 1083—pp. 1367, 1369.
—— v. Chicago, etc., R. Co., 102 Wis. 215, 78 N. W. 442—pp. 2343, 2405, 2793.
—— Cleveland, etc., Tract. Co. v.
—— v. Green, p. 3866.
—— Hubbersty v.
—— v. International R. Co., pp. 2114, 2192, 2195, 2346.
—— v. Joslin, p. 3792.
—— Lake Shore, etc., R. Co. v.
—— v. Maryland, pp. 3549, 3552.
—— Menacho v.
—— v. Metropolitan St. R. Co., p. 2876.
—— Michigan Cent. R. Co. v.
—— v. Missouri Pac. R. Co., pp. 1084, 1087, 1090, 1097, 1098, 1103, 1107, 1116, 3700.
—— v. New York Cent. R. Co., pp. 630, 638, 653.
—— v. New York, etc., R. Co., pp. 2435, 3182.
—— v. Thompson, p. 3864.
Warden v. Greer, p. 849.
—— Halsey v.
Warden of City Prison, Tyroler v.
Wardlaw v. California R. Co., p. 2146.
—— v. South Carolina R. Co., pp. 822, 897, 917.
Wardle v. New Orleans City R. Co., p. 1889.
Ward's Cent., etc., Co. v. Elkins, pp. 262, 263, 471.
Wardwell v. Chicago, etc., R. Co., pp. 1602, 2420, 2467, 2470, 2492.
Ware v. Gay, pp. 2586, 2656, 2693.
—— Gulf, etc., R. Co. v.
—— Mexican Nat. R. Co. v.
—— South Covington, etc., R. Co. v.
Ware River R. Co. v. Vibbard, p. 1166.
Ware, etc., Co. v. Mobile County, p. 3421.
Warehouse, etc., Supply Co. v. Galvin, pp. 1153, 1154, 1170, 3972.
Warfield v. Hepburn, 62 Fla. 409, 57 So. 618—pp. 2577, 2676, 2583, 2602.
—— Huguelet v.
—— Louisville, etc., R. Co. v.
—— v. Louisville, etc., R. Co., p. 3024.
—— Paxson Bros. v.
—— v. Railroad, p. 2434.
—— State v.
Waring v. Clarke, p. 3977.
—— v. Cox, p. 1216.
—— v. Morse, p. 3905.
Waring & Co. v. Baltimore, etc., R. Co., pp. 208, 233, 257, 511, 533, 539, 607, 608, 681, 682.
Warlick, Gulf, etc., R. Co. v.
Warner v. Baltimore, etc., R. Co., pp. 1686, 1792, 2134, 2135, 2136.
—— v. Burlington, etc., R. Co., pp. 3145, 3168, 3173, 3174.
Warner, Marcy v.
—— Murray v.
—— Texas, etc., R. Co. v.
—— v. The Illinois, Fed. Cas. No. 17, 1840—p. 527.
—— v. The Illinois (Pa.), 17 Phila. 549—p. 527.
—— v. Western Transp. Co., p. 759.
Warnken, Galveston, etc., R. Co. v.
Warren, Chicago, etc., R. Co. v.
—— v. Cleveland, etc., R. Co., pp. 723, 1045.
—— Connolly v.
—— v. Fitchburg R. Co., pp. 1510, 1512, 1513, 1514, 1518, 1722, 1746, 1790, 1792, 2135.
—— Illinois Cent. R. Co. v.
—— Lake Shore, etc., R. Co. v.
—— Leffingwell v.
—— Metropolitan St. R. Co. v.
—— St. Louis, etc., R. Co. v.
—— Wright, etc., Wirecloth Co. v.
Warren Adams, Ceballos v.
Warren Bridge, Charles River Bridge Co. v.
Warren Ins. Co., Minturn v.
Warren St. R. Co., Palmer v.
Warren, etc., St. R. Co., Costigan v.
Warrior Mower Co., Boston, R. Co. v.
Washburn, Atchison, etc., R. Co. v.
—— v. Chicago, etc., R. Co., p. 2710.
—— v. Empire Brick, etc., Co., p. 3964.
—— Lin Sing v.
—— Little Miami R. Co. v.
—— v. Nashville, etc., R. Co., p. 1550, 1570, 1760, 1761, 1953, 2213.
Washburn-Crosby Co. v. Boston, etc., Railroad, pp. 411, 3362.
Washburn, etc., Mfg. Co. v. Providence, etc., R. Co., pp. 3259, 3296, 3340.
Washer, Kohn Bros. v.
Washington v. Baltimore, etc., R. Co., p. 2116.
—— Houston, etc., R. Co. v.
—— International, etc., R. Co. v.
—— Kansas, etc., R. Co. v.
—— v. Kaleigh, etc., R. Co., p. 3322.
—— v. Spokane St. R. Co., pp. 1823, 1826, 1959, 2161.
—— United States v.
Washington County R. Co., Crabtree v.
Washington Marine Co. v. Rainier Mill, etc., Co., pp. 3951, 3966, 3968, 3969.
Washington Park Steamboat Co., Clemmens v.
Washington Southern R. Co. v. Commonwealth, p. 3494.
Washington Terminal Co., McManard v.
Washington-Virginia R. Co. v. Bouknight, pp. 2674, 2694, 2861.
Washington Water Power Co., Atwood v.
—— Austin v.
—— Denham v.
—— Johnson v.
—— Mueller v.
Washington, etc., R. Co., Adams v.
—— Brown v.
—— v. Brown, pp. 2087, 2090.
—— Carpenter v.
—— v. Chapman, pp. 2235, 2288.
—— v. Commonwealth, p. 125.
—— v. Grant, p. 2858.
—— Harmon v.
—— v. Harmon, pp. 1878, 1889, 2116, 2236, 3063.

Washington, etc., R. Co. v. Hickey, 5 App. D. C. 436—pp. 2127, 2260, 2656.
—— v. Hickey, 166 U. S. 521, 17 S. Ct. 661, 41 L. Ed. 1101—pp. 1709, 1999, 2012, 2656.
—— Holohan v.
—— Lemont v.
—— v. Lukens, p. 2911.
—— Nichol v.
—— Owen v.
—— Parker v.
—— v. Patterson, pp. 1519, 1520, 1523.
—— v. Quayle, p. 2535.
—— v. Trimyer, pp. 1735, 2011, 2764, 2765, 2897, 2976.
—— v. Varnell, pp. 1684, 1685, 1693, 1720.
—— v. Vaughan, pp. 1714, 1722, 1791, 2271, 2364, 2732.
Wasserman v. New York City R. Co., pp. 16, 48, 2652.
Water v. Ross, p. 1221.
Waterbury v. Chicago, etc., R. Co., p. 2132.
—— v. New York, etc., R. Co., pp. 1553, 1554, 1564, 1565, 1566, 1760, 1761.
Waterbury Button Co., Naugatuck R. Co. v.
Water Power Co., Ætna Nat. Bank v.
Water Witch, Brower v.
Water Witch, The.
Waterhouse, Ansell v.
—— Crofts v.
Waterloo, etc., Transit Co., Peoples' Sav. Bank v.
Waterman, Keaves v.
—— v. Vermont Cent. R. Co., pp. 459, 460.
Waters, Easton v.
—— Fremont, etc., R. Co. v.
—— Illinois Cent. R. Co. v.
—— v. Richmond, etc., R. Co., p. 468.
—— St. Louis, etc., R. Co. v.
Waters & Co., Southern R. Co. v.
Waters-Pierce Oil Co. v. Texas, p. 3472.
Watervliet, etc., R. Co., Higgins v.
Wathen, Capital Tract. Co. v.
—— Louisville, etc., R. Co. v.
Watkins v. Atlantic Ave. R. Co., pp. 2895, 2896.
—— v. Birmingham R., etc., Co., pp. 2185, 2235, 2250, 2282, 2355.
—— Ex parte.
—— Georgia, etc., R. Co. v.
—— Henningsen v.
—— Illinois Cent. R. Co. v.
—— v. Junker, p. 855.
—— v. New York, etc., R. Co., p. 3168.
—— v. Pennsylvania R. Co., pp. 190, 1625, 1636, 3316, 3322.
—— v. Raleigh, etc., R. Co., pp. 2126, 2255.
—— St. Louis, etc., R. Co. v.
—— Usury v.
Watkins Livery, etc., Co., Trout v.
Watkins Merchandise Co., Missouri, etc., R. Co. v.
—— v. Missouri, etc., R. Co., pp. 727, 732, 749, 753, 1118.
Watkinson v. Laughton, pp. 850, 855.
Watling, Berkley v.
Watney, Porteus v.
Watson v. Atlantic, etc., R. Co., pp. 499, 612, 613, 689, 3277, 3393.
—— East Tennessee, etc., R. Co. v.
—— Galveston, etc., R. Co. v.
—— v. Georgia Pac. R. Co., p. 2262.
—— G. H. & S. A. R. Co. v.
—— Kansas, etc., R. Co. v.
Watson v. Louisville, etc., R. Co., pp. 1612, 1613, 1627, 1628, 1631, 1632, 1633, 1635.
—— v. Memphis, etc., R. Co., pp. 268, 278, 286, 729, 733, 750.
—— Missouri Pac. R. Co. v.
—— v. New York, etc., R. Co., pp. 1620, 1630.
—— Ohio Valley R. Co. v.
—— v. Oswego St. R. Co., p. 2856.
—— v. Oxanna Land Co., pp. 1794, 2270.
—— v. Portland, etc., R. Co., pp. 1957, 2172, 2173.
—— v. Railway, pp. 3176, 3177.
—— St. Louis, etc., R. Co. v.
—— v. St Paul, etc., R. Co., p. 1721.
—— Southern R. Co. v.
—— v. Southern R. Co., pp. 2017, 2784.
—— Stafford v.
—— Sullivan-Sanford Lumber Co. v.
—— Texas Cent. R. Co. v.
—— The S. L.
Watt v. Cargo of Lumber, pp. 3878, 3958.
—— International, etc., R. Co. v.
Watters, Mobile St. R. Co. v.
—— Mobile, etc., R. Co. v.
—— v. Philadelphia, etc., R. Co., p. 2362.
Watts v. Boston, etc., R. Corp., pp. 285, 288, 884.
—— v. Camors, pp. 1170, 3869, 3870, 3873.
Watts & Co. v. Saxon, pp. 741, 742, 745, 747, 779.
Waxelbaum v. Southern R. Co., pp. 430, 939, 1033.
Way v. Chicago, etc., R. Co., 64 Iowa 48, 52 Am. Rep. 431, 19 N. W. 828—pp. 1572, 1573.
—— v. Chicago, etc., R. Co., 73 Iowa 463, 34 Am. & Eng. R. Cas. 286, 35 N. W. 525—pp. 1572, 2517, 2644.
—— v. Dennie, p. 514.
—— v. New Jersey Steamboat Co., p. 3586.
—— Ocean Steamship Co. v.
—— v. Southern R. Co., pp. 760, 3396.
Waycross, etc., R. Co., Gardner v.
Waydell v. Adams, pp. 3884, 3885.
Wayland v. Mosely, pp. 331, 332, 337, 339.
Wayne, Albatross v.
—— v. St. Louis, etc., R. Co. v. pp. 1743, 2575, 2674.
—— Steamboat Albatross v.
—— v. Steamboat General Pike, pp. 328, 332, 333.
Weakly, St. Louis, etc., R. Co. v.
Weams, Louisville City R. Co. v.
Weatherby, Texas, etc., R. Co. v.
Weathers, Birmingham R., etc., Co. v.
—— Louisville, etc., R. Co. v.
Weaver v. Ann Arbor R. Co., pp. 1567, 1640, 2097, 2098.
—— Louisville, etc., R. Co. v.
—— Missouri, etc., R. Co. v.
—— v. Pennsylvania R. Co., p. 2142.
—— People v.
—— v. Southern R. Co., p. 756.
Weaver Coal, etc., Co., Guinan v.
Webb, Alton R., etc., Co. v.
—— v. Atlantic, etc., R. Co., pp. 3192, 3197.
—— Braun v.
—— Buck v.
—— Chesapeake, etc., R. Co. v.
—— Cincinnati, etc., R. Co. v.
—— v. Great Western R. Co., p. 957.
—— Gregory v.
—— Griswold v.
Webb, Levien v.
—— Lincoln Tract. Co. v.
—— Missouri v.
—— Missouri, etc., R. Co. v.
—— Munsey v.
—— Southern R. Co. v.
—— Southwestern R. Co. v.
—— Williams v.
—— v. Winter, pp. 477, 480.
Webber v. Old Colony St. R. Co., pp. 1749, 2679, 2691.
—— v. Railway, p. 3177.
—— v. Virginia, pp. 3549, 3568.
Weber, Atchison, etc., R. Co. v.
—— v. Brooklyn, etc., R. Co., pp. 2418, 2482, 2484.
—— v. Chicago, etc., R. Co., p. 489.
—— v. Kansas City Cable R. Co., pp. 1710, 1988, 2113, 2251, 2833.
—— v. New Orleans, etc., R. Co., pp. 1879, 2689.
—— v. Rochester, etc., R. Co., pp. 1647, 2438, 2458.
—— v. Southern R. Co., pp. 196, 1596, 2709, 2854.
—— Wessel & Co. v.
Weber Co. v. Chicago, etc., R. Co., 92 Iowa 364, 60 N. W. 637—pp. 3112.
—— v. Chicago, etc., R. Co., 113 Iowa 188, 20 Am. & Eng. R. Cas., N. S., 464, 84 N. W. 1042—pp. 203, 2122, 3112, 3124, 3155, 3162, 3165.
Webster v. Bear, pp. 371, 372.
—— v. Bell, p. 3576.
—— Delaware, etc., Canal Co. v.
—— v. Elmira, etc., R. Co., p. 2694.
—— v. Fitchburg R. Co., pp. 1505, 1506, 1537, 1555.
—— Florida R., etc., Co. v.
—— v. Hudson River R. Co., p. 1999.
—— Merrick v.
—— Millard v.
—— v. Rome, etc., R. Co., pp. 2213, 2860.
—— v. Rome, etc., R. Co., 115 N. Y. 112, 21 N. E. 725—pp. 1815, 2897.
—— v. Superior Court, p. 34.
—— v. Union Pac. R. Co., pp. 1029, 1339, 1387, 3624.
Webster, M., B. & F. City St. Ry. Co., Renney v.
Wedekind v. Southern Pac. Co., p. 2811.
Weed v. Barney, pp. 572, 901.
—— Henadale v.
—— v. International, etc., R. Co., p. 1332.
—— v. Panama R. Co., 17 N. Y. 362, 72 Am. Dec. 474—pp. 628, 2038, 2070.
—— v. Panama R. Co., 12 N. Y. Super. Ct. 193—pp. 1670, 1673, 1676.
—— v. Saratoga, etc., R. Co., pp. 805, 3119, 3125, 3126, 3184.
Weeks v. Auburn, etc., Elect. R. Co., p. 1956.
—— v. Boston Elev. R. Co., p. 2169.
—— Byrne v.
—— Chicago, etc., R. Co. v.
—— v. Chicago, etc., R. Co., p. 3038.
—— v. New Orleans, etc., R. Co., pp. 2134, 2136, 2155.
—— v. New York, etc., R. Co. (N. Y.), 9 Hun 669—pp. 3123, 3125, 3126, 3145, 3147.
—— v. New York, etc., R. Co., 72 N. Y. 50, 28 Am. Rep. 104—pp. 3114, 3147.
—— Peck v.
Weems Steamboat Co. v. People's Steamboat Co., p. 3655.
Wegener v. Smith, p. 713.

Wegeschiede v. St. Louis Transit Co., p. 2290.
Wegner v. Smith, p. 355.
Wehman v. Southern Railway, p. 3185.
Wehrmann, Chicago, etc., R. Co. v.
—— v. Minneapolis, etc., R. Co., pp. 969, 970, 971, 1031, 3262, 3264, 3287, 3312.
Weida v. Chicago, etc., R. Co., p. 1298.
Weide v. Davidson, p. 838.
Weightman v. Louisville, etc., R. Co., pp. 1910, 1912.
Weikle, Evansville, etc., R. Co. v.
Weil v. Express Co., p. 864.
—— v. Merchants', etc., Transp. Co., p. 3256.
—— Missouri Pac. R. Co. v.
—— v. Pennsylvania R. R., p. 3666.
Weill v. New York, pp. 3995, 3997.
Weiller v. New York City R. Co., p. 2860.
—— Pennsylvania R Co. v.
—— People's, etc., R. Co. v.
Weinberg v. Albemarle, etc., R. Co., p. 3327.
—— v. Atlantic, etc., R. Co., 65 S. E. 634, 83 S. C. 468—p. 864.
—— v. Atlantic, etc., R. Co., 83 S. C. 470, 65 S. E. 637—p. 165.
Weinberger v. Compagnie Generale Transatlantique, pp. 4011, 4032.
Weiner, Mobile, etc., R. Co. v.
Weingart v. Pullman Co., pp. 3230, 3233.
Weinschenk v. New York, etc., R. Co., p. 1994.
Weir, Addoms v.
—— Adler v.
—— Bates v.
—— Bernstein v.
—— Brand v.
—— Campe v.
—— Coggswell v.
—— Coulter v.
—— Fein v.
—— Flint, etc., R. Co. v.
—— Frankfurt v.
—— Greenwald v.
—— Gurwitz v.
—— Harrison v.
—— Ingram v.
—— Jonasson v.
—— Levy v.
—— Mills v.
—— Mitchell v.
—— v. Norman, p. 3578.
—— Rogers v.
—— Rosenblum v.
—— Rosenthal v.
—— v. Rountree, pp. 2101, 2104, 2105, 3519.
—— Sageman v.
—— Schutte v.
—— v. Seattle Elect. Co., p. 2887.
—— Silverman v.
—— Taylor v.
—— v. Union R. Co., p. 2685.
—— United R., etc., Co. v.
—— White v.
Weisenberg v. Lackawanna, etc., R. Co., p. 2276.
Weisinger v. Southern R. Co., pp. 1282, 1465.
Weisman v. Philadelphia, etc., R. Co., p. 558.
Weisman & Co., Texas, etc., R. Co. v.
Weiss, New York, etc., Co. v.
—— New York, etc., Steamship Co. v.
Weisshaar v. Kimball Steamship Co., pp. 3992, 3997, 4045, 4046.
Weissman, Missouri Pac. R. Co. v.
Welborn v. Southern R. Co., p. 292.
Welbourne, International, etc., R. Co. v.
Welch v. Boston Elev. R. Co., p. 2777.
—— v. Boston, etc., R. Co., pp. 945, 1375.
—— v. Concord Railroad, pp. 896, 901, 905, 909.
—— International, etc., R. Co. v.
—— v. McClintock, pp. 3944, 3945.
—— Missouri, etc., R. Co. v.
—— v. Northern Pac. R. Co., p. 1374.
—— v. Pullman Palace Car Co. (N. Y.), 16 Abb. Prac., N. S., 352—pp. 3216, 3223, 3224.
—— v. Pullman Palace Car Co. (N. Y.), Sheld. 457—p. 3214.
—— The John M.
Weld, Pickering v.
—— Railroad Comm. v.
—— Reed v.
Welding v. Wagner, p. 3216.
Weller v. London, etc., R. Co., pp. 1924, 1926.
Wellesley, etc., R. Co., Killam v.
Wellington, Louisville R. Co. v.
—— The.
Wellman, Chicago, etc., R. Co. v.
—— v. Chicago, etc., R. Co., p. 38.
—— v. Metropolitan St. R. Co., pp. 1888, 2875.
—— v. Morse, p. 3953.
Wellmeyer v. St. Louis Transit Co., pp. 1998, 2184, 2343, 2355.
Wells v. Alabama, etc., R. Co., pp. 1859, 2706.
—— v. American Exp. Co., 44 Wis. 342—pp. 529, 543.
—— v. American Exp. Co., 55 Wis. 23, 11 N. W. 537, 12 N. W. 441, 42 Am. Rep. 695—p. 547.
—— Atlantic, etc., R. Co. v.
—— v. Boston, etc., Railroad, pp. 2712, 3031.
—— Chesapeake, etc., R. Co. v.
—— Cleveland, etc., R. Co. v.
—— Cronkite v.
—— v. Great Northern R. Co., pp. 499, 949, 960, 961, 977, 3109, 3127, 3128, 3132, 3149, 3162, 3166, 3167, 3189.
—— Gulf, etc., R. Co. v.
—— v. Maine Steamship Co., pp. 573, 574, 577, 578, 579.
—— Midd v.
—— Missouri, etc., R. Co. v.
—— v. National Life Ass'n, p. 650.
—— v. New York Cent. R. Co., pp. 2095, 2103.
—— v. New York Cent., etc., R. Co., pp. 1511, 1512, 1518.
—— v. New York City R. Co., pp. 1645, 1646.
—— Nudd v.
—— v. Oregon, etc., R. Co., p. 108.
—— Platt v.
—— St. Louis, etc., R. Co. v.
—— Sherman v.
—— v. Steinway R. Co., p. 2231.
—— v. Thomas, pp. 1147, 1156, 3359.
—— v. Wilmington, etc., R. Co., pp. 268, 272, 273, 304.
Wells Fargo Co., Hayes v.
—— Rick v.
Wells Fargo Exp. Co., Cohn-Goodman Co. v.
—— Gulf, etc., R. Co. v.
—— Rubin v.
—— v. Samuels, pp. 658, 635, 686, 687, 692, 695.
—— v. State, p. 3428.
—— Thomas v.
—— United States v.
—— v. Williams, pp. 465, 858, 1139, 1195, 1202.
Wells Fargo & Co. v. Battle, pp. 638, 643, 644, 646, 674, 686, 689, 860.
—— v. Bell, p. 810.
—— Blair v.
—— Cutter v.
—— v. Cutter, pp. 846, 1059.
—— Danciger v.
—— Fried v.
—— Greenfield v.
—— v. Hanson, pp. 515, 585, 587, 589, 593, 663, 664, 866.
—— Hooper v.
—— Jones v.
—— Knapp v.
—— Meyer v.
—— Michalitschke v.
—— Noonan v.
—— v. Northern Pac. R. Co., p. 3576.
—— v. Oregon R., etc., Co., p. 379.
—— Pacific Aviation Co. v.
—— Pierce Co. v.
—— v. Potter, p. 1478.
—— Powers Mercantile Co. v.
—— Reeder v.
—— Rowan v.
—— Scammon v.
—— Scrammon v.
—— State v.
—— Stevenson v.
—— Thurman v.
—— Travis v.
—— Wertheimer v.
—— v. Windham, pp. 543, 549, 580.
Wells Fargo & Co. Exp., Lafayette v.
—— Murphy v.
Wells-Fargo Co.'s Exp., Craddock & Co. v.
—— v. Fuller, 4 Tex. Civ. App. 213, 222, 23 S. W. 412—pp. 322, 333, 335, 502, 503, 508, 509, 511, 1257, 1259.
—— v. Fuller, 13 Tex. Civ. App. 610, 35 S. W. 824—pp. 1253, 1254, 1255, 1256, 1257.
—— Gary v.
—— v. Gentry, pp. 831, 832.
—— Laporte v.
—— v. Mitchell, p. 834.
—— Murphy v.
—— Security Trust Co. v.
Wells, etc., Co., Cushing v.
—— v. Oregon R., etc., Co., p. 108.
—— Pitlock v.
—— Ziegler v.
Welsh, Cafiero v.
—— International, etc., R. Co. v.
—— Louisville, etc., R. Co. v.
—— v. Pittsburg, etc., R. Co., pp. 211, 243, 728, 733, 749, 822, 948, 951, 996, 1363, 1368.
—— White v.
Welton v. Missouri, pp. 3418, 3419, 3421, 3445, 3446, 3549, 3568.
Wemple, Pennsylvania R. Co. v.
Wendling v. Chicago City R. Co., p. 2309.
Wente v. Chicago, etc., R. Co., 79 Neb. 175, 112 N. W. 300—p. 1455.
—— v. Chicago, etc., R. Co., 79 Neb. 179, 115 N. W. 859, 15 L. R. A., N. S., 756—pp. 1301, 1477, 1478.
Wentworth, Adams Exp. Co. v.
—— v. Eastern R. Co., p. 1798.
—— International, etc., R. Co. v.
—— v. Realm, p. 817.
Wentz v. Chicago, etc., R. Co., p. 3697.
—— v. Erie R. Co., pp. 1623, 1635.
—— Pennsylvania Co. v.
Wentz-Bates Mercantile Co. v. Union Pac. R. Co., p. 87.

Wenz v. Savannah, etc., R. Co., pp. 1628, 2408, 2482, 2528, 3098.
Wenzel v. City, etc., R. Co., pp. 1984, 2192.
—— v. Great Northern R. Co., p. 251.
Werbowlsky v. Fort Wayne, etc., R. Co., pp. 1826, 1833, 1890, 2249.
Werle v. Long Island R. Co., pp. 1937, 1951, 1953, 1980, 2181.
Werner v. Chicago, etc., R. Co., pp. 2065, 2066, 2229, 2745, 2949.
—— v. Evans, pp. 3114, 3115, 3127.
Werner Sawmill Co. v. Ferree, p. 494.
Wernick v. St. Louis, etc., R. Co., p. 796.
Wernke, Ohio Valley Trust Co. v.
—— Ohio Valley, etc., Co. v.
Wernwag v. Philadelphia, etc., R. Co., p. 549.
Wertheimer v. Interborough Rapid Transit Co., p. 1929.
—— v. Pennsylvania R. Co., 1 Fed. 232, 17 Blatchf. 421—pp. 320, 323, 1024, 1037, 1042.
—— v. Pennsylvania R. Co., W. N. C. (Pa.), 272—p. 321.
—— v. Wells, Fargo & Co., pp. 477, 479.
Wescott, Limburger v.
—— Sunderland v.
Wescott Exp. Co., Brookstone v.
Wesner, etc., Mfg. Co. v. Atlantic, etc., Railroad, pp. 642, 677.
Wessel & Co., Straus & Bro. v.
—— v. Weber, p. 479.
West, Chamberlain v.
—— v. Kansas Natural Gas Co., pp. 3433, 3533.
—— Kansas, etc., R. Co. v.
—— v. London, etc., R. Co., p. 221.
—— Martin v.
—— v. New York, etc., R. Co., p. 2865.
—— Portage County Mut. Fire Ins. Co. v.
—— Richmond R., etc., Co. v.
—— Rogers v.
—— v. St. Louis, etc., R. Co., p. 2233.
—— Southern R. Co. v.
—— Sprague v.
West Asheville, etc., R. Co., Witsell v.
West Bloomfield Tp. v. Detroit United Railway, pp. 1594, 1611.
Westchester Elect. R. Co., Brettner v.
—— Dista v.
—— Stern v.
Westchester St. R. Co., Public Service Comm. v.
West Chester, etc., R. Co., Johnson v.
—— v. McElwee, p. 2857.
—— v. Miles, pp. 191, 1943, 1944, 2417.
West Chicago St. R. Co. v. Binder, pp. 2156, 2519.
—— v. Dudzik, pp. 2151, 2249.
—— Hagestrom v.
—— v. Johnson, 180 Ill. 285, 54 N. E. 334—pp. 1743, 1827, 2125, 2933.
—— v. Johnson, 77 Ill. App. 142—p. 2160.
—— v. Kennelly, p. 2759.
—— v. Kromshinsky, p. 1743.
—— v. Lieserowitz, pp. 2990, 3006.
—— v. McCafferty, pp. 2398, 2922.
—— v. Manning, pp. 1561, 1562, 2119, 2244.
—— v. Marks, 182 Ill. 15, 55 N. E. 67—pp. 1818, 1820, 1959, 3002.
West Chicago St. R. Co. v. Marks, 82 Ill. App. 185—pp. 2196, 2883.
—— v. Martin, 154 Ill. 523, 39 N. E. 140—p. 2011.
—— v. Martin, 47 Ill. App. 610—p. 2696.
—— v. Mileham, p. 2586.
—— v. Piper, p. 2083.
—— v. Torpe, p. 2304.
—— v. Tuerke, 193 Ill. 385, 61 N. E. 1087, 1 R. R. R. 1, 24 Am. & Eng. R. Cas., N. S., 1—pp. 1842, 1843, 1845, 2007, 2897.
—— v. Tuerk, 90 Ill. App. 105—pp. 1709, 1842.
—— v. Walsh, p. 1535.
—— v. Williams, p. 2810.
West Chicago, etc., R. Co., Cohen v.
—— v. Horne, pp. 2117, 2118.
—— Kean v.
—— v. McNulty, p. 3033.
West Coast Naval Stores Co., Louisville, etc., R. Co. v.
—— v. Louisville, etc., R. Co., p. 102.
Westcott v. Fargo (N. Y.), 63 Barb. 349, 6 Lans. 319—pp. 815, 817, 1097, 1098.
—— v. Fargo, 61 N. Y. 542, 19 Am. Rep. 300—pp. 1116, 3371.
—— Harnett v.
—— Holt v.
—— Hopkins v.
—— Richards v.
—— Springer v.
—— Sunderland v.
—— Union Stock Yard Co. v.
Westcott Exp. Co., Soviero v.
West End St. R. Co., Corlin v.
—— Creamer v.
—— Dickinson v.
—— Gallagher v.
—— Gilbert v.
—— Gordon v.
—— Hamilton v.
—— Hill v.
—— Holland v.
—— Jacobs v.
—— McGilvray v.
—— Manning v.
—— Oddy v.
—— White v.
West End, etc., R. Co., Bigelow v.
West End, etc., St. R. Co. v. Mozely, pp. 1889, 2249, 2987.
Wester, St. Louis, etc., R. Co. v.
Western Gravel Road Co. v. Cox, p. 659.
Western Land, etc., Co., Union Stock Yards, etc., Co. v.
Western Mfg. Co. v. Guiding Star, pp. 820, 856.
Western Maryland R. Co., Abell v.
—— v. Herold, pp. 2143, 2149, 2390.
—— v. Landis, p. 3408.
—— v. Lynch, p. 1642.
—— Needy v.
—— v. Schaun, p. 2783.
—— v. Shirk, p. 1567.
—— v. Shivers, pp. 2670, 2695, 2859, 2898, 2900.
—— v. Stanley, p. 1982.
—— v. State, pp. 1701, 2262, 2401, 2703, 2880, 2926, 2969, 3006.
—— v. Stocksdale, pp. 1630, 2443, 2462.
Western New York, etc., R. Co., Interstate Commerce Comm. v.
—— Leggett v.
—— v. Penn, pp. 3613, 3654, 3731, 3776, 3787, 3789, 3791, 3793, 3795, 3796, 3797, 3840.
Western Pennsylvania R. Co., Bernhardt v.
Western Railroad, Goins v.
—— Hughes v.
Western R. Co. v. Bunch, pp. 284, 286.
—— Goins v.
—— v. Harwell, 91 Ala. 340, 8 So. 649, 45 Am. & Eng. R. Cas. 358—pp. 320, 323, 825, 983, 985, 986, 1035, 1388, 1389, 1395, 1396, 1399, 1454, 1455, 1456, 1457, 3377, 3378, 3380, 3383, 3384.
—— v. Harwell, 97 Ala. 341, 11 So. 781, 45 Am. & Eng. R. Cas. 351—pp. 1073, 1096, 1107, 1395, 1396, 1399, 1422, 3380, 3384, 3385.
—— Kimball v.
—— v. Little, p. 895.
—— Paramore v.
—— v. Thomas, p. 577.
—— v. Thornton, p. 576.
—— v. Walker, p. 1846.
—— v. Young, p. 1864.
Western R. Corp., Ayres v.
—— Boston, etc., R. Corp. v.
—— Coyle v.
—— Finn v.
—— Hegeman v.
—— Judson v.
—— Lamb v.
—— McDonald v.
—— Nolton v.
—— Sessions v.
Western Railway, Chappell v.
—— v. Hart, pp. 686, 784, 1028, 3309.
—— v. Railroad Comm., pp. 45, 46, 49, 50.
—— Smith v.
—— Tallassee Falls Mfg. Co. v.
Western Sash, etc., Co. v. Chicago, etc., R. Co., pp. 3334, 3536.
Western Stage Co., Compton v.
—— Sales v.
Western States, The.
Western Transit Co. v. Hosking, pp. 1033, 1049.
Western Transp. Co. v. Barber, p. 1167.
—— v. Hawley, pp. 537, 1243.
—— v. Hoyt, pp. 1145, 1161.
—— v. Marshall, pp. 476, 1230.
—— v. Newhall, pp. 727, 805, 815, 888, 965, 1003, 1004, 1006, 1007, 1026, 1033, 1036.
—— Parmelee v.
—— Warner v.
Western Union Tel. Co. v. Alabama State Board, p. 3559.
—— v. Atlantic, etc., Tel. Co., p. 5.
—— v. Bertram, p. 406.
—— Borough of Norwood v.
—— Burgess v.
—— v. Call Pub. Co., pp. 1180, 3441, 3448, 3449, 3602.
—— Coleman v.
—— v. Cooper, p. 663.
—— Cowan v.
—— v. Crall, p. 659.
—— v. Crider, p. 613.
—— Davis v.
—— v. Eubanks, p. 1119.
—— Glenn v.
—— v. Gottlieb, pp. 3553, 3572, 3590, 3592.
—— v. Harding, p. 613.
—— Hill v.
—— v. Hoffman, p. 663.
—— v. Jackson, p. 1116.
—— v. James, pp. 34, 3504.
—— v. Lovely, p. 3366.
—— McCord v.
—— v. McCoy, p. 613.
—— Marr v.
—— Massachusetts v.
—— v. Massachusetts, pp. 3550, 3551, 3552, 3553, 3572, 3591.
—— Mood v.
—— Pensacola Tel. Co. v.
—— v. Pennsylvania, 128 U. S. 39, 32 L. Ed. 345, 9 S. Ct. 6—p. 3559.

Western Union Tel. Co. v. Pennsylvania, 195 U. S. 540, 49 L. Ed. 312, 25 S. Ct. 133—p. 3592.
—— Phillips v.
—— Poteet v.
—— Primrose v.
—— Ratterman v.
—— v. Reynolds Bros., p. 9.
—— Rogers v.
—— St. Louis v.
—— Smith v.
—— State v.
—— v. Steinbergen, p. 613.
—— v. Taggart, pp. 3552, 3553, 3572, 3590, 3591, 3592, 3593, 3594.
—— v. Texas, p. 9.
—— Tyler v.
—— v. Wingate, p. 613.
—— Wolf v.
—— v. Woods, pp. 1488, 1750.
—— v. Yopst, p. 1087.
Western Vermont R. Co., Jones v.
Western, etc., Grain Co., Chicago, etc., R. Co. v.
Western, etc., Railroad v. Abbott, p. 2840.
—— v. Camp, pp. 893, 898, 900, 910, 912.
—— v. Drysdale, p. 2009.
—— v. Goodwin, p. 2257.
—— v. McElwee, pp. 3251, 3257, 3291, 3330.
—— Murphy v.
—— Turner v.
—— v. Turner, pp. 1494, 1544, 1547, 1550, 2038, 2039, 2042, 2043, 2045, 2411, 2481, 2482, 2483, 3064, 3087.
—— v. Wilson, p. 2125.
Western, etc., R. Co., Bell Bros. v.
—— Boatmen's Sav. Bank v.
—— v. Burnham, p. 2917.
—— v. Carlton, p. 3.
—— Covintgon v.
—— Daniels v.
—— v. Deitch, p. 2867.
—— v. Earwood, pp. 1912, 1915.
—— Elliott v.
—— Exposition Cotton Mills v.
—— v. Exposition Cotton Mills, pp. 788, 939, 942, 948, 954, 1490, 3304, 3306, 3377, 3390, 3396, 3397, 3403.
—— Hamilton v.
—— v. Herold, p. 2123.
—— v. Hunt, p. 2666.
—— Hutchings v.
—— Interstate Commerce Comm. v.
—— Kentucky, etc., Fire Ins. Co. v.
—— v. Ledbetter, pp. 2429, 3105.
—— Lewis v.
—— Lockhart v.
—— McGucken v.
—— Mitchell v.
—— v. Ohio Valley, etc., Co., pp. 320, 328, 335, 558, 560, 573, 575.
—— Penn Refin. Co. v.
—— Seaboard, etc., R. Co. v.
—— State v.
—— v. State, p. 2127.
—— v. Summerour, pp. 654, 695.
—— v. Voils, pp. 1561, 1562, 1914, 2065.
—— Wallace v.
—— Walters v.
—— Wilkes v.
Westervelt v. St. Louis Transit Co., pp. 1890, 2088, 2985.
Westfall v. Perry, p. 1352.
West Hartlepool Steam Nav. Co. v. 450 Tons of Kainit, pp. 3955, 3956.
—— v. Virginia-Carolina Chemical Co., p. 3955.
West Jersey Ferry Co., Burton v.
—— Fearn v.
West Jersey, etc., Co., Robertson v.
West Jersey, etc., R. Co., Feil v.
—— Johnson v.
—— Miller v.
—— Prethrow v.
—— Speer v.
—— Wilson v.
West Memphis Packet Co. v. White, pp. 2024, 2057.
Westminster, The.
Westmoreland, Darling v.
Weston v. Boston, etc., Railroad, pp. 641, 672, 676.
—— Edson v.
—— Malott v.
—— v. New York, etc., R. Co., pp. 1786, 2132.
Weston, etc., Railroad v. Mathis, p. 865.
West Pennsylvania R. Co., Bernhardt v.
Westphalen v. Atlantic, etc., R. Co., pp. 1289, 1348, 1457, 1458, 3409.
West Philadelphia R. Co., Rose v.
West Philadelphia, etc., R. Co. v. Gallagher, pp. 1829, 1960, 2126, 2174, 2884.
—— Whipple v.
Westray v. Miletus, p. 854.
West Seattle Land, etc., Co., Stevenson v.
West Side Belt R. Co., Wabash R. Co. v.
West Side R. Co., Kohler v.
Westside St. R. Co., Woodward v.
West St., etc., R. Co., Cogswell v.
West Virginia Cent., etc., R. Co., Carrico v.
West Virginia Mid. R. Co., Knicely v.
West Virginia Northern R. Co., United States v.
—— v. United States, pp. 3645, 3649, 3650.
West Virginia Transp. Co., Dresser v.
—— Laurel, etc., R. Co. v.
—— v. Sweetzer, pp. 4, 35, 36, 38, 62, 1194, 1199.
West Virginia, etc., R. Co., Berry v.
—— Carrico v.
—— Fisher v.
—— v. Kingwood Coal Co., p. 3826.
Westwood v. Dedham, etc., St. R. Co., pp. 77, 82, 131, 132.
Westznthins, In re.
Wetmore, Little Miami R. Co. v.
Wettstein, American Exp. Co. v.
Wetzell v. Chicago, etc., R. Co., p. 786.
—— v. Dinsmore, pp. 987, 1082.
Wever, Texas, etc., R. Co. v.
Weyand v. Atchinson, etc., R. Co., pp. 350, 363, 364, 369, 376, 377, 548, 3274.
Weymouth v. Broadway, etc., R. Co., 142 N. Y. 681, 37 N. E. 825—p. 1953.
—— v. Broadway, etc., R. Co., 2 Misc. Rep. 506, 22 N. Y. S. 1047, 51 N. Y. St. Rep. 612—p. 1953.
Whalen v. Consolidated Tract. Co., pp. 1715, 2069, 2074, 2887.
Whaley v. Atlantic, etc., R. Co., pp. 478, 496.
Wham, Denver, etc., R. Co. v.
Wharton, Atlantic, etc., R. Co. v.
What Cheer Sav. Bank v. Mowery, pp. 385, 386.
Whatcom County R., etc., Co., Bradburn v.
Whatley, Montgomery Tract. Co. v.
Wheat v. Platte, etc., R. Co., p. 576.
—— Texas, etc., R. Co. v.
Wheaton v. North Beach, etc., R. Co., pp. 1889, 2953.
Wheeler, Ætna Ins. Co. v.
—— Atlanta, etc., Railway v.
—— Barber & Co. v.
—— Barter & Co. v.
—— Deen v.
—— v. Grand Trunk R. Co., pp. 2116, 2212, 2867.
—— Great Western R. Co. v.
—— v. Hartford, etc., Tramway Co., p. 2087.
—— v. Hotel Stevens Co., p. 2375.
—— Houston City, etc, R. Co. v.
—— McFarland v.
—— v. Oceanic Steam Nav. Co., 52 Hun 75, 5 N. Y. S. 101, 22 N. Y. St. Rep. 590—p. 888.
—— v. Oceanic Steam Nav. Co., 72 Hun 5, 25 N. Y. S. 578, 55 N. Y. St. Rep. 715—p. 4032.
—— v. Oceanic Steam Nav. Co., 125 N. Y. 155, 26 N. E. 248, 21 Am. St. Rep. 729, Silvernail Ct. App. 276—pp. 822, 3195.
—— Rogers v.
—— St. Joseph, etc., R. Co. v.
—— v. St. Louis, etc., R. Co., p. 817.
—— v. San Francisco, etc., R. Co., pp. 210, 221, 1493.
—— Savannah Elect Co. v.
—— Scranton v.
—— v. South Orange, etc., Tract. Co., pp. 2346, 2894.
—— Stevens v.
—— Texas Cent. R. Co. v.
—— Wade v.
Wheeler Condenser, etc., Co., Hudson River Lighterage Co. v.
Wheeling Transportation Co. v.
—— Wheeling, etc., Transp. Co. v.
Wheeling Tract. Co., Killmeyer v.
—— Normile v.
Wheeling, etc., Bridge Co., Pennsylvania v.
Wheeling, etc., R. Co., Dimmey v.
—— Koontz v.
—— v. Koontz, 15 O. C. C. 288, 9 O. C. D. 102—pp. 380, 1224.
—— v. Koontz, 61 O. St. 551, 56 N. E. 471, 76 Am. St. Rep. 435—pp. 525, 1229, 1232, 1233, 1234.
Wheeling, etc., Transp. Co. v. Wheeling, p. 3581.
Wheelock, Parmelee v.
—— Parmelee Co. v.
Wheelwright v. Boston, etc., R. Co., p. 2139.
Whelan v. Georgia, etc., R. Co., p. 2260.
Wheless v. Meyer-Schmid Grocer Co., p. 1229.
Whicher v. Boston, etc., R. Co., pp. 3216, 3217, 3230.
Whilt v. Public Service Corp., 74 N. J. L. 141, 64 Atl. 972—p. 1961.
—— v. Public Service Corp., 76 N. J. L. 729, 72 Atl. 420, 74 Atl. 568—pp. 1961, 1969.
Whippel v. Michigan, etc., R. Co., pp. 1821, 1840.
Whipple v. Michigan Cent. R. Co., 90 N. W. 287, 130 Mich. 460—p. 2809.
—— v. Michigan Cent. R. Co., 106 N. W. 690, 143 Mich. 41—p. 2900.
—— v. Michigan Cent. R. Co., 143 Mich. 47, 106 N. W. 692—pp. 2645, 2900.
—— v. West Philadelphia, etc., R. Co., p. 2170.
Whitaker v. Chicago, etc., R. Co., pp. 815, 821.
—— Indianapolis St. R. Co. v.
—— v. Staten Island, etc., R. Co., p. 2888.

Whitbeck v. Atlantic Ave. R. Co., p. 2765.
Whitcher, Boston, etc., R. Co. v.
Whitcomb, Houston Transfer, etc., Co. v.
—— Leonard v.
White v. Atlantic Consol. St. R. Co., p. 2158.
—— Baltimore, etc., R. Co. v.
—— v. Boston, etc., R. Co., pp. 1828, 2793.
—— v. Boulton, p. 1694.
—— Bowigo v.
—— v. Canadian Pac. R. Co., p. 578.
—— Central, etc., R. Co. v.
—— v. Chesapeake, etc., R. Co., p. 2469.
—— v. Cincinnati, etc., R. Co., pp. 1343, 1345.
—— City Waterworks v.
—— v. Colorado Cent. R. Co., pp. 910, 915.
—— v. Columbia, etc., Elect. R. Co., p. 1992.
—— Columbian Nat. Bank v.
—— v. Conley, p. 744.
—— Eagle v.
—— v. Evansville, etc., R. Co., pp. 2454, 2621, 2622, 2623.
—— v. Fitchburg R. Co., pp. 1741, 1991, 2079, 2083, 2885.
—— Ft. Worth, etc., R. Co. v.
—— v. Goodrich Transp. Co., pp. 286, 287, 883, 1011.
—— v. Grand Rapids, etc., R. Co., p. 2433.
—— v. Great Western R. Co., p. 957.
—— Gulf, etc., R. Co. v.
—— Houston, etc., R. Co. v.
—— Illinois Cent. R. Co. v.
—— v. Illinois Cent. R. Co., pp. 1546, 1549, 1758, 1759.
—— Jeffersonville R. Co. v.
—— Kansas, etc., R. Co. v.
—— v. Lewiston, etc., R. Co., p. 2731.
—— v. Lewiston, etc., Railway, pp. 1536, 1805, 1807.
—— Louisville, etc., R. Co. v.
—— v. Milwaukee City R. Co., pp. 1986, 2889.
—— v. Minneapolis, etc., R. Co., pp. 670, 740, 767.
—— v. Missouri Pac. R. Co., pp. 211, 242, 440, 3364.
—— Missouri, etc., R. Co. v.
—— v. Mitchell, p. 1237.
—— v. Norfolk, etc., R. Co., pp. 2045, 2091, 3864.
—— v. North German Lloyd Steamship Co., pp. 610, 3867, 3868.
—— v. Peninsular R. Co., pp. 2125, 2210.
—— Pennsylvania R. Co. v.
—— v. Philadelphia Rapid Trans. Co., p. 2908.
—— v. Postal Tel., etc., Co., p. 10.
—— Richmond, etc., R. Co. v.
—— St. Louis, etc., R. Co. v.
—— v. St. Louis, etc., R. Co., pp. 3142, 3144.
—— v. Schweitzer, pp. 477, 493.
—— v. Seattle, etc., Nav. Co., pp. 3990, 3995.
—— v. South Covington, etc., R. Co., pp. 2054, 2701, 3070.
—— Southern R. Co. v.
—— Spencer v.
—— Texas, etc., R. Co. v.
—— v. The Kate Dale, p. 470.
—— v. The Mary Ann, p. 12.
—— v. Toncray, 36 Va. (9 Leigh) 347—p. 435.
—— v. Toneray, 46 Va. (5 Gratt.) 179—pp. 434, 435, 436, 456, 776, 3875, 3934.
—— Virginia, etc., R. Co. v.
White v. United States, p. 3865.
—— v. Van Kirk, pp. 333, 337, 338, 451.
—— v. Vann, pp. 1011, 1148.
—— v. Weir, pp. 3377, 3379.
—— v. Welsh, pp. 1212, 1214, 1231, 1232.
—— v. West End St. R. Co., p. 2248.
—— West Memphis Packet Co. v.
—— Yazoo, etc., R. Co. v.
White & Co., Blaisdell & Co. v.
White Laundry Co. v. Charleston, etc., R. Co., p. 165.
White Line Cent. Transit Co., Cincinnati Chronicle Co. v.
—— Standard Milling Co. v.
White Line Transit Co., Edwards v.
White Live Stoek Comm. Co. v. Chicago, etc., R. Co., p. 1365.
White Oak R. Co., State v.
White Star Line, Woods v.
White Star Steamship Co., Bullock v.
White Water R. Co. v. Butler, pp. 1755, 1867, 1872.
Whites' Exp. Co., Rappaport v.
Whitehead v. Anderson, pp. 1228, 1231, 1234, 1235, 1239, 1240, 1246, 1247.
—— Central R. Co. v.
—— v. St. Louis, etc., R. Co., 99 Mo. 263, 11 S. W. 751, 39 Am. & Eng. R. Cas. 410, 6 L. R. A. 409—pp. 1547, 1755, 1959, 2003, 2522, 2542, 2544, 2579, 2947.
—— v. St. Louis, etc., R. Co., 22 Mo. App. 60—p. 2122.
—— v. Wilmington, etc., R. Co., pp. 321, 323, 983.
Whitehill, Baltimore, etc., R. Co. v.
Whitehurst v. Texas, etc., R. Co., pp. 24, 778, 980.
Whiteley, Texas, etc., R. Co. v.
Whitesel, Madison, etc., R. Co. v.
Whitesell v. Crane, pp. 3189, 3190.
Whitesides v. Russell, p. 946.
—— v. Thurlkill, p. 728.
Whitefield, Memphis, etc., R. Co. v.
Whitham v. Chicago, etc., R. Co., p. 1668.
Whitin v. Pendegast, p. 772.
Whiting, Richardson v.
Whitley v. Southern R. Co., pp. 2509, 2513, 2547.
Whitling, Berkley v.
Whitlock, McAndrew v.
—— v. Northern Pac. R. Co., pp. 2076, 2960, 3075.
Whitman, Louisville, etc., R. Co. v.
—— v. Vanderbilt, p. 3962.
Whitmore v. Bowman, pp. 11, 768.
—— v. Caroline, pp. 3125, 3126, 3133, 3155.
Whitnack v. Chicago, etc., R. Co., pp. 326, 330, 331, 332, 333, 334, 3285.
Whitney v. Beckford, pp. 1155, 1156, 1157, 1159.
—— v. Chicago, etc., R. Co., pp. 849, 855, 908, 910, 918, 3161, 3169.
—— v. New York, etc., R. Co., pp. 1585, 2671.
—— v. Pullman Palace Car Co., p. 3224.
—— v. Rogers, pp. 1143, 1145.
—— Union Pac. R. Co. v.
Whitney Mfg. Co. v. Richmond, etc., R. Co., p. 524.
Whittaker, Illinois Cent. R. Co. v.
Whittemore v. Boston, etc., Railroad, 76 N. H. 388, 83 Atl. 125—p. 2435.
—— v. Boston, etc., Railroad (N. H.), 86 Atl. 824—p. 2561.
—— Illinois Cent. R. Co. v.
Whitten, Chicago, etc., R. Co. v.
Whittenburg, Blocker v.
Whittenton Mfg. Co. v. Memphis, etc., Packet Co., p. 829.
Whittier, Treadwell v.
Whittington, Baltimore, etc., R. Co. v.
Whittle v. Denver, etc., R. Co., p. 2001.
—— East Tennessee, etc., R. Co. v.
—— St. Louis, etc., R. Co. v.
—— v. Southern Railway, pp. 683, 684, 687, 688, 692, 3336.
Whittlesey v. Burlington, etc., R. Co., pp. 2735, 3007.
Whitworth v. Erie R. Co., pp. 1037, 1041, 1047, 3282, 3377, 3379, 3381.
Wibert v. New York, etc., R. Co. (N. Y.), 19 Barb. 36—pp. 246, 253, 621, 653, 655.
—— v. New York, etc., R. Co., 12 N. Y. 245—pp. 608, 618.
Wible v. Metropolitan St. R. Co., p. 2831.
Wiehern v. United States Exp. Co., p. 1045.
Wichita Mill, etc., Co., Orthwein's Sons v.
Wichita R., etc., Co., Burton v.
—— v. Cummings, p. 2312.
—— Finger v.
—— Haas v.
Wichita Sav. Bank v. Atchison, etc., R. Co., pp. 311, 312, 3879.
Wichita Valley R. Co., Stevens v.
Wichita Wholesale Grocery Co., Missouri Pac. R. Co. v.
Wichita, etc., Grocery Co., Missouri Pac. R. Co. v.
Wichita, etc., R. Co. v. Koch, 47 Kan. 753, 28 Pac. 1013—pp. 1411, 1424, 1425.
—— v. Koch, 8 Kan. App. 642, 56 Pac. 538—pp. 1420, 1426.
Wick v. St. Paul City R. Co., p. 2816.
Wickert v. Wisconsin Cent. R. Co., pp. 2511, 2512.
Wickham v. Leftwich, pp. 2906, 2973.
Wicks v. Louisville, etc., R. Co., pp. 1597, 2467.
Wickwire Steel Co. v. New York, etc., R. Co., pp. 3668, 3820, 3822.
Wideman, Southern R. Co. v.
Widener v. Philadelphia Rapid Transit Co., p. 2028.
Wideman, Louisville, etc., R. Co. v.
Widmer, La Conner, etc., Transp. Co. v.
Wiegand v. Central R. Co., pp. 3160, 3163, 3168, 3170, 3171.
Wiegel, Pittsburgh, etc., R. Co. v.
Wieland v. Southern Pac. Co., pp. 1667, 1668.
Wier, Flint, etc., R. Co. v.
—— Morris v.
Wigg v. Erie R. Co., p. 2795.
Wiggam, St. Louis, etc., R. Co. v.
Wiggin v. Boston, etc., R. Co., pp. 348, 517, 580, 590.
Wiggins v. King, p. 2462.
Wiggins Ferry Co. v. Chicago, etc., R. Co., p. 3268.
—— v. East St. Louis, 102 Ill. 560—p. 3587.
—— v. East St. Louis, 107 U. S. 365, 27 L. Ed. 419, 2 S. Ct. 257—pp. 3474, 3475, 3476, 3477, 3581, 3584, 3587.
—— Evers v.
—— Hammer v.
—— Morrissey v.
Wight v. United States, pp. 3436, 3437, 3684, 3685, 3687, 3690, 3694, 3702, 3711, 3712, 3741.

Wightman, Baltimore, etc., R. Co. v.
—— v. Chicago, etc., R. Co., pp. 1627, 2443.
Wilbanks, Gulf, etc., R. Co. v.
Wilbour v. Rhode Island Co., p. 2795.
Wilbourne, International, etc., R. Co. v.
Wilbur, Degado v.
—— v. Rhode Island Co., pp. 2587, 2590, 2675.
—— v. Southwest, etc., R. Co., p. 2697.
Wilburn v. St. Louis, etc., R. Co., p. 2608.
Wileke v. Henrotin, p. 2121.
Wilcox, Birmingham R., etc., Co. v.
—— Chicago, etc., R. Co. v.
—— v. Chicago, etc., R. Co., 24 Minn. 269—pp. 545, 592.
—— v. Chicago, etc., R. Co., 135 Mo. App. 193, 115 S. W. 1061—p. 1062.
—— Erie R. Co. v.
—— v. People, p. 3549.
—— v. Philadelphia, p. 3155.
—— v. Rhode Island Co., p. 2785.
—— v. San Antonio, etc., R. Co., pp. 1549, 2483.
—— Shackleford v.
—— Southern R. Co. v.
—— v. Southern Railway, pp. 1663, 2846, 2847, 2848.
Wilcox, etc., Co., Savannah, etc., R. Co. v.
Wild Hunter, Ellsworth v.
Wildcroft, The.
Wilde v. Lynn, etc., R. Co., p. 2195.
—— v. Merchants' Despatch Transp. Co., pp. 333, 1000, 1001.
Wildenfels, The.
Wilder, Croucher v.
—— Louisville R. Co. v.
—— v. Metropolitan St. R. Co., pp. 2691, 2737.
—— Ocean Steamship Co. v.
—— v. St. Johnsbury, etc., R. Co., pp. 211, 229.
Wildman, Evansville, etc., Steam Packet Co. v.
Wile, Howard Exp. Co. v.
—— v. Northern Pac. R. Co., pp. 2671, 2690.
Wilensky v. Central, etc., R. Co., 72 S. E. 418, 136 Ga. 889, Ann. Cas. 1912D. 271—p. 522.
—— v. Central, etc., R. Co., 10 Ga. App. 8, 72 S. W. 516—p. 522.
Wiles v. Northern Pac. R. Co., p. 3105.
Wiley, Randolph v.
—— v. Rutland R. Co., p. 2363.
Wiley, etc., Co., Swan v.
Wilhelm, G. C. & S. F. R. Co. v.
—— Gulf, etc., R. Co. v.
—— St. Louis, etc., R. Co. v.
Wilke v. Illinois Cent. R. Co., pp. 1269, 1457.
Wilkens, Baltimore, etc., R. Co. v.
Wilkerson, Baltimore City Pass. R. Co. v.
—— v. Corrigan Consol. St. R. Co., pp. 1986, 2682.
—— Ft. Worth, etc., R. Co. v.
—— Knoxville Tract. Co. v.
Wilkerson Bros., Houston, etc., R. Co. v.
Wilkes v. Buffalo, etc., R. Co., pp. 1582, 2864.
—— International, etc., R. Co. v.
—— v. Western, etc., R. Co., pp. 1768, 1776, 2575.
Wilkesbarre Lace Mfg. Co., First Nat. Bank v.
Wilkie v. Bolster, p. 2684.
Wilkins v. Atlantic, etc., R. Co., pp. 568, 1108.
—— Houston, etc., R. Co. v.
—— v. Pullman Co., p. 3208.
—— Smurthwaite v.
—— Steinman v.
Wilkinson, Alabama, etc., R. Co. v.
—— Atchison, etc., R. Co. v.
—— Baltimore City Pass. R. Co. v.
—— Burton v.
—— Norfolk, etc., R. Co. v.
—— v. Pensacola, etc., R. Co., p. 2921.
—— Richmond Tract. Co. v.
Will, Pomeroy, etc., Co. v.
Willamette Iron Bridge Co. v. Hatch, p. 3441.
Willamette Transp., etc., Co., Dice v.
Willamette Valley, Gleason v.
Willamette Val. R. Co., Moakler v.
Willamette, etc., R. Co., Lakin v.
Willard, Chicago, etc., R. Co. v.
—— v. Chicago, etc., R. Co., pp. 1397, 1472.
—— Ellis v.
—— v. Iowa Cent. R. Co., pp. 2809, 2863.
—— v. St. Paul City R. Co., pp. 2426, 2487, 2855, 3106.
—— v. Tayloe, p. 3871.
Willard Mfg. Co. v. Tierney, p. 392.
Willcox v. Missouri Pac. R. Co., p. 1249.
—— v. Richmond, etc., R. Co., p. 117.
Willett, Pullman Co. v.
—— v. Southern R. Co., pp. 3395, 3397.
Willetts v. Buffalo, etc., R. Co., pp. 1495, 2426.
Willey v. Portsmouth, p. 2737.
Willfong v. Omaha, etc., R. Co., p. 3524.
William Marshall, The.
William Power, The.
William Taber, The.
Williams, Adams Exp. Co. v.
—— Allen v.
—— v. Armour Car Lines, pp. 248, 263.
—— v. Atlantic, etc., R. Co., 56 Fla. 735, 48 So. 209, 24 L. R. A., N. S., 134—pp. 642, 643, 661, 669, 687.
—— v. Atlantic, etc., R. Co., 69 S. E. 402, 153 N. C. 360—p. 2559.
—— v. Baltimore, etc., R. Co., p. 806.
—— v. Branson, p. 10.
—— Bremner v.
—— v. Camden, etc., R. Co., p. 2316.
—— v. Carolina, etc., R. Co., pp. 2568, 3042, 3043, 3055.
—— v. Central R. Co., p. 1490.
—— v. Central, etc., R. Co., pp. 1390, 1455.
—— Chicago, etc., R. Co. v.
—— v. Chicago, etc., R. Co., pp. 2637, 2695.
—— v. Citizens' Elect. St. R. Co., pp. 2739, 2779, 2791.
—— Crawford v.
—— v. Delaware, etc., Canal Co., pp. 516, 890.
—— Dickman v.
—— v. Fears, 110 Ga. 584, 35 S. E. 699, 50 L. R. A. 685—p. 3566.
—— v. Fears, 179 U. S. 270, 45 L. Ed. 186, 21 S. Ct. 128—pp. 3418, 3419, 3420, 3421, 3435, 3566, 3569, 3570.
—— Ft. Smith, etc., R. Co. v.
—— Ft. Worth, etc., R. Co. v.
Williams v. Frost, pp. 3189, 3190.
—— Galveston, etc., R. Co. v.
—— v. Galveston, etc., R. Co., pp. 2128, 2646, 2906.
—— v. Gill, pp. 2046, 2055, 3032.
—— v. Grant, pp. 727, 732, 737, 748, 752.
—— v. Great Western R. Co., pp. 211, 238.
—— Gulf, etc., R. Co. v.
—— v. Hays, p. 3865.
—— v. Hodges, pp. 1233, 1235.
—— v. Holland, pp. 565, 567.
—— Houston, etc., R. Co. v.
—— Illinois Cent. R. Co. v.
—— International, etc., R. Co. v.
—— v. International, etc., R. Co., pp. 1950, 1951, 1979, 2344, 2755, 2888.
—— v. Island City Mercantile, etc., Co., p. 659.
—— v. Keokuk Northern Line Packet Co., p. 3145.
—— v. Louisiana R., etc., Co., p. 2532.
—— Louisville R. Co. v.
—— Louisville, etc., R. Co. v.
—— v. Louisville, etc., R. Co., 150 Ala. 324, 43 So. 576, 10 L. R. A., N. S., 413—pp. 2577, 2609.
—— v. Louisville, etc., R. Co. (Ala.), 58 So. 315—p. 332.
—— v. Louisville, etc., R. Co., 98 Ky. 247, 32 S. W. 934—p. 2527.
—— Missouri, etc., R. Co. v.
—— Mobile, etc., R. Co. v.
—— New York, etc., R. Co. v.
—— Norfolk, etc., R. Co. v.
—— North Chicago St. R. Co. v.
—— v. Oregon, etc., R. Co., pp. 1585, 2097.
—— Pecos, etc., R. Co. v.
—— v. Peytavin, p. 285.
—— v. Pittsburg R. Co., p. 2671.
—— Pittsburg, etc., R. Co. v.
—— v. Pullman Palace Car Co., 40 La. Ann. 87, 3 So. 631, 33 Am. & Eng. R. Cas. 407, 8 Am. St. Rep. 512—p. 3210.
—— v. Pullman Palace Car Co., 40 La. Ann. 417, 4 So. 85, 33 Am. & Eng. R. Cas. 414, 8 Am. St. Rep. 538—pp. 2042, 2074, 3226.
—— Richmond Tract. Co. v.
—— St. Louis, etc., R. Co. v.
—— San Antonio Tract. Co. v.
—— San Antonio, etc., R. Co. v.
—— Southern Exp. Co. v.
—— Southern R. Co. v.
—— v. Southern R. Co., 102 Miss. 617, 59 So. 850—pp. 1777, 1778, 2084.
—— v. Southern R. Co., 155 N. C. 260, 42 R. R. R. 105, 65 Am. & Eng. R. Cas., N. S., 105, 71 S. E. 346—pp. 267, 268, 274, 278, 286, 3134, 3135, 3136, 3186, 3188.
—— v. Spokane Falls, etc., R. Co., pp. 2671, 2793.
—— Texas, etc., R. Co. v.
—— v. The Columbia, p. 800.
—— The Main v.
—— Toledo, etc., R. Co. v.
—— Torpey v.
—— v. T. & P. R. Co., p. 2120.
—— United States v.
—— v. Vanderbilt, pp. 1612, 1613, 1681, 2772, 3046.
—— v. Vermont Mut. Fire Ins. Co., p. 1118.
—— v. Walsh, p. 3604.
—— v. Webb, 22 Misc. Rep. 513, 49 N. Y. S. 1111—pp. 3125, 3126, 3146.
—— v. Webb, 58 N. Y. S. 300, 27 Misc. Rep. 508—pp. 3214, 3217, 3221, 3222.
—— Wells, Fargo Exp. Co. v.
—— West Chicago St. R. Co. v.

Williams v. Wilmington, etc., R. Co., p. 294.
—— Yazoo, etc., R. Co. v.
—— v. Yazoo, etc., R. Co., p. 1429.
Williams Co. v. Pensacola, etc., Co., p. 619.
Williams & Co. v. Dotterer, pp. 1206, 1210.
Williams & Sons v. Morgan, p. 779.
Williams, etc., Co., Northern v.
Williamson v. Central, etc., R. Co., pp. 1679, 1747, 1864, 3045, 3055, 3089.
—— v. Grand Trunk Western R. Co., pp. 1524, 2772.
—— Prendergast v.
—— v. St. Louis Transit Co., pp. 2181, 2262, 2919, 2920.
—— v. St. Louis, etc., R. Co., pp. 2008, 2699.
Williamson & Co. v. Texas, etc., R. Co., pp. 319, 513, 516, 729.
Williamsport, etc., Lumber Co. v. Baltimore, etc., R. Co., pp. 493, 812.
Williamsport, etc., R. Co., Clunn v.
Willie D. Sandhoval, The.
Willie, The.
Williford, Kansas City, etc., R. Co. v.
—— v. Southern Railway, pp. 1518, 2328, 2673, 2790, 2873.
Willing, New York, etc., R. Co. v.
Willis, Birmingham R., etc., Co. v.
—— v. Chowning, p. 3398.
—— v. Grand Trunk R. Co., p. 945.
—— v. Long Island R. Co. (N. Y.), 32 Barb. 398—p. 2182.
—— v. Long Island R. Co., 34 N. Y. 670—pp. 1953, 1955, 2004, 2181.
—— v. Metropolitan St. R. Co., 71 N. Y. S. 554, 63 App. Div. 332—p. 2907.
—— v. Metropolitan St. R. Co., 78 N. Y. S. 478, 76 App. Div. 340, 33 Civ. Proc. R. 199—pp. 2656, 2658.
—— v. St. Joseph R., etc., Co., p. 1710.
—— v. Second Ave. Tract. Co., pp. 2012, 2261.
—— Texas Mex. R. Co. v.
Willis & Bro., Allyn & Co. v.
—— Fox & Bro. v.
Williscroft v. Cargo of the Cyrenian, pp. 3957, 3962, 3973.
Willison v. Northern Pac. R. Co., pp. 1460, 1466.
Willmington Steamboat Co., Klair v.
Willmott v. Corrigan Consol. St. R. Co. (Mo.), 16 S. W. 500—pp. 2797, 2802.
—— v. Corrigan Consol. St. R. Co., 106 Mo. 535, 17 S. W. 490—pp. 1558, 1740, 2372, 2388, 2797, 2802, 2916.
Willock v. Pennsylvania R. Co., pp. 729, 733, 749, 779, 782, 790, 791, 950.
Willoeby, Citizens' St. R. Co. v.
Willoughby v. Chicago Junction, etc., Stock Yards Co., pp. 91, 3703.
Wills v. Atchison, etc., R. Co., pp. 1698, 1708, 1721, 2015.
—— Chesapeake, etc., R. Co. v.
—— v. Lynn, etc., R. Co., p. 2188.
—— Sears v.
Willson v. Northern Pac. R. Co., pp. 3084, 3097.
Wilm, Gulf, etc., R. Co. v.
Wilmerding, Cartwright v.
Wilmington City R. Co., Benson v.
Wilmington City R. Co., Betts v.
—— Butler v.
—— Eaton v.
—— Elliott v.
—— File v.
—— Reiss v.
—— Riedel v.
—— Smithers v.
—— Waller v.
Wilmington Steamboat Co., Klair v.
—— Reed v.
—— v. Walker, p. 4002.
Wilmington, etc., R. Co., Allen v.
—— Arrington v.
—— Atlantic Exp. Co. v.
—— Black v.
—— Branch v.
—— Carter v.
—— Clark v.
—— v. Greenville, p. 3272.
—— Harrell v.
—— Hedges v.
—— Herring v.
—— Hilliard v.
—— Hines v.
—— Hodges v.
—— Keeter v.
—— King v.
—— Land v.
—— McGowan v.
—— McRae v.
—— Neal & Co. v.
—— Owens v.
—— Potter v.
—— Raynor v.
—— Rocky Mount Mills v.
—— Rose v.
—— Selby v.
—— Skinner v.
—— Smith v.
—— Tomlinson v.
—— Turrentine v.
—— Wallace v.
—— Wells v.
—— Whitehead v.
—— Williams v.
—— Young v.
—— Zemp v.
Wilmington, etc., Tract. Co., Freeman v.
Wilmshurst v. Bowker, p. 352.
Wilsey, Louisville, etc., R. Co. v.
—— v. Louisville, etc., R. Co., pp. 1529, 1597, 1973, 1975, 2432, 2467, 2468, 2663.
Wilson, Adams Exp. Co. v.
—— v. Adams Exp. Co., p. 549.
—— v. Ætna Ins. Co., p. 1118.
—— v. Anderson, p. 573.
—— v. Atlanta, etc., R. Co., pp. 267, 270, 284, 288, 603, 610, 654, 848, 853.
—— v. Atlantic, etc., R. Co., 129 Fed. 774—p. 244.
—— v. Atlantic, etc., R. Co., 79 S. C. 198, 60 S. E. 663—p. 164.
—— v. Atlantic, etc., R. Co. (N. C.), 75 S. E. 1090—p. 846.
—— v. Baltimore, etc., R. Co., pp. 3221, 3224.
—— v. Brett, p. 3067.
—— v. Broadway, etc., R. Co., p. 2764.
—— v. California Cent. R. Co., pp. 513, 820, 896, 900, 916, 917.
—— v. Charleston, etc., R. Co., p. 2280.
—— v. Chesapeake, etc., R. Co., pp. 946, 997, 1054, 3139, 3142, 3145, 3160, 3164, 3165, 3166, 3176, 3177, 3178.
—— Chicago, etc., R. Co. v.
—— v. Chicago City R. Co., pp. 2679, 2809, 2810.
—— v. Churchman, p. 1218.
—— Cleveland, etc., R. Co. v.
—— Crittenden v.
—— De Grau v.
—— v. Detroit United Railway, pp. 1531, 1795, 2278.
Wilson, Elgin City R. Co. v.
—— Elgin, etc., Tract. Co. v.
—— Evansville, etc., R. Co. v.
—— Faucher v.
—— Ft. Worth, etc., R. Co. v.
—— v. Fourteenth St. R. Co., p. 2373.
—— v. Gaines, pp. 63, 64.
—— v. Grand Trunk Railway, 56 Me. 60, 96 Am. Dec. 435—pp. 1153, 3109, 3134, 3138, 3167.
—— v. Grand Trunk Railway, 57 Me. 138, 2 Am. Rep. 26—p. 285.
—— Gulf, etc., R. Co. v.
—— v. Hamilton, pp. 11, 728, 740, 755, 763, 764, 768, 956, 1267, 1268, 1270, 1271.
—— v. Harry, pp. 3308, 3359.
—— Indianapolis St. R. Co. v.
—— Louisville, etc., R. Co. v.
—— v. Louisville, etc., R. Co., p. 801.
—— Mason v.
—— v. Missouri Pac. R. Co., p. 1321.
—— v. N. Castle, etc., R. Co., p. 653.
—— v. New Orleans, etc., R. Co., 63 Miss. 352—pp. 1666, 1852, 1875, 2068.
—— v. New Orleans, etc., R. Co., 68 Miss. 9, 8 So. 330—pp. 1869, 1875, 2068
—— Newport Dock Company v.
—— v. Northern Pac. R. Co., pp. 1722, 2128, 2260, 2682.
—— Pennsylvania R. Co. v.
—— v. Platt, p. 987.
—— Railway Co. v.
—— St. Louis, etc., R. Co. v.
—— v. St. Louis, etc., R. Co., pp. 1253, 1256, 1258, 1259.
—— v. Shaw, pp. 3445, 3446, 3449.
—— South, etc., R. Co. v.
—— v. Southern Pac. R. Co., pp. 917, 1040.
—— Strauss v.
—— Texas Mex. R. Co. v.
—— Texas, etc., R. Co. v.
—— v. The Lanashire, etc., R. Co., p. 653.
—— v. Troy, p. 855.
—— Turney v.
—— v. United States, p. 3461.
—— Western, etc., Railroad v.
—— v. West Jersey, etc., R. Co., p. 2463.
—— Yazoo, etc., R. Co. v.
—— v. York, etc., Railway, p. 634.
Wilson Grain Co. v. Central Nat. Bank, p. 393.
Wilson Hack Line, Texas, etc., R. Co. v.
Wilson Lumber Co., Hinckley v.
Wilson Sewing Mach. Co. v. Louisville, etc., R. Co., p. 547.
Wilson Sons & Co., Morris v.
Wilsons, etc., Line, Bloomingdale v.
Wilt v. Wabash, etc., R. Co., pp. 2430, 2431.
Wilton v. Middlesex R. Co., 107 Mass. 108, 9 Am. Rep. 11—p. 2521.
—— v. Middlesex R. Co., 125 Mass. 130—pp. 1564, 1571, 2524.
Wiltse v. Barnes, pp. 571, 572.
Wiman, Fitzhugh v.
Wimberly, Rome R. Co. v.
Wimmer, Chicago, etc., R. Co. v.
Wimpleberg v. Yonkers R. Co., p. 2321.
Winbourn, In re.
Winchell v. National Exp. Co., pp. 863, 1008.
—— v. New York Cent., etc., R. Co., p. 1998.
—— v. St. Paul City R. Co., p. 2814.

Winchester, etc., R. Co. v. Commonwealth, p. 23.
Windels v. Interborough Rapid Trans. Co., p. 2872.
Windham, Wells Fargo & Co. v.
Windmiller v. Northern Pac. R. Co., pp. 1063, 1071.
Windolph v. Adams Exp Co., p. 3520.
Windsor Steamboat Co., Phelps v.
Winfrey, Chicago, etc., R. Co. v.
—— v. Missouri, etc., R. Co., pp. 1695, 2389.
Wing v. New York, etc., R. Co., pp. 747, 3300.
Wingard v. Banning, p. 1164.
Wingate, Bonner v.
—— Sears v.
—— Toledo, etc., R. Co. v.
—— Western Union Tel. Co. v.
Wingfield, Arkansas, etc., R. Co. v.
Winhein v. Field, p. 2594.
Winkler v. Philadelphia, etc., R. Co., p. 3431.
Winkley, Union Freight R. Co. v.
Winlow, Parker v.
Winn v. American Exp. Co., pp. 819, 834, 861, 932, 1051, 1052, 1055, 1447, 1448, 3763.
—— Highland Ave., etc., R. Co. v.
—— Little Rock Tract., etc., Co. v.
Winne v. Illinois Cent. R. Co., pp. 819, 821, 828, 856.
Winnebago, The.
Winnebago, etc., Transp. Co., Hungerford v.
Winnegar v. Central Pass. R. Co., pp. 210, 1491, 1492, 2042, 2043, 2044.
Winnett v. Union Stock Yards Co., pp. 2, 3, 6.
Winona R., etc., Co., Palmer v.
Winona, etc., R. Co. v. Blake, pp. 34, 36, 63, 116, 208, 3493, 3497.
—— Derosia v.
—— Harrold v.
—— Johnson v.
—— Lawrence v.
—— v. Rousseau, pp. 1762, 1994, 1995, 2236, 2583, 2585, 2599, 2603, 2611, 2615, 2823, 2825.
—— Schilling v.
—— State v.
Winscott v. Chicago, etc., R. Co., pp. 2507, 2508.
Winship v. New York, etc., R. Co., p. 2903.
Winslow v. Boston, etc., R. Co., p. 2138.
—— Illinois Cent. R. Co. v.
—— v. Norton, pp. 362, 369, 373, 1221.
—— The R. G.
—— Thompson v.
—— v. Thompson, 128 Fed. 73—p. 3882.
—— v. Thompson, 134 Fed. 546, 67 C. C. A. 470—p. 3882.
—— v. Vermont, etc., R. Co., pp. 897, 901.
Winslow Bros. & Co. v. Atlantic, etc., R. Co., 151 N. C. 250, 65 S. E. 965—p. 1399.
—— v. Atlantic, etc., R. Co., 79 S. C. 344, 60 S. E. 709—pp. 1350, 1403, 1406, 3396, 3522, 3537, 3546.
Winslow, etc., Co. v. Vermont, etc., R. Co., pp. 551, 554.
Winsor, Burnham v.
—— Cutler v.
Winsor Coal Co. v. Chicago, etc., R. Co., pp. 41, 1198.
Winston v. Cox, etc., Co., p. 543.
Winter v. Central Iowa R. Co., pp. 1998, 2638
—— Erie, etc., Co. v.
—— v. Interurban St. R. Co., p. 2685.
—— New York, etc., R. Co. v.
Winter v. St. Louis, etc., R. Co., p. 1855.
—— v. Simonton, p. 3865.
—— Webb v.
Winters v. Baltimore, etc., R. Co., pp. 2164, 2214, 2292, 2806.
—— Chicago, etc., R. Co. v.
—— Cowen v.
—— v. Cowen, p. 3095.
—— v. Hannibal, etc., R. Co., p. 2200.
Winthrop Steamboat Co., Hughson v.
Wireman, Philadelphia, etc., R. Co. v.
Wirgman, Mactier v.
Wisconsin, State v.
—— Stone v.
—— v. Young, pp. 337, 338.
Wisconsin Cent. Co., Grinnell v.
Wisconsin Cent. R. Co., Beede v.
—— Lavis v.
—— McKibbin v.
—— Mahaffey v.
—— Mullan v.
—— Pope v.
—— v. United States, p. 3702.
—— Wickert v.
Wisconsin, etc., Railroad v. Jacobson, pp. 34, 103, 3486, 3535, 3647.
Wisconsin, etc., R. Co., Jacobson v.
—— v. Powers, pp. 3592, 3593.
Wisdom, Mobile, etc., R. Co. v.
Wise, Birmingham R. etc., Co. v.
—— v. Brooklyn Heights R. Co., p. 2879.
—— v. Columbia R., etc., Co., pp. 2378, 2391, 2947.
—— v. Covington, etc., St. R. Co., p. 2050.
—— v. South Covington, etc., R. Co., pp. 2050, 2053, 2056.
—— Sterling, etc., R. Co. v.
—— v. Wabash R. Co., pp. 1882, 2144.
Wisecarver v. Chicago, etc., R. Co., pp. 1318, 1330, 1349, 1367, 3276.
Wiseman, Galveston, etc., R. Co. v.
Wisner, Railroad Co. v.
Wissman, Ship Howard v.
Wisewell, North Chicago St. R. Co. v.
Witbeck v. Holland (N. Y.), 55 Barb. 443, 38 How. Prac. 273—pp. 535, 890.
—— v. Holland, 45 N. Y. 13—pp. 286, 535.
—— v. Schuyler, pp. 278, 279.
Witchia K., etc., Co., Haas v.
Witch Queen, The.
Withee v. Somerset Tract. Co., p. 1820.
Witherbee v. Meyer, p. 659.
Witherington, American Standard Jewelry Co. v.
Withers, Fordyce v.
—— v. Macon, etc., R. Co., pp. 1217, 1218.
—— Missouri, etc., R. Co. v.
—— v. Missouri, etc., R. Co., p. 453.
—— v. New Jersey Steamboat Co., pp. 492, 776, 798.
Witherspoon, Missouri, etc., R. Co. v.
Withey v. Pere Marquette R. Co., pp. 3120, 3121, 3123.
Withrow v. Southern R. Co., pp. 652, 679.
Witsell v. West Asheville, etc., R. Co., p. 2761.
Witt v. East Tennessee, etc., R. Co., pp. 557, 564.
—— Fraser v.
Witte, Pennsylvania Co. v.
Witters v. Metropolitan St. R. Co., p. 1984.
Witting v. St. Louis, etc., R. Co., 101 Mo. 631, 14 S. W. 743, 20 Am. St. Rep. 636, 10 L. R. A. 602—pp. 844, 1037, 1041, 1047, 1061, 1074.
—— v. St. Louis, etc., R. Co., 28 Mo. App. 103—pp. 1036, 1037.
Wittman v. C. H. & D. R. Co., pp. 2614, 2697.
Wittnebert, Gulf, etc., R. Co. v.
Witty, Chicago, etc., R. Co. v.
Witzler v. Collins, pp. 270, 273, 274, 306, 317, 337, 338, 810.
Woas v. St. Louis Trans. Co., pp. 2701, 2767, 2857, 2871.
Wojczynska v. Chicago Consol. Tract. Co., p. 2696.
Wolcott, Chicago, etc., R. Co. v.
—— v. Eagle Ins. Co., p. 3943.
—— Krender v.
Wold v. Keyser, p. 3954.
Woldert Grocery Co., St. Louis, etc., R. Co. v.
Wolf v. American Exp. Co., pp. 619, 724, 728, 733, 734, 742, 745, 749, 821, 1036.
—— American Merchants' Union Exp. Co. v.
—— v. Chicago, etc., R. Co., pp. 2363, 2644, 2906.
—— v. Grand Rapids, etc., Railway, pp. 277, 3137, 3141, 3142, 3143, 3193.
—— v. Hough, p. 1156.
—— v. Metropolitan St. R. Co., p. 2306.
—— Missouri, etc., R. Co. v.
—— St. Louis, etc., R. Co. v.
—— v. Third Ave. R. Co., p. 2073.
—— Union Pac. R. Co. v.
—— v. Western Union Tel. Co., p. 1087.
Wolf Co., Oakland Sugar Mill Co. v.
Wolfe, Chicago, etc., R. Co. v.
—— v. Georgia R., etc., Co., 53 S. E. 239, 124 Ga. 693—p. 2574.
—— v. Georgia R., etc., Co., 2 Ga. App. 499, 58 S. E. 899—pp. 1949, 2017, 2042, 2056, 2057, 2058.
—— v. Lacy, etc., Co., pp. 849, 855.
—— Louisville, etc., R. Co. v.
—— v. Meyers, pp. 331, 337.
—— v. Missouri Pac. Ry. Co., p. 550.
Wolff, Central R. Co. v.
—— v. Central R. Co., pp. 3176, 3179, 3181.
—— Wabash, etc., R. Co. v.
Wolfkiel v. Sixth Ave. R. Co., pp. 1888, 2859, 2877.
Wolford v. New York Cent., etc., R. Co., 85 N. E. 1118, 191 N. Y. 554—pp. 1907, 2352.
—— v. New York Cent., etc., R. Co., 102 N. Y. S. 1008, 118 App. Div. 553—p. 2348.
Wolston, Gulf, etc., R. Co. v.
Wolven v. Springfield Tract. Co., pp. 2585, 2604.
Womack, Southern Exp. Co. v.
Wood v. American Nat. Bank, p. 2627.
—— Atchison, etc., R. Co. v.
—— v. Baltimore, etc., R. Co., p. 528.
—— Bell v.
—— Bretherton v.
—— v. Brooklyn City R. Co., p. 2199.
—— Central, etc., R. Co. v.
—— v. Chester Traction Co., pp. 1690, 2192.
—— Chicago, etc., R. Co. v.
—— v. Chicago, etc., R. Co., pp. 614, 633, 634, 734.
—— v. Crocker, pp. 729, 897, 901, 904, 907.

Wood v. Cunard Steamship Co., pp. 4009, 4011, 4032, 4034.
—— v. Delaware, etc., R. Co., p. 2850.
—— Dillingham v.
—— v. Erie R. Co., p. 725.
—— v. Fleetwood, p. 410.
—— v. Georgia K., etc., Co., pp. 1938, 2857, 2941.
—— Grant v.
—— Gulf, etc., R. Co. v.
—— v. Jones, pp. 2113, 2114.
—— v. Keyser, pp. 3954, 3970.
—— v. Lake, p. 1195.
—— v. Lake Shore, etc., R. Co., pp. 1877, 2114, 2236.
—— Louisville, etc., R. Co. v.
—— v. Louisville, etc., R. Co., pp. 2025, 2030.
—— McCranie v.
—— v. Maine Cent. R. Co., pp. 727, 749, 3109, 3158, 3167.
—— Merchants', etc., Ass'n v.
—— v. Metropolitan St. R. Co., 181 Mo. 433, 81 S. W. 152—p. 2874.
—— v. Metropolitan St. R. Co., 107 Mo. App. 372, 81 S. W. 1273—p. 2874.
—— v. Milwaukee, etc., R. Co., pp. 524, 885, 886, 887, 897, 907, 3264, 3286.
—— v. New York, etc., R. Co., pp. 2200, 2903.
—— Norfolk, etc., R. Co. v.
—— North German Lloyd Steamship Co. v.
—— v. Pennsylvania R. Co., p. 1787.
—— v. Perry, pp. 331, 336, 337, 339.
—— v. Philadelphia, etc., R. Co., pp. 1575, 2696.
—— v. Richmond, etc., R. Co., p. 2132.
—— v. Roach, pp. 1209, 1210.
—— Schloss v.
—— v. Sewall, pp. 3953, 3959.
—— South, etc., R. Co. v.
—— Southern Exp. Co. v.
—— v. Southern Exp. Co., pp. 948, 1056, 1065, 1075.
—— Southern R. Co. v.
—— v. Southern R. Co., pp. 1412, 1428.
—— Texas, etc., R. Co. v.
—— Trent, etc., Nav. Co. v.
—— United States v.
—— v. Yeatman, pp. 1219, 1239, 1240.
Wood & Co., Baltimore, etc., R. Co. v.
Wood, etc., Cattle Co., Galveston, etc., R. Co. v.
Woo Dan v. Seattle Elect. R., etc., Co., pp. 2156, 2391, 2746.
Woodward, Chicago, etc., R. Co. v.
Woodbridge v. Delaware, etc., R. Co., p. 2524.
—— King v.
—— United R., etc., Co. v.
Woodburn v. Cincinnati, etc., R. Co., pp. 422, 1014, 3346.
Woodbury v. Frink, pp. 587, 817.
—— v. Maine Cent. R. Co., p. 2134.
Woodford v. Baltimore, etc., R. Co., pp. 1303, 1307, 1319, 1363, 1453, 1459, 1479.
Woodgate v. Great Western R. Co., p. 1670.
Woodhouse v. Rio Grande R. Co., pp. 33, 139, 140, 142.
Woodland Steamboat Co., Patridge v.
Woodridge, King v.
—— United R., etc., Co. v.
Woodroffe v. Roxborough, etc., R. Co., p. 2196.
Woodruff v. Nashville, etc., R. Co., p. 1217.
Woodruff, Nelson v.
—— v. Noyes, pp. 1219, 1244.
—— v. Parham, p. 3594.
—— St. Louis, etc., R. Co. v.
—— v. Sherrad, pp. 982, 1066, 1067.
Woodruff Mills, St. Louis, etc., R. Co. v.
Woodruff Sleeping, etc., Coach Co. v. Diehl, pp. 3146, 3215, 3216, 3217, 3218, 3219.
Woodruff, etc., Coach Co., State v.
Woods v. Devin, pp. 727, 732, 748, 3130.
—— Friend v.
—— v. Metropolitan St. R. Co., pp. 1636, 1651, 2462, 2463.
—— Missouri, etc., R. Co. v.
—— New York, etc., R. Co. v.
—— Pullman Palace Car Co. v.
—— St. Louis, etc., R. Co. v.
—— v. Southern Pac. Co., p. 2537.
—— Texas, etc., R. Co. v.
—— Western Union Tel. Co. v.
—— v. White Star Line, p. 1795.
Woodward, Chicago, etc., R. Co. v.
—— Denver, etc., R. Co. v.
—— v. Grand Trunk R. Co., p. 581.
—— v. Illinois Cent. R. Co., 1 Biss. 403, Fed. Cas. No. 18006—pp. 848, 854, 3339.
—— v. Illinois Cent. R. Co., Fed. Cas. No. 18007, 1 Biss. 447—pp. 3339, 3376, 3379.
—— v. Westside St. R. Co., p. 2160.
Woodworth v. McBride, p. 585.
—— Pennsylvania, etc., R. Co. v.
Woolcott, Krender v.
Wooldridge & Son v. Fort Worth, etc., R. Co., pp. 932, 934, 935.
Woolery v. Louisville, etc., R. Co., pp. 1752, 1755, 2127, 2129, 2261, 2262, 2702.
Wooley v. Chicago, etc., R. Co., pp. 540, 710, 717.
—— Southern R. Co. v.
Woolner Distilling Co., Chicago, etc., R. Co. v.
Woolridge, Chicago, etc., R. Co. v.
Woolsey v. Brooklyn Heights R. Co., pp. 1783, 1927, 1928.
—— v. Chicago, etc., R. Co., pp. 1503, 1587.
Woolverton, Morgan v.
—— Myerson v.
—— Sejalon v.
Woolwine v. Chesapeake, etc., R. Co., p. 2502.
Woonsocket St. R. Co., Moore v.
Wooster v. Farr, pp. 354, 1148, 1150, 1151.
Wooten, Charlotte, etc., R. Co. v.
—— v. Mobile, etc., R. Co., p. 2332.
Worcester Consol. St. R. Co., Dolphin v.
—— Olund v.
Worcester, etc., R. Co., Commonwealth v.
—— Nashua Lock Co. v.
Worcester, etc., St. R. Co., Clinton v.
—— Cummings v.
Word, Ft. Worth, etc., R. Co. v.
—— Galveston, etc., R. Co. v.
—— Illinois Cent. R. Co. v.
Worden v. Canadian Pac. R. Co., p. 849.
Wordin v. Bemis, pp. 528, 699, 702, 718.
Work v. Boston Elev. R. Co., pp. 1991, 1994, 2797.
—— Ft. Worth, etc., R. Co. v.
—— v. Leathers, pp. 3873, 3897, 3907, 3909, 3923.
Workman v. New York, p. 4076.
Worland, Jeffersonville, etc., R. Co. v.
Worley, Atchison, etc., R. Co. v.
—— Louisville R. Co. v.
Wormsdorf v. Detroit City R. Co., pp. 1684, 1687, 1827, 1833, 2742, 2763.
Worrell, Louisville, etc., Tract. Co. v.
Wortham, Gulf, etc., R. Co. v.
—— Missouri Pac. R. Co. v.
Worthen v. Grand Trunk R. Co., pp. 2171, 2762.
Worthington, Baltimore, etc., R. Co. v.
—— v. Central Vermont R. Co., pp. 2183, 2869.
—— Cincinnati, etc., R. Co. v.
—— Kansas, etc., R. Co. v.
—— Railroad Comm. v.
—— The Arglye v.
Wove Realty Co., Diepenbrock v.
—— Keller v.
Wrasse v. Citizens' Tract. Co., p. 2518.
Wray, Feise v.
—— Siffken v.
Wren v. Texas, etc., R. Co., p. 1253.
—— Toledo, etc., R. Co. v.
Wright v. Adams Exp. Co., 230 Pa. 635, 79 Atl. 760—p. 3520.
—— v. Adams Exp. Co., 43 Pa. Super. Ct. 40—p. 3521.
—— Atchison, etc., R. Co. v.
—— v. Atlantic, etc., R. Co., p. 2141.
—— Birmingham R., etc., Co. v.
—— v. Boston, etc., R. Co., p. 2895.
—— v. Boughton, pp. 3256, 3327, 3339.
—— v. Caldwell, pp. 267, 271, 3136, 4008.
—— v. California Cent. R. Co., pp. 197, 1940, 2122, 2427, 2478, 2482, 2486, 2492, 2854, 3023, 3204, 3239.
—— v. Chicago, etc., R. Co., pp. 2021, 2027.
—— Cleveland, etc., R. Co. v.
—— Columbus, etc., R. Co. v.
—— East Tennessee, etc., R. Co. v.
—— Faulkner v.
—— Ft. Worth, etc., R. Co. v.
—— v. Georgia R., etc., Co., pp. 1684, 1747, 1748, 1840, 1845, 2722, 2940.
—— v. Glens Falls, etc., R. Co., pp. 1610, 2413.
—— v. Grace & Co., pp. 3907, 3908, 3922.
—— Gulf, etc., R. Co. v.
—— Louisville, etc., R. Co. v.
—— v. McKee, pp. 802, 804, 806.
—— Marine Bank v.
—— Missouri Pac. R. Co. v.
—— Missouri, etc., R. Co. v.
—— New York, etc., Steamship Co. v.
—— Norrington v.
—— v. Northampton, etc., R. Co., p. 1581.
—— Norwich Co. v.
—— v. Orange, etc., R. Co., p. 2427.
—— v. Pennsylvania R. Co., pp. 2673, 2682, 2888.
—— Perkins v.
—— v. Philadelphia Rapid Trans. Co., p. 3068.
—— Receivers v.
—— St. Louis, etc., R. Co. v.
—— San Antonio, etc., R. Co. v.
—— v. Sioux Falls Tract. System, pp. 2669, 2777.
—— v. Snell, p. 233.
—— Southern R. Co. v.
—— v. Spencer, p. 1169.
—— Texas, etc., R. Co. v.
—— The Francis.
—— Toledo, etc., R. Co. v.

Wright v. Union R. Co., pp. 2544, 2628.
—— Wabash R. Co. v.
—— Walsh v.
Wright, etc., Lighterage Co., Sanbern v.
Wright, etc., Wirecloth Co. v. Warren, pp. 551, 552, 561.
Wrightsville, etc., R. Co., Augusta, etc., R. Co. v.
—— v. Joiner, p. 2924.
—— Kight v.
—— Riley v.
—— Smith v.
—— State v.
Wrixon, North Chicago St. R. Co. v.
Wunseh v. Northern Pac. R. Co., p. 3125.
Wyatt v. Citizens' R. Co., 55 Mo. 485—pp. 2249, 2254.
—— v. Citizens' R. Co., 62 Mo. 408—pp. 2376, 2377, 2396.
—— v. Pacific Elect. R. Co., pp. 2686, 2687, 2690, 2820, 3007.
Wyatt Park R. Co., Duncan v.
Wyckoff, Chicago City R. Co. v.
—— v. Chicago, City R. Co., pp. 2741, 2860.
Wyland, Deere Plow Co. v.
Wyld v. Pickford, p. 233.
Wylde v. Northern R. Co., pp. 2354, 2836.
Wyler-Ackerland & Co. v. Louisville, etc., R. Co., p. 654.
Wyler, etc., Co. v. Louisville, etc., R. Co., pp. 499, 533, 807.
Wylie, Missouri, etc., R. Co. v.
Wyly, Atlanta, etc., R. Co. v.
Wyman v. Northern Pac. R. Co., pp. 1571, 1620, 2476.
Wynantskill Knitting Co. v. Murray, pp. 529, 877, 904.
Wynn v. Allard, p. 2300.
—— v. Central Park, etc., R. Co., 133 N. Y. 575, 30 N. E. 721, 4 Silvernail Ct. App. 214—pp. 1827, 1844, 2003, 2869.
—— v. Central Park, etc., R. Co., 14 N. Y. S. 172, 38 N. Y. St. Rep. 181—p. 2698.
—— v. City, etc., R. Co., pp. 2518, 2519, 2524, 2548.
—— v. Georgia R., etc., Co., pp. 1603, 1604.
—— Louisville, etc., R. Co. v.
—— v. Paducah City Railway, p. 2978.
—— Railway Co. v.
—— Texas, etc., R. Co. v.
Wynne Hoop, etc., Co., St. Louis, etc., R. Co. v.
Wyrick v. Missouri, etc., R. Co., pp. 426, 969, 978, 984, 1044, 1293, 3761.
Wysor, Norfolk, etc., R. Co. v.
W. & A. R. Co. v. Kelly, p. 488.

Y

Yadkin R. Co., Carleton v.
Yancey v. Boston Elevated R. Co., pp. 1521, 1556, 1905, 2330, 2861, 2866, 3007.
Yarboro, Koberts v.
Yarborough v. Southern Railway, p. 846.
Yarbrough, Alabama, etc., R. Co. v.
—— Ex parte.
—— Southern Kansas R. Co. v.
Yarnell v. Kansas City, etc., R. Co., pp. 1893, 1911, 1912, 2511, 2667, 2686.
Yarwood, Galena, etc., R. Co. v.
Yates, Birmingham R., etc., Co. v.
—— Dixon v.
—— Gulf, etc., R. Co. v.
—— v. Milwaukee, p. 3529.
—— v. Philadelphia, etc., R. Co., p. 2732.
Yazoo, etc., R. Co. v. Aden, p. 2341.
—— v. Anderson, p. 2531.
—— Andrews v.
—— v. Baldwin, pp. 3115, 3116, 3119, 3120, 3123, 3126, 3127, 3129, 3151, 3185.
—— v. Beattie, pp. 1880, 2357.
—— v. Bent & Co., pp. 31, 315, 316, 429, 3540.
—— v. Blum, 89 Miss. 242, 42 So. 282, 11 Am. & Eng. Ann. Cas. 272—pp. 621, 622, 625.
—— v. Blum, 102 Miss. 303, 59 So. 92—pp. 900, 911.
—— v. Blum Co., pp. 615, 621.
—— Brown v.
—— v. Byrd, pp. 2115, 2117, 2175, 2176, 2180, 2184.
—— Campbell v.
—— v. Christmas, pp. 651, 661, 666, 683, 697.
—— Coleman v.
—— Daugherty v.
—— Davis v.
—— Dougherty v.
—— v. Faust (Miss.), 32 So. 9—p. 3055.
—— v. Faust (Miss.), 34 So. 356—p. 3059.
—— v. Fisher Bros., pp. 258, 263.
—— v. Fitzgerald, pp. 3071, 3076.
—— v. Georgia Home Ins. Co., pp. 3119, 3129.
—— v. Grant, p. 2641.
—— v. Greenwood Grocery Co., 96 Miss. 403, 51 So. 450—p. 3501.
—— v. Greenwood Grocery Co., 227 U. S. 1, 33 S. Ct. 213—p. 3488.
—— v. Hardie, pp. 2776, 3057.
—— v. Hatch, p. 2820.
—— v. Hughes, 94 Miss. 242, 47 So. 662, 22 L. R. A., N. S., 975—p. 3172.
—— v. Hughes (Miss.), 50 So. 627—p. 3054.
—— v. Humphrey, pp. 2301, 2336, 2641, 2676, 2690, 2861.
—— v. Jackson Vinegar Co., p. 161.
—— Johnson v.
—— v. Keystone Lumber Co., p. 25.
—— Keystone Lumber Yard v.
—— King v.
—— Kinney v.
—— v. McCall, p. 3180.
—— v. McKay, p. 625.
—— Metcalf v.
—— v. Millsaps, pp. 739, 744, 1041.
—— v. Mitchell, pp. 3013, 3015, 3055.
—— Parish & Co. v.
—— Reed v.
—— Reid v.
—— v. Roberts, pp. 1708, 2144, 2862.
—— v. Rodgers, p. 3092.
—— v. Searles, pp. 235, 700, 701, 705, 706, 716, 717, 718.
—— v. Shelby, pp. 2526, 2785.
—— v. Smith, 82 Miss. 656, 35 So. 168—p. 3017.
—— v. Smith (Miss.), 60 So. 73—p. 1918.
—— Tate v.
—— Thompson v.
—— v. Tillman, p. 2802.
—— Toler v.
—— Vincent v.
—— v. White, pp. 2848, 3015.
—— Williams v.
—— v. Williams, p. 3018.
—— v. Wilson, p. 1016.
Yeager, Union R., etc., Co. v.
Yeatman, Wood v.
Yecker v. San Antonio Tract. Co., p. 2319.
Yegen v. Northern Pac. R. Co., pp. 301, 348, 387.
Yeomans v. Contra Costa Steam Nav. Co., pp. 1577, 1588.
Yerkes v. Keokuk, etc., Packet Co., p. 2683.
Yersack v. Lackawanna, etc., R. Co., p. 2277.
Yesbik v. Macon, etc., R. Co., p. 303.
Yetter, Snelling v.
Yielding, Birmingham R., etc., Co. v.
Yoakum v. Dryden, pp. 268, 271, 272, 275, 276.
—— v. Dunn, pp. 663, 671, 820, 847, 850, 859, 876.
Yoder, Pennsylvania Co. v.
Yohe, Ohio, etc., R. Co. v.
Yonge v. Kinney, pp. 2298, 2693.
—— v. Pacific Mail Steamship Co., p. 3040.
Yonkers R. Co., Clancy v.
—— Gunter v.
—— Johnson v.
—— Nash v.
—— Wimpleberg v.
—— Zeccardi v.
Yopst, Western Union Tel Co. v.
York v. Chicago, etc., R. Co., pp. 28, 3574.
—— Gulf, etc., R. Co. v.
—— Missouri Pac. R. Co v.
York Co. v. Central Railroad, pp. 208, 726, 732, 739, 748, 930, 944, 947, 958, 959, 960, 961, 964, 970, 1003, 1180, 4025.
York Silk Mfg. Co., Charavay v.
York, etc., Co., New York, etc., R. Co. v.
York, etc., Railway, Wilson v.
Yorke Furniture Co. v. Southern R. Co., pp. 3681, 3753.
Yorton v. Milwaukee, etc., R. Co., 54 Wis. 234, 11 N. W. 482, 41 Am. Rep. 23—pp. 1976, 2460.
—— v. Milwaukee, etc., R. Co., 62 Wis. 367, 21 N. W. 516, 23 N. W. 401—pp. 3078, 3079.
Youghiogheny, etc., Coal Co. v. Erie R. Co., p. 255.
Youmans, Trowell v.
—— v. Wabash R. Co., p. 1551.
Young v. Boston, etc., R. Co., pp. 2353, 2354, 2797.
—— Bullard v.
—— Cassilay v.
—— v. Central, etc., R. Co., p. 1619.
—— Chicago City R. Co. v.
—— Chicago Terminal Transfer R. Co. v.
—— Chicago, etc., R. Co. v.
—— v. Chicago, etc., R. Co., p. 2286.
—— Cooper v.
—— v. East Alabama R. Co., p. 517.
—— Evansville, etc., R. Co. v.
—— Ex parte.
—— v. Fewson, p. 1941.
—— v. Frazier, p. 3479.
—— Galveston, etc., R. Co. v.
—— Insurance Co. v.
—— International, etc., R. Co. v.
—— Jolly v.
—— Kansas, etc., R. Co. v.
—— v. Lehman, etc., Co., p. 395.
—— v. Maeller, p. 701.
—— Missouri Pac. R. Co. v.
—— v. Missouri Pac. R. Co., 93 Mo App. 267—p. 2233.
—— v. Missouri Pac. R. Co. (Mo. App.), 84 S. W. 175—pp. 2235, 2293, 2666, 2825.
—— v. Moeller, p. 355.
—— v. New York, etc., R. Co., pp. 1514, 1796.
—— Passenger Railway v.
—— v. Pennsylvania R. Co., pp. 2495, 3182, 3318.

Young, Philadelphia, etc., R. Co. v.
—— St. Louis, etc., R. Co. v.
—— Sanders v.
—— v. Smith, pp. 524, 534, 3168.
—— v. Southern R. Co., pp. 830, 877.
—— Sword v.
—— v. Texas, etc., R. Co., pp. 2485, 2488, 2533.
—— Western R. Co. v.
—— v. Wilmington, etc., R. Co., pp. 915, 916.
—— Wisconsin v.
Young & Co., Cassilay v.
Younger, Gulf, etc., R. Co. v.
Youngerman, Cubbage v.
Yount, St. Louis, etc., R. Co. v.
—— v. Wabash R. Co., p. 530.
Yowell, Louisville, etc., R. Co. v.
Yturbide v. United States, p. 3696.
Yudelson, Louisville, etc., R. Co. v.
Yukon Independent Transp. Co., Pacific Coast Co. v.

Z

Zabron v. Cunard Steamship Co., p. 3979.
Zachary, North Carolina R. Co. v.
—— v. North Carolina R. Co., p. 3431.
Zackery v. Mobile, etc., R. Co., pp. 1495, 1496.
Zagelmeyer v. Cincinnati, etc., R. Co., pp. 69, 1598, 2467, 2470, 3078.
Zahloot v. Adams Exp. Co., p. 944.
Zalk v. Great Northern R. Co., pp. 803, 808.
Zambetti v. Garton, p. 3868.
Zamore v. Boston Elev. R. Co., pp. 2176, 2974.
Zanesville, etc., Road Co., Talmadge v.
Zantzinger, Galveston, etc., R. Co. v.
Zarniko, Clark v.
Zebe, Pennsylvania R. Co. v.
Zeccardi v. Yonkers R. Co., pp. 1525, 1526, 2042, 2051.
Zeigler v. Wells, etc., Co., pp. 807, 850.
Zeigler Bros. v. Mobile, etc., R. Co., pp. 3168, 3170, 3172, 3186, 3188, 3195.
Zemp v. Wilmington, etc., R. Co., pp. 2673, 2856, 2861.
Zenobia, The.
Zerega v. Poppe, p. 757.
Zerler, South Chicago City R. Co. v.
Zernecke, Chicago, etc., R. Co. v.
Zetterberg v. Great Northern R. Co., pp. 217, 218.
Ziegler v. Freeman, pp. 587, 816, 842.
Zilly, Indiana, etc., R. Co. v.
Zimmer v. Fox River Valley, etc., R. Co., pp. 2310, 2344, 3000.
—— v. New York, etc., R. Co., 137 N. Y. 460, 33 N. E. 642—pp. 984, 987, 1074, 1397, 1403.
—— v. New York, etc., R. Co., 16 N. Y. S. 631, 62 Hun 619, 42 N. Y. St. Rep. 63—p. 1381.
—— v. Third Ave. R. Co., p. 1699.
Zimmerman, Bloomington, etc., Railway v.
—— v. Rainey, p. 3948.
Zimmerman & Co., Gulf, etc., R. Co. v.
Zimmern's Coal Co. v. Louisville, etc., R. Co., p. 489.
Zink, East St. Louis, etc., R. Co. v.
Zinn v. New Jersey Steamboat Co., pp. 511, 602, 896, 901, 902.
Zoffinger, Lake Erie, etc., R. Co. v.
Zone, The.
Zouch v. Chesapeake, etc., R. Co., pp. 931, 949, 970, 1054, 1071, 1075, 1363.
Zuendt v. Missouri Pac. R. Co., pp. 2209, 2899.
Zwirtz, Choctaw, etc., R. Co. v.

CARRIERS

PART I

CARRIERS GENERALLY

CHAPTER I.

WHO ARE CARRIERS.

I. Common Carriers Defined, § 1.
II. Common Carriers and Private Carriers Distinguished, § 2.
III. Persons and Corporations Who Are Common Carriers, §§ 3-18.
A. Railroad Companies, § 3.
B. Owners of Spur Lines or Switches, § 4.
C. Sleeping Car Companies, § 5.
D. Street Railways, § 6.
E. Express Companies, § 7.
F. Transportation and Forwarding Companies, § 8.
G. Proprietors of Stage Coaches, § 9.
H. Proprietors of Omnibuses and Baggage Wagons, § 10.
I. Draymen and Truckmen, § 11.
J. Telegraph and Messenger Companies, § 12.
K. Transfer and Storage Companies, § 13.
L. Livery Stable Keepers, § 14.
M. Mail Contractors, § 15.
N. Owners of Ships Carrying Goods for Hire, § 16.
O. Ferrymen, § 17.
P. Boats Engaged in Towing, § 18.

§ 1. Common Carriers Defined.—A common carrier is one who undertakes for hire to transport the goods of those who may choose to employ him from place to place.[1] The tests whether a carrier is a "common carrier" are:

1. **Common carriers defined.**—*United States.*—Propeller Niagara *v.* Cordes, 21 How. 7, 22, 16 L. Ed. 41; Liverpool, etc., Steam Co. *v.* Phenix Ins. Co., 129 U. S. 397, 440, 32 L. Ed. 788, 9 S. Ct. 469; Railroad Co. *v.* Lockwood, 17 Wall. 357, 377, 21 L. Ed. 627; United States *v.* Sioux City Stock Yards Co., 162 Fed. 556, judgment affirmed, 167 Fed. 126; United States *v.* Ramsey, 116 C. C. A. 568, 197 Fed. 144.

Florida.—Johnson *v.* Pensacola, etc., R. Co., 16 Fla. 623, 26 Am. Rep. 731.

Georgia.—Fish *v.* Chapman, 2 Ga. 349, 46 Am. Dec. 393.

Illinois.—Illinois Cent. R. Co. *v.* Frankenburg, 54 Ill. 88, 5 Am. Rep. 92.

New Hampshire.—Elkins *v.* Boston, etc., R. Co., 23 N. H. 275.

New York.—Spears *v.* Lake Shore, etc., R. Co. (N. Y.), 67 Barb. 513.

Ohio.—United States Exp. Co. *v.* Backman, 28 O. St. 144, affirming 2 Cin. R. 251, 13 O. Dec. 885.

Tennessee.—Moss *v.* Bettis, 51 Tenn. (4 Heisk.), 661, 13 Am. Rep. 1.

Every person who undertakes to carry for compensation the goods of all persons, indifferently, is a common carrier. Mershon *v.* Hobensack, 22 N. J. L. 372, affirmed in 23 N. J. L. 580.

One holding out to the public as ready to undertake for hire the transportation of goods and so inviting custom of the public is a common carrier. Lloyd *v.* Haugh, etc., Transfer Co., 223 Pa. 148, 72 Atl. 516. See, also, Russell *v.* Livingston (N. Y.), 19 Barb. 346.

A person engaged in the business of

First, he must be engaged in the business of carrying goods for others as a public employee, and so hold himself out; second, he must undertake to carry goods of the kind to which his business is confined; third, he must undertake to carry by the methods by which his business is conducted and over his established roads; fourth, transportation must be for hire; and, fifth, an action must lie against him if he refused without reason to carry such goods for those willing to comply with his terms.[2] It is not necessary, to constitute one a common carrier, that a stipulation should be entered into as to the amount of freight to be paid. But, unless a right to compensation exists, the common-law liability of a common carrier is not created, though there may be the responsibility of a mandatary incurred.[3] Common carriers undertake generally, and not as a casual occupation;[4] but in order to make them such, it is not necessary that this should be their exclusive business, or that they should be continuously or regularly employed in it. They may combine it with another and several avocations, and yet be common carriers, and subject to the "extraordinary liabilities which have been imposed upon them in consequence of the public nature of their employment."[5] In determining whether a person or corporation engaged in transporting goods for others is a common carrier the mode employed in such trans-

carrying for others generally, to and from any point, is a common carrier. Pennewill *v.* Cullen (Del.), 5 Har. 238.

A common carrier is one who holds himself out in common, that is, to all people alike, that he is engaged in the business of transporting persons, or certain kinds of property, and is prepared and ready to carry for all who apply, on the same terms. Judgment, 80 N. E. 636, reversed. Cleveland, etc., R. Co. *v.* Henry, 170 Ind. 94, 83 N. E. 710.

Any person or corporation offering its services to all persons similarly situated and performing as its public vocation the services of transporting passengers, freight, or intelligence is a common carrier in the particular spheres of such employment. Winnett *v.* Union Stock Yards Co. of Omaha, 81 Neb. 67, 115 N. W. 627.

When a carrier has a regularly established business for carrying all or certain articles, and especially if that carrier is a corporation created for the purpose of the carrying trade, and the carriage of the articles is embraced within the scope of its chartered powers, it is a common carrier. Liverpool, etc., Steam Co. *v.* Phenix Ins. Co., 129 U. S. 397, 404, 32 L. Ed. 788, 9 S. Ct. 469; Railroad Co. *v.* Lockwood (U. S.), 17 Wall. 357, 377, 21 L. Ed. 627.

A common carrier is such by virtue of his occupation, and not by virtue of the responsibilities under which he rests, and therefore the nature of his occupation as a common carrier is not affected by a restriction upon his responsibilities, whether the restriction be by law or by contract. Liverpool, etc., Steam Co. *v.* Phenix Ins. Co., 129 U. S. 397, 440, 32 L. Ed. 788, 9 S. Ct. 469.

2. Santa Fe, etc., R. Co. *v.* Grant Bros. Constr. Co., 13 Ariz. 186, 108 Pac. 467. See, also, Varble *v.* Bigley (Ky.), 14 Bush 698, 29 Am. Rep. 435, and Samms *v.* Stewart, 20 O. 69, 55 Am. Dec. 445. Compare Tuckerman *v.* Stephens, etc., Transp. Co., 32 N. J. L. 320.

The two distinguishing characteristics of a common carrier are in respect to his duty, he being obliged to transport goods offered, and in respect to his risk, he being liable as an insurer. Varble *v.* Bigley (Ky.), 14 Bush 698, 29 Am. Rep. 435.

To render one a common carrier his undertaking must be general and for all people indifferently. The undertaking may be evidenced by the carrier's own notice or practically by a series of acts, by his known habitual continuance in this line of business. He must assume to be the servant of the public, he must undertake for all people. A special undertaking for one man does not render a person a common carrier. One who follows carrying for a livelihood or who gives out to the world in any intelligible way that he will take goods or other commodities for transportation from place to place whether for a year, a season or less time is a common carrier and subject to all the liabilities of such. Fish *v.* Chapman, 2 Ga. 349, 46 Am. Dec. 393.

3. Knox *v.* Rives, etc., Co., 14 Ala. 249, 48 Am. Dec. 97.

4. Fish *v.* Chapman, 2 Ga. 349, 46 Am. Dec. 393; Varble *v.* Bigley (Ky.), 14 Bush 698, 29 Am. Rep. 435; Samms *v.* Stewart, 20 O. 69, 55 Am. Dec. 445; Moss *v.* Bettis, 51 Tenn. (4 Heisk.) 661, 13 Am. Rep. 1.

A person whose business is not the carrying of goods, and who does not hold himself out to the world as such, will not be regarded as a common carrier, although he may occasionally carry goods for hire. Samms *v.* Stewart, 20 O. 69, 55 Am. Dec. 445.

5. Moss *v.* Bettis, 51 Tenn. (4 Heisk.) 661, 13 Am. Rep. 1.

portation is immaterial.[6] Nor is it essential to constitute a common carrier that the person or corporation undertaking such service own the means of transportation.[7] But a carrier who hires his vehicle, or his team, or his servant, for the purposes of transportation, does not assume the liabilities, and acquire the rights of a common carrier.[8] If a man holds himself forth to the public to carry for hire, he is a common carrier as much in his first trip as in his second, third, or fourth.[9] A common carrier of goods which transports live stock is as to the latter property also a common carrier.[10] In some states there are statutes defining common carriers, and some of these definitions have been interpreted by the courts.[11] Persons carrying on a transportation business under circumstances which, in law, constitute them common carriers, can not devest themselves of that character, nor secure an exemption from its liabilities, by declaring in their bills of lading, etc., that they are not to be deemed common carriers. What they are is to be determined by the nature of their business.[12]

A common carrier of passengers is one who undertakes, for hire, to carry all persons indifferently who may apply for passage. It is not essential that the fare should be paid in advance, or tendered, to establish the relation and reciprocal duties of carrier and passenger; it is enough that it is understood that it is to be paid.[13]

The State as a Common Carrier.—When the state engages in business as a common carrier it assumes the same obligations and liabilities which are incident to that business when it is conducted by individuals.[14]

§ 2. Common Carriers and Private Carriers Distinguished.—A common carrier is one who openly professes to carry for hire the goods of all persons who comply with its terms, while a private carrier is one who takes goods

6. Arkadelphia Milling Co. *v.* Smoker Merchandise Co., 100 Ark. 37, 139 S. W. 680.

7. Cownie Glove Co. *v.* Merchants' Dispatch Transp. Co., 130 Iowa 327, 106 N. W. 749, 114 Am. St. Rep. 419, 4 L. R. A., N. S., 1060; Blakiston *v.* Davies, Turner & Co., 42 Pa. Super. Ct. 390.

8. Gracie *v.* Palmer (U. S.), 8 Wheat. 605, 5 L. Ed. 696.

9. Fuller *v.* Bradley, 25 Pa. 120.

10. Central, etc., R. Co. *v.* Hall, 124 Ga. 322, 52 S. E. 679, 4 L. R. A., N. S., 898, 110 Am. St. Rep. 170.

11. Statutory definitions.—By the Georgia statutes, Civil Code, §§ 2263, 2264, a common carrier is defined to be one who undertakes to transport goods for a compensation and who pursues the business constantly or continuously for any period of time or any distance of transportation. These sections of the Code were taken from the common law. Central, etc., R. Co. *v.* Lippman, 110 Ga. 665, 36 S. E. 202, 50 L. R. A. 673.

Carriers of passengers, do not come within the definition of common carriers contained in the Georgia Civil Code, in connection with § 2276 thereof. Central, etc., R. Co. *v.* Lippman, 110 Ga. 665, 36 S. E. 202, 50 L. R. A. 673.

A corporation is none the less a general carrier, as defined by the Minnesota statute, Gen. St. 1894, § 379, because its articles do not in terms prescribe that one of its powers is to carry freight. In re Minneapolis, etc., R. Co., 101 Minn. 132, 112 N. W. 13.

"Any other carrier engaged in the transmission of messages or transportation of passengers or freight for hire," as used in the Nebraska statute, Laws 1907, p. 320, c. 90, § 4, defining a common carrier to be a corporation, etc., owning, managing, or controlling a railroad, etc., or any express company, car company, sleeping car company, and freight line company, telegraph and telephone companies, and any other carrier engaged in the transmission of messages or transportation of passengers or freight for hire, means only such companies as by their public profession hold themselves out as engaged in transmitting messages or transporting passengers or freight for hire, and as willing to perform such services for any person having occasion to employ them. Winnett *v.* Union Stock Yards Co., 81 Neb. 67, 115 N. W. 627.

12. Common carriers can not divest themselves of that character by declarations to the contrary.—Bank *v.* Adams Exp. Co., 93 U. S. 174, 23 L. Ed. 872.

13. Common carrier of passengers defined.—N. & C. R. Co. *v.* Messino, 33 Tenn. (1 Sneed), 220; McGregor *v.* Gill, 114 Tenn. 521, 86 S. W. 318, 108 Am. St. Rep. 919.

14. The state as a common carrier.—Western, etc., R. Co. *v.* Carlton, 28 Ga. 180.

for transportation in a particular case.[15] It is not, every carrying of passengers for hire that constitutes a party a common carrier. A party having the conveniences for carrying persons may in some, or perhaps many, cases carry passengers for hire, when done at the instance of passengers and for their accommodation, without incurring the responsibilities of a common carrier. He would be a private carrier, and held accountable under rules much less stringent.[16] Railroad contractors who consent to carry a passenger on a construction train for hire are not to be deemed common carriers, but only private carriers for hire.[17]

Common Carrier Acting as a Private Carrier.—A common carrier may become a private carrier, or a bailee for hire, when, as a matter of accommodation or special engagement, it undertakes to carry something which it is not its business to carry.[18]

§§ 3-18. Persons and Corporations Who Are Common Carriers—§ 3. Railroad Companies.—A railroad company is a common carrier of both persons and property,[19] unless there is something in its charter to relieve it from

15. **Common carriers and private carriers distinguished.**—The Cape Charles, 198 Fed. 346. See, also, Samms *v.* Stewart, 20 O. 69, 55 Am. Dec. 445.

Those who are engaged in the business of carrying for all who apply, indiscriminately, upon a particular route, by whatever mode of transportation they conduct their business, must be regarded as common carriers; while those who undertake to carry in a single instance, for a particular person, not being engaged in the business as a general employment, even for a portion of the time, must be considered private carriers. Johnson *v.* Pensacola, etc., R. Co., 16 Fla. 623, 26 Am. Rep. 731, 735.

A private carrier is one who, without being engaged in such business as a public employment, undertakes to deliver goods in a particular case for hire or reward. Pennewill *v.* Cullen (Del.), 5 Har. 238.

One who is employed to tear down a house for another and deliver the brick and lumber at another place is simply a private carrier for hire. McBurnie *v.* Stelsly, 29 Ky. L. Rep. 1191, 97 S. W. 42.

16. N. & C. R. Co. *v.* Messino, 33 Tenn. (1 Sneed), 220; McGregor *v.* Gill, 114 Tenn. 521, 86 S. W. 318, 108 Am. St. Rep. 919.

17. Shoemaker *v.* Kingsbury (U. S.), 12 Wall. 369, 20 L. Ed. 432.

18. **Common carrier acting as a private carrier.**—Railroad Co. *v.* Lockwood (U. S.), 17 Wall. 357, 377, 21 L. Ed. 627; Liverpool, etc., Steam Co. *v.* Phenix Ins. Co., 129 U. S. 397, 440, 32 L. Ed. 788, 9 S. Ct. 469; Santa Fe, etc., R. Co. *v.* Grant Bros. Constr. Co., 228 U. S. 177, 33 S. Ct. 474, reversing on other grounds, 13 Ariz. 186, 108 Pac. 467.

"For example, if a carrier of produce, running a truck boat between New York City and Norfolk, should be requested to carry a keg of specie, or a load of expensive furniture, which he could justly refuse to take, such agreement might be made in reference to his taking and carrying the same as the parties chose to make, not involving any stipulation contrary to law or public policy." Railroad Co. *v.* Lockwood (U. S.), 17 Wall. 357, 377, 21 L. Ed. 627.

19. **A railroad company is a common carrier.**—*United States.*—Express Cases, 117 U. S. 1, 23, 29 L. Ed. 791, 6 S. Ct. 542, 628.

Georgia.—Fish *v.* Chapman, 2 Ga. 349, 46 Am. Dec. 393; Caldwell *v.* Richmond, etc., R. Co., 89 Ga. 550, 15 S. E. 678; East Tennessee, etc., R. Co. *v.* Whittle, 27 Ga. 535, 73 Am. Dec. 741.

New York.—Heineman *v.* Grand Trunk R. Co. (N. Y.), 31 How. Prac. 430, 1 Sheld. 95.

Texas.—Houston, etc., R. Co. *v.* Moore, 49 Tex. 31, 30 Am. Rep. 98; G., C. & S. F. R. Co. *v.* McGown, 65 Tex. 640; Missouri Pac. R. Co. *v.* Harris, 67 Tex. 166, 2 S. W. 574; Gulf, etc., R. Co. *v.* Trawick, 68 Tex. 314, 4 S. W. 567, 2 Am. St. Rep. 494.

Railroad companies are common carriers engaged in public employment affecting the public interest. Laurel, etc., R. Co. *v.* West Virginia Transp. Co., 25 W. Va. 324; West Virginia Transp. Co. *v.* Sweetzer, 25 W. Va. 434.

A railroad company, which serves business houses located along a spur track by delivering to them cars of freight and cars to be freighted and shipped, is a common carrier with respect to the use it makes of the track. Agee & Co. *v.* Louisville, etc., R. Co., 142 Ala. 344, 37 So. 680.

A railroad company carrying live stock for hire, for such as choose to employ it, is a common carrier; and none the less so that this is not its principal business. Kimball *v.* Rutland, etc., R. Co., 26 Vt. 247, 62 Am. Dec. 567.

Under Georgia statutes, Code of 1882, § 2083, and Acts of 1855, p. 155, railroad

the heavy responsibilities of that character.[20] A railroad company which charges for the transportation of cattle, but permits the shipper to travel on a free pass upon the cars to take care of the cattle, is a common carrier for hire, both as to passenger and cattle.[21] A railroad company transporting at reduced rates men and supplies required by a construction company in grading an extension is not acting as a common carrier.[22] Evidence that twice in two years a railroad company had carried goods in passenger trains does not tend to prove that they intended to hold themselves out as common carriers of goods in passenger trains.[23] The character of common carrier imposed upon a railroad company can not be surrendered. It is imposed as the consideration which the public are to receive in return for the grants and privileges under the charter. The company, perhaps, may abandon its franchise and cease operating its road, but until then, at least, the condition that it shall be a common carrier subsists.[24]

Terminal Company.—A terminal railroad company owning no cars of its own and transporting only the railroad cars of other companies is a common carrier.[25]

Lessee of Railroad.—The lessee of a railroad is a common carrier over a line leased and controlled by it as much as over its own line, and is responsible in damages in respect to the leased road, as well as its own, to any person who has a right of action given him by law against railroad companies.[26]

Railroad Company Acquiring by Contract Right to Use Bridge.—Where a railroad company, by contract with a bridge company, acquires the right to use a bridge, with its approaches, for its engines, cars, and trains, the railroad company, and not the bridge company, is, as to all freight transported by the former over the bridge, the common carrier.[27]

Receivers.—A receiver of a railroad, operating the same, is a common carrier.[28]

companies are common carriers and liable as such in the transportation of freight. Falvey *v.* Georgia Railroad, 76 Ga. 597, 2 Am. St. Rep. 58.

Under a New Hampshire statute, Pub. St. 1901, c. 160, §§ 21-23, providing that every railroad corporation which shall contract for the transportation of milk in large quantities shall establish a tariff for its transportation by the can, it seems that a railroad company becomes a common carrier of milk on entering into a contract with a firm to furnish it with special cars for the transportation of milk. Baker *v.* Boston, etc., R. Co., 74 N. H. 100, 65 Atl. 386.

A railroad company, organized under the statute of Ohio, is a common carrier, and is subject to judicial control to prevent the abuse of its powers and privileges. Scofield *v.* Railway Co., 43 O. St. 571, 3 N. E. 907.

20. East Tennessee, etc., R. Co. *v.* Whittle, 27 Ga. 535, 73 Am. Dec. 741; Caldwell *v.* Richmond, etc., R. Co., 89 Ga. 550, 15 S. E. 678.

Railroad companies are common carriers, though this is not stated in their charter. Chicago, etc., R. Co. *v.* Thompson, 19 Ill. 578.

21. Railroad company charging for carrying cattle but permitting shipper to travel free.—Maslin *v.* Baltimore, etc., R. Co., 14 W. Va. 180, 35 Am. Rep. 748.

22. Transporting at reduced rates for construction company grading extension.—Santa Fe, etc., R. Co. *v.* Grant Bros. Constr. Co., 228 U. S. 177, 33 S. Ct. 474, reversing 13 Ariz. 186, 108 Pac. 467.

23. Effect of evidence that goods had been carried in passenger trains.—Elkins *v.* Boston, etc., R. Co., 23 N. H. 275.

24. Railroad company can not surrender its character of common carrier.—Western Union Tel. Co. *v.* Atlantic, etc., Tel. Co., 1 Wkly. Law Bull. 201, 7 O. Dec. 163, affirmed in 5 O. Dec. 407, 1 Wkly. Law Bull. 309.

A railway company can not, by contract, lay down its public character as a carrier of passengers and goods, which the law, as well as the nature of the employment in which it engages, fixes upon it, and become a mere private carrier. G., C. & S. F. R. Co. *v.* McGown, 65 Tex. 640, 645.

25. Terminal company is a common carrier.—United States *v.* Sioux City Stock Yards Co., 162 Fed. 556, judgment affirmed in 167 Fed. 126.

26. Lessee of railroad is a common carrier.—Logan & Co. *v.* Central Railroad, 74 Ga. 684; Caldwell *v.* Richmond, etc., R. Co., 89 Ga. 550, 15 S. E. 678.

27. Railroad company acquiring by contract right to use bridge.—Kentucky, etc., Bridge Co. *v.* Louisville, etc., R. Co., 37 Fed. 567, 2 L. R. A. 289.

28. Receiver operating railroad is a common carrier.—United States *v.* Ram-

§ 4. Owners of Spur Lines or Switches.—Corporation Voluntarily Contracting to Switch Cars Over Its Tracks.—Where a corporation, which is under no legal obligation to do so, voluntarily contracts to switch cars over its tracks, between two or more railways, for which service it collects a certain switching charge for switching the cars, loaded or empty, but charges no traffic rates on the freight transported or transferred in the cars, such corporation, in the performance of such service, assumes none of the responsibilities of a common carrier, but only those of a switchman.[29]

Lumber Company Building a Spur Line.—A spur railway line built by a lumber company on its own land, forming a connecting line between a railroad and its mill, some miles distant, for the purpose of transporting its own products to the railroad for shipment, which had no rolling stock except an engine and logging cars and which neither did, nor held itself out to do, carrying for the public, is not a common carrier.[30]

Mine Owner Constructing a Railroad Switch.—One who constructs a railroad switch, under a statute authorizing the owner of a coal mine within three miles of a railroad to condemn a right of way for a railroad switch to get his product to market, and providing that the owner of such road shall be, so far as they are applicable, governed by the laws relating to other railroads, is not a "common carrier," in contravention of a constitutional enactment, providing that no corporation engaged in the business of common carrier shall own a mine, so that it can either ship or permit to be shipped by the lessees of its mine all products thereof free of charge.[31]

§ 5. Sleeping Car Companies.—See post, "Palace Cars and Sleeping Cars."

§ 6. Street Railways.—Street railways are common carriers of passengers, with duties and responsibilities similar to those of a railroad company.[32]

sey, 116 C. C. A. 568, 197 Fed. 144; Beers *v.* Wabash, etc., R. Co., 34 Fed. 244; Blumenthal *v.* Brainerd, 38 Vt. 402, 91 Am. Dec. 349, 350; Paige *v.* Smith, 99 Mass. 395; Nichols *v.* Smith, 115 Mass. 332.

29. **Corporation voluntarily contracting to switch cars over its tracks.**—Kentucky, etc., Bridge Co. *v.* Louisville, etc., R. Co., 37 Fed. 567, 2 L. R. A. 289.

As to terminal companies, see ante, "Railroad Companies," § 3.

Stockyards company transporting freight a common carrier under laws of Nebraska.—A stockyards company owned about thirty-five miles of railway track, including what was known as a transfer track. Several private industries were conducted adjacent to the premises of the company. The transfer track connected with the track of several railroads. The stockyards company was engaged in the carrying of freight in car load lots. Cars billed to the stockyards or the industries adjacent thereto were placed on the transfer track by the railroad over whose line shipped, and from there hauled by the stockyards company, with its own engines, to the pens or sheds in the yards, or to the industries which were to receive the freight. Outgoing cars were hauled by the stockyards company to the transfer track, where they were received by a railroad. The railroads for such service were charged $1 per car. The stockyards company did not deal with the general public, but only with the railroads and the industries located adjacent to its premises, and with the consignees and consignors of live stock who received shipments or loaded shipments in its yards. It transported freight over its own tracks from one industry to another, and was not engaged in the production of commodities. Its vocation was purely one of service to others, and, with the exception of feeding live stock in transit, the service rendered was the transportation of freight. Held, that the stockyards company was a common carrier within the constitutional amendment adopted at the general election in 1906, creating a state railway commission, and Laws 1907, p. 320, c. 90, § 4, defining a common carrier to be any corporation, etc., owning, operating, etc., any railroad, etc. Winnett *v.* Union Stock Yards Co., 81 Neb. 67, 115 N. W. 627.

30. **Lumber company building a spur line.**—Taenzer & Co. *v.* Chicago, etc., R. Co., 95 C. C. A. 436, 170 Fed. 240.

31. **Mine owner constructing a railroad switch.**—Straight Creek Coal, etc., Co. *v.* Straight Creek Coal Min. Co., 135 Ky. 536, 122 S. W. 842, construing Const. of Ky., § 210, and Ky. St. 1909, § 815 (Russell's St. § 5352).

32. **Street railways are common carriers of passengers.**—Schloemer *v.* St. Louis Transit Co., 204 Mo. 99, 102 S. W.

§ 7. Express Companies.—Express companies, engaged in carrying for hire money, goods, and parcels, from one locality to another, although not using their own vehicles for the purpose of transportation, are common carriers,[33] and, as such, subject to all the duties and responsibilities of common carriers at common law.[34]

An expressman carrying the baggage of a railway passenger from the depot to hotels and private houses is a common carrier, and is liable for the loss of baggage while in his care and custody.[35]

§ 8. Transportation and Forwarding Companies.—A transportation company, not owning or controlling any means of conveyance itself, but engaging on its own behalf in the business of transporting goods through the agency and over the lines of other carriers of its own selection and employment, is a common carrier, and subject to all the responsibilities attaching to that character.[36] Forwarding companies which undertake for hire to transport baggage from its starting point to its final destination, such transaction being within the ordinary course of their business, are common carriers within the meaning of the law.[37] Even if the expressed purpose of a forwarding company's business were material, its designation that it was a "forwarder" and "distributor" would be sufficient to estop it from claiming that it was a mere forwarder and not a common carrier.[38] A "forwarding merchant" or "forwarder" is one who ships or sends forward goods for others to their destina-

565; San Antonio St. R. Co. *v.* Muth, 7 Tex. Civ. App. 443, 27 S. W. 752, affirmed in 93 Tex. 719, no op.; Texas, etc., R. Co. *v.* Miller, 79 Tex. 78, 82, 15 S. W. 264, 11 L. R. A. 395, 23 Am. St. Rep. 308.

33. Express companies are common carriers.—See post, "Transportation and Forwarding Companies," § 8.

United States.—Bank *v.* Adams Exp. Co., 93 U. S. 174, 23 L. Ed. 872.

Georgia.—Southern Exp. Co. *v.* State, 107 Ga. 670, 33 S. E. 637, 46 L. R. A. 417, 73 Am. St. Rep. 146; Southern Exp. Co. *v.* Newby, 36 Ga. 635, 91 Am. Dec. 783.

Tennessee.—Baker *v.* Louisville, etc., R. Co., 78 Tenn. (10 Lea) 304; Railway Co. *v.* Wynn, 88 Tenn. 319, 333, 14 S. W. 311; Express Co. *v.* Jackson, 92 Tenn. 326, 21 S. W. 666.

Texas.—Houston, etc., R. Co. *v.* Adams, 49 Tex. 748, 30 Am. Rep. 116.

Virginia.—Southern Exp. Co. *v.* McVeigh, 61 Va. (20 Gratt.) 264.

The express business is a branch of the carrying trade. Southern Exp. Co. *v.* St. Louis, etc., R. Co., 10 Fed. 869.

An express company, that receives and agrees to transport goods from one designated place to another designated place, for a compensation, in the ordinary means of conveyance, is a common carrier, although not the owner, and having no interest in the conveyance by which the goods are transported. United States Exp. Co. *v.* Backman, 28 O. St. 144, affirming 2 Cin. R. 251, 13 O. Dec. 885, followed in 14 O. C. D. 435, approved in Toledo, etc., R. Co. *v.* Bowler, etc., Co., 63 O. St. 274, 58 N. E. 813.

Under the South Dakota statute Rev. Civ. Code 1903, § 1577, providing that every one who offers to carry persons, property, or messages is a common carrier of whatever he thus offers to carry, an express company offering to carry money for hire is a common carrier thereof. Platt *v.* LeCocq, 150 Fed. 391.

34. Railway Co. *v.* Wynn, 88 Tenn. 319, 333, 14 S. W. 311; Merchants', etc., Transp. Co. *v.* Bloch, 86 Tenn. 392, 6 S. W. 881, 6 Am. St. Rep. 847; Baker *v.* Louisville, etc., R. Co., 78 Tenn. (10 Lea) 304; Nashville, etc., R. Co. *v.* Jackson, 53 Tenn. (6 Heisk.) 271; East Tennessee, etc., R. Co. *v.* Hale, 85 Tenn. 69, 1 S. W. 620; Express Co. *v.* Jackson, 92 Tenn. 326, 21 S. W. 666.

An express company is a common carrier and as such is bound to receive and transport articles and property offered to it for shipment under reasonable rules and regulations. Southern Exp. Co. *v.* State, 107 Ga. 670, 33 S. E. 637, 46 L. R. A. 417, 73 Am. St. Rep. 146; Southern Exp. Co. *v.* Newby, 36 Ga. 635, 91 Am. Dec. 783.

35. Expressman carrying baggage a common carrier.—Baker *v.* Maher (Mich.), Howell, N. P. 39.

36. A transportation company a common carrier.—See ante, "Express Companies," § 7.

Deming *v.* Merchants' Cotton-Press, etc., Co., 90 Tenn. 306, 17 S. W. 89, 13 L. R. A. 518; Merchants,' etc., Transp. Co. *v.* Bloch, 86 Tenn. 392, 6 S. W. 881, 6 Am. St. Rep. 847.

37. Forwarding companies are common carriers.—Bare *v.* American Forwarding Co., 146 Ill. App. 388, judgment affirmed in 242 Ill. 298, 89 N. E. 1021.

38. Lee *v.* Fidelity Storage, etc., Co., 51 Wash. 208, 98 Pac. 658.

tion by the instrumentality of third persons without himself incurring the liability of a carrier to deliver them, and neither includes a consignor shipping goods nor a carrier engaged in transporting them.[39]

§ 9. Proprietors of Stage Coaches.—Proprietors of stage coaches are common carriers.[40]

§ 10. Proprietors of Omnibuses and Baggage Wagons.—The proprietor of a line of omnibuses and baggage wagons, engaged in the business of carrying for hire passengers and baggage, or either alone, between the hotels and depots of a city, is a common carrier.[41]

§ 11. Draymen and Truckmen.—Persons who are engaged in the business of transporting goods from place to place in a city, in drays or transfer wagons, may be common carriers.[42] Persons engaged in the business of general truckmen, making a specialty of moving heavy machinery, who keep a large number of trucks and horses, and employ the necessary help, are common carriers.[43] A wagoner who carries goods for hire, is responsible as a common carrier, though transportation is only an occasional and incidental employment.[44] A regular tariff of charges is not essential to create a truckman a

39. **A "forwarding merchant" or "forwarder."**—In re Emerson, etc., Co., 117 C. C. A. 635, 199 Fed. 95; S. C., 117 C. C. A. 639, 199 Fed. 99.

40. **Proprietors of stage coaches are common carriers.**—Jones *v.* Voorhees, 10 O. 145.

41. **Proprietors of omnibuses and baggage wagons.**—Parmelee *v.* Lowitz, 74 Ill. 116, 24 Am. Rep. 276.

When a traveler delivers a trunk to a city baggage expressman, to be transported from depot to hotel for hire, and without taking passage himself, the carrier is answerable as a carrier of merchandise. Parmelee *v.* Lowitz, 74 Ill. 116, 24 Am. Rep. 276.

42. **Draymen may be common carriers.**—Arkadelphia Milling Co. *v.* Smoker Merchandise Co., 100 Ark. 37, 139 S. W. 680. See, also, Fish *v.* Chapman, 2 Ga. 349, 46 Am. Dec. 393; Lawson *v.* Connolly (Mich.), 141 N. W. 623.

Carrying goods by means of ox team and slide.—One carrying goods, for hire, from place to place about town, as a common employment, by means of an ox team and slide, is a common carrier. Robertson *v.* Kennedy, 32 Ky. (2 Dana) 430, 26 Am. Dec. 466.

One who, under a license so to do, hauls goods within the limits of a city for any person desiring his services, is a common carrier; and, while he can not be compelled to go beyond his territorial limits, yet, if he undertakes to do so, he is liable as a common carrier for the whole distance. Farley *v.* Lavary, 107 Ky. 523, 21 Ky. L. Rep. 1252, 54 S. W. 840, 47 L. R. A. 383.

A person engaged in the business of carrying freight by wagons from depots to other places, and of delivering packages for all persons who choose to employ him, is a common carrier. Caye *v.* Pool, 108 Ky. 124, 21 Ky. L. Rep. 1600, 55 S. W. 887, 49 L. R. A. 251, 94 Am. St. Rep. 348.

A drayman who is directed by a shipper to take her goods to the depot and ship them is a common carrier (citing Words and Phrases, vol. 2, p. 1317). Benson *v.* Oregon, etc., R. Co., 35 Utah 241, 99 Pac. 1072.

Drayage company transferring goods between railroads.—A drayage and transfer company which carried goods between St. Louis and East St. Louis, transferring them between railroads which had no other connection, receiving compensation out of the freight collected by the final carrier, was a common carrier of goods, and liable as such. Model Clothing Co. *v.* Columbia Transfer Co. (Mo. App.), 139 S. W. 242.

43. **General truckmen are common carriers.**—Judgment, 36 N. Y. S. 808, 15 Misc. Rep. 93, affirmed. Jackson Architectural Iron Works *v.* Hurlbut, 158 N. Y. 34, 52 N. E. 665, 70 Am. St. Rep. 432.

44. **Wagoner a common carrier though transportation is only an occasional employment.**—Gordon *v.* Hutchinson (Pa.), Watts & S. 285, 37 Am. Dec. 464. See, also, Moss *v.* Bettis, 57 Tenn. (4 Heisk.) 661, 13 Am. Rep. 1.

Where a planter, employing his wagons in hauling his cotton crop to market, and habitually lading them on their return trips with goods to be transported for hire, receives such goods, and executes his receipt therefor, undertaking to deliver them to the consignee in good order, and without delay, at the customary rate of charges, he will be responsible as a common carrier. Harrison *v.* Roy, 39 Miss. 396.

Defendants, whose usual business was farming, but who, during the season of hauling, employed a team in transporting

common carrier.[45]

§ 12. Telegraph and Messenger Companies.—Telegraph companies resemble railroad companies and other common carriers, in that they are instruments of commerce, and in that they exercise a public employment, and are therefore bound to serve all customers alike, without discrimination. They have, doubtless, a duty to the public to receive, to the extent of their capacity, all messages clearly and intelligibly written, and to transmit them upon reasonable terms. But they are not common carriers. Their duties are different, and are performed in different ways; and they are not subject to the same liabilities.[46] In Massachusetts it has been held that a telegraph company, furnishing messengers for the delivery of packages, does not assume the liability of a common carrier, but only agrees that the messenger furnished shall be a suitable person for the work.[47] But in the District of Columbia it has been held that companies engaged in supplying messenger service to the public are to a certain extent common carriers,

goods for hire between two places, were common carriers. Chevallier *v.* Straham, 2 Tex. 115, 47 Am. Dec. 639.

45. Regular tariff of charges not essential to create truckman a common carrier.—Judgment, 36 N. Y. S. 808, 15 Misc. Rep. 93, affirmed. Jackson Architectural Iron Works *v.* Hurlbut, 158 N. Y. 34, 52 N. E. 665, 70 Am. St. Rep. 432.

46. Status of telegraph companies.—Primrose *v.* Western Union Tel. Co., 154 U. S. 1, 38 L. Ed. 883, 14 S. Ct. 1098; Express Co. *v.* Caldwell, 21 Wall. 264, 22 L. Ed. 556; Western Union Tel. Co. *v.* Texas, 105 U. S. 460, 26 L. Ed. 1067; Hartford Fire Ins. Co. *v.* Chicago, etc., R. Co., 175 U. S. 91, 44 L. Ed. 84, 20 S. Ct. 33.

Telegraph companies are not public carriers in the strict sense of the term, yet on account of the public nature of their employment, they have in many cases been held to a very similar responsibility. Western Union Tel. Co. *v.* Reynolds Bros., 77 Va. 173, 46 Am. Rep. 715.

Although a telegraph company is not a common carrier, yet its relation with senders of messages over its lines is of a commercial nature, and contracts that the company shall not be liable for the negligence of its servants are affected, in some degree, by similar considerations. Hartford Fire Ins. Co. *v.* Chicago, etc., R. Co., 175 U. S. 91, 44 L. Ed. 84, 20 S. Ct. 33; Express Co. *v.* Caldwell, 21 Wall. 264, 22 L. Ed. 556; Western Union Tel. Co. *v.* Texas, 105 U. S. 460, 26 L. Ed. 1067; Primrose *v.* Western Union Tel. Co., 154 U. S. 1, 38 L. Ed. 883, 14 S. Ct. 1098.

Telegraph companies, though not common carriers, are engaged in a business that is in its nature almost, if not quite, as important to the public as is that of carriers. Like common carriers they can not contract with their employers for exemption from liability for the consequences of their own negligence. But they may, by such contracts, or by their rules and regulations brought to the knowledge of their employers, limit the measure of their responsibility to a reasonable extent. Whether their rules are reasonable or unreasonable must be determined with reference to public policy, precisely as in the case of a carrier. Express Co. *v.* Caldwell, 21 Wall. 264, 269, 22 L. Ed. 556; Primrose *v.* Western Union Tel. Co., 154 U. S. 1, 38 L. Ed. 883, 14 S. Ct. 1098.

Although there is much analogy between the common carrier and the telegraph company, both are in the exercise of a quasi public occupation, and both have, by the public, conferred upon them valuable franchises, and both may, and do, invoke the high prerogative of exercising the state right of eminent domain. Still telegraph companies are not common carriers, nor are they insurers, either of the accurate transmission or the sure and prompt delivery of messages. They are liable, however, for losses consequent upon their negligence. Marr *v.* Western Union Tel. Co., 85 Tenn. 529, 536, 3 S. W. 496; Telegraph Co. *v.* Munford, 87 Tenn. 190, 10 S. W. 318. See, also, Telegraph Co. *v.* Griswold, 37 O. St. 301, 41 Am. Rep. 500.

47. Telegraph companies furnishing messengers.—Murray *v.* Postal Tel., etc., Co., 210 Mass. 188, 96 N. E. 316.

The knowledge of a messenger company that messengers sent out by it were sometimes employed to carry money does not render the company a common carrier, where the company exercises no control over the messenger during his employment by a patron. Haskell *v.* Boston Dist. Messenger Co., 190 Mass. 189, 76 N. E. 215, 2 L. R. A., N. S., 1091, 112 Am. St. Rep. 324.

Where a bill for rent was intrusted to a messenger furnished by a messenger company, and the amount collected by the messenger, the company did not become a common carrier and insurer of the bill and the money. Haskell *v.* Boston Dist. Messenger Co., 190 Mass. 189, 76 N. E. 215, 2 L. R. A., N. S., 1091, 112 Am. St. Rep. 324.

must serve impartially all who require their services, are liable on proof of negligence; and under some circumstances, and always by special contract, they may make themselves insurers.[48]

§ 13. Transfer and Storage Companies.—A transfer and storage company engaged in a business of warehousing goods and forwarding them for a compensation in car load lots is a common carrier, so as to make it liable as such for the destruction of the goods while in its warehouse.[49] So a company chartered to do a general warehouse and storage business, but engaging as well in moving household goods and advertising that business in a way to solicit custom from the general public, is a common carrier, notwithstanding it claims the right to select those whom it will serve, and its custom is to discriminate, accepting some and rejecting others as it may choose.[50]

§ 14. Livery Stable Keepers.—A livery stable keeper, who lets a conveyance for a special journey, and furnishes a driver therefor, is merely a private carrier for hire, and is bound only to exercise that degree of care and skill in the selection of a vehicle, team, and driver which a prudent man would bestow in such a matter, and is not liable for injuries caused to a person in the vehicle, occasioned by negligent driving.[51]

§ 15. Mail Contractors.—A contractor to carry the mail between a railroad station and the postoffice in a town is not a common carrier and owes a railroad mail clerk no further duty than the exercise of reasonable care.[52]

§ 16. Owners of Ships Carrying Goods for Hire.—By the settled law, in the absence of some valid agreement to the contrary, the owner of a general ship, carrying goods for hire, whether employed in internal, in coasting or in foreign commerce, is a common carrier.[53] But it is the business of carrying

48. White *v.* Postal Tel., etc., Co., 25 App. D. C. 364.

49. **Transfer and storage companies.**—Kettenhofen *v.* Globe Transfer, etc., Co. (Wash.), 127 Pac. 295.

50. Lloyd *v.* Haugh, etc., Transfer Co., 223 Pa. 148, 72 Atl. 516.

51. **Livery stable keeper merely a private carrier.**—McGregor *v.* Gill, 114 Tenn. 521, 86 S. W. 318, 108 Am. St. Rep. 919.

52. **Mail contractors.**—Davis *v.* Crisham, 213 Mass. 151, 99 N. E. 959.

53. **Owners of ships carrying goods for hire.**—*United States.*—Liverpool, etc., Steam Co. *v.* Phenix Ins. Co., 129 U. S. 397, 437, 32 L. Ed. 788, 9 S. Ct. 469; Propeller Niagara *v.* Cordes (U. S.), 21 How. 7, 16 L. Ed. 41; The Lady Pike (U. S.), 21 Wall. 1, 22 L. Ed. 499; The J. P. Donaldson, 167 U. S. 599, 603, 42 L. Ed. 292, 17 S. Ct. 951; Central Transp. Co. *v.* Pullman's Palace Car Co., 139 U. S. 24, 51, 35 L. Ed. 55, 11 S. Ct. 478.

Connecticut.—Crosby *v.* Fitch, 12 Conn. 410, 31 Am. Dec. 745.

Georgia.—Fish *v.* Chapman, 2 Ga. 349, 46 Am. Dec. 393.

Massachusetts. — Hastings *v.* Pepper (Mass.), 11 Pick. 41; Gage *v.* Tirrell (Mass.), 9 Allen 299.

North Carolina.—Williams *v.* Branson, 4 N. C. 17, 5 N. C. 417, 1 Car. Law Rep. 224, 4 Am. Dec. 562.

Owners of steamboats carrying freight and parcels for hire are common carriers, and subject to their liabilities. Crosby *v.* Fitch, 12 Conn. 410, 31 Am. Dec. 745; Hale *v.* New Jersey Steam Nav. Co., 15 Conn. 539, 39 Am. Dec. 398; Brown, etc., Co. *v.* Clayton, 12 Ga. 564; The Emily, 5 Kan. 645; Allen *v.* Sewall (N. Y.), 2 Wend. 327; Bank *v.* Brown (N. Y.), 3 Wend. 158; Swindler *v.* Hilliard (S. C.), 2 Rich. Law 286, 45 Am. Dec. 732.

A steamboat company, holding itself out to the public as a carrier of passengers and freight, is a "common carrier." Reasor *v.* Paducah, etc., Ferry Co., 152 Ky. 220, 153 S. W. 222. Steamboats on inland rivers are common carriers. Faulkner *v.* Wright (S. C.), 1 Rice 107.

But a steamboat is not liable as a common carrier, unless the carriage of the goods was undertaken for hire. Chouteau *v.* St. Anthony, 16 Mo. 216.

Goods were shipped by the owner upon a steamer belonging to defendant, along with a large amount of merchandise belonging to other parties. The steamer performed regular service in the transportation of merchandise for hire between the ports of Liverpool and New York. Held, that defendant was liable as a common carrier. Liverpool, etc., Steam Co. *v.* Phenix Ins. Co., 129 U. S. 397, 32 L. Ed. 788, 9 S. Ct. 469; Liverpool, etc., Steam Co. *v.* Insurance Co., 129 U. S. 464, 32 L. Ed. 800, 9 S. Ct. 480.

The owner of a canal boat employed in transporting property for hire is a

goods for others, not a single act, known to the consignor to be outside the usual employment, which fixes the liability of a common carrier.[54] Therefore, where the owner of a vessel keeps it for his own use, the mere fact that he hires it to another by a special agreement will not make him liable as a common carrier;[55] and where the master of a vessel, engaged chiefly in carrying naval stores takes in charge a box of jewelry, without including it in a bill of lading, and without any contract as to the price for carrying it, he is only liable as an ordinary bailee, and not as common carrier.[56] A boat used by its owners for their own purposes, and those of others who agree to pay certain rates for the transportation of their goods from one point to another, and which is not shown to have been held out as a common carrier, cannot be declared to be such, at the instance of one of the agreeing parties.[57] He who receives and forwards goods, assuming the expense of transportation, for which he is compensated by the owner, but having no concern in the vessel by which the goods are sent, nor any interest in the freight, is not a common carrier.[58] To make the owner of a vessel liable as a common carrier, it is not necessary that his trips should be regular between the same points, it being sufficient if he is engaged in carrying for others generally to and from any point.[59]

§ 17. Ferrymen.—A ferryman, occupying a position in a line of public travel, and holding himself out for general employment, is a common carrier.[60]

common carrier. Arnold *v.* Halenbake (N. Y.), 5 Wend. 33.

Freighters of cotton and tobacco on flat boats are common carriers. Jones *v.* Walker, 13 Tenn. (5 Yerg.) 427.

Conveying goods from one place on a river to another.—One who undertakes, for a reward, to convey produce, or goods of any sort, from any place upon a river to another, becomes thereby liable as a common carrier. Craig *v.* Childress, 7 Tenn. (Peck) 270, 14 Am. Dec. 751; Johnson *v.* Friar, 12 Tenn. (4 Yerg.) 48, 26 Am. Dec. 215; Gordon *v.* Buchanan, 13 Tenn. (5 Yerg.) 71, 72; Turney *v.* Wilson, 15 Tenn. (7 Yerg.) 304, 27 Am. Dec. 515; Moss *v.* Bettis, 51 Tenn. (4 Heisk.) 661, 13 Am. Rep. 1.

Where the owners of a steamboat took produce to be carried and sold by them for a certain freight, and were bringing back on the same vessel the money which they obtained on the sale, when the vessel and money were accidentally consumed by fire, under the usage of trade they were acting as common carriers in going, as factors in selling the produce, and as common carriers in bringing back the money, and are liable for its loss, notwithstanding the accident. Harrington *v.* McShane (Pa.), 2 Watts 443, 27 Am. Dec. 321.

54. What fixes liability of a common carrier.—Fish *v.* Clark, 49 N. Y. 122, affirming 2 Lans. 176.

55. One hiring vessel by special agreement not a common carrier.—Pennewill *v.* Cullen (Del.), 5 Har. 238.

The owner of a canal boat, used generally for transporting his own merchandise, who enters into a contract with common carriers to transport a boat load of freight for an agreed price, is not a common carrier. Fish *v.* Clark, 49 N. Y. 122, affirming 2 Lans. 176.

56. Carrying box of jewelry without contract as to price of carriage.—Pender *v.* Robbins, 51 N. C. 207.

57. Agreement not making owners of boat common carriers.—Flautt *v.* Lashley, 36 La. Ann. 106.

58. Receiver and forwarder of goods who has no concern in vessel.—Roberts *v.* Turner (N. Y.), 12 Johns. 232, 7 Am. Dec. 311.

59. Owner of vessel carrying to and from any point, a common carrier.—Pennewill *v.* Cullen (Del.), 5 Har. 238.

60. Ferrymen are common carriers.—*Arkansas.*—Harvey *v.* Rose, 26 Ark. 3, 7 Am. Rep. 595.

California.—May *v.* Hanson, 5 Cal. 360, 63 Am. Dec. 135.

Iowa.—Whitmore *v.* Bowman (Iowa), 4 Greene 148.

Kentucky.—Hall & Co. *v.* Renfro, 60 Ky. (3 Metc.) 51.

Ohio.—Wilson *v.* Hamilton, 4 O. St. 722.

Pennsylvania.—Smith *v.* Seward, 3 Pa. 342.

Tennessee.—Sanders *v.* Young, 38 Tenn. (1 Head) 219, 73 Am. Dec. 175.

Texas.—Albright *v.* Penn, 14 Tex. 290.

A public ferryman who has given bond as required by law, is a common carrier. Babcock *v.* Herbert, 3 Ala. 392, 37 Am. Dec. 695.

A ferry company is a common carrier. Le Barron *v.* East Boston Ferry Co. (Mass.), 11 Allen 312, 87 Am. Dec. 717.

But in Michigan it has been held that a corporation incorporated under Comp. Laws, §§ 6646-6659, to own and operate ferries on a river, which owns and operates an amusement park and steamers

§ 18. Boats Engaged in Towing.—A steam tug which engages to tow a vessel into a port, is not a common carrier nor an insurer.[61]

for the transportation of persons to and from the park, is not a common carrier while engaged in transporting such persons, and may refuse transportation to any one at its pleasure. Meisner *v.* Detroit, etc., Ferry Co., 154 Mich. 545, 118 N. W. 14.

61. **Boats engaged in towing.**—The Margaret, 94 U. S. 494, 24 L. Ed. 146; The J. P. Donaldson, 167 U. S. 599, 603, 42 L. Ed. 292, 17 S. Ct. 951. Compare White *v.* The Mary Ann, 6 Cal. 462, 65 Am. Dec. 523.

"An engagement to tow does not impose either an obligation to insure, or the liability of common carriers. The burden is always upon him who alleges the breach of such a contract to show either that there has been no attempt at performance, or that there has been negligence or unskillfulness to his injury in the performance. Unlike the case of common carriers, damage sustained by the tow does not ordinarily raise a presumption that the tug has been in fault. The contract requires no more than that he who undertakes to tow shall carry out his undertaking with that degree of caution and skill which prudent navigators usually employ in similar services." The J. P. Donaldson, 167 U. S. 599, 603, 42 L. Ed. 292; The Steamer Webb (U. S.), 14 Wall. 406, 20 L. Ed. 774; The Propeller Burlington, 137 U. S. 386, 34 L. Ed. 731, 11 S. Ct. 138; The L. P. Dayton, 120 U. S. 337, 30 L. Ed. 669, 7 S. Ct. 568.

Plaintiffs were engaged in the business of towing boats on the Ohio river and its tributaries, but were not shown to have held themselves out to the public as ready to tow craft for all who might seek their services. They were not shown to have operated on a definite route or between established termini, and there was no evidence that the public looked to them as bound to carry without a special agreement, or that they ever intended to undertake to do so. Held, that they were not common carriers. Varble *v.* Bigley (Ky.), 14 Bush 698, 29 Am. Rep. 435.

CHAPTER II.

Control and Regulation.

I. Power to Control and Regulate in General, §§ 19-24.
A. Carriers in General, § 19.
B. Railroad Companies, § 20.
C. Express Companies, § 21.
D. Delegation of Power, §§ 22-24.
a. In General, §§ 22.
b. To Municipal Corporations, § 23.
c. To Commissions, § 24.

II. Companies, Persons, or Instrumentalities Affected by Regulations, §§ 25-28.
A. In General, § 25.
B. Railroad Companies, § 26.
C. Street Railroad Companies, § 27.
D. Express Companies, § 28.

III. Licenses and Taxes, § 29.

IV. Reports and Statements, § 30.

V. Conduct of Business in General, §§ 31-34.
A. Common Carriers in General, § 31.
B. Railroad Companies, § 32.
C. Business of Transmitting Money to Foreign Countries, § 33.
D. Hackmen and Draymen, § 34.

VI. Charges, §§ 35-95.
A. In General, §§ 35-84.
a. Power to Regulate, §§ 35-79.
(1) In General, § 35.
(2) Delegation of Power, §§ 36-37.
(a) To a Commission, § 36.
(b) To a Municipal Corporation, § 37.
(3) Classification of Railroads for Purposes of Regulation, §§ 38-39.
(a) Right to Classify, § 38.
(b) Mode of Classification, § 39.
(4) Limitation of Power, §§ 40-72.
(a) Reasonableness of Regulations, §§ 40-67.
aa. Regulations Must Be Reasonable, § 40.
bb. Mode of Determining Reasonableness, §§ 41-67.
(aa) That Carrier Has Performed Services for Rate Fixed Not Sole Criterion, § 41.
(bb) Carrier Entitled to Fair Return on Investment, §§ 42-49.
aaa. In General, § 42.
bbb. Mode of Determining Value of Property or Investment, §§ 43-49.
(aaa) In General, § 43.
(bbb) Fictitious Capitalization or Excessive Bonded Debt, § 44.
(ccc) Sworn Return of Value of Property Made for Purposes of Taxation, § 45.
(ddd) Value of Franchise, § 46.
(eee) Consolidated Corporation—Value of Assets of Constituent Corporations, § 47.

(fff) Part of Railroad within State to Be Regarded in Its Relation to Part without State, § 48.
(ggg) Road Purchased at Foreclosure Sale and Reorganized, § 49.
(cc) Carrier Entitled to Earn Interest upon a Valid Bonded Debt, § 50.
(dd) Ascertaining Cost of Doing Business or of Operating Road, § 51.
(ee) Consideration of Net Earnings in Determining Reasonableness of Rates Prescribed, §§ 52-54.
aaa. Net Earnings Must Be Sufficient to Pay Fair Return on Investment, § 52.
bbb. Mode of Computing Net Earnings and What They Include, § 53.
ccc. Earnings of Entire Road to Be Regarded, § 54.
(ff) Interstate Business to Be Disregarded, § 55.
(gg) Economic Factors and Natural Advantages of Localities May Be Considered, § 56.
(hh) Equality of Rates for Like Service, § 57.
(ii) Adoption of Rates Given by Carrier to Certain Shippers, § 58.
(jj) Accessibility of a Place to High Seas as Affecting Rates, § 59.
(kk) Betterments and Replacements Should Be Considered, § 60.
(ll) Passenger Traffic Considered as Separate and Independent from Freight Traffic, § 61.
(mm) Revenue That Has Been Derived from Rate under Consideration, § 62.
(nn) Effect of Several Sovereignties Being Interested, § 63.
(oo) Apportioning Value of Property and Expenses, §§ 64-65.
aaa. Necessity for Apportionment, § 64.
bbb. Method of Apportionment, § 65.
(pp) Line of Railroad Operated in Connection with Other Lines, § 66.
(qq) Mode of Arriving at Effect of Statutes Reducing Rates, § 67.
(b) Due Process of Law, § 68.
(c) Equal Protection of Laws, § 69.
(d) Taking Private Property without Just Compensation, § 70.
(e) Discrimination against Carrier in Favor of Certain Individuals, § 71.
(f) Limitations upon Power of a Municipality to Reduce Street Railroad Fares, § 72.
(5) Exemption from Regulation by Charter or Statute, §§ 73-78.
(a) In General, § 73.
(b) Necessity for Positive and Clear Words of Exemption, §§ 74-75.
aa. Doctrine Stated, § 74.
bb. Doctrine Illustrated, § 75.
(c) Succession to Rights of Company Entitled to Exemption, §§ 76-78.
aa. Purchase, § 76.
bb. Lease, § 77.
cc. Consolidation, § 78.
(6) Loss of Power by Abandonment or Nonuser, § 79.
b. Scope and Effect of Regulations, §§ 80-84.
(1) To Whom or to What Business or Route Regulations Are Applicable, § 80.
(2) Obligations Imposed on Carriers, § 81.
(3) Measure of Compensation Allowed, § 82.
(4) Regulations Will Not Be Construed to Be Retroactive, § 83.
(5) When a Statute Will Be Construed as Impliedly Repealing a Prior Statute, § 84.
B. Posting Schedule at Stations, § 85.
C. Local and Through Rates, § 86.
D. Long and Short Hauls, § 87.

E. Joint Tariff between Two or More Roads, § 88.
F. Transfers to Connecting Lines of Same Company, § 89.
G. Conditions in Grant of Franchise and Agreements with Municipalities, §§ 90-95.
a. Authority to Impose Conditions or to Make Agreements, § 90.
b. Change of Rates of Fare Fixed by Franchise or Agreement, § 91.
c. Effect of Acceptance by Carrier of Location Granted by Municipality, § 92.
d. Conditions and Agreements Construed, § 93.
e. Waiver of Right to Charge More than Amount Stipulated in Franchise, § 94.
f. Acquisition by Sale or Consolidation of a Railway Company Having a Contract with a Municipality, § 95.

VII. Preferences and Discriminations, §§ 96-108.
A. The Common-Law Doctrine, § 96.
B. Standard Measure of Uniformity in Rates, § 97.
C. Power to Prohibit Preferences and Discriminations, § 98.
D. Power of Legislature to Permit Discrimination, § 99.
E. Construction of Constitutional and Statutory Enactments and Commission Orders Forbidding Preferences or Discriminations, § 100.
F. Who Are Common Carriers within the Rule Prohibiting Discrimination, § 101.
G. What Constitutes an Unlawful Preference or Discrimination, § 102.
H. What Circumstances Will Justify Discrimination, §§ 103-108.
a. Business of Carrier Unusually or Unexpectedly Heavy, § 103.
b. Difference in Conditions under Which Shipment Is Made, § 104.
c. Through Rates and Local Rates, § 105.
d. Competition with Other Carriers, § 106.
e. Unusual Traffic Conditions Attending upon a General Coal Strike, § 107.
f. Cost of Mining Coal to Company in Whose Favor Discrimination Is Made, § 108.

VIII. Places of Stoppage, § 109.

IX. Receipt and Transportation of Freight and Passengers, § 110.

X. Exclusive Privileges, §§ 111-114.
A. To Express Companies, § 111.
B. To Corporations or Individuals Engaged in Transporting Passengers and Baggage to and from Railroad Depots, § 112.
C. To Ships Using a Wharf of Dock Constructed by a Railroad Company, § 113.
D. To the Use of a Switch Track, § 114.

XI. Connections with and Facilities to Other Carriers, §§ 115-129.
A. In General, § 115.
B. Joint Running Arrangements, § 116.
C. Connection between Roads or Trains, §§ 117-118.
a. Power to Require, § 117.
b. Character of Requirements, § 118.
D. Use of Terminals, § 119.
E. Reception, Transportation and Delivery of Cars, Passengers and Freight, §§ 120-123.
a. Rule at Common Law, § 120.
b. Power to Require, § 121.
c. Construction of Requirements, § 122.
d. Excuses for Refusal or Neglect to Perform Duty, § 123.
F. Moving or Switching Cars from a Connecting Line, § 124.
G. Facilities and Accommodations to Be Furnished by Railroad Companies to Express Companies, § 125.
H. Discrimination in Favor of One of Several Connecting Carriers, §§ 126-128.
a. Duty to Give Like Through Rates to All Connecting Carriers, § 126.

b. Discrimination as to Interchange of Business, § 127.
c. Discrimination as to Prepayment of Freight Charges, § 128.
I. Transfers between Street Railroad Companies, § 129.

XII. Use of Carrier's Premises and of Street or Premises Adjacent Thereto, §§ 130-132.
A. Exclusion of Persons in General, § 130.
B. Regulations for Conduct of Persons, § 131.
C. Rights of and Restrictions upon Individuals or Corporations Engaged in Transporting Passengers or Baggage, § 132.

XIII. Free Transportation to Police Officers, § 133.

XIV. Combinations of Carriers, § 134.

XV. Proceedings to Enforce or to Prevent Enforcement of Regulations, §§ 135-173.
A. Right of State to Insist on Compliance with Regulations, § 135.
B. Judicial Supervision and Remedies in General, §§ 136-159.
a. Scope of Judicial Supervision, §§ 136-137.
(1) In General, § 136.
(2) As to Rates, § 137.
b. Right to and Mode of Obtaining Relief, §§ 138-141.
(1) In General, § 138.
(2) Relief against Unreasonable Rates, §§ 139-141.
(a) Relief to Carrier, §§ 139-140.
aa. Rates Fixed by Legislature, § 139.
bb. Rates Fixed by Commission, § 140.
(b) Relief to Public, § 141.
c. Scope of Inquiry, § 142.
d. What Commission Orders Will Be Enforced, § 143.
e. Revival of Causes of Action, § 144.
f. Procedure and Evidence, §§ 145-159.
(1) Procedure in General, § 145.
(2) Jurisdiction, § 146.
(3) Parties, §§ 147-148.
(a) By Whom Suit May Be Brought, § 147.
(b) Who Are Proper Parties, § 148.
(4) Intervention, § 149.
(5) Pleading, §§ 150-152.
(a) Petition, § 150.
(b) Demurrer, § 151.
(c) When Pleadings Make the Taking of Testimony Unnecessary, § 152.
(6) Evidence, §§ 153-157.
(a) Presumptions and Burden of Proof, §§ 153-156.
aa. In General, § 153.
bb. As to Rates, §§ 154-155.
(aa) Rule Stated, § 154.
(bb) How Presumption May Be Overcome, § 155.
cc. In Proceedings against a Carrier for Contempt, § 156.
(b) Admissibility, § 157.
(7) Judgment, § 158.
(8) Procedure upon Review of Orders or Decisions of a Commission, § 159.
C. Injunction, §§ 160-173.
a. When and against Whom Injunction Will Lie, §§ 160-166.
(1) Injunction against Action by a State Commission, § 160.
(2) Injunction to Restrain Wrongful and Discriminatory Acts by a Carrier, § 161.
(3) Injunction to Restrain a Carrier from Charging Unlawful Rates, § 162.

(4) Injunction to Compel Transportation at Rate Fixed by Law, § 163.
(5) Injunction to Compel Carrier to Furnish Impartial Service, § 164.
(6) Injunction to Compel Carrier to Stand Cars in Front of a Shipper's Property, § 165.
(7) Injunction to Restrain Persons from Soliciting Business in or Near a Railroad Station, § 166.
b. Procedure and Evidence, §§ 167-173.
(1) Jurisdiction, § 167.
(2) Parties, § 168.
(3) Pleading—Petition, Complaint, or Information, § 169.
(4) Evidence—Presumptions and Burden of Proof, § 170.
(5) Reference to a Master, § 171.
(6) Laches, § 172.
(7) Decree, § 173.

XVI. Damages for Violations of Regulations, §§ 174-180.
A. Power of Legislature, § 174.
B. When an Action Will Lie, §§ 175-177.
a. In General, § 175.
b. Failure to Stop at Station, § 176.
c. Overcharge or Discrimination, § 177.
C. Measure of Damages, § 178.
D. Limitation of Actions, § 179.
E. Petition or Complaint, § 180.

XVII. Penalties for Violations of Regulations, §§ 181-275.
A. In General, § 181.
B. Overcharge and Discrimination, §§ 182-196.
a. Power to Impose Penalty, § 182.
b. Construction of Statutes Imposing Penalties, § 183.
c. Repeal of Statutes Imposing Penalties, § 184.
d. Conditions Precedent to Right of Action for Penalty, § 185.
e Who May Recover Penalty, § 186.
f. For What Acts Penalty Is Imposed, § 187.
g. Unit of Measurement in Determining What Is an Overcharge, § 188.
h. Number of Penalties Recoverable, § 189.
i. Amount of Penalty, § 190.
j. What Questions May Be Raised in Action for Penalty, § 191.
k. Defenses, §§ 192-195.
(1) Rates Charged No Higher than Those Fixed by Railroad Commission, § 192.
(2) Mistake, § 193.
(3) Facts Not Constituting a Defense, § 194.
(4) Estoppel to Set Up Defense, § 195.
l. Two Penalties—Effect of Enforcement of One, § 196.
C. Refusal to Transport Passengers, § 197.
D. Refusal to Sell Mileage Tickets at Reduced Rates, § 198.
E. Refusal to Furnish Passenger Tickets Granting Stop-Over Privileges, § 199.
F. Refusal to Give a Transfer, § 200.
G. Refusal to Sell Passenger Tickets of a Connecting Carrier, § 201.
H. Failure to Affix Check to Baggage and to Deliver Duplicate to Passenger, § 202.
I. Refusal to Redeem Unused Passenger Tickets, § 203.
J. Failure to Post Schedules of Rates, § 204.
K. Failure or Refusal to Receive or Transport Freight, §§ 205-210.

a. Statute Imposing Penalty Does Not Limit Carrier's Common-Law Liability, § 205.
b. Who May Recover Penalty, § 206.
c. When Penalty Will Be Imposed, § 207.
d. Number of Penalties Recoverable, § 208.
e. Tender and Refusal, § 209.
f. Defenses, § 210.
L. Refusal to Give Shipper a Proper Bill of Lading, § 211.
M. Delay in Shipment or Transportation of Freight, §§ 212-220.
a Power to Impose Penalty, § 212.
b. Who May Recover Penalty, § 213.
c. In What Cases Penalty Is Imposed, § 214.
d. Time within Which Freight Must Be Transported, § 215.
e. When Transportation Terminates, § 216.
f. Defenses, §§ 217-220.
(1) Failure to Prepay Charges, § 217.
(2) Notice to Shippers of Conditions Causing Delay, § 218.
(3) Sunday Laws, § 219.
(4) Estoppel to Set Up Defense, § 220.
N. Failure to Give Notice of Arrival of Freight to Consignee, § 221.
O. Refusal to Deliver Freight or Express Matter to Consignee, §§ 222-226.
a. Constitutionality of Statute Imposing Penalty, § 222.
b. Statute Imposing Penalty Not Merely in Aid of Common Law, § 223.
c. Where Delivery Must Be Made, § 224.
d. Conditions Precedent to Recovery of Penalty, § 225.
e. Number of Penalties Recoverable, § 226.
P. Failure of Consignee to Unload Cars within a Prescribed Time, § 227.
Q. Failure to Stop at Station, § 228.
R. Failure to Furnish or Delay in Furnishing Cars, §§ 229-234.
a. Constitutionality of Statutes Imposing Penalties, § 229.
b. Statutes Imposing Penalties Strictly Construed, § 230.
c. Powers and Duties of Railroad Commissions, § 231.
d. Application for Cars, § 232.
e. Places at Which Cars Must Be Furnished, § 233.
f. Defenses, § 234.
S. Failure to Pay or Adjust Claims, §§ 235-247.
a. Power to Impose Penalty, § 235.
b. Existence of Statutory Conditions Essential to Imposition of Penalty, § 236.
c. Who May Recover Penalty, § 237.
d. Where and When Cause of Action Arises, § 238.
e. Necessity of Filing Claim, and with Whom It May Be Filed, § 239.
f. Sufficiency of Claim, § 240.
g. Place of Payment of Claim, § 241.
h. Who Is Liable for Penalty, § 242.
i. Immaterial in What Manner Loss Was Caused, § 243.
j. Amount of Penalty, § 244.
k. What One Claiming Penalty Must Show, § 245.
l. Defenses, §§ 246-247.
(1) Amount Recoverable by Claimant as Affecting Right to Penalty, § 246.
(2) Effect of Voluntary Payment of Claim after Time Limited, § 247.
T. Failure to Make Annual Reports, § 248.
U. Procedure and Evidence, §§ 249-275.
a. Venue, § 249.
b. Time within Which Action Must Be Brought, § 250.
c. Parties—By Whom Action May Be Brought, § 251.
d. Pleading, §§ 252-263.

(1) Declaration, Petition, or Complaint, §§ 252-259.
(a) In General, § 252.
(b) Necessary Allegations, §§ 253-258.
aa. In Actions for Penalty for Overcharge, §§ 253-254.
(aa) Overcharge in Passenger Rates, § 253.
(bb) Overcharge in Freight Rates, § 254.
bb. In actions for Penalty for Unjust Discrimination between Shippers, § 255.
cc. In Actions for Penalty for Refusal to Receive or Transport Freight, § 256.
dd. In Actions for Penalty for Delay in Transportation of Freight, § 257.
ee. In Actions for Penalty for Failure to Furnish Double Decked Cars for Sheep, § 258.
(c) Unnecessary Allegations May Be Rejected as Surplusage, § 259.
(2) Answer—Sufficiency, §§ 260-263.
(a) In Actions for Penalty for Overcharge, § 260.
(b) In Actions for Penalty for Unlawful Discrimination in Rates, § 261.
(c) In Actions for Penalty for Delay in Transportation of Freight, § 262.
(d) In Actions for Penalty for Failure to. Furnish Cars, § 263.
e. Evidence, §§ 264-272.
(1) Presumptions and Burden of Proof, §§ 264-267.
(a) In Actions for Penalty for Overcharge, § 264.
(b) In Actions for Penalty for Discrimination in Rates, § 265.
(c) In Actions for Penalty for Failure to Receive and Transport Freight, § 266.
(d) In Actions for Penalty for Delay in Transportation of Freight, § 267.
(2) Admissibility, §§ 268-271.
(a) In Actions for Penalty for Overcharge, § 268.
(b) In Actions for Penalty for Discrimination in Rates, § 269.
(c) In Actions for Penalty for Delay in Transportation of Freight, § 270.
(d) In Actions for Penalty for Failure to Furnish Cars, § 271.
(3) Weight and Sufficiency, § 272.
f. Questions of Law and Fact, §§ 273-274.
(1) In Actions for Penalty for Discrimination in Freight Rates, § 273.
(2) In Actions for Penalty for Delay in Transportation of Freight, § 274.
g. Instructions, § 275.

XVIII. Offenses by Carriers or Their Agents, §§ 276-292.
A. In General, § 276.
B. Overcharge or Discrimination, § 277.
C. Carrying More than a Prescribed Number of Passengers, § 278.
D. Failure to Deliver Express Matter to Consignee, § 279.
E. Negligence Causing Death or Injury, §§ 280-282.
a. In General, § 280.
b. Who May Be Prosecuted, § 281.
c. Defenses, § 282.
F. Indictment, §§ 283-286.
a. Conditions Precedent to Indictment, § 283.
b. Necessary Allegations, § 284.
c. Effect of Unnecessary Allegations, § 285.
d. Offenses Covered by Indictment, § 286.
G. Trial, §§ 287-292.
a. Jurisdiction, § 287.
b. Evidence, §§ 288-290.
(1) Presumptions and Burden of Proof, § 288.
(2) Admissibility, § 289.

(3) Weight and Sufficiency, § 290.
c. Questions of Law and Fact, § 291.
d. Charge, § 292.
XIX. Offenses by Persons Dealing with Carriers or Using Their Conveyances, §§ 293-298.
A. In General, § 293.
B. Sale of Passenger Tickets by Brokers, § 294.
C. Acceptance and Use of a Pass, § 295.
D. Stealing or Attempting to Steal a Ride on Railroad Trains, § 296.
E. Obstructing Train and Endangering Safety of Passengers, § 297.
F. Indictment, Accusation, or Complaint, § 298.

§§ 19-24. Power to Control and Regulate in General—§ 19. Carriers in General.—The Legislature has full power to pass laws regulating the intrastate business of carriers; and, where not unconstitutional, the laws should be enforced.[1] Under the power accorded by constitutional enactment to regulate intrastate transportation, the legislature has authority to do anything necessary to the effectual exercise of the power conferred.[2] Such enactment should not be interpreted so as to render impotent or inoperative, but so as to preserve and make effective, the sovereign power of the state to regulate common carriers.[3] A constitutional provision giving the legislature full power to correct abuses and prevent unjust discrimination by common carriers, is not a grant of power to the legislature, nor is it a limitation upon the power of the legislature, but an express recognition by the constitution of a power existing in the legislative department of government.[4]

§ 20. Railroad Companies.—Railroad companies are common carriers, receiving from the state a delegation of a portion of its sovereign powers for the public good; and being public agents and, in the place and stead of the government, exercising public duties, they are, therefore, subject to the legislative and judicial authority to correct the abuse of their privileges and powers.[5] Within the limits of state and federal constitutional restrictions, they may be required by law to refrain from so using their property as to injure others, and by appropriate pains and penalties may be restrained from unjust discrimination and extortionate charges, compelled to observe precautionary measures against accident, and in other ways regulated for the public welfare.[6] The State may, by statute, require railroads to perform certain duties to the public and furnish proper and adequate facilities for the transportation of freight and passengers intrastate.[7] The police power is a fruitful source of legislative regulations of railroads for the public benefit.[8] A police regulation of a reasonable and proper

1. **Power of legislature to regulate intrastate business of carriers.**—King Lumber, etc., Co. *v.* Atlantic, etc., R. Co., 58 Fla. 292, 50 So. 509. See, also, Chicago, etc., R. Co. *v.* Ledbetter (Ark.), 153 S. W. 801.

2. State *v.* Atlantic, etc., R. Co., 56 Fla. 617, 47 So. 969, construing Const., art. 16, § 30.

3. State *v.* Atlantic, etc., R. Co., 56 Fla. 617, 47 So. 969, construing Const., art. 16, § 30.

4. Railroad Comm'rs *v.* Florida, etc., R. Co., 57 Fla. 522, 49 So. 43, construing Const., art. 16, § 30.

5. **Power to control and regulate railroad companies.**—Louisville, etc., R. Co. *v.* Railroad Comm., 19 Fed. 679; Scofield *v.* Railway Co., 43 O. St. 571, 3 N. E. 907.

6. Louisville, etc., R. Co. *v.* Railroad Comm., 19 Fed. 679; Lake Shore, etc., R. Co. *v.* Cincinnati, etc., R. Co., 30 O. St. 604, affirmed in Cincinnati, etc., R. Co. *v.* Troy, 68 O. St. 510, 67 N. E. 1051.

7. St. Louis, etc., R. Co. *v.* State, 99 Ark. 1, 136 S. W. 938.

8. **Prohibiting sale of tickets by persons not agents of carrier.—The New York statute,** Laws 1897, c. 506, § 1, prohibiting the sale of passenger tickets by persons not agents of the carrier, is not valid as a police regulation of carriers as quasi public corporations. Order 50 N. Y. S. 56, 26 App. Div. 228, reversed. Tyroler *v.* Warden of City Prison, 157 N. Y. 116, 51 N. E. 1006, 43 L. R. A. 264, 68 Am. St. Rep. 763.

Nor is such act valid as a police regu-

character can not be attacked on the ground that it imposes unnecessary burdens on the railroads affected by it.[9] An act regulating carriers as to the mode of transportation of the state militia is not an unlawful interference with the carrier's management of its business.[10] In many of the states the power of the legislature to regulate and control railroad companies is defined and limited by constitutional enactment.[11] The fact that the legislature has power to repeal the charter, and thus terminate the legal existence of a railroad company, does not validate an act which is neither necessary nor appropriate to carry into execution any valid power of the state over the conduct of the business of the

lation of the manner in which the business of ticket brokerage may be conducted. Order 50 N. Y. S. 56, 26 App. Div. 228, reversed. Tyroler *v.* Warden of City Prison, 157 N. Y. 116, 51 N. E. 1006, 43 L. R. A. 264, 68 Am. St. Rep. 763.

The sale of a valid passenger ticket by a broker is not a fraud, on either the transportation company or the traveler, calling for protective legislation in the exercise of the police power, as attempted by Laws 1897, c. 506. Order 50 N. Y. S. 56, 26 App. Div. 228, reversed. Tyroler *v.* Warden of City Prison, 157 N. Y. 116, 51 N. E. 1006, 43 L. R. A. 264, 68 Am. St. Rep. 763.

But in Tennessee, it has been held that Acts 1905, p. 873, c. 410, prohibiting persons other than the authorized agent of common carriers to sell or deal in passenger tickets issued and sold below the standard schedule rate under contract with the original purchaser, entered on the ticket to the effect that the ticket was nontransferable and should be void in the hands of a person other than the original purchaser, was a valid exercise of the state's police power to prevent fraud and the depreciation of public morals. Samuelson *v.* State, 116 Tenn. 470, 95 S. W. 1012, 115 Am. St. Rep. 805.

Disposition of property not called for by consignee.—The proviso in the Minnesota statute, § 11, c. 149, Gen. Laws 1895, requiring railroads and transportation companies to turn over to a storage company or public warehouseman all property which the consignee fails to call for or receive within 30 days after notice of its arrival, is unconstitutional and void, not being a lawful exercise of the police power of the state. State *v.* Chicago, etc., R. Co., 68 Minn. 381, 71 N. W. 400, 38 L. R. A. 672, 64 Am. St. Rep. 482.

9. Reasonable police regulation not invalid on ground that it imposes unnecessary burdens.—Smith *v.* State, 100 Tenn. 494, 46 S. W. 566, 41 L. R. A. 432.

10. Regulation of mode of transportation of state militia.—Simpson *v.* Chicago, etc., R. Co., 137 N. W. 2, 118 Minn. 380, 137 N. W. 2, 41 L. R. A., N. S., 524.

11. Constitutional provisions defining and limiting power of legislature.—In Iowa, the legislature has power to prohibit the giving of free passes by common carriers for the general welfare, hence Acts 32d Gen. Assem., c. 112 (Code Supp. 1907, §§ 2157f-2157j), forbidding the giving of free passes except to certain employees, is constitutional. Schulz *v.* Parker (Iowa), 139 N. W. 173.

The Nebraska Constitution, art. 11, § 4, providing that the liability of railroads as common carriers shall not be limited, does not prohibit the legislature from increasing the common-law liability of common carriers, and the statute will not be declared void on complaint of the carrier because in some hypothetical case the law might work to the disadvantage of a shipper. Cram *v.* Chicago, etc., R. Co., 84 Neb. 607, 122 N. W. 31.

The constitution of Texas, art. 10, § 2, confers power upon the legislature to pass laws for the correction of all abuses of railroad franchises and business transacted in pursuance thereof, to regulate freight and passenger tariffs, and prevent unjust discrimination and extortion. Railroad Comm. *v.* Houston, etc., R. Co., 90 Tex. 340, 351, 38 S. W. 750. See Houston, etc., R. Co. *v.* Harry & Bros., 63 Tex. 256, 259.

Under this provision it rests with the legislature to determine what constitute abuses and to fix penalties for their punishment. Houston, etc., R. Co. *v.* Harry & Bros., 63 Tex. 256, 259.

The power to correct abuses is not restricted to such as are connected with freight and passenger tariffs. Railroad Comm. *v.* Houston, etc., R. Co., 90 Tex. 340, 38 S. W. 750.

The word "abuses" as used in this amendment means "any improper use of a right or a privilege; as, abuse of a franchise." The language "the Legislature shall pass laws to correct abuses" is competent to express a command to the legislative department to pass laws for the correction of all abuses or improper uses of the franchises which had been granted or might be granted to railroads in this state, as well as all abuses connected with or growing out of business transacted in the exercise of such franchise. Railroad Comm. *v.* Houston, etc., R. Co., 90 Tex. 340, 351, 38 S. W. 750.

It was left to the legislature's discretion to decide whether the abuse to be corrected should be declared a crime and

railroad company.[12] The internal movement of freight is not freed from state control until after it has been finally released by the consignor to the carrier for transportation to a destination fixed beyond the state line, and such control is not lost until after the freight has been billed to its destination.[13] The surrender by a railway company of its special charter, to accept a general railroad law, before the state has made any attempt to regulate its tolls, frees the company from all liability to the state under a charter provision that when declared dividends shall aggregate a specified amount the legislature "may so regulate" the tolls that not more than a fixed percentage shall be divided annually on the capital employed, and the surplus profits shall be paid over to the state treasurer, and that, "if required," the corporation shall furnish the legislature a statement of expenditures; and such liability, therefore, can not be enforced by virtue of subsequent legislation, without impairing the rights of the railroad company under the federal constitution.[14]

§ 21. Express Companies.—Express companies operating over railroads exercising a public franchise in the state are equally subject to state control and regulation with the railroad companies over whose lines they operate within the limited field of business which they occupy.[15] A carrier by express is subject to legislative control though not organized as a corporation.[16]

§§ 22-24. Delegation of Power—§ 22. In General.—The legislature of a state cannot delegate the power to determine the form of the contracts which common carriers of persons or merchandise must make concerning transportation to private persons or corporations.[17]

§ 23. To Municipal Corporations.—A municipal ordinance prohibiting persons, unconnected with railroad trains, except passengers and other persons in the act of taking passage, from getting off or on engines or cars in the city limits, is authorized by a general charter power to pass all laws and ordinances that the municipal authorities may consider necessary for the preservation of the health, peace, prosperity and security of the citizens and which are not inconsistent with the constitution and laws of the state.[18]

§ 24. To Commissions.—The legislature of a state may create a state railroad commission and delegate to it power to regulate railroad companies in their relations with the public.[19] In some states the power to so delegate its authority

punished as such, or whether a civil injury, and be corrected by a civil action given by statute to the person whose rights had been violated, and allowing him to recover a fixed sum as a penalty, or as exemplary damages, far in excess of the actual damages suffered. Houston, etc., R. Co. *v.* Harry & Bros., 63 Tex. 256.

12. **Power to repeal charter.**—Judgment, Smith *v.* Lake Shore, etc., R. Co., 114 Mich. 460, 72 N. W. 328, reversed. Lake Shore, etc., R. Co. *v.* Smith, 173 U. S. 684, 43 L. Ed. 858, 19 S. Ct. 565.

13. **When state loses control over internal movement of freight.**—Larabee Flour Mills Co. *v.* Missouri Pac. R. Co., 74 Kan. 808, 88 Pac. 72.

14. **Effect of surrender of special charter to accept general railroad law.**—Judgment, 65 N. E. 401, 159 Ind. 438, reversed. Terre Haute, etc., R. Co. *v.* Ketcham, 194 U. S. 579, 48 L. Ed. 1124, 24 S. Ct. 767.

15. **Control and regulation of express companies.**—State *v.* Pacific Exp. Co., 80 Neb. 823, 115 N. W. 619; State *v.* Wells, Fargo & Co., 80 Neb. 838, 115 N. W. 625.

16. United States Exp. Co. *v.* State, 164 Ind. 196, 73 N. E. 101.

17. **Power can not be delegated to private persons or corporations.**—Attorney General *v.* Old Colony R. Co., 160 Mass. 62, 35 N. E. 252, 22 L. R. A. 112.

18. **Ordinance regulating the getting off or on engines or cars.**—Bearden *v.* Madison, 73 Ga. 184.

It will not be presumed that the municipal authorities will give to such an ordinance an unreasonable construction so as to prevent those having relatives or friends arriving or departing on trains from entering thereon to see after their safety and comfort. Bearden *v.* Madison, 73 Ga. 184.

19. **Legislature may create and delegate power to railroad commission.**—Georgia R. Co. *v.* Smith, 70 Ga. 694; Wayled Southern R. Co. *v.* State, 137 Ga. 497, 73 S. E. 741; Southern R. Co. *v.* Melton,

is conferred on the legislature by the constitution. Some of these constitutional provisions have been interpreted by the courts.[20] A state constitution, if it sees fit, may unite legislative and judicial powers in a railroad commission. There is nothing in the constitution of the United States which forbids such action.[21] Railroad commissioners are statutory officers, and can exercise only such authority as is conferred by law, or by fair implication as incident to that expressly conferred.[22] The difficulty of making a specific enumeration of all the powers the legislature confers on railroad commissioners for the regulation of carriers renders it necessary to confer some power in general terms, and general powers given are intended to confer other powers than those enumerated.[23] Railroad commissions must exercise the power delegated to them within legal and constitutional limitations and in such a way as not to invade the legal and constitutional rights of others.[24] Whether other subjects of transportation are regulated by railroad commissioners is immaterial in considering the validity of regulations of particular subjects; the validity of one legislative regulation not being affected by the mere failure to regulate other matters within the legislative power and the choice of subjects of regulation being for the legislature, within its powers.[25] Some of the peculiar provisions of state constitutions and statutes conferring powers on railroad commissions have been interpreted by

133 Ga. 277, 65 S. E. 665; Gray *v.* McLendon, 134 Ga. 224, 67 S. E. 859.

A state may, by statute, clothe commissions and administrative bodies with power to require railroads to perform certain duties to the public and furnish proper and adequate facilities for the transportation of freight and passengers intrastate. St. Louis, etc., R. Co. *v.* State, 99 Ark. 1, 136 S. W. 938.

20. The constitution of Arkansas, Amend. 4, authorizing the creation of the railroad commission, is not a limitation of the authority that may be vested in it for effecting all the purposes for which it was designed. St. Louis, etc., R. Co. *v.* State, 99 Ark. 1, 136 S. W. 938.

In Colorado, the general assembly had power, under the constitution, to create the state railroad commission, and to authorize it to regulate and control the service of common carriers and the rates charged for such service. Consumers' League *v.* Colorado, etc., R. Co., 53 Colo. 54, 125 Pac. 577.

The Constitution of Washington, art. 12, § 18, providing that a railroad and transportation commission may be established, and its powers and duties fully defined by law, is merely declaratory of the power of state regulation. Great Northern R. Co. *v.* Railroad Comm., 52 Wash. 33, 100 Pac. 184.

21. Power to unite legislative and judicial authority in commission. Prentis *v.* Atlantic Coast Line Co., 211 U. S. 210, 53 L. Ed. 150, 29 S. Ct. 67; Dreyer *v.* Illinois, 187 U. S. 71, 84, 47 L. Ed. 79, 23 S. Ct. 28; Winchester, etc., R. Co. *v.* Commonwealth, 106 Va. 264, 55 S. E. 174.

22. Commissioners can exercise only authority conferred.—Railroad Comm'rs *v.* Louisville, etc., R. Co., 57 Fla. 526, 49 So. 39; State *v.* Atlantic, etc., R. Co., 56 Fla. 617, 47 So. 969.

23. General powers confer other powers than those enumerated.—Railroad Comm'rs *v.* Atlantic, etc., R. Co., 61 Fla. 799, 54 So. 900.

24. How commission must exercise power.—Georgia R. Co. *v.* Smith, 70 Ga. 694.

A state corporation commission has no authority to make any rule or regulation in conflict with the federal constitution. Atlantic, etc., R. Co. *v.* Commonwealth, 102 Va. 599, 46 S. E. 911.

A state railroad commission, in prescribing a system of bookkeeping for intrastate business, does not conflict with the act of congress (Act Feb. 4, 1887, c. 104, § 20, 24 Stat. 379 [U. S. Comp. St. 1901, p. 3169]) forbidding railroads to keep any other accounts than those required by the interstate commerce commission. Texas, etc., R. Co. *v.* Railroad Comm. (Tex.), 150 S. W. 878, reversing judgment Railroad Comm. *v.* Texas, etc., R. Co. (Tex. Civ. App.), 140 S. W. 829.

While the Georgia statute, act of October 14, 1879, creating the railroad commission, is constitutional and the orders of the commissioners in pursuance of the authority there conferred, are valid and binding, their powers are not unlimited or beyond legal control by the proper authorities of the state. In case their orders violate the chartered rights of the company, such violation will be restrained and enjoined by proper order and decree. Georgia R. Co. *v.* Smith, 70 Ga. 694.

25. Whether other subjects of transportation are regulated immaterial in considering regulation of particular subjects.—Florida R. Comm'rs *v.* Atlantic, etc., R. Co., 60 Fla. 218, 53 So. 601.

the courts.[26] The South Dakota statute[27] regulating common carriers, applies to express companies doing business within the state, whether incorporated or

26. **The Constitution of Oklahoma,** art. 9, § 18 (1), gives the corporation commission authority to supervise, regulate, and control railroad companies in all matters relative to the performance of their public duties and their charges therefor, and to prevent unjust discrimination. Chicago, etc., R. Co. *v.* Filson (Okla.), 128 Pac. 298.

Power to correct abuses irrespective of their connection with subject of tariffs.—The Texas statute, Rev. St., art. 4562, vesting in the railroad commission power to regulate freight and passenger tariffs, to correct abuses, and to prevent unjust discrimination and extortion in rates; and art. 4579, making it the duty of the commission to investigate complaints against railroad companies and to enforce all laws in reference to railroads—are an express delegation to the commission of power to correct abuses defined by the laws regulating railroads, irrespective of their connection with the subject of tariffs. Railroad Comm. *v.* Houston, etc., R. Co., 90 Tex. 340, 38 S. W. 750.

Power to see that proper service is rendered.—The constitution of Louisiana, art. 284, which authorizes the state railroad commission to govern and regulate railroad freight and passenger tariffs and service, merely gives the commission power to see that proper service is rendered, and does not transfer from the legislature to the commission legislative powers. Whitehurst *v.* Texas, etc., R. Co., 131 La. 139, 59 So. 42.

Quality and reasonableness of intrastate service and compensation therefor—Michigan statute.—Questions relating to the quality and reasonableness of intrastate service and compensation therefor are primarily addressed to the railroad commission under Michigan Railroad Commission Act (Pub. Acts 1909, No. 300, as amended by Pub. Acts 1911, No. 139), subject to review by the state courts. Grand Trunk R. Co. *v.* Michigan R. Comm., 198 Fed. 1009.

A telephone is a facility and convenience within the constitution of Oklahoma, art. 9, § 18 (Bunn's Ed., § 222; Snyder's Ed., p. 238), empowering the corporation commission to require carriers to establish and maintain all such public service "facilities and conveniences" as may be reasonable and just. Atchison, etc., R. Co. *v.* State, 23 Okla. 210, 100 Pac. 11.

An order of the corporation commission requiring a carrier to install a telephone in its station in a town will not be disturbed where it appears that a telephone exchange is operated in the town, also that there is an exchange in an inland town of about three hundred population, and that the two towns are connected with a toll line, with free service to the subscribers of each exchange, and that such inland town receives all its freight by way of the station, and that the telephone would be of great convenience to the patrons of the station. Atchison, etc., R. Co. *v.* State, 23 Okla. 210, 100 Pac. 11.

Regulations as to passenger tickets—New Jersey statute.—An order by the Board of Public Utility Commissioners requiring tickets for intrastate commutation service, showing both termini and the same as to special intrastate rates, was within the jurisdiction of the Board under the New Jersey Public Utility Law (P. L. 1911, p. 374), if its determination as to the existence of regulations and practices that are unjust and unreasonable and the subjection of persons and localities to prejudice and disadvantage is sustained by proof. Pennsylvania R. Co. *v.* Board, 83 N. J. L. 67, 83 Atl. 945.

An order of the Board of Public Utility Commissioners requiring tickets showing both termini for intrastate commutation service or where special rates are granted is within the jurisdiction of the board where the companies refuse to sell or quote rates for the commutation or special rate tickets, except school tickets, to intrastate passengers to their termini, and require the passenger to take tickets reading to and from New York City. Pennsylvania R. Co. *v.* Board, 83 N. J. L. 67, 83 Atl. 945.

Reciprocal demurrage, bills of lading, and penalty for delay in shipment.—The Mississippi statute, Ann. Code Miss. 1892, § 4291, provided that the railroad commission might fix all charges and supervise and regulate all persons, etc., who may own or operate express, telegraph, telephone, or sleeping car companies. Acts 1898, p. 97, c. 82, provided that all laws, acts, and parts of acts giving authority to the railroad commission to supervise common carriers shall also apply to car service associations or other associations governing or controlling cars or rolling stock and railroads at whatever place they do business in the state, and the same penalty fixed by law for disobeying the mandates or orders of the railroad commission shall apply to the car service associations, as well as associations of other characters. The provisions of the act of 1898 were incorporated in Code 1906, § 4843, as to the supervision of car service associations. Held, that the railroad commission had power to make rules as to reciprocal demurrage, and to make rule 10, adopted

27. Rev. Pol. Code, 1903, c. 7.

not, and subjects them to the regulation and control of the state board of railroad commissioners.[28]

June 8, 1904, and effective June 18, 1904, providing that, when cars are properly loaded and shipping instructions given, the railroad agent must immediately issue bills of lading therefor, and that if a car or cars are detained or held, and not carried within twenty-four hours thereafter, the railroad shall be liable to the shipper for the payment of $1 for each day or a fraction of a day that the car or cars are thus detained or held. Yazoo, etc., R. Co. *v.* Keystone Lumber Co. (Miss.), 43 So. 605.

Time of shipment and transit and penalties.—The North Carolina statute, Laws 1903, p. 999, c. 590, § 3, providing that it shall be unlawful for any railroad company to omit to transport any goods received by it for shipment for a longer period than four days after receipt thereof, unless otherwise agreed on between the parties, or unless the same be destroyed, or to allow any such goods to remain at any intermediate point more than forty-eight hours, unless otherwise provided by the corporation commission, confers power on the commission to fix the time allowed as free time for intermediate points, and to make regulations as to the time of transit, but not to change the time allowed as free time at the point of shipment, nor to alter the penalties. Summers *v.* Southern R. Co., 138 N. C. 295, 50 S. E. 714.

Shipment of cotton.—Under the Texas statute, Rev. St., art. 4574, declaring it to be an unjust discrimination for any railroad to give undue or unreasonable preference or advantage to any particular person or locality, or subject any particular description of traffic to any undue or unreasonable prejudice, delay or disadvantage; and art. 4562, empowering the railroad commission to correct abuses—it is competent for such commission to prescribe regulations governing the shipment of cotton and the compressing of cotton in transit. Railroad Comm. *v.* Houston, etc., R. Co., 90 Tex. 340, 38 S. W. 750.

System of bookkeeping.—Under the Texas statute, Rev. St. 1895, art. 4571 (Rev. Civ. St. 1911, art. 6667), the state railroad commission can not require an arbitrary division of expenses between freight and passenger traffic, but in prescribing a system of bookkeeping can only require the recording of facts. Texas, etc., R. Co. *v.* Railroad Comm. (Tex.), 150 S. W. 878.

Notice and opportunity for hearing.—The Georgia statute, § 6 of the Railroad Commission Act of 1907 (Civil Code (1910), § 2663) contemplates that notice and an opportunity of a hearing be given to persons, railroads, or other corporations interested in the orders issued by the commission, and that provision may be made for such notice either by statute or rule of the commission. This section is to be construed to mean that the commission shall not issue a special order in a particular case, directed to a person or corporation, without first giving notice and an opportunity for hearing to the person or corporation so to be affected thereby. Wadley Southern R. Co. *v.* State, 137 Ga. 497, 73 S. E. 741.

Time when liability as carrier ends.—The South Carolina statute, Civ. Code 1902, § 3094, giving a railroad commission power to prescribe rates for storage of freight, and fixing the time after its arrival when storage charges shall begin, does not delegate to the commission the power to fix the time when the liability of the carrier ends, and that of warehouseman begins. Jones Bros. *v.* Southern R. Co., 76 S. C. 67, 56 S. E. 666.

Contracts for shipment of goods.—Under the Georgia statutes, the state railroad commission has no power to compel a railroad company to contract for the shipment of goods beyond its own line. State *v.* Wrightsville, etc., R. Co., 104 Ga. 437, 30 S. E. 891.

28. In South Dakota express companies controlled by railroad commissioners.—Platt *v.* LeCocq, 150 Fed. 391.

Rev. Civ. Code, S. D. 1903, § 1578, provides that a common carrier, if able to do so, must accept and carry whatever is offered him at a reasonable time and place of a kind that he undertakes or is accustomed to carry; and Pol. Code 1903, c. 7, § 437, prohibits a common carrier from subjecting any particular description of traffic to any prejudice or disadvantage in any respect whatsoever. Held, that a rule of an express company, providing that shipments of money would be received only during regular office hours if tendered before the departure of the last train on which the shipment could be made, which operated to require shipments of currency by a bank to be tendered on the day of the shipment before 6:30, 7, or 7:45 a. m., was unreasonable, and that the board of railroad commissioners had power to order the express company, so long as it held itself out as a common carrier of money, to receive same for transportation at all reasonable business hours of the day preceding the departure of trains at the hours specified. Platt *v.* LeCocq, 150 Fed. 391.

It was no defense to an express company's obligation to comply with the railroad commissioners' order that shippers of money could use the United States mails, and were therefore not prejudiced by the express company's rule, requiring presentation of money packages for ship-

§§ 25-28. Companies, Persons, or Instrumentalities Affected by Regulations—§ 25. In General.—No one can be compelled to engage in the business of a common carrier, but if he does so, he becomes subject to the duties imposed on common carriers.[29] In the constitution of California, art. 12, § 22, providing for a railroad commission to regulate the rates to be charged by transportation companies, the words "transportation companies" include individuals.[30]

§ 26. Railroad Companies.—A railroad company, accepting its charter subject to a constitutional provision prohibiting greater charges for shorter than for longer hauls, except when permitted by the railroad commission, is as much subject to the provisions for exoneration from that prohibition as to the prohibition itself, and can not claim that it has any implied contract exemption from these provisions by virtue of its charter and the consequent right to charge reasonable rates for its service.[31] A constitutional provision forbidding an officer of a company to engage in the business of transportation as a common carrier of freight or passengers over the works of the company, does not apply to the act of an officer of a railroad company in causing his own freight to be transported over the company's road.[32] When two railroad companies voluntarily enter into an agreement for joint rates, which covers all stations on their lines in the state, they virtually create a new and independent line, and become subject to the law preventing unjust discrimination and unreasonable exaction.[33] Where the railroad of one company is purchased by another railroad company, in pursuance of a statute authorizing the purchase, in the absence of any provision of law to the contrary, the road passes to the purchasing company subject to the same restrictions and limitations as to rates chargeable for transportation as attached to it in the hands of the vendor.[34]

§ 27. Street Railroad Companies.—Whether a street railroad company is subject to a particular law regulating railroad companies is to be determined by an interpretation of the terms of that law.[35] A railway company which per-

ment at unreasonable hours. Platt *v.* LeCocq, 150 Fed. 391.

Where an express company held itself out as a common carrier of money, it was no defense to an order of the board of railroad commissioners, requiring the receipt of money packages for transportation during reasonable business hours of the day preceding actual shipment, that to obey such order would compel the express company to transact the business at a loss. Platt *v.* LeCocq, 150 Fed. 391.

29. **Person engaged in business of common carrier subject to duties imposed.**—Missouri Pac. R. Co. *v.* Larabee Flour Mills Co., 211 U. S. 612, 53 L. Ed. 352, 29 S. Ct. 214.

30. **In California constitution words "transportation companies" include individuals.**—Southern Pac. Co. *v.* Board, 78 Fed. 236.

31. **Company accepting its charter subject to a constitutional provision.**—Judgment, 51 S. W. 164, 1012, 21 Ky. L. Rep. 232, 106 Ky. 633, 90 Am. St. Rep. 236, affirmed. Louisville, etc., R. Co. *v.* Kentucky, 183 U. S. 503, 46 L. Ed. 298, 22 S. Ct. 95.

32. **Prohibition against officer of company engaging in busines of transportation over works of company.**—Bucksport, etc., R. Co. *v.* Edinburgh, etc., Redwood Co., 16 C. C. A. 74, 68 Fed. 972, construing Const. art. 12, § 18.

33. **Companies voluntarily entering into agreement for joint rates.**—Blair *v.* Sioux, etc., R. Co., 109 Iowa 369, 80 N. W. 673.

34. **Purchase by railroad company of railroad of another company.**—Campbell *v.* Marietta, etc., R. Co., 23 O. St. 168, followed in Peters, etc., Co. *v.* Railroad Co., 42 O. St. 275, 283.

Consolidation of railroad companies by lease, purchase, or otherwise.—For an interpretation of certain New Hampshire statutes, under which a number of railroad companies were consolidated by lease, purchase, or otherwise with the Boston and Maine Railroad; and which contained restrictions as to increase of rates by the companies so consolidated, see State *v.* Boston, etc., Railroad, 76 N. H. 146, 80 Atl. 858.

35. **Street railroad companies.**—Under Greater New York Charter, § 1538, a corporation operating a street railroad is not subject to Railroad Law, § 104. Braffett *v.* Brooklyn, etc., R. Co., 204 N. Y. 440, 97 N. E. 888, affirming 137 App. Div. 899, 122 N. Y. S. 1122.

A street railroad corporation acquiring, under General Railroad Law (Laws 1890, c. 565), § 79, the railroads of two companies, is not within Railroad Law,

forms the service of an ordinary street railroad in a city under a franchise granted by the city is, as to such service, a street railroad, though it is also an interurban railroad engaging in carrying passengers beyond the limits of the city, and the fact that the State Railroad Commission has assumed jurisdiction over it does not prevent it from being subject to the franchise so far as it operates a system within the city.[36] Statutes limiting the fare to be charged by street railroad companies and requiring them to give transfers, have been interpreted by the courts to determine what companies and roads came within the scope of their provisions.[37]

§ 28. Express Companies.—In Iowa, under the express provisions of the Code,[38] laws relating to the transportation of property by railroad companies are applicable to express companies.[39] The statute of Indiana prescribing the duties of railroads with reference to intersecting lines[40] relates to the mere physical connection of the tracks, and has no application to express companies.[41]

§ 29. Licenses and Taxes.—The charters of some street railroad companies contain a provision requiring them to pay a license fee to the city in which they operate.[42] There are statutes in many of the states imposing a license or excise tax on express companies doing business in the state. Some of these statutes have been interpreted by the courts.[43] Power is generally dele-

§ 101, but within § 104, requiring giving of transfers. Braffett *v.* Brooklyn, etc., R. Co., 204 N. Y. 440, 97 N. E. 888, affirming order, 137 App. Div. 899, 122 N. Y. S. 1122.

36. Dennison *v.* Seattle, etc., R. Co., 64 Wash. 167, 116 Pac. 638.

37. Under Railroad Law, Laws 1890, p. 1113, c. 565, § 101, as amended by Laws 1897, p. 776, c. 688, relating to street surface railroads, and providing that no corporation constructing and operating a railroad under the provisions of this article, etc., shall charge any passenger more than five cents for one continuous ride from any point on its road, "or on any road, line or branch operated by it, or under its control," to any other point thereof, etc., and Railroad Law, Laws 1890, p. 1096, c. 565, § 39, imposing a penalty on any railroad corporation receiving more than the lawful rate of fare, etc., the operation or control of a road within the meaning of such sections means a control of the operation of the road, and not merely a control of the corporation or individuals operating it by reason of the ownership of a majority of the road's capital stock. Senior *v.* New York City R. Co., 111 App. Div. 39, 97 N. Y. S. 645, affirmed in 187 N. Y. 559, 80 N. E. 1120.

Rev. Code Chicago, § 1723, providing that the rate of fare "to be charged" on any street railway for any distance within the city limits shall not exceed five cents, and that at any point where a line of street railway does now or shall hereafter join, connect with, cross, or come within a distance of two hundred feet of another line belonging to the same owner, any passenger shall be entitled to a transfer, etc., applies not only to companies existing at the time the section was enacted, but to those coming into existence thereafter. Chicago Union Tract. Co. *v.* Chicago, 199 Ill. 484, 65 N. E. 451, 59 L. R. A. 631.

38. Code, § 2165.

39. Express companies.—McMillan *v.* American Exp. Co., 123 Iowa 236, 98 N. W. 629.

40. 2 Burns' Rev. St. 1849, § 5153; Rev. St. 1881, § 3903.

41. Decree, 88 Fed. 659, affirmed. Southern Indiana Exp. Co. *v.* United States Exp. Co., 35 C. C. A. 172, 92 Fed. 1022.

42. Same annual fee as is now paid by other railroads.—The charter of a street-railroad company was made subject "to the payment to the city of the same license fee annually for each car run thereon as is now paid by other city railroads in said city." Two railroads there paid $50, one $20, and three nothing. Held, that $50 was payable. New York *v.* Broadway, etc., R. Co., 97 N. Y. 275.

43. Florida statute imposing license tax on express companies.—A Florida statute, Gen. Revenue Law June 2, 1893, c. 4115, prohibits one from engaging in or managing the pursuits mentioned therein without first taking out a state license, and paying the occupation tax and license prescribed therein, and authorizes counties, cities, and towns to impose further taxes. It specifies that express companies shall pay in cities of 15,000 inhabitants or more a $200 license tax, in cities of 10,000 to 15,000 $100, in cities of 5,000 to 10,000 $75, in cities of 3,000 to 5,000 inhabitants $50, in cities of 1,000 to 3,000 inhabitants $25, in towns of less than 1,000 and more than fifty inhabitants $10. The violation of the act is made a misdemeanor. Held, the act

gated to counties and municipal corporations to impose taxes on common carriers doing business in the county or municipality. Some of the statutory provisions and charters delegating such power,[44] and some of the ordinances enacted in pursuance of the power so delegated,[45] have been interpreted by the

did not tax or regulate or apply to interstate commerce as distinguished from state or local commerce carried on by an express company, but applies only to local or state commerce, and a company must pay a license tax and take out a state license before doing business in a city, town, or village having more than fifty inhabitants; and, where there are in one county several cities, towns, or villages, the company must take out a separate state license for each in which it may intend to do business and pay the tax and fee therefor. Osborne *v.* State, 33 Fla. 162, 14 So. 588, 25 L. R. A. 120, 39 Am. St. Rep. 99.

Ohio statute imposing excise tax on express companies.—The amount paid to railroads for transportation of freight, as mentioned in the seventh subdivision of the second section of Act May 14, 1894 (91 Laws, 237), imposing an excise tax on express companies, is the amount paid for transportation of freight on business done wholly within Ohio. Adams Exp. Co. *v.* State, 55 O. St. 69, 44 N. E. 506.

44. Authority to impose license tax not applicable to foreign express companies.—The Kentucky statute, Act March 2, 1860, required foreign express companies doing business in the state to pay a license tax. The charter of the city of Lexington authorized the city to collect a license from express companies. Held, not to apply to foreign express companies. Adams Exp. Co. *v.* Lexington, 83 Ky. 657, 7 Ky. L. Rep. 716.

License taxes on express companies authorized by Florida statute.—A Florida statute, Gen. Revenue Law 1893, c. 4115, § 9, prohibits any person from engaging in any business without first securing a state license, and paying the occupation tax and license fee; authorizes counties and incorporated towns to impose further taxes of the same kind, not exceeding 50 per cent of the state tax when the business is carried on in such counties or towns; and directs that express companies doing business in the state shall pay in cities and villages of a specified population certain license taxes. Held, that any county may require of each company doing business within its limits to pay for doing business in any city or village in the county a license tax not exceeding 50 per cent of the amount paid the state for doing business in such city or village, and any incorporated city or town may also impose a tax for as much as 50 per cent of the state tax on any company doing business therein. Osborne *v.* State, 33 Fla. 162, 14 So. 588, 25 L. R. A. 120, 39 Am. St. Rep. 99.

The authority of a city under its charter to collect specific taxes on express companies doing business therein is not taken away as to the Southern Express Company by the provision of an act in relation to said company declaring "nor shall any municipal corporation levy any percentage tax upon the receipts of said company." City Council *v.* Shoemaker, 51 Ala. 114.

Tax authorized held to be an occupation tax.—A tax authorized by a city charter to be levied on "auctioneers, contractors, druggists, * * * omnibuses, carts, wagons and other vehicles used in the city for pay," in addition to the usual taxes assessed and collected on all property, is a tax on the occupation; and the fact that a defendant, who is the owner of a wagon, used it in one or two instances for hire will not alone support a conviction for his failure to procure a license for such wagon, but it must be shown that the vehicle is kept for hire or use for pay. Cheyenne *v.* O'Connell, 6 Wyo. 491, 46 Pac. 1088.

45. Ordinance not an attempt to impose additional tax on depot.—A city of the second class adopted an ordinance imposing an occupation tax "on each railroad corporation or company carrying or transporting freight or passengers to or from any point or place within the limits of this city, and to or from any point or place within the limits of this city and any point or place within the limits of this state, and having a depot or place of business within the limits of this city for receiving or discharging such passengers and receiving and delivering such freight. All interstate traffic commerce or business of such companies or corporations is hereby excepted and exempted from the levy of such tax." Held, that the ordinance was not an attempt to impose a tax on the depot of the complaining company, in addition to the tax arising from the general assessment of its property. York *v.* Chicago, etc., R. Co., 56 Neb. 572, 76 N. W. 1065.

Ordinance held not to include hearses.—An ordinance imposing a license on "each vehicle used for passengers, not having an annual hack license," does not include hearses. Burlington *v.* Unterkircher, 99 Iowa 401, 68 N. W. 795.

An ordinance imposing a license for "every vehicle or conveyance" which is "run" for hire or profit does not apply to a conveyance which is let without a driver, and is under the personal control of the hirer or his representative. Burlington *v.* Unterkircher, 99 Iowa 401, 68 N. W. 795.

courts. A municipal ordinance imposing a license fee on a common carrier must, of course, to be enforceable, be a valid exercise of the delegated power.[46]

A statute providing that express companies shall pay a privilege tax to the state, and that no company which has paid such tax shall be liable to pay any other tax in the state, precludes a city from levying a license tax on an express company.[47] A railroad company's liability to pay a license tax required of a company running cars through a city, for transporting freight or passengers to or from it, is not affected by its not having an agent or office in the city.[48] A railroad company which organizes an express company and carries on a regular express business as a part of the business of the railroad company, under the management and control of its officers, and by its own agents, is subject to pay a privilege tax imposed by statute upon express companies.[49]

§ 30. Reports and Statements.—Where a state railroad commission is authorized to see that a railroad company does not charge rates in excess of the limits set by its charter, it is entitled to reports from such company.[50] The United States Express Company being a joint-stock company and possessing the qualities of a partnership, but being a common carrier, a state railroad commission has the legal right to exact from it as a common carrier information as to all of its property and business within the state, for the purpose of fixing its charges or otherwise regulating its business, but not as to its property out of the state, nor as to its interstate business.[51] Some of the peculiar provisions of statutes relating to reports and statements required to be made by common carriers have been interpreted by the courts.[52]

46. Ordinances imposing license fees held valid.—An ordinance of the township of Lakewood, prescribing that it shall not be lawful to engage in the business of carrying passengers without paying a license fee, and punishing the violation of such provision with a fine, and requiring licensed vehicles to stand at certain designated places, is valid. Combs *v.* Lakewood, 68 N. J. L. 582, 53 Atl. 697.

Under the Iowa statute, Code, § 463, authorizing cities to regulate, license, and tax all conveyances for hire, an ordinance imposing an annual license fee "for each two-horse wagon or team, $6; for each one-horse wagon, dray, or cart, $4; for each hack, carriage, coach or omnibus, $10;" and providing that "each vehicle used for passengers, not having an annual hack license, shall pay a license of $1 per day," is reasonable and valid. Burlington *v.* Unterkircher, 99 Iowa 491, 68 N. W. 795.

An ordinance imposing annual license fees on the owners of conveyances run for hire, "for each two-horse wagon, $8; for each one-horse wagon, $5; * * * for each omnibus, $8; and for each hack or carriage, $10;" and which exempts from its operation vehicles bringing produce to market, and those owned by liverymen, but not kept on the street or other public place for hire—is a reasonable exercise of the power conferred on cities by the Iowa statute, Code, § 463, to regulate, license, and tax every description of conveyances for hire. Burlington *v.* Unterkircher, 99 Iowa 401, 68 N. W. 795.

The word "carriage," as used in said ordinance, includes single-horse buggies; and an annual license may therefore be charged for them, not the per diem license provided in the last clause. Burlington *v.* Unterkircher, 99 Iowa 401, 68 N. W. 795.

47. Statute precluding city from levying license tax on express company.—Douglass *v.* Anniston, 104 Ala. 291, 16 So. 133, construing act 1892-93.

48. Railroad company liable for license tax though having no agent or office in city.—Nashville, etc., R. Co. *v.* Alabama, 134 Ala. 414, 32 So. 731.

49. Railroad company carrying on express business.—Memphis, etc., R. Co. *v.* State, 77 Tenn. (9 Lea) 218, 42 Am. Rep. 673.

50. Reports and statements.—Mississippi R. Comm. *v.* Gulf, etc., R. Co., 78 Miss. 750, 29 So. 789.

51. State *v.* United States Exp. Co., 81 Minn. 87, 83 N. W. 465, 50 L. R. A. 667, 83 Am. St. Rep. 366.

52. Under the Florida statute, a railroad commission has no authority to adopt or enforce a rule requiring railroads to report to such commission by telegram, followed by a written report of all wrecks and their causes, and the names and addresses of the persons killed or injured therein. Railroad Comm'rs *v.* Louisville, etc., R. Co., 57 Fla. 526, 49 So. 39.

Under the Indiana statute, act of March 5, 1855 (Rev. St. 1876, p. 466), "declaring express companies to be common carriers," etc., it is the duty of the county recorder to procure the publication of

§§ 31-34. Conduct of Business in General—§ 31. Common Carriers in General.—It is the business of a common carrier to carry persons and property for hire.[53] The carrier has a right to conduct such business according to law, free from the interference of strangers.[54] But though a discretion is allowed a common carrier in the discharge of its public duties, it must be exercised in good faith, within the limitations of the law, and with reasonable regard for the public welfare, and is subject to review and regulation.[55] A carrier may prescribe reasonable regulations for the delivery to its agents of property for transportation, but it can not impose unusual conditions on a shipper, or require him to undergo unusual expense in delivering his goods for transportation.[56] While a common carrier may not be bound by a contract which renders it incapable of performing its duties to the public, yet where the subject-matter of a contract is not foreign to the purposes of the corporation, but is within its authorized power, and is not forbidden by statute, nor otherwise illegal, it will not be nullified by the courts.[57]

Conduct of Business by Agents.—Agents of common carriers must exercise the same kind of judgment in the employer's business as if doing business for themselves, and what would convince them that a certain fact exists is notice to the carrier of the existence thereof, so that agents must act on knowledge, probabilities, information, and judgment and infer facts as men generally do in similar matters when acting for themselves.[58]

§ 32. Railroad Companies.—In the absence of charter or statutory provisions affecting its right, it is competent for a railroad company to determine for itself within what limits it will act as a common carrier, what business it will engage in, what means and methods of transportation it will employ, what goods it will carry, and between what points and under what circumstances and conditions it will receive the same, subject always to the limitation that it must act in good faith, reasonably, and not arbitrarily or capriciously, and without discrimination; doing for all under like circumstances what it does for any one.[59]

the statement required of any such company by the 2nd section of such act; and the company is liable to the person making such publication for the value thereof where not made on contract. Fargo *v.* Ledger-Standard Co., 59 Ind. 496.

53. **Character of business.**—Texas, etc., R. Co. *v.* Fenwick, 34 Tex. Civ. App. 222, 226, 78 S. W. 548, affirmed in 98 Tex. 635, no op.

54. **Rights of carrier in conduct of business.**—Decree, 150 Fed. 391, reversed. Platt *v.* Lecocq, 85 C. C. A. 621, 158 Fed. 723, 15 L. R. A., N. S., 558.

55. **How business must be conducted.**—Railroad Comm'rs *v.* Florida, etc., R. Co., 57 Fla. 522, 49 So. 43.

56. **Regulations for delivery of property for transportation.**—St. Louis, etc., R. Co. *v.* State, 84 Ark. 150, 104 S. W. 1106.

57. **Contract rendering carrier incapable of performing its duties.**—Taylor *v.* Florida, etc., R. Co., 54 Fla. 635, 45 So. 574.

58. **Conduct of business by agents.**—Adams Exp. Co. *v.* Commonwealth, 33 Ky. L. Rep. 967, 112 S. W. 577, 18 L. R. A., N. S., 1182.

59. **Rights of railroad company in conduct of its business.**—Harp *v.* Choctaw, etc., R. Co., 118 Fed. 169, affirmed, 61 C. C. A. 405, 125 Fed. 445.

Right to make reasonable regulations.—A railroad company, has, unquestionably, the right to make reasonable regulations for conducting its business; and parties dealing with it must conform to such regulations. Houston, etc., R. Co. *v.* Moore, 49 Tex. 31, 30 Am. Rep. 98; Eddy *v.* Rider, 79 Tex. 53, 15 S. W. 113.

But such regulations can not be made and enforced if violative of the law, without liability to a person injured by their enforcement. Eddy *v.* Rider, 79 Tex. 53, 15 S. W. 113.

That a regulation of a railway company, that freight and passengers will be carried on its road in separate trains, is a reasonable regulation, can hardly be doubted by any one. Houston, etc., R. Co. *v.* Moore, 49 Tex. 31, 30 Am. Rep. 98.

Where railroad regulations are unnecessary and put shippers to delay and expense, the carrier may be liable. Donovan *v.* Texas, etc., R. Co., 64 Tex. 519.

The Texas statute, art. 4484, Sayles' Civ. Stats., gives to railway corporations "the right to regulate the time and manner in which passengers and property shall be transported," but it has never been thought that such regulations would be enforced by the courts except where

It is the duty of a railroad company to provide reasonably adequate facilities to meet the present and prospective demands for the safety, comfort, and convenience of the public.[60] It may, in addition to the facilities and accommodations already furnished, be required to render a particular service that it is essentially its duty to render for the reasonable convenience of its patrons among the public, and to meet the reasonable requirements of the public service undertaken.[61] Contracts for the carriage of freight by railroad companies are subject to regulation under the law, and when a lawful regulation has been imposed the carrier can not destroy it by any printed form of contract required to be signed by shippers.[62] In all the states there are constitutional provisions or statutes regulating railroad companies in the conduct of their business, or providing for their regulation by commissions appointed for the purpose. Some of the specific regulations with which railroad companies have been required to comply have been construed by the courts.[63]

they were reasonable, and whether or not they are in any case reasonable is a question to be determined according to all the circumstances of such case. Texas, etc., R. Co. *v.* Currie, 33 Tex. Civ. App. 277, 76 S. W. 810, affirmed in 97 Tex. 648, no op.

Management and running of trains.—Railroad companies may make reasonable regulations of their own for the management and running of their trains, or they may follow general customs in such management and running; which, when established, known, and acted on by the public, may impose upon the companies duties in reference to others, a breach of which, to their injury, might render such companies liable to damages. The facts involved in such regulations and customs, upon which duties would arise, not being matters known to the court, would have to be proved as other facts, where a breach of such duties might become the subject matter of a suit for damages. Texas, etc., R. Co. *v.* Murphy, 46 Tex. 356, 370, 26 Am. Rep. 272.

60. Duty to provide facilities to meet public demands.—Louisville, etc., R. Co. *v.* Railroad Comm'rs (Fla.), 58 So. 543.

It is the duty of the carrier to render a service that is reasonably adequate and of most convenience to the greatest number of the public affected by the service. Railroad Comm'rs *v.* Louisville, etc., R. Co., 62 Fla. 315, 57 So. 175.

61. Additional service. — Railroad Comm'rs *v.* Louisville, etc., R. Co., 62 Fla. 315, 57 So. 175.

The dipping of cattle in vats by a railroad transporting them from points below the quarantine line to points above it, under quarantine regulations prescribed by law, is so involved in the carriage of such cattle as to constitute a part of the railroad's public service. Midland Valley R. Co. *v.* State, 35 Okla. 672, 130 Pac. 803.

62. Contracts for carriage of freight. —Yazoo, etc., R. Co. *v.* Bent & Co. (Miss.), 47 So. 805.

63. Public service facilities and conveniences required under constitution of Oklahoma.—The provision in the constitution of Oklahoma, art. 9, § 18 (Bunn's Ed. § 222) relating to the duties of the corporation commission, and providing that it shall from time to time require transportation companies to maintain all "such public service facilities and conveniences as may be reasonable and just," means everything incident to the general, prompt, safe, and impartial performance of the duties to the public at large imposed by the state, in the proper exercise of its police power, on transportation companies. Chicago, etc., R. Co. *v.* State, 23 Okla. 94, 99 Pac. 901.

Sale of passenger tickets.—An order of the Board of Public Utility Commissioners of New Jersey held not to require the establishment of a commutation service by railroads, but merely to require that tickets shall be sold for an existing service designating specifically the termini of the journey, and that the rates be quoted and filed. Pennsylvania R. Co. *v.* Board, 83 N. J. L. 67, 83 Atl. 945.

An order of the Board of Public Utility Commissioners held not to involve the exercise of the power by the state to compel railroad companies to issue commutation or other special forms of tickets, but merely the power to end unjust discrimination. Pennsylvania R. Co. *v.* Board, 83 N. J. L. 67, 83 Atl. 945.

The stopping of lumber in transit for treatment contemplated by Railroad Commissioners' Rule 15 A, prescribing the charge for switching cars of rough lumber consigned to and arriving at the city of Jacksonville from points in the state to any planing mill in the Jacksonville yards, and thence after lumber is dressed to any point in the same yards, is in the nature of a special privilege, which the carrier may concede, but which the shipper can not demand as a matter of right. Railroad Comm'rs *v.* Atlantic, etc., R. Co., 59 Fla. 612, 52 So. 4.

Prohibition against using road for street railroad purposes.—In the California statute, Act May 20, 1861, authorizing municipalities to grant to any railroad

Maintenance of Warehouses.—A railroad company has no power, either express or implied, to maintain a regular public warehouse as an incident to its duty as public carrier;[64] and it can not be compelled to maintain such a warehouse, unless it has the power to act as a public warehouseman.[65]

When Regulations May Be Enforced Though Service Required Is Unremunerative.—Even though a particular duty of a railroad company, if enforced, would be in itself unremunerative and burdensome, such a result would be an incident to the service voluntarily undertaken, in consideration of the franchises permitted to be used for the public good, and the property rights of the carrier would not thereby be lawfully invaded, if the particular service is reasonably necessary for the public convenience, and the burden to the carrier has some fair relation to the benefits accruing to the public, and the burden of the particular service, considered with reference to the entire business of the carrier, does not in reality amount to a denial to the carrier of a reasonable compensation for the service rendered by it as an entirety.[66] If the performance of a particular useful, but nonessential, duty by a common carrier will as a part of a general public service contribute to the public convenience, the fact that the particular service must be rendered at a loss does not, in view of the nature of the duty required, excuse nonperformance; but the loss occasioned by the performance of a particular duty may be considered in determining the reasonableness of the order requiring the particular service to be rendered.[67] Where it appears that a particular service is a duty vitally necessary to the public, and its performance is essential in adequately rendering a general public service as a common carrier, the fact that the performance of the particular duty will be unremunerative will not in view of the nature of the duty to the public excuse nonperformance.[68]

company the use of streets for the purpose of reaching an accessible point for a depot, the provision that no company availing itself of the act should use its road "for street railroad purposes, or for the purpose of carrying passengers for a consideration from one point to another in the same city," was inserted to prevent competition between railroad companies covered by the act and local street railways, and not for the purpose of giving the public at large the right to travel free on such railroad within the city limits. Buswell *v.* Southern Pac. Co., 114 Cal. 445, 46 Pac. 291.

64. **Railroad company has no power to maintain a public warehouse.**—People *v.* Illinois Cent. R. Co., 233 Ill. 378, 84 N. E. 368.

65. **Railroad company can not be compelled to maintain a public warehouse.**—People *v.* Illinois Cent. R. Co., 233 Ill. 378, 84 N. E. 368.

Illinois statute does not require maintenance of warehouses.—The Illinois statute, Hurd's Rev. St. 1905, c. 114, § 3, requires railroad companies to transport grain in bulk, but there is nothing in the statute requiring them to maintain regular public warehouses. People *v.* Illinois Cent. R. Co., 233 Ill. 378, 84 N. E. 368.

66. **When regulations may be enforced though service required is unremunerative.**—Railroad Comm'rs *v.* Louisville, etc., R. Co., 62 Fla. 315, 57 So. 175.

If particular regulations are reasonably useful and expedient for the just requirements of the public service being performed by a common carrier, thereby making it a duty of the carrier to render the service, the regulations, if not illegal, may be enforced, even though the service required is not remunerative, unless it is made to clearly appear that the particular regulations are so unreasonable and arbitrary that their enforcement will operate to deny to the carrier a reasonable compensation for the entire service rendered by it. Railroad Comm'rs *v.* Louisville, etc., R. Co., 62 Fla. 315, 57 So. 175.

Common carrier held entitled to reasonable compensation for service, but not necessarily to full return for values used in rendering the service. Railroad Comm'rs *v.* Louisville, etc., R. Co. (Fla.), 57 So. 673.

Prime duty of carrier to render safe and reasonable service held required to be performed when possible, whether profitable or not. Railroad Comm'rs *v.* Louisville, etc., R. Co. (Fla.), 57 So. 673.

The risks and burdens of contingency of producing return for property, management, and labor used by carrier held to be assumed by the carrier in voluntarily undertaking to render public service. Railroad Comm'rs *v.* Louisville, etc., R. Co. (Fla.), 57 So. 673.

67. Railroad Comm'rs *v.* Louisville, etc., R. Co., 62 Fla. 315, 57 So. 175.

68. Railroad Comm'rs *v.* Louisville, etc., R. Co., 62 Fla. 315, 57 So. 175.

Considerations in Determining Whether a Regulation Is Confiscatory.—In determining whether the burden of a particular regulation enforced by state authority is confiscatory and unlawful because it prevents a railroad company from receiving a reasonable compensation for the service rendered, taken as an entirety, the fair actual value of all the property and labor and management rightly used in rendering the service should be considered. The cost of reproduction of the property may be an element to be considered in ascertaining the real value of the property used, but it is not the value that is to be arbitrarily considered in determining what is a reasonable compensation for the service rendered as a whole by a common carrier.[69]

When Courts and Commissions Should Not Interfere to Modify Established Rules.—Courts and commissions should not interfere to modify established rules of transportation companies on account of trivial troubles and incidental inconveniences, nor unless clear injustice or the imminent threat of it has resulted therefrom.[70]

Discontinuance of a Train.—Though information necessary to determine the question whether a train should be discontinued is inaccessible to the railroad commissioners except through the railroad company, it does not relieve the commissioners of the duty to regulate trains, nor deprive them of any authority they have to acquire the necessary information.[71]

Railroad Companies Can Not Escape Duties by Surrendering Management and Control of Their Roads.—Railroad companies voluntarily assume duties to the public from which they cannot free themselves by surrendering the management and control of their roads to other persons, in the absence of a law permitting them to do so.[72]

§ 33. Business of Transmitting Money to Foreign Countries.—A statute requiring all persons, who add to their business of selling steamship or railroad tickets to or from foreign countries the business of receiving money for transmission to foreign countries, to give a bond, merely regulates the carrying on of the business of transmitting money to foreign countries and restricts the business by requiring a bond to prevent fraud and the commission of crime, and is valid as within the police power.[73]

§ 34. Hackmen and Draymen.—A municipal ordinance regulating the business of carrying passengers and freight for hire in hacks and other vehicles on the streets of the municipality must conform to the municipal charter and must not be unreasonable.[74]

69. **Considerations in determining whether a regulation is confiscatory.**—Railroad Comm'rs *v.* Louisville, etc., R. Co., 62 Fla. 315, 57 So. 175.

70. **When courts and commissions should not interfere to modify established rules.**—Decree, 150 Fed. 391, reversed. Platt *v.* Lecocq, 85 C. C. A. 621, 158 Fed. 723, 15 L. R. A., N. S., 558.

71. **Discontinuance of a train—Effect of inaccessibility of information.**—Railroad Comm'rs *v.* Atlantic, etc., R. Co., 61 Fla. 799, 54 So. 900.

72. **Railroad companies can not escape duties by surrendering management and control of their roads.**—Woodhouse *v.* Rio Grande R. Co., 67 Tex. 416, 3 S. W. 323; Rio Grande R. Co. *v.* Cross, 5 Tex. Civ. App. 454, 456, 23 S. W. 529, affirmed in 93 Tex. 648, no op.

A provision in a railway charter which authorized the company to raise money by the sale of bonds, and to secure the bonds by a mortgage of its road, capital stock, franchises, etc., did not authorize the company to surrender the control and management of its road to the trustees in such mortgage, and thus relieve itself from its liabilities and duties to the state and the public. Rio Grande R. Co. *v.* Cross, 5 Tex. Civ. App. 454, 23 S. W. 529, affirmed in 93 Tex. 648, no op., following Woodhouse *v.* Rio Grande R. Co., 67 Tex. 416, 3 S. W. 323.

73. **Statute regulating business of transmitting money to foreign countries.**—Judgment, Benvega *v.* United States Surety Co., 115 N. Y. S. 199; Musco *v.* United Surety Co., 132 App. Div. 300, 117 N. Y. S. 21, order affirmed, 90 N. E. 171, construing Laws 1907, p. 263, c. 185, making it a misdemeanor to "stop, stand,

74. **Ordinance held an invalid exercise of power given by charter.**—An ordinance

§§ 35-95. Charges—§§ 35-84. In General—§§ 35-79. Power to Regulate—§ 35. In General.—The power to regulate and control the rates of carriers is within the police power of the state.[75] The legislature of a state has the power to prescribe and regulate the charges of a railroad company for the carriage of persons and merchandise within its limits, in the absence of a contract vesting in the company authority over those matters, subject to the limitation that the carriage is not required without reward, or upon conditions amounting to the taking of property for public use without just compensation; and that what is done does not amount to a regulation of foreign or interstate commerce.[76] The power thus to prescribe and regulate charges is in many of

or detain" any "carriage, hack, or vehicle" used to carry passengers or freight for hire, on any of certain named streets, or in front of any public hotel in the city, except when actually engaged in receiving or delivering passengers or freight, is an unreasonable and oppressive and invalid exercise of the power given by a city charter to license, tax, and regulate hackmen, draymen, etc., and to regulate stands for their vehicles, and to prevent the incumbering of the streets with any vehicle whatsoever. Ex parte Battis, 40 Tex. Cr. App. 112, 48 S. W. 513, 43 L. R. A. 863, 76 Am. St. Rep. 708.

Ordinance held not void for unreasonableness.—Provisions in the city ordinance establishing a hack stand which locate such stand across a thoroughfare from a city railroad station, and at a distance of 50 feet from the sidewalk in front thereof, and which require the drivers to stay with their vehicles, and forbid them leaving such vehicles to solicit passengers or to assist customers to the vehicles, and which prohibit runners therefor on the thoroughfare or sidewalk, do not render the ordinance void for unreasonableness. Ex parte Vance, 42 Tex. Cr. App. 619, 62 S. W. 568.

75. Power to regulate rates within police power.—In re Arkansas Rate Cases, 187 Fed. 290; Webster *v.* Superior Court, 67 Wash. 37, 120 Pac. 861.

76. Power of state to regulate charges of railroad companies.—*United States.*—Georgia, etc., R. Co. *v.* Smith, 128 U. S. 174, 179, 32 L. Ed. 377, 9 S. Ct. 47; Stone *v.* Farmers' Loan, etc., Co., 116 U. S. 307, 29 L. Ed. 636, 6 S. Ct. 334; Dow *v.* Beidelman, 125 U. S. 680, 31 L. Ed. 841, 8 S. Ct. 1028; Atlantic, etc., R. Co. *v.* North Carolina Corp. Comm., 206 U. S. 1, 51 L. Ed. 933, 27 S. Ct. 585; Minneapolis, etc., R. Co. *v.* Minnesota, 186 U. S. 257, 264, 46 L. Ed. 1151, 22 S. Ct. 900; Reagan *v.* Farmers' Loan, etc., Co., 154 U. S. 362, 38 L. Ed. 1014, 14 S. Ct. 1047; Wabash, etc., R. Co. *v.* Illinois, 118 U. S. 557, 30 L. Ed. 244, 7 S. Ct. 4; Chicago, etc., R. Co. *v.* Minnesota, 134 U. S. 418, 33 L. Ed. 970, 10 S. Ct. 462, 702; Erie R. Co. *v.* Purdy, 185 U. S. 148, 150, 46 L. Ed. 487, 22 S. Ct. 605; Hennington *v.* Georgia, 163 U. S. 299, 41 L. Ed. 166, 16 S. Ct. 1086; Western Union Tel. Co. *v.* James, 162 U. S. 650, 40 L. Ed. 1105, 16 S. Ct. 934; Lake Shore, etc., R. Co. *v.* Ohio, 173 U. S. 285, 43 L. Ed. 702, 19 S. Ct. 465; Munn *v.* Illinois, 94 U. S. 113, 24 L. Ed. 77; Railroad Co. *v.* Maryland (U. S.), 21 Wall. 456, 22 L. Ed. 678; Ruggles *v.* Illinois, 108 U. S. 526, 27 L. Ed. 812, 2 S. Ct. 832; Railroad Co. *v.* Richmond, 96 U. S. 521, 24 L. Ed. 734; Chicago, etc., R. Co. *v.* Wellman, 143 U. S. 339, 36 L. Ed. 176, 12 S. Ct. 400; Illinois Cent. R. Co. *v.* Illinois, 108 U. S. 541, 27 L. Ed. 818, 2 S. Ct. 839; St. Louis, etc., R. Co. *v.* Gill, 156 U. S. 649, 39 L. Ed. 567, 15 S. Ct. 484; Smyth *v.* Ames, 169 U. S. 466, 523, 42 L. Ed. 819, 18 S. Ct. 418; Norfolk, etc., R. Co. *v.* Pendleton, 156 U. S. 667, 673, 39 L. Ed. 574, 15 S. Ct. 413; Shields *v.* Ohio, 95 U. S. 319, 24 L. Ed. 357; Union Pac. R. Co. *v.* Goodridge, 149 U. S. 680, 37 L. Ed. 986, 13 S. Ct. 970; Lake Shore, etc., R. Co. *v.* Smith, 173 U. S. 684, 43 L. Ed. 858, 19 S. Ct. 565; McChord *v.* Louisville, etc., R. Co., 183 U. S. 483, 46 L. Ed. 289, 22 S. Ct. 165; Chicago, etc., R. Co. *v.* Tompkins, 176 U. S. 167, 44 L. Ed. 417, 20 S. Ct. 336; St. Louis, etc., R. Co. *v.* Stevenson, 156 U. S. 667, 39 L. Ed. 573, 15 S. Ct. 491; Chicago, etc., R. Co. *v.* Iowa, 94 U. S. 155, 24 L. Ed. 94; Peik *v.* Chicago, etc., R. Co., 94 U. S. 164, 24 L. Ed. 97; Chicago, etc., R. Co. *v.* Ackley, 94 U. S. 179, 24 L. Ed. 99; Winona, etc., R. Co. *v.* Blake, 94 U. S. 180, 24 L. Ed. 99; Stone *v.* Wisconsin, 94 U. S. 181, 24 L. Ed. 102; Louisville, etc., R. Co. *v.* Kentucky, 161 U. S. 677, 696, 40 L. Ed. 849, 16 S. Ct. 714; Detroit *v.* Detroit Citizens' St. R. Co., 184 U. S. 368, 387, 46 L. Ed. 592, 22 S. Ct. 410; Reagan *v.* Farmers' Loan, etc., Co., 154 U. S. 420, 38 L. Ed. 1031, 14 S. Ct. 1062; Reagan *v.* Mercantile Trust Co., 154 U. S. 418, 38 L. Ed. 1030, 14 S. Ct. 1062; Wisconsin, etc., Railroad *v.* Jacobson, 179 U. S. 287, 45 L. Ed. 194, 21 S. Ct. 115; Northern Securities Co. *v.* United States, 193 U. S. 197, 378, 48 L. Ed. 679, 24 S. Ct. 436; Louisville, etc., R. Co. *v.* Mississippi, 133 U. S. 587, 592, 33 L. Ed. 784, 10 S. Ct. 348; Covington, etc., Bridge Co. *v.* Kentucky, 154 U. S. 224, 38 L. Ed. 970, 14 S. Ct. 1094; Missouri Pac. R. Co. *v.* Nebraska, 164 U. S. 403, 41 L. Ed. 489, 17 S. Ct. 130; Covington, etc., Turnpike Road Co. *v.* Sandford, 164 U. S. 578, 41

the states conferred upon the legislature by express constitutional enactment;[77] and the legislature must always exercise its power within constitutional bounds.[78] It is essential to the validity of a statute regulating the rates to be charged by a railroad company that it shall not be ambiguous or uncertain.[79]

L. Ed. 560, 17 S. Ct. 198; Cotting *v.* Kansas City Stock Yards Co., 183 U. S. 79, 46 L. Ed. 92, 22 S. Ct. 30; Illinois Cent. R. Co. *v.* Illinois, 108 U. S. 541, 27 L. Ed. 818, 2 S. Ct. 839; Charlotte, etc., R. Co. *v.* Gibbes, 142 U. S. 386, 35 L. Ed. 1051, 12 S. Ct. 255; Metropolitan Trust Co. *v.* Houston, etc., R. Co., 90 Fed. 683; In re Arkansas Rate Cases, 187 Fed. 290; Southern Pac. Co. *v.* Bartine, 170 Fed. 725; Louisville, etc., R. Co. *v.* Railroad Comm., 196 Fed. 800.

Georgia.—Georgia R. Co. *v.* Smith, 70 Ga. 694.

Illinois.—Chicago Union Tract. Co. *v.* Chicago, 199 Ill. 484, 65 N. E. 451, 59 L. R. A. 631.

Indiana.—Southern Indiana R. Co. *v.* Railroad Comm., 172 Ind. 113, 87 N. E. 966.

Oregon.—State *v.* Corvallis, etc., R. Co., 59 Ore. 450, 117 Pac. 980.

Pennsylvania.—Pennsylvania R. Co. *v.* Philadelphia County, 220 Pa. 100, 68 Atl. 676.

Vermont.—State *v.* Central Vermont R. Co., 81 Vt. 463, 71 Atl. 194.

Virginia.—Richmond, etc., R. Co. *v.* Patterson, etc., Co., 92 Va. 670, 24 S. E. 261, 41 L. R. A. 511; Norfolk, etc., R. Co. *v.* Pendleton, 86 Va. 1004, 11 S. E. 1062, affirmed in 156 U. S. 667, 39 L. Ed. 574, 15 S. Ct. 413.

West Virginia.—Laurel, etc., R. Co. *v.* West Virginia Transp. Co., 25 W. Va. 324; West Virginia Transp. Co. *v.* Sweetzer, 25 W. Va. 434.

The legislature either directly or by delegation of authority to an appropriate agency has power to fix rates to be charged by railroad companies, provided the rates fixed are such as to afford reasonable compensation for the services rendered. Graham Ice Co. *v.* Chicago, etc., R. Co., 153 Wis. 145, 140 N. W. 1097.

The state government of Oklahoma has full power to regulate the charges for intrastate freight and passenger traffic on intrastate railroads. Chicago, etc., R. Co. *v.* Territory, 21 Okla. 334, 97 Pac. 267.

The right of the legislature of Indiana to regulate the fare upon street railroads organized under the act of 1861 does not depend upon the reservation in § 11 of the right to amend or repeal said act, as the power would exist even if the right to amend or repeal the act had not been reserved. Indianapolis *v.* Navin, 151 Ind. 139, 47 N. E. 525, 51 N. E. 80, 41 L. R. A. 337, 344.

Requiring rates to be fixed annually.—Carriers may be required to fix their rates annually for the transportation of passengers and freight. Cleveland, etc., R. Co. *v.* Illinois, 177 U. S. 514, 517, 44 L. Ed. 868, 20 S. Ct. 722; Railroad Co. *v.* Fuller (U. S.), 17 Wall. 560, 21 L. Ed. 710.

77. Power conferred by express constitutional enactment.—Trammel *v.* Dinsmore, 42 C. C. A. 623, 102 Fed. 794, affirmed in 183 U. S. 115, 46 L. Ed. 111, 22 S. Ct. 45; Southern R. Co. *v.* Melton, 133 Ga. 277, 65 S. E. 665.

Peculiar provisions of constitutions construed.—Georgia R. Co. *v.* Smith, 70 Ga. 694; Shields *v.* State, 26 O. St. 86.

78. Legislature must exercise power within constitutional bounds.—In re Arkansas Rate Cases, 187 Fed. 290.

Where a railroad is incorporated by a state, it takes its charter subject to the provisions of the state constitution as to regulation of rates by the state. Louisville, etc., R. Co. *v.* Kentucky, 183 U. S. 503, 46 L. Ed. 298, 22 S. Ct. 95.

79. Statute void for uncertainty.—Ky. St., § 816, providing that, if any railroad corporation shall charge or collect more than a just and reasonable rate of toll for the transportation of passengers or freight, it shall be guilty of extortion, and fixing a penalty therefor, is void for uncertainty, in that it fails to prescribe a standard as to what is just and reasonable, by which the carrier can regulate its conduct. Louisville, etc., R. Co. *v.* Commonwealth, 99 Ky. 132, 18 Ky. L. Rep. 42, 35 S. W. 129, 33 L. R. A. 209, 59 Am. St. Rep. 457.

Statutes held not void for ambiguity or uncertainty.—Act May 2, 1873, § 1, which declares that any railroad company which shall charge or receive more than a fair and reasonable compensation shall be guilty of extortion, is not void for uncertainty in defining the offense, since, when construed in connection with the eighth section, which provides for the making by the railroad and warehouse commissioners of a schedule of reasonable maximum rates for each railroad in the state, it furnishes a uniform rule for the guidance of the railroads. Chicago, etc., R. Co. *v.* Jones, 149 Ill. 361, 37 N. E. 247, 41 Am. St. Rep. 278, 24 L. R. A. 141.

Comp. Laws, § 6234, subd. 7, provides that in transporting freight by car, loaded by the shipper and unloaded by the consignee, no railroad shall charge for transporting each car more than $8 for any distance not exceeding ten miles, and not more than fifty cents a mile for the second 10 miles, etc. The maximum and minimum car load of the various classes

Basis of Power.—The power of a state to regulate railroad rates and charges arises from the fact that railroad companies are engaged in a public employment, affecting the public interest, and must be held to have accepted their rights, privileges and franchises subject to the condition that the government creating them or the government within whose limits they conduct their business, may by legislation protect the people against unreasonable charges for the services rendered by them.[80]

Railroads Incorporated under Act of Congress.—In the absence of any-

of freight was established by experts. Held, in an action to recover an overcharge, that the statute was not ambiguous or uncertain on the ground that it applied to the transportation of cars only, and not freight, nor was it uncertain on the ground that a car load is not a fixed quantity, since, while the capacity of cars differs, the load which each could carry was fixed and certain. Robinson *v.* Harmon, 157 Mich. 266, 117 N. W. 661.

80. **Reason of existence of power by state to regulate.**—*United States.*—Smyth *v.* Ames, 169 U. S. 466, 545, 42 L. Ed. 819, 18 S. Ct. 418; Railroad Co. *v.* Maryland (U. S.), 21 Wall. 456, 22 L. Ed. 678; Dow *v.* Beidelman, 125 U. S. 680, 687, 31 L. Ed. 841, 8 S. Ct. 1028; Louisville, etc., R. Co. *v.* Kentucky, 183 U. S. 503, 46 L. Ed. 298, 22 S. Ct. 95; Chicago, etc., R. Co. *v.* Ackley, 94 U. S. 179, 24 L. Ed. 99; Winona, etc., R. Co. *v.* Blake, 94 U. S. 180, 24 L. Ed. 99; Stone *v.* Wisconsin, 94 U. S. 181, 24 L. Ed. 102; Chicago, etc., R. Co. *v.* Minnesota, 134 U. S. 418, 33 L. Ed. 970, 10 S. Ct. 462, 702; Chicago, etc., R. Co. *v.* Iowa, 94 U. S. 155, 24 L. Ed. 94; Georgia R., etc., Co. *v.* Smith, 128 U. S. 174, 32 L. Ed. 377, 9 S. Ct. 47; Peik *v.* Chicago, etc., R. Co., 94 U. S. 164, 165, 24 L. Ed. 97.

West Virginia.—Laurel, etc. R. Co. *v.* West Virginia Transp. Co., 25 W. Va. 324; West Virginia Transp. Co. *v.* Sweetzer, 25 W. Va. 434.

Railroad companies are carriers for hire. They are incorporated as such, and given extraordinary powers, in order that they may better serve the public in that capacity. They are, therefore, engaged in a public employment affecting the public interest, and are subject to legislative control as to their rates of fare and freight, unless protected by their charters. Dow *v.* Beidelman, 125 U. S. 680, 31 L. Ed. 841, 8 S. Ct. 1028; Louisville, etc., R. Co. *v.* Kentucky, 183 U. S. 503, 46 L. Ed. 298, 22 S. Ct. 95; Chicago, etc., R. Co. *v.* Ackley, 94 U. S. 179, 24 L. Ed. 99; Winona, etc., R. Co. *v.* Blake, 94 U. S. 180, 24 L. Ed. 99; Stone *v.* Wisconsin, 94 U. S. 181, 24 L. Ed. 102; Chicago, etc., R. Co. *v.* Minnesota, 134 U. S. 418, 33 L. Ed. 970, 10 S. Ct. 462, 702.

The incorporation of a railroad company by a state and the granting of special privileges to carry out the object of incorporation, more particularly the authority to exercise the state's right of eminent domain, and the obligation assumed by the acceptance of the charter to transport all persons and merchandise upon like conditions and for reasonable rates affect the property and employment with a public use and thus subject the business of the company to legislative control in the interest of the public. Central, etc., R. Co. *v.* Murphey, 116 Ga. 863, 43 S. E. 265, 60 L. R. A. 817, citing Georgia R., etc., Co. *v.* Smith, 128 U. S. 174, 32 L. Ed. 377, 9 S. Ct. 47.

Under the rule that the owner of property set apart to a public use impliedly agrees to be governed by such reasonable regulations as the public may adopt to promote the common convenience and general welfare, the state may enact reasonable regulations fixing the rates for transportation of freight and passengers. State *v.* Corvallis, etc., R. Co., 59 Ore. 450, 117 Pac. 980.

A railroad is a public highway, and none the less so because constructed and maintained through the agency of a corporation deriving its existence and powers from the state. Such a corporation was created for public purposes. It performs a function of the state. Its authority to exercise the right of eminent domain and to charge tolls was given primarily for the benefit of the public. It is under governmental control though such control must be exercised with due regard to the constitutional guarantees for the protection of its property. Olcott *v.* Supervisors (U. S.), 16 Wall. 678, 21 L. Ed. 382; Sinking Fund Cases, 99 U. S. 700, 25 L. Ed. 496, 14 S. Ct. 594; Cherokee Nation *v.* Southern Kansas R. Co., 135 U. S. 641, 34 L. Ed. 295, 10 S. Ct. 965. It can not, therefore, be admitted that a railroad corporation maintaining a highway under the authority of the state may fix its rates with a view solely to its own interests, and ignore the rights of the public. But the rights of the public would be ignored if rates for the transportation of persons or property on a railroad are exacted without reference to the fair value of the property used for the public or the fair value of the services rendered, but in order simply that the corporation may meet operating expenses, pay the interest on its obligations, and declare a dividend to stockholders. Smyth *v.* Ames, 169 U. S. 466, 544, 42 L. Ed. 819, 18 S. Ct. 418.

thing to the contrary in the charter or statute creating a railroad corporation, a state may reasonably regulate its rates and tariffs upon intrastate traffic, although it is incorporated under an act on congress.[81]

State Newly Admitted to Union.—Where an act of congress regulating the rates on a railroad in a territory provides that such regulations shall be in force until a state government shall exist in the territory, when such government shall be authorized to regulate the cost of transportation by the railroad company, upon the organization of the territory as a state and its admission to the Union, the rates fixed by the act of congress cease to be of force, and the power to regulate intrastate rates on the railroad passes into the control of the state, subject only to the constitutional rights of the railroad company.[82]

Railroads Incorporated in Several States.—Where a railroad running through more than one state is incorporated under the laws of each state through which it passes, it is, as to the state incorporating it, a domestic corporation, subject to the state laws not in conflict with the constitution of the United States, including state laws regulating freights and fares for business done exclusively within the state.[83]

Consolidated Company, Consisting of Domestic and Foreign Corporations.—Where domestic railroad corporations are consolidated with foreign corporations on terms which, in effect, require the consolidated company, when operating in the state to be subject to its laws, the state may legislate for the company within the state precisely as it could have legislated for its own original companies, if no consolidation had taken place.[84]

That Income Is Pledged to Secure Debts Does Not Preclude Regulation.—The state may limit the amount of charges by railroad companies for fares and freights, unless restrained by some contract in the charter, even though their income may have been pledged as security for the payment of obligations incurred upon the faith of the charter.[85]

Power to Declare What Shall Be a Reasonable Compensation or to Fix a Maximum Charge.—By the common law carriers or other persons exercising a public employment could not charge more than a reasonable compensation for their services, and it is within the power of the legislature to declare

81. Railroad created by congress.—Reagan *v.* Mercantile Trust Co., 154 U. S. 418, 38 L. Ed. 1030, 14 S. Ct. 1062; Smyth *v.* Ames, 169 U. S. 466, 523, 42 L. Ed. 819, 18 S. Ct. 418; Thomson *v.* Pacific Railroad (U. S.), 9 Wall. 579, 19 L. Ed. 792; Railroad Co. *v.* Peniston (U. S.), 18 Wall. 5, 21 L. Ed. 787.

The provision in the act of Congress of July 1, 1862, ch. 120, 12 Stat. 489, incorporating the Union Pacific Railroad Company, that congress might reduce the rates of fare if unreasonable in amount and might fix and establish the same by law whenever the net earnings of the entire road should exceed ten per cent upon its cost, exclusive of the five per cent to be paid to the United States, did not affect the right of the several states through which the road passes to regulate the rates within their respective limits. Smyth *v.* Ames, 169 U. S. 466, 522, 42 L. Ed. 819, 18 S. Ct. 418.

82. State newly admitted to union.—Oklahoma *v.* Atchison, etc., R. Co., 220 U. S. 277, 55 L. Ed. 465, 31 S. Ct. 434; Oklahoma *v.* Chicago, etc., R. Co., 220 U. S. 302, 55 L. Ed. 474, 31 S. Ct. 442, affirming 21 Okla. 334, 97 Pac. 267.

83. Railroads incorporated by several states.—Stone *v.* Farmers' Loan, etc., Co., 116 U. S. 307, 29 L. Ed. 636, 6 S. Ct. 334.

84. Consolidated company, consisting of domestic and foreign corporations.—Peik *v.* Chicago, etc., R. Co., 94 U. S. 164, 24 L. Ed. 97.

85. That income is pledged to secure debts does not preclude regulation.—Peik *v.* Chicago, etc., R. Co., 94 U. S. 164, 24 L. Ed. 97; Munn *v.* Illinois, 94 U. S. 113, 24 L. Ed. 77; Chicago, etc., R. Co. *v.* Iowa, 94 U. S. 155, 24 L. Ed. 94.

The fact that before the power of regulation was exercised, the company pledged its income as security for the payment of debts incurred, and leased its road to a tenant that relied upon the earnings for the means of paying the stipulated rent, does not affect the validity of the regulation, as the company could neither grant nor pledge more than it had, and its pledgee or tenant took the property subject to the exercise by the state of the same powers of regulation which might have been exercised over the company itself. Chicago, etc., R. Co. *v.* Iowa, 94 U. S. 155, 24 L. Ed. 94.

what shall be a reasonable compensation for such services, or, perhaps more properly speaking, to fix a maximum beyond which any charge made would be unreasonable.[86] But a state can not compel a railroad company to contract with any individual or class for carriage at a charge less than the established or regular scale of fares.[87] In some states the legislature is expressly empowered by the constitution to fix maximum rates for railroad companies;[88] and some of the peculiar provisions of statutes fixing such maximum rates have been held to be constitutional.[89] Statutes fixing maximum railroad rates are not invalid because they have caused the discharge of many railroad employees.[90]

§§ 36-37. Delegation of Power—§ 36. To a Commission.—There can be no doubt of the general power of a state to regulate the fares and freights which may be charged and received by railroad or other carriers by means of a commission created for that purpose.[91] Such a commission is merely an admin-

86. Power to declare what shall be a reasonable compensation or to fix a maximum charge.—*United States.*—Munn *v.* Illinois, 94 U. S. 113, 24 L. Ed. 77; Dow *v.* Beidelman, 125 U. S. 680, 686, 31 L. Ed. 841, 8 S. Ct. 1028; Lake Shore, etc., R. Co. *v.* Smith, 173 U. S. 684, 43 L. Ed. 858, 19 S. Ct. 565, reversing 114 Mich. 460, 72 N. W. 328.

Michigan.—Wellman *v.* Chicago, etc., R. Co., 83 Mich. 592, 47 N. W. 489.

Texas.—Houston, etc., R. Co. *v.* Harry & Bros., 63 Tex. 256, 259.

Virginia.—Commonwealth *v.* Atlantic, etc., R. Co., 106 Va. 61, 55 S. E. 572.

West Virginia.—Laurel, etc., R. Co. *v.* West Virginia Transp. Co., 25 W. Va. 324; West Virginia Transp. Co. *v.* Sweetzer, 25 W. Va. 434.

To limit the rate of charges for services rendered in a public employment, or for the use of property in which the public has an interest, is only changing a regulation which existed before. It establishes no new principle in the law, but only gives a new effect to an old one. Munn *v.* Illinois, 94 U. S. 113, 24 L. Ed. 77; Dow *v.* Beidelman, 125 U. S. 680, 31 L. Ed. 841, 8 S. Ct. 1028.

The legislature has the general power to fix a maximum rate per mile for carrying passengers on a railroad. Pingree *v.* Michigan Cent. R. Co., 118 Mich. 314, 76 N. W. 635, 53 L. R. A. 274.

87. Class legislation invalid.—Commonwealth *v.* Atlantic, etc., R. Co., 106 Va. 61, 67, 55 S. E. 572.

Statute requiring railroad company to sell mileage tickets at a reduced rate.—The New York statute, Laws 1895, c. 1027, § 1, requiring railroad companies to sell 1,000-mile mileage tickets at a reduced rate, is not a valid exercise of the right of the state to fix maximum rates for transportation, but an arbitrary enactment in favor of those able or willing to purchase the reduced-rate ticket. Judgment, 15 App. Div. 251, 44 N. Y. S. 175, reversed. Beardsley *v.* New York, etc., R. Co., 162 N. Y. 230, 56 N. E. 488.

Statute fixing charge for carrying militia held constitutional.—The Minnesota statute, Laws 1909, c. 493 (Rev. Laws Supp. 1909, §§ 2007-32, 2007-33), requiring railroad companies to carry officers and men of the national guard under military orders at the rate of one cent per mile, held constitutional. Simpson *v.* Chicago, etc., R. Co., 118 Minn. 380, 137 N. W. 2, 41 L. R. A., N. S., 524.

88. Legislature empowered by constitution to fix maximum rates.—Under the Constitution of North Dakota, § 142, the legislature can prescribe maximum rates for the transportation by common carriers of commodities within the state, if they are reasonable. McCue *v.* Northern Pac. R. Co., 19 N. Dak. 45, 120 N. W. 869.

The constitution of Texas confers upon the legislature the right to fix railroad maximum rates, and relief from such rates must be obtained from the legislature, and not from the courts. State *v.* Farmers' Loan, etc., Co., 81 Tex. 530, 17 S. W. 60.

89. Statutes fixing maximum rates held constitutional.—The New Jersey statute, Gen. Railroad Law 1903, § 38 (P. L. 1903, p. 665), providing that a railroad may charge such fare as it shall think reasonable, not exceeding three cents per mile, and not exceeding in the case of railroads under special charter three and one-half cents per mile, and providing for the sale of tickets limited as to time for less than the regular fare, is constitutional. Shelton *v.* Erie R. Co., 73 N. J. L. 558, 66 Atl. 403, 9 L. R. A., N. S., 727.

The West Virginia act of 1873, c. 227, establishing a reasonable maximum rate of charges for the transportation of passengers and freight was constitutional. Laurel, etc., R. Co. *v.* West Virginia Transp. Co., 25 W. Va. 324; West Virginia Transp. Co. *v.* Sweetzer, 25 W. Va. 434.

90. Statutes not invalid because they have caused discharge of many railroad employees.—St. Louis, etc., R. Co. *v.* Hadley, 168 Fed. 317.

91. Regulation by commission.—Atlantic, etc., R. Co. *v.* North Carolina Corp. Comm., 206 U. S. 1, 51 L. Ed. 933, 27 S. Ct. 585; Reagan *v.* Farmers' Loan,

istrative board created by the state for carrying into effect the will of the state, as expressed by its legislation.[92] The state may require the railroads of the state to pay the salary and expenses of such commission.[93]

Constitutionality of Statutes Creating Commissions.—While an act creating a railroad commission for the purpose of regulating rates is not invalid merely because it delegates such power to the commission,[94] or because it empowers the commission to establish joint through rates or tariffs over the lines of independent connecting roads,[95] all of its provisions must be certain and consistent,[96] and it must not attempt to make the rates fixed by the commission con-

etc., Co., 154 U. S. 362, 32 L. Ed. 1014, 14 S. Ct. 1047; S. C., 154 U. S. 420, 38 L. Ed. 1031, 14 S. Ct. 1062; Reagan *v.* Mercantile Trust Co., 154 U. S. 418, 38 L. Ed. 1030, 14 S. Ct. 1062; McChord *v.* Louisville, etc., R. Co., 183 U. S. 483, 46 L. Ed. 289, 22 S. Ct. 165; Minneapolis, etc., R. Co. *v.* Minnesota, 186 U. S. 257, 264, 46 L. Ed. 1151, 22 S. Ct. 900; Dow *v.* Beidelman, 125 U. S. 680, 31 L. Ed. 841, 8 S. Ct. 1028; Chicago, etc., R. Co. *v.* Tompkins, 176 U. S. 167, 44 L. Ed. 417, 20 S. Ct. 336; Stone *v.* Farmers' Loan, etc., Co., 116 U. S. 307, 336, 29 L. Ed. 636, 6 S. Ct. 334; Chicago, etc., R. Co. *v.* Minnesota, 134 U. S. 418, 33 L. Ed. 970, 10 S. Ct. 462, 702; In re Arkansas Rate Cases, 187 Fed. 290; Southern Pac. Co. *v.* Bartine, 170 Fed. 725.

A state, having the power to regulate commerce within its boundaries, may establish a board or commission to which it can intrust the power to fix rates for transportation of passengers and freight on railroads wholly within its borders. Chapman, etc., Lumber Co. *v.* Jonesboro, etc., R. Co., 97 Ark. 300, 133 S. W. 1119.

The provisions of the constitution of Georgia requiring the legislature to pass laws regulating freight and passenger tariffs within the state, and regulations adopted by the railroad commission established by the statutes passed in pursuance thereof, administered subject to the limitation that the carriage can not be required without reward or upon conditions amounting to the taking of property for public use without just compensation, do not violate the constitution of the United States, but are within the powers of the state, and have full force as public law. Trammel *v.* Dinsmore, 42 C. C. A. 623, 102 Fed. 794. Affirmed, 183 U. S. 115, 46 L. Ed. 111, 22 S. Ct. 45.

92. Nature of commission.—Reagan *v.* Farmers' Loan, etc., Co., 154 U. S. 362, 38 L. Ed. 1014, 14 S. Ct. 1047; S. C., 154 U. S. 420, 38 L. Ed. 1031, 14 S. Ct. 1062; Reagan *v.* Mercantile Trust Co., 154 U. S. 418, 38 L. Ed. 1030, 14 S. Ct. 1062.

93. Power to make railroads bear expenses of commission.—Charlotte, etc., R. Co. *v.* Gibbes, 142 U. S. 386, 35 L. Ed. 1051, 12 S. Ct. 255; Louisville, etc., R. Co. *v.* Kentucky, 161 U. S. 677, 696, 40 L. Ed. 849, 16 S. Ct. 714.

An act requiring the state railroad corporations to pay the salary and expenses of the state railroad commission is not in conflict with the fourteenth amendment of the federal constitution. Charlotte, etc., R. Co. *v.* Gibbes, 142 U. S. 386, 35 L. Ed. 1051, 12 S. Ct. 255.

94. Statute not invalid because it delegates power to commission.—Stone *v.* Farmers' Loan, etc., Co., 116 U. S. 307, 29 L. Ed. 636, 6 S. Ct. 334.

"Much litigation has arisen in regard to railroad commissions. At first railroad companies contested the constitutionality of acts creating these commissions and conferring upon them the power to fix reasonable rates and to make reasonable rules and regulations. The most common ground of attack was that this was a delegation of legislative power. It is now firmly established by the decisions of the courts of this country, both state and federal, that such powers can be conferred without constituting an unconstitutional delegation of legislative power." Southern R. Co. *v.* Melton, 133 Ga. 277, 280, 65 S. E. 665.

The Mississippi act creating a commission and charging it with the duty of supervising railroads is not unconstitutional upon that ground alone. Stone *v.* Farmers' Loan, etc., Co., 116 U. S. 307, 29 L. Ed. 636, 6 S. Ct. 334.

95. Power to provide for regulation of joint through tariffs.—The Minnesota act of 1895, creating a railroad and warehouse commission and defining its duties is not invalid because it undertakes to authorize the commission to establish joint through rates or tariffs over the lines of independent connecting roads, and to apportion and divide the joint earnings. Minneapolis, etc., R. Co. *v.* Minnesota, 186 U. S. 257, 46 L. Ed. 1151, 22 S. Ct. 900.

96. Certainty and consistency essential.—Stone *v.* Farmers' Loan, etc., Co., 116 U. S. 307, 29 L. Ed. 636, 6 S. Ct. 334.

The Mississippi statute creating a commission and charging it with the duty of supervising railroads is not void because of the uncertainty or inconsistency of its provisions. Stone *v.* Farmers' Loan, etc., Co., 116 U. S. 307, 29 L. Ed. 636, 6 S. Ct. 334.

clusive, but must leave the question of their reasonableness open to judicial inquiry.[97]

Constitutional Provisions and Statutes Delegating Power to Commissions Construed.—Some of the constitutional provisions and statutes creating railroad commissions and authorizing them to fix and regulate charges for the carriage of passengers and freight by railroad companies operating in the state have been interpreted by the courts.[98] Jurisdiction so extensive as to place in

97. Act must leave question of reasonableness of rates open to judicial inquiry.—The Minnesota act of March 7, 1887 (General laws of 1887, ch. 10), establishing a railroad and warehouse commission, as interpreted by the supreme court of that state, is unconstitutional in that it makes the rates established by the commission conclusive, and does not allow judicial inquiry into their reasonableness. Chicago, etc., R. Co. *v.* Minnesota, 134 U. S. 418, 33 L. Ed. 970, 10 S. Ct. 462, 702.

98. Constitutional provisions and statutes delegating power to commissions construed.—*Colorado.*—Under act March 22, 1907 (Laws 1907, p. 532, 536-538), §§ 3, 12, 13, 14, and 15, state railroad commission held to have power to regulate rates for transportation and prohibit unreasonable rates, even if not discriminatory or preferential. Consumers' League *v.* Colorado, etc., R. Co., 53 Colo. 54, 125 Pac. 577.

Florida.—By a contract between the S. A. L. Ry. Co. and the F. W. S. Ry. Co., the former agreed to furnish to the latter an equipment for its line of railway, to be operated by the officers of the former in connection with its own road, the latter company to pay for the use of the equipment the same rentals which the other company charged other lines for the use of similar equipments, the W. S. Co. to assume its portion of the salaries of the officers operating such road, the S. A. L. Co. agreeing to guaranty the payment of certain bonds issued by the other company, and to make good any deficiency in the operating expenses and fixed charges. Held, that the S. A. L. Co. controls and operates the other company, within the railroad commission law (Acts 1899, p. 78, c. 4700, §§ 3, 4), prohibiting any railroad from making unjust discrimination in its freight or passenger rates on its tracks, or on any railroad "which it has the right, license, or permission to use, operate, or control," so that the railroad commissioners had power, under § 6 (page 80) of said law, to make reasonable and just rates for freight and passenger tariffs, to be observed in the operation of the road under the terms of the contracts. State *v.* Seaboard, etc., Railway, 48 Fla. 129, 37 So. 314; S. C., 48 Fla. 152, 37 So. 658. Affirmed Seaboard, etc., Railway *v.* Ellis, 203 U. S. 261, 51 L. Ed. 175, 27 S. Ct. 109.

Georgia.—A "joint rate" within the meaning of Act Oct. 14, 1879 (Acts 1878, p. 125), § 5, as amended by Acts 1889, p. 131, and Civ. Code 1895, § 2189, declaring that the railroad commissioners shall have power to make just and reasonable joint rates for all connecting railroads as to traffic passing from one road to the other, is a rate charged for the transportation of goods or passengers over connecting lines of two or more railroads and divided among them for the services rendered by each respectively. Hill *v.* Wadley Southern R. Co., 128 Ga. 705, 57 S. E. 795.

Where the railroad commissioners declared that a continuous mileage rate should apply to two connecting railroad companies, the stock and bonds of one of which were owned by the other, though each had its separate directors and was operated separately, applying the rate previously fixed for the owning company, such rate was a joint rate within the meaning of Act Oct. 14, 1879 (Acts of 1878, p. 125), § 5, as amended by Acts 1889, p. 131, and Civ. Code 1895, § 2189, declaring that the railroad commissioners shall have the power to make just and reasonable joint rates for all connecting railroads, and the action of the commissioners was not ipso facto illegal on the ground that it was not a joint rate and not authorized by the statute, if the rate so fixed was reasonable and just. Hill *v.* Wadley Southern R. Co., 128 Ga. 705, 57 S. E. 795.

A "joint rate" as authorized by Act Oct. 14, 1879 (Acts 1878, p. 125), § 5, as amended by the act of 1889 (Acts 1889, p. 131; Civ. Code 1895, § 2189), declaring that the railroad commissioners shall have power to make just and reasonable joint rates for all connecting railroads as to traffic passing from one road to the other, may be made by deducting some prescribed per cent from each of the local rates and adding together the two rates thus reduced, but such method is not exclusive. Hill *v.* Wadley Southern R. Co., 128 Ga. 705, 57 S. E. 795.

Illinois.—Under the act establishing the State Railroad and Warehouse Commission and defining its jurisdiction, it had jurisdiction as to the charges of common carriers for switching cars to industries on their own or other lines, regardless of whether it could compel service without compensation, or whether it could compel a carrier to allow its cars to leave its own tracks. East Side Packing Co. *v.* Vandalia R. Co., 258 Ill. 397, 101 N. E. 600.

Iowa.—Act Iowa, April 5, 1888, provides

the hands of a commission power to make general maximum rates for all commodities between all points in the state is not to be implied, but must be given

for the regulation of transportation charges by railroad companies, and for a board of commissioners to fix reasonable charges. Section 17 requires said board to make a schedule of maximum rates, which shall be deemed prima facie reasonable. Sections 18 and 20 provide that any person may complain that the charges made or published by any company are higher than those fixed by the schedule, or that the latter are unreasonably high, upon which the board shall investigate the complaint. The decision made thereon shall set out the maximum rates to be charged thereafter, and neither the decision nor the schedule therein contained shall be limited to the case complained of, but shall extend to all such rates between points in the state, and to whatever part of the line of said road within the state as may have been fairly within the scope of the investigation. Held, that the power to make a full schedule is not only conferred by § 17, but is given also by said other sections, in case a complaint has been made and investigated. Chicago, etc., R. Co. *v.* Dey, 38 Fed. 656.

Massachusetts.—The authority of the board of railroad commissioners under Pub. St., c. 112, §§ 192-194, is not to consider the general subject of rates, but to "ascertain at what rates facilities for the carriage of milk under contract or in large quantities are furnished by the railroad corporation," and to compare them with the tariff for the carriage of milk by the can, to fix rates by the can "fairly proportionate with such contract or large quantity rates." The order when made is to have the force and effect of a criminal statute, which calls for strictness and regularity in proceedings under it. Littlefield *v.* Fitchburg R. Co., 158 Mass. 1, 32 N. E. 859.

Michigan.—The legislature by enacting Pub. Acts 1909, No. 300, permits carriers to charge reasonable and just rates for services performed and confers on the railroad commission the power to ascertain whether a rate is reasonable and just. Detroit, etc., R. Co. *v.* Michigan R. Comm., 171 Mich. 325, 137 N. W. 329.

Pub. Acts 1909, No. 300, regulating carriers, creating the railroad commission with power as authorized by § 8 to promulgate demurrage rules, and declaring in § 3 that the act shall apply to the transportation of "property between points within this state, and to the receiving, switching, delivering, storing, and handling of such property and to all charges connected therewith," limits the power of the commission to promulgate demurrage rules to cases where the property has been or is to be transported between points within the state, and demurrage rules adopted by the commission are limited to intrastate transportation. Ann Arbor R. Co. *v.* Michigan R. Comm., 163 Mich. 49, 127 N. W. 746.

Minnesota.—Under Gen. Laws 1887, c. 10, as amended by Laws 1891, c. 106, the state railroad and warehouse commission, when reducing rates on the complaint of any one that rates between certain points on a certain railroad are too high, may, for the purpose of preventing discrimination by its own acts, reduce the rates on the whole line or system. Steenerson *v.* Great Northern R. Co., 69 Minn. 353, 72 N. W. 713.

Mississippi.—Act Miss. March 11, 1884, confers upon the railroad commission the power to control all rates for the transportation of goods, wares, and merchandise from points within the state to points without the state, and from points without to points within the state. Mobile, etc., R. Co. *v.* Sessions, 28 Fed. 592.

Missouri.—In Laws Mo. 1887 (Ex. Sess.), making it the duty of the railroad commissioners to see that schedules of rates are reasonable and just, and providing that they "may," on complaint of any person, or on their own motion, determine whether the schedule of rates adopted by any common carrier is reasonable and just, the word "may" must be construed as "shall," as the statute is intended to be mandatory. Winsor Coal Co. *v.* Chicago, etc., R. Co., 52 Fed. 716.

Oklahoma.—The corporation commission has the power, under Const., art. 9, § 18, to fix a reasonable charge to be paid by shippers to the railroad for the dipping of cattle brought above the quarantine line before delivery. Midland Valley R. Co. *v.* State, 35 Okla. 672, 130 Pac. 803.

Texas.—The railroad commission of Texas, under authority from the legislature, has power to fix railroad passenger rates not exceeding a maximum rate of three cents per mile, and may fix different rates for different carriers, subject to the constitutional restriction that it can not deny to one carrier the equal protection of the laws by prescribing for it an unreasonably low and confiscatory rate, while other carriers similarly situated are permitted to charge a higher rate. Houston, etc., R. Co. *v.* Storey, 149 Fed. 499.

Virginia.—The constitution of Virginia, § 156, subsec. "b," declares that the state corporation commission shall have the power of regulating all transportation companies in relation to the performance of their public duties and charges therefor, and that the commission shall enforce such rates as may be reasonable. A transportation company, the business of which consisted of conducting a switch line and handling cars to and from industries with which it had established switching connec-

in language admitting no other reasonable construction.[99] A statute requiring the railroad commissioners to fix tables of maximum charges, is not to be extended by construction to authorize the fixing of such charges to points beyond the limits of the state.[1]

Regulations by Commission in Excess of Statutory Power.—Where a railroad commission after a hearing on specific complaint as to a rate on a particular commodity makes a general rate tariff for maximum rates on all commodities which is beyond its statutory power, the whole tariff falls, and the rate on the tariff on the particular commodity will not be separately sustained.[2]

Necessary Prerequisites to Regulations.—Where rate regulations of railroad commissioners are not necessarily proper as a matter of law, or the propriety of the regulation may depend on circumstances, there should be an investigation before the regulation is made.[3] Some of the statutes authorizing railroad commission to fix or adjust rates require the commission, before doing so, to give notice.[4] Under other statutes the commission is not authorized to adjust rates until a complaint has been made, and their action is limited to the rates complained of.[5]

tions, observed the usual custom of placing cars in position to be weighed on consignees' or shippers' individual track scales, which scale service was necessary to the due delivery of goods. Held, that the Corporation Commission had authority to fix the charges for placing the cars in position on such scales. Norfolk, etc., R. Co. *v.* Commonwealth, 103 Va. 289, 49 S. E. 39.

99. Power to make general maximum rates not implied.—Siler *v.* Louisville, etc., R. Co., 213 U. S. 175, 176, 53 L. Ed. 753, 29 S. Ct. 451 (construing Kentucky railroad commission act).

The fact that the legislature of a state gives to a railroad commission no power to raise rates, but only power to reduce rates found to be exorbitant after hearing on specific complaint, is an argument against construing the statute so as to give the commission power to fix maximum rates on all commodities. Siler *v.* Louisville, etc., R. Co., 213 U. S. 175, 53 L. Ed. 753, 29 S. Ct. 451.

Power to make a general schedule of maximum rates for the transportation of all commodities, upon all railroads, to and from all points within the state, upon a general and comprehensive complaint that rates are too high, or upon like information of the commission itself, is not conferred upon the Kentucky railroad commission by Act Ky. March 10, 1900 (Acts 1900, p. 5, c. 2), authorizing it, upon complaint that the rates of any railway company are extortionate, or upon its own information, to fix a reasonable rate if, after hearing, it finds the rates extortionate. Siler *v.* Louisville, etc., R. Co., 213 U. S. 175, 53 L. Ed. 753, 29 S. Ct. 451; Siler *v.* Illinois Cent. R. Co., 213 U. S. 199, 53 L. Ed. 760, 29 S. Ct. 458.

1. No implied power to fix charges to points out of state.—Merrill *v.* Boston, etc., R. Co., 63 N. H. 259, construing St. 1883, c. 101.

2. Regulations by commission in excess of statutory power.—Siler *v.* Louisville, etc., R. Co., 213 U. S. 175, 53 L. Ed. 753, 29 S. Ct. 451.

A particular rate on a specific commodity fixed by the Kentucky railroad commission will not, in order to sustain its validity, be separated from the general order fixing a general schedule of maximum rates for all commodities, upon all railroads, to and from all points within the state, where the specific order was made after a general complaint was filed and is itself a general order, and was made in the exercise of the unfounded assumption of the power under Act Ky. March 10, 1900 (Acts 1900, p. 5, c. 2), to make a general tariff of rates. Siler *v.* Louisville, etc., R. Co., 213 U. S. 175, 53 L. Ed. 753, 29 S. Ct. 451.

3. When investigation necessary before regulation is made.—Railroad Comm'rs *v.* Florida, etc., R. Co., 64 Fla. 112, 59 So. 385.

Before making a railroad rate order, the railroad commissioners should inquire into and consider the interests of all directly and substantially affected. Railroad Comm'rs *v.* Florida, etc., R. Co., 64 Fla. 112, 59 So. 385.

4. Notice must be given.—Under the Iowa statute, chapter 17, § 3, Acts 1890, authorizing commissioners to establish joint through rates, and providing that they shall be governed therein by the act of 1888, which requires notice in the fixing of rates, a joint through rate, adopted without notice, is void. State *v.* Chicago, etc., R. Co., 90 Iowa 594, 58 N. W. 1060.

5. No power to adjust rates of which no complaint has been made.—Under the Washington statute, § 3 of Act 1905, p. 147, c. 81, vesting the railroad commission with power upon complaint made "* * * after a full hearing to make any finding declaring any existing rate for the transportation of persons or property to be unreasonable, discriminatory or insuffi-

§ 37. To a Municipal Corporation.—Authority is sometimes conferred by statute or charter upon municipal corporations to prescribe or regulate the charges of carriers within the municipality.[6] An ordinance fixing a rate for hire of hacks, etc., and imposing fine or imprisonment for refusal to pay such rate, was within the legislative authority of a municipality authorized to regulate such conveyances.[7]

§§ 38-39. Classification of Railroads for Purposes of Regulation—§ 38. Right to Classify.—Since a uniform rate of charges for all railroad companies in the state might operate unjustly upon some, it is proper to provide in some way for an adaption of the rates to the circumstances of the different roads, and the general assembly may, in the exercise of its legislative discretion, do this by a system of classification.[8]

§ 39. Mode of Classification.—Whether the classification shall be according to the amount of passengers and freight carried, or of gross or net earnings, during a previous year, or according to the simpler and more constant test of the length of the line of the railroad, is a matter within the discretion of the legislature. If the same rule is applied to all railroads of the same class, there is no violation of the constitutional provision securing to all the equal protection of the laws.[9]

cient, * * * and to declare and order what shall be a just and reasonable rate * * * to be imposed, enforced, or performed or followed in the future in the place of that found to be objectionable," the railroad commission has no power, upon complaint as to certain rates, to adjust rates of which no complaint is made, nor to forbid railroad companies operating in the state from changing their existing tariffs not theretofore fixed by the commission, without the consent of the commission. Great Northern R. Co. *v.* Railroad Comm. (Wash.), 92 Pac. 457.

Since, under such section the commission has no power upon complaint made as to certain rates to adjust rates of which no complaint is made, a complaint, framed under such section, in which the commission allege that certain rates are fair, just, and reasonable, raises no issue which the railroad company must answer, and the commission can not adjust such rates. Great Northern R. Co. *v.* Railroad Comm. (Wash.), 92 Pac. 457.

An order of the railroad commission, changing commodity freight rates, is void, where no complaint has been made against the existing rates, and no hearing had thereon. Northern Pac. R. Co. *v.* Railroad Comm., 52 Wash. 440, 100 Pac. 987.

6. Statutes authorizing limitation of rate to be charged by street railroad companies.—Under the Illinois statute, 1 Starr & C. Ann. St. (2d Ed.), pp. 689-715, art. 5, § 1 (City and Village Act April 10, 1872), adopted by the city of Chicago as its charter, as well as under former charters (Act Feb. 14, 1851, and Act Feb. 13, 1863), authorizing the city to regulate and prescribe the compensation of hackmen, cabmen, omnibus drivers, and "all others pursuing a like occupation," the city had power to enact Rev. Code Chicago, §§ 1723, 1725, limiting the rate of fare to be charged by street railway companies, inasmuch as the phrase "others pursuing a like occupation," when construed ejusdem generis, includes street railway companies. Chicago Union Tract. Co. *v.* Chicago, 199 Ill. 484, 65 N. E. 451, 59 L. R. A. 631.

Charter provision not authorizing municipality to fix rates of fare.—A provision in the charter of a city authorizing it to "pass all by-laws concerning carriages, wagons, carts," etc., "and every by-law, ordinance and regulation it may deem proper for the peace, health, order or good government of the city," does not authorize it to fix rates of fare. Old Colony Trust Co. *v.* Atlanta, 83 Fed. 39.

It is within the power of Atlantic City to pass ordinances regulating the business of omnibuses, automobiles, or locomobiles, and fixing the fares to be charged. Atlantic City *v.* Fonsler, 70 N. J. L. 125, 56 Atl. 119.

7. Ordinance authorized by legislative authority to regulate conveyances.—Bray *v.* State, 140 Ala. 172, 37 So. 250.

8. Right to classify roads for purpose of regulation.—Dow *v.* Beidelman, 125 U. S. 680, 31 L. Ed. 841, 8 S. Ct. 1028.

9. Mode of classification.—Dow *v.* Beidelman, 125 U. S. 680, 31 L. Ed. 841, 8 S. Ct. 1028; Chicago, etc., R. Co. *v.* Iowa, 94 U. S. 155, 24 L. Ed. 94; Ruggles *v.* Illinois, 108 U. S. 526, 27 L. Ed. 812, 2 S. Ct. 832; Illinois Cent. R. Co. *v.* Illinois, 108 U. S. 541, 27 L. Ed. 818, 2 S. Ct. 839.

Classification according to amount of business.—The legislature, in the exercise of its power of regulating fares and freights, may classify the railroads according to the amount of the business which they have done or appear likely to do and fix their rates accordingly. Dow

§§ 40-72. Limitation of Power—§§ 40-67. Reasonableness of Regulations—§ 40. Regulations Must Be Reasonable.—The power of a state, either through its legislature or a commission, to regulate the rates of charge of common carriers on intrastate business, is subject to the limitation that such rates must be reasonable,[10] and afford just and reasonable compensation for the services performed[11] and for the use of the property devoted to the business, estimated at its fair value.[12] The rights of carriers and the public with respect

v. Beidelman, 125 U. S. 680, 31 L. Ed. 841, 8 S. Ct. 1028.

Classification according to trackage.—A classification by statute according to the length of the several lines, with different rates for passengers for roads in each class, is valid. Dow *v.* Beidelman, 125 U. S. 680, 31 L. Ed. 841, 8 S. Ct. 1028.

Classification according to gross annual earnings per mile.—The statute of Illinois of April 15, 1871 (Illinois Laws of 1871, p. 640), which classified the railroads in the state according to their gross annual earnings per mile, and puts different limits on the compensation of the different classes per mile for carrying a passenger and his baggage, is constitutional and valid, in restricting to the limit of three cents a mile existing corporations, whose charters gave them power to make all by-laws, rules and regulations not repugnant to law, and giving their directors power to establish such rates of toll as they should by their by-laws determine. Ruggles *v.* Illinois, 108 U. S. 526, 27 L. Ed. 812, 2 S. Ct. 832; Illinois Cent. R. Co. *v.* Illinois, 108 U. S. 541, 27 L. Ed. 818, 2 S. Ct. 839; Dow *v.* Beidelman, 125 U. S. 680, 31 L. Ed. 841, 8 S. Ct. 1028.

A statute regulating the rate for the carriage of passengers, by different classes of railroads, according to their gross earnings per mile, is not in conflict with art. 1, § 4, of the constitution of Iowa, which provides that "all laws of a general nature shall have a uniform operation," and "the general assembly shall not grant to any citizen, or class of citizens, privileges or immunities which upon the same terms shall not equally belong to all citizens." * * * "The statute divides the railroads of the state into classes, according to business, and establishes a maximum of rates for each of the classes. It operates uniformly on each class, this is all the constitution requires." Chicago, etc., R. Co. *v.* Iowa, 94 U. S. 155, 24 L. Ed. 94.

10. Rates prescribed must be reasonable.—Southern Pac. Co. *v.* Bartine, 170 Fed. 725; In re Arkansas Rate Cases, 187 Fed. 290; Louisville, etc., R. Co. *v.* Railroad Comm., 196 Fed. 800; Chapman, etc., Lumber Co. *v.* Jonesboro, etc., R. Co., 97 Ark. 300, 133 S. W. 1119; Southern Indiana R. Co. *v.* Railroad Comm., 172 Ind. 113, 87 N. E. 966; Pennsylvania R. Co. *v.* Philadelphia County, 220 Pa. 100, 68 Atl. 676; Graham Ice Co. *v.* Chicago, etc., R. Co., 153 Wis. 145, 140 N. W. 1097.

Whether a rate for the carriage of goods and passengers by a railroad company fixed by the railroad commissioners is legal depends on whether it is reasonable and just or unreasonable and confiscatory. Hill *v.* Wadley Southern R. Co., 128 Ga. 705, 57 S. E. 795.

A state has no right to fix a rate unreasonably low, though it may prevent a railroad from fixing one unreasonably high. Southern Pac. Co. *v.* Board, 78 Fed. 236.

A corporation performing public services and the people financially interested in its business and affairs have rights that may not be invaded by legislative enactment in disregard of the fundamental guarantees for the protection of property, and regulations of rates to be valid must be reasonable. Smyth *v.* Ames, 169 U. S. 466, 526, 42 L. Ed. 819, 18 S. Ct. 418.

A grant to the legislature in the constitution of Nebraska of the power to establish maximum rates for the transportation of passengers and freight on railroads in that state has reference to "reasonable" maximum rates. It can not be admitted that the power granted may be exerted in derogation of rights secured by the constitution of the United States, or that the judiciary may not, when its jurisdiction is properly invoked, protect those rights. Smyth *v.* Ames, 169 U. S. 466, 526, 42 L. Ed. 819, 18 S. Ct. 418.

11. Rates prescribed must afford just and reasonable compensation for services.—Southern Pac. Co. *v.* Bartine, 170 Fed. 725; State *v.* Central Vermont R. Co., 81 Vt. 463, 71 Atl. 194; Graham Ice Co. *v.* Chicago, etc., R. Co., 153 Wis. 145, 140 N. W. 1097.

Though the public has an interest in the use of private property devoted to the railroad service, and the legislature may by statute limit the charges for such service, it can not reduce them below the point of fair remuneration. Coal, etc., R. Co. *v.* Conley, 67 W. Va. 129, 67 S. E. 613.

12. Rates prescribed must afford reasonble compensation for use of property.—Southern Pac. Co. *v.* Bartine, 170 Fed. 725.

Confiscatory orders.—In Wisconsin it has been held that "Confiscatory orders" are ordinarily, but not always, unlawful and unreasonable, and to be confiscatory an order of the railroad commission regulating rates, or charges must deprive the railroad of a fair return upon its property, and not merely reduce former rates or charges. Minneapolis, etc., R.

to rates are reciprocal. The carrier is entitled to ask a fair return on the value of its property it employs for the public convenience, and the public is entitled to demand that no more be exacted from it for the use of the public highway than the services rendered are reasonably worth.[13] Statutes fixing rates for transportation by carriers will not be held unconstitutional on the ground that they are unreasonable without the fullest disclosure of all material facts.[14] The reasonableness or unreasonableness of the particular provisions of statutes, commission orders and municipal ordinances, prescribing or regulating the rates to be charged by carriers for the carriage of passengers or freight, has, in a number of cases, been determined by the courts.[15]

Co. *v.* Railroad Comm., 136 Wis. 146, 116 N. W. 905.

State railroad commissioners can not enforce a schedule of rates for switching cars in a city, which fixes the compensation at less than the actual cost to the company for the work. Chicago, etc., R. Co. *v.* Becker, 35 Fed. 883.

13. Reciprocal rights of carriers and the public.—In re Arkansas Rate Cases, 187 Fed. 290.

While a carrier is entitled to adequate recompense for the service it performs, the individuals are entitled to a rate that they can reasonably afford to pay for the service they require. The company, on the one hand, has the right to derive a fair income from its investment, and the public, on the other hand, to have no more exacted than the services in themselves are worth. Puget Sound Elect. Railway *v.* Railroad Comm., 65 Wash. 75, 117 Pac. 739.

14. Fullest disclosure of all material facts to show unreasonableness essential.—Tucker *v.* Missouri Pac. R. Co., 82 Kan. 222, 108 Pac. 89.

15. Statutes held unconstitutional as being confiscatory.—Act Ala. Feb. 14, 1907 (Acts 1907, p. 104), fixing passenger rates, and Act Nov. 23, 1907 (Acts Sp. Sess. 1907, pp. 91-159), known as the Eight Group Acts, relating to freight rates, held unconstitutional as to complainant railroad companies as confiscatory. Western Railway *v.* Railroad Comm., 197 Fed. 954.

The passenger rate act of Illinois of May 27, 1907, fixing maximum fares of two cents per mile, held confiscatory and unconstitutional, as applied to the Chicago, Peoria & St. Louis Railway Company of Illinois. Trust Co. *v.* Chicago, etc., R. Co., 199 Fed. 593.

Evidence insufficient to show statutory rates unconstitutional and confiscatory.—In suits to enjoin the enforcement of Act Nev. March 5, 1907 (St. Nev. 1907, p. 73, c. 44), creating a railroad commission and authorizing it to establish freight rates on intrastate business, not higher than those prescribed in a schedule of maximum rates, evidence considered, and, except in the case of one complainant, held insufficient to show that such maximum rates, if adopted and enforced would be unconstitutional as confiscatory. Southern Pac. Co. *v.* Bartine, 170 Fed. 725.

Commission order held unreasonable and unjust.—Railroad commission order No. 553 of August 6, 1906, establishing freight rates for the hauling of sugar cane, held, under the evidence, to be unreasonable and unjust within Const. art. 284, conferring on the commission authority to adopt reasonable and just rates. Morgan's etc., Steamship Co. *v.* Railroad Comm., 127 La. 636, 53 So. 890.

Commission order held unreasonable and confiscatory.—Railroad Commission Order No. 976, passed February 26, 1909, establishing and reducing the rate on petroleum and its products in less than car load lots, held unreasonable and confiscatory. Louisiana, etc., R. Co. *v.* Railroad Comm., 131 La. 387, 59 So. 820.

Rate fixed by commission held reasonable.—The rate fixed by the corporation commission of twenty-five cents per car for placing cars in position to be weighed on consignee's or shipper's individual track scales is reasonable. Norfolk, etc., R. Co. *v.* Commonwealth, 103 Va. 289, 49 S. E. 39.

One commission order held reasonable and another unreasonable.—Orders made by the railroad commission of Louisiana, fixing rates on gravel and sand in car loads, considered, and one held reasonable and valid, and another void as unreasonable. Thompson *v.* Railroad Comm., 198 Fed. 691.

Evidence not showing rate made by commission unreasonable and unjust.—Plaintiff in an action against the railroad commission does not, as required by the Texas statute, Rev. St. 1895, art. 4566, show that the freight rate on cotton made by it is unreasonable and unjust to him because there is no car rate, and because it is the same amount per one hundred pounds whether pressed to a density of forty pounds to the cubic foot, as shipped by him, or to a density of only twenty and one-half pounds, as shipped by others. Judgment, Railroad Comm. *v.* Weld (Tex. Civ. App.), 68 S. W. 1117, reversed. Railroad Comm. *v.* Weld, 96 Tex. 394, 73 S. W. 529.

Municipal regulation held unreasonable.—A municipal regulation extending the five cent fare limit of a street railroad

Rates May Be Valid as to Some Railroads Though Not Compensatory as to Others.—That state statutes fixing railroad rates are not enforceable as to particular railroads, because the rates as applied to such roads are not compensatory, does not render them invalid as to other roads.[16]

Right of Carrier to Increase Rates to Meet Changed Conditions.—A carrier has the right, if rates have been fixed too low in the past, to meet changed conditions by increasing them if the increase is reasonable, and a state statute, which denies it that right and forces it to continue in force rates which are unremunerative and confiscatory, is unconstitutional and void.[17]

Right to Change Rates Which Have Been Lowered to Meet an Exigency.—A railroad company has the right to change rates which to meet an exigency have been made so low as to be unremunerative when the necessity therefor has ceased to exist, and a statute which prohibits the increase of such rates is unconstitutional as confiscatory.[18]

Conclusiveness of Statutory Rate in Action for Freights.—A carrier can not recover for the transportation of property more than the maximum fixed by the legislature, by showing that the amount charged was no more than reasonable compensation for the services rendered.[19]

§§ 41-67. Mode of Determining Reasonableness—§ 41. That Carrier Has Performed Services for Rate Fixed Not Sole Criterion.—A freight rate fixed by a railroad commission with power to establish reasonable and just rates, can not be held just and reasonable solely because the carrier has performed services for the fixed rate.[20]

§§ 42-49. Carrier Entitled to Fair Return on Investment—§ 42. In General.—The basis of all calculations as to the reasonableness of rates to be charged by a corporation maintaining a highway under legislative sanction, must be the fair value of the property being used by it for the convenience of the public.[21] And, having regard to the fair value of the carrier's investment, the rates fixed must admit of its earning a compensation that under all the circumstances is just to it and to the public.[22] A carrier can not be compelled, by the

held invalid for unreasonableness. East St. Louis, etc., R. Co. *v.* Belleville, 193 Fed. 95.

Ordinance held not unreasonable.—An ordinance permitting an omnibus driver to charge only ten cents for carrying a passenger, irrespective of the distance, is not unreasonable. Atlantic City *v.* Brown, 72 N. J. L. 207, 62 Atl. 428.

16. **Rates may be valid as to some railroads though not compensatory as to others.**—St. Louis, etc., R. Co. *v.* Hadley, 168 Fed. 317.

17. **Right of carrier to increase rates to meet changed conditions.**—Western Railway *v.* Railroad Comm., 197 Fed. 954.

18. **Right to change rates which have been lowered to meet an exigency.**—Louisville, etc., R. Co. *v.* Railroad Comm., 196 Fed. 800.

19. **Conclusiveness of statutory rates in action for freights.**—Chicago, etc., R. Co. *v.* Ackley, 94 U. S. 179, 24 L. Ed. 99; Peik *v.* Chicago, etc., R. Co., 94 U. S. 164, 24 L. Ed. 97.

20. **That carrier has performed services for rate fixed not sole criterion.**—Detroit, etc., R. Co. *v.* Michigan R. Comm., 171 Mich. 325, 137 N. W. 329.

21. **Value of carrier's property proper basis of calculations as to reasonableness of rates.**—Minneapolis, etc., R. Co. *v.* Minnesota, 186 U. S. 257, 46 L. Ed. 1151, 22 S. Ct. 900; Smyth *v.* Ames, 169 U. S. 466, 42 L. Ed. 819, 18 S. Ct. 418; Missouri, etc., R. Co. *v.* Love, 177 Fed. 493; Seaboard Air Line R. Co. *v.* Railroad Comm., 155 Fed. 792; Detroit, etc., R. Co. *v.* Michigan R. Comm., 171 Mich. 325, 137 N. W. 329.

Whether an intrastate freight rate is reasonable or confiscatory depends on the valuation of the railroad company's property, the income derived from the rate, and the proportion between the two. Montana, etc., R. Co. *v.* Morley, 198 Fed. 991.

22. **Return on investment must be just to carrier and to the public.**—Lake Shore, etc., R. Co. *v.* Smith, 173 U. S. 684, 43 L. Ed. 858, 19 S. Ct. 565; Chicago, etc., R. Co. *v.* Wellman, 143 U. S. 339, 36 L. Ed. 176, 12 S. Ct. 400; Reagan *v.* Farmers' Loan, etc., Co., 154 U. S. 362, 38 L. Ed. 1014, 14 S. Ct. 1047; St. Louis, etc., R. Co. *v.* Gill, 156 U. S. 649, 39 L. Ed. 567, 15 S. Ct. 484; Smyth *v.* Ames, 169 U. S. 466, 42 L. Ed. 819, 18 S. Ct. 418.

What the company is entitled to ask is a fair return upon the value of that

establishment of rates by a state commission, to transact its whole business at a loss, as rates which would so operate would be confiscatory.[23] And rates for railroad transportation are not unreasonable only when they amount to practical confiscation, nor are they necessarily reasonable when they allow any dividend, however small, but a railroad company is entitled to be reimbursed its charges and expenses, and to receive, besides, an adequate return upon the investment.[24] But rates charged by a common carrier can go no higher than the

which is employed for the public convenience. On the other hand, what the public is entitled to demand is that no more be exacted from it for the use of a public highway than the services rendered by it are reasonably worth. Smyth *v.* Ames, 169 U. S. 466, 547, 42 L. Ed. 819, 18 S. Ct. 418.

Whether railroad rates prescribed by a state commission are reasonable involves a determination of the value of the property devoted to the public use to which the rates apply, the measure of a reasonable return on that value and whether the rates allowed to be charged are sufficient to that end. Missouri, etc., R. Co. *v.* Love, 177 Fed. 493.

The reasonableness of rates for the intrastate carriage of freight and passengers established by a state, as affecting a particular carrier, can not be determined alone from the kind or amount of business done by such carrier; the fact remaining, which must be considered, that it is entitled to earn a fair return on its investment, if it can be done without making the rates oppressive. In re Arkansas Rate Cases, 187 Fed. 290.

Carrier entitled to reasonable profit on entire intrastate business.—While a railroad is not entitled to earn a profit on every mile of its road nor on every article carried by it, it is nevertheless entitled to earn a reasonable profit on its entire intrastate business. Southern R. Co. *v.* McNeill, 155 Fed. 756.

A rate prescribed by a state railroad commission for the carriage of a particular commodity will not be held to be unreasonable, where it appears that it is more than the average rate received by the road for the carriage of all freight for the previous year. Seaboard, etc., Railway *v.* Ellis, 203 U. S. 261, 51 L. Ed. 175, 27 S. Ct. 109.

23. Carrier can not be compelled to transact its whole business at a loss.—Louisiana R., etc., Co. *v.* Railroad Comm., 131 La. 387, 59 So. 820.

In a suit to enjoin the enforcement of a carrier's schedule prepared by the board of railroad commissioners, a table was introduced in evidence showing the operating expenses of two of the roads affected for four years, and it appeared that, if the schedule as proposed had been in operation at that time, the business of the roads would have been done at an actual loss, and nothing left for a return on the value of the property. Held, that the rates of the commission were unreasonably low. Northern Pac. R. Co. *v.* Keyes, 91 Fed. 47.

The constitution of Louisiana, art. 284, gives authority to the Railroad commission to adopt reasonable and just rates. Held, that the commission is authorized to make rates which are reasonable and just and no other, and no rate can be reasonable and just to a railroad company which is established safely upon the basis of the company's gross revenue, since gross revenue may be insufficient to meet expense and to yield a return upon invested capital. Morgan's, etc., Steamship Co. *v.* Railroad Comm., 127 La. 636, 53 So. 890.

24. Railroad company entitled to receive an adequate return upon investment.—Southern Pac. Co. *v.* Board, 78 Fed. 236.

If a railroad is not ill conceived, greater in extent than it should be, or unduly expensive in construction, and is operated wisely and economically, rates producing no more than a reasonable return on its fair value would not be unjust to any one. Missouri, etc., R. Co. *v.* Love, 177 Fed. 493.

Freight rates established by state authority are invalid as unreasonable and confiscating, if so low that a carrier can not earn a fair and reasonable return on the value of the property devoted to the service. Northern Pac. R. Co. *v.* Lee, 199 Fed. 621.

The railroad commission established by the Michigan statute, Pub. Acts 1909, No. 300, with power to fix reasonable and just rates, must consider the value of the property of the carrier employed for the public convenience, and give it a fair return on such value. Detroit, etc., R. Co. *v.* Michigan R. Comm., 171 Mich. 325, 137 N. W. 329.

Under the Wisconsin Statute, Laws 1905, pp. 556, 559, c. 362, §§ 12, 14, requiring railroads to furnish adequate service, and that the charges and rates be reasonable, and permitting the railroad commission to fix reasonable rates, and § 16, permitting the railroad or other party in interest to have such orders reviewed in the circuit court, in an action against a commission to vacate an order on the ground that it is unlawful or unreasonable, in determining whether any order is unreasonable, the court must consider that every unnecessary burden imposed upon the railroad impairs its net receipts and diminishes the margin between its gross receipts and the amount sufficient

service is reasonably worth to the public, even though charges so limited would fail to produce a fair return to the carrier upon its investment.[25] What constitutes a fair return to a carrier on its investment is a mixed question of law and fact.[26] In determining the question consideration should be given to the profits realized generally on similar investments in the locality of the one under consideration,[27] and to the legal rate of interest in the state.[28] That a road was

to assure a fair return on the value of its property, plus the amount of its fixed charges and operating expenses, and that the rights of the public and of the railroad require that this margin should ordinarily not be exhausted or impaired by orders of the commission as fast as it accumulates. Minneapolis, etc., R. Co. *v.* Railroad Comm., 136 Wis. 146, 116 N. W. 905.

The Missouri statute, Act Feb. 27, 1907 (Laws 1907, p. 170), establishing two cent passenger fares on intrastate railroads, and Act March 19, 1907 (Laws 1907, p. 171), establishing maximum freight rates held confiscatory and unconstitutional on evidence showing that none of the roads doing business thereunder can earn to exceed 3 per cent net income on its state business, while as to some the business must be done at a loss. St. Louis, etc., R. Co. *v.* Hadley, 168 Fed. 317.

Sufficiency of evidence as to unreasonableness of rates.—A general averment in a bill that a tariff, as established, is unjust and unreasonable, is supported by the admitted facts that the road cost far more than the amount of the stock and bonds outstanding; that such stock and bonds represent money invested in its construction; that there has been no waste or mismanagement in the construction or operation; that supplies and labor have been purchased at the lowest possible price consistent with the successful operation of the road; that the rates voluntarily fixed by the company have been for 10 years steadily decreasing, until the aggregate decrease has been more than 50 per cent; that, under the rates thus voluntarily established, the stock, which represents two-fifths of the value, has never received anything in the way of dividends, and that for the last three years the earnings above operating expenses have been insufficient to pay the interest on the bonded debt, and that the proposed tariff, as enforced, will so diminish the earnings that they will not be able to pay one-half the interest on the bonded debt above the operating expenses; and such an averment, so supported, will, in the absence of any satisfactory showing to the contrary, sustain a finding that the proposed tariff is unjust and unreasonable. Reagan *v.* Farmers' Loan, etc., Co., 154 U. S. 362, 38 L. Ed. 1014, 14 S. Ct. 1047.

25. Rates can go no higher than service is reasonably worth to public.—Puget Sound Elect. Railway *v.* Railroad Comm., 65 Wash. 75, 117 Pac. 739.

It does not necessarily follow that a schedule of maximum freight rates is confiscatory and unconstitutional because it fails to yield a reasonable return on the investment. Such rates must be reasonable not only to the company but also to the public, and the fact that they do not prove remunerative to a new road built through a sparsely settled country where there is at present little local business does not require the few people and the small business to pay such rates as will make the road immediately profitable to its stockholders. Southern Pac. Co. *v.* Bartine, 170 Fed. 725.

Where the carrying of 25 per cent of the total number of passengers carried by a street railroad company under rates affecting only 10 per cent of the passenger revenue at a rate less than what would be an adequate return for the use of its property affords it a profit over the actual costs of moving the passenger and is the only rate the passenger can afford to pay, such a rate is a reasonable rate, both to the company and to the public. Puget Sound Elect. Railway *v.* Railroad Comm., 65 Wash. 75, 117 Pac. 739.

26. What constitutes a fair return a mixed question of law and fact.—Northern Pac. R. Co. *v.* Lee, 199 Fed. 621.

27. Ordinarily, the right to the rate of returns, realized generally on similar investments in the locality of the one under consideration, is deemed reasonable and fair, if the investor could earn it, and the rate is allowed on the amount actually invested in good faith, fictitious valuations being rejected. Coal, etc., R. Co. *v.* Conley, 67 W. Va. 129, 67 S. E. 613.

28. Rate of profit allowable.—In determining whether passenger rates prescribed by the Pennsylvania statute, Act April 5, 1907 (P. L. 59), are unreasonable in so far as a particular carrier is concerned, the question is whether such rate will enable the carrier to earn a net income not less than the legal rate of interest after paying fixed charges and operating expenses, maintaining the plant, and providing a suitable sinking fund for the payment of debts and a fair profit to the owners of the property. Pennsylvania R. Co. *v.* Philadelphia County, 220 Pa. 100, 68 Atl. 676.

Railroads in Alabama are entitled to earn a net profit of 8 per cent on the value of the property employed by them in intrastate business, so long as the business is done without discrimination and

built without expectation of an immediate realization of a fair return on the investment does not justify disallowance of such return if it can be earned without exaction of unreasonable rates.[29]

Rate on a Particular Commodity.—A reduced rate on a particular commodity is not reasonable, if established without regard to whether it will pay the cost of the service, or yield a fair return to the carrier on the capital invested.[30]

§§ 43-49. Mode of Determining Value of Property or Investment—§ 43. In General.—In order to ascertain the fair value of the property used by the carrier, the original cost of construction, the amount expended in permanent improvements, the amount and market value of its bonds and stock, the present as compared with the original cost of construction, the probable earning capacity of the property under particular rates prescribed by statute, and the sum required to meet operating expenses, are all matters for consideration, and are to be given such weight as may be just and right in each case.[31] To ascer-

at reasonable rates. Louisville, etc., R. Co. v. Railroad Comm., 196 Fed. 800.

And a schedule of rates fixed by law which will not permit them to earn such return is confiscatory and unconstitutional. Western Railway v. Railroad Comm., 197 Fed. 954.

Railroad companies in Arkansas held entitled to earn an income of 6 per cent per annum on the value of their property employed in intrastate business, computed on the basis of the assessed valuation of such property, and from the earnings of a prosperous year to reserve a surplus of 1.5 per cent in addition; and the rates established by the Arkansas railroad commission and the two-cent passenger law of February 9, 1907 (Acts Ark. 1907, p. 10), held confiscatory as to such companies, and their enforcement enjoined. In re Arkansas Rate Cases, 187 Fed. 290.

In Minnesota it has been held that where the evidence shows that the rates, as reduced by the state railroad and warehouse commission, would produce 2½ per cent net income on the cost of reproducing the terminals, and 5 per cent net income on the cost of reproducing the rest of the road, the same is a fairly liberal income. Steenerson v. Great Northern R. Co., 69 Minn. 353, 72 N. W. 713.

In a case in the United States circuit court in Missouri it was held that railroad property, properly built and managed, is entitled to earn an annual income of 6 per cent on its fair valuation, and a statute fixing rates under which it can not make such income is confiscatory and unconstitutional. St. Louis, etc., R. Co. v. Hadley, 168 Fed. 317.

29. **Immaterial that immediate realization of a fair return was not expected.**—Coal, etc., R. Co. v. Conley, 67 W. Va. 129, 67 S. E. 613.

30. **Rate on a particular commodity.**—Louisiana R., etc., Co. v. Railroad Comm., 131 La. 387, 59 So. 820.

A reduced rate upon a particular commodity transported by a carrier is not reasonable and just within the constitution of Louisiana, art. 284, giving the railroad commission power to adopt reasonable and just rates when it is established without regard to whether the existing rate is high or low, as compared with rates on other commodities, and without regard to whether it will pay the cost of the services rendered or yield a fair return to the carrier upon capital invested. Morgan's, etc., Steamship Co. v. Railroad Comm., 127 La. 636, 53 So. 890.

While a statute of a state requiring a railroad company to transport a particular commodity within the state for less than cost does not involve the taking of property without due process of law, within the prohibition of the fourteenth amendment of the United States constitution, so long as the railroad company obtains a fair revenue from the whole of its intrastate business, it does not follow that such a rate, to be unreasonable and unjust, within Const., art. 284, giving authority to the railroad commission to fix reasonable and just rates for railroads, must also be obnoxious to the fourteenth amendment. Morgan's, etc., Steamship Co. v. Railroad Comm., 127 La. 636, 53 So. 890.

But it has been held that the proper test as to whether rates fixed for transporting coal are reasonable is not whether the rate fixed is sufficiently high to enable the carrier to earn a fair compensation, but whether, under such rates, it will be enabled from its total freight receipts on all its intrastate traffic to earn a sum, above operating expenses reasonably necessary for such traffic, sufficient to yield a fair and reasonable profit upon its investment. McCue v. Northern Pac. R. Co., 19 N. Dak. 45, 120 N. W. 869.

31. **Mode of determining value of property.** Smyth v. Ames, 169 U. S. 466, 42 L. Ed. 819, 18 S. Ct. 418.

In estimating the value of the property of a railroad company for the purpose of determining the reasonableness of rates fixed by a state, neither the market

tain the value of a railroad to determine the validity of a rate regulating statute, the most reliable test is the cost of reproduction of the road when the statute was enacted taking the value of the road at that time without regard to what may have been its value when constructed.[32] Courts, in determining whether a rate for freight charges fixed by state authority is reasonable, can not assume that the cost of reproduction of a line of railway, or that the present, as compared with the original, cost of construction, is the amount of stock and bonds outstanding, or that it is what the road has cost up to the time of the trial.[33] The assessed valuation of the property of a carrier is entitled to great weight in determining the value of the property employed for the establishment of rates.[34] The value of a railroad, like that of any other business property, may be a matter of growth; and its location, good will, and established business are elements to be considered in determining such value.[35]

§ 44. Fictitious Capitalization or Excessive Bonded Debt.—If a railroad corporation has bonded its property for an amount that exceeds its fair value, or if its capitalization is largely fictitious, it may not impose upon the public the burden of such increased rates as may be required for the purpose of realizing profits upon such excessive valuation or fictitious capitalization; and the apparent value of the property and franchises used by the corporation, as represented by its stocks, bonds and obligations, is not alone to be considered when determining the rates that may be reasonably charged.[36]

§ 45. Sworn Return of Value of Property Made for Purposes of Taxation.—A sworn return of the value of a line of railroad, made to the state

value of its stocks and bonds, the cost of construction, nor the cost of reproduction of the property is absolutely controlling, but each should be regarded as a fact tending to show fair value, and, if one only of such facts is shown, it may be assumed that it represents such value. Southern Pac. Co. *v.* Bartine, 170 Fed. 725.

32. Cost of reproduction most reliable test of value.—Louisville, etc., R. Co. *v.* Railroad Comm., 196 Fed. 800. Compare Metropolitan Trust Co. *v.* Houston, etc., R. Co., 90 Fed. 683.

In the valuation of the property of a railroad company for the purpose of determining the reasonableness of a state statute regulating rates, as affecting such property, a fundamental and generally controlling inquiry is the cost of reproducing the property in its existing condition at the time of the inquiry. Western Railway *v.* Railroad Comm., 197 Fed. 954.

In Minnesota it has been held that the question whether the rates for transportation fixed by the state railroad and warehouse commission are unreasonable and confiscatory is determined by ascertaining what, under all the circumstances, is a reasonable income on the cost of reproducing the road at the present time. Steenerson *v.* Great Northern R. Co., 69 Minn. 353, 72 N. W. 713.

33. State *v.* Minneapolis, etc., R. Co., 80 Minn. 191, 83 N. W. 60, 89 Am. St. Rep. 514, affirmed Minneapolis, etc., R. Co. *v.* Minnesota, 186 U. S. 257, 46 L. Ed. 1151, 22 S. Ct. 900.

34. Assessed valuation of property.—Detroit, etc., R. Co. *v.* Michigan R. Comm., 171 Mich. 325, 137 N. W. 329.

Evidence of a greater value than the assessed value must be shown by a carrier when it attacks rates fixed by the railroad commission created by the Michigan statute, Pub. Acts 1909, No. 300. Detroit, etc., R. Co. *v.* Michigan R. Comm., 171 Mich. 325, 137 N. W. 329.

35. Location, good will, and established business.—Metropolitan Trust Co. *v.* Houston, etc., R. Co., 90 Fed. 683.

Circumstances not warranting consideration of value as a going concern.—But where a railroad company, owning a monopoly of transportation between certain points, the tonnage of which consisted largely of coal transported from the mines to a junction with a transcontinental line, had never been able to pay interest on its bonds, had accumulated only a very limited equipment, and had not prospered to any material extent, it was not entitled to an addition to its reproductive value in determining the reasonableness of a freight rate for added value as a going concern. Montana, etc., R. Co. *v.* Morley, 198 Fed. 991.

36. Fictitious capitalization or excessive bonded indebtedness.—Smyth *v.* Ames, 169 U. S. 466, 42 L. Ed. 819, 18 S. Ct. 418.

A bonded debt of a railroad is neither a complete nor accurate criterion of the value of the property for the ascertainment of the reasonable or confiscatory character of intrastate freight rates. Montana, etc., R. Co. *v.* Morley, 198 Fed. 991.

authorities for purposes of taxation by an officer of the company, is evidence of the value of the property, to be considered in determining the reasonableness of rates or charges fixed by the state for the carriage of passengers or freight, but is not conclusive on the company for the latter purpose, and does not estop it to show that the actual cost of reproducing the property would be much greater than the value so given.[37]

§ 46. Value of Franchise.—In valuing the property of a railroad company for the purpose of determining the validity of a state statute regulating rates, the value of the company's franchise is to be included, and, where the state by its tax commission has placed a value on such franchise for taxation purposes, it may fairly be taken by the court as a basis for its finding.[38]

§ 47. Consolidated Corporation—Value of Assets of Constituent Corporations.—The valuation placed by a consolidated street railroad corporation on the assets of the constituent corporations will not bind the railway commission in estimating the valuation upon which the corporation should earn an income, or in fixing the price the carrier may charge for transporting passengers.[39]

§ 48. Part of Railroad within State to Be Regarded in Its Relation to Part without State.—In the case of a railroad system extending into or through two or more states, the part within a state, the value of which is to be determined upon an issue as to the reasonableness of rates therein, should be regarded in its relation to the whole, and consideration given to the influence upon that value of property outside the state employed in aid of all its transportation business.[40]

§ 49. Road Purchased at Foreclosure Sale and Reorganized.—Where a road was purchased at a foreclosure sale and reorganized, the fact that the rates fixed will not pay a fair return on the original cost of the investment does not show them to be unreasonable, there being no evidence to show the cost of the investment to the persons purchasing and reorganizing it.[41]

§ 50. Carrier Entitled to Earn Interest upon a Valid Bonded Debt.—The interest upon a valid bonded debt of a railroad company, contracted in a

37. **Return of value of property made for purposes of taxation.**—Louisville, etc., R. Co. *v.* Brown, 123 Fed. 946.

The return of a valuation of a part of its property to the board of equalization does not estop a railroad company, in a proceeding for placing a valuation on the whole property for the purpose of fixing transportation rates, but is competent evidence. Southern Pac. Co. *v.* Board, 87 Fed. 21.

38. **Value of franchise.**—Louisville, etc., R. Co. *v.* Railroad Comm., 196 Fed. 800.

39. **Consolidated corporation—Value of sets of constituent corporations.**—Tyrrell *v.* Lincoln Tract. Co. (Neb.), 134 N. W. 278.

40. **Part of railroad within state to be regarded in its relation to part without state.**—Missouri, etc., R. Co. *v.* Love, 177 Fed. 493.

41. **Road purchased at foreclosure sale and reorganized.**—Dow *v.* Beidelman, 125 U. S. 680, 31 L. Ed. 841, 8 S. Ct. 1028.

A state statute (Arkansas Act of April 4, 1887) restricting the rate for carrying passengers to three cents a mile is not shown to be invalid because of the unreasonableness of its provisions, as applied to a railroad bought under a foreclosure sale and reorganized, by the admitted facts that with the same traffic that the road has, and charging for transportation at the rate of three cents per mile, the net yearly income will pay less than 1½ per cent on the original cost of the road, and only a little more than 2 per cent of the amount of its bonded debt, there being no evidence whatever as to how much money the bonds cost, or as to the amount of the capital stock of the corporation as reorganized, or as to the sum paid for the road at its purchase under the foreclosure. It can not be presumed that the price paid at the sale under the decree of foreclosure equalled the original cost of the road, or the amount of outstanding bonded debt, and without any proof of the sum invested by the reorganized corporation the court has no means, even if it would under any circumstances have the power, of determining that the rate of three cents a mile is unreasonable. Dow *v.* Beidelman, 125 U. S. 680, 31 L. Ed. 841, 8 S. Ct. 1028.

careful, economical, and honest administration of its business, constitutes a fixed charge, which the company is entitled to earn before its net earnings above operating expenses can be considered as dividends, which are subject to regulation or reduction in the discretion of the legislature.[42]

§ 51. Ascertaining Cost of Doing Business or of Operating Road.—As the reasonableness of a schedule of rates for local business of a railroad company must be determined by a comparison between the gross receipts and the cost of doing the business, it can not be determined until the cost of doing the business is ascertained.[43] In ascertaining the cost of operating a railroad, with reference to determining the reasonableness of rates, the expenses of operation are not to be strictly limited to the cost of running trains, excluding all betterments.[44] When estimating the cost of operating a railway per ton of freight per mile of carriage, for the purpose of determining the reasonableness of a tariff of rates fixed by a state railroad and warehouse commission, it is error to take into consideration an amount of the earnings which has been appropriated and paid out as dividends on stock shares of such railway.[45]

§§ 52-54. Consideration of Net Earnings in Determining Reasonableness of Rates Prescribed—§ 52. Net Earnings Must Be Sufficient to Pay Fair Return on Investment.—In fixing the rates of a carrier, regard must be had to the net earnings, and these must be sufficient, under the proposed schedule, to pay a fair return on the carrier's investment.[46] But a schedule of railroad rates established by state authority is not unreasonably low as to a particular road because it will not enable the company to accumulate from its net earnings a sinking fund for the payment of its indebtedness.[47]

42. Carrier entitled to earn interest on a valid bonded debt.—Chicago, etc., R. Co. *v.* Smith, 110 Fed. 473.

43. Necessity of ascertaining cost of doing business.—Decree, 90 Fed. 363, reversed. Chicago, etc., R. Co. *v.* Tompkins, 176 U. S. 167, 44 L. Ed. 417, 20 S. Ct. 336.

44. Mode of ascertaining cost of operating railroad.—Southern Pac. Co. *v.* Board, 78 Fed. 236.

45. State *v.* Minneapolis, etc., R. Co., 80 Minn. 191, 83 N. W. 60, 89 Am. St. Rep. 514, affirmed Minneapolis, etc., R. Co. *v.* Minnesota, 186 U. S. 257, 46 L. Ed. 1151, 22 S. Ct. 900.

46. Net earnings must be sufficient to pay fair return on investment.—Chicago, etc., R. Co. *v.* Tompkins, 176 U. S. 167, 44 L. Ed. 417, 20 S. Ct. 336. See, also, Seaboard, etc., Railway *v.* Ellis, 203 U. S. 261, 51 L. Ed. 175, 27 S. Ct. 109.

Upon a bill to restrain the enforcement of a schedule of rates for the carriage of passengers and freight published by the railroad commission of a state, the court in reaching its conclusion proceeded upon the theory that the comparison of the actual gross receipts of the company from the business within the state with those which it would have received if the rates which it prescribed had been in force was sufficient to determine the question of the reasonableness of the rates. It was held that this was error; that the question of expenses incurred in producing the gross receipts should have been taken into account and a balance struck between the two and the net earnings ascertained. Chicago, etc., R. Co. *v.* Tompkins, 176 U. S. 167, 44 L. Ed. 417, 20 S. Ct. 336.

The Nebraska statute, Act April 12, 1893 (Laws 1893, p. 164, c. 24), prescribing local freight rates on railroads, which reduces such rates 29½ per cent, is invalid where the rates prescribed are such, as to companies operating roads within the state, and doing an interstate business, that there would be no net earnings from transportation of freight if such rates were applied to all their business. Ames *v.* Union Pac. R. Co., 64 Fed. 165.

Where the business of a railroad company within a state is efficiently, economically, and honestly conducted, and its operating expenses are no greater than such management requires, and the net earnings of its lines within the state, above operating expenses, both from local and through business, are less than half the amount required to pay the interest on the mortgage debt upon lines within the state, the local earnings at the same time being insufficient to pay half of the proportion of such interest justly chargeable thereon, a state regulation reducing the rates it is permitted to charge on local business, the effect of which will be to materially decrease its net earnings, is unreasonable and unjust and a violation of its constitutional rights. Chicago, etc., R. Co. *v.* Smith, 110 Fed. 473.

47. Carrier not entitled to accumulate sinking fund from net earnings.—Houston, etc., R. Co. *v.* Storey, 149 Fed. 499.

§ 53. Mode of Computing Net Earnings and What They Include.—In computing the net income of a railroad company, for the purpose of determining whether the rates prescribed by the state are reasonable or confiscatory, the intrastate business of the company is justly chargeable with its proper proportion of the expense incurred by the company in maintaining agents in various parts of the country to solicit business.[48] In making such computation net earnings must be held to include earnings applied to the purchase of additional equipment and other improvements,[49] and the fair rental value of the dining room, saloon, check stand, etc., privileges in a passenger station, although the carrier grants such privileges for a merely nominal rental.[50] In computing the net earnings, sums paid out by the carrier for injuries to persons may properly be included in operating expenses.[51] In computing the net earnings from its intrastate business miscellaneous earnings and expenses, not directly attributable to either intrastate or interstate business, may properly be apportioned between the two on the basis of the earnings from each source.[52]

§ 54. Earnings of Entire Road to Be Regarded.—A carrier can not claim the right to earn a net profit from every mile, section or other part into which the road may be divided, nor attack as unjust a regulation which fixes a rate at which some such part would be unremunerative, as it would be practically impossible to ascertain in what proportion the several parts should share with others in the expenses and receipts in which they participated.[53] To the extent that the question of injustice is to be determined by the effects of an act fixing the rate upon the earnings of the company, the earnings of the entire line must be estimated as against all its legitimate expenses under the operation of the act within the limits of the state.[54] A state railroad commission may reduce the freight upon a particular article, provided the company is able to earn a fair profit upon its entire business, and the burden of proof is upon it to impeach the action of the commission in this particular.[55]

48. Mode of computing net earnings and what they include.—In re Arkansas Rate Cases, 187 Fed. 290.

49. Coal, etc., R. Co. *v.* Conley, 67 W. Va. 129, 67 S. E. 613.

50. In re Arkansas Rate Cases, 187 Fed. 290.

51. In re Arkansas Rate Cases, 187 Fed. 290.

52. In re Arkansas Rate Cases, 187 Fed. 290.

53. Earnings of entire road, and not any particular part, the proper criterion.—St. Louis, etc., R. Co. *v.* Gill, 156 U. S. 649, 39 L. Ed. 567, 15 S. Ct. 484; St. Louis, etc., R. Co. *v.* Stevenson, 156 U. S. 667, 39 L. Ed. 573, 15 S. Ct. 491.

54. St. Louis, etc., R. Co. *v.* Gill, 156 U. S. 649, 665, 39 L. Ed. 567, 15 S. Ct. 484.

The reasonableness of a passenger rate of a certain amount per mile fixed by the legislature must in the case of a railroad company be determined by its effect on the net earnings of the company on its entire line within the state, and not by its effect on any subdivision, even though it was once a separate road. St. Louis, etc., R. Co. *v.* Gill, 156 U. S. 649, 39 L. Ed. 567, 15 S. Ct. 484, affirming 54 Ark. 101, 15 S. W. 18.

55. Freight may be reduced upon particular article if entire business earns fair profit.—Minneapolis, etc., R. Co. *v.* Minnesota, 186 U. S. 257, 46 L. Ed. 1151, 22 S. Ct. 900.

The fact that if rates upon all goods carried were fixed at the amount imposed by the commission upon coal in carloads the road would not pay its operating expenses does not show that the rate fixed by the commission is unreasonable. It may well be that the existing rates upon other merchandise, which are not disturbed by the commission, may be sufficient to earn large profits to the company, though it may earn little or nothing upon coal in carload lots. Minneapolis, etc., R. Co. *v.* Minnesota, 186 U. S. 257, 46 L. Ed. 1151, 22 S. Ct. 900.

A rate fixed by a railroad commission on a certain article can not be held to be unreasonable where there is no evidence from which a reasonable deduction can be made as to the cost of transporting such commodity, the amount of such commodity carried, or the effect which the rate will have on the carrier's income. Seaboard, etc., Railway *v.* Ellis, 203 U. S. 261, 51 L. Ed. 175, 27 S. Ct. 109.

But in Louisiana it has been held that though when the railroad commission establishes general rates affecting the entire intrastate business of a railroad company, the revenue derived from that business can be considered in determining whether such rates are reasonable and

§ 55. Interstate Business to Be Disregarded.—The reasonableness or unreasonableness of rates prescribed by a state for the transportation of persons and property wholly within its limits must be determined without reference to the interstate business done by the carrier, or to the profits derived from it.[56] The state can not justify unreasonably low rates for domestic transportation, considered alone, upon the ground that the carrier is earning large profits on its interstate business, over which, so far as rates are concerned, the state has no control. Nor can the carrier justify unreasonably high rates on domestic business upon the ground that it will be able only in that way to meet losses on its interstate business.[57] But the carrier's earnings or losses from interstate commerce may be considered in determining the proportion of the value of the property assignable to local business and for other purposes.[58]

just within Const., art. 284, giving such commission authority to establish just and reasonable rates, yet where the rates are fixed on a particular commodity, the question is whether they produce a revenue, in the first place, sufficient to pay the actual cost of the service rendered, and, in the next place, sufficient to yield a fair return in the proportion that the business of handling such commodity bears to the whole intrastate business upon the capital employed, a possible exception existing where the carrier handles both the raw and manufactured material, and the loss on the one haul may be made good by the gain on the other, the whole constituting one and the same business. Morgan's, etc., Steamship Co. *v.* Railroad Comm., 127 La. 636, 53 So. 890.

And in Texas it has been held that where a railroad company attacking the reasonableness of the rate on lumber as fixed by the railroad commission showed that the revenue derived from hauling lumber at such rate was not sufficient to pay the cost of transportation, the rate was unreasonable, though a railroad company can not select an unimportant article and attack the rate prescribed for that as unreasonable for that reason. Gulf, etc., R. Co. *v.* Railroad Comm., 102 Tex. 338, 113 S. W. 741, 116 S. W. 795.

56. Interstate business and profits derived therefrom to be disregarded.—Smyth *v.* Ames, 169 U. S. 466, 42 L. Ed. 819, 18 S. Ct. 418; Northern Pac. R. Co. *v.* Keyes, 91 Fed. 47; Louisville, etc., R. Co. *v.* Railroad Comm., 196 Fed. 800; In re Arkansas R. Rates, 163 Fed. 141; State *v.* Seaboard, etc., Railway, 48 Fla. 129, 37 So. 314, affirmed in 203 U. S. 261, 51 L. Ed. 175, 27 S. Ct. 109; Morgan's etc., Steamship Co. *v.* Railroad Comm., 127 La. 636, 53 So. 890.

In determining the reasonableness of local rates, the interstate traffic which orignates or terminates in the state can not be divided upon a mileage basis, and such portion thereof as is done within the state be held subject to state control and considered in fixing rates. Northern Pac. R. Co. *v.* Keyes, 91 Fed. 47.

The basis of all calculations as to reasonableness of rates charged by a railroad must be the fair value of the property, and as to rates for transportation of persons and property within the limits of the state, the reasonableness of such rates must be based on the value of the property devoted to domestic commerce, without reference to the value of the property devoted to interstate commerce. Seaboard Air Line R. Co. *v.* Railroad Comm., 155 Fed. 792.

But in Michigan it has been held that under Act No. 90, Pub. Acts 1891, providing for fixing the rates for transportation of passengers on railroads, it is competent for the railroad commissioner, in fixing such rates, to include in the computation the amount of the interstate fares earned by that portion of the road lying within the state. Osborn *v.* Wabash R. Co., 126 Mich. 113, 85 N. W. 466.

57. Smyth *v.* Ames, 169 U. S. 466, 42 L. Ed. 819, 18 S. Ct. 418.

"So far as rates of transportation are concerned, domestic business should not be made to bear the losses on interstate business, nor the latter the losses on domestic business. It is only rates for the transportation of persons and property between points within the state that the state can prescribe; and when it undertakes to prescribe rates not to be exceeded by the carrier, it must do so with reference exclusively to what is just and reasonable, as between the carrier and the public, in respect of domestic business. The argument that a railroad line is an entirety; that its income goes into, and its expenses are provided for, out of a common fund; and that its capitalization is on its entire line, within and without the state, can have no application where the state is without authority over rates on the entire line, and can only deal with local rates and make such regulations as are necessary to give just compensation on local business." Smyth *v.* Ames, 169 U. S. 466, 42 L. Ed. 819, 18 S. Ct. 418.

58. Purposes for which earnings or losses from interstate commerce may be considered.—State *v.* Seaboard, etc., Railway, 48 Fla. 129, 37 So. 314; S. C., 48 Fla. 152, 37 So. 658. Affirmed Seaboard, etc., Railway *v.* Ellis, 203 U. S. 261, 51 L. Ed. 175, 27 S. Ct. 109.

§ 56. Economic Factors and Natural Advantages of Localities May Be Considered.—A railroad commission, in fixing its schedule of rates, may consider any economic factor which may influence freight transportation, and may also consider the natural advantages of localities, and may justify a classification of commodity rates in localities, excepting rates between designated points from the general classification; and, where such exception is made, the presumption is in favor of the reasonableness of the classification, and the burden is on the railroad company to prove that it is illegal.[59] The circumstances of each railroad and each market or locality must determine the rates of toll properly to be allowed for the stopping of a commodity in transit for treatment, since while the carrier is entitled to receive some compensation beyond the mere cost of such service, the cost thereof may be greater or less in one city than another.[60]

§ 57. Equality of Rates for Like Service.—The state may require equality of rates where the conditions are the same, and an order of a railroad commission, which, in effect, makes rates equal, is valid.[61] An order of a railroad commission fixing rates on one road only, is not invalid, where the effect of such order is to equalize rates.[62] But in considering the reasonableness of a rate for the carriage of freight, a railroad commission and the courts are justified in taking into consideration what is known as "commercial necessity," namely, the application of principles, when fixing rates, which are forced upon common carriers by various conditions and circumstances and are in common practice among them—a business policy which actuates and influences the carriers themselves to disregard a rule of strict comparison and strict equality as between bulk, or weight, or value, as well as distance of carriage.[63]

§ 58. Adoption of Rates Given by Carrier to Certain Shippers.—Even if a state may not compel a railroad company to do business at a loss and conceding that a railroad company may insist, as against the power of the state, upon the right to establish such rates as will afford reasonable compensation for the services rendered, yet when it voluntarily establishes local rates for some shippers, it can not resist the power of the state to enforce the same rates for all. The state may insist upon equality as between all its citizens, and that equality can not be defeated in respect to any local shipments by arrangements made with or to favor outside companies.[64]

59. **Economic factors and natural advantages of localities may be considered.**—Southern R. Co. *v.* Atlanta Stove Works, 128 Ga. 207, 57 S. E. 429.

60. Florida R. Comm'rs *v.* Atlantic, etc., R. Co., 60 Fla. 218, 53 So. 601.

61. **State may require equality of rates under like conditions.**—Seaboard, etc., Railway *v.* Ellis, 203 U. S. 261, 51 L. Ed. 175, 27 S. Ct. 109.

62. **Validity of order fixing rates on one road, where rates are thus made equal.**—Seaboard, etc., Railway *v.* Ellis, 203 U. S. 261, 51 L. Ed. 175, 27 S. Ct. 109.

63. **"Commercial necessity" may be considered.**—State *v.* Minneapolis, etc., R. Co., 80 Minn. 191, 83 N. W. 60, 89 Am. St. Rep. 514, affirmed Minneapolis, etc., R. Co. *v.* Minnesota, 186 U. S. 257, 46 L. Ed. 1151, 22 S. Ct. 900.

64. **Adoption by state of rates given certain shippers.**—Alabama, etc., R. Co. *v.* Mississippi R. Comm., 203 U. S. 496, 51 L. Ed. 289, 27 S. Ct. 163.

Whenever, under the guise or pretense of a rebilling rate, some merchants are given a low local rate, the commission is justified in making that rate the rate for all. It is not bound to inquire whether it furnishes adequate return to the railway company, for the state may insist upon equality, to be enforced under the same conditions against all who perform a public or quasi public service. Alabama, etc., R. Co. *v.* Mississippi R. Comm., 203 U. S. 496, 51 L. Ed. 289, 27 S. Ct. 163.

When voluntarily the Vicksburg company established a local rate of 3½ per cent from Vicksburg to Meridian for those who had within 90 days made a shipment over the Shreveport road, it estopped itself from complaining of an order making that rate applicable to all shipments, no matter whence they arose, and in favor of all merchants, whether those transporting over the Shreveport road or not. Alabama, etc., R. Co. *v.* Mississippi R. Comm., 203 U. S. 496, 51 L. Ed. 289, 27 S. Ct. 163.

The power of a state to enforce an equality of local rates as between all parties shipping for the same distance

§ 59. Accessibility of a Place to High Seas as Affecting Rates.—Though a shipping center be accessible to the high seas, it should neither be entitled to any favorable indulgence in the matter of railroad rates, nor the object of adverse discrimination on that account.[65]

§ 60. Betterments and Replacements Should Be Considered.—State authorities, in fixing rates to be charged by railroads, should take into consideration betterments and replacements made necessary by the growth of traffic, such as replacing wooden by iron bridges, and similar expenditures beyond ordinary repairs, which must be met from the gross earnings.[66]

§ 61. Passenger Traffic Considered as Separate and Independent from Freight Traffic.—In determining whether the passenger rates prescribed by statute are unjust as to a particular carrier, the passenger traffic of the road should be considered as a separate and independent subject from the freight traffic.[67]

§ 62. Revenue That Has Been Derived from Rate under Consideration.—Where a freight rate has been made for the future and a reasonable time has passed during which it has been applicable, the revenue derived therefrom should be regarded in determining whether it is remunerative or confiscatory.[68]

§ 63. Effect of Several Sovereignties Being Interested.—If, by the scope of the operations of a railroad company, several sovereignties are interested, the special insistence of the officers of one should not be permitted to cast an undue burden on the others. The factors common to all, affecting the reasonableness of rates, should be equitably dealt with and adjusted; and this, though the local rates of a single state are alone in questions.[69]

§§ 64-65. Apportioning Value of Property and Expenses—§ 64. Necessity for Apportionment.—To determine whether a rate regulating statute is reasonable as to a particular company, it is necessary to ascertain the value of all its property devoted to its business as carrier in the state, and to apportion such value between its interstate and intrastate business.[70]

over the same road, can not be doubted, and it can not be thwarted by any action of a railroad company which does not involve an actual interstate shipment, although done with a view of promoting the business interests of the company. Alabama, etc., R. Co. *v.* Mississippi R. Comm., 203 U. S. 496, 51 L. Ed. 289, 27 S. Ct. 163.

65. **Effect of accessibility of a place to high seas.**—Railroad Comm. *v.* Galveston Chamber of Commerce (Tex.), 145 S. W. 573.

Though the existence of water communication might compel railroads to seek lower rates to a certain point, it would not entitle that point to demand lower rates from the railroad. Railroad Comm. *v.* Galveston Chamber of Commerce (Tex.), 145 S. W. 573.

66. **Betterments and replacements.**—Metropolitan Trust Co. *v.* Houston, etc., R. Co., 90 Fed. 683.

A railroad company may properly charge its returns with an annual sum to provide for depreciation and replacement, and have such sum allowed in any determination of what is a proper return upon its investment, to be approximated in fixing its rates of carriage, but it can not make the traffic of a future year bear all the burdens of the deterioration of past years, since each year should carry the burden of its own wear and tear, so that, when renewals become necessary, the burden is equally borne by all contributing features. Puget Sound Elect. Railway *v.* Railroad Comm., 65 Wash. 75, 117 Pac. 739.

67. **Passenger traffic considered as separate and independent from freight traffic.**—Pennsylvania R. Co. *v.* Philadelphia County, 220 Pa. 100, 68 Atl. 676.

68. **Consideration of revenue derived from rate.**—Montana, etc., R. Co. *v.* Morley, 198 Fed. 991.

69. **Effect of several sovereignties being interested.**—Missouri, etc., R. Co. *v.* Love, 177 Fed. 493.

70. **Necessity for apportionment.**—Louisville, etc., R. Co. *v.* Railroad Comm., 196 Fed. 800.

Where the same property, labor, and management are used at the same time by a common carrier in interstate and intrastate commerce, the value of the property and labor and management used should be properly apportioned in deter-

§ 65. Method of Apportionment.—While the authorities are not entirely in accord as to the proper method of apportioning the value of the property and the expenses of a railroad company engaged in both intrastate and interstate business for the purpose of determining whether rates on intrastate business established by a state are reasonable or confiscatory with respect to such company, the weight of authority would seem to support the rule that the revenue or gross earnings basis is the best and most equitable mode of apportionment, making a proper allowance for the greater cost of the intrastate business.[71] The revenue train mileage basis used by railroads in apportioning common operating expenses between their freight and passenger business, while concededly only an approximation, would seem to be the most satisfactory for making such apportionment for the purpose of determining the reasonableness of a state statute fixing passenger fares.[72]

§ 66. Line of Railroad Operated in Connection with Other Lines.—The fact that a line of railroad is operated in connection with other lines owned by the same company, but under separate charters, whereby the earnings of such line are increased and its operating expenses reduced, does not prevent its being considered as a separate and independent line for the purpose of determining the reasonableness of rates thereon, fixed by the state; full consideration of the joint operation being given when the road is credited for the increased business and reduced expenses.[73]

mining the reasonableness of the compensation for service rendered by the carrier in the intrastate business taken separately and as an entirety, or in connection with the interstate business concurrently done. Railroad Comm'rs *v.* Louisville, etc., R. Co., 62 Fla. 315, 57 So. 175.

71. **Apportionment to determine whether rates on intrastate business are reasonable.**—Trust Co. *v.* Chicago, etc., R. Co., 199 Fed. 593; Missouri, etc., R. Co. *v.* Love, 177 Fed. 493.

On an issue as to whether railroad rates on intrastate business established by a state are reasonable or confiscatory with respect to a railroad company doing both intrastate and interstate business, the proportion of the entire value of the property of the company in the state which is devoted to the intrastate business, and on which it is entitled to earn a fair return from such business, may fairly be determined on the basis of the earnings, by taking the same proportion of the entire value that the intrastate earnings bear to the entire earnings in the state from both intrastate and interstate business. In re Arkansas Rate Cases, 187 Fed. 290.

On an issue as to whether railroad rates on intrastate business established by a state are reasonable or confiscatory with respect to a company doing both intrastate and interstate business, the expense of doing the intrastate business can not properly be computed alone on the basis of the earnings from such business as compared with the total earnings from both classes; but other factors should be taken into consideration, such as the comparative rates received for and expense of handling each class, the kind of traffic forming the bulk of each, especially where the interstate business is largely in the carriage of grain and similar commodities paying a low rate, which forms but a small part of local shipments and other matters which under the particular circumstances affect the question. In re Arkansas Rate Cases, 187 Fed. 290.

In apportioning the cost of maintaining the way and structures of a railroad between its intrastate and interstate business, on an issue as to the reasonableness of intrastate rates established by a state, there seems no fairer basis than the earnings from the two classes of business; while, on the other hand the cost of locomotive and car maintenance which should be charged to each class of business can be more nearly approximated by using the car mile basis. In re Arkansas Rate Cases, 187 Fed. 290.

In determining the reasonableness of freight and passenger rates established by a state on intrastate railroad traffic, as applied to a railroad doing both interstate and intrastate business, the difference in the cost of handling each kind of business as related to the earnings from each should be considered, and in apportioning the total expenses between the two kinds of business the best method is to make the division on the basis of the relative earnings from each class of business. St. Louis, etc., R. Co. *v.* Hadley, 168 Fed. 317.

72. **Apportioning operating expenses between freight and passenger business.**—Trust Co. *v.* Chicago, etc., R. Co., 199 Fed. 593.

73. **Line of railroad operated in connection with other lines.**—Louisville, etc., R. Co. *v.* Brown, 123 Fed. 946.

§ 67. Mode of Arriving at Effect of Statutes Reducing Rates.—One of the most satisfactory modes of arriving at the effect on the revenues of corporations of statutes reducing rates is to take the gross and net income for the preceding years, if it be probable that the business will continue in substantially the same volume and at the same cost, and compare the results of prior years under the prior laws and the results which would have been effected if the reduced rates had been applied to such business.[74] To ascertain whether the reduced rates would be harmful or beneficial, the court may, in case of doubt, order them tested by actual operation; but such experiments are never justifiable where the facts presented show only a moderate income under the former law and a strong probability of scant earnings or deficiency under the reduced rates.[75]

§ 68. Due Process of Law.—A railroad corporation is a person within the meaning of the fourteenth amendment of the constitution of the United States declaring that no state shall deprive any person of property without due process of law,[76] and under pretense of regulating fares and freights, the state can not do that which in law amounts to a taking of private property without due process of law.[77] If the rates are fixed at an insufficient amount,[78] or without judicial investigation,[79] the company is deprived of the lawful use of its property, and

74. **Mode of arriving at effect of statutes reducing rates.**—Seaboard Air Line R. Co. *v.* Railroad Comm., 155 Fed. 792.

75. Seaboard Air Line R. Co. *v.* Railroad Comm., 155 Fed. 792.

76. **Railroad corporation a person within fourteenth amendment of federal constitution.**—Santa Clara *v.* Southern Pac. R. Co., 118 U. S. 394, 30 L. Ed. 118, 6 S. Ct. 1132; Charlotte, etc., R. Co. *v.* Gibbes, 142 U. S. 386, 35 L. Ed. 1051, 12 S. Ct. 255; Covington, etc., Turnpike Road Co. *v.* Sandford, 164 U. S. 578, 41 L. Ed. 560, 17 S. Ct. 198; Gulf, etc., R. Co. *v.* Ellis, 165 U. S. 150, 41 L. Ed. 666, 17 S. Ct. 255; Pembina, etc., Milling Co. *v.* Pennsylvania, 125 U. S. 181, 31 L. Ed. 650, 8 S. Ct. 737; Minneapolis, etc., R. Co. *v.* Beckwith, 129 U. S. 26, 29, 32 L. Ed. 585, 9 S. Ct. 207.

77. **Regulation must not take property without due process.**—Stone *v.* Farmers' Loan, etc., Co., 116 U. S. 307, 331, 29 L. Ed. 636, 6 S. Ct. 334; St. Louis, etc., R. Co. *v.* Gill, 156 U. S. 649, 657, 39 L. Ed. 567, 15 S. Ct. 484; Dow *v.* Beidelman, 125 U. S. 680, 31 L. Ed. 841, 8 S. Ct. 1028; Chicago, etc., R. Co. *v.* Minnesota, 134 U. S. 418, 33 L. Ed. 970, 10 S. Ct. 462, 702; Reagan *v.* Farmers' Loan, etc., Co., 154 U. S. 362, 38 L. Ed. 1014, 14 S. Ct. 1047; Chicago, etc., R. Co. *v.* Wellman, 143 U. S. 339, 36 L. Ed. 176, 12 S. Ct. 400; Lake Shore, etc., R. Co. *v.* Smith, 173 U. S. 684, 43 L. Ed. 858, 19 S. Ct. 565; Smyth *v.* Ames, 169 U. S. 466, 42 L. Ed. 819, 18 S. Ct. 418; Louisville, etc., R. Co. *v.* Kentucky, 183 U. S. 503, 46 L. Ed. 298, 22 S. Ct. 95; Chicago, etc., R. Co. *v.* Chicago, 166 U. S. 226, 41 L. Ed. 979, 17 S. Ct. 581; Chicago, etc., R. Co. *v.* Tompkins, 176 U. S. 167, 44 L. Ed. 417, 20 S. Ct. 336; Minneapolis, etc., R. Co. *v.* Minnesota, 186 U. S. 257, 46 L. Ed. 1151, 22 S. Ct. 900; Chicago, etc., R. Co. *v.* Drainage Comm'rs, 200 U. S. 561, 50 L. Ed. 596, 26 S. Ct. 341; Atlantic, etc., R. Co. *v.* North Carolina Corp. Comm., 206 U. S. 1, 51 L. Ed. 933, 27 S. Ct. 585.

As the public power to regulate railways and the private right of ownership of such property coexist and do not the one destroy the other, it has been settled that the right of ownership of railway property like other property rights finds protection in constitutional guarantees, and, therefore, wherever the power of regulation is exerted in such an arbitrary and unreasonable way as to cause it to be in effect not a regulation but an infringement upon the right of ownership, such an exertion of power is void because repugnant to the due process and equal protection clauses of the fourteenth amendment. Atlantic, etc., R. Co. *v.* North Carolina Corp. Comm., 206 U. S. 1, 20, 51 L. Ed. 933, 27 S. Ct. 585.

78. **Insufficient rates.**—Lake Shore, etc., R. Co. *v.* Smith, 173 U. S. 684, 697, 43 L. Ed. 858, 19 S. Ct. 565; Chicago, etc., R. Co. *v.* Wellman, 143 U. S. 339, 36 L. Ed. 176, 12 S. Ct. 400; Reagan *v.* Farmers Loan, etc., Co., 154 U. S. 362, 38 L. Ed. 1014, 14 S. Ct. 1047; St. Louis, etc., R. Co. *v.* Gill, 156 U. S. 649, 39 L. Ed. 567, 15 S. Ct. 484; Smyth *v.* Ames, 169 U. S. 466, 42 L. Ed. 819, 18 S. Ct. 418; Metropolitan Trust Co. *v.* Houston, etc., R. Co., 90 Fed. 683.

79. **Absence of judicial investigation in fixing rates.**—Chicago, etc., R. Co. *v.* Minnesota, 134 U. S. 418, 33 L. Ed. 970, 10 S. Ct. 462, 702; Smyth *v.* Ames, 169 U. S. 466, 523, 42 L. Ed. 819, 18 S. Ct. 418; Louisville, etc., R. Co. *v.* Kentucky, 183 U. S. 503, 46 L. Ed. 298, 22 S. Ct. 95.

Where a railroad commission arbitrarily fixes rates of fare and freight, in respect to which the company is given no opportunity to be heard, and which are

thus, in substance and effect, of the property itself, without due process of law and in violation of the constitution. But general statutes regulating the use of railroads in a state, or fixing maximum rates of charges for transportation, when not forbidden by charter contracts, do not necessarily deprive a corporation owning or operating a railroad within the state of its property without due process of law.[80]

Requiring Sale of Thousand Mile Tickets.—An act requiring carriers to keep on sale at their principal ticket offices thousand mile tickets, and fixing a sum to be charged therefor, and providing that such tickets shall be good for a certain time after issuance, is invalid as taking property without due process of law.[81] The fact that a railroad company has voluntarily sold one thousand mile

confiscatory, and amount to depriving it of property without due process of law, the courts may give relief against their enforcement. Louisville, etc., R. Co. *v.* Kentucky, 183 U. S. 503, 46 L. Ed. 298, 22 S. Ct. 95.

80. General statutes fixing maximum charges not necessarily unconstitutional.—Stone *v.* Farmers' Loan, etc., Co., 116 U. S. 307, 29 L. Ed. 636, 6 S. Ct. 334; Munn *v.* Illinois, 94 U. S. 113, 24 L. Ed. 77; Railroad Co. *v.* Richmond, 96 U. S. 521, 24 L. Ed. 734; Spring Valley Water Works *v.* Schottler, 110 U. S. 347, 28 L. Ed. 173, 4 S. Ct. 48.

Mode of determining whether rates prescribed are unconstitutional.—The question of whether the rates prescribed by a city ordinance limiting the fare to be charged by street railway companies are so low as to constitute a deprivation of property without due process of law can not be determined by a consideration of the earnings of a portion only of the lines of a street railway company, but only by estimating the earnings of the entire line as against the expenses of the entire line. Chicago Union Tract. Co. *v.* Chicago, 199 Ill. 579, 65 N. E. 470.

81. Requiring sale of thousand mile tickets.—Lake Shore, etc., R. Co. *v.* Smith, 173 U. S. 684, 43 L. Ed. 858, 19 S. Ct. 565. See, also, Attorney General *v.* Atlantic, etc., R. Co., 106 Va. 61, 55 S. E. 572.

"Regulations for maximum rates for present transportation of persons or property bear no resemblance to those which assume to provide for the purchase of tickets in quantities at a lower than the general rate, and to provide that they shall be good for years to come. This is not fixing maximum rates, nor is it proper regulation. It is an illegal and unjustifiable interference with the rights of the company." Lake Shore, etc., R. Co. *v.* Smith, 173 U. S. 684, 43 L. Ed. 858, 19 S. Ct. 565.

The act of the Michigan legislature, No. 90 of the year 1891, amending the general railroad law, provided as follows: "That one thousand mile tickets shall be kept for sale at the principal ticket offices of all railroad companies in this state or carrying on business partly within and partly without the limits of the state, at a price not exceeding twenty dollars in the lower Peninsula and twenty-five dollars in the upper Peninsula. Such one thousand mile tickets may be made non-transferable, but whenever required by the purchaser they shall be issued in the names of the purchaser, his wife and children, designating the name of each on such ticket, and in case such ticket is presented by any other than the person or persons named thereon, the conductor may take it up and collect fare, and thereupon such one thousand mile ticket shall be forfeited to the railroad company. Each one thousand mile ticket shall be valid for two years only after date of purchase, and in case it is not wholly used within the time, the company issuing the same shall redeem the unused portion thereof, if presented by the purchaser for redemption within thirty days after the expiration of such time, and shall on such redemption be entitled to charge three cents per mile for the portion thereof used." It was held that the act was void as taking property without due process of law. Lake Shore, etc., R. Co. *v.* Smith, 173 U. S. 684, 43 L. Ed. 858, 19 S. Ct. 565.

The act was held not to be legislation for the convenience of the public, so as to be validated on that ground. Judgment, Smith *v.* Lake Shore, etc., R. Co., 114 Mich. 460, 72 N. W. 328, reversed. Lake Shore, etc., R. Co. *v.* Smith, 173 U. S. 684, 43 L. Ed. 858, 19 S. Ct. 565.

In New York it has been held that a statute, Laws 1895, p. 961, c. 1027, as amended by Laws 1896, p. 758, c. 835, Laws 1897, p. 622, c. 484, and Laws 1898, p. 1326, c. 577, providing that any corporation operating a railroad in the state, the lines of which exceed 100 miles in length, shall issue mileage tickets for either 1,000 or 500 miles, which shall entitle the holder thereof, or any member of his family, to travel thereon, was unconstitutional and inoperative as to corporations formed prior to the enactment, but constitutional as to corporations organized subsequent thereto. Judgment, 113 App. Div. 894, 98 N. Y. S. 1109, reversed. Parish *v.* Ulster, etc., R. Co., 192 N. Y. 353, 85 N. E. 153.

tickets, good for a year from the time of their sale, does not of itself authorize the legislature to require the road so to do, nor furnish a standard by which to measure the reasonableness of a statute requiring the company to sell one thousand mile tickets at rates less than the regular rates, and to be valid for two years.[82]

§ 69. Equal Protection of Laws.—Corporations are persons within the meaning of the fourteenth amendment of the constitution of the United States providing that no State shall deny to any person within its jurisdiction the equal protection of the laws,[83] and a regulation of rates which in effect denies a railroad company the equal protection of the laws is invalid.[84] A state enactment, or regulations made under the authority of a state enactment, establishing rates for the transportation of persons or property by railroad that will not admit of the carrier earning such compensation as under all the circumstances is just to it and to the public, would deny to it the equal protection of the laws, and would therefore be repugnant to the fourteenth amendment of the constitution.[85] But general statutes regulating the use of railroads in a state or fixing the maximum rates of charges for transportation, when not forbidden by charter contracts, do not necessarily take away from the corporation the equal protection of the laws.[86]

Requiring Sale of Thousand Mile Tickets.—An act requiring carriers to keep at their principal ticket offices thousand mile tickets, and fixing a sum to be charged therefor, and providing that such tickets shall be good for a certain time after issuance, is invalid as depriving the carrier of the equal protection of the law.[87]

82. Judgment, Smith *v.* Lake Shore, etc., R. Co., 114 Mich. 460, 72 N. W. 328, reversed. Lake Shore, etc., R. Co. *v.* Smith, 173 U. S. 684, 43 L. Ed. 858, 19 S. Ct. 565.

83. Corporations persons within fourteenth amendment of federal constitution.—Smyth *v.* Ames, 169 U. S. 466, 522, 42 L. Ed. 819, 18 S. Ct. 418; Santa Clara *v.* Southern Pac. R. Co., 118 U. S. 394, 30 L. Ed. 118, 6 S. Ct. 1132; Charlotte, etc., R. Co. *v.* Gibbes, 142 U. S. 386, 35 L. Ed. 1051, 12 S. Ct. 255; Gulf, etc., R. Co. *v.* Ellis, 165 U. S. 150, 41 L. Ed. 666, 17 S. Ct. 255; Covington, etc., Turnpike Road Co. *v.* Sandford, 164 U. S. 578, 592, 41 L. Ed. 560, 17 S. Ct. 198; Pembina, etc., Milling Co. *v.* Pennsylvania, 125 U. S. 181, 31 L. Ed. 650, 8 S. Ct. 737; Minneapolis, etc., R. Co. *v.* Beckwith, 129 U. S. 26, 29, 32 L. Ed. 285, 9 S. Ct. 207.

84. Regulation of rates denying equal protection of laws is invalid.—Reagan *v.* Farmers' Loan, etc., Co., 154 U. S. 362, 38 L. Ed. 1014, 14 S. Ct. 1047; Smyth *v.* Ames, 169 U. S. 466, 42 L. Ed. 819, 18 S. Ct. 418; St. Louis, etc., R. Co. *v.* Gill, 156 U. S. 649, 39 L. Ed. 567, 15 S. Ct. 484; Stone *v.* Farmers' Loan, etc., Co., 116 U. S. 307, 29 L. Ed. 636, 6 S. Ct. 334; Dow *v.* Beidelman, 125 U. S. 680, 681, 31 L. Ed. 841, 8 S. Ct. 1028; Chicago, etc., R. Co. *v.* Minnesota, 134 U. S. 418, 33 L. Ed. 970, 10 S. Ct. 462, 702; Chicago, etc., R. Co. *v.* Wellman, 143 U. S. 339, 36 L. Ed. 176, 12 S. Ct. 400; Metropolitan Trust Co. *v.* Houston, etc., R. Co., 90 Fed. 683.

85. Smyth *v.* Ames, 169 U. S. 466, 42 L. Ed. 819, 18 S. Ct. 418.

In so far as a carrier is thus deprived of its property without judicial investigation by denial of the right to charge reasonable rates, while other persons are permitted to receive reasonable profits upon their invested capital, the company is deprived of the equal protection of the laws. Chicago, etc., R. Co. *v.* Minnesota, 134 U. S. 418, 33 L. Ed. 970, 10 S. Ct. 462, 702.

86. General statutes fixing maximum rates not necessarily unconstitutional.—Stone *v.* Farmers' Loan, etc., Co., 116 U. S. 307, 29 L. Ed. 636, 6 S. Ct. 334; Munn *v.* Illinois, 94 U. S. 113, 24 L. Ed. 77; Railroad Co. *v.* Richmond, 96 U. S. 521, 24 L. Ed. 734; Spring Valley Water Works *v.* Schottler, 110 U. S. 347, 28 L. Ed. 173, 4 S. Ct. 48.

Iowa statute held constitutional.—The act of the general assembly of the state of Iowa, entitled "An act to establish reasonable maximum rates of charges for the transportation of freight and passengers on the different roads of this state," approved March 23, 1874, is not in conflict with § 4, art. 1, of the constitution of Iowa, which provides that "all laws of a general nature shall have a uniform operation," and that "the general assemblly shall not grant to any citizen, or class of citizens, privileges or immunities which, upon the same terms, shall not equally belong to all citizens." Chicago, etc., R. Co. *v.* Iowa, 94 U. S. 155, 24 L. Ed. 94.

87. Requiring sale of thousand mile tickets.—Lake Shore, etc., R. Co. *v.* Smith, 173 U. S. 684, 43 L. Ed. 858, 19 S. Ct. 565.

While the state may make reasona-

§ 70. Taking Private Property without Just Compensation.—A regulation of charges which amounts to taking of private property without just compensation is invalid.[88]

Necessity for Adequate Security Where Passengers Are Required to Be Carried before Fares Have Been Paid in Money.—If it be assumed that, under the power to regulate the fares of common carriers of passengers, the Legislature can require the passengers to be carried before the fares have been paid in money, the security for the ultimate payment of the fares in money ought to be as certain as that required when private property is taken for public uses, and a statute which does not provide adequate security is unconstitutional.[89]

§ 71. Discrimination against Carrier in Favor of Certain Individuals.—In fixing rates, the legislature may not discriminate against a railroad company and in favor of certain individuals, without any reasonable basis therefor.[90]

ble regulations for the government of public service corporations, and to that end may fix a reasonable maximum rate for the transportation of passengers, it can not arbitrarily fix a maximum passenger rate of two cents a mile on mileage books of five hundred miles or over and require the carrier always to keep the same on sale to all who apply therefor, and to redeem them at a later period than they have heretofore redeemed mileage books. Such legislation is class legislation, and it is not for the protection of all the people, but of the favored few. It discriminates in favor of the wholesale buyer, and also invades the right of the carrier to conduct and manage his own affairs. It denies to the carrier the equal protection of the laws, and so is unconstitutional. Attorney General *v.* Atlantic, etc., R. Co., 106 Va. 61, 55 S. E. 572.

88. **Taking property without just compensation.**—Reagan *v.* Farmers' Loan, etc., Co., 154 U. S. 362, 38 L. Ed. 1014, 14 S. Ct. 1047; Smyth *v.* Ames, 169 U. S. 466, 42 L. Ed. 819, 18 S. Ct. 418; Chicago, etc., R. Co. *v.* Minnesota, 134 U. S. 418, 455, 33 L. Ed. 970, 10 S. Ct. 462, 702; Stone *v.* Farmers' Loan, etc., Co., 116 U. S. 307, 29 L. Ed. 636, 6 S. Ct. 334; Dow *v.* Beidelman, 125 U. S. 680, 31 L. Ed. 841, 8 S. Ct. 1028; Georgia R., etc., Co. *v.* Smith, 128 U. S. 174, 32 L. Ed. 377, 9 S. Ct. 47; Missouri Pac. R. Co. *v.* Nebraska, 164 U. S. 403, 41 L. Ed. 489, 17 S. Ct. 130.

Under pretense of regulating fares and freights, the state can not require a railroad corporation to carry persons or property without reward; neither can it do that which in law amounts to a taking of private property for public use without just compensation. Stone *v.* Farmers' Loan, etc., Co., 116 U. S. 307, 29 L. Ed. 636, 6 S. Ct. 334; Dow *v.* Beidelman, 125 U. S. 680, 31 L. Ed. 841, 8 S. Ct. 1028; Reagan *v.* Farmers' Loan, etc., Co., 154 U. S. 362, 38 L. Ed. 1014, 14 S. Ct. 1047; Smyth *v.* Ames, 169 U. S. 466, 42 L. Ed. 819, 18 S. Ct. 418; Georgia R., etc., Co. *v.* Smith, 128 U. S. 174, 32 L. Ed. 377, 9 S. Ct. 47; Chicago, etc., R. Co. *v.* Minnesota, 134 U. S. 418, 455, 33 L. Ed. 970, 10 S. Ct. 462, 702.

Under Act June 7, 1887 (Railroad Commission Act), authorizing the railroad commissioners to prescribe reasonable and just rates of freight and passenger transportation, the enforcement of a tariff of rates which will not pay the expenses of operating the railroad is an abuse of the discretion given to the commissioners, and amounts to taking the company's property without just compensation. Pensacola, etc., R. Co. *v.* State, 25 Fla. 310, 5 So. 833, 3 L. R. A. 661.

The act of Nebraska of 1893, entitled "An act to regulate railroads, to classify freights, to fix reasonable maximum rates to be charged for the transportation of freights upon each of the railroads in the state of Nebraska, and to provide penalties for the violation of this act," is void as taking private property without due compensation, and its enforcement may be enjoined. Smyth *v.* Ames, 169 U. S. 466, 42 L. Ed. 819, 18 S. Ct. 418.

89. **Necessity for adequate security where passengers are required to be carried before fares have been paid in money.**—Attorney General *v.* Old Colony R. Co., 160 Mass. 62, 35 N. E. 252, 22 L. R. A. 112.

90. **Discrimination against carrier in favor of certain individuals.**—Lake Shore, etc., R. Co. *v.* Smith, 173 U. S. 684, 43 L. Ed. 858, 19 S. Ct. 565.

The power of the legislature to enact general laws regarding a company and its affairs does not include the power to compel it to make an exception in favor of some particular class in the community and to carry the members of that class at a less sum than it has the right to charge for those who are not fortunate enough to be members thereof. This is not a reasonable regulation. Lake Shore, etc., R. Co. *v.* Smith, 173 U. S. 684, 43 L. Ed. 858, 19 S. Ct. 565.

§ 72. Limitations upon Power of a Municipality to Reduce Street Railroad Fares.—The power of a municipality to reduce street railroad fares is subject to the limitations (1) that there is reasonable need on the part of the public, considering the nature and extent of the service, of lower rates and better terms than those existing; (2) that the rates and terms fixed by the ordinance are not clearly unreasonable, in view of all the conditions.[91]

§§ 73-78. Exemption from Regulation by Charter or Statute—§ 73. —In General.—The power of a state to regulate the rates of charges of railroad companies for the transportation of persons and freight within its jurisdiction, may, as to a particular railroad company be surrendered or in some manner qualified, by stipulations in the charter of the company, or other legislation amounting to a contract.[92] The charter of a municipality, authorizing it to prescribe rates for transportation of passengers or property within its limits, and a statute providing that the act regulating carriers shall not apply to the transportation of passengers carried solely within the limits of cities by street and other railroads, do not prohibit the state railroad commission from regulating rates on traffic originating or extending beyond the boundaries of the municipality.[93]

§§ 74-75. Necessity for Positive and Clear Words of Exemption —§ 74. Doctrine Stated.—The right of a state reasonably to limit the amount of charges by a railroad company for the transportation of persons and property within its jurisdiction, can not be granted away by its legislature unless by words of positive grant or words equivalent in law.[94] It is a salutary rule of interpre-

91. **Limitations upon power of a municipality to reduce street railroad fares.**—Milwaukee Elect. R., etc., Co. *v.* Milwaukee, 87 Fed. 577.

92. **Power to regulate charges may be surrendered by charter or other legislation.**—Georgia R., etc., Co. *v.* Smith, 128 U. S. 174, 32 L. Ed. 377, 9 S. Ct. 47; Chicago, etc., R. Co. *v.* Minnesota, 134 U. S. 418, 455, 33 L. Ed. 970, 10 S. Ct. 462, 702; Georgia R. Co. *v.* Smith, 70 Ga. 694; Norfolk, etc., R. Co. *v.* Pendleton, 86 Va. 1004, 11 S. E. 1062, affirmed in 156 U. S. 667, 39 L. Ed. 574, 15 S. Ct. 413.

A railroad company may charge rates within the limits set by its charter, though they exceed those fixed by the railroad commission; but the commission may see that it keeps within the charter rates, and for this purpose is entitled to reports from it. Mississippi R. Comm. *v.* Gulf, etc., R. Co., 78 Miss. 750, 29 So. 789.

Under the constitution, of Pennsylvania, prohibiting the legislature from altering or revoking corporate charters in such a manner as to work injustice to the incorporators, an act prescribing maximum passenger rates for railroads lower than the rates the corporation was authorized to charge by its charter may be unconstitutional, though the rates prescribed are not so low as to be confiscatory. Pennsylvania R. Co. *v.* Philadelphia County, 220 Pa. 100, 68 Atl. 676.

But in West Virginia it has been held that a legislature can not, by a charter granted to a railroad company, make stipulations as to charges which will be binding on future legislatures. Laurel, etc., R. Co. *v.* West Virginia Transp. Co., 25 W. Va. 324; West Virginia Transp. Co. *v.* Sweetzer, 25 W. Va. 434.

Accordingly it has been held that the legislature has a right to establish by general act a maximum schedule of charges for the transportation of passengers and freight, and to make it applicable to railroad companies operating under previously granted charters, though such charters empower the railroads to contract "in reference to its business the same as private individuals," or "to demand and receive such sums for transportation as it deems reasonable," or to "carry freight and passengers, charging reasonable terms," or though it is authorized to charge a fixed rate declared by its charter to be exempt from legislative control, and though no right to repeal or alter the charter is reserved to the legislature. Laurel, etc., R. Co. *v.* West Virginia Transp. Co., 25 W. Va. 324; West Virginia Transp. Co. *v.* Sweetzer, 25 W. Va. 434.

93. **Municipal charter and statute construed.**—Portland R., etc., Co. *v.* Railroad Comm., 56 Ore. 468, 109 Pac. 273, denying rehearing 105 Pac. 709, construing Portland City Charter (Laws 1903, § 73) and Laws 1907, p. 70, § 11.

94. **Necessity for positive and clear words of exemption.**—Stone *v.* Farmers' Loan, etc., Co., 116 U. S. 307, 29 L. Ed. 636, 6 S. Ct. 49, 88, 91, 334, 348, 1191; Chicago, etc., R. Co. *v.* Minnesota, 134 U.

tation, founded upon an obvious public policy, that such exemptions are in derogation of the sovereign authority and of common right, and therefore are not to be extended beyond the exact and express requirements of the grant construed strictissimi juris.[95] If there is reasonable doubt, it must be resolved in favor of the existence of the power.[96]

§ 75. Doctrine Illustrated.—A statute which gives a railroad company the right to fix such rates as it may deem reasonable or proper,[97] or which gives the company the right to regulate rates by its by-laws, provided such by-laws are not contrary to the laws of the state,[98] or which gives it the right "from time to time

S. 418, 455, 33 L. Ed. 970, 10 S. Ct. 462, 702; Minneapolis, etc., R. Co. *v.* Minnesota, 134 U. S. 467, 33 L. Ed. 985, 10 S. Ct. 473; Georgia R., etc., Co. *v.* Smith, 128 U. S. 174, 32 L. Ed. 377, 9 S. Ct. 47; Ruggles *v.* Illinois, 108 U. S. 526, 27 L. Ed. 812, 2 S. Ct. 832; Illinois Cent. R. Co. *v.* Illinois, 108 U. S. 541, 27 L. Ed. 818, 2 S. Ct. 839; Winona, etc., R. Co. *v.* Blake, 94 U. S. 180, 24 L. Ed. 99; Louisville, etc., R. Co. *v.* Kentucky, 183 U. S. 503, 46 L. Ed. 298, 22 S. Ct. 95.

The state has the power to regulate its freight and passenger fare upon railroads, unless that right has been clearly parted with in granting charters to the roads, and where this right is parted with, the words of the charter must amount to a positive contract. Georgia R. Co. *v.* Smith, 70 Ga. 694.

95. Grant of exemption construed strictly against company.—Norfolk, etc., R. Co. *v.* Pendleton, 156 U. S. 667, 673, 39 L. Ed. 574, 15 S. Ct. 413; Morgan *v.* Louisiana, 93 U. S. 217, 23 L. Ed. 860; Wilson *v.* Gaines, 103 U. S. 417, 26 L. Ed. 401; Chesapeake, etc., R. Co. *v.* Miller, 114 U. S. 176, 29 L. Ed. 121, 5 S. Ct. 815.

The exemption must appear by such clear and unmistakable language that it can not be reasonably construed consistently with the reservation of the power by the state. Georgia R., etc., Co. *v.* Smith, 128 U. S. 174, 32 L. Ed. 377, 9 S. Ct. 47; Detroit *v.* Detroit Citizens' St. R. Co., 184 U. S. 368, 46 L. Ed. 592, 22 S. Ct. 410.

96. Doubt resolved in favor of existence of power to regulate.—Stone *v.* Farmers' Loan, etc., Co., 116 U. S. 307, 29 L. Ed. 636, 6 S. Ct. 334.

97. Statute giving company right to fix reasonable rates.—Peik *v.* Chicago, etc., R. Co., 94 U. S. 164, 24 L. Ed. 97; Stone *v.* Illinois Cent. R. Co., 116 U. S. 347, 29 L. Ed. 650, 6 S. Ct. 348.

Where the charter of a railroad company authorizes the president and the directors to adopt and establish such a tariff of charges for the transportation of persons and property as they might think proper, and to alter and change the same at pleasure, the state is not deprived of its power to regulate the rates and charges. Stone *v.* Illinois Cent. R. Co., 116 U. S. 347, 29 L. Ed. 650, 6 S. Ct. 348.

Where a charter of a railroad company provided that the company might receive for transportation such tolls and charges as should from time to time be established, fixed and regulated by its directors, and that the act should be liberally and favorably construed so as to favor all the purposes and objects of the same, provided that nothing contained therein should be so construed as to prevent the state regulation of rates for transportation within the state, and provided further that there should be no discrimination in favor of any road, it was held that the state was not deprived of the power to regulate the rates for transportation within the state. Stone *v.* New Orleans, etc., R. Co., 116 U. S. 352, 29 L. Ed. 651, 6 S. Ct. 349, 391.

The Chicago and Northwestern R. Co. was, by its charter, and the charters of other companies consolidated with it, authorized "to demand and receive such sum or sums of money for the transportation of persons and property, and for storage of property, as it shall deem reasonable." The constitution of Wisconsin, in force when the charters were granted, provides that all acts for the creation of corporations within the state "may be altered or repealed by the legislature at any time after their passage." Held, that the legislature had power to prescribe a maximum of charges to be made by said company for transporting persons or property within the state, or taken up outside the state and brought within it, or taken up inside and carried without. Peik *v.* Chicago, etc., R. Co., 94 U. S. 164, 24 L. Ed. 97.

98. Act giving company power to fix rates by valid by-laws.—Ruggles *v.* Illinois, 108 U. S. 526, 27 L. Ed. 812, 2 S. Ct. 832; Illinois Cent. R. Co. *v.* Illinois, 108 U. S. 541, 27 L. Ed. 818, 2 S. Ct. 839.

The amended charter of a railroad company provided that the board of directors should have power to fix rates by by-laws and to levy and collect the same, while other parts of the charter provided that the by-laws should not be repugnant to the constitution and laws of the United States or of the state. It was held that the state might regulate the rates for the charge of carriage over the roads notwithstanding the first provision of the amended charter. Ruggles *v.* Illinois, 108 U. S. 526, 27 L. Ed. 812, 2 S. Ct. 832; Illinois Cent. R. Co. *v.* Illinois, 108 U. S. 541, 27 L. Ed. 818, 2 S. Ct. 839.

to fix, regulate and receive the tolls and charges by them to be received for transportation."[99] does not deprive the state of its power, within the limits of its general authority, as controlled by the constitution of the United States, to act upon the reasonableness of the tolls and charges so fixed and regulated. On the other hand, if the charter provides that the charges, which the company may make for its services in the transportation of persons and property, shall be subject only to its own control up to the limit designated, exemption from legislative interference within that limit will be maintained.[1]

§§ 76-78. Succession to Rights of Company Entitled to Exemption —§ 76. Purchase.—A special statutory exemption or privilege, such as a right to fix and determine rates of fare, does not accompany the property in its transfer to a purchaser, in the absence of express direction to that effect in the statute.[2]

§ 77 Lease.—Where a railroad corporation which has the same power as private individuals to make contracts, including the power to make by-laws and make all rules and regulations deemed expedient for the management of its affairs, is leased to another corporation, perpetually, the latter is not exempt from reasonable regulations of rates by the state.[3]

99. Statute giving company power to fix, regulate and receive rates.—Stone *v.* Farmers' Loan, etc., Co., 116 U. S. 307, 29 L. Ed. 636, 6 S. Ct. 334; Chicago, etc., R. Co. *v.* Minnesota, 134 U. S. 418, 455, 33 L. Ed. 970, 10 S. Ct. 462, 702.

A mere grant of power in the charter, to the directors of the company, to make needful rules and regulations touching the rates of toll and the manner or collecting the same, cannot properly be interpreted as depriving the state of its general authority to regulate, at any time in the future when it might see fit to do so, the rates of toll to be collected by the company. Chicago, etc., R. Co. *v.* Minnesota, 134 U. S. 418, 455, 33 L. Ed. 970, 10 S. Ct. 462, 702; Minneapolis, etc., R. Co. *v.* Minnesota, 134 U. S. 467, 33 L. Ed. 985, 10 S. Ct. 473.

1. Charter fixing limit beyond which state cannot regulate.—Georgia R., etc., Co. *v.* Smith, 128 U. S. 174, 32 L. Ed. 377, 9 S. Ct. 47. See, also, Detroit *v.* Detroit Citizens' St. R. Co., 184 U. S. 368, 46 L. Ed. 592, 22 S. Ct. 410.

Although the general purpose of a proviso in a statute is to qualify the operation of the statute, or of some part of it, it is often used in other senses, and is so used in the act of the legislature of Georgia of December 21, 1833, incorporating the Georgia Railroad Company; and that act does not exempt the corporation created by it, or its successors, from the duty of submitting to reasonable requirements concerning transportation rates made by a railroad commission created by the state. Georgia R., etc., Co. *v.* Smith, 128 U. S. 174, 32 L. Ed. 377, 9 S. Ct. 47.

2. Right of purchaser of exempt company to exemption.—St. Louis, etc., R. Co. *v.* Gill, 156 U. S. 649, 39 L. Ed. 567, 15 S. Ct. 484; Morgan *v.* Louisiana, 93 U. S. 217, 23 L. Ed. 860; Wilson *v.* Gaines, 103 U. S. 417, 26 L. Ed. 401; Chesapeake, etc., R. Co. *v.* Miller, 114 U. S. 176, 29 L. Ed. 121, 5 S. Ct. 813; Norfolk, etc., R. Co. *v.* Pendleton, 156 U. S. 667, 673, 39 L. Ed. 574, 15 S. Ct. 413.

Sale under foreclosure.—Where one company purchases the property and ordinary franchises of another at a sale under foreclosure, it does not succeed to the rights of the latter as to exemption from rate regulation. Norfolk, etc., R. Co. *v.* Pendleton, 156 U. S. 667, 673, 39 L. Ed. 574, 15 S. Ct. 413.

3. Lease.—Chicago, etc., R. Co. *v.* Iowa, 94 U. S. 155, 24 L. Ed. 94; Dow *v.* Beidelman, 125 U. S. 680, 31 L. Ed. 841, 8 S. Ct. 1028.

A corporation having a perpetual lease of the railroad of another organized under the general corporation law of Iowa of 1851, ch. 43, with the same powers as private individuals to make contracts, as well as the power to establish by-laws and make all rules and regulations deemed expedient for the management of its affairs, in accordance with law, was held to be bound by the subsequent statute of Iowa of 1874, ch. 68, entitled "An act to establish reasonable maximum rates of charges for transportation of freight and passengers on the different railroads of this state," by which those railroads were classified according to the gross amount of their earnings per mile for the preceding year; and the compensation per mile, which those of each class might receive tor the transportation of a passenger with ordinary baggage, was limited to three cents, three cents and a half, and four cents, respectively. Chicago, etc., R Co. *v.* Iowa, 94 U. S. 155, 24 L. Ed. 94; Dow *v.* Beidelman, 125 U. S. 680, 31 L. Ed. 841, 8 S. Ct. 1028.

A foreign corporation leasing a railroad is subject to the same regulations that the lessor would have been subject

§ 78. Consolidation.—Where the charter of several railroad corporations provide for exemption from rate regulation, and these roads are subsequently acquired by a corporation formed for that purpose and which succeeds to their rights "subject to all laws of the commonwealth which apply to railroad corporations generally," the state may regulate the rates of the consolidated company.[4]

§ 79. Loss of Power by Abandonment or Nonuser.—A power of government which actually exists is not lost by nonuser. The fact, therefore, that the power of regulating the maximum rates of fare and freight was not exercised for more than twenty years after the incorporation of a railroad company is unimportant.[5]

§§ 80-84. Scope and Effect of Regulations—§ 80. To Whom or to What Business or Route Regulations Are Applicable.—Applicable Only to Intrastate Commerce.—An order of a state railroad commission regulating freight rates should be interpreted to apply only to intrastate commerce, under the rule that a statute should be so construed if possible, as to render it not subject to an objection that would be fatal to its validity.[6]

Statutes Regulating Rates of Railroad Companies Not Applicable to Street Railways or Express Companies.—A statute declaring that railroad companies shall not charge more than three cents a mile for the transportation of a passenger and his ordinary baggage, under a penalty, does not apply to street railroads.[7] Nor does a statute regulating the rates to be charged by railroad companies apply to an express company.[8]

Passenger Rate Regulations Not Applicable to Carriage on Freight Trains.—Regulations as to rates of fare for passengers do not apply to passen-

to had the lease not been made. Stone *v.* Illinois Cent. R. Co., 116 U. S. 347, 29 L. Ed. 650, 6 S. Ct. 348.

4. Consolidation.—Norfolk, etc., R. Co. *v.* Pendleton, 156 U. S. 667, 39 L. Ed. 574, 15 S. Ct. 413.

The consolidation, pursuant to the statute of Ohio of April 10, 1856 (4 Curwen 2791), of two or more railway companies works their dissolution. All the powers and franchises of the new company which is thereby formed are derived from that statute, and are subject to "be altered, revoked, or repealed by the general assembly," under § 2, art. 1, of the constitution of that state, which took effect September 1, 1851. The general assembly does not, therefore, impair the obligation of a contract by prescribing the rates for the transportation of passengers by the new company, although one of the original companies was, prior to the adoption of that constitution, organized under a charter which imposed no limitation as to such rates. Shields *v.* Ohio, 95 U. S. 319, 24 L. Ed. 357.

5. No loss of power by abandonment or nonuser.—Chicago, etc., R. Co. *v.* Iowa, 94 U. S. 155, 24 L. Ed. 94.

6. Regulations applicable only to intrastate commerce.—Oregon R., etc., Co. *v.* Campbell, 177 Fed. 318.

Where the petition of shippers filed with a state railroad commission prayed for an order requiring railroads maintaining a physical connection in a city to file reasonable rates for the switching of car load traffic between their lines, an order of the commission fixing a tariff per car load for the movement of all commodities in car loads in the switching service, must be construed as applicable only to intrastate commerce. Chicago, etc., R. Co. *v.* Railroad Comm., 175 Ind. 630, 95 N. E. 364.

7. Regulation not applicable to street railroads.—Hoyt *v.* Sixth Ave. R. Co. (N. Y.), 1 Daly 528.

8. Regulations not applicable to express companies.—The Texas statute, Rev. St., arts. 4256, 4257, provide that no railroad company shall demand or receive for transporting a passenger exceeding five cents per mile or a fraction thereof; that railroads companies may charge and receive not exceeding fifty cents per one hundred pounds per one hundred miles for transporting freight, but the charges on each class or kind shall be uniform, and no unjust discriminations in the rates or charges shall be made against any person or place; provided that, when the distance from the place of shipment to the point of destination is fifty miles or less, a charge not exceeding thirty cents per one hundred pounds may be made. Held not intended to apply to express companies. Texas Exp. Co. *v.* Texas, etc., R. Co., 4 Woods 370, 6 Fed. 426.

ger carriage on freight trains.[9]

Phrase "Continuous Ride in the Same General Direction," Construed.—The phrase, "continuous ride in the same general direction," in an ordinance relating to rates of fare to be charged by a traction company, means a journey over the company's own tracks.[10]

Two Railroads Operating in Connection with One Another Constitute a Single Road.—For the purpose of the West Virginia statutes regulating railroad rates, two railroads operating in connection with one another under a lease or otherwise constitute a single road.[11]

Other Peculiar Provisions of Rate Regulating Statutes.—The interpretation of other peculiar provisions of rate regulating statutes to determine to what railroads or routes they are applicable will be found in the appended note.[12]

§ 81. Obligations Imposed on Carriers.—The franchise of a railroad company granting a portion of the sovereign power of the state, in consideration of the construction of the road and the performance of the duty of common carrier, imposes upon the company the obligation to transport merchandise and passengers on the terms fixed in the grant.[13] Under a statute prohibiting carriers from charging shippers more than the public tariff rates, such rates are compensation for the performance of all the carrier's common-law or statutory duties.[14] Some of the peculiar provisions of commission rules or orders regulating charges by railroad companies have been interpreted by the courts to determine what service, if any, is thereby imposed on such companies.[15]

9. **Passenger rate regulations not applicable to carriage on freight trains.**—Partee *v.* Georgia Railroad, 72 Ga. 347.

10. **Phrase "continuous ride in the same general direction," construed.**—Reed *v.* Trenton, 80 N. J. Eq. 503, 85 Atl. 270.

11. **Two railroads operating in connection with one another constitute a single road.**—Coal, etc., R. Co. *v.* Conley, 67 W. Va. 129, 67 S. E. 613, construing Acts 1872-73, ch. 227, and Acts 1907, ch. 41 (Code Supp. 1909, §§ 2496a1, 2496a3).

12. **Regulation applicable to whole route.**—The sixteenth section of the charter of the Camden & Amboy Railroad Company, which restricts the rates of tolls and fares, applies to the whole route between the cities of New York and Philadelphia and every mile of it. Camden, etc., Transp. Co. *v.* Briggs, 22 N. J. L. 623. See, also, Camden, etc., R. Co. *v.* Briggs, 21 N. J. 406.

Act not applicable to any railroad under fifty miles in length.—The proviso in the West Virginia statute, Acts 1907, c. 41 (Code Supp. 1909, §§ 2496a1-2496a3), that nothing in the act shall apply to any railroad under fifty miles in length and not a part of any other railroad over fifty miles in length, means the same as if it had said nothing in this act shall apply to any railroad under fifty miles in length and not a part of or under the control of any other railroad whose entire length is over fifty miles. Coal, etc., R. Co. *v.* Conley, 67 W. Va. 129, 67 S. E. 613.

The words "under the control, management or operation," as used in the proviso of such statute, providing that the act shall not apply to any railroad under fifty miles in length under the control, management, or operation of any other road, mean the same as the words "a part of." Coal, etc., R. Co. *v.* Conley, 67 W. Va. 129, 67 S. E. 613.

Regulation applicable to railroad company notwithstanding it had changed its name.—The Wisconsin statute, Laws 1874, c. 273, providing the maximum rates to be charged by railroads within Wisconsin included the "Milwaukee & St. Paul Railway Company." Just prior to the passing of the act such company changed its name to the "Chicago, Milwaukee & St. Paul Railway Company," by which name it was sued for a violation of the act. No other company was ever known by the first name. Held, that the provisions of the act applied to the defendant. Attorney General *v.* Chicago, etc., R. Co., 35 Wis. 425.

The rate for freight to which the Southern Pacific Railroad Company is limited by its charter has no reference to any road except that which the company is authorized to build and operate in Texas. Knight & Co. *v.* Southern Pac. R. Co., 41 Tex. 406.

13. **Obligation imposed by franchise.**—Rogers, etc., Mach. Works *v.* Erie R. Co., 20 N. J. Eq. 379.

14. **Public tariff rates compensation for all carrier's duties.**—George *v.* Chicago, etc., R. Co., 214 Mo. 551, 113 S. W. 1099, construing Rev. St. 1899, § 1136 (Ann. St. 1906, p. 975).

15. **Commissioner's rule fixing charge for switching held not to compel a service.**—Rule 15A of the railroad commissioners of Florida, fixing the charge for switching cars of rough lumber consigned

§ 82. Measure of Compensation Allowed.—Where the measure of compensation of a carrier is fixed by statute, no greater sum can be lawfully demanded or received, and all evidence that charges higher than those so fixed are reasonable is immaterial and inadmissible.[16] The provisions of rate regulating statutes have been interpreted by the courts to determine the basis rate for local freight,[17] the distinction between "single-line rates" and "double-line rates,"[18] the rate chargeable for heavy articles,[19] the charge allowable for transportation in addition to toll,[20] the right of shippers to demand commutation on freight,[21]

to and arriving at the city of Jacksonville from points in the state to any planing mill in the Jacksonville yards and thence after lumber is dressed to any point in the same yard, merely fixes a rate for switching cars so consigned and arriving and does not seek to compel a service. Florida R. Comm'rs *v.* Atlantic, etc., R. Co., 60 Fla. 218, 53 So. 601. See, also, Railroad Comm'rs *v.* Atlantic, etc., R. Co., 59 Fla. 612, 52 So. 4.

The word "switching," as used in a rule of the railroad and warehouse commission of Illinois regulating charges, is synonymous with the word "transferring." The service contemplated by such rule is the movement of loaded cars to or from the junction of another railroad for distances less than three miles, as distinguished from the hauling or transporting of them from one station or place to another on the same road. Sparta Gas, etc., Co. *v.* Illinois So. R. Co., 155 Ill. App. 283, affirmed 93 N. E. 312.

Where in the service rendered all of the elements of a regular transportation were found, such as collection of the cars and placing them for loading, the haul after they were loaded, and the loss of use of cars at the end of the haul, the services rendered by the carrier were not a "switch movement" of cars as defined by the rules of the railroad and warehouse commission regulating switching charges. Sparta Gas, etc., Co. *v.* Illinois So. R. Co., 155 Ill. App. 283, affirmed in 93 N. E. 312.

16. Carrier limited to measure of compensation fixed by statute.—Heiserman *v.* Burlington, etc., R. Co., 63 Iowa 732, 18 N. W. 903.

17. Basis rate for local freight.—The rate on freight "carried over the whole line of its road," which furnishes the basis for the additional 50 per cent allowed by the Alabama statute, Acts 1873, p. 62, for the transportation of "local freight," is the rate charged on freight taken on at one terminus and discharged at the other, and not the rate for freight brought from or carried to a point beyond the termini of the road. The basis rate is the rate prevailing at the time of shipment. Mobile, etc., R. Co. *v.* Steiner, etc., Co., 61 Ala. 559.

18. Distinction between "single-line rates" and "double-line rates."—The distinction in the Kansas statute, Laws 1905, c. 353, establishing rates for transportation of oil, between "single-line rates" and "double-line rates" is between rates for shipment over a single line and for shipment over more than one line. Tucker *v.* Missouri Pac. R. Co., 82 Kan. 222, 108 Pac. 89.

19. Rate chargeable for heavy articles.—Where the charter of a railroad company authorized it "to charge for the transportation of passengers at a rate not exceeding seven and one half cents per mile, and for the transportation of goods by weight not exceeding fifty cents per one hundred pounds per one hundred miles," held, that for heavy articles the company could only charge, for the actual distance of transportation, the rate allowed by the charter. Knox *v.* South Carolina R. Co., 5 S. C. 22.

20. Charge allowable for transportation in addition to toll.—The charter of a railroad company provided "that the toll on any species of property shall not exceed an average of four cents per ton per mile, nor upon each passenger an average of two cents per mile." Held, that the company might charge for transportation in addition to the toll. Boyle *v.* Philadelphia, etc., R. Co., 54 Pa. 310.

Under the provision of the charter of a railroad company authorizing it to take toll for freight, etc., "not exceeding four cents per ton per mile for toll, and three cents per ton per mile for transportation," held, that the company had authority for demanding the aggregate of the sums, viz. seven cents per mile per ton, for private freight in their own cars on their road. Appeal of Cumberland Val. R. Co., 62 Pa. 218.

Amount permitted to be charged for toll and freight.—The thirteenth section of the Pennsylvania act of April 3, 1837, incorporating the Pittsburgh & Connellsville Railroad Company, authorized the company to charge a toll on traffic passing over its road, not exceeding five cents per ton per mile. The fourteenth section authorized the company to charge for freight and toll for goods conveyed

21. Under a Pennsylvania statute commuting "local freight," millers buying grain west of Pennsylvania, and shipping it to Pittsburg, and thence by railroad to Philadelphia, could not demand commutation on the freight for the latter transit. Rowland *v.* Pennsylvania R. Co., 52 Pa. 250.

the mode of ascertaining average charges,[22] and what constitutes the operation or control of one railroad by another.[23] Statutes and municipal ordinances requiring street railroad companies to issue tickets to school children at reduced rates have also received judicial interpretation.[24] Many other of the peculiar

in its own cars "not exceeding twice the rates granted in the preceding section for tolls alone." The ninth section of the act of April 10, 1846, repealed the thirteenth section, and provided that the rates of the tolls should not exceed four cents per mile per ton, and two cents per mile for each burden or freight car, every four wheels being computed as a car. Held, that the act of 1846 did not amend the act of 1837 so that the company could, under the fourteenth section of the former act, only charge double the rate authorized by the act of 1846, and that it was entitled to charge for toll and freight double the rate authorized by the thirteenth section of the act of 1837, viz, ten cents per ton per mile, notwithstanding the repeal thereof. National Tube Works Co. *v.* Baltimore, etc., R. Co. (Pa.), 8 Atl. 6.

22. **Mode of ascertaining average charges.**—Under the Pennsylvania statute, Act April 11, 1848, incorporating the D. & P. Ry. Co., as amended by Act April 2, 1850, § 2, providing that "average charges for toll and transportation shall not exceed four cents per ton per mile for freight," the "average charges" are to be ascertained by dividing the entire receipts by the whole quantity of tonage, reduced to a common standard of tons moved one mile. Hersh *v.* Northern Cent. R. Co., 74 Pa. 181.

23. **What constitutes the operation or control of one railroad by another.**—Under the New York Railroad Law (Laws 1890, p. 1113, c. 565, § 101) as amended by Laws 1897, p. 776, c. 688, relating to street surface railroads, and providing that no corporation constructing and operating a railroad under the provisions of this article, etc., shall charge any passenger more than five cents for one continuous ride from any point on its road, "or on any road, line or branch operated by it, or under its control," to any other point thereof, etc., and Railroad Law (Laws 1890, p. 1096, c. 565, § 39) imposing a penalty on any railroad corporation receiving more than the lawful rate of fare, etc., the operation or control of a road within the meaning of such sections means a control of the operation of the road, and not merely a control of the corporation or individuals operating it by reason of the ownership of a majority of the road's capital stock. Judgment, 111 App. Div. 39, 97 N. Y. S. 645, affirmed. Senior *v.* New York City R. Co., 187 N. Y. 559, 80 N. E. 1120.

24. **"Public schools" held to include parochial school maintained by private benevolence.**—Where a street railroad's franchise ordinance required the issuance of 20-ride tickets at the rate of two and a half cents each to children under fifteen actually attending the "public schools of the city," such quoted clause included a parochial school maintained by private benevolence. Oklahoma R. Co. *v.* St. Joseph's Parochial School, 33 Okl. 755, 127 Pac. 1087.

Under the Washington statute, Rem. & Bal. Code, §§ 4317, 4333, and 4366, the words "school children" in a franchise granting half fares to school children held to apply only to those attending the common schools. Seattle *v.* Seattle Elect. Co., 71 Wash. 213, 128 Pac. 220.

The word "pupils," as used in the Massachusetts statute Rev. Laws, c. 112, § 72, requiring street railroads to transport the pupils of public schools at half rates, means children and youths attending the public schools, and does not include students in colleges and professional schools, nor young men or boys attending nautical or industrial schools, nor adults attending evening schools or evening high schools, nor children attending vacation schools. Commonwealth *v.* Connecticut Valley St. R. Co., 196 Mass. 309, 82 N. E. 19.

What schools are "public schools" under Massachusetts statute.—The schools referred to in the Massachusetts statute, Rev. Laws, c., 42, §§ 1, 2, requiring cities and towns to maintain certain schools, are open under proper regulations to all children of the city or town, as provided by chapter 44, § 3; and all children between the ages of 7 and 14 are obliged to attend such schools, unless they receive equivalent instruction outside of them, as provided by chapter 44, §§ 1, 2. Held, that Rev. Laws, c. 112, § 72, providing that street railway companies shall transport pupils of the "public schools" at half fare, while traveling to and from the schoolhouses in which they attend school, referred to those schools mentioned in chapter 42, §§ 1, 2, which are a part of the system of compulsory education for children, and did not include other schools maintained at public expense, such as industrial schools, nautical schools, evening schools, etc., authorized by §§ 10, 11, 12, 15, 16. Commonwealth *v.* Connecticut Valley St. R. Co., 196 Mass. 309, 82 N. E. 19.

What schools are "private schools" under Massachusetts statute.—The Massachusetts statute, Rev. Laws, c. 112, § 72, requiring street railroads to transport "pupils of the public schools" at half rates, was amended by St. 1906, p. 653, c. 479, by the insertion of the words "or

provisions of rate regulating statutes or commission orders have been construed by the courts to determine the amount that may be charged by carriers for the carriage of passengers or freight.[25]

private" after the word "public." Held, that the word "private," as so used, included only such schools as were ejusdem generis with the public schools previously mentioned, namely, in which instruction was permitted to take the place of the compulsory instruction required in the public schools designated by Rev. Laws, c. 42, §§ 1, 2, and hence did not include education in a private business college. Commonwealth *v.* Connecticut Valley St. R. Co., 196 Mass. 309, 82 N. E. 19.

25. West Virginia passenger rate regulation construed.—The West Virginia statute, Acts 1907, c. 41 (Code Supp. 1909, §§ 2496a1-2496a3), divides steam railroads into classes for the purpose of passenger rate regulation, subjecting all railroads fifty miles long and over to two cents a mile in the case of adults, and leaving all others subject to the former legislation applicable to them at the date of the passage of the act. Coal, etc., R. Co. *v.* Conley, 67 W. Va. 129, 67 S. E. 613.

Minimum charge of ten cents for a passenger.—The South Carolina statute, Rev. St. 1893, § 1657, authorizes the railroad commissioners to establish reasonable rates for the transportation of passengers. A circular issued by such commissioners, dated April 2, 1896, authorized a charge of ten cents, when the regular fare would be less than that amount. Held, to authorize the charge of ten cents where the regular fare for the distance traveled would be only three cents. Kibler *v.* Southern Railway, 62 S. C. 252, 40 S. E. 556.

Carrier authorized to charge nearest multiple of five whether above or below actual fare.—Under the Ohio statute, Rev. St., 3374, which provides that railroads shall charge not more than three cents per mile for the transportation of passengers, but that the fare may be made that multiple of five nearest reached by multiplying the rate by the distance, the railroad shall charge the nearest mutiple of five, whether it is above or below the actual fare; and, in case the fare is equally distant from the multiple next below and the one next above, it may charge either. Cleveland, etc., R. Co. *v.* Wells, 61 O. St. 268, 55 N. E. 827.

Charge for fraction of a mile.—The Michigan statute, 3 How. Ann. St. § 3323, subd. 9, which authorizes railroad companies to regulate the time and manner in which passengers and property shall be transported, and the tolls and compensation to be paid therefor, but provides that such compensation for transporting any passenger and his or her ordinary baggage, not exceeding a given weight, shall not exceed two, two and one-half, or three cents per mile, according to the gross earnings per mile of each road, will not permit a charge for a fraction of a mile, unless it is so large a fraction as to make the charge of one cent or more not in excess of the rate per mile fixed by the statute. Zagelmeyer *v.* Cincinnati, etc., R. Co., 102 Mich. 214, 60 N. W. 436, 47 Am. St. Rep. 514.

Where the distance between two points was 6.48 miles a railroad had no authority to charge to exceed nineteen cents (the fraction over nineteen cents being less than one-half cent), under Laws 1899, Act No. 202, establishing a rate of fare 3 cents per mile. Chamberlain *v.* Lake Shore, etc., R. Co., 122 Mich. 477, 81 N. W. 339.

Charges for urban and suburban passenger traffic.—The Maryland statute, Act 1860, c. 259, authorized a company to lay down a railway for passenger cars between the city of Baltimore and Towsontown, and fixed the rate of fare between those points. Section 8 authorized the company to extend its railway into Baltimore, subject to such restrictions and conditions as the city might prescribe. By an ordinance of the city the rate of fare was fixed at five cents for each passenger for all distances within the city limits. Act 1865, c. 115, § 1, authorized the company to collect from each passenger over its road not more than thirty cents for the distance between the city limits and Towsontown, and not more than 6 cents for each mile or fraction thereof for way passengers an any portion of its railroad. Held, that the company had no right to claim from a passenger to the city of Baltimore, from a place on the road distant less than a mile from the city, more than eleven cents; that is, six cents for the fraction of a mile beyond the city limits, and five cents for the route over its road in the city. Baltimore, etc., Turnpike Road *v.* Boone, 45 Md. 344.

Street surface railroad leasing and operating connecting elevated and steam surface roads.—The New York statute, Laws 1890, p. 1113, c. 565, art. 4, entitled "Street Surface Railroads," § 101 provides that "no corporation constructing and operating a railroad under the provisions of this article or of chap. 252, p. 309, of the Laws of 1884" (relating to street surface roads) shall charge any passenger more than five cents for one continuous ride from any point on its road, or on any road, line, or branch operated by it, or under its control, to any other point thereof, or any connecting branch thereof within the limits of any incorporated city,

§ 83. Regulations Will Not Be Construed to Be Retroactive.—Statutes, which establish a railroad commission and provide for the regulation of freights and fares, will not be construed to have a retroactive effect, so as to affect pre-

or more than one fare within the limits of any such city for passage over its main line and any branch or extension thereof, if the right to construct such branch or extension was acquired under the provisions of such chapter or this article. Section 104 requires the issuance of transfers to any point on any railroad operated by it. Held, that a road incorporated as a street surface railroad which leases and operates connecting elevated and steam surface railroads does so under art. 3, § 78, which applies to all railroads, and it may charge more than one fare for a continuous passage over its road and the elevated and steam surface roads, as it operates such roads under their respective charters, and its right in this respect is not changed by changing its motive power from steam to electricity. People *v.* Brooklyn Heights R. Co., 187 N. Y. 48, 79 N. E. 838.

Power of company limited by its charter to increase passenger rate under general act.—The New York statute, General Railroad Act 1850, § 49, conferred all the powers and privileges in the act on corporations then existing, whether created by special charter or under the general act of 1848; but no liabilities were imposed on them, except such as were contained in certain sections, and which were not inconsistent with the provisions of their charters. Held that, where an existing corporation was limited by its charter to a rate of fare for passengers less than that prescribed by the act, it was authorized by such act to increase its rate to a sum not exceeding that thus prescribed. Johnson *v.* Hudson R. Co., 49 N. Y. 455, reversing 32 N. Y. Super. Ct. 298.

Bridge Toll.—By the act of congress authorizing the construction of a railway bridge across the Arkansas river at Ft. Smith, Ark., it is provided that no higher charge shall be made for the transporation of passengers over the bridge than is paid for similar transportation over the railroad leading to the bridge. Act Ark. Leg. April 4, 1887, provides that only three cents per mile shall be charged for carrying passengers. Held, that a charge of seventy cents for eleven miles of travel—thirty cents for transporation ten miles, and forty cents for bridge tool—constituted an overcharge within the meaning of the act. St. Louis, etc., R. Co. *v.* Stevenson, 54 Ark. 116, 15 S. W. 22.

A street railroad company holding a franchise subject to the railroad law, and succeeding another company having a similar franchise and a contract with a bridge company to use the bridge for its cars on the payment of one cent for each passenger carried, leased its franchise to a lessee, who operated lines over the bridge. The lease did not give any rights to cross the bridge, but a traffic agreement between the street railroad company and the lessee gave to the lessee the privileges the company had by virtue of the contract with the bridge company. Neither the street railroad company nor the bridge company conferred on the lessee the right to collect toll for persons carried across the bridge. Held, that Laws 1905, c. 358, providing for a fare not to exceed five cents, applied to the lessee, and prohibited it from charging six cents, though it paid one cent to the bridge company, since such payment was merely a part of the operating expenses, and the collection of the one cent could not be held to be collected as toll as the agent of the bridge company. Cohoes R. Co. *v.* Public Service Comm., 143 App. Div. 769, 128 N. Y. S. 384, order affirmed 95 N. E. 1137.

Switching Charges.—Under the Railroad Commission Act, defining the jurisdiction of the state board of railroad commissioners and the meaning of the term "transportation," held, that a carrier could not divide up its charge for switching cars so as to charge, in addition to the regular switching charge, a car rental on cars furnished by it for deliveries to industries on its own or other lines. East Side Packing Co. *v.* Vandalia R. Co., 258 Ill. 397, 101 N. E. 600.

Authorizing charge of fifty cents per hundredweight per hundred miles.—Under the Texas statute, Rev. St., art. 4257, authorizing railroads to charge fifty cents per hundredweight per hundred miles, a railroad can charge fifty cents for carrying less than a hundredweight that distance. Murray *v.* Gulf, etc., R. Co., 63 Tex. 407, 51 Am. Rep. 659.

Meaning of term car load.—Where the term "car load," as used in Rev. St. 1879, § 833, providing for the appointment of railroad commissioners, the division of freights into certain classes, and the fixing of maximum rates at so much per "car load" for each class, has been construed by the commissioners, whose duty it is to enforce the said statute, as meaning, in the light of existing usage, ten tons instead of all that a car can safely carry, this construction, being reasonable and just, will be upheld, especially where it has been acted upon long enough to have become a rule. Ross *v.* Kansas City St. R. Co., 111 Mo. 18, 19 S. W. 541.

What are "logs and box materials" under Alabama statute.—Blocks of wood from six to fifteen inches in diameter and

viously existing valid contracts, in the absence of some indication that such was the legislative intent.[26]

§ 84. When a Statute Will Be Construed as Impliedly Repealing a Prior Statute.—A statute regulating passenger or freight rates will not be construed as impliedly repealing a prior statute on the same subject, unless there is an unreconcilable repugnancy, or the new law is intended to supersede the prior one and comprise in itself a complete system of legislation.[27]

thirty-eight to forty-two inches long, sawed from round logs in their natural state, are not classified as "logs and box materials" by the Alabama statute, 110 commodities act (Laws 1907, p. 209); and a contract for their transportation, which describes them as cordwood, at the rate fixed for cordwood, is binding on the shipper and carrier; and the mere fact that the consignee or subsequent buyer may manufacture the blocks into barrel heads does not justify the carrier in reclassifying them as logs and box material, and demanding a higher rate as a condition precedent to a delivery. Southern R. Co. *v.* Lowe, 170 Ala. 598, 54 So. 51.

26. Regulations will not be construed to be retroactive.—Sultan R., etc., Co. *v.* Great Northern R. Co., 58 Wash. 604, 109 Pac. 1020, denying hearing in banc 109 P. 320, construing Laws 1905, c. 81, Laws 1907, c. 226, and Laws 1909, c. 93.

27. Statute not repealing former laws.—The North Carolina statute, Laws, 1907, p. 252, c. 217, regulating passenger and freight rates within the state, contains no provision repealing laws in existence at the time so far as the freight rates are concerned and with reference to passenger rates but only contains § 6, which repeals Revisal 1905, § 2618, requiring all railroad companies to furnish first and second class passenger accommodations. Held, that all laws in existence at the time of the passage of the act of 1907, and not inconsistent therewith, were still in force, under the rule stated in the text. Southern R. Co. *v.* McNeill, 155 Fed. 756.

Statute not repealed by statute subsequently enacted.—The Missouri statute, Rev. St. 1889, § 2629, forbidding any railroad from charging over any portion of its road a greater compensation than it charges for the transportation of similar quantities of the same class of goods over any other portion of equal distance, which was passed in pursuance of Const., art. 12, § 12, containing much the same language, and requiring the passage of suitable enforcing acts by the legislature, was not repealed by Rev. St. 1889, § 2637, subsequently enacted, and which forbids railroads from charging a greater aggregate compensation for the transportation of like property "under similar circumstances and conditions for a shorter than a longer distance over the same line in the same direction," especially since another section of the latter act (Rev. St. 1889, § 2659) expressly provides that it is not intended to repeal any law in force unless in direct conflict therewith; but both sections may stand together, the former regulating freight charges in any direction over any part of the road, and the latter in the same direction under like circumstances and conditions. McGrew *v.* Missouri Pac. R. Co., 177 Mo. 533, 76 S. W. 995.

Statute not materially modifying provisions of former law.—The Nebraska statute, Act 1893, known as the "Maximum Rate Law" (Sess. Laws, c. 24), fixing maximum rates for the transportation by rail of commodities within the state, does not materially modify the provisions of the law enacted in 1887 (Sess. Laws, c. 60), defining the duties and powers of the state board of transportation, granting such board the right to reduce freight rates or modify the schedule of commodities when it seems to them just and reasonable. Judgment 58 Neb. 823, 80 N. W. 43, affirmed on rehearing. Nebraska Tel. Co. *v.* Cornell, 59 Neb. 737, 82 N. W. 1.

Statute repealing prior statute.—Revisal N. C. 1905, § 2567, subsec. 9, giving railroads the right to make passenger rates within a limit of five cents a mile, was repealed by Laws 1907, p. 675, c. 469, § 7, extending and enlarging the powers of the corporation commission. Southern R. Co. *v.* McNeill, 155 Fed. 756.

Revisal N. C. 1905, § 2567, subsec. 9, conferring on railroad companies the right to make passenger rates within a maximum of five cents a mile, repealed by implication § 1099, subd. 1, which imposed on the North Carolina railroad commission the duty of making passenger rates. Southern R. Co. *v.* McNeill, 155 Fed. 756.

The West Virginia statute, subsections 7 and 8, § 82c, c. 54, Code 1891, establishing classifications of freight and rates of charges therefor, was repealed by chapter 17, Acts 1895, authorizing railway companies to establish such classifications and rates, under certain restrictions. Norfolk, etc., R. Co. *v.* Pinnacle Coal Co., 44 W. Va. 574, 30 S. E. 196, 41 L. R. A. 414.

Effect of statute upon charter vesting exclusive right to fix rates.—The North Carolina act of 1899 creating a state corporation commission, and giving it the

§ 85. Posting Schedule at Stations.—Carriers may be required to post a printed copy of their schedule of rates at all their stations,[28] and in some states are required to do so by statute or commission rule.[29]

§ 86. Local and Through Rates.—A local railway's share of an interstate rate is not a legitimate basis upon which a state railroad commission can establish and enforce a purely local rate.[30] Under a statute which requires a railroad company to transport freight and passengers for the government "at fair and reasonable rates," the company is not bound to transport local passengers at through rates, if the local rates are "fair and reasonable."[31] The mere fact that a through rate for carriage between two points on connecting roads within the state, does not exceed the aggregate of the local rates of the two roads for carriage between the same points, does not show that the through rate is reasonable.[32]

right to regulate the rates of railroads, operates as an alteration and repeal, pro tanto, of the charter of any railroad company of the state which vests such company with the exclusive right to fix its rates. Matthews *v.* Board of Corp. Comm'rs, 97 Fed. 400.

The New York statutes, Laws 1890, c. 565, § 37, providing that "every" railroad company "may" collect certain rates of fare, repeals a provision of a charter of a railroad company (Laws 1872, c. 594, § 5) authorizing it to fix its own rates, since the intent of the legislature was to fix a uniform rule as to railroad fares. Parker *v.* Elmira, etc., R. Co., 27 App. Div. 383, 49 N. Y. S. 1127, judgment affirmed 165 N. Y. 274, 59 N. E. 81.

28. Carriers may be required to post copy of rates at all stations.—Cleveland, etc., R. Co. *v.* Illinois, 177 U. S. 514, 517, 44 L. Ed. 868, 20 S. Ct. 722; Railroad Co. *v.* Fuller, 17 Wall. 560, 21 L. Ed. 710.

29. Duties imposed by requirement to post schedules of rates in stations.—Under rule 4, adopted by the railroad commission of Florida, on September, 23, 1889, requiring each railroad company to "keep posted" in each of its stations copies of rate schedules, and the rules and regulations of the board regulating the transportation of freight and passengers, it is not sufficient for the company to nail up in its stations a pamphlet of eleven printed pages containing the information required, nor is it sufficient to bind the schedules together, and leave them open to the public on a prominent desk in the waiting room of the station. State *v.* Pensacola, etc., R. Co., 27 Fla. 403, 9 So. 89.

Under a rule of the Florida railroad commission requiring railroad companies to post up in their stations their freight and passenger rates, the schedule may be printed on two cards so posted as to read as one. State *v.* Pensacola, etc., R. Co., 27 Fla. 403, 9 So. 89.

Under a rule of the Florida railroad commission requiring each railroad company to "post in a conspicuous place, and keep continuously posted in each of its stations," certain rate schedules, it is not sufficient for the company to send the schedules to its agents with instructions to post, but it must see that they are continuously kept posted, as required by the rule. State *v.* Pensacola, etc., R. Co., 27 Fla. 403, 9 So. 89.

Under a rule of the Florida railroad commission requiring each railroad company to post in its stations copies of the schedule of freight rates prescribed for it by the commission, the company is not required to post special rates which it is authorized to make for temporary use for particular persons and places. State *v.* Pensacola, etc., R. Co., 27 Fla. 403, 9 So. 89.

Under a rule adopted by the Florida railroad commission requiring each railroad company to post in its stations copies of the schedules of its passenger rates, the company is not required to show in the schedules the rate per mile, nor the distances between stations, in the absence of any law or rule of the commission requiring it. State *v.* Pensacola, etc., R. Co., 27 Fla. 403, 9 So. 89.

30. Basing local rate on local carrier's share of intestate rate for same service improper.—Alabama, etc., R. Co. *v.* Mississippi R. Comm., 203 U. S. 496, 51 L. Ed. 289, 27 S. Ct. 163; Union Pac. R. Co. *v.* United States, 117 U. S. 355, 29 L. Ed. 920, 6 S. Ct. 772, 21 Ct. Cl. 502.

Service rendered in transporting a local passenger between two points is not in law identical with that rendered in transporting a through passenger between the same points as part of the transit over the distance of the whole line. Union Pac. R. Co. *v.* United States, 117 U. S. 355, 29 L. Ed. 920, 6 S. Ct. 772, 21 Ct. Cl. 502.

31. Carrier not bound to transport local passengers at through rates.—Union Pac. R. Co. *v.* United States, 20 Ct. Cl. 70, affirmed in 117 U. S. 355, 29 L. Ed. 920 6, S. Ct. 772, 21 Ct. Cl. 502.

32. Through rate equal to aggregate of local rates.—Minneapolis, etc., R. Co. *v.* Minnesota, 186 U. S. 257, 46 L. Ed. 1151, 22 S. Ct. 900, affirming 80 Minn. 191, 83 N. W. 60, 89 Am. St. Rep. 514.

§ 87. Long and Short Hauls.—That a railroad company should fix a greater sum for carriage for a less distance than the maximum allowed for a greater distance, is unreasonable, as a matter of law.[33] The state may prohibit railroad companies from charging more for a short than for a long haul where the carriage is wholly within the state,[34] but when such a provision, as construed

33. Greater charge for less distance than maximum allowed for greater, unreasonable as matter of law.—Campbell *v.* Marietta, etc., R. Co., 23 O. St. 168.

34. State may prohibit greater charge for short than for long haul.—Wabash, etc., R. Co. *v.* Illinois, 118 U. S. 557, 30 L. Ed. 244, 7 S. Ct. 4; Louisville, etc., R. Co. *v.* Kentucky, 183 U. S. 503, 46 L. Ed. 298, 22 S. Ct. 95.

A state railroad corporation voluntarily formed can not exempt itself from the control reserved to itself by the state by its constitution, and if not protected by a valid contract, can not sucessfully invoke the interposition of the federal courts, in respect to the long and short haul clause in the state constitution, on the ground simply that the railroad is property. Louisville, etc., R. Co. *v.* Kentucky, 183 U. S. 503, 513, 46 L. Ed. 298, 22 S. Ct. 95.

The Constitution of Kentucky, § 218, and Ky. St. § 820, prohibiting a common carrier charging more for a short haul than for a long haul, where the shorter distance is included in the longer distance, are not in conflict with the constitution of the United States or any act of congress. Illinois Cent. R. Co. *v.* Commonwealth, 23 Ky. L. Rep. 544, 63 S. W. 448.

The Missouri statute, Act April 1, 1872 (Laws 1872, p. 69), entitled "An act to prevent unjust discrimination and extortion in the rates to be charged by the different railroads in this state for the transportation of freight thereon," by § 1 (Rev. St. 1899, § 1126 [Ann. St. 1906, p. 971]) prohibits a railroad company in the state from charging for transportation of property for any distance over its road any larger amount as compensation than is charged by it for the transportation or similar quantities of the same class of property over a greater distance over its road; from charging different rates for receiving, handling, or delivering freight at different points on its road, or any road used by it in connection therewith; and from charging for transportation of property over any portion of its road a greater amount as compensation than is charged by it for transportation of similar quantities of the same class of property over any portion of its road of equal distance. The act was taken substantially from the Illinois law (Laws 1871-72, p. 635). In 1873, the Illinois law was declared unconstitutional on the ground that the constitution restricted the power of the legislature to prohibit discriminations to those which were unjust and made the question of the injustice of any alleged discrimination of a judicial question for the court, and that the legislature had no power to declare anything to be an unjust discrimination. The Missiouri constitution of 1865 did not limit the power of the legislature to prohibit discriminations by railroads, but Const. 1875, art. 12, § 14 (Ann. St. 1906, p. 306), adopted literally from the Illinois constitution (art. 11, § 12), the portion held to have been violated by the Illinois law providing that railroads are public highways, and railroad companies common carriers, and that the general assembly shall pass laws to correct abuses and prevent unjust discrimination and extortion in the rates of freight and passenger traffic on the different railroads in the state, and shall pass laws establishing maximum rates and charges for transportation of passengers and freight on the railroads, and enforce all such laws by adequate penality. The Missiouri constitution, also by art. 12, § 12 (page 306), providing that it shall not be lawful for any railroad company to charge for transportation of freight or passengers a greater amount for a less distance than the amount charged for a greater distance, and that suitable laws shall be passed to enforce the provision, adopted the very gist of the statute (the so-called "short-haul" rule) extending its provisions to passengers as well as to freight. Held, that the intent in adopting § 12 was to establish the short-haul rule as a part of the fundamental law and to put it in operation, and the provision of § 14, directing the legislature to pass laws to correct abuses and prevent unjust discrimination and extortion in the rates of freight and passenger traffic, does not operate as an implied limitation on the power of the legislature to prevent only such discriminations as are unjust, the use of the word "unjust" not being intended to limit the legislature's power in that regard, but to require the exercise of such power, and to declare what shall be unjust discrimination, and such provision refers to discriminations generally, whereas the short haul rule, established by § 12, applies to a particular class of discriminations, specifically established in positive and explicit terms, so that the short-haul provision of Act 1872 was not rendered unconstitutional by the adoption of the Constitution of 1875. McGrew *v.* Missouri Pac. R. Co. (Mo.), 132 S. W. 1076.

The Nebraska statute, Comp. St. 1903, c. 72, art. 5, forbidding railroads to charge

by the state courts, applies to or interferes with interstate commerce, it is invalid.[35] The fact that competition exists at the longer, and not at the shorter, distance point, does not constitute such a dissimilarity of conditions as will authorize the carrier to charge more for the short than for the long haul.[36] A statute prohibiting the charging of more for a shorter than for a longer distance, applies, although by the original contract of carriage the merchandise was to be carried to a station beyond that at which it was left.[37] A statute providing that railroad companies shall not charge more than a certain sum for the transportation of freight of a particular weight or bulk a certain distance, does not compel them to proportion their charges to the distance carried, but fixes a maximum sum within which the companies may charge, subject only to the common-law rule that the same shall be reasonable in each particular case.[38] The short haul clauses, prohibiting the charging of more for a shorter than for a longer distance, as embodied in the constitutions and rate regulating statutes of the several states, differ somewhat in phraseology. The peculiar provisions of some of these clauses have been interpreted by the courts.[39] The action of the Kentucky Railroad Com-

for transportation for a specific distance a greater sum than they charge for carriage over a greater distance, was within the legislative discretion. Chicago, etc., R. Co. *v.* Anderson, 72 Neb. 856, 101 N. W. 1019.

35. Provision as to long and short hauls must not interfere with interstate commerce.—Louisville, etc., R. Co. *v.* Eubank, 184 U. S. 27, 46 L. Ed. 416, 22 S. Ct. 277.

36. Effect of competition.—Louisville, etc., R. Co. *v.* Commonwealth, 106 Ky. 633, 21 Ky. L. Rep. 232, 51 S. W. 164, 1012, 90 Am. St. Rep. 236, affirmed in 183 U. S. 503, 46 L. Ed. 298, 22 S. W. 95.

Under the constitution of Kentucky, § 218, providing that "it shall be unlawful for any person or corporation owning or operating a railroad in this state, or any common carrier, to charge or receive any greater compensation in the aggregate for the transportation of passengers or of property of like kind under substantially similar circumstances and conditions for a shorter than for a longer distance over the same line in the same direction, the shorter being included within the longer distance," competition does not justify a carrier in charging more for a shorter than for a longer distance, as the words "substantially similar circumstances and conditions" relate to the actual cost of transportation. Louisville, etc., R. Co. *v.* Commonwealth, 104 Ky. 226, 20 Ky. L. Rep. 1102, 1380, 46 S. W. 707, 47 S. W. 210, 598, 43 L. R. A. 541; Hutcheson *v.* Louisville, etc., R. Co., 108 Ky. 615, 22 Ky. L. Rep. 361, 57 S. W. 251.

But in a case in a federal court it was held that notwithstanding the Oregon statute, Act Feb. 20, 1885, § 4 (Sess. Laws, 39), declaring it unlawful for any person engaged in the transportation of property by a railway to charge or receive any greater compensation for a short haul than a longer one in the same direction, a railway corporation may charge less for a long haul than a short one in the same direction, when the rate for the long haul is caused by other lines of transportation competing for business at the point from whence the long haul is made; and where the road of such corporation forms a part of a line of transportation consisting largely of water carriage, between two principal points, the rate may be made so as to enable it to compete with another road that constitutes a part of another line of water and railway transportation between the same points. Ex parte Koehler, 25 Fed. 73.

37. Provision in original contract of carriage not precluding application of short haul clause.—Osgood *v.* Concord Railroad, 63 N. H. 255, construing Laws 1879, c. 55.

38. Prohibiting charge of more than a certain sum for a certain distance. Ragan *v.* Aiken, 77 Tenn. (9 Lea) 609, 42 Am. Rep. 684.

39. Peculiar Provisions of short haul clauses interpreted.—**As § 218 of the constitution of Kentucky,** does not apply unless the shorter is included within the longer distance, a carrier does not violate the law where the long haul is altogether on its main line, while the short haul originates on a branch road, as the shipment is an entirety, and can not be split into parts to bring it within the law. Louisville & N. R. Co. *v.* Walker, 110 Ky. 961, 23 Ky. L. Rep. 453, 63 S. W. 20.

The Missouri statute, Rev. St. 1899, § 1126 (Ann. St. 1906, p. 971), prohibiting a carrier from charging for transporting goods a larger amount than is charged for the transportation of similar quantities of the same class of goods over a greater distance on the same road, regulates freight charges in any direction on the same road, as applied to shipments of the same class of property in similar quantities, and is not repealed by §§ 1129, 1133, 1134 (Ann. St. 1906, pp. 973-975), prohibiting a carrier from charging more for transporting a car of freight, than it

mission in exonerating a carrier from the operation of the law prohibiting the charging of more for a shorter than for a longer distance is not retrospective, and does not, therefore, affect the liability which the carrier had previously incurred to shippers by a violation of the law.[40]

§ 88. Joint Tariff between Two or More Roads.—The power of the state to regulate freight charges includes the power to establish joint through rates over separate lines within its borders.[41] Where a joint tariff between two or more

charges per car for several cars of a like class of freight; prohibiting rebating; making it unlawful for any carrier to give any undue preference to any person in the transportation of goods, and making it unlawful for any carrier to charge any greater compensation in the aggregate for the transportation of like kinds of property under similar circumstances, for a shorter than a longer distance over the same line, in the same direction. Cohn *v.* St. Louis, etc., R. Co., 151 Mo. App. 661, 133 S. W. 59, transferred from supreme court 131 S. W. 881.

Act April 1, 1872 (Laws 1872, p. 69), relating wholly to local discriminations by railroads, contains a short-haul provision, and prohibits a railroad from receiving for transportation of property any greater amount as compensation than is charged for the transportation of the same class of property over a greater distance upon the same road without regard to direction, circumstances, or conditions. Laws Extra Sess. 1887, p. 17, § 4, (Rev. St. 1899, § 1134 [Ann. St. 1906, p. 975]), relating to discriminations under "like circumstances," or "substantially similar circumstances and conditions," embraces a short-haul provision applying to hauls in the same direction under similar circumstances and conditions. The act of 1887 provided that it was not intended to repeal any law then in force, unless in direct conflict therewith, but was intended to be supplemental to such laws. Held, that such provision as to repeal furnishes the sole and only test for determining whether the act of 1872 was repealed by the act of 1887, and the two laws merely establishing two systems for preventing discrimination by railroad companies, the later act containing some but not all of the things contained in the system created by the former act and many other things, they are not in direct conflict as to the short-haul clause, and the former act was not repealed by the latter one as to such provision. McGrew *v.* Missouri Pac. R. Co. (Mo.), 132 S. W. 1076.

That the penalties created by the acts are different, it being necessary in order to enforce the penalty prescribed by the act of 1887 (Laws Extra Sess. 1887, p. 15) for violating its short-haul section, to allege and prove that the shorter and longer hauls were made in the same direction and under similar circumstances and conditions, while such allegations and proof would not be necessary to enforce the penalty prescribed by the act of 1872, and that in a proceeding to enforce the latter penalty it would be no defense to show the facts making defendant liable to the other penalties, does not operate to work a repeal of the former act by the latter one. McGrew *v.* Missouri Pac. R. Co. (Mo.), 132 S. W. 1076.

The Texas statute, Rev. Stat., § 4257, prohibiting railroad companies from charging more for a short than a long haul is not confined to cases where the freight is being transported between the same points. Texas, etc., R. Co. *v.* Kuteman, 79 Tex. 465, 14 S. W. 693.

40. Action exonerating carrier from operation of short-haul clause not retrospective.—Louisville, etc., R. Co. *v.* Vancleave, 110 Ky. 968, 23 Ky. L. Rep. 479, 63 S. W. 22, construing Const., § 218, and Ky. St., § 820.

41. State may establish joint through rates over separate lines.—Burlington, etc., R. Co. *v.* Dey, 82 Iowa 312, 48 N. W. 98, 31 Am. St. Rep. 477, 12 L. R. A. 436.

Such part of the Minnesota statute, Laws 1895, c. 91, as authorizes the state railroad and warehouse commission to establish by order joint through rates for the transportation of freight over any two or more connecting lines of railway within the state, and to compel obedience thereto, does not violate any of the constitutional provisions, federal or state. State *v.* Minneapolis, etc., R. Co., 80 Minn. 191, 83 S. W. 60, 89 Am. St. Rep. 511, affirmed Minneapolis, etc., R. Co. *v.* Minnesota, 186 U. S. 257, 46 L. Ed. 1151, 22 S. Ct. 900.

Commission order a complete fixing of a continuous mileage rate between two roads.—Circular No. 325, of the railroad commission, declaring that continuous mileage rates shall apply to the Central Railroad and the Wadley Southern Railway Company for transportation of passengers and freight passing between those railroads or over any portion of either, such rates to be governed by the freight and passenger tariffs prescribed by the Georgia railroad commission for the Central of Georgia Railway Company, is a clear and complete fixing of a continuous mileage rate between the two roads, without necessity of resorting, to ascertain its meaning, to rule No. 1 of the commission, declaring that, when two or more

roads has been agreed upon, such tariff is as much within the control of the legislature as if it related only to transportation over a single line.[42] A state legislature may authorize its railroad commission to reduce, as unreasonable, a joint through rate agreed upon by two or more railroads, and apportion the same among the several railroad companies interested.[43] Under a statute providing that the railroad commission shall have power to fix rates for all connecting lines in the state, and if connecting railroads fail to agree on a division of the charges the commission shall fix the pro rata, a joint rate fixed by the commission is not void for failure to divide the rate between the companies.[44]

§ 89. Transfers to Connecting Lines of Same Company.[45]—The power which the legislature of a state has to require a street railroad company to furnish transfer tickets entitling passengers to ride on a connecting line owned or controlled by it without payment of additional fare it may delegate to the corporation commission of the state[46] or to the municipality in which the lines of such company are located.[47] Some of the peculiar provisions of statutes and municipal ordinances requiring street railroad companies to give such transfers have been interpreted by the courts.[48]

connecting lines of railroad are operated by one management, or where the majority of the stock of each is controlled by one of such companies, the lines of railroads of all shall be considered as constituting but one railroad, and the rates shall be computed on a continuous mileage basis. Hill *v.* Wadley Southern R. Co., 128 Ga. 705, 57 S. E. 795.

42. Joint tariff agreement within control of legislature.—Minneapolis, etc., R. Co. *v.* Minnesota, 186 U. S. 257, 46 L. Ed. 1151, 22 S. Ct. 900.

Granting that a state has no right to interfere with the internal economy of a railroad farther than to secure the safety and comfort of passengers, as, for example, to fix the wages of employees or control its contracts for construction, or the purchase of supplies, it has a clear right to pass upon the reasonableness of contracts in which the public is interested, whether such contracts be made directly with the patrons of the road, or for a joint action in the transportation of persons or property in which the public is indirectly concerned. Minneapolis, etc., R. Co. *v.* Minnesota, 186 U. S. 257, 46 L. Ed. 1151, 22 S. Ct. 900.

43. Reduction of joint through rate.—Judgment, State *v.* Minneapolis, etc., R. Co., 80 Minn. 191, 83 N. W. 60, 89 Am. St. Rep. 514, affirmed. Minneapolis, etc., R. Co. *v.* Minnesota, 186 U. S. 257, 46 L. Ed. 1151, 22 S. Ct. 900.

44. Joint rate not void for failure to divide rate between companies.—Southern Indiana R. Co. *v.* Railroad Comm., 172 Ind. 113, 87 N. E. 966, construing Acts 1907, p. 458, c. 241.

45. As to transfers to other lines, see post, "Transfers between Street Railroad Companies," sec. 129.

46. Order requiring transfers within power of corporation commission.—An order that a street railway company in Oklahoma City give transfers on request, held within the power of the corporation commission and to be reasonable and just. Oklahoma Ry. Co. *v.* Powell, 33 Okla. 737, 127 Pac. 1080.

47. Municipality may require transfers under power to limit rate of fare.—The city of Chicago, having power under its charter (1 Starr & C. Ann. St. [2d Ed.] pp. 689-715, art. 5, § 1) to limit the rate of fare to be charged by street railway companies, had also, as a necessary incident thereto, power to enact Rev. Code Chicago, §§ 1723, 1725, requiring street railway companies to furnish transfer tickets entitling passengers to ride on a connecting line of the same company without the payment of an additional fare. Chicago Union Tract Co. *v.* Chicago, 199 Ill. 484, 65 N. E. 451, 59 L. R. A. 631.

The city of Atlanta, Ga., has no authority to impose a compulsory system of passenger transfers upon the Atlanta Consolidated Street-Railway Company, either under the city charter, the charters of the two corporations whose property was purchased by the said consolidated company, the state statutes ratifying and confirming the incorporation of street and surburban railroad companies, or under the Constitution of Georgia and the ordinance of the city of Atlanta, made in pursuance thereof, consenting to the occupation of its streets by the said consolidated company. Atlanta *v.* Old Colony Trust Co., 32 C. C. A. 125, 88 Fed. 859, affirming Old Colony Trust Co. *v.* Atlanta, 83 Fed. 39.

48. Lessee of intersecting roads required to give transfers.—Where a street surface railroad is operated under the New York railroad law (Laws 1890, p. 1082, c. 565, as amended by Laws 1892, p. 1382, c. 676), and leases other roads which intersect with its own road, the lessee must, under section 104, c. 676, p. 1406, Laws 1892, carry any passenger desiring to make one continuous trip to any

§§ 90-95. Conditions in Grant of Franchise and Agreements with Municipalities—§ 90. Authority to Impose Conditions or to Make Agreements.—Municipal corporations are frequently authorized by statute to impose conditions as to the rates of fare to be charged by street railroad companies in granting to such companies the right to use the streets of the municipality, or to enter into agreements with such companies relative to the rates of fare to be charged.[49] A village, in granting a franchise to a street railroad company, may bargain with it with reference to rates of fare between points in the village and outside points; and the acceptance of the franchise with such a condition makes a valid contract.[50] A municipal contract which secures to the public for a term of years the benefit of a single fare of not more than five cents for a continuous passage over the whole length, or any portion of consolidated and extended street railway lines does not violate the provision of a statute providing that a municipal

portion of any railroad embraced in such contract for a single fare. Judgment, 95 App. Div. 253, 89 N. Y. S. 41, affirmed. O'Reilly *v.* Brooklyn Heights R. Co., 179 N. Y. 450, 72 N. E. 517.

Corporation required to give transfers to road of which it is the beneficial owner.—Under Rev. Code Chicago, § 1723, providing that at any point where the line of a street railway points, connects, crosses, or comes within a distance of two hundred feet of any other line owned or operated by the same company any passenger shall be entitled to a transfer entitling him to ride on the connecting line without additional charge, a street railway corporation is required to give transfers if it is the real beneficial owner of both the connecting lines, though the dry legal title to one of them may be in another corporation. Chicago Union Tract. Co. *v.* Chicago, 199 Ill. 579, 65 N. E. 470.

Carrier not prohibited from limiting time within which transfer can be used.—The Maryland statute, Acts 1900, p. 463, c. 313, requiring the street car company of Baltimore City to give, on request, each passenger paying a cash fare a transfer for a "continuous" ride, does not prohibit the company from limiting the time within which a transfer can be used. Garrison *v.* United R. etc., Co., 97 Md. 347, 55 Atl. 371, 99 Am. St. Rep. 452.

49. Statutory authority to impose conditions or to make agreements as to rates of fare.—Under the Wisconsin statute, St. 1898, § 1863, as amended by Laws 1901, c. 425, authorizing an interurban railway company to use the streets of a city, providing its consent is obtained, and providing that such consent may be given on such terms as the common council may prescribe, the city has the power to refuse consent, and so can impose as a condition to consent, that the railway company's fare between the cities shall not exceed ten cents. Manitowoc *v.* Manitowoc, etc., Tract. Co., 145 Wis. 13, 129 N. W. 925.

Binding agreements relative to rates of fare between a municipality and street railways organized either under the Michigan tram railway act as amended in 1861, or under the street railway act of 1867, which can not be altered without consent of both parties, were expressly authorized by § 20 of the latter act, declaring that railway rates shall be established by agreement between the company and the corporate authorities, the provisions of which section were by § 29 made applicable to all street railway corporations already organized and in operation. Detroit *v.* Detroit Citizens' St. R. Co., 184 U. S. 368, 46 L. Ed. 592, 22 S. Ct. 410.

Where the selectmen of a town, on granting a street railway location, inserted a provision fixing the maximum fare to be charged within a locality covering three towns, such provision was a valid exercise of power granted by the Massachusetts statute, Pub. St. 1882, c. 113, and was not affected by St. 1898, c. 578, withdrawing such power from local boards, adopted within less than a month after the location became effective. Westwood *v.* Dedham, etc., St. R. Co., 209 Mass. 213, 95 N. E. 81.

Statute not authorizing municipality to impose a limitation on rates.—Under the Massachusetts statute, Pub. St. 1882, c. 113, § 43 (Rev. Laws, c. 112, § 69), providing that a street railway company may establish the rates of fare, subject to its charter and the statutes, and in view of the course of legislation (Pub. St. 1882, c. 113, §§ 44, 45; St. 1898, pp. 747, 748, c. 578, §§ 23, 26; St. 1901, p. 113, c. 180) relating to limitations and revision of rates of fare, St. 1898, p. 743, c. 578, § 13, providing that the selectmen of a town, in granting a location to a street railway company, may impose such conditions as the public interest may require, does not authorize them to impose a limitation on the rates of fare the company may charge. Keefe *v.* Lexington, etc., St. R. Co., 185 Mass. 183, 70 N. E. 37; Cunningham *v.* Boston, etc., St. R. Co., 188 Mass. 250, 74 N. E. 355.

50. Authority of village to bargain as to fare to points outside village.—Public Service Comm. *v.* Westchester St. R. Co., 206 N. Y. 209, 99 N. E. 536, affirming order 151 App. Div. 914, 135 N. Y. S. 1138.

corporation shall not, during the term of a street railway grant, or renewal thereof, release the grantee from any obligation or liability thereby imposed, because such contract deprives the municipality of the right to regulate fares over a portion of the consolidated lines, reserved in an ordinance adopted before the consolidation, granting a renewal franchise to the corporation which then owned such portion of the lines.[51] Under a statute authorizing towns to make contracts granting franchises to corporations operating street railways, which provides that the charge for service shall not exceed the price charged by the corporation at the time of granting the franchise, a contract which limits the rate of fare to less than that then charged by the corporation is not beyond the town's authority.[52]

§ 91. Change of Rates of Fare Fixed by Franchise or Agreement.—Where street railway fares have been established by agreement between a municipality and a street railway company, the municipality can not reduce such fares while the agreement remains in force;[53] nor can the fares so established be changed by the street railway company.[54] Under statutes conferring power upon municipalities to determine the conditions of the grant of a franchise to a street railroad company, including the rates of fare to be charged, but no power to thereafter prescribe rates of fare, if a grant by a municipality itself fixes the rate of fare a reserved right of regulation does not authorize the municipality to thereafter change it during the life of the grant.[55] A statute providing that, after a grant or renewal of a grant is made by a municipal corporation, it shall not, during the term of such grant or renewal, release the

51. **Effect of statute prohibiting municipality from releasing carrier from any obligation imposed by its franchise.**—Decree, Cleveland City R. Co. *v.* Cleveland, 94 Fed. 385, affirmed. Cleveland *v.* Cleveland City R. Co., 194 U. S. 517, 48 L. Ed. 1102, 24 S. Ct. 756; Cleveland *v.* Cleveland Elect. R. Co., 194 U. S. 538, 48 L. Ed. 1109, 24 S. Ct. 764, construing Bates Ann. St. Ohio 1897, § 2502.

52. **Statute held to authorize contract limiting fare to less than was formerly charged.**—Adams *v.* Union R. Co., 21 R. I. 134, 42 Atl. 515, 44 L. R. A. 273.

53. **No right to reduce street railway fares established by agreement** between a city and the railway company subsequent to the amendment of March 27, 1867, to § 34 of the Michigan tram railway act, so long as by such reduction rights or franchises already granted were not destroyed or impaired, or the company deprived of granted rights of construction and operation, was given such city by the provision of that amendment forbidding municipal authorities from making any regulations or conditions which would have that effect, as such provision, being a general one, does not limit the express authority of the municipality, previously conferred by § 20 of the Michigan street railway act, to bind itself by an agreement fixing street railway fares. Detroit *v.* Detroit Citizens' St. R. Co., 184 U. S. 368, 46 L. Ed. 592, 22 S. Ct. 410.

No permission to municipal authorities to reduce street railway fares without the consent of the company below the rate at which they were fixed in compliance with Michigan Street Railway Act 1867, § 20, which declares that such rates shall be established by agreement between the parties, can be implied from the further provision of that section that the rates of fare agreed upon shall not be increased without the consent of the city authorities. Detroit *v.* Detroit Citizens' St. R. Co., 184 U. S. 368, 46 L. Ed. 592, 22 S. Ct. 410.

54. **Agreement precluding railway company from abolishing sale of six tickets for twenty-five cents.**—Where an ordinance is passed granting a street railway company terms for an extension, and providing that the rate of fare shall not exceed five cents per single fare, or six tickets for twenty-five cents, such being the rate of fare before the passage of the ordinance, neither the railway company nor another company to which it has leased its line can abolish the sale of six tickets for twenty-five cents from points on the two lines for which the extension was allowed by the city. Reading *v.* United Tract. Co., 236 Pa. 197, 84 Atl. 666. Compare Philadelphia *v.* Philadelphia Rapid Transit Co., 228 Pa. 325, 77 Atl. 501.

55. **Reserved right of regulation not authorizing change in rate of fare—Statutes construed.**—Cleveland City R. Co. *v.* Cleveland, 94 Fed. 385. Affirmed, Cleveland *v.* Cleveland City R. Co., 194 U. S. 517, 48 L. Ed. 1102, 24 S. Ct. 756, and Cleveland *v.* Cleveland Elect. R. Co., 194 U. S. 538, 48 L. Ed. 1109, 24 S. Ct. 764.

grantee from any obligation or liability imposed by the terms of such grant or renewal, does not prohibit a city making a grant of a franchise to a street-railroad company, in which it reserves the right to change the rates of fare to be charged, from thereafter modifying such contract on sufficient consideration.[56]

§ 92. Effect of Acceptance by Carrier of Location Granted by Municipality.—The acceptance by a street railway company of a location granted by a municipality does not make valid conditions in the grant as to fares, which the town could not legally impose, nor does it make a contract as to fares between the company and the municipality.[57]

§ 93. Conditions and Agreements Construed.—Many of the peculiar provisions of conditions or reservations in grants of franchises to street railroad companies and of agreements between municipalities and such companies have been interpreted by the courts. The courts have thus been called upon to determine whether a municipality has reserved to itself the right to fix or to reduce rates of fare,[58] what fare the carrier is authorized to charge,[59] the amount that will entitle a passenger to carriage,[60] whether it is the carrier's

56. Statute not precluding municipality from exercising reserved right to change rates of fare.—Cleveland City R. Co. *v.* Cleveland, 94 Fed. 385. Affirmed, Cleveland *v.* Cleveland City R. Co., 194 U. S. 517, 48 L. Ed. 1102, 24 S. Ct. 756, and Cleveland *v.* Cleveland Elect. R. Co., 194 U. S. 538, 48 L. Ed. 1109, 24 S. Ct. 764, construing Rev. St. Ohio, § 2502.

57. Effect of acceptance by carrier of location granted by municipality.—Keefe *v.* Lexington, etc., St. R. Co., 185 Mass. 183, 70 N. E. 37.

58. Reservation not authorizing municipality to fix rates of fare.—A reservation in an ordinance granting the use of streets for a street railroad that such road shall be "subject to all the laws and ordinances now in force, and such as may be hereafter made," does not authorize the city to fix rates of fare, unless it is, either expressly or by necessary implication, thereto authorized by some law of the state. Old Colony Trust Co. *v.* Atlanta, 83 Fed. 39.

Reservation not authorizing municipality to reduce rates of fare.—A reservation in an ordinance granting a street railway franchise of the right from time to time to make such further rules, orders, or regulations as to the common council may seem proper, does not include the right on the part of the city at its own pleasure to reduce the rates of fare agreed upon in such ordinance. Detroit *v.* Detroit Citizens' St. R. Co., 184 U. S. 368, 46 L. Ed. 592, 22 S. Ct. 410.

59. Carrier only authorized to charge single fare for ride in both divisions of city.—Where city ordinances granted the right to operate street railway lines in the South and West divisions of the city, and provided that the rate of fare for any distance should not exceed five cents, the street railway company was not thereby authorized to charge a fare of five cents for a ride in one division, and another fare for a ride in the other division, but only to charge a single fare for a ride in both divisions. Chicago Union Tract. Co. *v.* Chicago, 199 Ill. 484, 65 N. E. 451, 59 L. R. A. 631.

Fare chargeable from point in village out toward another village.—A railroad company operating a road through the village of H. to the village of W., being entitled, under its franchise, to charge one fare of five cents between the limits of the village of H. and the village of W., where a charge of one fare was made through the village of H. to a point therein, another fare could be charged from that point out toward the village of W., without incurring the penalty for charging excessive fares, under Railroad Law, § 39 (Laws 1890, p. 1096, c. 565). Byars *v.* Bennington, etc., R. Co., 99 App. Div. 34, 90 N. Y. S. 736, affirmed in 184 N. Y. 554, 76 N. E. 1090.

Rates prescribed between certain points binding though points are beyond limits of municipality.—A street railway operating its line through a village under a franchise from such village, which provides for a certain rate of fare per mile between certain points, is bound by such rate, even though the points specified are beyond the limits of the village. Vining *v.* Detroit, etc., Railway, 133 Mich. 539, 95 N. W. 542.

60. Right to ride for five cents.—A franchise to a street railway from the village of W., situated wholly within the township of N., providing that the company shall be entitled to charge at the rate of one and a half cents per mile, except as thereinafter provided, for a continuous trip, provided no passenger shall be carried for a less fare than five cents for any distance, does not prevent one having the right to ride for five cents between any two points in N. township, though he may pass through the village of W., or go from a point within it to a point outside

duty to sell tickets at a stipulated price,[61] what obligation the carrier is under in relation to the giving of transfers,[62] who may travel at the rate prescribed,[63] what institutions of learning are included in the word "schools," where a street

in N. township. Kissane *v.* Detroit, etc., Railway, 121 Mich. 175, 79 N. W. 1104.

Through passenger entitled to ride through township and villages therein at township rate.—In Michigan, where the councils and township boards of several cities, villages, and townships, under whose ordinances and resolutions an electric railway runs, fixed a rate for travel thereon through each city, village, and township respectively, a through passenger would be entitled to ride through a township and the villages therein at the township rate, since a village is under the jurisdiction of the township board as to all but village affairs. Coy *v.* Detroit, etc., Railway, 125 Mich. 616, 85 N. W. 6.

Passenger entitled to ride beyond township limits at rate prescribed.—Where a township, in pursuance of the Michigan statute, Comp. Laws 1897, § 6446, on granting consent to an electric railway company to construct and operate its line along the highways of the township, imposed a condition that the railway company should not charge more than two cents per mile for each passenger carried, provided that no single fare should be less than five cents, a passenger taking a car in the township was entitled to ride over the entire line at the rate of two cents per mile, though it extended beyond the township limits, provided that the total amount paid should not be less than five cents. Ross Tp. *v.* Michigan United R. Co. (Mich.), 130 N. W. 358.

61. Franchise requiring sale of five tickets for 50 cents.—A street-railway company operating under a franchise requiring the sale of five tickets for fifty cents, which sells such tickets in two parts, one of which is good to a named point on the line, and the other part good for the remainder of the trip, will not be heard to say, in an action for damages for refusal to sell five tickets to one who had paid his fare on the first part of the line with a stub, intending to pay for the remainder of the trip with a stub from the new tickets, that the franchise called only for the acceptance of a through ticket in payment of fare, and hence plaintiff could not recover for defendant's failure to furnish a ticket in two parts, not called for by the franchise. Rice *v.* Detroit, etc., R. Co., 122 Mich. 677, 81 N. W. 927, 48 L. R. A. 84.

62. Carrier not required to grant transfers from lines in one city to those in another.—A street railway company permitted to construct a railway in a city on condition that the fare for riding in the city be five cents, and that it gives transfers to all of its lines, took an assignment of all the rights and succeeded to all the obligations of another street railway company which had constructed a line in an adjoining city on the same condition. Held that, having been permitted to connect the lines without any such condition, it was not required to grant transfers from the lines in one city to those in the other. Montpelier *v.* Barre, etc., Power Co., 76 Vt. 66, 56 Atl. 278.

Country passengers entitled to same transfer rights as city passengers.—The franchise of a street railway provided that passengers on a line extending into the country should, on arriving in the city at a certain point, be transferred to the cars of another line, and, when so transferred, should have the same rights and privileges as passengers on that line. Passengers on the latter line were entitled, without additional fare, to one transfer therefrom to any of the company's cars going in the same direction. Held, that passengers on the country extension, on arriving in the city, were entitled to a transfer to the main line, and thereafter, without additional fare, to a transfer to other cars going in the same direction, as long as the city passengers were entitled thereto; since the franchise entitled country passengers to the same privileges as city passengers, and not merely to the same number of transfers. Richmond, etc., R. Co. *v.* Brown, 97 Va. 26, 32 S. E. 775.

Line held an intersecting line within obligation to give transfers to intersecting lines.—The ordinance granting a franchise to a street railroad company provided that it should sell half-fare tickets between certain hours, and give transfers at points where one line intersected with another. The company owned a line which extended from its point of intersection with another line to the city limits, beyond which it was owned by a different corporation, which, however, ran its cars with the same operatives into the city and to the point of intersection. Held, that this line was an intersecting line, to which the provisions as to half-fare tickets and transfers applied. Virginia Passenger, etc., Co. *v.* Commonwealth, 103 Va. 644, 49 S. E. 995.

63. Who may travel at the rate prescribed.—Where the ordinance of one of several villages, townships, and cities, under whose ordinances an electric railway runs, entitled such railway to charge at the rate of one and a half cents a mile for travel on its road between any two points thereon, any member of the public, though not a resident of such village, was entitled to ride at such rate. Coy *v.* Detroit, etc., Railway, 125 Mich. 616, 85 N. W. 6.

railway company is required to provide pupils in schools transportation at half price,[64] and the effect of annexation of territory by the municipality subsequent to its agreement with the carrier.[65] A construction of a contract in a franchise to carry school children for half price, acquiesced in by the parties binds their future actions.[66]

§ 94. Waiver of Right to Charge More than Amount Stipulated in Franchise.—Where a town granted a franchise to a street-railroad company,

64. **The word "schools"** is one of broad signification, and sometimes it may appear, by the connection in which it is used, to include higher institutions of learning; but ordinarily, and without something to indicate that a wider meaning was intended to be given to the word, it will not be taken to include higher institutions of learning, such as colleges, universities, or institutions for the teaching of trades, professions, or business; and where a street railway was, as a condition to a grant of a location, required to provide to pupils in attendance upon the public schools, the state normal school of W., or any school in W., transportation at half price while going to and from school, neither a college nor a business institute in W. could fairly come within the language of the restriction. Clinton *v.* Worcester, etc., St. R. Co., 199 Mass. 279, 85 N. E. 507.

65. **Ordinance prescribing rates of fare has effect in territory subsequently annexed.**—An ordinance accepted by a street railway company providing that at certain hours during the day the company should charge certain fares over its lines within the city must be construed strictly against the company, and therefore has equal effect in territory subsequently annexed to the city. People *v.* Detroit United Railway, 162 Mich. 460, 127 N. W. 748, affirming judgment 125 N. W. 700, on rehearing.

An ordinance was passed providing that a street railroad company should furnish workingmen's tickets at a reduced rate, good over any of its lines in the city, which ordinance was accepted by the railway, and the same ordinance gave the railway a right to extend its tracks to the easterly limits of the city. Subsequently the railway franchise was assigned to a united company, which thereafter purchased a suburban line wholly without the limits of the city. The city then extended its limits to cover a portion of the territory in which the purchased railroad was. Held, that since there were two methods of extending a street railway, one by construction, and the other by purchase under Comp. Laws 1897, § 6448, the purchase of the suburban railway by the united company was an "extension," and hence the company was bound by the ordinance, regardless of the franchise of the suburban railroad. People *v.* Detroit United Railway, 162 Mich. 460, 125 N. W. 700, judgment affirmed on rehearing 127 N. W. 748.

Held, also that the ordinance covered future extensions of the city limits, since it was reasonably in the contemplation of the original parties that the limits would be extended; and hence the company was bound to give such reduced fares on its purchased line. People *v.* Detroit United Railway, 162 Mich. 460, 125 N. W. 700, 127 N. W. 748.

Passengers within territory annexed must be carried at rate prescribed.—A franchise to operate a system of street railroads in a city which provides that the fare shall not exceed five cents between points within the city limits, though a transfer shall be necessary, is applicable to territory subsequently annexed to the city, and passengers within the territory annexed must be carried for five cents. Dennison *v.* Seattle, etc., R. Co., 64 Wash. 167, 116 Pac. 638.

A contract between a city and a street railway operating its lines in the city which binds the company to carry passengers within the city for a single fare not exceeding five cents, and to issue transfers to all passengers for a continuous trip one way to and from all lines in the city, is binding on the company operating a line in territory outside of the city under a county franchise on the territory being subsequently annexed to the city. Peterson *v.* Tacoma, etc., R. Co., 60 Wash. 406, 111 Pac. 338.

Carrier bound to accept transfer to passenger's destination in territory annexed.—A street railroad operating its lines in a city under a contract to issue transfer tickets free of charge to all passengers requesting the same, who might board its cars at any point on any of its lines in the city, and whose destination might be to any other point on any other line of the company's road in the limits of the city, is bound to transport a passenger tendering such transfer to his destination on the company's line, though that be in territory annexed to the city after the contract was made, and on its interurban line, on which it had a franchise entitling it to charge an additional fare outside the city as its limits were before the annexation of territory. Indiana R. Co. *v.* Hoffman, 161 Ind. 593, 69 N. E. 399.

66. **Construction acquiesced in by parties binds their future actions.**—Seattle *v.* Seattle Elect. Co., 71 Wash. 213, 128 Pac. 220.

the contract stipulating that the fare between any two points on its lines should not exceed five cents, the grantee waived its right to charge more as successor of another company whose charter allowed it to charge ten cents, under which charter the grantee had established a fare of five cents for a continuous ride.[67]

§ 95 Acquisition by Sale or Consolidation of a Railway Company Having a Contract with a Municipality.—Where a street railway company acquires a location from the selectmen of a town, which provides that no higher than a specified fare rate shall be charged, a subsequent corporation acquiring the assets and franchises of the original company under a general law, authorizing such acquisition by sale or consolidation takes subject to the same obligation.[68]

§§ 96-108. Preferences and Discriminations—§ 96. The Common-Law Doctrine.—Independent of statute, every common carrier must carry for all to the extent of its capacity, without undue or unreasonable discrimination either in charges or facilities.[69] It can not so operate its road or conduct its business as to give an undue advantage to certain individuals, to the exclusion of others.[70] It is no proper business of a common carrier to foster particular enterprise or to build up new industries, but, deriving its franchise from the legislature, and depending upon the will of the people for its very existence, it is bound to deal fairly with the public, to extend them reasonable facilities for the transportation of their persons and property, and to put all its patrons upon an absolute equality.[71] But it has been held that a common carrier is permitted

67. **Waiver of right to charge more than amount stipulated in franchise.**—Adams *v.* Union R. Co., 21 R. I. 134, 42 Atl. 515, 44 L. R. A. 273.

68. **Acquisition by sale or consolidation of a railway company having a contract with a municipality.**—Westwood *v.* Dedham, etc., St. R. Co., 209 Mass. 213, 95 N. E. 81, construing St. 1906, c. 463, pt. 3, §§ 144, 145.

69. **Duty not to discriminate as to charges or facilities.**—Atchison, etc., R. Co. *v.* Denver, etc., R. Co., 110 U. S. 667, 28 L. Ed. 291, 4 S. Ct. 185.

A railroad company as a common carrier is required to treat the public with equality and fairness. Houston, etc., R. Co. *v.* Rust, 58 Tex. 98.

Section 6 of the constitution of Colorado providing that: "All individuals, associations, and corporations shall have equal rights to have persons and property transported over any railroad in this state, and no undue or unreasonable discrimination shall be made in charges or facilities for transportation of freight or passengers within the state, and no railroad company, nor any lessee, manager, or employee thereof, shall give any preference to individuals, associations, or corporations in furnishing cars or motive power," imposed no greater obligation upon a railroad company than the common law imposed upon it. Atchison, etc., R. Co. *v.* Denver, etc., R. Co., 110 U. S. 667, 28 L. Ed. 291, 4 S. Ct. 185.

Where a railroad voluntarily establishes as to a certain favored class of shippers a rate so low as to be unremunerative, the rate must nevertheless be granted to all alike. Alabama, etc., R. Co. *v.* Railroad Comm., 86 Miss. 667, 38 So. 356, affirmed in 203 U. S. 496, 51 L. Ed. 289, 27 S. Ct. 163.

70. Louisville, etc., R. Co. *v.* Central Stock Yards Co., 30 Ky. L. Rep. 18, 97 S. W. 778.

Carriers may not discriminate between markets or individuals in granting the privilege of milling lumber in transit. Railroad Comm'rs *v.* Atlantic, etc., R. Co., 59 Fla. 612, 52 So. 4.

71. Union Pac. R. Co. *v.* Goodridge, 149 U. S. 680, 37 L. Ed. 986, 13 S. Ct. 970 (holding that this principle is recognized in the Colorado act of 1885 prohibiting discriminations in charges).

Railway companies derive their charter rights from the state and owe an equal duty to every citizen, and they can not exercise their charter rights in such manner as to benefit an individual, town or community, to the detriment of another. H. & T. C. R. Co. *v.* Smith, 63 Tex. 322.

A "rebilling rate," to receive the sanction of law, must operate uniformly and fairly, and can not lawfully be restricted to shippers in a certain locality who previously receive freights over a certain other favored associate carrier. Alabama, etc., R. Co. *v.* Railroad Comm., 86 Miss. 667, 38 So. 356. Affirmed 203 U. S. 496, 51 L. Ed. 289, 27 S. Ct. 163.

A true rebilling rate is one in which goods received in unbroken car load lots over one line of railway can be rebilled over the same or another line, completing one continuous trip, simply changing the consignee, and altering the destination of

to discriminate in freight rates, provided the circumstances are not such as to make such discrimination unjust and unreasonable, and that one complaining of such discrimination is required to show that it is unjust and unreasonable.[72]

§ 97. Standard Measure of Uniformity in Rates.—To procure uniformity in the rates of carriers, there must be a standard measurement, and the only standard measure possible in order to insure absolute uniformity is money.[73]

§ 98. Power to Prohibit Preferences and Discriminations.—A state acting through its legislature may prohibit a common carrier from giving preferences and from making discriminations either in its charges or facilities. This is a valid exercise of the police power.[74] But in exercising this power the legislature must act within constitutional limitations,[75] and the provisions of the prohibiting statute must be certain.[76] Power is frequently conferred upon

the identical shipment, without unloading. Alabama, etc., R. Co. *v.* Railroad Comm., 86 Miss. 667, 38 So. 356, affirmed in 203 U. S. 496, 51 L. Ed. 289, 27 S. Ct. 163.

A so-called "rebilling rate" adopted by a railroad, which is not applied to consignments arriving over all connecting lines, but is only available to those receiving freight over associate lines, and under which freight reconsigned over the rebilling road does not complete one continuous trip without rehandling, and is not necessarily the identical shipment originally consigned, there being a custom of granting dealers handling freight over the associate line the privilege within ninety days from the date of their "expense bills," or receipts showing the amount of freight received over such line, of shipping an equal amount of freight over the rebilling line at the rate adopted, is not a true rebilling rate. Alabama, etc., R. Co. *v.* Railroad Comm., 86 Miss. 667, 38 So. 356, affirmed in 203 U. S. 496, 51 L. Ed. 289, 27 S. Ct. 163.

72. Discrimination in freight rates permissible if not unjust and unreasonable.—Railroad Comm. *v.* Weld, 96 Tex. 394, 73 S. W. 529, reversing 68 S. W. 1117; Houston, etc., R. Co. *v.* Rust, 58 Tex. 98.

73. Only standard measure of uniformity possible is money.—State *v.* Union Pac. R. Co., 87 Neb. 29, 126 N. W. 859.

"If a railway company can adopt the principle of barter and receive in return for its service specific articles the value of which may vary from day to day, and often may be uncertain, the magnitude of the task of ascertainment of the value of each article alone would render the regulation of rates, so as to prevent discrimination, absolutely impossible." State *v.* Union Pac. R. Co., 87 Neb. 29, 126 N. W. 859.

74. Statute prohibiting discriminations an exercise of police power.—The Kentucky statute, St. 1903, §§ 818, 819, prohibiting discriminations by common carriers and providing penalties therefor, was but a further exercise of the state's police power to regulate carriers and designed to provide a means of compelling obedience to the mandatory provisions of Const., § 213, relating to the same subject. Louisville, etc., R. Co. *v.* Central Stock Yards Co., 30 Ky. L. Rep. 18, 97 S. W. 778.

Power of legislature to prohibit free transportation.—The Nebraska statute, Laws 1907, p. 342, c. 93, prohibiting the issuance acceptance, and use of free transportation, is within the power of the legislature to regulate the business of common carriers by preventing unjust discrimination. State *v.* Martyn, 82 Neb. 225, 117 N. W. 719.

Power of legislature to prohibit unjust discriminations in fixing joint rates.—The Iowa statute, Acts 23d Gen. Assem., c. 17, § 1, providing that unjust discriminations made by railroad companies in fixing joint rates shall be punished under Acts 22d Gen. Assem., c. 28, is constitutional. Blair *v.* Sioux, etc., R. Co. (Iowa), 73 N. W. 1053.

The state may supervise a carrier's branch roads built by it for lumbermen, and thereby prevent discrimination. Detroit, etc., R. Co. *v.* Michigan R. Comm., 171 Mich. 325, 137 N. W. 329.

75. Power of legislature restrained to a prohibition of unjust discriminations.—The Illinois statute, act July 1, 1871, making any discrimination by railroad companies in their charges for freight a penal offense, and providing for a forfeiture of all their franchises for any willful violation of the act, without any other penalty for the first offense, violates the provision of Const., art. 11, § 15, that "the general assembly shall pass laws to correct abuses and prevent unjust discrimination and extortion in the rates of freight and passenger tariffs on the different roads in the state, and enforce such laws by adequate penalties, to the extent, if necessary for that purpose, of forfeiture of their property and franchises." The power of the legislature is, by implication, restrained to a prohibition of those discriminations which are unjust. Chicago, etc., R. Co. *v.* People, 67 Ill. 11, 16 Am. Rep. 599.

76. Statute void for uncertainty.—The Kentucky statute, § 818, providing that it shall be unlawful for any corporation to make or give "any undue or unreasonable

corporation or railroad commissions to make and enforce such regulations as may be necessary to prevent unjust or unreasonable discriminations by carriers, or to correct charges made by a carrier which are unjustly discriminatory.[77] Certain municipal ordinances prohibiting discrimination by carriers have been held valid.[78]

preference or advantage" to any particular person or locality, or any particular description of traffic, in the transportation of a like kind of traffic, is void for uncertainty. Commonwealth *v.* Louisville, etc., R. Co., 20 Ky. L. Rep. 491, 46 S. W. 700.

77. **Power conferred upon corporation or railroad commissions.—The railroad commission of Georgia,** under the authority given by Civ. Code 1895, § 2189, to make such reasonable rules as may be necessary to prevent unjust discrimination in transportation of freight, has power to promulgate a rule requiring railroad companies to afford all persons equal facilities in the transportation of freight, without unjust discrimination. Augusta Brokerage Co. *v.* Central, etc., R. Co., 121 Ga. 48, 48 S. E. 714.

Under the Railroad Commission Act of 1907, the commission held to have authority to declare as an unlawful discrimination a course of conduct of a company with relation to connecting lines. Wadley Southern R. Co. *v.* State, 137 Ga. 497, 73 S. E. 741.

The Mississippi statute.—Code 1892, § 4297, authorizes the railroad commission to determine all complaints made of any tariff of rates made by any railroad, or fixed or approved by the commission, on the ground that the charges are unjust or discriminatory, and provides that when, by investigation, the commission is satisfied of the justice of the complaint, it shall give notice of any change deemed proper, and require compliance with the order. Held, that the commission had power to abolish a condition precedent to the enjoyment of a so-called "rebilling rate," voluntarily established by a railroad, restricting the rate to the exclusive benefit of those who had received previous and equal shipments of freight over an associated line connecting at one terminus of the road, and to convert the rate into an open or flat rate, so that all dealers handling grain in car load lots could enjoy the rate then in force between the termini. Alabama, etc., R. Co. *v.* Railroad Comm., 86 Miss. 667, 38 So. 356, affirmed in 203 U. S. 496, 51 L. Ed. 289, 27 S. Ct. 163.

The Constitution of Oklahoma, art. 9, § 18, providing that the state corporation commission shall require carriers to establish and maintain such public facilities as may be reasonable, and from time to time shall make and enforce such requirements and regulations as may be necessary to prevent unjust or unreasonable discrimination in favor of any person, locality, etc., in the matter of car service or efficiency of transportation, does not give such commission power to require a carrier at its own expense to provide such equal facilities between private persons or corporations as to overcome or equalize disadvantages caused by dissimilarity of location. St. Louis, etc., R. Co. *v.* State, 27 Okla. 426, 112 Pac. 1121.

The Railroad Commission Law of Oregon (Laws 1907), p. 70, c. 53, § 11), makes the term "railroad" as used therein include all corporations which operate by electric power any interurban railroad, etc. Section 28 authorizes the railroad commission, upon complaint of any municipality that fares are unreasonable, or discriminatory, to investigate and order just and reasonable fares, upon finding that those complained of are unreasonable or unjustly discriminatory. Section 48 makes it unlawful to charge smaller compensation to persons furnishing part of the facilities than to other persons. Section 49 makes the giving of an unreasonable preference, or the subjecting of any person to an unreasonable prejudice, an unjust discrimination. Section 59 requires the act to be liberally construed to attain the public welfare and substantial justice between passengers and railroads. Section 61 makes the duties of railroads the same as at common law, and the remedies against them the same, except where otherwise provided, and makes the provisions of the act cumulative. Held, in view of § 61, that the railroad commission could correct charges made by an electric railroad company which were unjustly discriminatory as to a locality, upon complaint of a town, independent of Laws 1909, p. 158, c. 97, making the provisions of the railroad commission law applicable to any locality. Portland, etc., R. Co. *v.* Railroad Comm., 56 Ore. 468, 105 Pac. 709, rehearing denied 109 Pac. 273.

78. **The fact that an ordinance requires an omnibus driver to carry any person tendering himself as a passenger,** whether the driver desires to carry him or not, does not render it invalid. Atlantic City *v.* Brown, 72 N. J. L. 207, 62 Atl. 428.

An ordinance requiring the driver of an omnibus under all circumstances to accept a person tendering himself as a passenger was held not wholly void, but only so far as it imposed the penalty prescribed therein against those whose refusal to accept a person who offered himself as a passenger was justified by the circumstances under which the refusal occurred. Atlantic City *v.* Brown, 72 N. J. L. 207, 62 Atl. 428.

An ordinance making it unlawful for a

§ 99. Power of Legislature to Permit Discrimination.—A state constitution prohibiting undue or unreasonable discrimination in charges or facilities for the transportation of passengers within the state takes from the legislature the power of abolishing this rule as applied to railroad companies.[79] But it has been held that a constitution providing that "transportation of freight and passengers by railroad, steamboat, or other common carrier shall be so regulated by general law as to prevent unjust discrimination," authorizes the legislature to prescribe other circumstances and conditions than those prescribed in the constitution in which carriers may discriminate in respect to charges for transportation, being a recognition of the justice of authorizing discrimination deemed just.[80]

§ 100. Construction of Constitutional and Statutory Enactments and Commission Orders Forbidding Preferences or Discriminations.—Many of the peculiar provisions of constitutional and statutory enactments and commission orders forbidding preferences or discriminations by carriers have received judicial interpretation. The courts have been called upon to construe such enactments or orders forbidding unjust discrimination,[81] forbidding unequal preferences,[82] forbidding unjust or unreasonable discriminations in charges,[83] requiring railroads to give reasonable and equal terms, facilities and

driver of a public conveyance to refuse to convey any passenger in Atlantic City is a reasonable exercise of power. Atlantic City *v.* Fonsler, 70 N. J. L. 125, 56 Atl. 119.

79. **Power of legislature to permit discrimination.**—Atchison, etc., R. Co. *v.* Denver, etc., R. Co., 110 U. S. 667, 674, 28 L. Ed. 291, 4 S. Ct. 185 (construing Colorado constitution).

80. Louisville, etc., R. Co. *v.* Commonwealth (Ky.), 46 S. W. 702, construing Constitution of Kentucky, §§ 196, 215.

81. **Statute applicable only to transportation "between points within the state."**—The Texas statute, Rev. St. 1895, art. 4575, providing that, if any railroad subject to the act unjustly discriminates against a person, it shall be liable to the one injured thereby for a certain penalty, is not applicable to discriminations as to the delivery of freight shipped from another state; art. 4580 providing that the act shall apply to and affect only the transportation of freight and cars "between points within the state." Judgment (Civ. App.) 42 S. W. 362, affirmed. Fielder *v.* Missouri, etc., R. Co., 92 Tex. 176, 46 S. W. 633.

Existing contracts, fairly made, not abrogated.—The Illinois statute, Act July 1, 1873, prohibiting extortion and unjust discrimination by railroads, was not intended to interfere with, or abrogate, existing contracts for the carriage of goods fairly made prior to its passage. Chicago, etc., R. Co. *v.* Chicago, etc., Coal Co., 79 Ill. 121.

Written application by shippers for cars.—The Nebraska statute, Comp. St. 1909, c. 72, art. 5, relating to rates and unjust discrimination by carriers, was intended to prevent unjust and unlawful discrimination by carriers, and § 1a thereof, providing that all shippers of freight in car load lots shall enter a written application for cars in a book kept for that purpose subject to public inspection by a person in charge of the carrier's business at a shipping point, stating the number of cars desired, when and where desired, etc., provides a reasonable method of preserving written evidence of the fact that cars were ordered by the shipper for the transportation of his goods, the date of his order, and the time when the cars were to be furnished. Anderson *v.* Chicago, etc., R. Co., 88 Neb. 430, 129 N. W. 1008.

82. **Carrier required to build spur to accommodate grain elevator.**—Under the Minnesota statute, Laws 1887, c. 10, § 2, subd. b, forbidding carriers to give unequal preferences, a railway company is obliged to give equal facilities for shipping grain to all persons who in good faith erect, or desire to erect, ware-houses at any station; and if it refuse a request for an elevator site on a right of way such as it grants to others, and the warehouseman buys land adjoining, and builds his elevator thereon, the company can not refuse to build a spur on its land to accommodate his business. Farwell Farmers' Warehouse Ass'n *v.* Minneapolis, etc., R. Co., 55 Minn. 8, 56 N. W. 248.

83. **Statute only prohibiting such charges as "unjustly" discriminate.**—The Florida statute authorizing the Florida railroad commission to fix railroad rates does not prohibit discriminating charges, but only prohibits such as "unjustly" discriminate, as well as those that are unreasonable and unjust. Railroad Comm'rs *v.* Florida, etc., R. Co., 64 Fla. 112, 59 So. 385.

While an unjust discrimination will not be permitted under such statute, so as to make the service of a carrier remunerative, yet, in determining whether a charge

accommodations,[84] prohibiting discrimination in freight charges,[85] requiring

is unjustly discriminating, the rights of the carrier are to be considered. Railroad Comm'rs *v.* Florida, etc., R. Co., 64 Fla. 112, 59 S. W. 385.

Statute not prohibiting competition for passenger business.—The Indiana statute, Acts 1905, p. 83, c. 53, regulating carriers, and prohibiting unjust discrimination in rates, construed, and held not to prohibit a railroad company from competing with another company for passenger business. Etter *v.* Cleveland, etc., R. Co., 171 Ind. 581, 86 N. E. 1020.

Prohibition applicable where carriers voluntarily fix joint rates.—The Iowa statute, Acts 22d Gen. Assem., c. 28, prohibiting common carriers from making unjust discriminations in their charges, applies where railroad companies voluntarily fix joint rates. Blair *v.* Sioux, etc., R. Co. (Iowa), 73 N. W. 1053.

Commutation tickets permitted to be sold.—Passenger tickets sold by a carrier at reduced rates, good for a limited time only, held to be commutation tickets within the Indiana statute, Acts 1905, p. 96, c. 53, § 14, prohibiting unjust discrimination in rates, but permitting the sale of commutation tickets. Etter *v.* Cleveland, etc., R. Co., 171 Ind. 581, 86 N. E. 1020.

Tract abutting navigable water on which is a dock, a "facility" for freight and passengers.—A tract of 20 acres acquired by a railroad under Act Cong. March 3, 1875, abutting a navigable water on which is a dock for receiving and discharging freight and passengers and for forwarding through freight and passengers, is a "facility" for freight and passengers within the constitution of Idaho, art. 11, § 6, forbidding undue or unreasonable discrimination. Coeur d'Alene, etc., Transp. Co. *v.* Ferrell, 22 Idaho 752, 128 Pac. 565.

84. Statute requiring railroads to give reasonable and equal terms, facilities and accommodations.—The Vermont statute, Acts 1882, p. 47, No. 36 (V. S. 3902-3904), requiring railroads to give all persons "reasonable and equal terms * * * facilities and accommodations" for the transportation of freight, etc., must be construed in the light of Acts 1882, p. 47, No. 37 (V. S. 3896), authorizing a railroad corporation to establish rates, etc., and, when so done, it requires a railroad corporation to make rates reasonable and equal as required by the common law, and it is but declaratory of the common law defining the rights and obligations of carriers; the words "facilities and accommodations" relating to the incidents of transportation, the word "terms" signifying rates. State *v.* Central Vermont R. Co., 81 Vt. 463, 71 Atl. 194.

85. Compensation required to be equal in amount for equal distances.—The North Carolina statute, Code, § 1966, makes it unlawful for any railroad corporation to charge for the transportation of freight a greater amount "than shall at the same time be charged by it for the transportation of an equal quantity of the same class of freight, transported in the same direction, over any portion of the same railroad of equal distance." Held, to mean that the compensation to be charged shippers respectively for carrying an equal quantity of the same class of freight for each, going in the same direction, must be equal in amount for equal distances, no matter on what part of the road, and although the freight of one shipper is to be transported a different and longer distance than that of the other. Hines *v.* Wilmington, etc., R. Co., 95 N. C. 434, 59 Am. Rep. 250.

When charges must be the same.—The requirement of the constitution of Kentucky, § 215, that the charges shall be the same for receiving, transporting, and handling freight of the same class from and to the same points, "and upon the same conditions," relates to the receiving, loading, unloading, transporting, hauling, delivering, and handling freight, and requires the charges therefor to be the same for all persons alike, except when the freight is transported from and to different points, or is of different classes, or the cost of transporting, including savings by reason of facilities furnished by the shipper, is different. Louisville, etc., R. Co. *v.* Commonwealth (Ky.), 46 S. W. 702.

Unlawful to obtain transportation at a less rate than that established.—Under the direct provisions of the Virginia Code of 1904, § 1294c, cl. 7, it is unlawful, after the freight rate of a railroad company has been authorized and published by the state corporation commission, for any person, by contract or other device, to obtain transportation at a less rate, and any contract for such reduced transportation is void. Carolina, etc., Railway *v.* Clinch Valley Lumber Co., 112 Va. 540, 72 S. E. 116.

A provision in a railroad charter, that "average charges for toll and transportation shall not exceed four cents per ton per mile for freight," construed to permit the company to impose more than four cents per mile on some charges, to discriminate in favor of longer distances, and to fix different charges per mile for different kinds of freight. The adjustment was to be made between the whole road and the entire public who used it. It need not bear equally on each individual. Hersh *v.* Northern Cent. R. Co., 74 Pa. 181.

Word "contemporaneous" construed.—The North Carolina statute, Revisal 1905, § 3749, provides that if any carrier shall collect from any person a greater compensation for transportation of property

transportation of freight of the same class for all persons for the same method of payment,[86] forbidding discrimination in charges as between long and short hauls,[87] prohibiting discrimination in passenger charges,[88] prohibiting issuance of passes, or the furnishing of free transportation,[89] prohibiting discrimination

than it receives from any other for doing a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances, it shall be liable to a fine of a specified sum. Held, that the word "contemporaneous" means a period of time through which shipments of freight are made by one shipper at one rate, and by other shippers at another rate. Hilton Lumber Co. *v.* Atlantic, etc., R. Co., 141 N. C. 171, 53 S. E. 823, 6 L. R. A., N. S., 225.

Discriminatory rate void though agreed to by mistake.—Under the Nebraska statute, Cobbey's Ann. St. 1903, § 10,009, a contract between a railroad company and a shipper to transport merchandise for a less rate than regularly charged to others for similar service is void, though the rate was agreed to by mistake; and an action will not lie against the carrier for breach of the contract if it exacts the regular rate. Judgment 113 N. W. 983, reversed on rehearing. Haurigan *v.* Chicago, etc., R. Co., 80 Neb. 139, 117 N. W. 100; Wentz-Bates Mercantile Co. *v.* Union Pac. R. Co., 85 Neb. 584, 123 N. W. 1085.

86. Under the Kentucky constitution, § 215, requiring all railway companies to transport freight of the same class for all persons for the same method of payment, and Ky. St. 1894, § 817, declaring one failing to do this guilty of unjust discrimination, a contract by a lumber company to carry a party's freight in consideration of a former grant of a right of way for a railroad can not be specifically enforced against a railroad company leasing the right of way and doing the business of a common carrier, since the carrying of the freight free would be a violation of the constitution and statutes. Hurley *v.* Big Sandy, etc., R. Co. (Ky.), 125 S. W. 302.

87. The Missouri statute, Rev. St. 1909, § 3173 prohibiting discrimination in transportation charges as between long and short hauls of the same class of freight on the same road, applies where the transportation is over the same road, but not where the two hauls are over different lines operated by different corporations, though they have common officers. Darlington Lumber Co. *v.* Missouri Pac. R. Co. (Mo.), 147 S. W. 1052.

88. Statute prohibiting unjust discrimination in passenger charges liberally construed.—A statute may be remedial in part and penal in part for purposes of construction, so that the penalty clause of the Montana statute, Rev. Codes, § 4337, making it unlawful for any carrier to transfer a person for a less sum than is charged for a similar ticket of the same class, and making any carrier who shall violate the statute guilty of a misdemeanor, and punishable, etc., should be construed according to the fair import of its terms, with a view to affectuating its object as required by § 8096; but the part prohibiting unjust discrimination in charging for transportation should be liberally construed with a view to carrying out the legislative intention. John *v.* Northern Pac. R. Co., 42 Mont. 18, 111 Pac. 632.

Statute not abrogating system of three cent fares for school children.—The New Jersey Public Utility Law (P. L. 1911, c. 195), § 18, does not abrogate the system of three-cent fares for school children previously maintained by a street railway company; such section applying only to such preferences as are "undue or unreasonable." Public Service R. Co. *v.* Board, 81 N. J. L. (52 Vr.), 363, 80 Atl. 27.

89. To whom carrier may furnish transportation free.—The constitution of Oklahoma, art. 9, § 13, prohibiting railroad or transportation companies from issuing passes, with certain exceptions, does not prohibit a municipal corporation operating a street railway from furnishing transportation free to its policemen, firemen, and United States mail carriers, and half-rate tickets to school children, and free transportation to children under a certain age while traveling with a parent or guardian. Oklahoma *v.* Oklahoma R. Co. (Okla.), 93 Pac. 48.

By such constitutional provision, municipalities are not prohibited, from granting franchises for street railways with conditions contained there in for the carrying of policemen, firemen, United States mail carriers, and children under a certain age free, and for the furnishing to school children of transportation at a reduced rate, and when accepted by the grantee of the franchise, such conditions are valid. Oklahoma *v.* Oklahoma R. Co. (Okla.), 93 Pac. 48.

In Montana, railroad companies may issue free transportation or sell tickets at reduced rates, as the case may require, to its employees and members of their families; to doctors, nurses, and helpers being taken to wrecks; to soldiers and sailors going to or coming from institutions wherein they are kept; to ministers or persons engaged in charitable and religious works; and, by the direct provision of Rev. Codes, § 4369, to members and employees of the railroad commission traveling on private business. § 4394 prohibiting employees of the commission or the board of commissioners from accepting or requesting any pass for themselves or any

in facilities for transportation of freight,[90] prohibiting the giving to any locality any unreasonable preference,[91] prohibiting discrimination between passengers from different localities as to transfer privileges,[92] requiring goods to be forwarded in the order in which they are received,[93] and requiring the carrier to permit tracks to be connected with its track.[94]

other person except as herein otherwise provided. John *v.* Northern Pac. R. Co., 42 Mont. 18, 111 Pac. 632.

Statute not retrospective.—Laws 1909, c. 126, § 2, provides that no carrier shall give any free ticket, pass, or transportation for passengers between points within the state except to certain specified persons. Section 6 authorized the imposition of fines for violation of the act. Defendant leased a railroad, agreeing in the lease to transport stockholders of the lessor to and from their annual and special meetings "free of charge." Plaintiff, a stockholder of the lessor, applied for transportation and was refused. Held, that the issuance of the pass would not be a violation of chapter 126, since it can not be presumed that the legislature intended the act to have a retrospective effect, rendering former valid contracts illegal and void. Emerson *v.* Boston, etc., Railroad, 75 N. H. 427, 75 Atl. 529.

90. Commission rule prohibiting discrimination against shippers and not against commodities.—The rule promulgated by the railroad commission of Georgia that carriers shall afford all persons in the conduct of their interstate business equal facilities in the transportation and delivery of freight, prohibits discrimination against shippers and not against commodities. Central, etc., R. Co. *v.* Augusta Brokerage Co., 122 Ga. 646, 50 S. E. 473, 69 L. R. A. 119.

A siding connection is a "facility for transportation" within the Pennsylvania statute, Act June 4, 1883 (P. L. 72), providing that any undue or unreasonable discrimination by a railroad company in facilities for the transportation of freight shall be unlawful. Minds *v.* Pennsylvania R. Co., 228 Pa. 575, 77 Atl. 909.

Effect of an unexpected rush of business.—The Arkansas statute, Kirby's Dig., § 6804, making it unlawful for carriers to make any preference in furnishing cars, and requiring them to furnish without discrimination sufficient facilities for the carriage of freight, is but declaratory of the common law, making it the duty of carriers to furnish facilities for the transportation of freight offered in the regular course of business, but without requiring them to furnish facilities for an unprecedented rush of business, and a carrier unable to furnish cars for all shippers, by reason of an unexpected rush of business, must furnish such cars as it has to all shippers, without discrimination. St. Louis, etc., R. Co. *v.* Clay Gin Co., 77 Ark. 357, 92 S. W. 531.

91. Statutes forbidding the giving to any locality any unreasonable preference.—The New Jersey Public Utility Law (P. L. 1911, p. 374) is not merely declaratory of the commutation law, but forbids the giving to any locality any unreasonable preference or the subjection of any locality to any prejudice. Pennsylvania R. Co. *v.* Board, 83 N. J. L. 67, 83 Atl. 945.

92. How commission order may be complied with.—An order of a railroad commission requiring an electric railroad to cease an unlawful discrimination between the passengers from one locality and those from another locality by desisting from refusing the latter the same transfer privileges voluntarily accorded to the former may be complied with by giving transfers to all or by desisting entirely from giving transfers, and it is not a positive command to give transfers. Portland R., etc., Co. *v.* Railroad Comm., 56 Ore. 468, 109 Pac. 273, denying rehearing 105 Pac. 709.

93. Phrase "warehouses or depots" embraces entire station.—The Texas statute, Rev. St. 1895, art. 4537, directing railroads receiving goods for transportation into their "warehouses or depots" to forward them in the order in which they are received, and making them liable for losses occasioned by a failure so to do, requires a railroad to forward property received for shipment in the order in which it is received, though merely received on a platform used for handling that kind of property; the phrase "warehouses or depots" embracing the entire station of the road. Hill *v.* St. Louis, etc., R. Co. (Tex. Civ. App.), 75 S. W. 874, reversed St. Louis, etc., R. Co. *v.* Hill, 97 Tex. 506, 80 S. W. 368.

94. Connection required to be permitted only where such privilege had already been granted.—Under the Washington statute, 1 Ballinger's Ann. Codes & St., § 4332, providing that it shall be unlawful for any railroad to discriminate in charges or facilities for transportation, and that every road permitting any one to connect a track with its track for the accommodation of any elevator, shall accord the same right to every other person soliciting it, a railroad company is not required to permit a connection with its track, except where it had already granted such privilege. Northwestern Warehouse Co. *v.* Oregon R., etc., Co., 32 Wash. 218, 73 Pac. 388.

§ 101. Who Are Common Carriers within the Rule Prohibiting Discrimination.—A railway company holding itself out to the public as ready to do switching, which requires it to have its own rails and right of way, and go upon the rails and right of way of another company, with which it has no express contract relating either to compensation for switching or to track rights, is a common carrier, and as such must switch cars without discrimination against a disfavored shipper.[95] A railroad, which serves business houses located along a spur track by delivering to them cars of freight and cars to be freighted and shipped, is a common carrier with respect to the use it makes of the track, and is, as such, bound to treat the houses located along the track without discrimination, and can not discontinue its service as to one and continue it as to others.[96]

§ 102. What Constitutes an Unlawful Preference or Discrimination.—What is an unlawful preference or discrimination is, in each particular case, a mixed question of law and fact, and must be ascertained by applying to the facts in the case the principles of the common law, or the peculiar provisions of the constitutional or statutory enactment or commission order governing the case. Guided by this basic rule of interpretation the courts have in many cases determined whether an unlawful preference was shown,[97] or have held that certain facts in evidence constituted,[98] or that certain facts did not consti-

95. **Who are common carriers within the rule prohibiting discrimination.**—Larabee Flour Mills Co. *v.* Missouri Pac. R. Co., 74 Kan. 808, 88 Pac. 72.

96. Agee & Co. *v.* Louisville, etc., R. Co., 142 Ala. 344, 37 So. 680.

97. **The act of a carrier in hauling goods for some shippers without prepayment of freight,** and not for others engaged in the same business, does not constitute a violation of the Michigan statute, Laws 1907, No. 312, § 17, making it unlawful for a common carrier to give any preference to any shipper or subject him to any undue or unreasonable disadvantage or prejudice. Brown, etc., Coal Co. *v.* Grand Trunk R. System, 159 Mich. 565, 124 N. W. 528.

Refusing to furnish cars for loading on station track.—Defendant railroad company, which had previously permitted the loading of cars with coal on its side track at a station, made a regulation by which it withdrew such permission, and it thereafter refused to furnish cars to be so loaded to plaintiff or to any other shipper. During such time, however, certain mine owners, who through agreements with the company had constructed private spur tracks to their mines, were furnished cars, some of which they loaded from wagons while standing on such spur tracks before the development of the mines and the construction of tipples for loading. Held, that the furnishing of cars for such purpose, while refusing to furnish cars for loading on the station track to plaintiff, who had constructed no spur track, did not constitute the giving of an undue preference, either under the common law or the statute of Arkansas (Laws 1899, p. 89), prohibiting the giving of any preference in the furnishing of cars. Judgment 118 Fed. 169, affirmed. Harp *v.* Choctaw, etc., R. Co., 61 C. C. A. 405, 125 Fed. 445.

98. **Less charge for shipping to one consignee than to others.**—Where a railroad makes a less charge for shipping to a certain consignee than to others in the same city, there is an unjust discrimination. St. Louis, etc., R. Co. *v.* Hill, 14 Ill. App. 579.

Contract to repay shipper a portion of charge paid by him.—A railroad company whose line extends to a point of intersection with a canal of the state can not make a valid contract to repay to a shipper a portion of the freight paid by him, it being the regular rate posted by the company and received from other shippers; such contract being prohibited by the Ohio statute, Rev. St., §§ 3366, 3367, to prevent discrimination in rates of carriage. Baltimore, etc., R. Co. *v.* Diamond Coal Co., 61 O. St. 242, 55 N. E. 616.

Special rebate not extended to other shippers.—A contract by a railway company with a shipper, by which he is to ship his grain at the regular rates paid by all shippers, and then receive a special rebate, extended to no other shipper, or to but one other shipper, is contrary to §§ 2, 3 of the Illinois act of 1873, against extortion and unjust discrimination (2 Starr & C. Ann. St., c. 114, pars. 146, 147), and is void. Indianapolis, etc., R. Co. *v.* Ervin, 118 Ill. 250, 8 N. E. 862, 59 Am. Rep. 369.

Discrimination against local purchasers.—Where a common carrier allowed the purchasers of hogs to ship them to a central point of the state and from there to ship them to foreign states, charging them only the interstate rate which was lower than the local rate, and these hogs came

into competition with those of purchasers making only local shipments, there was an unjust discrimination against the local purchasers within the purview of Iowa statute, Code, §§ 2124, 2125, respectively, providing that no common carrier shall give any preference to any particular person or persons. Central Trust Co. *v.* Chicago, etc., R. Co. (Iowa), 135 N. W. 721.

But under these sections it is not a discrimination against local purchasers for a carrier to charge persons purchasing hogs for interstate shipment the lower interstate rate, though allowing them to assemble the hogs to a central point and from there reship them to foreign states; such hogs not coming into competition with local shipments. Central Trust Co. *v.* Chicago, etc., R. Co. (Iowa), 135 N. W. 721.

Contract to furnish transportation in payment for advertising.—A contract by a railroad company to furnish to the proprietors of a newspaper, as requested, transportation at the statutory rate under certain limitations and restrictions not required in ordinary tickets, in payment for advertising to be furnished "at agreed rates," which rates are not specified in the contract, but are to be settled by the parties themselves by another agreement contravenes the intent and purposes of the Nebraska statutes prohibiting unjust discriminations, which seek to preserve to every individual an equal right to the transportation service of carriers, since, if a proprietor of one newspaper may be selected by a carrier to receive transportation for advertising services, while the proprietor of another can not avail himself at his own option of the privileges of such a contract, there would be no uniformity of charge, and is violative of railway commission Act (Laws 1907, c. 90), § 14, and Cobbey's Ann. St. 1909, § 10,662, prohibiting common carriers from charging one person a greater or less compensation than another for the same service and from charging other than the rates fixed and established. State *v.* Union Pac. R. Co., 87 Neb. 29, 126 N. W. 859.

Discrimination between passengers in amount of fare.—Under the Georgia statute Civ. Code, § 2188, prohibiting discriminations by carriers, a railroad company can not lawfully demand of one passenger more fare for his transportation from one station to another on its line than it is in the habit, under like conditions and circumstances, of charging others for the same service. Phillips *v.* Southern R. Co., 114 Ga. 284, 40 S. E. 268.

Discrimination in charges in favor of certain towns.—The fare charged by an electric railroad company from the city limits of a city having more than 50,000 population to certain suburban towns was fifteen cents, without transfer privileges, while that charged upon another division to certain other towns, which were a less distance from the city limits, was ten cents, with transfer privileges. Held, that there was an unjust discrimination in charges in favor of the towns on the latter division, which the railroad commission properly corrected. Portland R., etc., Co. *v.* Railroad Comm., 57 Ore. 126, 105 Pac. 715.

Under the Oregon Railroad Commission Law (Laws 1907, p. 82, c. 53, § 28) authorizing the Railroad commission, upon finding on investigation upon the complaint of any municipality, that fares are unreasonable or discriminatory, to substitute just and reasonable fares therefor, fares may be changed if they are unjustly discriminatory, though not unreasonable for the service performed, so that, where an electric railroad company voluntarily charged five cent fare, with transfer privileges, from the limits of a city of over 50,000 population, within which the fare was limited to five cents by statute, to a certain town, it thereby established the value of similar service on its other lines, and it was an unjust discrimination to charge a ten cent fare on a different line to another town an equal distance from the limits of such city, and that the population outside the city limits on the five cent lines was denser than on the ten cent lines, or that the fares on the former lines were limited to five cents by a contract with the company's predecessor, or that the physical conditions at the point on one of the five cent lines where it crossed the city limits made it impossible for passengers to leave the cars there, was immaterial. Portland R., etc., Co. *v.* Railroad Comm., 56 Ore. 468, 105 Pac. 709, rehearing denied 109 Pac. 273.

Inequality in charges between points in state and a point in another state.—A charge of a greater sum by a railroad company for freight to a point in another state from a point in Illinois than from another point in Illinois, more distant, is an unjust discrimination, within the Illinois statute, Rev. St. 1874, p. 817, § 87, prohibiting unjust discrimination by railroad companies in rates or charges for the transportation of passengers or freight on railroads within the state, where it is not shown that such inequality in the charges is all for carriage entirely beyond the limits of Illinois; the presumption being that the excess in charge for the less distance affects every part of the line of carriage between the more distant point and the state line, proportionally with the balance of the line. Wabash, etc., R. Co. *v.* People, 105 Ill. 236.

One car load of lumber is of "like quantity" with another, within the Texas statute forbidding railroad companies to discriminate in their freight charges, though the two car loads are of different weight and dimensions. New York,

tute,[99] an unlawful discrimination. In determining what constitutes unlawful preference or discrimination courts have been required to interpret peculiar phraseol-

etc., R. Co. *v.* Gallaher, 79 Tex. 685, 15 S. W. 694.

Rebilling rate.—Evidence that the effect of a rebilling rate adopted by a complainant railroad was to enable a dealer in Vicksburg, the terminus of its road reached by an associate line, to ship a barge load of grain received there, over complainant's road, at the rate of three and one-half cents, under the guise of rebilling, while a barge load of grain received there by a dealer in Meridian, the other terminus of complainant's road, could only be shipped over the same upon payment of the local rate of ten cents per one hundred pounds, showed an unjust discrimination in favor of those receiving freight over the associate line. Alabama, etc., R. Co. *v.* Railroad Comm., 86 Miss. 667, 38 So. 356, affirmed in 203 U. S. 496, 51 L. Ed. 289, 27 S. Ct. 163.

Discrimination in joint rates.—A petition alleging that two railroad companies voluntarily established joint rates, and charged plaintiff a rate in excess of the same joint rates on like shipments, at the same time, which were made to other points, for like distances, over their lines of road, makes a prima facie case, showing that they have violated the Iowa statute, Acts 22d Gen. Assem., c. 28, as to discrimination. Blair *v.* Sioux, etc., R. Co. (Iowa), 73 N. W. 1053.

99. Different rates for different kinds of coal.—The fact that a railroad company charges a higher rate for carrying ordinary commercial coal than it does for carrying an inferior quality of coal, which is used by railroads exclusively, is shipped on the cars of other companies, and is mined and shipped during months when there is little demand for ordinary coal, does not show unjust discrimination. Louisville, etc., R. Co. *v.* Crown Coal Co., 43 Ill. App. 228.

Competitive rate less than rate of competing carrier.—In proceedings under the Ohio statute, Act April 2, 1906 (98 Ohio Laws, p. 342), regulating carriers and creating a board of railroad commissioners, competition is an element to be considered in determining whether rates are reasonable and just; and the fact that a competitive rate is less than the rate of the other competing carrier does not constitute unreasonable discrimination. Railroad Comm. *v.* Hocking Valley R. Co., 82 O. St. 25, 91 N. E. 865.

Contract to pay back a rebate.—A contract by a railroad company in consideration of the shipment over its road of a large lot of corn, to pay back a rebate in freight, does not violate the Illinois statute to prevent unjust discriminations in freight charges by railroad carriers, where such contract is to carry the grain at the customary rates. Toledo, etc., R. Co. *v.* Elliott, 76 Ill. 67.

Agreement not intended as a device to pay a rebate.—The certificate of incorporation of the Chicago Junction Railways & Union Stock-Yards Company authorized it to hold shares of stock in an Illinois corporation, a transit company, which owned stock yards in Chicago, and a belt line which connected all the railroads entering the city. The transit company, most of whose stock was owned by the junction company, depended on the permanent market for cattle created by the presence of slaughtering and packing establishments. Some of the packers, known as "nonassociate," contemplated a removal from the vicinity of the stock yards. Other of the packers, known as "associate," purchased a large tract of land at a distance from Chicago, and made preparations to remove their plants and establish stock yards of their own. The junction company entered into a contract with the associate packers, by which it was to give them a large amount of interest-bearing income bonds in consideration of a conveyance of the land purchased, and an agreement not to remove their plants, etc. Held, on a bill to restrain the execution of the contract, that trackage charges paid by the railroad companies to the transit company for the use of the latter's tracks were not repaid by the packers to the railroads, and that the agreement was not intended as a device to pay a rebate to the associate packers in violation of the Illinois statute which prohibits discrimination in railroad rates. Willoughby *v.* Chicago Junction, etc., Stock Yards Co., 50 N. J. Eq. 656, 25 Atl. 277.

Refusal to carry goods without prepayment of freight.—Plaintiff, a shipper, upon a showing that a carrier had a credit list consisting of certain customers, some of whom were competitors of plaintiff, for which it carried goods without requiring a prepayment of freight and that it had accorded this privilege to plaintiff over a year, was not entitled to compel the carrier to haul his goods without prepayment of freight on the ground that refusal to do so constituted discrimination. Brown, etc., Coal Co. *v.* Grand Trunk R. System, 159 Mich. 565, 124 N. W. 528.

A failure to furnish cars by a railroad company for the transportation of property is not such unjust discrimination as is contemplated by the Iowa statute, Acts 17th Gen. Assem., c. 77, § 13. Bond *v.* Wabash, etc., R. Co., 67 Iowa 712, 25 N. W. 892.

A carrier's special contract to furnish a shipper a specified number of cars at specific times and places is not invalid, as

ogy of many constitutional provisions and statutes. Among the enactments that have thus received judicial interpretation are provisions requiring carriers to furnish without discrimination facilities for the transportation of freight,[1] re-

contrary to public policy and discriminatory. Oregon R., etc., Co. *v.* Dumas, 104 C. C. A. 641, 181 Fed. 781.

Refusal to construct side track and furnish cars.—A complaint against a carrier for unjust discrimination, which merely alleges that defendant refused to lease its land to plaintiff that he might build a warehouse thereon; that plaintiff afterwards erected warehouses not on its land, but near defendant's side track, and leased them to a co-operative association, to be used for the purpose of handling and shipping grain; that said lessee bought wheat, and put it in the warehouses for shipment; that thereupon plaintiff demanded of defendant that it construct a side track to said houses, which demand was refused; that he then demanded that cars be furnished in which to ship the grain, which demand was also refused; and that defendant also refused to make and maintain connections with its side track for the purpose of handling and shipping grain therefrom, and has refused to recognize plaintiff's houses as grain houses for any purpose, and refused to allow the association to transact its business through plaintiff's houses—does not state a cause of action. Myers *v.* Chicago, etc., R. Co., 50 Minn. 371, 52 N. W. 962.

Refusing to furnish same facilities where conditions are different.—The difference between the business of persons receiving and shipping dead freight over a spur track upon which their premises abut, and that of a company whose premises are forty feet away from the track, and which seeks to receive and ship live stock, is so great that it is not unjust discrimination to refuse to furnish the same facilities to the latter as to the former. Butchers', etc., Stock Yards Co. *v.* Louisville, etc., R. Co., 14 C. C. A. 290, 67 Fed. 35.

Refusal to construct side track to an elevator located off right of way.—The fact that a railroad permitted the location of an elevator, maintained by a private corporation, on the industrial track on the right of way, does not render its refusal to construct, at its own expense, a side track to a competing elevator, located off the right of way, an unlawful discrimination, within the Constitution of Oklahoma, art. 9, § 18 (Bunn's Ed., § 222). Chicago, etc., R. Co. *v.* State, 23 Okla. 94, 99 Pac. 901.

Furnishing cars to shippers owning spur tracks in preference to those not owning tracks.—Where all shippers in the same situation at a given point on a railroad are treated alike in the matter of furnishing coal cars, the mere fact that shippers who own spur tracks are furnished cars in preference to those who do not own tracks, but require the use of the railroad's side tracks, which are needed by the railroad to conduct its general business and serve the public, is not a discrimination, within the constitution of Arkansas, art. 17, § 3, providing that all persons shall have an equal right to transportation on railroads, and forbidding undue or unreasonable discrimination. Choctaw, etc., R. Co. *v.* State, 73 Ark. 373, 84 S. W. 502, 92 S. W. 26.

Refusal to pay cost of compressing cotton at a certain plant.—A carrier made no distinction in rate between compressed and uncompressed cotton, but included in its rate the cost of compression, and uncompressed cotton in a designated district was compressed at a distant place at the carrier's expense at a plant in which it was interested. A plant existed in the designated district, but the carrier declined to pay the cost of compression there, though such cost was not greater than that paid at the other plant. It accorded to both places the same privilege as to rebilling and through rating. Held, that the carrier was not guilty of discrimination, in violation of the Alabama statute, Act Feb. 23, 1907 (Laws 1907, pp. 123, 129), §§ 17, 32. Railroad Comm. *v.* Central, etc., R. Co., 159 Ala. 550, 49 So. 237.

The fact that a railroad company, by agreement with a manufacturing concern, made previous to the latter's organization, which agreement was an inducement to its organization, charges it less per ton for the transportation from a certain point of coal to be used for manufacturing purposes than it charges a dealer in coal for like transportation, does not constitute an "undue or unreasonable discrimination," within the meaning of the Pennsylvania statute, Act June 4, 1883, prohibiting such discrimination, since the charges are not for a like service from the same place, upon like conditions, and under similar circumstances. Hoover *v.* Pennsylvania R. Co., 156 Pa. 220, 27 Atl. 282, 22 L. R. A. 263, 36 Am. St. Rep. 43.

1. Number of cars furnished.—On the issue whether a carrier discriminated against plaintiff and in favor of a rival shipper, the evidence showed that the shippers were given substantially the same facilities for transportation; that in one month plaintiff was given five cars and the rival shipper six; that in another month plaintiff received ten cars, while the rival shipper received seven; that in another month each received seventeen cars. It was also shown that from the 3d to the 10th of the last month the

quiring railroad corporations to give to all persons reasonable and equal terms, facilities and accommodations,[2] providing that no common carrier shall receive from any person any greater compensation than it charges any other person for a like and contemporaneous service,[3] prohibiting the giving of unreasonable preferences and imposing unreasonable disadvantages on any particular person, locality, or any description of traffic over any person, or any particular description of traffic similarly situated,[4] providing that no discrimination in charges or facilities for transportation shall be made between places or persons or in the facilities for the transportation of the same classes of freight or passen-

plaintiff received only three cars, while his rival received six. Held, insufficient to show a discrimination in violation of the Arkansas statute, Kirby's Dig., § 6804, making it the duty of carriers to furnish without discrimination facilities for the transportation of freight. St. Louis, etc., R. Co. *v.* Clay Gin Co., 77 Ark. 357, 92 S. W. 531.

Commission rule prohibiting discrimination against shippers not against commodities.—The rule promulgated by the railroad commission of Georgia, that carriers, "in the conduct of their intrastate business, shall afford to all persons equal facilities in the transportation and delivery of freight," prohibits discrimination against shippers, not against commodities. As to issuing through bills of lading, or furnishing its cars to connecting carriers, in order that shipments may be carried to ultimate destination without reloading at terminal points, a carrier may discriminate against cotton seed, provided all shippers of that commodity are treated alike. That such discrimination is dictated by the business interests of the carrier, and really affects but a single shipper, because he is the only person at a terminal point who is engaged in shipping cotton seed out of the state, can not alter the matter. Central, etc., R. Co. *v.* Augusta Brokerage Co., 122 Ga. 646, 50 S. E. 473, 69 L. R. A. 119.

2. Words "reasonable and equal terms" construed.—A., a student over twenty years of age, paid to a railroad corporation the regular price of a season ticket entitling him to transportation over its road, between two stations, for three months. The directors of the corporation had authorized its president, upon special application and in his discretion, to allow season tickets to be sold to students over twenty years of age, for the same term, between the same stations, for one-half the price A. paid, and such tickets had been sold. Held, in an action by A. to recover of the corporation one-half of the amount paid by him, that there was no violation of the Massachusetts statute, St. 1874, c. 372, § 138, which requires railroad corporations to give to all persons reasonable and equal terms, facilities, and accommodations; that the requirement of this section, which is re-enacted from St. 1867, c. 339, is to be construed in the light of the decision in Fitchburg R. Co. *v.* Gage (Mass.), 12 Gray 393, and the words "reasonable and equal terms" are not to be taken as used in a strict literal sense; and that the action could not be maintained. Spofford *v.* Boston, etc., Railroad, 128 Mass. 326.

Carrying coal for a shipper for less than is charged others.—The mere fact that a carrier discriminated in favor of a shipper of coal by carrying coal for it between designated points at fifty cents less per ton than it granted to any other shipper does not show a violation of the Vermont statute, Acts 1882, p. 47, No. 36 (V. S. 3902-3904), requiring carriers to give all persons reasonable and equal terms and accommodations, for the rates charged may have been reasonable and equal within the law, though less in amount. State *v.* Central Vermont R. Co., 81 Vt. 463, 71 Atl. 194.

3. Issuing passes.—Under the North Carolina statute, Laws 1891, c. 320, § 4, providing that no common carrier shall receive from any person any greater compensation than it charges any other person for a like and contemporaneous service, it is unlawful for a railroad company to issue passes, and transport people thereon free of charge. State *v.* Southern R. Co., 122 N. C. 1052, 30 S. E. 133, 41 L. R. A. 246.

4. Refusing to receive packages of money between certain hours.—The South Dakota statute, Rev. Pol. Code S. D., § 437, prohibits any common carrier from giving unreasonable preferences and imposing unreasonable disadvantages on any particular person, locality, or any description of traffic over any person, or any particular description of traffic similarly situated. Held, that rules and practice of an express company to refuse to receive packages of money on the day preceding that on which the only trains carrying express matter start from places of tender for the destination of the packages between 6:29 and 8 a. m. do not violate the section, where the rules and practice are universal, apply to all cities and towns except certain large cities, and apply to 40 cities and towns in South Dakota. Decree 150 Fed. 391, reversed. Platt *v.* LeCocq, 85 C. C. A. 621, 158 Fed. 723, 15 L. R. A., N. S., 558.

gers,[5] prohibiting railroad companies from making any departure from their published freight rates except to aid in the development of industrial enterprises in the state,[6] prohibiting preferential contracts for the receipt, delivery, or transportation of freight,[7] prohibiting discrimination between localities, or charging a greater rate for a shorter haul,[8] providing that rates of fare shall be the same for all persons between the same points,[9] and providing that all individuals shall have equal rights to be transported over any railroad in the state, and making it unlawful for any common carrier to charge any person for

5. **Rates prescribed held not to constitute an unjust discrimination.**—The constitution of Washington, art. 12, § 15, which provides that no discrimination in charges or facilities for transportation shall be made by any railroad between places or persons or in the facilities for the transportation of the same classes of freight or passengers, is not violated by rates, ordered by the railroad commission, which do not charge any persons or classes of persons a greater or less rate for the same service than is charged all other persons similarly situated, and which have a like effect upon all who are similarly situated. To constitute an unjust discrimination, the company would have to receive a greater or less rate from one person than another to whom it furnished a like service under like conditions, either directly or indirectly. Puget Sound Elect. Railway *v.* Railroad Comm., 65 Wash. 75, 117 Pac. 739.

6. **Rebate on coal shipped to a miller.**—Under the Alabama statute, Code 1886, § 1161, which prohibits railroad companies from making any departure from their published freight rates except to aid in the development of industrial enterprises in the state, an agreement to allow a rebate on coal shipped to a miller, and used by him in manufacturing corn into meal, is valid. Louisville, etc., R. Co. *v.* Fulgham, 91 Ala. 555, 8 So. 803.

7. **A contract by which defendant railroad company agreed not to establish any other stockyards in a certain city,** but to deliver all live stock shipped over its roads and consigned to such city at stockyards controlled by the B. Company, etc., was void, as in violation of the constitution of Kentucky, § 214, prohibitng preferential contracts for the receipt, delivery, or transportation of freight, and as against public policy. Louisville, etc., R. Co. *v.* Central Stock Yards Co., 30 Ky. L. Rep. 18, 97 S. W. 778.

Contract for transportation of freight at less than regular rate.—The constitution of Kentucky, § 214, provides that no railway shall make any preferential contract for the transportation of freight. Ky. St., § 817 (Russell's St., § 5354), makes it an offense for any railroad company to charge a greater or less compensation for any service rendered to one person in the transportation of passengers or property than it charges any other person for doing a like service. Held, that a contract with a railroad company for the transportation of freight between two points in this state at a rate less than the regular rate of such company is contrary to public policy and void, although the shipper was ignorant of the preference. Chesapeake, etc., R. Co. *v.* Maysville Brick Co. (Ky.), 116 S. W. 1183.

8. **Discrimination between localities, or charging a greater rate for a shorter haul.**—Where a railroad company charges higher rates for carrying freight a less distance than its published rates for carrying it a greater distance in the same direction over the same road, it violates the Missouri statute, Rev. St. 1899, §§ 1133, 1134, prohibiting discrimination between localities, or charging a greater rate for a shorter haul, though it does not actually carry any freight the greater distance. Cohn *v.* St. Louis, etc., R. Co., 181 Mo. 30, 79 S. W. 961.

Plaintiff shipped coal over defendant's railroad from C. to K., the rates charged being greater than rates advertised on the same date for shipments of coal over defendant's road in the same direction from M. to K., a greater distance. Held, an unlawful discrimination, though no coal was actually shipped from M. to K. on the day on which plaintiff's coal was shipped, since defendant, in advertising a certain rate from M., must be deemed to have charged such rate within the Missouri statute, Rev. St., § 2637, making it unlawful for a carrier to "charge" a greater compensation for transportation of like kinds of property, under similar circumstances, for a shorter than a longer distance in the same direction. Seawell *v.* Kansas City, etc., R. Co., 119 Mo. 222, 24 S. W. 1002.

9. **Giving passenger purchasing ticket before entering cars a discount from advertised fare.**—A regulation of a railroad corporation that a passenger who shall purchase a ticket before entering its cars shall be entitled to a discount from the advertised rates of fare, but, if such ticket is not purchased, the full rate of fare shall be charged, is a reasonable regulation, and does not violate a rule prescribed by statute that the rates of fare shall be the same for all persons between the same points. Swan *v.* Manchester, etc., Railway, 132 Mass. 116, 42 Am. Rep. 432.

any ticket a greater sum than is charged for a similar ticket of the same class.[10] Where a railroad company renders services to one corporation so as to enable it to serve the public, and without sufficient excuse refuses to render similar service to another corporation lawfully authorized to serve the public, it is an unjust discrimination, which the railroad commissioners have the power to make just and reasonable rules to prevent.[11] Under a statute providing that a carrier receiving from any person a greater or less compensation for services rendered or to be rendered by it than it receives from any other person for a like service shall be guilty of an unjust discrimination forbidden by the act, a carrier may not exchange transportation for services or property by way of barter.[12] The rule that a contract by a carrier to transport goods for less than the published rate is illegal has no application, where there is a consideration for the contract, in addition to and independent of the freight rate agreed upon, so that the rate is not necessarily discriminatory.[13] The fact that a rate imposed by a carrier is per se reasonable does not disprove the charge that it is unlawful, for, where rates are relatively unjust so that undue preference is afforded to one locality or undue prejudice results to another, the higher rate is unjust, though it is not in itself excessive.[14] When the facts are ascertained, the question of the existence of an "undue or unreasonable discrimination," within the meaning of a statute prohibiting such discrimination, is for the court.[15]

§§ 103-108. What Circumstances Will Justify Discrimination—§ 103. Business of Carrier Unusually or Unexpectedly Heavy.—An unprecedented demand on a railroad company for cars is an excuse for failing to provide cars, as required by a statute making it the duty of carriers to furnish, without discrimination, sufficient facilities for the carriage of freight, where the company has sufficient equipment for the ordinary demands.[16] Where

10. Giving free passes.—The Constitution of Montana, art. 15, § 7, provides that all individuals shall have equal rights to be transported over any railroad in the state, provided that excursion or commutation tickets may be issued and sold at special rates. Rev. Codes, § 4337, makes it unlawful for any common carrier to charge any person for any ticket a greater sum than is charged for a similar ticket of the same class, and § 8524 makes every railroad corporation which fails to observe any of the duties prescribed by law in reference to railroads subject to a fine, etc. Held, that the giving of all free passes, with certain exceptions recognized by law, was prohibited, so that the carriage of a passenger by defendant on a pass issued without compensation to the employee of another railroad company which issued similar free passes for use by defendant's employees was illegal. John *v.* Northern Pac. R. Co., 42 Mont. 18, 111 Pac. 632.

11. State *v.* Atlantic Coast Line R. Co., 51 Fla. 578, 40 So. 875; S. C., 52 Fla. 646, 41 So. 705.

12. Exchange of transportation for services or property forbidden.—State *v.* Union Pac. R. Co., 87 Neb. 29, 126 N. W. 859, construing Cobbey's Ann. St. 1909, § 10,662.

13. Consideration for contract to transport goods in addition to freight rate.—Sultan R., etc., Co. *v.* Great Northern R. Co., 58 Wash. 604, 109 Pac. 1020, denying hearing in 109 Pac. 320.

14. A rate may be preferential though not unreasonable.—Portland R., etc., Co. *v.* Railroad Comm., 56 Ore. 468, 105 Pac. 709, 109 Pac. 273.

15. Question of existence of discrimination is for court.—Hoover *v.* Pennsylvania R. Co., 156 Pa. 220, 27 Atl. 282, 22 L. R. A. 263, 36 Am. St. Rep. 43.

16. Unprecedented demand for cars.—St. Louis, etc., R. Co. *v.* Leder Bros., 79 Ark. 59, 95 S. W. 170, construing Kirby's Dig., § 6804.

In an action against a carrier for failure to furnish cars for the carriage of freight, the evidence showed that there was a shortage in cars by reason of an extraordinary accumulation of freight, that the carrier had seven cars per mile for each mile of its main line and branches which compared favorably with other carriers in that part of the country; that it in anticipation of new business ordered 1,500 new freight cars, which it thought would be sufficient to handle the business. Held, that the carrier was not liable; it being bound only to provide reasonable facilities for the carriage of freight offered in the regular course of business. St. Louis, etc., R. Co. *v.* Clay Gin Co., 77 Ark. 357, 92 S. W. 531.

The refusal of a railroad company to furnish cars to the owner of a coal mine, to be loaded by wagons on its commercial

there is a press of business, perishable goods, or goods the inherent character of which is such as to render them peculiarly liable to serious injury from delay, have been considered of such exceptional character as to authorize a reasonable preference, as to expedition in hauling them, over freight not of such a character, in absence of express statutory regulations on the subject, but such rule can not be invoked as a cloak for making illegal discriminations for one shipper or class of shippers as against another without real ground for its application.[17] That a railroad's line was congested is not an excuse for refusing a siding to a coal property, where the railroad afforded siding privileges to other operators, and a reduction of the cars to other operators would have prevented an increase of the total traffic.[18]

§ 104. Difference in Conditions under Which Shipment Is Made.—Under a constitutional enactment providing that all railroad companies shall haul "freight of the same class for all persons, associations or corporations from and to the same points and upon the same conditions, in the same manner and for the same charges and for the same method of payment," it has been held that a railroad company may charge less for hauling coal used for manufacturing purposes than it charges for hauling coal used for domestic purposes, as the fact that the company receives the manufactured product for return shipment in the one case and not in the other constitutes a difference in conditions which authorizes a difference in charges.[19] But under a statute providing that any carrier charging one person more than another for the same service is guilty of discrimination, it has been held that a railroad carrying raw material to factories can not charge a factory which agrees to ship the manufactured product by the same road less for the same service than it charges a factory which will make no such agreement.[20]

§ 105. Through Rates and Local Rates.—A constitutional enactment providing that all railways shall transport freight of the same class from and to the same points for the same charges, does not prohibit a railway company

tracks in its yards at a station at a time when the business of the road was unusually heavy, necessitating the constant use of such tracks, and its supply of cars was insufficient to handle its traffic, while at the same time it furnished cars to other mine owners on their own private tracks, to be loaded by tipple, was not unreasonable; nor did it constitute an unlawful preference or discrimination, either under the common law, or the statutes of Arkansas, which prohibit any preference or discrimination in the furnishing of cars. Harp *v.* Choctaw, etc., R. Co., 118 Fed. 169, affirmed in 61 C. C. A. 405, 125 Fed. 445.

Failure to furnish facilities at points where there was no competition.—A failure on the part of a railroad company to furnish facilities for forwarding all cotton offered at points on its line where there was no competition, when it furnished sufficient transportation at competing points, in a year when the shipments of cotton were unexpectedly heavy, is not such unjust discrimination as will subject the company to a penalty at the suit of a shipper, under Arkansas statute, Act March 24, 1887, providing that "all individuals, associations, and corporations shall have equal rights to have persons and property transported over railroads, and no unjust or undue discrimination shall be made in charges or facilities; and that no discrimination in charges or facilities for transportation shall be made between transportation companies and individuals, or in favor of either." Little Rock, etc., R. Co. *v.* Oppenheimer, 64 Ark. 271, 43 S. W. 150, 44 L. R. A. 353.

17. Perference as to expedition in hauling perishable goods.—Southern R. Co. *v.* Atlanta Sand, etc., Co., 135 Ga. 35, 68 S. E. 807.

18. Congestion on line no excuse for refusing a siding.—Cox *v.* Pennsylvania R. Co. (Pa.), 85 Atl. 863.

19. Shipping to manufacturer where carrier is to ship manufactured product.—Louisville, etc., R. Co. *v.* Commonwealth, 108 Ky. 628, 22 Ky. L. Rep. 328, 57 S. W. 508, construing Const. § 215.

20. Hilton Lumber Co. *v.* Atlantic, etc., R. Co., 136 N. C. 479, 48 S. E. 813, construing Laws 1899, p. 301, c. 164, § 13.

A carrier may not give one customer a lower rate for the shipment of logs, than another, merely because the former ships the manufactured product over the carrier's line. Hilton Lumber Co. *v.* Atlantic, etc., R. Co., 141 N. C. 171, 53 S. E. 823, 6 L. R. A., N. S., 225.

from charging a through rate which is less than the sum of the local rates between the two points.[21]

§ 106. Competition with Other Carriers.—The establishment permanently of less rates of freight at points of competition with other roads than is fixed at other places for the same distance can not be justified by showing that the rates charged at such other places are reasonably low, and that the rates charged at competing points are unreasonably low. Even if the higher rates are reasonably low, when regarded with reference to the profit upon the capital invested in the road, they are not reasonable in the true sense of the term, if no satisfactory reason can be given for charging less rates for the same or greater services to persons at other stations. Railroad corporations should not use their power to benefit particular individuals or build up particular localities by arbitrary discriminations in their favor that must cause injury to other persons or places engaged in rival pursuits, or occupying rival positions.[22]

§ 107. Unusual Traffic Conditions Attending upon a General Coal Strike.—Unusual traffic conditions attending upon a general coal strike do not relieve a railroad company from the duty of furnishing equal transportation facilities to a coal company.[23]

§ 108. Cost of Mining Coal to Company in Whose Favor Discrimination Is Made.—A discriminating rate on shipments of coal can not be justified on the ground of the cost of mining coal to the company in whose favor the rate is made.[24]

§ 109. Places of Stoppage.—Subject to the rule that it must not unreasonably interfere with interstate commerce,[25] a state may prescribe the places where trains shall stop, and require them to stop there.[26] Thus trains operating entirely within the state may be required to stop at every county seat through which they pass,[27] and this is true even though such trains are engaged in car-

21. **Through rate less than sum of local rates.**—Southern Railway *v.* Commonwealth, 116 Ky. 907, 25 Ky. L. Rep. 1078, 77 S. W. 207, construing Const., § 215.

22. **Competition no justification for discrimination.**—Chicago, etc., R. Co. *v.* People, 67 Ill. 11, 16 Am. Rep. 599.

The clause of the Illinois statute, approved May 2, 1873, prohibiting discrimination by railroads, which provides that "competition with any other railroad or means of transportation" at the favored point shall be no defense in an action for unjust discrimination, held to mean competition in railroad traffic, and not merely competition in the markets and lines of merchandise involved in such discrimination. Illinois Cent. R. Co. *v.* People, 121 Ill. 304, 12 N. E. 670.

Cut rates made by other railroads at competitive points are no excuse for unjust discrimination in favor of such points. Illinois Cent. R. Co. *v.* People, 121 Ill. 304, 12 N. E. 670.

23. **Unusual traffic conditions attending upon a general coal strike.**—Minds *v.* Pennsylvania R. Co., 228 Pa. 575, 77 Atl. 909.

24. **Cost of mining coal to company in whose favor discrimination is made.**—Union Pac. R. Co. *v.* Goodridge, 149 U. S. 680, 37 L. Ed. 986, 13 S. Ct. 970; Union Pac. R. Co. *v.* Taggart, 149 U. S. 698, 37 L. Ed. 905, 13 S. Ct. 977.

25. **Stopping must not unreasonably interfere with interstate Commerce.**—Cleveland, etc., R. Co. *v.* Illinois, 177 U. S. 514, 518, 44 L. Ed. 868, 20 S. Ct. 722; Illinois Cent. R. Co. *v.* Illinois, 163 U. S. 142, 41 L. Ed. 107, 16 S. Ct. 1096.

26. **Requiring trains to stop at certain places.**—Gladson *v.* Minnesota, 166 U. S. 427, 431, 41 L. Ed. 1064, 17 S. Ct. 627.

In Lake Shore, etc., R. Co. *v.* Ohio, 173 U. S. 285, 43 L. Ed. 702, 19 S. Ct. 465, a statute of Ohio providing that every railroad company should cause three of its regular trains carrying passengers, if so many are run daily, Sundays excepted, to stop at a station, city or village containing over three thousand inhabitants for a time sufficient to receive and let off passengers, was held to be, in the absence of legislation by congress upon the subject, consistent with the constitution of the United States, when applied to trains engaged in interstate commerce through the state of Ohio. Cleveland, etc., R. Co. *v.* Illinois, 177 U. S. 514, 519, 44 L. Ed. 868, 20 S. Ct. 722.

27. **Requiring trains to stop at county seats.**—Gladson *v.* Minnesota, 166 U. S.

rying the mail and also make connection with trains running into another state.[28]

§ 110. Receipt and Transportation of Freight and Passengers.—There are statutes in some states requiring railroad companies to receive and transport passengers applying or freight tendered for transportation. Such a requirement is a legitimate exercise of the police power of the state.[29] Some of the peculiar provisions of such statutes have been interpreted by the courts.[30] The duty of a carrier to accept goods tendered at its station does not require it to accept cars offered by competing roads at arbitrary points near its terminus for the purpose of using its terminal station. A law requiring the carrier so to do is unconstitutional as taking property without due process of law.[31]

§§ 111-114. Exclusive Privileges—§ 111. To Express Companies.—Special contracts between express and railroad companies, over whose lines express matter is carried, giving special and exclusive privileges to the former,

427, 41 L. Ed. 1064, 17 S. Ct. 627; Cleveland, etc., R. Co. *v.* Illinois, 177 U. S. 514, 44 L. Ed. 868, 20 S. Ct. 722 (holding that a statute requiring trains to stop at county seats was not applicable to a through express train, where the other train service at this point was sufficient for the public need).

An Illinois statute required all trains to stop at county seats. Upon the construction of this statute, see Illinois Cent. R. Co. *v.* People, 143 Ill. 434, 33 N. E. 173, 19 L. R. A. 119, in which case the Illinois decisions are considered. Similar statutes have been held valid in Arkansas and Minnesota, and mandamuses held to lie to enforce them. State *v.* Gladson, 57 Minn. 385, 59 N. W. 487, 24 L. R. A. 502; Railway Co. *v.* B'Shears, 59 Ark. 237, 27 S. W. 2. The Arkansas statute required trains to stop within the corporate limits, upon the application of not less than fifty citizens.

28. Trains carrying mail or connecting with interstate trains.—Gladson *v.* Minnesota, 166 U. S. 427, 41 L. Ed. 1064, 17 S. Ct. 627; Cleveland, etc., R. Co. *v.* Illinois, 177 U. S. 514, 518, 44 L. Ed. 868, 20 S. Ct. 722.

A state statute requiring every railroad to stop all its regular passenger trains running wholly within the state at its stations in all county seats long enough to take on and discharge passengers with safety, was held to be a reasonable exercise of the police power of the state, even as applied to a train connecting with a train of the same company running into another state, and carrying some interstate passengers as well as the mail. Cleveland, etc., R. Co. *v.* Illinois, 177 U. S. 514, 518, 44 L. Ed. 868, 20 S. Ct. 722; Gladson *v.* Minnesota, 166 U. S. 427, 41 L. Ed. 1064, 17 S. Ct. 627.

29. Statute held a legitimate exercise of police power.—The North Carolina statute, Revisal 1905, § 2632, declares that it shall be unlawful for any railroad company to neglect to transport within a reasonable time any goods received for shipment and billed to or from any place in the state, unless otherwise agreed between the parties or unless the same be destroyed, under a penalty. It is further provided that the company shall be deemed to have transported the goods in a reasonable time if it has done so within the ordinary time required for such transportation, and that a delay of two days at the initial point, and forty-eigth hours at one intermediate point for each one hundred miles or fraction over which goods are to be tranported, shall be held to be prima facie reasonable, and a failure to transport within such time shall be held prima facie unreasonable. Held, that the statute was a legitimate exercise of the police power of the state, and reasonable in its provisions. Stone & Co. *v.* Atlantic, etc., R. Co., 144 N. C. 220, 56 S. E. 932.

30. Peculiar provisions of statutes construed.—The requirement of the Charter of the Portland & Oxford Cent. R. Co., § 8 (Sp. Laws 1857, c. 122, § 8), that the corporation "shall be obliged to receive, at all proper times and places, and convey, persons and articles," etc., should be construed to mean that the times and places designated for the purpose named shall be in fact reasonable and consistent with the right of the public to use the road. Railroad Comm'rs *v.* Portland, etc., R. Co., 63 Me. 269, 18 Am. Rep. 208.

The Michigan Railroad Commission Act (Pub. Acts 1909, No. 300, as amended by Pub. Acts 1911, No. 139) held to require receipt and transportation of freight locally consigned between points in the same city or town, whether from another railroad or not, and such as is offered at any junction or transfer point for delivery on sidings, without reference to where the shipment originated. Grand Trunk R. Co. *v.* Michigan R. Comm., 198 Fed. 1009.

31. When carrier not required to accept cars offered by competing roads.—Louisville, etc., R. Co. *v.* Central Stock Yards Co., 212 U. S. 132, 133, 53 L. Ed. 441, 29 S. Ct. 246.

are lawful.[32] Where a street railway company is authorized to transact express business over its lines, it is entitled to limit such business to a single express company, provided it thereby affords reasonable express facilities to the public.[33]

§ 112. To Corporations or Individuals Engaged in Transporting Passengers and Baggage to and from Railroad Depots.—The preponderance of authority supports the rule that a railroad company may grant to a corporation or individual the exclusive right of entering its trains to solicit the transportation of passengers and baggage,[34] or the exclusive privilege of soliciting such patronage within its depot,[35] or the exclusive privilege of soliciting business on the depot grounds and of plying there the business of a carrier of passengers or baggage.[36] It has also been held that a union depot company

32. Exclusive privileges to express companies.—Blank *v.* Illinois Cent. R. Co., 80 Ill. App. 475, affirmed in 182 Ill. 332, 55 N. E. 332.

33. Dulaney *v.* United R., etc., Co., 104 Md. 423, 65 Atl. 45.

34. Entering trains to solicit transportation of passengers and baggage.—Kates *v.* Atlanta Baggage, etc., Co., 107 Ga. 636, 34 S. E. 372, 46 L. R. A. 431; Godbout *v.* St. Paul Union Depot Co., 79 Minn. 188, 81 N. W. 835, 47 L. R. A. 532.

35. Soliciting patronage in depot.—Donovan *v.* Pennsylvania Co., 199 U. S. 279, 50 L. Ed. 192, 26 S. Ct. 91, affirming 60 C. C. A. 168, 124 Fed. 1016; Godbout *v.* St. Paul Union Depot Co., 79 Minn. 188, 81 N. W. 835, 47 L. R. A. 532.

A contract entered into by a depot company with a hack company, where such hack company furnishes men to meet all trains coming into the city, to allow passengers opportunity to arrange for the carriage of themselves and baggage from the depot, and also furnishes a man at the depot to serve incoming passengers, the rates charged for such services to be reasonable, and not greater than the scale of charges fixed by ordinance, in consideration of which such hack company is given the exclusive privilege of soliciting patronage within the depot and on the trains, furnishes a reasonable and proper arrangement, not interfering with the rights of the traveling public. Godbout *v.* St. Paul Union Depot Co., 79 Minn. 188, 81 N. W. 835, 47 L. R. A. 532.

A railroad company is under no duty, as a common carrier, to permit a hackman to enter its stations for the purpose of soliciting business from its passengers, and therefore its granting of such right to one person or concern does not entitle others to equal privileges on the same terms. Pennsylvania Co. *v.* Donovan, 116 Fed. 907; Donovan *v.* Pennsylvania Co., 57 C. C. A. 362, 120 Fed. 215, 61 L. R. A. 140; Donovan *v.* Pennsylvania Co., 60 C. C. A. 168, 124 Fed. 1016, affirmed in 199 U. S. 279, 50 L. Ed. 192, 26 S. Ct. 91.

Entry to depot in pursuance of a contract or order.—All hackmen and persons engaged in the business of conveying passengers and baggage for hire have the right of entry, without discrimination, to the depots of a common carrier, to deliver or receive passengers or baggage, in pursuance of a contract or order, subject to proper rules and regulations, for the interest of the traveling public. Godbout *v.* St. Paul Union Depot Co., 79 Minn. 188, 81 N. W. 835, 47 L. R. A. 532.

36. Soliciting patronage and plying business on depot grounds.—A railroad company's grant of the exclusive privilege of soliciting business on the depot grounds at a station, and of "plying" there the business of a carrier of passengers or luggage, and forbidding others to do such acts on the grounds, where not inconsistent with the reasonable accommodation of passengers, and where the charges are fair, is a reasonable provision, such as the road has a right to make. New York, etc., R. Co. *v.* Scovill, 71 Conn. 136, 41 Atl. 246, 42 L. R. A. 157, 71 Am. St. Rep. 159; Godbout *v.* St. Paul Union Depot Co., 79 Minn. 188, 81 N. W. 835, 47 L. R. A. 532. See, also, Union, etc., R. Co. *v.* Meeking, 42 Colo. 89, 94 Pac. 16, and Oregon, etc., R. Co. *v.* Davidson, 33 Utah 370, 94 Pac. 10.

A railway company which has made an arrangement with a transfer company to furnish at its passenger station all the vehicles necessary for the accommodation of the passengers arriving there on its trains or on the trains of other railroad companies using the station may legally exclude from the station and depot grounds all other hackman or cabmen seeking entrance for the purpose of soliciting for themselves the custom or patronage of passengers. Decree, Donnovan *v.* Pennsylvania Co., 60 C. C. A. 168, 124 Fed. 1016, affirmed. Donovan *v.* Pennsylvania Co., 199 U. S. 279, 50 L. Ed. 192, 26 S. Ct. 91.

Job teamsters, though common carriers, have, in the absence of statutory authority, or a contract with a railroad company, no right to solicit on its depot grounds the carriage of passengers' baggage; all the right in this respect being that of the passengers that they shall be

may grant to a transfer company the exclusive right to use a designated portion of its depot grounds for the standing of hacks and vehicles,[37] and that a railroad company may rent to a corporation or individual which has been given the exclusive right to solicit the transportation of passengers and baggage, a portion of its baggage room, and concede to it or him the privileges necessarily incident to the occupancy and use thereof, provided that so doing does not interfere with the exercise by any other person of any right which he may lawfully demand of the company as a common carrier.[38] But it has been

conveniently and satisfactorily served in the matter of the transfer of their baggage; and, when such service is furnished, though through an individual to whom the company has granted, for a consideration, the exclusive privilege of soliciting on the grounds such carriage, others may be excluded from so soliciting. Hedding *v.* Gallagher, 72 N. H. 377, 57 Atl. 225, 64 L. R. A. 811.

Where a railroad company contracts with a party, giving him exclusive right to enter its grounds to solicit the patronage of passengers, and notifies another party of such contract, and forbids him from entering to solicit patronage, a subsequent entry of such latter person for such purpose is unlawful. Boston, etc., R. Co. *v.* Brown, 177 Mass. 65, 58 N. E. 189, 52 L. R. A. 418.

The fact that he does so under a contract with a certain hotel to transport passengers from the station to the hotel will not avoid his liability since notice to the carrier was notice to the hotel. Boston, etc., R. Co. *v.* Brown, 177 Mass. 65, 58 N. E. 189, 52 L. R. A. 418.

The fact that the person to whom the privilege was sold was not a duly licensed hackman in accordance with the city ordinance was no defense to a bill by the carrier for an injunction restraining such hackman from entering its premises. Boston, etc., R. Co. *v.* Sullivan, 177 Mass. 230, 58 N. E. 689, 83 Am. St. Rep. 275.

But in Indiana it has been held that a depot corporation, under its charter power to make regulations governing its depot, can not discriminate between the owners of public vehicles by allowing one to stand and solicit business before the entrance to its depot, and exclude others. Indianapolis Union R. Co. *v.* Dohn, 153 Ind. 10, 53 N. E. 937, 45 L. R. A. 427, 74 Am. St. Rep. 274.

And in Mississippi it has been held that a railroad can not authorize one hackman to drive into its inclosed depot grounds to solicit business to the exclusion of all others, since this would create a monopoly, prevent competition, and inconvenience the public. State *v.* Reed, 76 Miss. 211, 24 So. 308, 43 L. R. A. 134, 71 Am. St. Rep. 528.

In Illinois it has been held that railway companies can not grant special privileges beyond the limits of their own lines and make a contract with one which gives him the right to carry passengers from their depots beyond their own lines, and exclude others from such privilege of carriage. Pennsylvania Co. *v.* Chicago, 181 Ill. 289, 54 N. E. 825, 53 L. R. A. 223.

37. Use of portion of depot grounds for standing of hacks and vehicles.—A union depot company organized under the Ohio statute, Rev. St. 1892, §§ 3446-3452, may grant to a transfer company such exclusive right, and a rule of such company, excluding therefrom all others engaged in a like business, except for the purpose of delivering passengers or receiving passengers who shall have previously employed them, is reasonable, and may be enforced, so long as the company furnishes adequate accommodations in the way of vehicles to meet the needs of the traveling public, and makes no greater charge for carrying passengers and baggage from such station than is made by others for like services. State *v.* Union Depot Co., 71 O. St. 379, 73 N. E. 633, 68 L. R. A. 792.

But in Kentucky it has been held that a contract by which a railroad company gave a transfer company the exclusive use of a part of its depot grounds was void as amounting to a practical monopoly of the transfer business. Palmer Transfer Co. *v.* Anderson (Ky.), 115 S. W. 182, 19 L. R. A., N. S., 756.

38. Renting portion of baggage room.—Kates *v.* Atlanta Baggage, etc., Co., 107 Ga. 636, 34 S. E. 372, 46 L. R. A. 431.

Exclusive right to carry on private enterprise in baggage room.—Where a corporation, acting for a common carrier in providing a baggage room and receiving and taking baggage, contracts with a second corporation to allow it the exclusive right to carry on a private enterprise in its baggage room, but complied with its duty to a third corporation as a member of the public generally by receiving and checking such parcels, accompanied by a ticket or other evidence of the right of transportation, and giving such third corporation as to such parcels as are attended with tickets the preference over the parcels tendered by the second corporation to go on storage, the first corporation does not violate any duty to the third, and the latter can not challenge the legality of the contract between the first and the second corporations, or enjoin operations thereunder. Atlanta Terminal Co. *v.* American Baggage, etc., Co., 125 Ga. 677, 54 S. E. 711.

held that a railway company can not grant to one hack owner the exclusive right to use its platform for receiving and discharging passengers.[39] The peculiar provisions of certain constitutional enactments and statutes have been construed and have been held not to preclude a carrier from granting to a corporation or individual the exclusive privilege of soliciting the transportation of passengers or baggage on its trains, or in its depot or depot grounds.[40]

39. Exclusive right to use platform for receiving and discharging passengers.—McConnell *v.* Pedigo, 92 Ky. 465, 13 Ky. L. Rep. 689, 18 S. W. 15; Montana Union R. Co. *v.* Langlois, 9 Mont. 419, 24 Pac. 208, 18 Am. St. Rep. 745, 8 L. R. A. 753.

In Michigan it has been held that independently of, as well as under, How. Ann. St., § 3355, providing that "all railroad corporations shall grant equal facilities for the transportation of passengers and freights to all persons, companies, or corporations," a railroad company can not grant to a hack and bus company exclusive, or even better, facilities for delivering and receiving passengers to and from the depot than that allowed others in the same business. Kalamazoo Hack, etc., Co. *v.* Sootsma, 84 Mich. 194, 47 N. W. 667, 22 Am. St. Rep. 693, 10 L. R. A. 819.

In Missouri it has been held that the owner of a bus line, who has made an approach to a depot platform under an oral agreement with the railway company that he should have its exclusive use, can not confine the teams of a rival line to other parts of the platform, at which the chance of getting passengers is not so good, and to which in dry weather vehicles can be driven or backed up with some difficulty, while in wet weather it is very hard to do so; the exclusive privilege being against public policy and the spirit of Const., art. 12, § 23, which prohibits "discrimination in charges or facilities in transportation * * * between transportation companies and individuals, or in favor of either." Cravens *v.* Rogers, 101 Mo. 247, 14 S. W. 106.

40. Constitutional provisions and statutes not precluding grant of exclusive privileges.—Under the Massachusetts statutes, Pub. St., c. 112, § 188, providing that "every railroad corporation shall give to all persons or companies reasonable and equal terms, facilities, and accommodations for the transportation of themselves, their agents and servants, and of any merchandise and other property, upon its railroad, and for the use of its depot and other buildings and grounds, and, at any point where its railroad connects with another railroad, reasonable and equal terms and facilities of interchange," a railroad company can give to a particular person the exclusive right to come on its premises, and solicit patronage from passengers arriving at or leaving the station, and maintain trespass against the owner of express teams—a common carrier of passengers and their baggage to and from a railroad station—for using, without the consent of the company, the latter's grounds, buildings, and platforms for the purpose of soliciting the patronage of passengers. Old Colony R. Co. *v.* Tripp, 147 Mass. 35, 17 N. E. 89, 9 Am. St. Rep. 661.

The Michigan statute, Comp. Laws 1897, § 6266, requiring all railroad companies to grant equal facilities for the transportation of freight and passengers, etc., without discrimination in favor of any individual, company, etc., does not prevent a raiload company from making an agreement with one engaged in transferring baggage and passengers, by which he is permitted to go upon the passenger trains and solicit passengers and baggage to the exclusion of others engaged in the same business. Dingman *v.* Duluth, etc., R. Co., 164 Mich. 328, 130 N. W. 24.

The Minnesota statute, Gen. St. 1894, § 380, subd. b, providing that a common carrier shall not make or give any unreasonable or unequal preference to any particular person, firm, or corporation in any respect, or subject the same to any prejudice, applies only to persons having contractual relations with the carrier, and does not forbid the granting of exclusive privileges to a hackman to solicit patronage within the depot and on the trains of a common carrier. Godbout *v.* St. Paul Union Depot Co., 79 Minn. 188, 81 N. W. 835, 47 L. R. A. 532.

The constitution of Utah, art. 12, § 12, declaring all railroad and other transportation companies common carriers and subject to legislative control, and that such companies shall receive and transport each other's passengers and freight without discrimination or unnecessary delay, even if applying to drivers of cabs, hacks, and express wagons, does not confer on such persons the right to enter on a railroad company's depot grounds to solicit business, or prevent a railroad company inhibiting the soliciting of business on its grounds, except by one concern operating carriages. Oregon, etc., R. Co. *v.* Davidson, 33 Utah 370, 94 Pac. 10.

Under the Virginia statute, Acts 1891-92, p. 965, providing that common carriers shall not give preferences to particular persons in any respect, or subject any particular person to prejudice, a baggage transfer company could not restrain a railway company from allowing a rival baggage company the exclusive privilege

§ 113. To Ships Using a Wharf or Dock Constructed by a Railroad Company.—A railroad company which has built a wharf connected with its tracks in navigable waters, with a view to facilitating the handling of freight received from or consigned to ships using such waters, is bound to afford the owners of competing vessels equal privileges with respect to the use of the wharf and its appliances,[41] and it can not permit its use by such vessels or carrying lines as it may select, and exclude others to the encouragement of a monopoly and the hindrance of competition, but, where such use is permitted by any, it must be open to all on equal terms.[42]

Exclusive Right to Receive and Discharge Freight and Passengers at Dock.—A contract by a railroad company granting to a steamboat company the exclusive right to receive and discharge freight and passengers at a dock connected with its depot grounds is an unreasonable discrimination.[43]

§ 114. To the Use of a Switch Track.—A contract whereby a railroad company undertakes to grant to a coal company the exclusive right to the use of a certain switch track for hauling coal, in consideration of the coal company's agreement to permit a part of the track to be constructed over its land, is void, as against public policy, and furnishes no excuse for the railroad company's refusal to haul coal over the track for another coal company.[44]

§§ 115-129. Connections with and Facilities to Other Carriers—§ 115. In General.—Rule at Common Law.—At common law a carrier is not bound to carry except on his own line. If he contracts to go beyond, he may, in the absence of statutory regulation to the contrary, determine for himself what agencies he will employ.[45] In the absence of statute or contract, one railroad company can not compel another to stop trains at a junction, or compel the other to permit the use of half a mile of its track, etc., or to make rates with it, and haul its cars.[46]

§ 116. Joint Running Arrangements.—Under a statute providing that any railway corporation may make joint running arrangements, not in conflict with law, with any corporation operating any connecting railway, a railway may contract with connecting lines to carry beyond its line, subject only to the

of entering its grounds to solicit baggage. Norfolk, etc., R. Co. *v.* Old Dominion Baggage Co., 99 Va. 111, 37 S. E. 784, 50 L. R. A. 722.

41. **Owners of vessels must be afforded equal privileges.**—Macon, etc., R. Co. *v.* Graham, 117 Ga. 555, 43 S. E. 1000.

42. So held in relation to a wharf built by a railroad company, in extension of a street, out into the deep waters of a harbor, where ships from all ports come in the carrying on of commerce, and where they load and discharge cargoes, on which wharf the company has laid its tracks, making it a quasi terminal for the transfer of goods between its own line and vessels owned by other carriers. West Coast Naval Stores Co. *v.* Louisville, etc., R. Co., 57 C. C. A. 671, 121 Fed. 645.

43. **Contract held an unreasonable discrimination.**—Coeur d'Alene, etc., Transp. Co. *v.* Ferrell, 22 Idaho 752, 128 Pac. 565 (holding that such discrimination is in violation of the Constitution of Idaho, art. 11, § 6).

Railroad company can not lease terminal point of track on dock to steamboat company.—A railroad corporation, though it has the right to erect and maintain docks as incident to its business, and to hold or dispose of them, can not, when engaged in the business of common carrier, lease the terminal point of its railroad track on its dock in a navigable stream to a steamboat company, and thereby defeat the ingress and egress to and from its track on the part of competing steamboat companies. Indian River Steamboat Co. *v.* East Coast Transp. Co., 28 Fla. 387, 10 So. 480, 29 Am. St. Rep. 258.

44. **Contract granting exclusive use of switch track void.**—Louisville, etc., R. Co. *v.* Pittsburg, etc., Coal Co., 111 Ky. 960, 23 Ky. L. Rep. 1318, 64 S. W. 969, 55 L. R. A. 601, 98 Am. St. Rep. 447.

45. **Rule at common law.**—Atchison, etc., R. Co. *v.* Denver, etc., R. Co., 110 U. S. 667, 28 L. Ed. 291, 4 S. Ct. 185.

46. Shelbyville R. Co. *v.* Louisville, etc., R. Co., 82 Ky. 541, 6 Ky. L. Rep. 611.

qualification that under such agreement arbitrary rates can not be fixed which are discriminatory in their nature.[47]

§§ 117-118. Connection between Roads or Trains—§ 117. Power to Require.—The state may require a railroad company to operate its trains so as to make connection with trains of other roads,[48] although the performance of such duty involves a loss by the railroad company.[49] Thus a carrier may be required to make connection with the trains of another road even though an additional train is required for this purpose,[50] and a state may compel a railroad company to acquire the necessary land and make a track connection for the purpose of affording facilities for the interchange of business with another road although in order to carry out the order, the company is required to exercise the power of eminent domain and incur expenses.[51] But such a requirement must not violate the constitutional prohibition against taking property without due process of law.[52] The places and persons interested, the volume of business to be affected, and the saving in time and expense to the shipper, as against the cost and loss to the carrier, must be considered in determining the reasonbleness of, and the public necessity for, an order of a state railroad commission requiring trackage connections at certain points between competing railway companies for the interchange of business, which is attacked as taking property without due process of law.[53] Some of the peculiar provisions of state statutes

47. Joint running arrangements.—Bras *v.* McConnell, 114 Iowa 401, 87 N. W. 290, construing Code, § 2066.

48. Requiring trains to connect with trains of other roads.—Atlantic, etc., R. Co. *v.* North Carolina Corp. Comm., 206 U. S. 1, 51 L. Ed. 933, 27 S. Ct. 585; Wisconsin, etc., Railroad *v.* Jacobson, 179 U. S. 287, 45 L. Ed. 194, 21 S. Ct. 115. See, also, Gladson *v.* Minnesota, 166 U. S. 427, 41 L. Ed. 1064, 17 S. Ct. 627.

The Corporation Commission Act of North Carolina (Acts 1899, pp. 291, 304, c. 164, §§ 1, 21), giving the commission power to require a railroad company to make reasonable and proper connection with the trains of other roads for the convenience of the traveling public, is within the power of the legislature. North Carolina Corp. Comm. *v.* Atlantic, etc., R. Co., 137 N. C. 1, 49 S. E. 191, 115 Am. St. Rep. 636, affirmed Atlantic, etc., R. Co. *v.* North Carolina Corp. Comm., 206 U. S. 1, 51 L. Ed. 933, 27 S. Ct. 585.

49. Connection may be required though it involves loss.—Atlantic, etc., R. Co. *v.* North Carolina Corp. Comm., 206 U. S. 1, 51 L. Ed. 933, 27 S. Ct. 585; Wisconsin, etc., Railroad *v.* Jacobson, 179 U. S. 287, 45 L. Ed. 194, 21 S. Ct. 115.

The corporation commission of North Carolina, under the authority given by the Corporation Commission Act (Acts 1899, pp. 291, 304, c. 164, §§ 1, 21) may require a railroad company to make connection with a train of another railroad, though it costs the railroad company $15 a day to do this; its net earnings in the state being nearly $2,000,000 per year, and several thousand passengers a year being thus saved several hours and the inconvenience of traveling at night. North Carolina Corp. Comm. *v.* Atlantic, etc., R. Co., 137 N. C. 1, 49 S. E. 191, 115 Am. St. Rep. 636, affirmed Atlantic, etc., R. Co. *v.* North Carolina Corp. Comm., 206 U. S. 1, 51 L. Ed. 933, 27 S. Ct. 585.

50. Connection may be required though an additional train is necessary.—Atlantic, etc., R. Co. *v.* North Carolina Corp. Comm., 206 U. S. 1, 51 L. Ed. 933, 27 S. Ct. 585.

The fact that the running of an extra train by a railroad, in order to comply with an order of a state corporation commission requiring it to be run, in order to make connection with through trains of other roads, causes some pecuniary loss to the company, is not sufficient to show the injustice or unreasonableness of the regulation. Atlantic, etc., R. Co. *v.* North Carolina Corp. Comm., 206 U. S. 1, 51 L. Ed. 933, 27 S. Ct. 585.

51. Acquisition of land necessary in order to make track connection.—Wisconsin, etc., Railroad *v.* Jacobson, 179 U. S. 287, 45 L. Ed. 194, 21 S. Ct. 115.

52. Due process of law required.—Oregon R., etc., Co. *v.* Fairchild, 224 U. S. 510, 56 L. Ed. 863, 32 S. Ct. 535.

53. Considerations in determining reasonableness of and necessity for order requiring trackage connections.—Oregon R., etc., Co. *v.* Fairchild, 224 U. S. 510, 56 L. Ed. 863, 32 S. Ct. 535.

No public necessity is shown which will justify, under the due process of law clause of the federal constitution, an order of a state railroad commission requiring trackage connections at certain points between competing railway companies for the interchange of business, where the commission acted without any evidence of inadequate service, with no proof of public complaint or of a public

conferring upon the railroad or corporation commission of the state power to require railroad companies to make connections when the public convenience requires it, or to make regulations in relation to such connections, have been interpreted by the courts.[54]

§ 118. Character of Requirements.—Some of the peculiar provisions of statutes requiring railroad companies to make connections, or to furnish facilities for such connections, have been construed by the courts to determine the character of connections or facilities required.[55]

demand, with no testimony that any freight had been offered in the past for shipment between those points, or that any such freight would be offered in the future, and with no proof as to the volume of business at any of these points, nor the amount of freight that would be routed over the track connections if they were constructed, and with no testimony as to the probable revenue that would be derived from the use of the track connections, or if the saving in freight or otherwise that would result to the shippers. Oregon R., etc., Co. *v.* Fairchild, 224 U. S. 510, 56 L. Ed. 863, 32 S. Ct. 535.

54. Statutes conferring authority on commissions construed.—In Florida the special and general authority given the railroad commissioners to make reasonable regulations requiring carriers to provide necessary facilities and proper schedules to serve the uses and convenience of the public includes authority to make reasonable regulations requiring facilities for making connections between different roads. Railroad Comm'rs *v.* Florida, etc., R. Co., 58 Fla. 524, 50 So. 425.

The powers given the railroad commissioners are ample to authorize them to make just and reasonable regulations of the schedules of railroads with reference to connections, so as to afford reasonable convenience and comfort to the public affected by the service. Railroad Comm'rs *v.* Florida, etc., R. Co., 57 Fla. 522, 49 So. 43.

The North Carolina statute, Code 1883, § 1957 (9), giving railroad companies the right to regulate the time and manner in which passengers and property shall be transported, is modified by the Railroad Commission Act (Acts 1891, p. 275, c. 320), making the right of the railroad companies to fix the time of running their trains subject to the power of the commission to require connections to be made when public convenience requires it and it is reasonable and just, which provision is reenacted in the Corporation Commission Act (Acts 1899, p. 291, c. 164). North Carolina Corp. Comm. *v.* Atlantic, etc., R. Co., 137 N. C. 1, 49 S. E. 191, 115 Am. St. Rep. 636, affirmed Atlantic, etc., R. Co. *v.* North Carolina Corp. Comm., 206 U. S. 1, 51 L. Ed. 933, 27 S. Ct. 585.

Under the corporation commission act (Acts 1899, p. 291, c. 164, § 1), providing that the corporation commission shall have such general control and supervision of railroad companies as is necessary to carry into effect the provisions of the act, and § 21, providing that all common carriers shall afford all reasonable, proper, and equal facilities for the interchange of traffic and forwarding freight and passengers, and shall make as close connections as practicable for the convenience of the traveling public, the commission has power to require a railroad company to have a train arrive at a certain station on its road at a certain time, so as to connect with a train of another company. North Carolina Corp. Comm. *v.* Atlantic, etc., R. Co., 137 N. C. 1, 49 S. E. 191, 115 Am. St. Rep. 636, affirmed Atlantic, etc., R. Co. *v.* North Carolina Corp. Comm., 206 U. S. 1, 51 L. Ed. 933, 27 S. Ct. 585.

In Virginia, the state corporation commission may, under the powers conferred by § 1294d, subsection 37, of the Code of 1904, establish as many connections between two railroads as may be reasonably necessary for the convenient interchange of traffic between such roads, and for the accommodation of said roads and the public. Louisville, etc., R. Co. *v.* Interstate R. Co., 107 Va. 225, 57 S. E. 654.

55. Connection of trains required.—The North Carolina Corporation Commission Act (Acts 1899, p. 304, c. 164, § 21), requiring connecting lines of common carriers to make as close connections as practicable for the convenience of the traveling public, does not mean a simple physical connection of tracks, but a connection of trains. North Carolina Corp. Comm. *v.* Atlanta, etc., R. Co., 137 N. C. 1, 49 S. E. 191, 115 Am. St. Rep. 636, affirmed Atlantic, etc., R. Co. *v.* North Carolina Corp. Comm., 206 U. S. 1, 51 L. Ed. 933, 27 S. Ct. 585.

Statute violated by changing time card so as to discontinue connection.—The Virginia statute, Act March 3, 1892, § 4, requires common carriers to afford all reasonable, proper, and equal facilities for traffic between their respective lines, and for receiving, forwarding, and delivering passengers and property to and from their several lines and connecting lines. Held, that a railroad so changing its time card by which a connection with a connecting road, which is of general

§ 119. Use of Terminals.—In some states there are statutes requiring, or authorizing the railroad commission of the state to require, railroad or terminal companies to permit other railroad companies to use their terminals. The charges for such use are generally fixed or regulated by the statute or by an order of the commission. The peculiar provisions of some of these statutes have received judicial interpretation.[56]

§§ 120-123. Reception, Transportation and Delivery of Cars, Passengers and Freight—§ 120. Rule at Common Law.—The common-law obligations of a railroad company to a connecting line as to reception, transportation, and delivery of freight are the same as those existing between such company and an individual shipper.[57] A railroad company is not a common carrier of the sleeping cars of another, and may impose terms on which it will haul such cars.[58]

§ 121. Power to Require.—It is competent for the legislature of a state to prescribe that loaded cars shall be transferred from one line to another without breaking bulk, unless at the expense of the company unloading them.[59] A provision in the constitution of a state that a carrier must deliver its cars to con-

convenience, is discontinued, in order to furnish better facilities to several towns, was in violation of the statute. Southern Ry. Co. *v.* Commonwealth, 98 Va. 758, 37 S. E. 294.

56. To what companies statutes apply.—The power conferred on the railroad commissioners by the Florida statute Laws 1899, c. 4700, § 6, with reference to requiring the admission into passenger terminals of railroad companies desiring or required by the commissioners to enter, and to fixing reasonable rates of compensation for the uses of such terminals, has no reference to a terminal station owned and used exclusively for its own traffic by any common carrier or railroad company, but applies to those passenger terminals owned or operated by a terminal company or individual, or by a railroad company in connection with its main line, when such terminal company, individual, or railroad company undertakes the public business of furnishing terminal facilities to railroad common carriers. State *v.* Jacksonville Terminal Co., 41 Fla. 377, 27 So. 225.

The Peoria & Pekin Union Railroad Company is not a union depot company, and is not bound by the Illinois statutes regulating the charges of union depot companies, or bound to let other railroads use its tracks and depots on any terms. Terre Haute, etc., R. Co. *v.* Peoria, etc., R. Co., 81 Ill. App. 435, affirmed in 182 Ill. 501, 55 N. E. 377.

Railroads owning joint depot not compelled to permit its use by another railroad.—The Virginia statute, Code 1904, § 7294c (4), provides that transportation companies shall afford reasonable facilities for the interchange of traffic between their respective lines, and for the forwarding and delivery of passengers and property to and from their several lines without discrimination, but that the section shall not require any such company to give the use of its track or terminal facilities to another company engaged in the like business. Section 1313a (16) provides that the corporation commission shall have authority to require all corporations doing business within the state to discharge any public duty imposed on such corporations by the constitution or by law. Held, that § 1313a (16) did not define or create any public duty to be performed by transportation companies, and did not, therefore, modify or restrict the operation of § 1294c (4), under which the corporation commission had no authority to compel railroads owning and operating a joint depot in a town to permit the use of such depot and its terminal tracks by another railroad company. Norton Board *v.* Norfolk, etc., R. Co., 111 Va. 59, 68 S. E. 351.

Power of commissioners in relation to fixing rates.—Under the Florida statute, Laws 1899, c. 4700, §§ 8, 10, 17, 18, 21, ample provision is made to enable the railroad commissioners to ascertain the facts necessary to be known in order to arrive at and fix just and reasonable rates for the uses of passenger terminals and the privileges thereof, which they are by § 6 empowered to prescribe and enforce. State *v.* Jacksonville Terminal Co., 41 Fla. 377, 27 So. 225.

57. Common-law obligations same as to an individual shipper.—Shelbyville R. Co. *v.* Louisville, etc., R. Co., 82 Ky. 541, 6 Ky. L. Rep. 611.

58. Railroad company not a common carrier of sleeping cars.—Denver, etc., R. Co. *v.* Whan (Colo.), 89 Pac. 39.

59. Transfer of loaded cars without breaking bulk.—Burlington, etc., R. Co. *v.* Dey, 82 Iowa 312, 48 N. W. 98, 31 Am. St. Rep. 477, 12 L. R. A. 436.

necting carriers without providing adequate protection for their return, or compensation for their use, amounts to a taking of property without due process of law within the meaning of the fourteenth amendment of the federal constitution.[60] And the property of a railway company is taken without due process of law where such company is compelled, upon payment simply for the service of carriage, to accept cars offered to it at an arbitrary connecting point near its terminus, by a competing road, for the purpose of reaching and using the former's terminal facilities.[61]

§ 122. Construction of Requirements.—Many of the peculiar provisions of constitutional enactments and statutes relating to the reception, transportation, or delivery of cars, passengers, or freight have been interpreted by the courts. Among the provisions that have received judicial interpretation are enactments requiring every railway corporation to draw over its road the cars of connecting railways;[62] enactments requiring that where railroads cross or connect they shall furnish each other with accommodations in the transportation of passengers and goods;[63] enactments requiring railroad companies whose lines connect to receive and transfer each other's passengers, freight, and loaded or empty cars without delay or discrimination;[64] enactments requiring all railroad companies to grant equal facilities for the transportation of passengers and freight to all persons, companies, or corporations;[65] enactments requiring rail-

60. Requirements constituting taking of property without due process of law.—Louisville, etc., R. Co. *v.* Central Stock Yards Co., 212 U. S. 132, 53 L. Ed. 441, 29 S. Ct. 246, reversing 30 Ky. L. Rep. 18, 97 S. W. 778. (Section 213 of the Constitution of Kentucky held violative of Federal Constitution.)

61. Louisville, etc., R. Co. *v.* Central Stock Yards Co., 212 U. S. 132, 53 L. Ed. 441, 29 S. Ct. 246, reversing 30 Ky. L. Rep. 18, 97 S. W. 778. (Section 213 of the constitution of Kentucky held violative of Federal constitution.)

62. Construction of enactments relating to reception, transportation, or delivery of cars, passengers, or freight.—Plaintiff shipped lumber to Des Moines over a certain railroad. The cars were delivered to a terminal company, engaged in switching cars, and tendered to defendant company to be hauled to points on defendant's line. Defendant refused to receive the cars, but offered to take the lumber on its own cars, stating that the first carrier had forbidden it to use its cars. Plaintiff, in a talk with the original carrier's agent after the original contract of shipment was made, obtained from him permission for the use of the first carrier's cars by defendant in the shipment of plaintiff's lumber. Held, that an order directing defendant to receive the cars, and the lumber loaded thereon tendered by plaintiff, and transfer it over defendant's railway to the stations set forth in the application, and to receive and transport "all such other and further cars, and lumber loaded thereon, as may be loaded with lumber of plaintiff, and under its direction and control, that plaintiff may hereafter tender for shipment over defendant's line," was not justified by the Iowa statute, Code, § 1292, providing that every railway corporation shall draw over its road the cars of connecting railways. Green Bay Lumber Co. *v.* Chicago, etc., R. Co., 102 Iowa 292, 71 N. W. 406.

63. Where a company was incorporated to construct and operate a street railroad for the transportation of persons and property, and with right to occupy so much of the streets and highways on its route as necessary, and power to acquire such real estate and rights of way as were necessary to its business, and to exercise the right of eminent domain, and its tracks approach the terminal of another road, it is subject to V. S. c. 169, § 3860 et seq., providing that, where railroads cross or connect, they shall furnish each other with accommodations in the transportation of passengers and goods, and it is not essential that such road already own any property connecting with the property of the other road. Rutland R. Co. *v.* Bellows Falls, etc., St. R. Co., 73 Vt. 20, 50 Atl. 636.

64. The Virginia statute so providing Const. § 166 (Code 1904, p. cclxi) does not require railroads maintaining and using a union depot to permit its use by another railroad. Norton Board *v.* Norfolk, etc., R. Co., 111 Va. 59, 68 S. E. 351.

65. The Michigan statute so requiring, How. Ann. St., § 3355, does not relate entirely to the mere carriage in the cars of the road, but includes the receiving of such passengers and freight at its depots, and by other "persons, companies, or corporations" at the point upon its road where the carriage ends. Kalamazoo Hack, etc., Co. *v.* Sootsma, 84 Mich. 194, 47 N. W. 667, 10 L. R. A. 819, 22 Am. St. Rep. 693.

road companies to deliver and switch empty or loaded cars coming to or going from any other railroad with equal promptness and dispatch, and without discrimination, and to receive, deliver, and transport all freight from and to any point where there is a physical connection between the tracks of such companies;[66] and enactments requiring railroad companies to receive all freight and passengers coming to it from a connecting line, and going to points on its line or beyond, and to transport the same to destination or the next connecting lines, and defining connecting railroads as railroads which connect by crossing each other's tracks or otherwise, so as to form a continuous or connecting line from one point in the state to another point in the state.[67]

§ 123. Excuses for Refusal or Neglect to Perform Duty.—The refusal of a common carrier to obey the mandatory provisions of a constitutional enactment requiring delivery and transfer of freight from and to any point where there is a physical connection between the tracks of such carrier and another road, without discrimination, can not be excused on the ground that to observe such provisions would subject the carrier to inconvenience or increased expense.[68] Where a carrier had agreed to perform switching duties imposed by a constitutional requirement and was willing yet to perform such duties for all other railroads, except with reference to live stock consigned to complainant's stockyards, it could not claim to be relieved from the duty of switching the stock

66. The constitution of Kentucky which so provided Const., § 213, made it compulsory on every common carrier to use its terminal facilities in receiving, delivering, interchanging, transferring, and transporting freight in car loads or less quantities at points of physical connection with other roads, for all alike, when so requested. Louisville, etc., R. Co. *v.* Central Stock Yards Co., 30 Ky. L. Rep. 18, 97 S. W. 778.

Such constitutional provision should not be construed as only requiring the carrier to transfer and deliver to other carriers such cars as it might receive from other carriers, but requires such delivery of its own cars as well. Louisville, etc., R. Co. *v.* Central Stock Yards Co., 30 Ky. L. Rep. 18, 97 S. W. 778.

The duty imposed on railway companies by such constitutional enactment does not require a railway company maintaining a live stock depot as a point of delivery for cattle having a municipality as their general destination to receive live stock billed to a similar depot at substantially the same point on another railway, and to deliver the same to that railway at a point of physical connection between the two roads for ultimate delivery there. Decree 55 C. C. A. 63, 118 Fed. 113, affirmed. Central Stock Yards Co. *v.* Louisville, etc., R. Co., 192 U. S. 565, 48 L. Ed. 565, 24 S. Ct. 339.

67. Under the Texas statute so providing Rev. St. art. 4535, 4536, a railroad company is not compelled to switch freight which was not consigned over its lines from the line of one railroad to that of another in the same city, and is not required to respond in damages for a failure so to do. Judgment, Texas, etc., R. Co. *v.* Gulf, etc., R. Co. (Tex. Civ. App.), 54 S. W. 1031, affirmed. Gulf, etc., R. Co. *v.* Texas, etc., R. Co., 93 Tex. 482, 56 S. W. 328.

Railroads which intersect or cross each other either at grade or by an overhead and grade crossing are connecting lines of railroad, within the meaning of the Texas statute. International, etc., R. Co. *v.* Railroad Comm. (Tex. Civ. App.), 86 S. W. 16, judgment affirmed in 89 S. W. 961.

A series of railway switches belonging jointly to several railroads, and on which it is possible to run cars from the tracks of one road having no interest therein to those of another road about three-quarters of a mile away, in the same city, is not a connecting line between the two roads under the Texas statute. Texas, etc., R. Co. *v.* Gulf, etc., R. Co. (Tex. Civ. App.), 54 S. W. 1031, judgment affirmed Gulf, etc., R. Co. *v.* Texas, etc., R. Co., 93 Tex. 482, 56 S. W. 328.

Since mere switch connections between several railroads in the same city are not connecting lines under the statute, the owners of such switch connections were not obliged to make transfers thereon to and from roads not their own, and by performing such service for some roads did not subject themselves to the performance of a like service for all roads tendering similar business and offering like compensation. Texas, etc., R. Co. *v.* Gulf, etc., R. Co. (Tex. Civ. App.), 54 S. W. 1031, judgment affirmed Gulf, etc., R. Co. *v.* Texas, etc., R. Co., 93 Tex. 482, 56 S. W. 328.

68. Inconvenience or increased expense no excuse.—Louisville, etc., R. Co. *v.* Central Stock Yards Co., 30 Ky. L. Rep. 18, 97 S. W. 778, construing Const., § 213.

on the theory that such switching was an unreasonable use of its cars.[69] A constitutional provision compelling one railroad company to receive and transfer over its line cars of another company is not intended to compel a road to receive cars in a defective or unsafe condition.[70]

§ 124. Moving or Switching Cars from a Connecting Line.—There are in some states statutes which require carriers to move or switch the cars of a connecting carrier from the tracks of such carrier on to its own tracks,[71] or which authorize the railroad commission to require the performance of such service by a carrier.[72]

§ 125. Facilities and Accommodations to Be Furnished by Railroad Companies to Express Companies.—The obligations of a railroad company to the public as a common carrier do not require it to furnish express facilities to all alike who demand them,[73] or to furnish an express company facilities for doing an express business upon its road, the same in all respects as it provides for itself or affords to any other express company.[74] A railroad corporation is not bound to furnish an expressman, who seeks to carry on his business over its road, with facilities and accommodations different in kind from those furnished to the general public; and the fact that it has furnished him with facilities for many years, and that he has thereby acquired a valuable business, is

69. **Switching live stock not an unreasonable use of cars.**—Louisville, etc., R. Co. *v.* Central Stock Yards Co., 30 Ky. L. Rep. 18, 97 S. W. 778, construing Const., § 213.

70. **Carrier not compelled to receive cars in a defective or unsafe condition.**—Louisville, etc., R. Co. *v.* Williams, 95 Ky. 199, 15 Ky. L. Rep. 548, 24 S. W. 1, 44 Am. St. Rep. 214, construing Const., § 213.

71. **Switching charges.**—The Ohio statute, Rev. St. 1908, §§ 3340, 3341, which provide that when the tracks of two railway companies connect, and the tracks of one lie contiguous to coal mines, manufacturing establishments, etc., it shall be the duty of such company on request to switch the cars of other companies on to such tracks and move the same to such coal mines, etc., to be loaded or unloaded, and fixing maximum rates per car which may be charged to the companies from whom the cars are received for such service within the terminal limits of cities and towns, provided that nothing therein shall require any company to furnish its terminals and facilities at such rates to any other company which shall not afford similar terminals and reciprocal facilities, relate only to the charge which such railway companies may make each other for switching services in the delivery of incoming freight which one receives from the other, and create no right of action against either of the companies in favor of individual shippers, if the switching charge is in excess of that provided. Townsend Brick, etc., Co. *v.* Central Trust Co., 109 C. C. A. 381, 187 Fed. 63.

72. **Authority of railroad commission.**—The Indiana statute, Burns' Ann. St. 1908, §§ 5206, 5533, 5540, impliedly authorize the railroad commission to require a carrier to move a car from a connecting line to its public tracks. Chicago, etc., R. Co. *v.* Railroad Comm., 175 Ind. 630, 95 N. E. 364.

73. **Railroad companies not required to furnish express facilities to all alike.**—Pfister *v.* Central Pac. R. Co., 70 Cal. 169, 11 Pac. 686, 59 Am. Rep. 404.

74. Memphis, etc., R. Co. *v.* Southern Exp. Co., 117 U. S. 1, 29 L. Ed. 791, 6 S. Ct. 542, 628, 1190, reversing 10 Fed. 210, 869; overruling Dinsmore *v.* Louisville, etc., R. Co., 2 Fed. 465; 2 Flip. 672, 1 Ky. L. Rep. 42; Wells, etc., Co. *v.* Oregon R., etc., Co., 18 Fed. 517, 9 Sawy. 370; Wells *v.* Oregon, etc., R. Co., 18 Fed. 667.

The North Carolina statute, Acts 1891, c. 320, § 4, provides that it shall be unlawful for any common carrier to give any unreasonable preference to any particular person, company, or locality, or any particular description of traffic, or to subject any person, company, or locality, or any particular description of traffic, to any undue disadvantage. Held, that this section does not change or enlarge the duty imposed on railroad companies by the common law, under which they are not obliged, because they furnish facilities to one express company, to furnish other express companies with facilities for doing an express business on their roads, the same in all respects as they provide for themselves or afford to any particular express company, where such railroad companies have never held themselves out as common carriers of express companies. Atlantic Exp. Co. *v.* Wilmington, etc., R. Co., 111 N. C. 463, 16 S. E. 393, 18 L. R. A. 393, 32 Am. St. Rep. 805.

immaterial.[75] A statute requiring each railroad to give all persons or companies reasonable and equal terms and facilities for transportation, does not preclude a railroad company from carrying on the express business itself, to the exclusion of all other parties.[76] Some of the peculiar provisions of statutes relating to the facilities and accommodations required to be furnished by railroad companies to express companies have been interpreted by the courts.[77]

§§ 126-128. Discrimination in Favor of One of Several Connecting Carriers—§ 126. Duty to Give Like Through Rates to All Connecting Carriers.—The provision of a state constitution prohibiting undue or unreasonable discrimination in charges or facilities for transportation of freight or passengers within the state, does not require a railroad company to give to one connecting carrier the same through rates that it does to another, unless it is shown that the relative situation of the two companies, both as to the kind of service and as to the conditions under which it is to be performed, are substantially the same, so that what is reasonable for one must necessarily be reasonable for the other.[78]

75. **Railroad company not bound to furnish expressman facilities and accommodations different from those furnished general public.**—Sargent *v.* Boston, etc., R. Corp., 115 Mass. 416.

76. **Railroad company not precluded from carrying on express business to exclusion of others.**—Sargent *v.* Boston, etc., R. Corp., 115 Mass. 416, construing St. 1867, c. 339.

77. **Peculiar provisions of statutes construed.—The Maine statute,** Pub. Laws Feb. 29, 1868, c. 193, § 1, provides that "all expressmen * * * shall have reasonable and equal terms for the transportation of themselves," etc., "upon any railroad," etc. Held, that a railroad company which let to a certain express company the exclusive use of a separate apartment in each car of its trains, and agreed that it would not, during the continuance of the contract, let any space in any of its passenger trains to any other express company, was liable in damages, under such statute, for refusing to transport the goods of another express company, where the demand to do so was made before the expiration of the contract. New England Exp. Co. *v.* Maine Cent. R. Co., 57 Me. 188, 2 Am. Rep. 31.

Rev. St., c. 51, § 134, requiring railroads to extend equal facilities and accommodations to all express companies engaged in business within the state, protects foreign express companies as well as domestic. International Exp. Co. *v.* Grand Trunk Railway, 81 Me. 92, 16 Atl. 370.

To a bill in equity to enforce compliance with the statute, defendant answered that it was doing its own express business. It appeared that when complainant demanded accommodations an express company was operating over the road, and defendant refused to permit complainant to do so, alleging that it was inconvenient to accommodate two companies. On the trial defendant pretended that the express company was then operating over the road as its agent until its facilities could be perfected, but no contract was shown, and the business appeared to be conducted as before. Held, that it was but an attempt to evade the statute, and an injunction would be granted. International Exp. Co. *v.* Grand Trunk Railway, 81 Me. 92, 16 Atl. 370.

The Massachusetts statute, 1894, c. 469, § 1, requiring a railroad company to give to "all persons and companies now engaged in only a local express business" terms, facilities, and accommodations for transportation of merchandise reasonable and equal to those furnished other companies doing business over the railroad, having regard to the amount and character of the service, inures to the benefit of one engaged in the local express business, who, at the time the act was passed, was having his packages carried on the freight trains of a railroad, as well as to one who was using the passenger trains of the railroad for such purpose. Kidder *v.* Fitchburg R. Co., 165 Mass. 398, 43 N. E. 115.

78. **Duty to give like through rates to all connecting carriers.**—Atchison, etc., R. Co. *v.* Denver, etc., R. Co., 110 U. S. 667, 681, 28 L. Ed. 291, 4 S. Ct. 185.

"At common law, a carrier is not bound to carry except on his own line, and we think it quite clear that if he contracts to go beyond he may, in the absence of statutory regulations to the contrary, determine for himself what agencies he will employ. His contract is equivalent to an extension of his line for the purposes of the contract, and if he holds himself out as a carrier beyond the line, so that he may be required to carry in that way for all alike, he may nevertheless confine himself in carrying to the particular route he chooses to use. He puts himself in no worse position, by extending his route with the help of others, than he would occupy if the means of transportation em-

§ 127. Discrimination as to Interchange of Business.—A railroad company need not stop at the junction of one railroad and interchange business there, because it has established joint depot accommodations and provided facilities for doing a connecting business with another company at another place, and this is true under a state constitution prohibiting unreasonable discrimination in favor of one against another company seeking to do business on its road.[79]

§ 128. Discrimination as to Prepayment of Freight Charges.—By statute in some states railroad companies are precluded from discriminating between connecting carriers as to the prepayment of freight charges.[80]

§ 129. Transfers between Street Railroad Companies.—Some of the peculiar provisions of statutes and franchises requiring street railroad companies to give transfers to other lines have received judicial interpretation.[81] Where a traction company contracts with a city by acceptance of an ordinance granting permission to maintain its railroad, conditioned that specified rates of fare shall be charged, and no words are used indicating that the parties are contracting for any other corporation, its obligation is to carry passengers for the stipulated fares only over its own lines.[82]

§§ 130-132. Use of Carrier's Premises and of Street or Premises Adjacent Thereto—§ 130. Exclusion of Persons in General.—A railway company has the right to exclude from its depots and warerooms persons who

ployed were all his own. He certainly may select his own agencies and his own associates for doing his own work." Atchison, etc., R. Co. *v.* Denver, etc., R. Co., 110 U. S. 667, 28 L. Ed. 291, 4 S. Ct. 185.

79. **Discrimination as to interchange of business.**—Atchison, etc., R. Co. *v.* Denver, etc., R. Co., 110 U. S. 667, 28 L. Ed. 291, 4 S. Ct. 185.

The provision of the constitution of Colorado, § 6, prohibiting undue or unreasonable discrimination to be made in charges or facilities for transportation of freight or passengers within the state, and of § 4 giving every railroad company the right to connect with any other railroad, does not require the railroad company to construct a station or make a regular stopping place at any point at which the other carrier may make a mechanical union with its tracks. Atchison, etc., R. Co. *v.* Denver, etc., R. Co., 110 U. S. 667, 28 L. Ed. 291, 4 S. Ct. 185.

80. **Discrimination as to prepayment of freight charges.**—Wadley, etc., R. Co. *v.* State, 137 Ga. 497, 73 S. E. 741, construing Railroad Commission Act.

The charter of the Northern Pacific Railroad Company, Act July 2, 1864, § 5, requiring the company to permit other companies to form running connections with it on fair and equitable terms, includes only arrangements as to the time of arrival and departure of trains and as to stations, platforms, etc., and does not apply to discrimination in the prepayment of freight. Oregon, etc., R. Co. *v.* Northern Pac. R. Co., 9 C. C. A. 409, 61 Fed. 158, affirming 51 Fed. 465.

81. **Construction of provisions requiring transfers.**—Under the New York statute, Laws 1885, p. 525, c. 305, making it lawful for any street surface railway company to contract with another such company for the use of their respective roads, and Laws 1890, p. 1082, c. 565, and Laws 1892, p. 1382, c. 676, continuing the privileges of contracting and the obligations incurred thereby, and providing that street railroads entering into such contracts shall carry or permit any other party to such contract to carry between any two points on the roads, or portions thereof, embraced in the contract, any passenger desiring to make a continuous trip between such points for one single fare, not higher than the fare lawfully chargeable by either of the parties for an adult passenger, the legislature intended, in consideration of the privilege of contracting, to require that the lines so brought together under the contracts should carry passengers for one single fare between any two-points on the lines, to the end that the public convenience may be promoted, as expressed therein. O'Reilly *v.* Brooklyn Heights R. Co., 95 App. Div. 253, 89 N. Y. S. 41, judgment affirmed in 179 N. Y. 450, 72 N. E. 517.

For the construction of the franchise of a street railway company providing for the exchange of transfers with any other company operating street railways which shall give and receive transfers to and from the lines of the company, and stipulating for a basis of settlement. See Linhoff *v.* Seattle, etc., R. Co., 62 Wash. 544, 114 Pac. 431.

82. **Contract with city not requiring the giving of transfers.**—Reed *v.* Trenton, 80 N. J. Eq. 503, 85 Atl. 270.

come there in an intoxicated condition, and who are turbulent and troublesome and disturb and interfere with the agents and employees of the company in the discharge of their work, and may also exclude therefrom those who are reported to be dishonest, and on account of whose past presence in and about its depots and warerooms freight had been removed without the company's consent, and for which it was compelled to pay the consignee the value thereof.[83] A regulation by a railway company forbidding peddlers and loafers from entering a passenger room at a station is valid.[84]

§ 131. Regulations for Conduct of Persons.—A railroad corporation has authority to make and carry into execution reasonable regulations for the conduct of all persons using the railroad or resorting to its depots, without prescribing such regulations by by-laws; and the superintendent of a railroad depot, appointed by the corporation, has the same authority by delegation.[85] But the superintendent of a railroad depot has not a right to order a person to leave the depot, and not come there any more, and to remove him therefrom by force, if he does come, merely because such person, in the judgment of the superintendent, and without proof of the fact, had violated the regulations established by the railroad corporation, or had conducted himself offensively towards the superintendent.[86]

§ 132. Rights of and Restrictions upon Individuals or Corporations Engaged in Transporting Passengers or Baggage.[87]—A common carrier of passengers and their baggage to and from railroad stations, in the business of soliciting the patronage of passengers at a railroad station, holds no relation with the railroad company as a common carrier, and has no right, without its consent, to use its station grounds and buildings.[88] But licensed hackmen or cabmen, when not forbidden by valid municipal regulations,[89] may, within reasonable limits, use the public sidewalk in front of, adjacent to, or about the main entrance to a railway passenger station in prosecuting their calling, but are not entitled to congregate upon such sidewalk so as to interfere with the ingress and egress of passengers and employees.[90] A railroad company has the right to designate the places abutting on the station platform where competing hackmen,[91]

83. Persons carrier may exclude from its depots and warerooms.—Chicago, etc., R. Co. *v.* Armstrong, 30 Okla. 134, 120 Pac. 952.

84. Summitt *v.* State, 76 Tenn. (8 Lea) 413, 41 Am. Rep. 637.

85. Authority to make regulations for conduct of persons.—Commonwealth *v.* Power, 48 Mass. (7 Metc.) 596, 41 Am. Dec. 465; Hall *v.* Power (Mass.), 12 Metc. 482, 46 Am. Dec. 698.

86. Authority of superintendent of depot.—Hall *v.* Power (Mass.), 12 Metc. 482, 46 Am. Dec. 698.

87. As to the grant of exclusive privileges to corporations or individuals engaged in transporting passengers or baggage, see ante, "To Corporations or Individuals Engaged in Transporting Passengers and Baggage to and from Railroad Depots," § 112.

88. No right to use station grounds and buildings without carrier's consent.—Old Colony R. Co. *v.* Tripp, 147 Mass. 35, 17 N. E. 89, 9 Am. St. Rep. 661; Commonwealth *v.* Carey, 147 Mass. 40, 17 N. E. 97.

A regulation by a railway company forbidding hackmen and expressmen from entering a passenger room at a station, is valid; but a hackman with a check for baggage may enter the baggage room therefor. Summitt *v.* State, 76 Tenn. (8 Lea) 413, 41 Am. Rep. 637.

89. Municipal regulations as to places at which hackmen may stand.—A city regulation, requiring hackmen to occupy certain designated places at railway depots, is not invalid. Ottawa *v.* Bodley, 67 Kan. 178, 72 Pac. 545.

The power of a municipality to regulate the places at which hackmen may stand at a city depot is not affected by any contract a hackman may make with a passenger to meet him at a place other than that designated by the city marshal. Ottawa *v.* Bodley, 67 Kan. 178, 72 Pac. 545.

90. Right to use sidewalk adjacent to station.—Decree, Donnovan *v.* Pennsylvania Co., 60 C. C. A. 168, 124 Fed. 1016, affirmed. Donovan *v.* Pennsylvania Co., 199 U. S. 279, 50 L. Ed. 192, 26 S. Ct. 91.

91. Designation of places where competing hackmen shall stand.—Hot Springs *v.* Demby, 90 Ark. 574, 119 S. W. 1126; Cole *v.* Rowen, 88 Mich. 219, 50 N. W. 138, 13 L. R. A. 848.

or the owners of competing omnibus lines,[92] shall stand their vehicles while awaiting the arrival and departure of trains and where they shall receive and discharge, passengers and baggage; and where it adopts regulations assigning such places, and a hack or bus driver refuses to obey them, the station master is not guilty of assault and battery in taking hold of him and ejecting him from the stand assigned to another.[93] A railroad company also has a right to order that hacks shall not stand at a particular place on its premises,[94] and to remove a hackman who willfully disobeys such order, using as much force as may be necessary.[95] Prohibiting the soliciting of customers for any hotel on a depot platform while passenger trains are stopping is not an interference with any common right, but a proper exercise of the police power.[96] Municipalities are sometimes empowered to regulate the soliciting of persons arriving on trains.[97] The granting by a railroad company to one concern operating carriages the exclusive privilege of soliciting business on its depot grounds gives others no right to do so, even if such exclusive privilege be void as creating a monopoly, and though the grantee thereof be not excluded.[98]

92. **Designation of places where owners of competing omnibus lines shall stand.**—Lucas *v.* Herbert, 148 Ind. 64, 47 N. E. 146, 37 L. R. A. 376; Cole *v.* Rowen, 88 Mich. 219, 50 N. W. 138, 13 L. R. A. 848.

93. **Right of station master to enforce regulations assigning stands.**—Cole *v.* Rowen, 88 Mich. 219, 50 N. W. 138, 13 L. R. A. 848.

94. **Carrier may prohibit hacks standing at a particular place on its premises.**—A railroad company has a right to order that hacks shall not stand in front of the entrance to its station. Smith *v.* New York, etc., R. Co., 149 Pa. 249, 24 Atl. 304.

Where a street ran through and under premises occupied by plaintiff as a railway station, and plaintiff claimed the fee in the street, subject only to the easement, defendant had no right, against plaintiff's protest, to take up a stand as a hackman on such street within the line of plaintiff's premises, and plaintiff might maintain trespass. New York, etc., R. Co. *v.* Bork, 23 R. I. 218, 49 Atl. 965.

95. **Right to remove hackman.**—Smith *v.* New York, etc., R. Co., 149 Pa. 249, 24 Atl. 304.

96. **Prohibition against soliciting customers for hotel on depot platform.**—The power conferred on towns by the Arkansas statute, Kirby's Dig., § 5438, to regulate soliciting persons who arrive on trains for hotels, etc., and by § 5454, to regulate omnibuses, drays, etc., and hotels, or an ordinance passed thereunder prohibiting the soliciting of customers for any hotel, etc., on a depot platform while passenger trains are stopping, is not an interference with any common right, but a proper exercise of the police power. Emerson *v.* McNeil, 84 Ark. 552, 106 S. W. 479.

Such an ordinance is none the less valid because the platform on which the soliciting is prohibited is the property of the railroad company. Emerson *v.* McNeil, 84 Ark. 552, 106 S. W. 479.

97. **Power of municipalities to regulate soliciting persons arriving on trains.**—Under the Arkansas statutes, Kirby's Dig., §§ 5438, 5454, a town was empowered to pass an ordinance prohibiting the soliciting of customers for any hotel, etc., on a depot platform while passenger trains were stopping. Emerson *v.* McNeil, 84 Ark. 552, 106 S. W. 479.

Under the Arkansas statute, Sand. & H. Dig., § 5132, giving a city authority to regulate the drumming of persons, arriving on trains, for hotels, etc., an ordinance providing that every person obtaining a drummer's license shall, while engaged in the business, wear a badge of a certain character, showing for what he is drumming, is not void as unreasonable. Hot Springs *v.* Curry, 64 Ark. 152, 41 S. W. 55.

A city council has not, under the "general welfare clause" in the charter of the city, the power to pass an ordinance absolutely prohibiting drummers, runners, hackmen, cabmen, and all other persons from entering, with the owner's consent, a union passenger depot in such city, "to solicit custom or patrons." Cosgrove *v.* Augusta, 103 Ga. 835, 31 S. E. 445, 42 L. R. A. 711, 68 Am. St. Rep. 149.

Construction of ordinance prohibiting soliciting for hotels at railroad depots.—An ordinance of the city of Hot Springs made it unlawful for any person to drum or solicit business for a hotel on the trains or depots of any railroads. Petitioner was a hotel keeper, and was convicted of soliciting patronage for his hotel "on the platform" of a railroad station. Held, that the word "depot," in the ordinance, included, not only the depot building, but the platform and grounds connected therewith, and used by the company for its business with the public. Moore *v.* Campbell, 85 Ark. 581, 109 S. W. 544.

98. **Effect of granting one concern exclusive privilege of soliciting business.**—Oregon, etc., R. Co. *v.* Davidson, 33

§ 133. Free Transportation to Police Officers.—A statute requiring street railway companies to grant free transportation to police officers, is a valid exercise of the police power of the state, since policemen are frequently required to be on street cars in the execution of their duties as such.[99]

§ 134. Combinations of Carriers.—Contract Fixing Fares at a Certain Sum.—A contract between a street railroad company and its predecessor, fixing the passenger fares on a certain line at a certain sum, will be assumed to be valid until abrogated by law.[1]

Contract Not to Reduce Rates During a Limited Period.—An agreement between a railroad company and a competitor that during a limited period the former company will not reduce its present rates, unless required by law, is not contrary to public policy.[2]

Association Agreement Not to Carry Freight for Less than Rate Fixed.—An agreement by the members of an association that none of them shall carry freight for less than the rate fixed by the association, without reference to whether the rate is reasonable or not, is illegal.[3]

Agreement Not to Cross Competing Company's Tracks at Grade.—An agreement by a street-railway company with a competing company not to cross the latter's tracks at grade in the future, entered into when the parties knew the municipality would not generally permit street-railway crossings except at grade, is against public policy, since it tends to create a monopoly.[4]

Pooling Arrangements.—A pooling arrangement between rival railroad companies whereby freight rates are established is prima facie illegal.[5] An arrangement by which two competing systems of railroads agree to divide their earnings for traffic between given points, for which they were previously competitors, is against public interest, contrary to public policy, and can not be judicially enforced.[6]

Agreement to Share Through Freight Pro Rata with a Connecting Line.—In the absence of any statutory regulations upon the subject, a railway or line of steamboats may agree to share through freight pro rata with a connecting line, to the exclusion of other lines, without incurring any liability for the loss which may result to the other lines by reason of such arrangement.[7]

Uniform Charge for Detention of Cars by Shippers.—A car service association of railroad companies, organized to make and enforce penalties for the

Utah 370, 94 Pac. 10. See ante, "To Corporations or Individuals Engaged in Transporting Passengers and Baggage to and from Railroad Depots," § 112.

99. **Free Transportation to police officers.**—State *v.* Sutton, 83 N. J. L. 46, 84 Atl. 1057.

1. **Contract fixing fares at a certain sum.**—Portland R., etc., Co. *v.* Railroad Comm., 56 Ore. 468, 105 Pac. 709, rehearing denied 109 Pac. 273.

2. **Contract not to reduce rates during a limited period.**—Raritan River R. Co. *v.* Middlesex, etc., Tract. Co., 70 N. J. L. 732, 58 Atl. 332.

3. **Association agreement not to carry freight for less than rate fixed.**—Sayre *v.* Louisville Union Benev. Ass'n (Ky.), 1 Duv. 143, 85 Am. Dec. 613.

4. **Agreement not to cross competing company's tracks at grade.**—Judgment 70 Ill. App. 254, affirmed. South Chicago, etc., R. Co. *v.* Calumet Elect. R. Co., 171 Ill. 391, 49 N. E. 576.

5. **Pooling arrangement whereby freight rates are established.**—Cleveland, etc., R. Co. *v.* Closser, 126 Ind. 348, 26 N. E. 159, 22 Am. St. Rep. 593, 9 L. R. A. 754.

6. **Arrangement by competing roads to divide earnings for traffic between given points.**—Texas, etc., R. Co. *v.* Southern Pac. R. Co., 41 La. Ann. 970, 6 So. 888, 17 Am. St. Rep. 445.

What roads are competing.—Two railroad companies, which have each a through and separate line of communication between two given points, are competing companies for all traffic between such points. Texas, etc., R. Co. *v.* Southern Pac. R. Co., 41 La. Ann. 970, 6 So. 888, 17 Am. St. Rep. 445.

7. **Agreement to share through freight pro rata with a connecting line.**—Eclipse Towboat Co. *v.* Pontchartrain R. Co., 24 La. Ann. 1.

unreasonable detention of cars by shippers, is not rendered invalid by the fact that all the members agreed to make a uniform charge for detention.[8]

Regulation of Freight Association as to Estimated Weight of Tank Cars.—A regulation promulgated and observed by a freight association, consisting of numerous railway companies, by which the capacity of tank cars owned by shippers, and not listed in what is denominated a "Joint Tank Line Circular," showing the actual weight, shall be estimated at a certain number of pounds, will not be declared unreasonable, in the absence of a reliable basis for computation, or anything to show that the gross amount of freight charged and collected thereunder was excessive.[9]

§§ 135-173. Proceedings to Enforce or to Prevent Enforcement of Regulations—§ 135. Right of State to Insist on Compliance with Regulations.—The state may insist on a compliance as to the present and future with a statute, fixing maximum passenger and freight rates, and nothing short of a repeal of the statute can defeat the right of the state.[10]

§§ 136-159. Judicial Supervision and Remedies in General—§§ 136-137. Scope of Judicial Supervision—§ 136. In General.—The courts may compel carriers to perform a positive duty imposed by law, and may restrain acts in excess of the powers granted.[11] In the absence of a law or a rule of the railroad commission of the state prescribing the type to be used in printing schedules of rates to be posted by railroad companies in their stations, the court of last resort in the state can not by mandamus direct in what sized type they shall be printed.[12] Where the railroad commission of a state has ordered a railroad company to furnish certain service to passengers and shippers, under its power to require railroads to furnish adequate service, though the court that reviews such order would not have made it under the circumstances, had it been sitting as a commission, yet if competent and reasonable men might differ as to its propriety or reasonableness, and it was therefore within the power of the commission, it will not be declared unreasonable.[13] In determining the scope of the supervisory power of the courts over the orders or reports of railroad commissions, consideration must of course be given to any statutory provision affecting the matter.[14]

§ 137. As to Rates.—The question of the reasonableness of a rate of charge for transportation by a railroad company, involving, as it does, the element of reasonableness, both as regards the company and as regards the public, is eminently a question for judicial investigation, requiring the process of law for its deter-

8. **Uniform charge for detention of cars by shippers.**—Kentucky Wagon Mfg. Co. *v.* Ohio, etc., R. Co., 98 Ky. 152, 17 Ky. L. Rep. 726, 32 S. W. 595, 36 L. R. A. 850, 56 Am. St. Rep. 326.

9. **Regulation of freight association as to estimated weight of tank cars.**—Coates *v.* Chicago, etc., R. Co., 8 S. Dak. 173, 65 N. W. 1067.

10. **Right of state to insist on compliance with regulations.**—State *v.* Boston, etc., Railroad, 75 N. H. 327, 74 Atl. 542.

11. **Power of courts to compel and restrain.**—Horton *v.* Southern R. Co., 173 Ala. 231, 55 So. 531. See post, "Injunction," §§ 160-178.

12. **Size of type to be used in printing schedule of rates.**—State *v.* Pensacola, etc., R. Co., 27 Fla. 403, 9 So. 89.

13. **When commission order to carrier as to service will not be declared unreasonable.**—Minneapolis, etc., R. Co. *v.* Railroad Comm., 136 Wis. 146, 116 N. W. 905, construing Laws 1905, pp. 556, 559, c. 362, §§ 12, 14.

14. **In Massachusetts** a report of commissioners is not to be treated in all respects like an award of arbitrators. All the powers of the commissioners are derived from judicial appointment, and the court will so far supervise their award as to see that they have acted within the scope of the authority with which they are invested, and that they have acted upon all matters submitted to them. Boston, etc., R. Corp. *v.* Western R. Corp. (Mass.), 14 Gray 253. See, also Hingham, etc., Turnpike Corp. *v.* Norfolk (Mass.), 6 Allen 353; Metropolitan R. Co. *v.* Quincy R. Co. (Mass.), 12 Allen 262; Inhabitants of Wrentham *v.* Inhabitants of Norfolk, 114 Mass. 555.

mination,[15] and can not be conclusively determined by the legislature.[16] It is within the power and is the duty of the courts to inquire whether rates prescribed by a state railroad commission are unjust and unreasonable and such as to constitute an unconstitutional invasion of property rights.[17] But the courts have no general supervisory jurisdiction over the question of freight and passenger rates.[18] The extent of judicial interference is protection against unrea-

15. Reasonableness of a rate a judicial question.—Reagan *v.* Farmers' Loan, etc., Co., 154 U. S. 362, 38 L. Ed. 1014, 14 S. Ct. 1047; Chicago, etc., R. Co. *v.* Minnesota, 134 U. S. 418, 33 L. Ed. 970, 10 S. Ct. 462; Chicago, etc., R. Co. *v.* Wellman, 143 U. S. 339, 36 L. Ed. 176, 12 S. Ct. 400; Lake Shore, etc., R. Co. *v.* Smith, 173 U. S. 684, 43 L. Ed. 858, 19 S. Ct. 565; St. Louis, etc., R. Co. *v.* Gill, 156 U. S. 649, 39 L. Ed. 567, 15 S. Ct. 484; Smyth *v.* Ames, 169 U. S. 466, 42 L. Ed. 819, 18 S. Ct. 418; Covington, etc., Turnpike Co. *v.* Sandford, 164 U. S. 578, 592, 41 L. Ed. 560, 17 S. Ct. 198; Chicago, etc., R. Co. *v.* Tompkins, 176 U. S. 167, 173, 44 L. Ed. 417, 20 S. Ct. 336; Stone *v.* Farmers' Loan, etc., Co. 116 U. S. 307, 29 L. Ed. 636, 6 S. Ct. 334, 388, 1191; Dow *v.* Beidelman, 125 U. S. 680, 681, 31 L. Ed. 841, 8 S. Ct. 1028; Steenerson *v.* Great Northern R. Co., 69 Minn. 353, 72 N. W. 713; Stone *v.* Natchez, etc., R. Co., 62 Miss. 646.

There is a remedy in the courts for relief against legislation establishing a tariff of rates which is so unreasonable as to practically destroy the value of property of companies engaged in the carrying business, and especially may the courts of the United States treat such a question as a judicial one, and hold such acts of legislation to be in conflict with the constitution of the United States, as depriving the companies of their property without due process of law, and as depriving them of the equal protection of the laws. St. Louis, etc., R. Co. *v.* Gill, 156 U. S. 649, 39 L. Ed. 567, 15 S. Ct. 484; Stone *v.* Farmers' Loan, etc., Co., 116 U. S. 307, 29 L. Ed. 636, 6 S. Ct. 334, 388, 1191; Dow *v.* Beidelman, 125 U. S. 680, 681, 31 L. Ed. 841, 8 S. Ct. 1028; Chicago, etc., R. Co. *v.* Minnesota, 134 U. S. 418, 33 L. Ed. 970, 10 S. Ct. 462; Chicago, etc., R. Co. *v.* Wellman, 143 U. S. 339, 36 L. Ed. 176, 12 S. Ct. 400; Reagan *v.* Farmers' Loan, etc., Co., 154 U. S. 362, 38 L. Ed. 1014, 14 S. Ct. 1047; Covington, etc., Turnpike Co. *v.* Sandford, 164 U. S. 578, 592, 41 L. Ed. 560, 17 S. Ct. 198; Smyth *v.* Ames, 169 U. S. 466, 42 L. Ed. 819, 18 S. Ct. 418.

16. Reasonableness of rate can not be conclusively determined by legislature.—Smyth *v.* Ames, 169 U. S. 466, 42 L. Ed. 819, 18 S. Ct. 418; Chicago, etc., R. Co. *v.* Minnesota, 134 U. S. 418, 33 L. Ed. 970, 10 S. Ct. 462.

While rates for the transportation of persons and property within the limits of a state are primarily for its determination, the question whether they are so unreasonably low as to deprive the carrier of its property without such compensation as the constitution secures, and therefore without due process of law, can not be so conclusively determined by the legislature of the state or by regulations adopted under its authority, that the matter may not become the subject of judicial inquiry. Smyth *v.* Ames, 169 U. S. 466, 42 L. Ed. 819, 18 S. Ct. 418.

The idea that any legislature, state or federal, can conclusively determine for the people and for the courts that what it enacts in the form of law, or what it authorizes its agents to do, is consistent with the fundamental law, is in opposition to the theory of our institutions. The duty rests upon all courts, federal and state, when their jurisdiction is properly invoked, to see to it that no right secured by the supreme law of the land is impaired or destroyed by legislation. This function and duty of the judiciary distinguishes the American system from all other systems of government. The perpetuity of our institutions and the liberty which is enjoyed under them depend, in no small degree, upon the power given the judiciary to declare null and void all legislation that is clearly repugnant to the supreme law of the land. Smyth *v.* Ames, 169 U. S. 466, 42 L. Ed. 819, 18 S. Ct. 418.

17. Power of courts over rates prescribed by railroad commission.—Trammel *v.* Dinsmore, 42 C. C. A. 623, 102 Fed. 794, affirmed in 183 U. S. 115, 46 L. Ed. 111, 22 S. Ct. 45; Southern R. Co. *v.* Atlanta Sand, etc., Co., 135 Ga. 35, 68 S. E. 807.

The courts have this power under the Texas statute, Rev. St. 1895, arts. 4565, 4566. Gulf, etc., R. Co. *v.* Railroad Comm., 102 Tex. 338, 116 S. W. 795, reversing on rehearing 113 S. W. 741.

18. Courts have no general supervisory jurisdiction over rates.—Raritan River R. Co. *v.* Middlesex, etc., Tract. Co., 70 N. J. L. 732, 58 Atl. 332.

Under the Texas statute, Rev. St. 1895, arts. 4565, 4566, courts are not entitled to inquire as to the motives of the railroad commission in fixing rates. Railroad Comm. *v.* Galveston Chamber of Commerce (Tex.), 145 S. W. 573.

sonable rates,[19] and the judiciary ought not to interfere with the collection of rates established under legislative sanction, unless they are so plainly and palpably unreasonable as to make their enforcement equivalent to the taking of property for public use without such compensation as under all the circumstances is just both to the owner and to the public.[20] If the courts decide that rates fixed by the legislature or commission are unreasonable, it is not within their power to prepare a new schedule or provide rates which they may deem reasonable.[21] Nor are the courts concerned whether the rates fixed be unnecessary or merely speculative.[22] Under a statute prohibiting a railroad company from discriminating in charges or facilities in the transportation of freight or passengers, a court can not compel a railroad company to allow to a warehouseman or storage company the same service at the same rates as the company allows to another warehouseman, especially where such service and rates are discriminating.[23] A court

19. Extent of judicial interference is pretection against unreasonable rates.—*United States.*—Reagan *v.* Farmers' Loan, etc., Co., 154 U. S. 362, 38 L. Ed. 1014, 14 S. Ct. 1047; Chicago, etc., R. Co. *v.* Wellman, 143 U. S. 339, 36 L. Ed. 176, 12 S. Ct. 400; Stone *v.* Farmers' Loan, etc., Co., 116 U. S. 307, 29 L. Ed. 636, 6 S. Ct. 334, 388, 1191; Chicago, etc., R. Co. *v.* Minnesota, 134 U. S. 418, 33 L. Ed. 970, 10 S. Ct. 462; Smyth *v.* Ames, 169 U. S. 466, 42 L. Ed. 819, 18 S. Ct. 418; Dow *v.* Beidelman, 125 U. S. 680, 31 L. Ed. 841, 8 S. Ct. 1028; Peik *v.* Chicago, etc., R. Co., 94 U. S. 164, 24 L. Ed. 97; Chicago, etc., R. Co. *v.* Ackley, 94 U. S. 179, 24 L. Ed. 99; Winona, etc., R. Co. *v.* Blake, 94 U. S. 180, 24 L. Ed. 99; Stone *v.* Wisconsin, 94 U. S. 181, 24 L. Ed. 102; San Diego Land, etc., Co. *v.* National City, 174 U. S. 739, 43 L. Ed. 1154, 19 S. Ct. 804.

New Jersey.—Raritan River R. Co. *v.* Middlesex, etc., Tract. Co., 70 N. J. L. 732, 58 Atl. 332.

On appeal a court can review the acts of a state railroad and warehouse commission only so far as to determine whether the rates fixed by it are unreasonable and confiscatory, and to what extent. Steenerson *v.* Great Northern R. Co., 69 Minn. 353, 72 N. W. 713.

20. San Diego Land, etc., Co. *v.* National City, 174 U. S. 739, 43 L. Ed. 1154, 19 S. Ct. 804; Chicago, etc., R. Co. *v.* Wellman, 143 U. S. 339, 36 L. Ed. 176, 12 S. Ct. 400; Reagan *v.* Farmers' Loan, etc., Co., 154 U. S. 362, 38 L. Ed. 1014, 14 S. Ct. 1047; Smyth *v.* Ames, 169 U. S. 466, 42 L. Ed. 819, 18 S. Ct. 418. See, also, Henderson Bridge Co. *v.* Henderson, 173 U. S. 592, 43 L. Ed. 823, 19 S. Ct. 553.

21. Courts can not prepare new schedule of rates.—Dow *v.* Beidelman, 125 U. S. 680, 31 L. Ed. 841, 8 S. Ct. 1028; Peik *v.* Chicago, etc., R. Co., 94 U. S. 164, 24 L. Ed. 97; Chicago, etc., R. Co. *v.* Ackley, 94 U. S. 179, 24 L. Ed. 99; Winona, etc., R. Co. *v.* Blake, 94 U. S. 180, 24 L. Ed. 99; Stone *v.* Wisconsin, 94 U. S. 181, 24 L. Ed. 102; Chicago, etc., R. Co. *v.* Wellman, 143 U. S. 339, 36 L. Ed. 176, 12 S. Ct. 400; Stone *v.* Farmers' Loan, etc., Co., 116 U. S. 307, 29 L. Ed. 636, 6 S. Ct. 334, 388, 1191; Chicago, etc., R. Co. *v.* Minnesota, 134 U. S. 418, 33 L. Ed. 970, 10 S. Ct. 462; Smyth *v.* Ames, 169 U. S. 466, 42 L. Ed. 819, 18 S. Ct. 418.

It is not the function of the courts to establish a schedule of rates. It is not, therefore, within the power of courts to prepare a new schedule, or rearrange one already established. The inquiry in such case, is limited to the effect of the tariff as a whole, including therein the rates prescribed for all the several classes of goods, and the decrees must either condemn or sustain the act of quasi legislation. If a law be adjudged invalid, the court may not, in the decree, attempt to enact a law upon the same subject which shall be obnoxious to no legal objections. It stops with simply passing its judgment on the validity of the act before it. Reagan *v.* Farmers' Loan, etc., Co., 154 U. S. 362, 38 L. Ed. 1014, 14 S. Ct. 1047.

The courts are not authorized to revise or change the body of rates imposed by a legislature or a commission. They do not determine whether one rate is preferable to another, or what, under all circumstances, would be fair and reasonable, as between the carriers and the shippers. They do not engage in any mere administrative work. Reagan *v.* Farmers' Loan, etc., Co., 154 U. S. 362, 38 L. Ed. 1014, 14 S. Ct. 1047; Trammel *v.* Dinsmore, 42 C. C. A. 623, 102 Fed. 794, affirmed in 183 U. S. 115, 46 L. Ed. 111, 22 S. Ct. 45.

22. Courts not concerned whether rates be unnecessary or merely speculative.—State *v.* Atlantic, etc., R. Co., 48 Fla. 146, 37 So. 657, affirmed Atlantic, etc., R. Co. *v.* Ellis, 203 U. S. 256, 51 L. Ed. 174, 27 S. Ct. 108; State *v.* Jacksonville, etc., R. Co., 48 Fla. 153, 37 So. 658.

23. Court can not compel carrier to carry at same rate it carriers for another.—Chouteau *v.* Union, R., etc., Co., 22 Mo. App. 286, construing Rev. St., § 821.

of equity should not hold invalid an act of the legislature fixing maximum rates of a carrier until a fair trial has been made of continuing business under the statutes, and the practical result of such rates has been determined;[24] and before such a statute can be held invalid, the receipts and earnings of the carrier must be fully shown, in order that it may clearly appear that a prudent and honest management within the rates prescribed would not secure to the company reasonable compensation for the use of its property and conducting its business.[25]

Review of Findings of Commission Where Inquiry Calls for Expert Evidence.—On questions as to the valuation of street railroad property, the estimate of future earnings, operating expenses, maintenance, depreciation, taxes, and fixed charges and other results reached by the railroad commission in fixing rates, the inquiry calls largely for expert evidence, and the findings made are necessarily of the same nature, and the findings should not be disturbed on review unless they bear evidence of having been reached arbitrarily and without a full consideration of all the controlling facts, but courts may review the questions submitted in so far as they require the application of legal principles.[26]

§§ 138-141. Right to and Mode of Obtaining Relief—§ 138. In General.—Duties imposed upon a carrier by statute or by its charter may be enforced by mandamus, quo warranto, or such other summary proceeding as the law may provide.[27] But a duty may be enforced by mandamus only where it is specific and plainly imposed upon the carrier.[28] In seeking relief from orders or rules of a railroad commission thought to be unduly burdensome or otherwise illegal, a carrier should apply to the commission for change of modification before resorting to the courts.[29] A court will not grant relief in the first instance where relief is within the power of the commission to give on proper application therefor.[30]

24. Practical result of rates must be determined.—State *v.* Adams Exp. Co., 85 Neb. 25, 122 N. W. 691.

25. Receipts and earnings of carrier must be shown.—State *v.* Adams Exp. Co., 85 Neb. 25, 122 N. W. 691.

26. Review of findings of commission where inquiry calls for expert evidence.—Puget Sound Elect. Railway *v.* Railroad Comm., 65 Wash. 75, 117 Pac. 739.

27. Mandamus and other remedies not forbidden by implication.—Under the constitution of Florida Const. 1885, art. 16, § 30, which, after specifying that the legislature may pass certain laws regulating common carriers, "and shall provide for enforcing such laws by adequate penalties and forfeitures, does not, by implication, forbid the use of mandamus and other remedies for enforcing duties imposed by laws passed to accomplish the purposes specified; and the courts may apply such of the ordinary remedies as may be applicable. State *v.* Jacksonville Terminal Co., 41 Fla. 377, 27 So. 225.

Quo warranto proceedings authorized.—Where a railroad company fixes a rate of freight per 100 pounds for carrying petroleum oil in iron tank cars, substantially lower than its rate for transporting it in barrels in car-load lots, it is exercising "a franchise, privilege, or right in contravention of law," within the meaning of the Ohio statute, Rev. St., § 6761, cl. 4, authorizing quo warranto proceedings against corporations. State *v.* Cincinnati, etc., R. Co., 47 O. St. 130, 23 N. E. 928.

Summary proceedings to enforce duties imposed on a street railroad company.—As to the power of the New York public service commission under the Public Service Commission Law (Laws 1907, c. 429) §§ 48, 57, to enforce duties imposed on street railroad companies by provisions in their charters or by orders of the commission, see Willcox *v.* Richmond, etc., R. Co., 142 App. Div. 44, 128 N. Y. S. 266, order affirmed in 201 N. Y. 577, 95 N. E. 1141.

28. Duty enforceable by mandamus only where specific and plainly imposed.—People *v.* New York, etc., R. Co., 104 N. Y. 58, 9 N. E. 856, 58 Am. Rep. 484.

29. Court will not grant relief in first instance where commission has power to grant it.—Railroad Comm'rs *v.* Florida, etc., R. Co., 58 Fla. 524, 50 So. 425.

30. So held under the Indiana statute, Burns' Ann. St. 1908, § 5537c, empowering the railroad commission to grant a rehearing in any case in which it has made a final order, or to modify any final order made by it. Chicago, etc., R. Co. *v.* Railroad Comm., 175 Ind. 630, 95 N. E. 364.

Such statute provides that the orders of the railroad commission shall take effect not more than thirty days after entry thereof, unless suspended or modified by the commission, and impliedly authorizes the commission to suspend the tak-

Whether the rules and regulations adopted by a state corporation commission violate any right of transportation companies can only be properly determined as the questions arise in concrete cases, and upon the particular facts of each case, and cannot be properly decided on an appeal where only abstract questions are raised.[31] If any rule or regulation is made by a commission which in its application to the facts of a particular case, violates any right of a defendant protected by the constitution of the United States, he may have its validity tested by an appeal to the court of last resort in the state.[32] The right of appeal from the orders or decisions of a state commission is generally regulated by constitutional provision or statute, and therefore the question whether an appeal lies in a particular case is to be determined by a proper construction of such provision or statute.[33]

ing effect of any order pending a petition for rehearing or modification thereof, and a party aggrieved by an order of the commission can not resort to the courts merely on the ground that a petition for rehearing will not probably be acted on by the commission before the time fixed by the statute for the taking effect of the order unless suspended by the commission. Chicago, etc., R. Co. *v.* Railroad Comm., 175 Ind. 630, 95 N. E. 364.

Proceedings before the railroad commisioner, provided for by the Virginia statute, Act March 3, 1892, and his inability to have the cause or complaint corrected, are conditions precedent to the exercise of the jurisdiction conferred upon the circuit courts. Southern R. Co. *v.* Commonwealth, 98 Va. 758, 37 S. E. 294.

31. Validity of regulations not properly determinable on appeal where only abstract questions are raised.—Atlantic, etc., R. Co. *v.* Commonwealth, 102 Va. 599, 46 S. E. 911.

32. Appeal where a constitutional right is violated.—Atlantic, etc., R. Co. *v.* Commonwealth, 102 Va. 599, 46 S. E. 911.

33. Construction of constitutional provisions and statutes.—Under the constitution of Kentucky, § 218, prohibiting common carriers from charging more for a short than for a long haul, but providing that the railroad commission may in "special cases," grant relief from the operation of the section, the action of the commission in refusing such relief can not be reviewed by the courts. Louisville, etc., R. Co. *v.* Commonwealth, 104 Ky. 226, 20 Ky. L. Rep. 1102, 1380, 46 S. W. 707, 47 S. W. 210, 598, 43 L. R. A. 541.

The North Carolina statute. Revisal 1905, § 1100, authorizes the corporation commission to make rules governing railroad companies in the unloading of freight, etc. The commission's rule 8, set forth in its circular No. 36, Report 1905, provides that, when a railway company fails to deliver freight at the depot within 48 hours after its arrival, the shipper or consignee shall be paid $1 a day for the delay. Section 1074 provides that, if a company violates a rule of the commission, and recompense for the injury done thereby to any one as may be directed by the commission is not made, the company shall incur a specified penalty. Section 1064 authorizes the commission to institute investigations to ascertain if their rules, etc., are being complied with. On the hearing of a complaint by a consignee that a company had violated the rule the commission found that the company should pay complainant $1, and ordered it paid. Held, that the order was not appealable; the commission not having power to enforce complainant's right of recovery by its own process, section 1074 merely authorizing an appeal fro a decision effecting or purporting to effect some right or interest of a party to a controversy, and in some way determinative of some material questions involved, and the end of the commission's investigation being merely to afford it information and enable it to act intelligently in determining whether it should sue for the penalty authorized by the statute. North Corolina Corp. Comm. *v.* Southern R. Co. (N. C.), 61 S. E. 271.

Under the constitution of Oklahoma, art. 9, § 20 (Bunn's Ed., § 231) an appeal lies to the supreme Court from the action of the corporation commission prescribing rates, charges, or classifications of traffic or affecting the train schedule, or requiring additional facilities, conveniences, or public service, or refusing to approve a suspending bond, or requiring additional security thereon or an increase thereof. St. Louis, etc., R. Co. *v.* State, 24 Okla. 805, 105 Pac. 351.

But the repeal of an administrative order by the corporation commision, providing for the enforcement of penalities against passengers who board trains without purchasing tickets, is not appealable, under this constitutional provision. Atchison, etc., R. Co. *v.* State, 28 Okla. 12, 115 Pac. 1101.

Under the Wisconsin statute, Laws 1905, p. 549, c. 362, relating to a review of the orders, etc., of the railroad commission it is not necessary that the orders be confiscatory in character and effect to enable the court to review them, such a construction being negatived by Const.,

§§ 139-141. Relief against Unreasonable Rates—§§ 139-140. Relief to Carrier—§ 139. Rates Fixed by Legislature.—Where the legislature choose to act directly on the subject by themselves establishing a tariff of rates and prescribing penalties, there is no opportunity to resort to a compendious remedy, such as a proceeding in equity, because there is no public functionary or commission which can be made to respond and therefore, if a carrier is to have any relief, it must be found in a right to raise the question of the reasonableness of the statutory rates by way of defense to an action for the collection of the penalties.[34]

§ 140. Rates Fixed by Commission.—Where the legislature creates commissions or boards of public works, with power to establish rates for the transportation of passengers and freight, the remedy for a tariff alleged to be unreasonable should be sought in a bill in equity or some equivalent proceeding, wherein the rights of the public as well as those of the company complaining can be protected.[35] Whether a rate fixed by such a commission is confiscatory so as to deprive the carrier of its property without due process of law within the meaning of the fourteenth amendment of the constitution of the United States depends upon the valuation of the property, the income derivable from the rate, and the proportion between the two, which are matters of fact which the carrier cannot be prevented from trying before a competent tribunal of its own choosing.[36] In many states there are constitutional provisions or statutes prescribing the method for bringing the question of the reasonableness of rates prescribed by the railroad commission before the courts for judicial determination.[37]

art. 7, § 8, giving circuit courts appellate jurisdiction of, and supervisory control over, all inferior courts and tribunals. Minneapolis, etc., R. Co. *v.* Railroad Comm., 136 Wis. 146, 116 N. W. 905.

34. Rates fixed by legislature.—St. Louis, etc., R. Co. *v.* Gill, 156 U. S. 649, 39 L. Ed. 567, 15 S. Ct. 484. See, also, Chicago, etc., R. Co. *v.* Minnesota, 134 U. S. 418, 33 L. Ed. 970, 10 S. Ct. 462. But see Coal, etc., R. Co. *v.* Conley, 67 W. Va. 129, 67 S. E. 613.

Where it reasonably appears from a consideration of all the evidence that the maximum statutory rates allowed to a carrier are not confiscatory, but afford at least some profit, the courts will not interfere, but will require the party complaining to apply for relief to the rate-making power, or to the tribunal provided by statute with power to increase such rates in case they are found unreasonable. State *v.* Adams Exp. Co., 85 Neb. 25, 122 N. W. 691; State *v.* Wells, Fargo & Co., 85 Neb. 42, 122 N. W. 697.

35. Rates fixed by commission.—St. Louis, etc., R. Co. *v.* Gill, 156 U. S. 649, 39 L. Ed. 1014, 1047; Chicago, etc., R. Co. *v.* Minnesota, 134 U. S. 418, 33 L. Ed. 970, 10 S. Ct. 462; Reagan *v.* Farmers' Loan, etc., Co., 154 U. S. 362, 38 L. Ed. 1014, 1047; S. C., 154 U. S. 420, 38 L. Ed. 1031, 14 S. Ct. 1062; Reagan *v.* Mercantile Trust Co., 154 U. S. 418, 38 L. Ed. 1030, 14 S. Ct. 1062; S. C., 154 U. S. 413, 38 L. Ed. 1028, 14 S. Ct. 1060; Covington, etc., Turnpike Co. *v.* Sandford, 164 U. S. 578, 592, 41 L. Ed. 560, 17 S. Ct. 198.

36. Prentis *v.* Atlantic Coast Line Co., 211 U. S. 210, 53 L. Ed. 150, 29 S. Ct. 67.

37. In Indiana a carrier may present any objection to an order of the railroad commission, reducing a rate charged, in an action commenced in the superior court pursuant to Acts 1907, p. 469, c. 241, § 6, providing that any carrier, etc., dissatisfied with an order of the commission, may within thirty days begin an action against the commission to suspend or set aside such order. Chicago, etc., R. Co. *v.* Railroad Comm., 173 Ind. 469, 87 N. E. 1030.

Under the constitution of Louisiana, art. 285, any party interested has the right to appeal to the courts upon the question whether a rate established by the railroad commission is reasonable and just. Morgan, etc., Co. *v.* Railroad Comm., 127 La. 636, 53 So. 890.

A Minnesota statute, Gen. St. 1894, § 393, provides for an appeal from the state railroad and warehouse commission to the district court, and that upon such appeal the district court shall have jurisdiction to and shall examine the whole matter in controversy, including matters of fact, and that the remedy therein provided for shall be in addition to all existing legal remedies. Held, that where the commission made an order fixing a tariff rate, and the carrier did not appeal from such order on hearing in the district court, the carrier, in mandamus proceedings, was entitled to an examination of matters of fact, in which evidence might be taken de novo, since the order

§ 141. Relief to Public.—The state may fix rates and authorize them to be charged and place them beyond the power of the interference of the courts on the ground that they are extortionate, and such rates, except for some constitutional or statutory provision so authorizing, cannot be adjudged by a court to be extortionate.[38] Relief from onerous and burdensome rates of transportation imposed under state authority must be sought in the competition of different lines, and, perhaps, in the power of congress to establish post roads and facilitate military and commercial intercourse between the different parts of the country.[39] But where a carrier charges a rate which is in violation of a constitutional or statutory enactment or commission order relief may be had by an action instituted by an individual who is required to pay such rate or by the commission whose order the carrier has violated, the mode of proceeding in such case being generally prescribed by constitutional provision or statute.[40]

§ 142. Scope of Inquiry.—Under a statute authorizing an action against the railroad commission by a party dissatisfied with a rate made by it, in which such party must show that the rate is unreasonable and unjust to him, the inquiry is not limited to whether the rate is so unreasonable and unjust as to amount to the taking of property without due process of law.[41] A court, on

is not conclusive as to the reasonableness of the tariff in the absence of an appeal therefrom. State *v.* Minneapolis, etc., R. Co., 80 Minn. 191, 83 N. W. 60, 89 Am. St. Rep. 514, affirmed Minneapolis, etc., R. Co. *v.* Minnesota, 186 U. S. 257, 46 L. Ed. 1151, 22 S. Ct. 900.

An earlier statute in this state, Gen. Laws 1887, c. 10, creating the railroad and warehouse commission and defining its duties, did not authorize and appeal to the district court from an order of the commission prescribing rates to be charged by common carriers. Railway Transfer Co. *v.* Railroad, etc., Comm., 39 Minn. 231, 39 N. W. 150.

38. **Courts can not interfere with rates fixed by state.**—McGrew *v.* Missouri Pac. R. Co., 230 Mo. 496, 132 S. W. 1076.

39. **Where relief from rates imposed under state authority must be sought.**—Railroad Co. *v.* Maryland (U. S.), 21 Wall. 456, 22 L. Ed. 678.

40. **When mandamus is a proper remedy.**—Where a state board of transportation has investigated charges of unjust discrimination against a railroad company, and has found such unjust discrimination to exist, and ordered such railroad company to reduce its rates to conform to a schedule presented by such board, which order the railroad company neglected to comply with, mandamus is a proper remedy to enforce such order. State *v.* Fremont, etc., R. Co., 22 Neb. 313, 35 N. W. 118.

In Alabama, mandamus is not the proper remedy for excessive charges by a railway company; that under Code, § 1698, allowing double damages, etc., being adequate. State *v.* Mobile, etc., R. Co., 59 Ala. 321.

Action by railroad commission to enforce its orders authorized.—On the complaint of a shipper, the Board of Railroad Commissioners of Iowa required a railway company to conform its charges to the schedule of charges prepared by the board, and informed it that the overcharge should be refunded to the complainant. The railway company refusing so to do, the board sued to enforce its order. On the trial the board did not demand a refunding of the overcharge, nor did the company attempt to show that the schedule charges of the board were unreasonable. Held, the action by the board was authorized under Acts 22d. Gen. Assem., c. 28, § 16, providing that actions may be brought to enforce the lawful orders of the board. Campbell *v.* Chicago, etc., R. Co., 86 Iowa 587, 53 N. W. 351, 17 L. R. A. 443.

Railroad commission without jurisdiction to compel reinstatement of lower competitive rate.—The constitution of California, art. 12, § 20, prohibits a railroad corporation which has reduced its transportation rates for the purpose of competition from raising such rates without the consent of the authorities vested with the power to regulate such rates. Section 22, authorizes the railroad commissioners to hear and determine complaints against railroads, but provides that nothing therein contained shall prevent individuals from maintaining actions against railroad companies, and authorizes the recovery of exemplary damages in suits based on excessive charges. Held, that the railroad commission has no jurisdiction of judicial proceedings instituted before it to compel a railway company to reinstate a lower competitive rate which it had formerly made. Edson *v.* Southern Pac. Co., 133 Cal. 25, 65 Pac. 15.

41. **Scope of inquiry.**—Judgment Railroad Comm. *v.* Weld (Tex. Civ. App.), 68 S. W. 1117, reversed in 96 Tex. 394, 73 S. W. 529, construing Rev. St. 1895, arts. 4565, 4566.

appeal from an order of a railroad commission fixing rates, will not enter on an inquiry of the reasonableness of the rates based on a comparison with rates which were canceled by the carrier before the commission made its investigation.[42]

§ 143. What Commission Orders Will Be Enforced.—All reasonable regulations by a railroad commission within the authority conferred upon it should be enforced to carry out the express purpose of the law in the interest of the general welfare; but unreasonable regulations are not within the authority conferred, and when unreasonable and violative of constitutional provisions will not be enforced.[43]

§ 144. Revival of Causes of Action.—An amendatory statute authorizing suits against railroad companies for violation of regulations of the railroad commission to be brought within twelve months after the termination of suits by the commission to enforce their rates, does not revive a cause of action that accrued under the amended statute and that had been extinguished by lapse of time prior to the enactment of the amendatory statute.[44]

§§ 145-159. Procedure and Evidence—§ 145. Procedure in General.—Proceedings before a corporation commission for contempt for violation of its orders are governed by the same rules as obtain in courts.[45]

§ 146. Jurisdiction.—Statutes creating railroad commissions or conferring power upon them generally prescribe what courts shall have jurisdiction of proceedings to enforce or to prevent enforcement of regulations of the commission. Some of the peculiar provisions of these statutes have been interpreted by the courts.[46]

§§ 147-148. Parties—§ 147. By Whom Suit May Be Brought.—A railroad corporation,[47] or the beneficial owner thereof,[48] may invoke the aid of

42. Detroit, etc., R. Co. *v.* Michigan R. Comm., 171 Mich. 335, 137 N. W. 329.

43. What commission orders will be enforced.—Railroad Comm'rs *v.* Florida, etc., R. Co., 58 Fla. 524, 50 So. 425.

An order of the railroad commissioners will not be enforced, notwithstanding the carrier failed to apply to the commissioners for relief from the order before disregarding it, where it is in effect admitted that its enforcement will be injurious to the public and violate constitutional rights of the carrier. Railroad Comm'rs *v.* Florida, etc., R. Co., 58 Fla. 524, 50 So. 425.

44. Amendatory statute not reviving cause of action extinguished by lapse of time.—La Floridienne *v.* Seaboard, etc., Railway, 59 Fla. 196, 52 So. 298, construing Laws 1907, c. 5624, amending Gen. St. 1906, § 2910.

45. Proceedings before corporation commission for contempt.—St. Louis, etc., R. Co. *v.* Cannon & Son, 31 Okla. 476, 122 Pac. 231.

46. Proceedings by mandamus to enforce regulations of commission.—By § 8 of the railroad and warehouse commission act of Minnesota (Laws 1887, c. 10) the supreme court is vested (concurrently with the district court) with original jurisdiction of all proceedings by mandamus, to compel compliance with the regulations of the commission with reference to transportation rates, as provided therein. State *v.* Chicago, etc., R. Co., 38 Minn. 281, 37 N. W. 782, reversed in 134 U. S. 418, 33 L. Ed. 970, 10 S. Ct. 462, 702.

Jurisdiction of suit to prevent enforcement of regulation of commission.—Under the Texas statute, Rev. St., arts. 4565, 4566, providing that, if any railroad company is dissatisfied with any rule or regulation adopted by the railroad commission, it may file a petition in court, stating its objections, on the trial of which the burden shall be on the plaintiff to show that the rule or regulation is unjust and unreasonable, the court in which such petition is filed has jurisdiction to determine whether the regulation is unreasonable and unjust. Railroad Comm. *v.* Houston, etc., R. Co., 90 Tex. 340, 38 S. W. 750.

47. Railroad company as complaint.—Reagan *v.* Farmers' Loan, etc., Co., 154 U. S. 362, 38 L. Ed. 1014, 14 S. Ct. 1047.

48. Beneficial owner of road as complaint.—Reagan *v.* Farmers' Loan, etc., Co., 154 U. S. 362, 38 L. Ed. 1014, 14 S. Ct. 1047.

Clearly a citizen of another state, who has, under authority of the laws of the

the courts by suit in order to determine whether the contract rights created by its charter are violated by acts regulating rates. A statute authorizing the railroad commission of a state to institute proceedings against railroads for violating or neglecting to comply with any law of the state as to railroads, does not preclude the attorney general from proceeding, of his own motion, whenever he concludes the interests of the public require it.[49] A voluntary unincorporated association is without legal authority to institute in its own behalf and for the benefit of another proceedings before a railroad commission challenging the reasonableness of switching charges.[50]

§ 148. Who Are Proper Parties.—To proceedings by the railroad commissioner of a state to require two railroad companies to make proper connections, one of such companies is a proper party although it has already made the required connection, since all the parties should be before the court, so that all the matters in dispute can be determined, and a judgment binding on both corporations be rendered.[51]

§ 149. Intervention.—In proceedings before a railroad commission to regulate the rates of a common carrier, another carrier, not a party to the proceeding, though indirectly affected thereby, cannot intervene as a matter of right.[52]

§§ 150-152. Pleading—§ 150. Petition.—A railroad company attacking the reasonableness and justice of a prescribed rate being required to show by clear and satisfactory proof that the rate is unjust and unreasonable, the petition must allege facts and circumstances that would, if true, authorize the court to adjudge the rate unjust and unreasonable as matter of law.[53] In a petition

state, become pecuniarily interested in, or the beneficial owner of, the property of the corporation, may invoke the judgment of the federal courts as to whether the contract rights created by the charter, and of which it is thus the beneficial owner, are violated by subsequent acts of the state in limitation of the right to collect tolls. Reagan *v.* Farmers' Loan, etc., Co., 154 U. S. 362, 38 L. Ed. 1014, 14 S. Ct. 1047. Compare Peik *v.* Chicago, etc., R. Co., 94 U. S. 164, 24 L. Ed. 97.

49. Authority conferred upon commission not precluding action by attorney general.—State *v.* Boston, etc., Railroad, 75 N. H. 327, 74 Atl. 542, construing Pub. St. 1891, c. 155, § 15.

50. Institution of proceedings by voluntary unincorporated association.—Darlington Lumber Co. *v.* Missouri Pac. R. Co. (Mo.), 147 S. W. 1052.

51. Proper parties to proceedings to require carriers to make connections.—Southern R. Co. *v.* Commonwealth, 98 Va. 758, 37 S. E. 294.

52. Intervention.—Appeal of Great Northern R. Co., 60 Minn. 461, 62 N. W. 826.

53. What petition attacking reasonableness and justice of rate must allege.—Gulf, etc., R. Co. *v.* Railroad Comm., 102 Tex. 338, 113 S. W. 741.

Petitions held insufficient.—A petition which alleged that the hauling of lumber over the portion of the complaining company's road designated in the petition at the rate specified by the railroad commision would not yield sufficient revenue to pay cost of transportation, but did not state the earnings of the railroad in hauling lumber over the remainder of its road nor the amount of lumber traffic from points beyond the stations from which the objectionable traffics were prescribed, was insufficient, since the company could not select one rate and a particular part of its road for the application of the rate, and establish therefrom that the rate was not reasonable, as the rate, when applied to hauls over the entire road, might afford a profit. Gulf, etc., R. Co. *v.* Railroad Comm., 102 Tex. 338, 113 S. W. 741.

An allegation by a railroad company that the rates fixed by the railroad commissioners for it are unjust and unreasonable when compared with the rates permitted on other lines of railroad in this state, operating under the same conditions, does not overthrow the reasonableness or justice of the rate complained of, as a rate reasonable and just in itself for one road may not be so for another, though they connect with each other. Storrs *v.* Pensacola, etc., R. Co., 29 Fla. 617, 11 So. 226.

Bills held sufficient.—A bill, filed by a railroad, charging an absolute loss on the transportation of passengers, occasioned by the operation of a statute, and less than a reasonable return for the entire service rendered by it, verified by oath and accompanied by statements, showing in detail the gross income, expenses and net earnings, sworn to and sustaining the allegations of the bill

for a mandamus to compel a railroad company to accept lawful freight rates, without discrimination, there must be a sufficient allegation to enable the court, upon awarding the writ, to command the company to do a specific act or thing.[54] A petition made to a railroad commission alleging merely that complainant, having in view the shipment of coal over a certain road, had applied to said road for ground near its tracks for erection of a coal shed to be used when shipping coal, and had been refused, but not alleging the purpose for which the shed was desired, or that complainant was, or ever proposed to be, a shipper or dealer in coal, or that there had been discrimination in granting like privilege to others, is insufficient.[55]

§ 151. Demurrer.—Where the petition attacking the reasonableness of a rate fixed by a railroad commission is demurred to, the court, in determining whether the unreasonableness of the rate is established by clear and satisfactory evidence, must consider the allegations of the petition as facts proved by clear and satisfactory evidence.[56] But it has been held that averments of railroad companies as to the adequacy of public service being performed by them and the future effect of an order relative to such service made by state authority, are merely conclusions that are not admitted by a demurrer, in the absence of averments or specific facts to sustain the conclusions.[57]

§ 152. When Pleadings Make the Taking of Testimony Unnecessary.—Where it clearly appears from the pleadings that a regulation of railroad commissioners is just, it is unnecessary for the court to take testimony on the subject.[58]

§§ 153-157. Evidence—§§ 153-156. Presumptions and Burden of Proof—§ 153. In General.—The rules, orders or findings of a state railroad commission are presumed to be reasonable and just,[59] and will not be interfered with, unless their invalidity is made to clearly appear.[60]

proper, is sufficient as a bill to invalidate a rate regulating statute. Coal, etc., R. Co. *v.* Conley, 67 W. Va. 129, 67 S. E. 613.

Where within twenty months under a state constitution passenger rates were reduced thirty-three and one-third per cent, and by about a dozen orders of the railroad commission freight rates on about 40 per cent of the intrastate freight business of the railroads were reduced about 40 per cent, a bill is not demurrable or defective which avers that the passenger rate is confiscatory, and that the effect of the freight rates is to take the property of complainant without just compensation, though the bill contains no averment that each order, taken by itself, is confiscatory. Love *v.* Atchison, etc., R. Co., 107 C. C. A. 403, 185 Fed. 321.

54. Petition for mandamus to compel acceptance of lawful freight rates.—State *v.* Mobile, etc., R. Co., 59 Ala. 321, holding that an allegation that relator tendered "bales of lint cotton" to the railroad company, without specifying any number, was fatally indefinite.

55. Petition in proceedings to compel carrier to permit erection of coal shed.—State *v.* Chicago, etc., R. Co., 86 Iowa 641, 53 N. W. 323, so holding as to a petition made under McClain's Code, § 2061.

56. Effect of demurrer.—Judgment, 113 S. W. 741, reversed on rehearing. Gulf, etc., R. Co. *v.* Railroad Comm., 102 Tex. 338, 116 S. W. 795.

57. Railroad Comm'rs *v.* Louisville, etc., R. Co., 63 Fla. 274, 57 So. 673.

58. When pleadings make the taking of testimony unnecessary. — Railroad Comm'rs *v.* Atlantic, etc., R. Co., 61 Fla. 799, 54 So. 900.

59. Rules, orders, or findings of commission presumed reasonable and just.—Railroad Comm'rs *v.* Florida, etc., R. Co., 58 Fla. 524, 50 So. 425; Railroad Comm'rs *v.* Louisville, etc., R. Co., 63 Fla. 274, 57 So. 673.

60. Railroad Comm'rs *v.* Louisville, etc., R. C ., 63 Fla. 274, 57 So. 673.

In determining whether a rate, rule, regulation, or order of the railroad commission upon a subject within its authority is so unreasonable and arbitrary as to be illegal and unenforceable, the court, in deference to the governmental functions conferred by law upon the commissioners, will not only require the prima facies of reasonableness impressed by the statute upon the rate, rule, regulation, or order to be overcome by admissions or proofs, but will require the admissions or proofs of facts tending to show unreasonableness to be clear and convincing, every reasonable doubt being yielded in

§§ 154-155. As to Rates—§ 154. Rule Stated.—It is a rule as to which all the authorities are in agreement, and which has in many states been embodied in the constitution or statutes, that rates fixed by the legislature,[61] or by a commission under constitutional or legislative authority,[62] are prima facie

favor of the rate, rule, regulation, or order. Railroad Comm'rs *v.* Louisville, etc., R. Co. (Fla.), 57 So. 175.

Under the Texas statute, Rev. St. 1895, arts. 4665, 4566, the right of courts to set aside a determination of the railroad commission held dependent on a clear showing of unreasonableness. Railroad Comm. *v.* Galveston Chamber of Commerce (Tex.), 145 S. W. 573, reversing judgment Galveston Chamber of Commerce *v.* Railroad Comm. (Tex. Civ. App.), 137 S. W. 737.

61. Presumption as to reasonableness of rates fixed by legislature.—Ruggles *v.* Illinois, 108 U. S. 526, 27 L. Ed. 812, 2 S. Ct. 832.

The North Dakota statute, Laws 1907, p. 73, c. 51, amending and re-enacting Rev. Codes, 1905, § 4395, prescribing maximum coal rates, is presumptively valid, and the burden is on the carrier to prove that such rates are clearly unreasonable. State *v.* Northern Pac. R. Co., 19 N. Dak. 45, 120 N. W. 869.

While the rates for passenger service prescribed by the Pennsylvania statute, Act April 5, 1907 (P. L. 59), were presumptively reasonable, such presumption was no stronger than the ordinary presumption in favor of the constitutionality of an act of the legislature, and was of no great strength or sanctity, in view of the fact that the act was passed without investigation in obedience to public agitation. Pennsylvania R. Co. *v.* Philadelphia County, 220 Pa. 100, 68 Atl. 676.

62. Presumption that rates fixed by commission are lawful, just and reasonable.—*United States.*—Minneapolis, etc., R. Co. *v.* Minnesota, 186 U. S. 257, 46 L. Ed. 1151, 22 S. Ct. 900; Dow *v.* Beidelman, 125 U. S. 680, 31 L. Ed. 841, 8 S. Ct. 1028; Chicago, etc., R. Co. *v.* Tompkins, 176 U. S. 167, 44 L. Ed. 417, 20 S. Ct. 336; Seaboard, etc., Railway *v.* Ellis, 203 U. S. 261, 51 L. Ed. 175, 27 S. Ct. 109; Atlantic, etc., R. Co. *v.* Ellis, 203 U. S. 256, 51 L. Ed. 174, 27 S. Ct. 108.

If the rates established by the commission are not conclusive, they are at least prima facie evidence of what is reasonable and just. Reagan *v.* Farmers' Loan, etc., Co., 154 U. S. 362, 38 L. Ed. 1014, 14 S. Ct. 1047; S. C., 154 U. S. 420, 38 L. Ed. 1031, 14 S. Ct. 1062; Reagan *v.* Mercantile Trust Co., 154 U. S. 418, 38 L. Ed. 1030, 14 S. Ct. 1062.

Florida.—The effect of the Act of June 7, 1887 (Railroad Commission Act), is not to make schedules of rates prescribed by the railroad commission conclusive as against judicial inquiry, but is to provide a new mode of proving the reasonableness and just character of the rates fixed, and make the schedules competent and adequate evidence of the correctness of the action of the commissioners, in the absence of countervailing proof that they have exceeded their powers, or abused their discretion, and invaded some right of the railroad company. Pensacola, etc., R. Co. *v.* State, 25 Fla. 310, 5 So. 833, 3 L. R. A. 661.

Where a tariff of freight and passenger rates has been established by the railroad commissioners, and a railroad company and the commissioners differ as to whether such rates, considered as a whole, will prove remunerative to the company, and there is room for a difference of intelligent opinion on the subject, the courts can not substitute their judgment for that of the commissioners, but the tariffs as fixed by the commission must, in so far as the courts are concerned, be left to the test of experiment. Storrs *v.* Pensacola, etc., R. Co., 29 Fla. 617, 11 So. 226; Pensacola, etc., R. Co. *v.* State, 25 Fla. 310, 5 So. 833, 3 L. R. A. 661.

Georgia.—Sorrell *v.* Central Railroad, 75 Ga. 509.

Illinois.—State *v.* Illinois Cent. R. Co., 246 Ill. 188, 92 N. E. 814.

Iowa.—Though the last sentence of § 3 of the "Joint Rate Act" (23d Gen. Assem. c. 17) is utterly unintelligible, so that, construed by itself, it would enact that the rate fixed by the commissioners should be absolute and conclusive as to its reasonableness, yet it will be construed with Acts 22d Gen. Assem., c. 28, of which it is amendatory, and which provides that the rate fixed shall be prima facie evidence only of its reasonableness, and thus construed the whole act is valid, effective, and sensible. Burlington, etc., R. Co. *v.* Dey, 82 Iowa 312, 48 N. W. 98, 31 Am. St. Rep. 477, 12 L. R. A. 436.

Louisiana.—Morgan, etc., Co. *v.* Railroad Comm., 127 La. 636, 53 So. 890.

Michigan.—Michigan Cent. R. Co. *v.* Michigan Comm., 160 Mich. 365, 125 N. W. 549; Detroit, etc., R. Co. *v.* Michigan R. Comm., 171 Mich. 335, 137 N. W. 329.

Minnesota.—Steenerson *v.* Great Northern R. Co., 69 Minn. 353, 72 N. W. 713, construing Gen. Laws 1887, c. 10, as amended by Laws 1891, c. 106; State *v.* Minneapolis, etc., R. Co., 80 Minn. 191, 83 N. W. 60, 89 Am. St. Rep. 514, construing Gen. St. 1894, § 392, subd. 8, and Laws 1895, c. 91, § 3, subd. c, and Id., § 381, subd. c, affirmed in 186 U. S. 257, 46 L. Ed. 1151, 22 S. Ct. 900.

Under a prior statute Gen. Laws 1887, c. 10, § 8, the determination of the rail-

presumed to be lawful, just, and reasonable, and the burden of proving the contrary is on the carrier or other person questioning the fact. And the rate of fare prescribed by a city ordinance limiting the rate of fare to be charged by street railway companies is presumed to be reasonable until its unreasonableness is shown, and the burden of showing the rate to be unreasonable is on the companies.[63] A statute providing that rates fixed by a commission shall be regarded as prima facie reasonable, is valid; it being competent for the legislature to prescribe rules of evidence for all proceedings under the laws.[64]

§ 155. How Presumption May Be Overcome.—The presumption that rates fixed by statute or by a state railroad commission are lawful and reasonable can be overcome only by showing by clear and satisfactory evidence that they are unlawful or unreasonable. This rule has in many jurisdictions been given statutory sanction.[65] But such presumption may be overcome by admissions in pleadings which clearly show the invalidity of the rate order, or admit that it is unreasonable, and was arbitrarily made, without evidence or due considera-

road and warehouse commission as to what were usual and reasonable fares and rates for the transportation of persons and property by a railway company was held to be conclusive; and, in proceedings by mandamus to compel compliance with the tariff of rates recommended and published by them, no issue could be raised or inquiry had on that question. State *v.* Chicago, etc., R. Co., 38 Minn. 281, 37 N. W. 782; State *v.* Minneapolis, etc., R. Co., 40 Minn. 156, 41 N. W. 465.

Mississippi.—Stone *v.* Natchez, etc., R. Co., 62 Miss. 646.

Ohio.—Act April 2, 1906 (98 Ohio Laws, p. 342), creating a board of railroad commissioners, section 16, par. "e," giving prima facie effect to determination of commissioners, applies to the determination of facts upon evidence as to unreasonable rates, but does not countervail the well-settled rule that in proceedings in error the presumption is that the court below applied the law correctly. Railroad Comm. *v.* Hocking Valley R. Co., 82 O. St. 25, 91 N. E. 865.

Oklahoma.—Const., art. 9, § 22 (Bunn's Ed., § 235; Snyder's Ed. p. 259), makes an order of the corporation commission prima facie just and reasonable; but such presumption arising in favor of the order, while a strong one, is not conclusive, and may be rebutted. Atchison, etc., R. Co. *v.* State, 23 Okla. 210, 100 Pac. 11.

Where, on appeal from an order fixing freight rates, both parties appeared and agreed to submit the appeal on the record, and waived the filing of briefs, the order would be affirmed, in the absence of a showing wherein the rates fixed were unreasonable or unjust. Chicago, etc., R. Co. *v.* State (Okla.), 128 Pac. 908.

Texas.—Judgment, 113 S. W. 741, reversed on rehearing. Gulf, etc., R. Co. *v.* Railroad Comm., 102 Tex. 338, 116 S. W. 795, construing Rev. St. 1895, arts. 4565, 4566.

Virginia.—Washington, etc., R. Co. *v.* Commonwealth, 112 Va. 515, 71 S. E. 539, construing Const. 1902, §§ 156d, 156f (Code 1904, pp. cclix, cclx).

Under Const., § 156, subsec. "f," providing that the action of the state corporation commission shall be regarded as prima facie just and correct, on appeal from an order fixing the charge which a transportation corporation might make for placing cars to be weighed on consignees' or shippers' individual track scales the charges fixed were prima facie correct, and the finding entitled to peculiar weight. Norfolk, etc., R. Co. *v.* Commonwealth, 103 Va. 289, 49 S. E. 39.

Washington.—The findings of the railroad commission in determining a rate for switching cars are presumed to be correct. Northern Pac. R. Co. *v.* Railroad Comm., 57 Wash. 134, 106 Pac. 611.

A rate for switching cars which has been continued in force a considerable time is presumed reasonable and remunerative. Northern Pac. R. Co. *v.* Railroad Comm., 57 Wash. 134, 106 Pac. 611.

Wisconsin.—Minneapolis, etc., R. Co. *v.* Railroad Comm., 136 Wis. 146, 116 N. W. 905, construing Laws 1905, p. 549, c. 362.

63. Presumption that rate prescribed by municipal ordinance is reasonable.—Chicago Union Tract. Co. *v.* Chicago, 199 Ill. 579, 65 N. E. 470.

64. Statute making rates fixed by commission prima facie reasonable is valid.—So held as to the provision in the Iowa statute (23d Gen. Assem. c. 17, §§ 3, 4), that the "joint rates," and the division thereof between the different companies, as fixed by the commissioners, shall be regarded as prima facie reasonable. Burlington, etc., R. Co. *v.* Dey, 82 Iowa 312, 48 N. W. 98, 31 Am. St. Rep. 477, 12 L. R. A. 436.

65. How presumption of lawfulness and reasonableness of rates can be overcome.—*Michigan.*—Detroit, etc., R. Co. *v.* Michigan R. Comm., 171 Mich. 335, 137 N. W. 329; Michigan Cent. R. Co. *v.*

tion.[66] Speculative suggestions as to what might possibly result, with no showing of the actual test, are insufficient to overthrow the findings of a commission.[67] Where a statute makes the rates adopted by the railroad commission prima facie evidence that the same are reasonable, and a fair return on the value of the road, evidence that the rates are not a fair return on the amount of the bonded debt, capital stock, and current debts is insufficient to overcome the prima facie reasonableness of the rates adopted, unless it is also shown that the value of the road equals such outstanding liabilities.[68] Where a carrier's contention that a rate established by a commission is unreasonable is supported by statistics in which it appears that dividends on the stock are calculated as a part of the operating expenses, the carrier does not rebut and overcome the prima facie character of the tariff established by the commission.[69] Where a carrier attempts to establish the invalidity of a statute establishing maximum rates, it must make full and complete disclosure of all revenue derived from the business, and the disbursement of the same for all purposes, including salaries paid to all its officers, agents, and employees, so that it may be determined whether such expenditures are necessary, as well as reasonable.[70]

§ 156. In Proceedings against a Carrier for Contempt.—In proceedings against a railway company for contempt for violating an order of the State

Michigan R. Comm., 160 Mich. 365, 125 N. W. 549, holding that the evidence in a suit by railroad companies to avoid an order of the railroad commission fixing rates for excess baggage failed to show that the commission did not have before it evidence that the rates theretofore in effect were unreasonable, or that the rates fixed by it, though based on mileage, instead of on the passenger fare, were unreasonable.

North Dakota.—State *v.* Northern Pac. R. Co., 19 N. Dak. 45, 120 N. W. 869. The evidence in this case was held not to overcome the prima facie presumption that rates for transportation of coal in car load lots prescribed by Laws 1907, p. 73, c. 51, amending and re-enacting Rev. Codes 1905, § 4395, were reasonable.

Texas.—Gulf, etc., R. Co. *v.* Railroad Comm., 102 Tex. 338, 116 S. W. 795, reversing on rehearing 113 S. W. 741. In this case it was held that under the Texas statute, Rev. Stat. 1895, arts. 4565, 4566, a citizen, as well as a railroad company, instituting an action to contest the reasonableness of rates, must show by clear and conclusive proof that the rates complained of are unreasonable.

Wisconsin.—Minneapolis, etc., R. Co. *v.* Railroad Comm., 136 Wis. 146, 116 N. W. 905, holding that the "clear and satisfactory" proof required by the Wisconsin statute, Laws 1905, p. 549, ch. 362, is such proof as is necessary to establish fraud or prove mistake in the execution of a written instrument.

Rule in Florida.—In Florida it has been held that in determining whether a regulation of the railroad commissioners is unenforceable, the courts will not only require the prima facies of reasonableness impressed by the statute to be overcome, but will require the admissions or proofs to be convincing beyond reasonable doubt. Railroad Comm'rs *v.* Atlantic, etc., R. Co. (Fla.), 60 So. 186.

66. Admissions in pleadings.—Railroad Comm'rs *v.* Florida, etc., R. Co., 64 Fla. 112, 59 So. 385.

67. Speculative suggestions with no showing of actual test insufficient.—State *v.* Seaboard, etc., Railway, 48 Fla. 150, 152, 37 So. 658, affirmed Seaboard, etc., Railway *v.* Ellis, 203 U. S. 261, 51 L. Ed. 175, 27 S. Ct. 109.

68. Evidence insufficient to overcome prima facie reasonableness of rates.—State *v.* Southern Pac. Co., 23 Ore. 424, 31 Pac. 960.

69. So held in interpreting the Minnesota statutes, Gen. St. 1894, § 392, subd. 8, and Laws 1895, c. 91, § 3, subd. c, and Id., § 381, subd. c, which provide that the tariff of railroad rates made by the state railroad and warehouse commission shall be taken by the courts as prima facie evidence that such tariff was equal and reasonable, the burden being on the carriers to show to the contrary. State *v.* Minneapolis, etc., R. Co., 80 Minn. 191, 83 N. W. 60, 89 Am. St. Rep. 514, affirming Minneapolis, etc., R. Co. *v.* Minnesota, 186 U. S. 257, 46 L. Ed. 1151, 22 S. Ct. 900.

70. What carrier must disclose.—State *v.* Adams Exp. Co., 85 Neb. 25, 122 N. W. 691; State *v.* Wells, Fargo & Co., 85 Neb. 42, 122 N. W. 697.

In the absence of any showing as to earnings or profits of a street railway company, the court can not pass on the question as to whether an ordinance regulating the rates of fare to be charged by such companies amounts to a deprivation of property without due process of law. Chicago Union Tract. Co. *v.* Chicago, 199 Ill. 484, 65 N. E. 451, 59 L. R. A. 631.

Corporation Commission, where the railway company admits the act of violation with which it is charged, but attempts to defend against the proceedings upon the ground that it was done through a misapprehension of the order or as a result of a mistake, the burden is upon the company to establish such cause.[71]

§ 157. Admissibility.—In proceedings before a railroad commission to regulate the rates of a common carrier, the commission, and, on appeal, the court, should be liberal in receiving evidence on the question of what is a reasonable rate, and may hear arguments in behalf of any person or corporation interested in the result.[72] On a hearing to enforce compliance with any orders of a corporation commission against a carrier, the latter must be permitted to introduce evidence to controvert the reasonableness of the order complained of.[73]

§ 158. Judgment.—Where a railroad company is cited for contempt for the violation of an order of a corporation commission, a judgment limited in its scope to finding it guilty of a violation of its own tariffs, not based on any charge in the complaint and the citation issued, is erroneous and must on appeal be set aside.[74] A judgment in proceedings under a statute authorizing a court to order connecting railroad lines to make connections, which fixes a schedule for certain connecting trains, to be in effect if the companies fail to agree on a schedule making a desired connection, is erroneous, unless it provides that the connecting roads may afterwards agree on a new schedule, not in conflict with the law.[75]

§ 159. Procedure upon Review of Orders or Decisions of a Commission.—The procedure upon review of orders or decisions of a commission is governed by constitutional provision or statute. Therefore questions as to the mode of review,[76] the mode of procedure necessary to obtain it,[77] what is pre-

71. **Burden of proof in proceedings for contempt.**—St. Louis, etc., R. Co. *v.* State, 26 Okla. 764, 110 Pac. 759.

72. **Admissibility of evidence.**—Appeal of Great Northern R. Co., 60 Minn. 461, 62 N. W. 826.

On the question of what rate of return upon its investment should be allowed to a street railway, that in the locality where the railway operated the prevailing rate of interest on loans running for a long time and backed by first-class security was 7 per cent, that on ordinary commercial paper the rate was 8 per cent, and that the railway appealing from rates ordered by the railroad commission had itself loaned to an allied corporation a large sum on its notes at 6 per cent, raising the amount by an issue of bonds, may be taken into consideration on the question of adequate return. Puget Sound Elect. Railway *v.* Railroad Comm., 65 Wash. 75, 117 Pac. 739.

73. Atchison, etc., R. Co. *v.* State, 26 Okla. 166, 109 Pac. 218.

74. **Judgment in proceedings for contempt.**—St. Louis, etc., R. Co. *v.* Cannon & Son, 31 Okla. 476, 122 Pac. 231.

75. **Judgment under statute authorizing court to order railroad connections.**—Southern R. Co. *v.* Commonwealth, 98 Va. 758, 37 S. E. 294, construing Act of March 3, 1892, authorizing the circuit court to order connecting railroad lines to make connections.

76. **Mode of review.**—In Florida, rules and regulations adopted by a railroad commission are subject to review as administrative matters, not by appeal or writ of error to correct mere errors or irregularities, but in mandamus and other appropriate proceedings to test their validity. Railroad Comm'rs *v.* Florida, etc., R. Co., 58 Fla. 524, 50 So. 425.

77. **Mode of procedure to obtain review.**—The Ohio statute, Rev. St., §§ 244-16, par. "d," prescribing the mode of procedure necessary to obtain a review of a judgment in an action brought under such section before the board of railroad commissioners because of alleged unlawful discrimination, applies exclusively to a judgment rendered by the court of common pleas in such action. Railroad Comm. *v.* Hocking Valley R. Co., 79 O. St. 419, 87 N. E. 548.

At any time within twelve months from the final order of the corporation commission on a record certified in accordance with the constitution of Oklahoma, art. 9, § 22 (Bunn's Ed., § 234), any party aggrieved may prosecute an appeal from the corporation commission by application to the chairman thereof to certify all facts on which the case appealed from was based, together with the evidence considered by the commission, as well as such other evidence as the commission may deem proper to certify, also a written statement of the reasons of the action which will constitute the record for review. Kansas, etc., R. Co. *v.* Love, 23 Okla. 224, 100 Pac. 22.

requisite thereto,[78] the sufficiency of a petition therefor,[79] the time within which an appeal may be taken,[80] whether the filing of a bond is essential,[81] and the sufficiency of the record on appeal,[82] are to be determined by a proper interpretation of the governing constitutional or statutory enactment.

§§ 160-173. Injunction—§§ 160-166. When and against Whom Injunction Will Lie—§ 160. Injunction against Action by a State Commission.—The proceedings of a state railroad commission which are legislative in nature are not proceedings in a court, and are subject to injunctive process, no matter what may be the character of the body in which they take place.[83] It is within the power and is the duty of the courts to inquire whether rates prescribed by such a commission are unjust and unreasonable, such as to constitute an unconstitutional invasion of property rights, and, if so, to enjoin their enforcement.[84] A bill against a commission to restrain the members from enforcing such a rate is not bad as an attempt to enjoin legislation or as a suit

78. **In Oklahoma a motion for new trial is not a prerequisite to an appeal** to the supreme court from an order of the corporation commission. Atchison, etc., R. Co. *v.* Love, 23 Okla. 192, 99 Pac. 1081; Kansas, etc., R. Co. *v.* Love, 23 Okla. 224, 100 Pac. 22.

79. **Petition.**—A Texas statute, Rev. St. 1895, art. 4565, provides that a railroad company dissatisfied with the decision of any rate, etc., adopted by the railroad commission, may file a petition setting forth the particular cause of objection to the decision, rate, etc., or to either or all of them, in certain courts. Held, that a railroad company in such an action is not required to attack all the rates prescribed, but may attack one rate only. Gulf, etc., R. Co. *v.* Railroad Comm., 102 Tex. 338, 113 S. W. 741.

80. **Time within which appeal may be taken.**—In Oklahoma any proper party may appeal to the supreme court from a final order of the corporation commission at any time within one year from the date of the same. Atchison, etc., R. Co. *v.* Love, 23 Okla. 192, 99 Pac. 1081.

Under the Ohio statute, Rev. St., § 244-16, par. "d," either party to an action before the railroad commission against a railroad for unjust discrimination may appeal within sixty days after judgment in the court of common pleas, or take the case up on error. Railroad Comm. *v.* Hocking Valley R. Co., 79 O. St. 419, 87 N. E. 548.

81. **Statute requiring compensatory bond mandatory.**—The provision in the Washington statute, Laws 1909, c. 93, § 3, requiring a compensatory bond on an appeal from an order sustaining a reduction of passenger rates by the railroad commission was mandatory. Puget Sound Elect. Railway *v.* Mitchell, 60 Wash. 660, 111 Pac. 873.

82. **Record on appeal.**—Under the constitution of Oklahoma, art. 9, § 22 (Bunn's Ed. § 234), the corporation commission, on hearing an order proposed to fix rates to be charged by a railroad company for hauling intrastate freight, must make a finding of fact on which the order is based, and, on appeal from such order, certify the facts so found to the supreme court. Midland Valley R. Co. *v.* State, 24 Okla. 817, 104 Pac. 1086; St. Louis, etc., R. Co. *v.* State, 24 Okla. 828, 104 Pac. 1087; Missouri, etc., R. Co. *v.* State, 24 Okla. 832, 104 Pac. 1089.

Under this provision the facts upon which the action of the commission appealed from was based and which may be essential for the proper decision of the appeal, together with such of the evidence introduced before, or considered by, the commission as may be selected or required to be certified by any party in interest as well as such other evidence as the commission may deem proper to certify, and a written statement by the commission of the reasons for its action, certified by the chairman of the commission under its seal, constitute the complete record for an appeal to the supreme court. Atchison, etc., R. Co. *v.* Love, 23 Okla. 192, 99 Pac. 1081.

When the commission, in fixing rates for intrastate freight, fails to make a finding of facts and certify the same to the supreme court, on appeal, the court may remand the case, with directions to find the facts and certify them before the appeal is determined. Midland Valley R. Co. *v.* State, 24 Okla. 817, 104 Pac. 1086.

83. **Proceedings which are legislative in nature subject to injunctive process.**—Prentis *v.* Atlantic Coast Line Co., 211 U. S. 210, 53 L. Ed. 150, 29 S. Ct. 67.

The making of a rate by a legislative body, after hearing the interested parties, is not res judicata upon the validity of the rate when questioned by those parties in a suit in a court. Litigation does not arise until after legislation; nor can a state make such legislative action res judicata in subsequent litigation. Prentis *v.* Atlantic Coast Line Co., 211 U. S. 210, 53 L. Ed. 150, 29 S. Ct. 67.

84. **When enforcement of rates prescribed by commission will be enjoined.**—Trammel *v.* Dinsmore, 42 C. C. A. 623, 102 Fed. 794, affirmed in 183 U. S. 115, 46 L. Ed. 111, 22 S. Ct. 45.

against a state.[85] But where the duty of fixing and enforcing rates is vested in a state railroad commission, injunction to restrain the commission from proceeding, the illegal ground for equitable interposition being threatened multiplicity of suits and irreparable injury, will not lie before the rates are fixed at all.[86] Proceedings for such an injunction should not be commenced in a federal court until the rate has been fixed by the state tribunal having the last word.[87] The enforcement of the orders of a state railroad commission may be restrained on the ground that such enforcement would cause complainant irreparable injury in its business.[88] The enforcement of rates prescribed by such a commission may be enjoined on ground that they are unjust and unreasonable;[89]

85. Prentis *v.* Atlantic Coast Line Co., 211 U. S. 210, 53 L. Ed. 150, 29 S. Ct. 67; Reagan *v.* Farmers' Loan, etc., Co., 154 U. S. 362, 38 S. Ct. 1014, 14 S. Ct. 1047; Smyth *v.* Ames, 169 U. S. 466, 42 L. Ed. 819, 18 S. Ct. 418; Chicago, etc., R. Co. *v.* Tompkins, 176 U. S. 167, 44 L. Ed. 417, 20 S. Ct. 336; Hanley *v.* Kansas, etc., R. Co., 187 U. S. 617, 47 L. Ed. 333, 23 S. Ct. 214; McNeill *v.* Southern R. Co., 202 U. S. 543, 50 L. Ed. 1142, 26 S. Ct. 722; Mississippi R. Comm. *v.* Illinois Cent R. Co., 203 U. S. 335, 51 L. Ed. 209, 27 S. Ct. 90; Ex parte Young, 209 U. S. 123, 52 L. Ed. 714, 28 S. Ct. 441.

86. Injunction will not lie before rates are fixed.—McChord *v.* Louisville, etc., R. Co., 183 U. S. 483, 46 L. Ed. 289, 22 S. Ct. 165; Reagan *v.* Farmers' Loan, etc., Co., 154 U. S. 362, 38 L. Ed. 1014, 14 S. Ct. 1047; S. C., 154 U. S. 420, 38 L. Ed. 1031, 14 S. Ct. 1062; Reagan *v.* Mercantile Trust Co., 154 U. S. 418, 38 L. Ed. 1030, 14 S. Ct. 1062; S. C., 154 U. S. 413, 38 L. Ed. 1028, 14 S. Ct. 1060; Stone *v.* Farmers' Loan, etc., Co., 116 U. S. 307, 29 L. Ed. 636, 6 S. Ct. 334, 388, 1191.

87. While a party does not lose his right to complain of action under an unconstitutional law by not using diligence to prevent its enactment, on a question of railroad rates, when an appeal to the supreme court of the state from an order of the state corporation commission fixing such rates is given by the state constitution, it is proper that dissatisfied railroads should take this matter to the supreme court of their state before bringing a bill in the circuit court of the United States. Under the circumstances of this case action on a bill was suspended to await the result of such an appeal. Prentis *v.* Atlantic Coast Line Co., 211 U. S. 210, 53 L. Ed. 150, 29 S. Ct. 67.

88. Irreparable injury—Facts authorizing preliminary injunction.—Complainant owned a large grain elevator at Ft. Worth, Tex., and was engaged largely in buying grain in other states for shipment and export, shipping the same over the defendant railroad company's lines to Ft. Worth, which was its southern terminus, transferring it there to its elevator for cleaning and grading, and then reshipping, availing itself of the proportional tariff on through shipments put in force by the defendant and other connecting companies. The Texas railroad commission, also made defendants, without notice to either complainant or the railroad company entered orders requiring the company to cancel its proportional tariffs, prohibiting it from permitting grain shipped on export billing to be transferred into complainant's elevator, and requiring it to cancel any contracts it might have with complainant whereby it had undertaken to pay any sum of money for any purpose whatever. It was further required to file a notice of compliance with such orders by a given time, under penalty of the institution of "such proceedings as may be found proper and adequate to enforce compliance" therewith. Complainant alleged in its bill that defendant railroad company had given notice of its intention to obey such orders being moved thereto, as alleged by the fact that it had other interests pending before the commission of great importance to itself. Held, such facts not being controverted, that complainant was entitled to a preliminary injunction restraining the commission from enforcing its orders until the final hearing, as operating to cause complainant irreparable injury in its business. Rosenbaum Grain Co. *v.* Chicago, etc., R. Co., 130 Fed. 46, order affirmed Railroad Comm. *v.* Rosenbaum Grain Co., 130 Fed. 110, 64 C. C. A. 444.

89. Injunction on ground that rates are unjust and unreasonable.—Trammel *v.* Dinsmore, 42 C. C. A. 623, 102 Fed. 794, affirmed in 183 U. S. 115, 46 L. Ed. 111, 22 S. Ct. 45.

On demurrer to a bill to restrain enforcement by state railroad commissioners of a tariff of rates prescribed by them for carriage of goods by a railroad, averring that such tariff was unjust and unreasonable, it was admitted that the road cost far more than the amount of the company's stock and bonds outstanding, which represented money invested in its construction; that there had been no waste or mismanagement in the construction or operation; that supplies and labor had been purchased at the lowest

that they are confiscatory;[90] or that they amount to the taking of property without due process of law or to a denial of the equal protection of the laws.[91] But where the statutory remedy in equity is prompt a complainant is not, as a matter of law, entitled to enjoin enforcement of a commission order

possible price consistent with the successful operation of the road; that the rates voluntarily fixed by the company had been for ten years steadily decreasing, until the aggregate decrease had been more than fifty per cent; that under the rates thus voluntarily established the stock, which represented two-fifths of the value, had never received anything in the way of dividends, and that for the last three years the earnings above operating expenses had been insufficient to pay the interest on the bonded debt; and that the proposed tariff, as enforced, would so diminish the earnings that they would not pay one-half the interest on the bonded debt above the operating expenses. Held that, in the absence of any satisfactory showing to the contrary, this justified a finding that the proposed tariff was unjust and unreasonable, and a decree restraining it being put in force. Reagan *v.* Farmers' Loan, etc., Co., 154 U. S. 362, 38 L. Ed. 1014, 14 S. Ct. 1047; Reagan *v.* Mercantile Trust Co., 154 U. S. 418, 38 L. Ed. 1030, 14 S. Ct. 1062.

90. Injunction on ground that rates are confiscatory.—A court of equity has the power to enjoin a continuous operation of confiscatory fare and rates established by a railroad commission, which had changed a lawful status in existence before they took effect. Love *v.* Atchison, etc., R. Co., 107 C. C. A. 403, 185 Fed. 321.

In an action to enjoin the enforcement of fares and rates established by a railroad commission as confiscatory, evidence held to show no abuse of discretion in granting the prayer of complainant. Love *v.* Atchison, etc., R. Co., 107 C. C. A. 403, 185 Fed. 321.

That a railroad tested the fare and rates established by a railroad commission for several months is no ground for denying injunction against the continued operation of this fare and these rates on the ground that they were confiscatory. Love *v.* Atchison, etc., R. Co., 107 C. C. A. 403, 185 Fed. 321.

Railroad companies, that will be deprived of parts of their property devoted to public use without just compensation during a rate-making process by provisions of a state constitution, or a state law, or a state commission, prescribing tentative rates and putting them in effect during the rate-making process, may obtain an injunction to the same extent that they may after the process is complete. Love *v.* Atchison, etc., R. Co., 107 C. C. A. 403, 185 Fed. 321, affirming orders Atchison, etc., R. Co. *v.* Love, 174 Fed. 59 and Missouri, etc., R. Co. *v.* Love, 177 Fed. 493.

A preliminary injunction is not a matter of strict right, and it is often the duty of a court to refuse such an injunctoin where it is doubtful what upon the final hearing may be ascertained to be the real facts in the case, and where the rights of the complainants are such that they will suffer no more injury if they finally succeed than would be inflicted upon the defendants if unjustly enjoined. Especially is this true where it is sought to enjoin the operation of a state law fixing railroad rates alleged to be confiscatory but which has not yet gone into effect, when it is probable that a practical test of the law will be required to ascertain the truth, and in such case an injunction should not be granted on ex parte affidavits alone merely stating opinions. Decree Central, etc., R. Co. *v.* Railroad Comm., 161 Fed. 925, reversed, Railroad Comm. *v.* Central, etc., R. Co., 95 C. C. A. 117, 170 Fed. 225.

In a suit to enjoin the enforcement of rates fixed by a state law as confiscatory, the fact that bonds may be required from complainants for the protection of passengers and shippers against loss from overcharges if the law shall be finally held valid is not a sufficient ground for granting preliminary injunctions, it being evident that such bonds would not practically give adequate protection to many of such passengers and shippers, where the amount involved was small. Railroad Comm. *v.* Central, etc., R. Co., 170 Fed. 225, 95 C. C. A. 117.

91. Taking property without due process of law or denial of equal protection of laws.—Reagan *v.* Farmers' Loan, etc., Co., 154 U. S. 362, 38 L. Ed. 1014, 14 S. Ct. 1047; Smyth *v.* Ames, 169 U. S. 466, 522, 42 L. Ed. 819, 18 S. Ct. 418; Reagan *v.* Mercantile Trust Co., 154 U. S. 418, 38 L. Ed. 1030, 14 S. Ct. 1062.

A railroad company is entitled to an injunction restraining a state railroad commission from putting in force a proposed tariff schedule, where the bill alleges that the rates established by such schedule will amount to a taking of complainant's property without due process of law, by reducing its earnings far below the amount required to pay the operating expenses, taxes, and fixed charges, and the cause is submitted for a final decision on demurrer to other paragraphs of the bill and without any denial of such allegation. Wallace *v.* Arkansas Cent. R. Co., 55 C. C. A. 192, 118 Fed. 422.

fixing rates, pending a suit to set aside the order.[92] Where a fine imposed by a railroad commission is in the nature of an interlocutory order, an injunction against its collection will not lie if there is an ample remedy without it.[93]

§ 161. Injunction to Restrain Wrongful and Discriminatory Acts by a Carrier.—Where alleged wrongful and discriminating acts of a carrier are of daily recurrence, and their continuance will cause further and irreparable injury to complainant's business, complainant is entitled to an injunction to prevent the wrongs complained of, and to compel the carrier to perform its duty to complainant, without discrimination.[94] Injunction lies at the suit of a shipper to restrain a carrier from granting discriminatory favors to other shippers to his prejudice and injury, where the remedy at law is not adequate or effectual.[95]

§ 162. Injunction to Restrain a Carrier from Charging Unlawful Rates.—An injunction will lie at the suit of the state to restrain a carrier from charging rates in excess of those prescribed by statute;[96] and in such a suit the court can not consider whether defendant's obedience to the law will cause greater public injury than its disobedience.[97] The purchaser of a part of a street railroad is subject to an injunction restraining him from charging a 10-cent fare thereon, contrary to the terms of the franchise.[98] An injunction will lie at the suit of the selectment of a town who have granted a street railroad location to restrain the railroad company from enforcing rates in excess of the maximum specified in the location.[99]

92. Another remedy as precluding injunction.—Michigan Cent. R. Co. *v.* Murphy, 156 Mich. 459, 120 N. W. 1073, holding that under the Michigan statute, Pub Acts, 1907, p. 428, No. 312, §§ 16, 22, 25, 26, complainants were not entitled to enjoin enforcement of an order changing excess baggage rates, pending a suit to set aside the order.

93. Kansas, etc., R. Co. *v.* Railroad Comm., 106 La. 583, 31 So. 131.

94. Injunction to restrain wrongful and discriminatory acts by a carrier.—Louisville, etc., R. Co. *v.* Central Stock Yards Co., 30 Ky. L. Rep. 18, 97 S. W. 778, construing constitution §§ 213, 214

Where alleged arbitrary and discriminating acts of a carrier in refusing to switch and deliver stock cars to a connecting carrier for transportation to complainant's stockyards operated to irreparably injure complainant's business, and such acts were violative of the constitutional provision, Const., §§ 213, 214, prohibiting discrimination, the right to sue to restrain such acts was not limited to shippers of live stock and commission merchants, but extended to complainant as well. Louisville, etc., R. Co. *v.* Central Stock Yards Co., 30 Ky. L. Rep. 18, 97 S. W. 778.

95. Merchants', etc., Transp. Co. *v.* Granger, 132 Ga. 167, 63 S. E. 700.

96. Injunction to restrain a carrier from charging unlawful rates.—The attorney general may, on behalf of the state, enjoin common carriers whose rates are fixed by law from violating the statute and exacting unlawful and excessive rates and charges. State *v.* Pacific Exp. Co., 80 Neb. 823, 115 N. W. 619.

Equity may enjoin a railroad which has taken the franchise to collect tolls and other powers granted to it on trust that it will not charge the public more than the reasonable rates established by the legislature from thereafter charging rates in excess of those established, independently of any remedy at law. State *v.* Boston, etc., Railroad, 75 N. H. 327, 74 Atl. 542.

The legal remedies provided by the Wisconsin statute, Laws 1874, c. 273, did not prevent relief in a suit by injunction by the state against the railroad companies. Attorney General *v.* Chicago, etc., R. Co., 35 Wis. 425.

97. Court can not consider injury carrier's obedience to law will cause.—Attorney General *v.* Chicago, etc., R. Co., 35 Wis. 425.

98. Purchaser of part of street railroad subject to injunction.—Public Service Comm. *v.* Westchester St. R. Co., 206 N. Y. 209, 99 N. E. 536, affirming order in 151 App. Div. 914, 135 N. Y. S. 1135.

99. Injunction to restrain street railroad from enforcing rates in excess of limitation in location.—Westwood *v.* Dedham, etc., St. R. Co., 209 Mass. 213, 95 N. E. 81.

Where a street railroad location contained a valid provision fixing the maximum fare to be charged for a specified locality, it was no answer to a suit, by the selectmen of a town granting the location, to restrain the railroad company from enforcing rates in excess of the maximum specified, that the management had not acted arbitrarily, that the increased fares were reasonable, and that the maximum rates specified by the location were

§ 163. Injunction to Compel Transportation at Rate Fixed by Law.—An injunction will not lie to compel a common carrier to transport goods at the rate fixed by law.[1]

§ 164. Injunction to Compel Carrier to Furnish Impartial Service.—A mandatory injunction will lie to compel a railroad company to fulfill its corporate obligation to furnish impartial service,[2] and it is no defense to such an action that the plaintiff has an adequate remedy by an action at law to recover damages for the wrong done.[3]

§ 165. Injunction to Compel Carrier to Stand Cars in Front of a Shipper's Property.—A mandatory injunction will not lie to compel a railroad company to stand freight cars on its track in the center of a street in front of a shipper's property to be loaded, in the absence of express authority from the city to use the street in that way, and of conclusive testimony that it would not be prejudicial to the use of the track by the company's other patrons.[4]

§ 166. Injunction to Restrain Persons from Soliciting Business in or Near a Railroad Station.—A railroad company may enjoin persons from entering its station for the purpose of soliciting the custom of incoming passengers for cabs, carriages, express wagons, and hotels.[5] It is also entitled to injunctive relief against the constant, unlawful attempt of hackmen and cabmen to enter its depot grounds to solicit patronage, and their use of the sidewalk in front of the station so as to interfere unduly with the ingress and egress of passengers.[6] An injunction is justified in such cases by the inadequacy of any remedy at law.[7]

insufficient to pay operating expenses, and, if enforced, would result in the curtailment of service. Westwood *v.* Dedham, etc., St. R. Co., 209 Mass. 213, 95 N. E. 81.

1. **Injunction will not lie to compel transportation at rate fixed by law.**—Rogers Locomotive, etc., Works *v.* Erie R. Co., 20 N. J. Eq. 379.

2. **Injunction to compel carrier to furnish impartial service.**—Louisville, etc., R. Co. *v.* Pittsburg, etc., Coall Co., 111 Ky. 960, 23 Ky. L. Rep. 1318, 64 S. W. 969, 55 L. R. A. 601, 98 Am. St. Rep. 447.

3. Louisville, etc., R. Co. *v.* Pittsburg, etc., Coal Co., 111 Ky. 960, 23 Ky. L. Rep. 1318, 64 S. W. 969, 970, 55 L. R. A. 601, 98 Am. St. Rep. 447.

The fact that plaintiff may recover damages in an action at law for defendant's refusal to furnish cars for loading coal for shipment furnishes no reason for refusing a mandatory injunction to compel defendant to furnish the cars. Louisville, etc., R. Co. *v.* Pittsburg, etc., Coal Co., 111 Ky. 960, 23 Ky. L. Rep. 1318, 64 S. W. 969, 55 L. R. A. 601, 98 Am. St. Rep. 447.

4. **Injunction to compel carrier to stand cars in front of a shipper's property.**—Louisville, etc., R. Co. *v.* Pittsburg, etc., Coal Co., 111 Ky. 960, 23 Ky. L. Rep. 1318, 64 S. W. 969, 55 L. R. A. 601, 98 Am. St. Rep. 447.

5. **Injunction to restrain persons from entering station.**—Pennsylvania Co. *v.* Donovan, 116 Fed. 907; Donovan *v.* Pennsylvania Co., 57 C. C. A. 362, 120 Fed. 215, 61 L. R. A. 140; Donnovan *v.* Pennsylvania Co., 60 C. C. A. 168, 124 Fed. 1016. Affirmed, 199 U. S. 279, 50 L. Ed. 192, 26 S. Ct. 91.

6. **Injunction to restrain persons from entering depot grounds and using sidewalk.**—Decree, Donnovan *v.* Pennsylvania Co., 60 C. C. A. 168, 124 Fed. 1016, affirmed. Donovan *v.* Pennsylvania Co., 199 U. S. 279, 50 L. Ed. 192, 26 S. Ct. 91.

A railroad company has a property right to a free and unobstructed entrance to its stations for its passengers and employees, and is entitled to protection in such right by injunction to restrain hackmen from continuously congregating upon the sidewalk around the doors of a station, for the purpose of soliciting business, in such numbers as to interfere with ingress and egress; but such an injunction should go no further than is necessary to protect complainant's private right of property, leaving any obstruction to the use of the street or walk by the public generally to be dealt with by the municipality. Pennsylvania Co. *v.* Donovan, 116 Fed. 907; Donovan *v.* Pennsylvania Co., 57 C. C. A. 362, 120 Fed. 215, 61 L. R. A. 140; Donnovan *v.* Pennsylvania Co., 60 C. C. A. 168, 124 Fed. 1016; affirmed in 199 U. S. 279, 50 L. Ed. 192, 26 S. Ct. 91.

7. **Injunction justified by inadequacy of any remedy at law.**—Donovan *v.* Pennsylvania Co., 199 U. S. 279, 50 L. Ed. 192, 26 S. Ct. 91, affirming 60 C. C. A. 168, 124 Fed. 1016.

§§ 167-173. Procedure and Evidence—§ 167. Jurisdiction.—A suit to enjoin the enforcement of rates by a corporation commission may be brought in the federal courts, where the proper ground of jurisdiction exists, as it is not a suit against a state within the eleventh amendment of the federal constitution.[8]

§ 168. Parties.—Where the supervisors of a township grant to a street railway company the right to lay its tracks on a highway, but stipulate, as a condition of the grant, that the company shall not charge a fare exceeding a certain amount, and the company, after the construction of its road, charges a fare exceeding the amount stipulated, owners of property abutting on the road, who have no contract with the company as to the rate of fare, are not proper parties to a bill by the township authorities to restrain the company from collecting a greater rate of fare than that stipulated in the contract.[9]

§ 169. Pleading—Petition, Complaint, or Information.—The question of the sufficiency of the averments in a petition or complaint in a suit to enjoin a state commission from fixing or enforcing certain rates has in several cases been passed on by the courts.[10] It is no objection to the granting of an injunction at the suit of the state to restrain a railway company from charging rates exceeding those fixed by statute, that the information does not show specific injury to the public. It is sufficient that the facts alleged satisfy the court that

8. **Federal courts have jurisdiction of suit to enjoin enforcement of rates.** Reagan *v.* Farmers' Loan, etc., Co., 154 U. S. 362, 38 L. Ed. 1014, 14 S. Ct. 1047; S. C., 154 U. S. 420, 38 L. Ed. 1031, 14 S. Ct. 1062; Reagan *v.* Mercantile Trust Co., 154 U. S. 418, 38 L. Ed. 1030, 14 S. Ct. 1062.

Where an act creating a railroad commission (Texas act, April 3, 1891, § 6) provides that suits against it may be brought "in a court of competent jurisdiction in" a designated county, the United States circuit court for that county has jurisdiction of a suit brought against it by a citizen of another state to restrain enforcement of illegal rates. Reagan *v.* Farmers' Loan, etc., Co., 154 U. S. 362, 38 L. Ed. 1014, 14 S. Ct. 1047.

A federal court has jurisdiction to restrain the illegal acts of a state corporation commission, although the statute under which it assumes to act is constitutional. Reagan *v.* Farmers' Loan, etc., Co., 154 U. S. 362, 38 L. Ed. 1014, 14 S. Ct. 1047; S. C., 154 U. S. 420, 38 L. Ed. 1031, 14 S. Ct. 1062; Reagan *v.* Mercantile Trust Co., 154 U. S. 418, 38 L. Ed. 1030, 14 S. Ct. 1062.

9. **Abutting owners not proper parties to bill by township authorities against railway company.**—Millcreek *v.* Erie, etc., St. R. Co., 209 Pa. 300, 58 Atl. 613.

10. **Averment not charging that rate established is unreasonable.**—An averment in a petition to restrain the state railroad commissioners from enforcing an order establishing "through joint rates" of freight from points on plaintiff's line to points on the lines of connecting carriers, that the order was made without authority of law, and in excess of the powers of the commissioners, does not charge that the rate established is unreasonable. Burlington, etc., R. Co. *v.* Dey, 89 Iowa 13, 56 N. W. 267.

Averment an allegation of a conclusion only.—An averment in the petition to enjoin the commissioners from fixing a joint rate under the Iowa "joint rate act," that "by said acts your petitioner * * * is compelled to enter into involuntary, unreasonable, and unprofitable contracts, * * * compelling the operation of its road at a loss," is not a direct allegation of fact, but of a conclusion only, that the effect of the statute will be to compel the operation of petitioner's road at a loss. Burlington, etc., R. Co. *v.* Dey, 82 Iowa 312, 48 N. W. 98, 31 Am. St. Rep. 477, 12 L. R. A. 436.

Complaint not objectionable as indefinite and uncertain.—A complaint in an action by a railroad company maintaining a physical connection with another railroad company in a city to enjoin the railroad commission from enforcing an order establishing switching tariffs for the city for the movement of all commodities in car load lots from the interchange track to the points of loading and unloading, which alleges that in constructing the facilities at the city the company has only provided sufficient facilities to accommodate its own business, and that it does not have facilities to handle the business of the other company, is not objectionable as indefinite and as relating merely to the arrangements for handling the business to and from the tracks where freight is to be loaded and unloaded, in the absence of a motion to make the complaint more definite and certain. Chicago, etc., R. Co. *v.* Railroad Comm., 175 Ind. 630, 95 N. E. 364.

defendant's disobedience of the law may be productive of public injury.[11]

§ 170. Evidence—Presumptions and Burden of Proof.—Rates to be charged by a railroad company, made by a state railroad commission, charged by law with the duty of fixing just and reasonable rates, are presumptively just and reasonable, although the statute does not expressly make them so, and the burden rests on the railroad company to prove to the contrary before it is entitled to an injunction to restrain their enforcement.[12] Since a suit to have a statute regulating railroad rates declared confiscatory in its effect on complainant's business interferes with the operation of a legislative act, no bill for that purpose should be entertained, nor any injunction awarded, except on the showing of a strong prima facie case.[13]

§ 171. Reference to a Master.—Upon a bill to enjoin the enforcement of a schedule of rates prescribed by a state railroad commission, the proper practice is to refer the testimony to a competent master to make all needed computations, and fully find the facts, as before the supreme court can be called upon to make an examination of the case, it is entitled to have the benefit of the services of a competent master and an approval of his findings by the trial court.[14]

§ 172. Laches.—The right of the state to enjoin a railroad from continuing in the future to charge rates in excess of the maximum fixed by the legislature is not affected by the laches of the state.[15]

§ 173. Decree.—A decree, enjoining the enforcement of a rate statute as confiscatory, should contain a clause saving to the defendant the right to proceed at any time in the future, in any appropriate way, to obtain a vacation thereof, if, under altered conditions, it is no longer confiscatory.[16]

§§ 174-180. Damages for Violations of Regulations—§ 174. Power of Legislature.—The legislature of a state may provide by general law that a shipper of live stock may recover liquidated damages from a carrier for failure to transport such stock committed to it for transit between stations in the state.[17] Fixing the damages for culpable violations of a statute, which impose a limitation of the time for the transportation of live stock by common carriers, at $10 for each car for every hour by which the time of transportation exceeds the statutory limit, is not such a legislative usurpation of judicial functions as renders the statute repugnant to the due process of law clause of the constitu-

11. **Information in suit to restrain carrier from charging unlawful rates.**—Attorney General *v.* Chicago, etc., R. Co., 35 Wis. 425.

12. **Rates made by commission presumptively just and reasonable.**—Texas, etc., R. Co. *v.* Railroad Comm., 112 C. C. A. 538, 192 Fed. 280.

Discretion of court properly exercised in denying preliminary injunction.—The rates fixed by the railroad commission being under the Michigan statute (Pub. Acts 1907, p. 417, No. 312) prima facie lawful and reasonable, and the burden to prove the contrary being on the railroad contesting, where railroad companies whose rates were being inquired into by the commission were given a full hearing, but offered no testimony and did not appeal to the commission to change the rates, and in a suit in the circuit court to judicially determine the validity of rates fixed by the commission admitted that the rates fixed were not confiscatory but afforded some remuneration above expenses, the court acted within its discretion in denying a preliminary injunction restraining the commission from enforcing its order, pending the suit. Michigan Cent. R. Co. *v.* Murphy, 156 Mich. 459, 120 N. W. 1073.

13. **Injunction on ground that rate statute is confiscatory.**—Coal, etc., R. Co. *v.* Conley, 67 W. Va. 129, 67 S. E. 613.

14. **Reference to master.**—Chicago, etc., R. Co. *v.* Tompkins, 176 U. S. 167, 44 L. Ed. 417, 20 S. Ct. 336.

15. **Right of state to enjoin not affected by laches.**—State *v.* Boston, etc., Railroad, 75 N. H. 327, 74 Atl. 542.

16. **Decree should contain saving clause.**—Coal, etc., R. Co. *v.* Conley, 67 W. Va. 129, 67 S. E. 613.

17. **Power of legislature.**—Cram *v.* Chicago, etc., R. Co., 84 Neb. 607, 122 N. W. 31, 26 L. R. A., N. S., 1022, rehearing denied 123 N. W. 1045.

tion of the United States, where the highest court of the state holds that the statute imposes only compensatory damages, fixing them at a sum certain because of the difficulty of the ascertainment of the actual damages suffered.[18]

§§ 175-177. When an Action Will Lie—§ 175. In General.—It is a general principle applicable to common carriers that when a duty is imposed on them by law an action may be sustained against them by any person who is specially injured by their failure to perform that duty.[19]

§ 176. Failure to Stop at Station.—A statute providing that if any carrier shall do any act prohibited by the statute or omit to do any act required to be done, it shall be liable to penal damages, does not render a railroad company liable for failure to stop a train at a flag station, as a violation of a statute providing that every railroad company shall cause all its trains to stop on each arrival at a station advertised by such company as a station for receiving passengers.[20]

§ 177. Overcharge or Discrimination.—By statute in many states carriers are made liable for damages resulting from overcharge or discrimination. The peculiar provisions of some of these statutes have been interpreted by the courts.[21] Where a carrier has charged more for a short haul than for a long

18. Chicago, etc., R. Co. *v.* Cram, 228 U. S. 70, 33 S. Ct. 437, affirming judgments Cram *v.* Chicago, etc., R. Co., 84 Neb. 607, 122 N. W. 31, 26 L. R. A., N. S., 1022; S. C., 85 Neb. 586, 123 N. W. 1045, 16 L. R. A., N. S., 1028; Chicago, etc., R. Co. *v.* Kyle, 228 U. S. 85, 33 S. Ct. 440, affirming judgment Kyle *v.* Chicago, etc., R. Co., 84 Neb. 621, 122 N. W. 37.

19. **Any person specially injured may sue.**—Cohen *v.* Southern Exp. Co., 53 Ga. 128.

20. **Failure to stop at station—South Carolina statutes construed.**—Rountree *v.* Atlantic, etc., R. Co., 73 S. C. 268, 53 S. E. 424, construing Civ. Code 1902, §§ 2134, 2202.

21. **Refusal of a railroad company to permit plaintiff to purchase and use wooden cars** on its lines held not a discrimination for which plaintiff was entitled to recover damages under the Pennsylvania statute, Act June 4, 1883 (P. L. 72). Walnut Coal Co. *v.* Pennsylvania R. Co., 237 Pa. 410, 85 Atl. 440.

That rate charged was fixed by commission no defense.—A railroad company making an unreasonable freight charge is not relieved from liability to the shipper in treble damages therefore under the Iowa statute, Acts 22d Gen. Assem., c. 28, §§ 2, 9, by the fact that the rate charged was that fixed by the railroad commissioners under § 17, providing that the commissioners shall make a schedule of reasonable maximum rates, which shall be "prima facie evidence that the rates therein fixed are reasonable." Barris *v.* Chicago, etc., R. Co., 102 Iowa 375, 71 N. W. 339, 63 Am. St. Rep. 449.

No defense that unadjusted claim for damages was part of consideration for discrimination.—In an action to recover triple damages for an unjust discrimination as to charges for transportation of freights under Colorado Act of 1885, it is no defense, that the company claims that part of the consideration for the carriage for the person in whose favor the discrimination was made, was an unadjusted claim for damages held by him against the company, where the evidence shows that the claim had not been brought forward or pressed. Union Pac. R. Co. *v.* Goodridge, 149 U. S. 680, 37 L. Ed. 986, 13 S. Ct. 970; Union Pac. R. Co. *v.* Taggart, 149 U. S. 698, 37 L. Ed. 905, 13 S. Ct. 977.

Facts warranting recovery for overcharge.—An Alabama statute, Code, § 3460, provides that any railroad which shall exact more than the rate specified in any bill of lading, or shall make any overcharge, shall be liable for double the damages sustained, unless the service as to which the extortion was committed was performed at rates previously approved by the railroad commissioners, when only actual damages may be recovered. Held that, where bills of lading for coal shipped specified a rate of fifty cents per ton, and defendant exacted seventy cents per ton, and contended, in an action to recover the excess, that the fifty-cent rate was a mistake, and that the seventy-cent rate had been authorized by the railroad commissioners, and had been posted in all freight depots, but failed to prove that such rate had been so allowed or posted in the place to which the coal was shipped, plaintiff was entitled to recover under the statute. Southern R. Co. *v.* Anniston Foundry, etc., Co., 135 Ala. 315, 33 So. 274.

What must be shown in action under Missouri statute.—Though, in an action

haul, in violation of a constitutional provision, the fact that the statutes provide only for indictment of the carrier for violation of the constitutional provision does not prevent a shipper aggrieved by such violation from maintaining a suit against the carrier for damages sustained thereby.[22]

§ 178. Measure of Damages.—Where a seller loses the benefit of the sale by the refusal of a railroad company to furnish him with cars in which to ship the goods in violation of statute, his measure of damages against the company is the profits lost by his inability to fulfill his agreement, provided he would otherwise have performed the same.[23] Under a statute making a railroad company liable to a person injured by unjust discrimination in charges "for damages treble the amount of the injury suffered," the "injury suffered" must be proved, and it is not to be measured by the total amount of the discriminations complained of.[24] In an action by a coal company, against a railroad company, for discrimination in furnishing transportation facilities under a statute, imposing a liability for damages treble the amount of injures suffered, the jury, in assessing damages, may consider the difference between the mining cost and the fair average selling price in the mining region at the period of discrimination, though such is not absolutely the measure of damages, and, where the discrimination alleged is the refusal of a siding, the loss on unmined coal which plaintiff was unreasonably prevented from mining by the refusal of the siding may be considered.[25] Interest is not recoverable on treble damages imposed by a statute as a penalty for unjust discrimination in charges by a railroad company.[26] In a suit for damages for violation of the rule of a railroad commission prohibiting unjust discrimination in transportation of freight, exemplary damages may be recovered if it appears that the conduct of the carrier amounted to a willful violation of law.[27]

§ 179. Limitation of Actions.—Actions for damages for violations of statutory and commission regulations of charges and discriminations must be brought within the time limited by statute.[28]

against a railroad, under the Missouri statute, Rev. St. 1899, § 1136, for unreasonable charges, the plaintiff must show that the charges were more than the rates fixed by the carrier and approved by the Board of Railroad Commissioners, such a showing is not necessary in an action under §§ 1133 and 1134 for discrimination between localities, and for charging a higher rate for a shorter than for a longer haul. Cohn *v.* St. Louis, etc., R. Co., 181 Mo. 30, 79 S. W. 961.

Liability of express company under Mississippi statute.—Under the Mississippi statute, Ann. Code 1892, §§ 4288, 4291, an express company, discriminating out of distinct purpose, is liable to the party discriminated against for twice the damages sustained, and is liable in actual damages to one discriminated against for the sum he has paid in excess of the rate charged others, even where the discrimination was not out of distinct purpose. American Exp. Co. *v.* Crawley, 88 Miss. 525, 41 So. 261.

22. Damages sustained by greater charge for short than for long haul.—Hutcheson *v.* Louisville, etc., R. Co., 108 Ky. 615, 22 Ky. L. Rep. 361, 57 S. W. 251.

23. Damages where benefit of sale is lost through carriers refusal to furnish cars.—Judgment (Tex. Civ. App.) 40 S. W. 431, reversed. Houston, etc., R. Co. *v.* Campbell, 91 Tex. 551, 45 S. W. 2, 43 L. R. A. 225, citing Houston, etc., R. Co. *v.* Hill, 70 Tex. 51, 7 S. W. 659.

24. How injury suffered is to be measured.—Hoover *v.* Pennsylvania R. Co., 156 Pa. 220, 27 Atl. 282, 36 Am. St. Rep. 43, 22 L. R. A. 263, construing Act June 4, 1883.

25. What may be considered in determining measure of damages.—Minds *v.* Pennsylvania R. Co., 228 Pa. 575, 77 Atl. 909 (action brought under Act of June 4, 1883, P. L. 72).

26. Interest not recoverable on treble damages imposed as a penalty.—Blair *v.* Sioux, etc., R. Co., 109 Iowa 369, 80 N. W. 673.

27. When exemplary damages may be recovered.—Augusta Brokerage Co. *v.* Central, etc., R. Co., 121 Ga. 48, 48 S. E. 714.

28. Limitation of actions.—Under the Florida statute, Gen. St. 1906, § 2910, authorizing suits against railroads for violation of the regulations and rates of the railroad commissioners, such suits to be brought within twelve months after the alleged injury, the time thus limited is a condition precedent to the suit and is a part of the right of action itself, and after it has elapsed the right of action is ex-

§ 180. Petition or Complaint.—The petition or complaint in an action against a carrier for damages resulting from violation of a statutory regulation must conform to the statute. The courts have in several cases passed upon the sufficiency of such petitions or complaints.[29] In an action against a railroad company for discrimination in freight charges, where there are several acts of discrimination, it is not necessary to state each as a separate cause of action.[30] Where in a suit for damages for violation of the rule of a railroad commission

tinguished. La Floridienne v. Seaboard, etc., Railway, 59 Fla. 196, 52 So. 298.

The Iowa statute, Laws 22d Gen. Assem., c. 28, § 9, imposing a liability to treble damages for freight overcharges by railroads above the established maximum rate, making it a misdemeanor to so overcharge, and giving a right of action to the person injured for the recovery of such damages and attorney's fees on first making fifteen days' written demand, imposes such damages as a penalty, and not as compensation. Hence the action is governed by Code 1873, § 2529, subd. 1, prescribing a two-year limitation for penal actions. Baker Wire Co. v. Chicago, etc., R. Co., 106 Iowa 239, 76 N. W. 665.

The provision of the Kentucky statute, Ky St., § 819, that all prosecutions and actions "under this law" shall be commenced within two years after the offense shall have been committed or the cause of action shall have accrued, applies not only to prosecutions and actions under the sections immediately preceding, referring to extortion, discrimination, and preferences, but to an action under the section immediately following, relating to the long and short haul. Louisville, etc., R. Co. v. Walker, 110 Ky. 961, 23 Ky. L. Rep. 453, 63 S. W. 20.

29. Petition held sufficient.—In an action against a railroad company for the violation of the Missouri statute, Rev. St. 1899, § 1133, prohibiting railroads from giving any unreasonable advantage to any locality, or subjecting any locality to unreasonable disadvantage, and § 1134, prohibiting them from charging higher rates for a shorter than for a longer haul, a petition alleging that the defendant has charged the plaintiffs a higher rate for shipping freight from a certain point to their station than its published tariffs from the same point in the same direction to stations at a greater distance—specifying the difference in the charges, and the amount on which the excessive freight was paid, and alleging that merchants doing business at the other points were given an undue advantage over plaintiffs—sufficiently states in what way they were injured by defendant's acts. Cohn v. St. Louis, etc., R. Co., 181 Mo. 30, 79 S. W. 961.

Petitions or complaints held insufficient.—A petition against a carrier for treble damages under the Iowa statute, Code, §§ 2125, 2130, forbidding any combination, contract or agreement to prevent the carriage of freight from being continuous from place of shipment to destination and authorizing the recovery of treble damages, was insufficient to warrant recovery, where it failed to allege any contract, combination, or agreement to prevent a continuous carriage from the point of shipment to destination. Clark v. American Exp. Co., 130 Iowa 254, 106 N. W. 642.

The Iowa Code, § 2125, requires common carriers according to their respective powers, to afford all reasonable, proper and equal facilities for the interchange of traffic between their respective lines and for receiving, forwarding, and delivering freight to and from their several lines, and to and from other lines and places connected therewith, and § 2130 authorizes a recovery of treble damages for a violation of § 2125. Held, that where a petition against a carrier failed to allege that defendant did not provide proper facilities for the interchange of traffic between it and the connecting carrier, or for the forwarding of the freight to other lines and places connected therewith, the petition did not state a cause of action for treble damages, under such section. Clark v. American Exp. Co., 130 Iowa 254, 106 N. W. 642.

A complaint against a railway company alleging that it refused to lease its land to plaintiff that he might build warehouses thereon, and that he erected two warehouses adjacent to defendant's side track and partly on its land, but was ordered to remove the same, that afterwards the defendant refused to construct a side track to these buildings, but not alleging or showing by facts that unequal or unreasonable preferences or advantages were made discriminating against plaintiff, or that the defendant could have constructed the required side track on its own land so as to reach the warehouses, did not state a cause of action for unjust discrimination under the Minnesota statute, Gen. Laws 1887, c. 10, § 2. Myers v. Chicago, etc., R. Co., 50 Minn. 371, 52 N. W. 962.

30. Not necessary to state each discrimination as a separate cause of action.—Cohn v. St. Louis, etc., R. Co., 181 Mo. 30, 79 S. W. 961, so holding in an action under Rev. St. 1899, §§ 1133, 1134.

prohibiting unjust discrimination in transportation of freight, exemplary damages may be recovered if it appears that the conduct of the carrier amounted to a willful violation of the law, allegations of the petition which would throw light on the question as to whether the conduct of the carrier was willful will not be stricken out as irrelevant.[31]

§§ 181-275. Penalties for Violations of Regulations—§ 181. In General.—The state has power to impose penalties upon carriers for failure to discharge public duties, provided they are not so enormous that the carier is prevented from resorting to the courts to determine the validity of the statute.[32] Power is sometimes conferred upon a railroad commission to enforce the penalty incurred for an injury inflicted by a carrier in violating any rule or regulation of the commission.[33] Statutes which impose penalties upon carriers for neglect of duty are to be strictly construed; and those who seek to recover such penalties must bring their cases clearly within the terms of the statute.[34]

§§ 182-196. Overcharge and Discrimination—§ 182. Power to Impose Penalty.—The legislature has the right to fix a money penalty upon a railroad company for charging more than the fixed maximum rates of toll for carriage of freight and passengers.[35]

§ 183. Construction of Statutes Imposing Penalties.—A statute imposing a penalty for an overcharge or discrimination in rates, like all penal statutes, must be strictly construed.[36]

31. **Allegations held not irrelevant.**—Augusta Brokerage Co. *v.* Central, etc., R. Co., 121 Ga. 48, 48 S. E. 714.

32. **Power of state to impose penalties.**—Garrison *v.* Southern R. Co., 150 N. C. 575, 64 S. E. 578.

Statute not unconstitutional on ground that penalties are excessive.—A state statute, which confers on a railroad commission the power to require railroads to afford the usual and like customary facilities for interchange of freight to patrons of each and all routes or lines alike, and to make just and reasonable rules for preventing unjust discriminations, and provides for notice and an opportunity of a hearing of the railroad company to be affected by any order of the commission, and for a violation of an order of the commission imposes a penalty on the corporation in a sum not to exceed $5,000, in the discretion of the trial judge, and also subjects any person violating or abetting the violation of the order to punishment for a misdemeanor, does not offend the constitutional guaranties of due process of law and the equal protection of the laws, in that the railroad to be affected by the order is prevented from testing the validity of the statute or the order of the railroad commission because of excessive penalties. Wadley, etc., R. Co. *v.* State, 137 Ga. 497, 73 S. E. 741.

33. **Power of railroad commission to enforce penalty.**—The authority given the railroad commissioners by the Florida statute, Gen. St. 1906, § 2910, as amended by Acts 1907, p. 108, c. 5624, extends only to injuries inflicted by a carrier in violation of a rule, rate, or regulation directly affecting its duties as a common carrier. Railroad Comm'rs *v.* Atlantic, etc., R. Co., 56 Fla. 525, 47 So. 870.

Mere liabilities for money payments, imposed by a rule of the railroad commissioners upon a carrier in favor of a shipper as cumulative remedies for breaches of duties, are not within the statute. Railroad Comm'rs *v.* Atlantic, etc., R. Co., 56 Fla. 525, 47 So. 870.

34. **Penal statutes strictly construed.**—Schloss *v.* Atchison, etc., R. Co., 85 Tex. 601, 22 S. W. 1014.

35. **Power of legislature to impose penalty for overcharge.**—State *v.* Winona, etc., R. Co., 19 Minn. 434 (Gil. 377).

36. **Statutes imposing penalties strictly construed.**—The Missouri statute requiring the Board of Railroad and Warehouse Commissioners to investigate the reasonableness of rates including switching charges, and imposing penalties for disobedience of its orders, is penal, and must be strictly construed. Darlington Lumber Co. *v.* Missouri Pac. R. Co. (Mo.), 147 S. W. 1052.

The statutory remedy for overcharge in freight afforded by the Texas statute, Rev. St., art. 4258, is not exclusive, but cumulative, and he who would recover the penalty provided by it must bring himself clearly within its terms. Murray & Bro. *v.* Gulf, etc., R. Co., 63 Tex. 407, 51 Am. Rep. 650.

In Hines *v.* Wilmington, etc., R. Co., 95 N. C. 434, 59 Am. Rep. 250, a statute imposing penalties on railroad companies for discriminations in freight rates was held penal, and was accordingly construed with the utmost strictness.

§ 184. Repeal of Statutes Imposing Penalties.—A statute imposing a penalty for an unreasonable discrimination, payable to the person injured, is not repealed by a subsequent statute which has no reference to parties discriminated against, but provides in the interest of the general public for proceedings at the instance of the commonwealth, for attacking or restraining violations of law in respect to discriminations, and making such a violation a penal offense, punishable by fine.[37] Nor is a statute prescribing a penalty for an overcharge or unjust discrimination, to be recovered by the party aggrieved, repealed by a subsequent statute imposing a penalty for such an overcharge or discrimination, to be recovered by the state, and providing for the recovery of double damages by the party aggrieved, where such statute provides that the remedies given shall be regarded as cumulative, and that the act shall not be construed as repealing any statute giving such remedies, and where the subject-matter of each statute is merely declaratory of the common law, and hence not repugnant.[38]

§ 185. Conditions Precedent to Right of Action for Penalty.—Statutes imposing penalties for an overcharge or discrimination to be recovered by the person aggrieved sometimes prescribe certain conditions precedent to the right to bring an action for the penalty, as that the bringing of the action shall be in the discretion of the railroad commission,[39] or that no liability can be incurred for unreasonable or extortionate charges until a schedule of maximum rates has been made by the railroad commission,[40] or requiring notice to the carrier of an overcharge and its refusal to refund, as a condition precedent to the right of action.[41]

37. **Repeal of statutes imposing penalties.**—Jackson *v.* Pennsylvania R. Co., 228 Pa. 566, 77 Atl. 905, and Minds *v.* Pennsylvania R. Co., 228 Pa. 575, 77 Atl. 909, holding that the act of June 4, 1883 (P. L. 7) was not repealed by the Act of May 31, 1907 (P. L. 352), nor by the Act of May 31, 1907 (P. L. 354).

38. Chicago, etc., R. Co. *v.* McElroy, 92 Ark. 600, 123 S. W. 771, holding that Acts of 1887, p. 227, was not repealed by Acts 1899, p. 86, § 9 (Kirby's Dig., § 6802); Roberts *v.* St. Louis, etc., R. Co., 95 Ark. 249, 130 S. W. 531, holding the Act of March 24, 1887 (Kirby's Dig., §§ 6722, 6725) was not repealed by the Act of March 11, 1899 (Acts 1899, p. 82).

39. **Right of action—Discretion of railroad commission.**—The Wisconsin statute, Acts 1876, c. 57, § 7, provides that all railroad companies violating the provisions of the act regulating charges shall forfeit to the persons paying the excessive rates three times the actual damages sustained, and that it shall be the duty of the railroad commissioners to investigate complaints in regard to such violation, and, on finding the complaint well-founded, to report the facts to the attorney general, who shall thereupon prosecute the complaint, at the expense of the state, for the benefit of the party aggrieved. Held, that there was no absolute right in the party aggrieved to bring an action for three times the excess, but that the bringing of the action was in the discretion of the commissioners. Smith *v.* Chicago, etc., R. Co., 43 Wis. 686.

40. **No liability until maxim rates have been fixed by railroad commission.**—Under the Illinois statute, Act May 2, 1873, imposing a penalty on railroad companies for making any unjust discrimination in freight rates, and providing that the railroad and warehouse commissioners shall fix a schedule of reasonable maximum rates, which shall be prima facie evidence of the reasonableness of the rates therein fixed, no liability can be incurred for unreasonable or extortionate charges until such schedules are made by the commissioners. Chicago, etc., R. Co. *v.* People, 77 Ill. 443.

41. **When notice and refusal to refund is required.**—Under the Texas statute, Rev. St., arts. 4257, 4258, and the acts of April 19, 1879, and April 10, 1883, amendatory thereof, limiting freight rates to be charged by railroads to fifty cents per one hundred pounds per one hundred miles, and giving the right to recover a penalty of $500 from railroad companies for willful discrimination in freight charges after refusal for twenty days, upon notice, to refund the overcharge, a notice and refusal to refund are only required where a charge exceeding the fifty cent rate is made. Woodhouse *v.* Rio Grande R. Co., 67 Tex. 416, 3 S. W. 323.

Notice should so identify transaction that it can be investigated.—The purpose of a statute requiring notice of an overcharge and giving time for the carrier to refund is to enable the carrier to ascertain whether an overcharge has been made, and to enable it to do so the no-

§ 186. Who May Recover Penalty.—Under a statute imposing a penalty on a carrier for demanding greater compensation than is allowed by law to be recovered in a suit by the "party aggrieved," a passenger whose father purchased a ticket for her use, and who used it on defendant's passenger train, was held to be a "party aggrieved" and entitled to maintain the action for the penalty.[42] Under such a statute a passenger, who was wrongfully required to pay to the auditor on defendant's train a fare in addition to her ticket, can, although she was not the purchaser of the ticket, maintain an action for the penalty.[43] The voluntary payment by a passenger of an unlawful overcharge does not preclude him from recovering the statutory penalty.[44] And where a statute imposing a penalty for charging excessive freight rates, to be recovered by the injured party, contains no exception denying the right of action to a person voluntarily paying the charges, such right of action is not affected by the fact that the excessive charges may have been paid without protest, and with full knowledge of the facts.[45] The fact that a passenger got on a train for the sole purpose of subjecting the railroad company to the penalty for overcharge does not impair his right to recover such penalty.[46] A recovery in such case is not defeated by the fact that the overcharge was paid by the passenger under a champertous agreement with an attorney to induce the company to accept the overcharge and then recover the penalty.[47] Where the agent of a railway company collects from himself, as shipper of goods, an illegal freight charge, and pays the same over to the company, he is pari delicto with the company, and can not recover from it the penalty provided for such illegal charge.[48]

§ 187. For What Acts Penalty Is Imposed.—For what acts a carrier is liable under a statute or commission order imposing a penalty for an overcharge or discrimination, and whether a liability exists in a particular case, is to be determined by a proper construction of the terms of the statute or order as applied to the facts in evidence. Some of the peculiar provisions of such statutes or orders have received judicial interpretation.[49]

tice should so identify the transaction that it can be investigated. Sabine, etc., R. Co. *v.* Cruse, 83 Tex. 460, 18 S. W. 755. See, also, Woodhouse *v.* Rio Grande R. Co., 67 Tex. 416, 3 S. W. 323.

Notice to agent.—Under the Texas statute, Sayles' Civ. St., art. 4258b, § 10, providing that penalties for overcharges on freight shall not be recoverable unless the party aggrieved shall give notice thereof in writing to the railway company or to the agent demanding or receiving the same, if it is claimed that notice was given to an agent who is not to be deemed the agent of the railway company generally, it should be shown that the notice was given to the agent who demanded or received the overcharge, as the statute requires that notice be given to some officer of the company clothed with general powers. Sabine, etc., R. Co. *v.* Cruse, 83 Tex. 460, 18 S. W. 755.

Under this statute it was held that a notice which was delivered to the successor of the local agent who received the overcharge, and which failed to give data from which the record of the shipment could be found on the company's books, was insufficient. Sabine, etc., R. Co. *v.* Cruse, 83 Tex. 460, 18 S. W. 755.

42. Who entitled to recover under statute authorizing suit by party aggrieved.—St. Louis, etc., R. Co. *v.* Freeman, 95 Ark. 218, 128 S. W. 1024, construing Kirby's Dig., § 6620.

43. St. Louis, etc., R. Co. *v.* Frisby, 95 Ark. 281, 129 S. W. 291, construing Kirby's Dig., § 6620.

44. Penalty recoverable though payment of overcharge was voluntary.—St. Louis, etc., R. Co. *v.* Gill, 54 Ark. 101, 15 S. W. 18, 11 L. R. A. 452.

45. Streeter *v.* Chicago, etc., R. Co., 40 Wis. 294, construing Laws 1874, c. 273. But see Stallings *v.* Southern R. Co., 92 S. C. 290, 75 S. E. 449.

46. Penalty recoverable though passengers sole purpose was to subject carrier thereto.—St. Louis, etc., R. Co. *v.* Gill, 54 Ark. 101, 15 S. W. 18, 11 L. R. A. 452; Fisher *v.* New York Cent. R. Co., 46 N. Y. 644.

47. Missouri Pac. R. Co. *v.* Smith, 60 Ark. 221, 29 S. W. 752.

48. Agent of carrier collecting from himself, as shipper, illegal charge.—Steever *v.* Illinois Cent. R. Co., 62 Iowa 371, 17 N. W. 595.

49. Switching charges.—A car of wheat billed to an elevator company over defendant railway was set by its employees on the connecting track between such

Maximum Rate Not Applicable to Transshipment, Elevator and Demurrage Charges.—A rate charge exceeding the maximum allowed by statute for through transmission over defendant road and a connecting road, pursuant to an agreement therewith, will not be held to be in excess if within the maxi-

line and that of another road, and by the latter delivered over its switching tracks to the elevator company; the former company having no authority to use the lines of the latter. Held, that the former company in collecting from the shipper $2 switching charges made by the latter company did not subject itself to a penalty under rule 6 of order forty-five of the corporation commission of Oklahoma, providing that, where a mill is located on a different line, a switching charge not exceeding $1 each way shall be charged. Atchison, etc., R. Co. *v.* State, 26 Okla. 166, 109 Pac. 218.

Collection from consignee of more than bill of lading specifies.—The Arkansas statute, Sand. & H. Dig., § 6254, making it unlawful for a railroad to collect from a consignee of freight more for transportation "than is specified in the bill of lading," and declaring a penalty for refusal to deliver on tender of the amount specified, does not apply where goods were shipped from L., consigned to G. at H., via R., but the bill of lading only stated the charges from L. to R., and the connecting line at R., which was not a party to the bill of lading, accepted the shipment from the original carrier, and paid it the amount of charges claimed by it, without knowing that they were more than the bill of lading specified, and then refused to deliver to consignee, except on payment of its charges and those it had paid the original carrier. St. Louis, etc., R. Co. *v.* Gibson, 68 Ark. 34, 56 S. W. 268.

Under such a statute it is the duty of the carrier, where the weight of the goods is not specified in the bill of lading, to weigh them within a reasonable time, and ascertain the charges, according to the rates specified in the bill of lading; and if it fail to do so, and refuse to deliver the goods, it is liable to the penalty. Little Rock, etc., R. Co. *v.* Hanniford, 49 Ark. 291, 5 S. W. 294.

Contract of affreightment—Method of loading.—A written contract of affreightment stipulated that, if the goods were loaded in a box car, the rate should be so much per hundred pounds actual weight, and, if loaded on a flat car, so much per hundred pounds per 10,000 pounds. The actual weight of the consignment was 1,550 pounds, and the carrier loaded a part in a box car and part on a flat car, in a way to make the freight more than it would have been if the whole consignment had been loaded on either car. Held, that this was an overcharge, and that plaintiff, after paying the whole charge and complying with the Georgia statutes, Civ. Code, § 2316, was entitled to recover the overcharge and the penalty prescribed by said act. Stewart *v.* Comer, 100 Ga. 754, 28 S. E. 461, 62 Am. St. Rep. 353.

Overcharge by conductor not ratified by company.—The West Virginia statute, Code 1891, c. 54, p. 559, § 82c, cl. 5, imposing a penalty of $500 upon railroads for overcharge in freight or passenger rates, does not apply to an overcharge by a conductor in violation of the company's rates and rules, which the company is not shown to have ratified. Hall *v.* Norfolk, etc., R. Co., 44 W. Va. 36, 28 S. E. 754, 41 L. R. A. 669, 67 Am. St. Rep. 757.

Transportation of freight to other states.—The North Carolina statute, Code, § 1966, imposing a penalty on companies operating in the state, for discrimination in freight charges, does not apply to the transportation of freight to other states. McLean *v.* Charlotte, etc., R. Co., 96 N. C. 1, 4 S. E. 769.

Higher rate for carrying freight in one direction than in the opposite.—A carrier, charging a higher rate for carrying freight in one direction than it does for carrying freight of the same class in the opposite direction, does not as a matter of law make an overcharge, within the North Carolina statute, Revisal 1905, §§ 2642-2644, imposing a penalty on a railroad charging more for the transportation of property than is allowed by law, etc. Scull & Co. *v.* Atlantic, etc., R. Co., 144 N. C. 180, 56 S. E. 876.

Rule as to short and long haul not applicable to transportation over other roads.—The Massachusetts statute, St. 1874, c. 372, § 140, prohibiting any railroad corporation from charging or receiving more for transporting freight "to any station on its road" than for transporting "the like class and quantity of freight from the same original point of departure to a station at a greater distance on its road in the same direction," applies to transportation over its own road, and not over other railroads, for which it charges and receives nothing except as collecting agent of other corporations. Commonwealth *v.* Worcester, etc., R. Co., 124 Mass. 561.

Transportation without discrimination of goods destined to point on connecting line.—A shipper demanded that a shipment should be transported by the initial carrier to a designated point, and there delivered to a connecting carrier for transportation to a point on its line. The initial carrier refused, and the written contract of shipment signed by the

mum, after deducting transshipment, elevator, and demurrage charges necessitated by the existence of the two roads.[50]

Switching Charges in Addition to Lawful Rate for Carriage.—Where a railroad company charges for the carriage of freight, in addition to the lawful rate for carriage between the place of shipment and the point of destination, switching charges it has been compelled to pay for transporting the freight from another railroad line to its own line at the place of shipment, it is not liable under a statute imposing a penalty for an overcharge.[51]

Penalties for Unjust or Willful Acts.—Under the statutes in some states imposing penalties on carriers for discrimination it is only an unjust[52] or a willful[53] discrimination that will subject the carrier to the penalty. The word "willfully," as used in a statute imposing a penalty on railroad companies for willfully neglecting to post rates of fare and freight, and for overcharging, does not imply malice, so that, if it be shown that the company designedly omitted to comply with the act, its liability for the penalty is fixed.[54]

Preference in Furnishing Cars to Owners of Spur Tracks.—Where all shippers in the same situation at a given point on a railroad are treated alike in the matter of furnishing coal cars, the mere fact that shippers who own spur tracks are furnished cars in preference to those who do not own tracks, but require the use of the railroad's side tracks, which are needed by the railroad to conduct its general business and serve the public does not constitute a violation of a statute providing a penalty for unlawful discrimination.[55]

Additional Charge by Train Auditor.—Although no contention is made,

shipper bound the initial carrier to carry the property to another point and there deliver it to another connecting carrier for transportation to the point of destination. The shipper signed the contract without reading it. Held, that the initial carrier was not liable to the penalty imposed by the Texas statute, Rev. St. 1895, art. 4574, subd. 2, making a railroad company failing to transport and deliver without discrimination goods destined to any point on a connecting line guilty of unjust discrimination. Judgment (Tex. Civ. App.), 86 S. W. 374, modified. San Antonio, etc., R. Co. *v.* Stribling, 99 Tex. 319, 89 S. W. 963.

But such statute renders a railway company liable for the penalty imposed, where it fails to comply with a contract of shipment binding it to transport goods to a designated station, and which states the ultimate destination as a station on a connecting carrier's line, but carries the shipment beyond the designated station and there delivers it to another connecting carrier. Judgment (Tex. Civ. App.), 86 S. W. 374, modified. San Antonio, etc., R. Co. *v.* Stribling, 99 Tex. 319, 89 S. W. 963.

Injury to particular person need not be shown.—In suits by the state against railroad companies for unjust discrimination in rates, under the Illinois statute approved May 2, 1873, no injury to any particular person need be shown, as in actions by private individuals under such law. Illinois Cent. R. Co. *v.* People, 121 Ill. 304, 12 N. E. 670.

50. Maximum rate not applicable to transshipment, elevator and demurrage charges.—Owen *v.* St. Louis, etc., R. Co., 83 Mo. 454.

51. Switching charges in addition to lawful rate for carriage.—Gilliland *v.* Illinois Cent. R. Co., 81 Miss. 41, 32 So. 916, construing Code, §§ 4287, 4288.

52. Only unjust discrimination will subject carrier to penalty.—Under the Texas statute Rev. St., art. 4257, as amended by Act April 19, 1879, and the Act of April 10, 1883, it is only in cases of unjust discrimination by railroad companies that the penalty against them for such discrimination can be enforced. Woodhouse *v.* Rio Grande R. Co., 67 Tex. 416, 3 S. W. 323.

53. Only willful discrimination will subject carrier to penalty.—To subject a railway company to penalty for unjust discrimination in rates, under the Texas statute, the discrimination must be "willfully" made. Woodhouse *v.* Rio Grande R. Co., 67 Tex. 416, 419, 3 S. W. 323.

What is a willful act of discrimination.—A "willful" act of discrimination in freight charges is an act done "knowingly or intentionally, and without reasonable ground for believing it to be lawful." Woodhouse *v.* Rio Grande R. Co., 67 Tex. 416, 419, 3 S. W. 323.

54. Word "willfully" does not imply malice.—Fuller *v.* Chicago, etc., R. Co., 31 Iowa 187, construing Acts 1862, c. 169, § 2.

55. Preference in furnishing cars to owners of spur tracks.—Choctaw, etc., R. Co. *v.* State, 73 Ark. 373, 84 S. W. 502, 92 S. W. 26, construing Act of March 11, 1899 (Acts 1899, p. 82, c. 53).

in an action against a railroad company for the penalty for overcharge of fare, of such overcharge by the ticket agent, yet, if the train auditor wrongfully made an additional charge, the two acts together may be considered as the act of one, for the purpose of holding the railroad liable.[56]

Charges Collected upon Goods Not Delivered.—Charges collected upon a portion of a shipment which was not delivered is an overcharge within a statute, making railroad companies liable to a penalty for failure to refund an overcharge of freight within a specified time.[57]

§ 188. Unit of Measurement in Determining What Is an Overcharge.—Under a statute relating to penalties for charging illegal fares on railroads, which fixes the rate which a company may receive for the transportation of passengers at not exceeding three cents a mile for a distance of more than eight miles, the unit of measurement is one mile, and the limit of three cents applies first to nine miles, then to ten, and so on, and for any distances less than nine miles it does not apply.[58]

§ 189. Number of Penalties Recoverable.—In a suit against a carrier under a statute imposing a penalty for overcharging a passenger, whether the carrier is liable to but one penalty, or to more than one, where there has been more than one case of overcharge, is to be determined by a construction of the terms of the statute imposing the penalty and the facts in the particular case.[59]

§ 190. Amount of Penalty.—In some states the imposition of excessive penalties is expressly forbidden by the constitution.[60] Before judgment, the penalty imposed upon a railroad company by statute, for overcharges for carrying freight or passengers, does not bear interest, if the statute does not itself allow it, and the liability is not of that character which entitles it to draw interest under the general statutes relating to interest.[61]

§ 191. What Questions May Be Raised in Action for Penalty.—Where the legislature establishes a passenger rate of so much per mile, and prescribes

56. **Additional charge by train auditor.**—St. Louis, etc., R. Co. *v.* Frisby, 95 Ark. 281, 129 S. W. 291.

57. **Charges collected upon goods not delivered.**—Cottrell *v.* Carolina, etc., R. Co., 141 N. C. 383, 54 S. E. 288, construing Revisal 1905, §§ 2642, 2644.

58. **Unit of measurement in determining what is an overcharge.**—Cleveland, etc., R. Co. *v.* Wells, 65 O. St. 313, 62 N. E. 332, 58 L. R. A. 651, construing Rev. St. 3376.

59. **Number of penalties recoverable.**—A carrier charging excessive fare on the sale of two tickets to a husband for himself and wife is subject to but one penalty under the Arkansas statute, Kirby's Dig., § 6620. Chicago, etc., R. Co. *v.* Young, 102 Ark. 599, 145 S. W. 203.

Under the New York statute, Laws 1857, p. 432, § 1, one who, at different times, was charged excessive fare, can recover but one penalty for all unlawful charges prior to the commencement of the action. Fisher *v.* New York Cent. R. Co., 46 N. Y. 644.

The Ohio law of 1873 gave a right of recovery for each case of overcharge. Pittsburgh, etc., R. Co. *v.* Moore, 33 O. St. 384, 31 Am. Rep. 543, distinguishing 46 N. Y. 644.

60. **Penalties held not excessive.**—The penalties established by the Iowa "joint rate act," being not less than $1,000, nor more than $5,000, for the first offense, charging more than the rate fixed by the commissioners, and not less than $5,000 nor more than $10,000 for every subsequent offense, are not excessive, within Const., art. 1, § 17, forbidding the imposition of such penalties. Burlington, etc., R. Co. *v.* Dey, 82 Iowa 312, 48 N. W. 98, 31 Am. St. Rep. 477, 12 L. R. A. 436.

Provision in Indiana constitution refers to criminal proceedings.—The Indiana statute, Acts 1901, p. 149 (Burn's Rev. St. 1901, § 3312b, et seq.), prohibiting unjust discrimination by an express company against any other company engaged in the same business, and prescribing a penalty for its violation, recoverable by the state, is not repugnant to Const., art. 1, § 16, declaring that all penalties shall be proportioned to the nature of the offense, as the provision has reference to criminal proceedings. Adams Exp. Co. *v.* State, 161 Ind. 328, 67 N. E. 1033.

61. **Interest not allowed.**—Iron R. Co. *v.* Lawrence Furnace Co., 49 O. St. 102, 30 N. E. 616.

penalties for a charge in excess thereof, to be recovered of the carrier by the passenger excessively charged, the question of the reasonableness of the rate so fixed by the legislature may be raised in an action for such penalty.[62]

§§ 192-195. Defenses—§ 192. Rates Charged No Higher than Those Fixed by Railroad Commission.—The state is precluded from denying that the traffic rates fixed by the railroad commission are reasonable, and railroad companies can not be subjected to penalties prescribed by statute, on the ground that their rates are unreasonable, if they charge no more than the rates thus fixed.[63]

§ 193. Mistake.—Under a statute, which provides that if a railroad company shall charge or receive any greater compensation for the transportation of passengers than is allowed by law, it shall be liable to a penalty, to be recovered by the party aggrieved, the wrong is in the fact of charging, or receiving a greater compensation than is allowed; and where the company or its agent demands and receives for a fare a larger amount than is lawful, knowing that it or he is receiving that amount, the company is liable, and a mistake in making the overcharge will only go in mitigation of the penalty.[64] Therefore, it is no defense to an action under such a statute that the overcharge was made through a mistake as to the distance between stations.[65] But an honest mistake of an agent of a railroad company in making change, whereby he receives a larger amount than is lawful, will not make the company liable to the penalty.[66] The New York statute[67] providing for a penalty for the exacting by a carrier of unlawful rates of fare expressly exempts from its operation a carrier making an overcharge through inadvertence or mistake not amounting to gross negligence.[68]

§ 194. Facts Not Constituting a Defense.—It is no defense to a complaint of unjust discrimination that the privileges allowed to the favored party may be withdrawn at any time.[69] If a railroad receives for transportation a

62. Question of reasonableness of rate fixed by legislature.—St. Louis, etc., R. Co. *v.* Gill, 156 U. S. 649, 39 L. Ed. 567, 15 S. Ct. 484; St. Louis, etc., R. Co. *v.* Stevenson, 156 U. S. 667, 39 L. Ed. 573, 15 S. Ct. 484, 491.

63. Rates charged no higher than those fixed by commission.—Burlington, etc., R. Co. *v.* Dey, 82 Iowa 312, 48 N. W. 98, 31 Am. St. Rep. 477, 12 L. R. A. 436.

64. Mistake no defense where amount received is known.—St. Louis, etc., R. Co. *v.* Waldrop, 93 Ark. 42, 123 S. W. 778, construing Kirby's Dig., § 6620. Compare Chicago, etc., R. Co. *v.* McDermott (Ark.), 152 S. W. 983.

65. Mistake as to distance between stations no defense.—Missouri Pac. R. Co. *v.* Smith, 60 Ark. 221, 29 S. W. 752; Chicago, etc., R. Co. *v.* McDermott (Ark.), 152 S. W. 983.

66. Honest mistake of agent in making change a good defense.—Little Rock, etc., R. Co. *v.* Clark, 58 Ark. 490, 25 S. W. 504; Chicago, etc., R. Co. *v.* Young, 102 Ark. 599, 145 S. W. 203. See, also, Chicago, etc., R. Co. *v.* McDermott (Ark.), 152 S. W. 983.

67. Mistake not amounting to gross negligence—New York statute construed. —Laws 1890, pp. 1095, 1096, c. 565, §§ 37, 39, as amended by Laws 1892, p. 1392, c. 676.

68. Under this statute, where a railroad makes a mistake in the construction of its statutory rights, such as an ordinarily prudent person, honestly desiring to act within his rights, might make, it is exempt from the penalty. Judgment 88 App. Div. 147, 84 N. Y. S. 383, 14 N. Y. Ann. Cas. 6, affirmed. Goodspeed *v.* Ithaca St. R. Co., 184 N. Y. 351, 77 N. E. 392.

The statute does not impose the forfeiture on a company making an overcharge through a mistake made in good faith as to the effect of § 37, of the act, making the rates of fare for the transportation of passengers depend on the grades which were overcome by the road. Goodspeed *v.* Ithaca St. R. Co., 88 App. Div. 147, 84 N. Y. S. 383, 14 N. Y. Ann. Cas. 6, affirmed in 184 N. Y. 351, 77 N. E. 392.

When, under the advice of its counsel, a railroad company makes an overcharge, the right to which might be legally considered a fairly doubtful question, it constitutes an inadvertance or mistake not amounting to gross negligence, within the terms of the statute. Parker *v.* Elmira, etc., R. Co., 27 App. Div. 383, 49 N. Y. S. 1127, affirmed in 165 N. Y. 274, 59 N. E. 81.

69. No defense that privileges to favored party may be withdrawn.—Butch-

carload of merchandise to a station on its road where it delivers the goods, and they are accepted by the consignee, and charges more than it charges for transporting the same a greater distance, it is liable to the penalty imposed by a statute forbidding such discrimination, although by the original contract the merchandise was to be transported to a more distant station.[70] In an action against a railroad company to recover the penalties for overcharges for transportation, where there was a special contract between the shipper and the company for legal rates, the plaintiff is not remitted to an action for breach of the contract, and such contract constitutes no defense.[71] In an action by a shipper to recover penal damages under a statute forbidding discrimination in freight rates, the railroad company can not set up in justification of the lower rates a contract with the party in whose favor they were made, whereby, in consideration of the lower rates, such party released the railroad company from an unexplained, indefinite, and unadjusted claim for damages arising from a tort; for to allow such a defense would practically emasculate the law.[72]

§ 195. Estoppel to Set Up Defense.—In a qui tam action against a railroad company for the penalty for having taken overcharges for the transportation of merchandise, the company, in making defense, is not estopped from showing that the packages alleged to have been overcharged could have been charged at a higher rate, or that they were all, or in part, express matter, and not fully charged as such, or that for small packages the company could have charged more.[73]

§ 196. Two Penalties—Effect of Enforcement of One.—Where a statute imposes two distinct penalties for an overcharge, and the penalties are not alternative, the enforcement of one will not prevent the enforcement of the other.[74]

§ 197. Refusal to Transport Passengers.—Under statutes in some jurisdictions the refusal of a railroad company to transport a passenger without legal excuse subjects the company to a penalty.[75]

ers', etc., Stock Yards Co. *v.* Louisville, etc., R. Co., 14 C. C. A. 290, 67 Fed. 35.

70. Facts not constituting defense to greater charge for shorter than for longer haul.—Osgood *v.* Concord Railroad, 63 N. H. 255, construing Laws 1859, c. 55.

71. Special contract for legal rates no defense.—Reynolds *v.* Chicago, etc., R. Co., 85 Mo. 90.

72. Contract with party in whose favor discrimination is made, no defense.—Union Pac. R. Co. *v.* Goodridge, 149 U. S. 680, 37 L. Ed. 986, 13 S. Ct. 970; Union Pac. R. Co. *v.* Taggart, 149 U. S. 698, 37 L. Ed. 905, 13 S. Ct. 977.

73. Carrier not estopped to show goods could have been charged at higher rate.—McGregor *v.* Erie R. Co., 35 N. J. L. 115.

74. Two penalties—Effect of enforcement of one.—Herriman *v.* Burlington, etc., R. Co., 57 Iowa 187, 9 N. W. 378, 10 N. W. 340.

The Iowa statute, Acts 15th Gen. Assem., c. 68, fixes a maximum rate for freight charges, and provides that a higher charge shall be "punished by a forfeiture of $500 to the school fund," and that the company "shall forfeit and pay to the person injured five times the amount of the charges," etc. Held, that an action under the first clause would not be a bar to an action under the second. Herriman *v.* Burlington, etc., R. Co., 57 Iowa 187, 9 N. W. 378, 10 N. W. 340.

75. Refusal to transport passengers.—A Michigan staute, Comp. Laws, § 6235, requires every railroad corporation to furnish sufficient accommodation for the transportation of passengers, etc., and declares that on refusal to transport any passenger without legal excuse it shall pay for such default damages or a penalty at the party's election. Held, that a carrier was not liable to a passenger under such section for failure to transport her by a particular train, which had been discontinued and proper notice given, provided the mistake in selling her a ticket for use on such train, was an error of the local ticket agent. Geer *v.* Michigan Cent. R. Co., 142 Mich. 511, 106 N. W. 72.

But where a railroad company had advertised a train on a branch line to leave

§ 198. Refusal to Sell Mileage Tickets at Reduced Rates.—A statute, making a railroad company liable to a penalty for refusal to sell a 1,000-mile mileage ticket at a reduced rate, is void, is not within the police power of the state.[76]

§ 199. Refusal to Furnish Passenger Tickets Granting Stop-Over Privileges.—Under a statute prescribing a penalty for the refusal of a carrier to furnish passenger tickets granting stop-over privileges without the payment of additional fare to persons "desiring a passage," persons who demand such tickets solely for the purpose of having such demand refused, and thus laying the foundation for the prosecution of an action to recover the penalty, are not entitled to recover the penalty.[77]

§ 200. Refusal to Give a Transfer.—Under statutes in some states the refusal of a street railroad company to give to a passenger paying one single fare a transfer to other lines operated by the company, makes the company liable to a penalty.[78]

a connecting point shortly after the arrival of another train, and had sent printed posters to its agents showing the contemplated operation of such train, but before the time arrived when the train was advertised to be put on notice of its withdrawal was sent to some of the company's agents, and was published, but the agent at Y. had received no such notice, by reason whereof he sold a ticket to plaintiff for passage over such branch line, and advised her of the running of the advertised train, and on her arrival at the junction point she was compelled to remain there overnight, the company was liable for the penalty prescribed. Van Camp *v.* Michigan Cent. R. Co., 137 Mich. 467, 100 N. W. 771.

76. Statute imposing penalty void.—Judgment 15 App. Div. 251, 44 N. Y. S. 175, reversed. Beardsley *v.* New York, etc., R. Co., 162 N. Y. 230, 56 N. E. 488, so holding as to Laws 1895, c. 1027, § 1.

77. Refusal to furnish passenger tickets granting stop-over privileges.—Southern Pac. Co. *v.* Robinson, 132 Cal. 408, 64 Pac. 572.

Certain persons combined for the purpose of creating causes of actions for the penalty prescribed under Civ. Code, § 490, and demanded tickets with the stop-over privilege of a railroad company, and also demanded passage from an intermediate station, having stopped there, for the purpose of being refused passage on a subsequent train, nearly 3,000 times. They did not desire the stop-over privilege, but in making their demands desired that they be refused. Held, that they could not recover the penalties provided by the statute, since it referred only to persons desiring the stop-over privilege. Southern Pac. Co. *v.* Robinson, 132 Cal. 408, 64 Pac. 572.

78. Refusal to give a transfer.—The New York statute, Laws 1890, p. 1106, c. 565, § 78, as amended by Laws 1892, p. 1398, c. 676, provides that any railroad corporation may contract with any other for the use of their respective roads, and if such contract shall be a lease, certain formalities are to be observed in its execution. Section 104 (page 1114) provides for transfers from one road to another upon payment of a single fare. Held, that the latter section applies to surface lines leased by one or more corporations to another, and operated by the lessee, so as to render the lessee liable where transfers are tendered and refused for the penalties provided for their refusal. Judgment, 96 App. Div. 636, 89 N. Y. S. 1105, modified. Griffin *v.* Interurban St. R. Co., 179 N. Y. 438, 72 N. E. 513.

The New York Railroad Law, Laws 1892, p. 1406, c. 676, § 104, contemplates a person who enters on or continues a trip with the actual desire of getting to some place, and whose controlling purpose is interfered with by an unjust refusal to give him a transfer, and who therefore is defeated of his aim, and does not apply to a person who boarded a car merely to seek information as to the custom of the corporation to issue or not to issue transfers at a certain point over a certain route, which information he desired for use in litigation, and who had no definite purpose of going to any particular place, since he was not prevented by the refusal of a transfer from accomplishing all he had intended, and was therefore not an "aggrieved party." Judgment, 121 App. Div. 582, 106 N. Y. S. 378, affirmed. Bull *v.* New York City R. Co., 192 N. Y. 361, 85 N. E. 385.

In an action to recover the penalty imposed by such statute it appeared that defendant was the operating company of several leased lines, under a contract entered into pursuant to the statute. Plaintiff was a passenger on one of such lines, and demanded a transfer to another of the leased lines, which was refused. Held, that defendant's liability for the penalty could not be defeated because plaintiff's initial trip was on one of defendant's leased lines, to be completed

§ 201. Refusal to Sell Passenger Tickets of a Connecting Carrier.—A statute imposing a penalty for refusing to sell passenger tickets of a connecting carrier at the rate prescribed by the railroad commission, is not unconstitutional, as compelling a railroad company to become the agent of another railroad, or to appoint another railroad company its agent against its consent, nor as depriving a railroad of the right to select its own agents.[79] In what cases the liability of a railroad company attaches under such a statute is to be determined by an interpretation of the peculiar provisions of the statute.[80]

§ 202. Failure to Affix Check to Baggage and to Deliver Duplicate to Passenger.—Under a statute, requiring a railroad company to affix a check to every parcel of baggage and to deliver a duplicate thereof to the passenger, and imposing a penalty for failure to do so, and declaring that no fare shall be collected from such passenger, the liability to furnish the passenger free transportation on refusal to deliver him a check is as much a part of the penalty as the cash penalty therein prescribed.[81] A railroad corporation which in fact receives the baggage of a passenger upon a train on which it is not bound to take it, to be transported over a portion of the road for which he has purchased a ticket, is subject, upon refusing to check the baggage, to the penalty prescribed for such refusal.[82]

§ 203. Refusal to Redeem Unused Passenger Tickets.—Under statutes in some jurisdictions carriers are required to provide for the redemption of unused passenger tickets, and a penalty is imposed for their failure or refusal to do so.[83]

on another of such lines, instead of on the defendant's line, to be completed on one or the other of the lessor company's lines. O'Reilly *v.* Brooklyn Heights R. Co., 95 App. Div. 253, 89 N. Y. S. 41, affirmed in 179 N. Y. 450, 72 N. E. 517, construing in addition to the above statute, Laws 1885, p. 525, c. 305; Laws 1890, p. 1082, c. 565; Laws 1892, p. 1382, c. 676.

The penalties provided for on refusal of transfer on payment of a single fare from one to another of leased surface railroads, under Laws 1890, p. 1082, c. 565, as amended by Laws 1892, pp. 1398, 1406, c. 676, §§ 78, 104, are not cumulative, and the bringing of an action for one penalty is a waiver of all previous penalties incurred. Judgment, 96 App. Div. 636, 89 N. Y. S. 1105, modified. Griffin *v.* Interurban St. R. Co., 179 N. Y. 438, 72 N. E. 513.

79. Statute imposing penalty not unconstitutional.—Stephens *v.* Central, etc., R. Co., 138 Ga. 625, 75 S. E. 1041, so holding as to Civ. Code, 1910, §§ 2752-2755.

80. In what cases liability for penalty attaches.—The Georgia statute, Civ. Code, 1895, § 2299, compelling a railroad to sell any ticket of any other railroad company with which it may be directly or indirectly connected for passage over the lines of such connecting companies, and § 2301, imposing a penalty for violation of § 2299, to be recovered either by the company discriminated against or by the person offering to buy the ticket, or both, are intended solely to prevent one railroad company from discriminating against a connecting company, and no liability attaches for the penalty imposed for a refusal to sell a ticket to a point on the line of a connecting company, unless such connecting company shall have tendered its tickets and requested their sale. Jones *v.* Louisville, etc., R. Co., 132 Ga. 11, 63 S. E. 627.

81. Failure to affix check to baggage and to deliver duplicate to passenger.—Tarr *v.* Oregon, etc., R. Co. (Idaho), 93 Pac. 957, construing Rev. St. 1887, § 2674.

82. Commonwealth *v.* Connecticut R. Co., 81 Mass. (15 Gray) 447, construing St. 1854, c. 23.

83. Refusal to redeem unused passenger tickets.—Under the Iowa statute Code Supp. 1902, §§ 2128a, 2128b, 2128c, where a ticket agent refuses to sell a person a ticket to a certain point, and so induces him to buy one to a more distant point, which ticket the agent afterwards refuses to redeem when returned unused, the carrier is liable for the penalty unless lack of good faith on the part of plaintiff in the purchase is shown. Cook *v.* Chicago, etc., R. Co., 136 Iowa 497, 113 N. W. 1079.

Under such statute, where the telegraph operator at a railroad station while relieving the station agent, refused to redeem a passenger ticket, the mere fact that the station agent had been authorized to redeem tickets is no defense in an action for the penalty. Rohrig *v.* Chicago, etc., R. Co., 130 Iowa 380, 106 N. W. 935.

For a construction of the provisions of

§ 204. Failure to Post Schedules of Rates.—In some states there are statutes requiring railroad companies to post schedules of rates, and imposing a penalty for their failure to do so.[84] In an action for a penalty for failure to post rates made by a railroad commission, the railroad company can not interpose as a defense that the commission has not published schedules of rates for all the railroads in the state although there is a statute providing that the schedule shall not be taken as evidence until schedules have been prepared for all the railroad companies in the state, as such a statute only applies to the reception of the schedule as evidence.[85]

§§ 205-210. Failure or Refusal to Receive or Transport Freight—§ 205. Statute Imposing Penalty Does Not Limit Carrier's Common-Law Liability.—A statute requiring railroad companies to accept freight, and imposing a penalty for refusal, and making it unlawful to allow freight to remain unshipped for a time specified, unless agreed to by the owner, does not limit the carrier's common-law liability, nor apply to delays arising from the carrier's negligence.[86]

§ 206. Who May Recover Penalty.—The "party aggrieved," under a statute authorizing recovery by such party of a penalty for a carrier's refusal to receive or transport freight, is one injured by the refusal.[87] The party injured in such case is the shipper.[88] Under such a statute, an agent can not recover for the use of his principal, not being the real party in interest;[89] nor can a connecting carrier to whom the freight is consigned recover the penalty;[90] nor

an earlier Iowa statute Acts 28th Gen. Assem., c. 71, §§ 1, 2, 3, see Jolley *v.* Chicago, etc., R. Co., 119 Iowa 491, 93 N. W. 555.

84. **Failure to post schedules of rates.**—The Arkansas statute, Act March 24, 1887, §§ 7, 12 (Sand. & H. Dig., §§ 6307, 6312), require that all railroad corporations in the state of Arkansas shall keep posted up, at every depot freight office, printed schedules for freight rates; and that, for a violation of the act, they shall forfeit and pay for every such offense a certain sum, to be recovered by a civil action "by the party aggrieved;" but that a notice in writing of the violation, and a demand for reparation, must be served by claimant fifteen days before the commencement of the action. Held, that the reparation contemplated by the act was compensation for injuries or wrongs suffered from the failure to post the rates, and that hence only a person so injuriously affected was entitled to the penalty. Arkansas, etc., R. Co. *v.* Harris, 62 Ark. 452, 36 S. W. 186.

A notice which does not state how claimant was aggrieved by a failure to post schedules, the extent of his grievances, and the damage occasioned thereby, is fatally defective. Arkansas, etc., R. Co. *v.* Harris, 62 Ark. 452, 36 S. W. 186.

85. Johnson *v.* Seaboard, etc., Railway, 73 S. C. 36, 52 S. E. 644, construing Civ. Code 1902, § 2093.

86. **Carrier's common law liability not limited.**—Rehearing, Parker *v.* Railroad Co., 131 N. C. 827, 43 S. E. 1005, denied. Parker *v.* Atlantic, etc., R. Co., 133 N. C. 335, 45 S. E. 658, 63 L. R. A. 827, construing Code, §§ 1964, 1967.

87. **The "party aggrieved" is one injured by the refusal.**—McRackan *v.* Atlantic, etc., R. Co., 150 N. C. 331, 63 S. E. 1042, construing Revisal 1905, § 2631.

88. **Shipper the party entitled to recover penalty.**—Crosby *v.* Pere Marquette R. Co., 131 Mich. 288, 91 N. W. 124; construing 2 Comp. Laws 1897, § 6235; Burlington Lumber Co. *v.* Southern R. Co., 152 N. C. 70, 67 S. E. 167, construing Revisal 1905, § 2631; Reid *v.* Southern R. Co., 149 N. C. 423, 63 S. E. 112.

A consignor of goods, who, under contract with the consignee, was permitted to return certain goods that had been shipped to him by the consignee, but was not to receive credit therefor on his account until the goods were received by the consignee, is the party aggrieved, within the North Carolina statute, Laws 1903, p. 999, c. 590, § 3, making it unlawful for railroads to omit to transport goods received, for a longer period than four days after receipt thereof, and providing penalties for a violation thereof, which they shall forfeit to the party aggrieved. Summers *v.* Southern R. Co., 138 N. C. 295, 50 S. E. 714.

89. **Agent can not recover for use of principal.**—McRackan *v.* Atlantic, etc., R. Co., 150 N. C. 331, 63 S. E. 1042, construing Revisal 1905, § 2631.

90. **Connecting carrier can not recover penalty.**—Crosby *v.* Pere Marquette R. Co., 131 Mich. 288, 91 N. W. 124, construing 2 Comp. Laws 1897, § 6235.

can it be recovered by an attorney for persons who attached the goods shipped in suits against the real owner.[91]

§ 207. When Penalty Will Be Imposed.—In what cases the penalty will be imposed, under a statute imposing a penalty for a carrier's failure or refusal to receive or transport freight, is to be determined by a proper construction of the terms of the statute imposing the penalty; such statute to be construed in connection with any other statute having application to the particular case.[92]

§ 208. Number of Penalties Recoverable.—Under a statute imposing a penalty for a transportation company's refusal to ship freight tendered it, and providing that each article refused shall constitute a separate offense, where a railroad company refuses to transport a lot of cattle a separate penalty can be recovered for each head thereof, since each head is an article within the statute.[93]

§ 209. Tender and Refusal.—To entitle a shipper to the statutory penalty for refusal to receive freight for shipment, it is not enough to constitute a tender that he place the freight on the carrier's platform or simply ask the carrier's agent when the freight can be shipped, but there must be an actual tender, though it is not essential that any particular language be used, but it is suffi-

91. **Attorney for persons who attached goods can not recover penalty.**—McRackan v. Atlantic, etc., R. Co., 150 N. C. 331, 63 S. E. 1042, construing Revisal 1905, § 2631.

92. **When penalty will be imposed.**—The North Carolina statute, Revisal 1905, § 2631, declares that freight agents of railroads shall receive all articles of the nature received by such company for transportation whenever tendered at a regular depot and forward the same by the routes selected by the person tendering the freight under existing laws and for a failure so to do imposes a penalty of $50 for each day's delay and actual damages. Held, that where a freight agent refused to accept freight on January 27, 1905, or issue a bill of lading therefor because of alleged lack of time to ascertain the freight rates, but permitted the freight to remain in the railroad's warehouse until he had time to ascertain the rates, which he failed to do until February 8th, there was a failure to receive for transportation when tendered, creating a liability under such section. Twitty v. Southern R. Co., 141 N. C. 355, 53 S. E. 957.

But since Revisal 1905, § 2632, allows the carrier two days at the initial point of shipment in which to ship freight, it incurred no penalty under Revisal, § 2631, for not shipping by the train which was being loaded when the goods were offered for shipment, even though the carrier's employee used discourteous and unwarranted language in refusing to ship on that train. Cox v. Atlantic, etc., R. Co., 148 N. C. 459, 62 S. E. 556.

A carrier refusing to receive cotton tendered for shipment, and to issue a bill of lading therefor, unless the shipper will undergo the extra expense of placing the cotton on its platform covered with cotton, violates the Arkansas statute, Kirby's Dig., § 6803, and can not escape liability by relying on § 528, which forbids a carrier from issuing a receipt for property until the same has been received into its custody. St. Louis, etc., R. Co. v. State, 84 Ark. 150, 104 S. W. 1106.

In the North Carolina statute, Code, § 1964, imposing a penalty for the refusal of a railroad to receive goods for transportation at any regular station, the words "regular station" denote a place where the railroad transacts regular and orderly business with suitable buildings and appliances, and with agents to give bills of lading and receipts to shippers tendering or receiving freight at all appropriate times; and the fact that a place is set down in the circulars and orders of the railroad as a station, and that a mail train stops there regularly is not sufficient to make it a "regular station." Land v. Wilmington, etc., R. Co., 104 N. C. 48, 10 S. E. 80.

A point on a railroad where there was never any station agent, no agent's office, no books kept, tickets sold, or bills of lading given, but where conductors had frequently stopped trains to receive and let off freight and passengers, is not a "regular station" within the meaning of such statute. Kellogg v. Suffolk, etc., R. Co., 100 N. C. 158, 5 S. E. 379.

93. **Separate penalty recoverable for each article.**—Carter v. Wilmington, etc., R. Co., 126 N. C. 437, 36 S. E. 14; S. C., 129 N. C. 213, 39 S. E. 827, construing Code, § 1964.

cient if the language amount in common understanding to a tender and refusal.[94] Where a shipper is permitted to place lumber on a car, but the carrier refuses to receive it for shipment, this is a "refusal to receive" it, within a statute imposing a penalty for such refusal.[95] Under a statute providing that a carrier shall forfeit a penalty of a prescribed amount for each day it refuses to receive freight tendered for shipment, to entitle a shipper to the daily penalty there must have been a tender and refusal each day.[96]

§ 210. Defenses.—When a carrier shows the existence of conditions for which it is not responsible, preventing the discharge of its duty to receive goods for shipment, it will not be held liable for the penalty imposed by statute for failure to receive and ship goods.[97] But it is not a sufficient defense to an action to recover the statutory penalty for a carrier's refusal to receive freight for shipment that the consignee of freight failed to unload cars consigned to him, creating a congestion of traffic at the point of destination,[98] or that an unusual emergency has caused a shortage of cars so that goods can not be shipped out as rapidly as customary,[99] or that the defendant's agent who refused to receive the goods for shipment was ignorant of the location of the station to which the goods were to be shipped, which was located on a railroad maintaining a separate organization from, but operated by, defendant,[1] or that the shipper asked for a bill of lading to a point on a

94. **What amounts to a tender.**—Wampum Cotton Mills *v.* Carolina, etc., R. Co., 150 N. C. 608, 64 S. E. 586.

Facts not amounting to general tender for shipment.—In an action for the statutory penalty for a carrier's failure to accept meat for shipment, the evidence held to show that the meat arrived too late for shipment, and was voluntarily taken away by the shipper, so as not to be a general tender for shipment. Cox *v.* Atlantic, etc., R. Co., 148 N. C. 459, 62 S. E. 556.

Place and time of tender.—To entitle a shipper to the penalty imposed by the North Carolina statute, Revisal 1905, § 2631, for a carrier's failure to receive freight for shipment, it must be tendered at a regular depot and during business hours. Garrison *v.* Southern R. Co., 150 N. C. 575, 64 S. E. 578.

95. **What amounts to a refusal to receive goods for shipment.**—Garrison *v.* Southern R. Co., 150 N. C. 575, 64 S. E. 578, construing Revisal 1905, § 2631.

96. **Statute requiring a tender and refusal each day.**—Wampum Cotton Mills *v.* Carolina, etc., R. Co., 150 N. C. 608, 64 S. E. 586. Compare Garrison *v.* Southern R. Co., 150 N. C. 575, 64 S. E. 578.

Where a shipper placed lumber on a car with the carrier's consent and demanded a bill of lading, which was refused, and went to the agent of the carrier two or three times and asked if he had shipped the car load, and he said he had not, and plaintiff refused to unload the car, there was a tender and refusal to ship on each day from the time the goods were placed in the car until they were finally shipped, within the North Carolina statute, Revisal 1905, § 2631, imposing a penalty of $50 for each day a carrier refuses to receive freight. Garrison *v.* Southern R. Co., 150 N. C. 575, 64 S. E. 578.

97. **Existence of conditions for which carrier is not responsible.**—Garrison *v.* Southern R. Co., 150 N. C. 575, 64 S. E. 578, construing Revisal 1905, § 2631.

Motive power tied up by strike.—The North Carolina statute, Revisal 1905, § 2631, requires every railroad to receive all articles for transportation whenever tendered, and imposes a penalty of $50 for each day it refuses to receive freight. Section 2632 imposes a penalty for refusing to transport freight within a reasonable time and requires shipments to start from the initial point within two days after the freight is received. Held, that a carrier could plead any legal excuse to avoid the penalty for failure to receive freight, and, if a carrier was unable to transport cattle because its motive power was tied up by a strike, it would not be liable for the statutory penalty for its refusal to receive the stock. Murphy Hardware Co. *v.* Southern R. Co., 150 N. C. 703, 64 S. E. 873, 22 L. R. A., N. S., 1200.

98. **Congestion of traffic at point of destination.**—Garrison *v.* Southern R. Co., 150 N. C. 575, 64 S. E. 578, construing Revisal 1905, § 2631.

99. **Unusual emergency causing shortage of cars.**—St. Louis, etc., R. Co. *v.* State, 84 Ark. 150, 104 S. W. 1106, construing Kirby's Dig., § 6803.

1. **Carrier's agent ignorant of location of station.**—Goods were delivered for shipment to a station on a railroad, which, though it maintained a separate organization for local purposes, was operated by defendant company and its receipts paid over to defendant's treasurer

connecting line,[2] or that a connecting carrier refuses to receive freight for the consignee,[3] or that the shipper suffered no pecuniary injury by the delay in shipment caused by the carrier's refusal.[4] It being the duty of a carrier of interstate commerce to file and publish its schedule of rates, its failure to do so is no defense to an action for the penalty for refusing to receive for transportation an interstate shipment.[5] That a shipper presented goods for shipment to Scottsville, Tenn., when the real name of the town on defendant's line was Scottville, Tenn., did not relieve the carrier from the statutory penalties for refusal to receive goods for shipment thereto.[6]

§ 211. Refusal to Give Shipper a Proper Bill of Lading.—Under a statute imposing a penalty on a common carrier for refusing to give a shipper, when demanded, a bill of lading or memorandum in writing stating the quantity, character, order, and condition of goods received for shipment, a railroad company is not liable because an agent refused to state, in a bill of lading, the weight or quantity of a car of lumber, loaded by the shipper, at a switch where there was no agent or means of weighing, and when the shipper did not furnish the agent an invoice of the shipment.[7]

§§ 212-220. Delay in Shipment or Transportation of Freight—§ 212. Power to Impose Penalty.—A state statute prohibiting delay by carriers in the shipment of freight, and providing a penalty for violation thereof, is a proper exercise of the state's police power.[8] In some states power is conferred upon

and its operating reports made to defendant's auditor, and the salaries of its employees were paid by defendant. Defendant's agent, who refused to receive goods for shipment on the ground that he did not know the location of the station, was replaced by another agent shortly thereafter, who received and shipped the goods to the point of consignment. Held, that defendant's first agent should have known or ascertained the location of the shipping point, and his ignorance of its location would not relieve defendant from the penalty imposed by the North Carolina statute, Revisal 1905, § 2631, for failure to receive goods for shipment. Reid v. Southern R. Co., 150 N. C. 753, 64 S. E. 874.

2. Shipper's request for bill of lading to point on connecting line.—Wampum Cotton Mills v. Carolina, etc., R. Co,, 150 N. C. 612, 64 S. E. 588, construing Revisal, § 2631.

3. Refusal by connecting carrier to receive freight for consignee.—Wampum Cotton Mills v. Carolina, etc., R. Co., 150 N. C. 612, 64 S. E. 588, construing Revisal, § 2631.

4. No pecuniary injury to shipper.—Reid v. Southern R. Co., 150 N. C. 753, 64 S. E. 874, construing Revisal 1905, § 2631.

5. Failure of carrier to file and publish schedule of rates.—Burlington Lumber Co. v. Southern R. Co., 152 N. C. 70, 67 S. E. 167.

Under the North Carolina statute, Revisal 1905, § 2631, imposing a penalty on carriers for refusal to receive freight for shipment, a carrier is liable where freight for shipment to another state was tendered, and because the agent did not have the schedule of freight rates to the point of destination he refused for over two months to issue a bill of lading of any sort even to the end of its line or to deliver to a connecting carrier. Burlington Lumber Co. v. Southern R. Co., 152 N. C. 70, 67 S. E. 167.

6. Mispelling name of destination point.—Reid v. Southern R. Co., 150 N. C. 753, 64 S. E. 874.

7. Facts not rendering carrier liable.—Conley v. Sherman, etc., R. Co., 90 Tex. 295, 38 S. W. 519, construing Rev. St. 1895, art. 322; Sherman, etc., R. Co. v. Conly (Tex. Civ. App.), 37 S. W. 253, construing Rev. St. 1895, art. 322.

8. Power to impose penalty.—Lexington Grocery Co. v. Southern R. Co., 136 N. C. 396, 48 S. E. 801, so holding as to Laws 1901, c. 634, p. 868; Wall-Huske Co. v. Southern R. Co., 147 N. C. 407, 61 S. E. 277.

The North Carolina statute, Revisal 1905, § 2632, which provides that the party aggrieved may recover a penalty for a carrier's unreasonable delay in transporting goods, is constitutional as a valid exercise of the police power. Rollins v. Seaboard, etc., Railroad, 146 N. C. 153, 59 S. E. 671; Cardwell v. Southern R. Co., 146 N. C. 218, 59 S. E. 673; Davis v. Southern R. Co., 147 N. C. 68, 60 S. E. 722.

Texas statute held constitutional.—The Texas statute, Rev. St. 1895, art. 4496, imposing on a railroad company a penalty of 5 per cent per month on the value of a shipment during its negligent detention in transportation, does not violate Const., art. 1, § 13, declaring that ex-

the railroad commission to adopt rules making carriers liable to a penalty for delay in the shipment or transportation of freight.[9]

§ 213. Who May Recover Penalty.—Statutes imposing penalties on carriers for delay in transporting freight generally provide as to who shall be entitled to recover the penalty. Under the North Carolina statute the penalty may be recovered by the "party aggrieved," [10] and an action therefor can not be brought on relation of the state.[11] Under the South Carolina statute the penalty may be recovered "by any consignee who may be injured in any way by such delay or by the owner or holder of the bill of lading." [12]

cessive fines should not be imposed, nor cruel and unusual punishment inflicted. Texas Cent. R. Co. *v.* Hannay-Frerichs & Co., 104 Tex. 603, 142 S. W. 1163, modifying judgment 130 S. W. 250.

9. Power of railroad commission.—Under the power to require carriers to furnish necessary transportation facilities and to prescribe rules to secure the furnishing of such facilities, etc., the railroad commissioners may adopt a rule making a carrier liable to a shipper for $1 for each day a car properly loaded, and for which shipping instructions have been given, should be detained in violation of the rules of the commissioners; and such a rule is neither excessive or unreasonable, nor an arbitrary or unjust discrimination against freight not so loaded. The failure or refusal to discharge the liability imposed by the rule is not in violation of law, and the failure or refusal to pay the liability fixed by the rule is not made a penal violation thereof. State *v.* Atlantic, etc., R. Co., 56 Fla. 617, 47 So. 969.

10. North Carolina statute—Penalty recoverable by "party aggrieved."—Revised 1905, § 2632.

Where goods are delivered to a carrier for transportation and a bill of lading issued, the title, in the absence of any direction or agreement to the contrary, vests in the consignee, who alone is the "party aggrieved." Elliott *v.* Southern R. Co., 155 N. C. 235, 71 S. E. 339.

In an action to recover the penalty by the consignors of a shipment of hay, one of the plaintiffs testified that the consignees were anxious for the hay, and that they paid in full for it after delivery. Held, that the consignees, and not the consignors, were the parties aggrieved, within the statute, and that the consignors were without right to sue for the delay. Stone & Co. *v.* Atlantic, etc., R. Co., 144 N. C. 220, 56 S. E. 932.

But where the plaintiff sold goods to one at a distant point, delivered them to the carrier, and received a bill of lading therefor, and delivery at the buyer's home was a part of the contract of sale, it was held that plaintiff, and not the consignee, was the "party aggrieved" by the unreasonable delay, since the plaintiff was the one whose legal right was denied. Cardwell *v.* Southern R. Co., 146 N. C. 218, 59 S. E. 673.

A consignor shipping goods under an agreement that the consignee shall not pay for them until their arrival is the "party aggrieved" by delay in transportation, and he may recover the penalty, nothing else appearing. Davis *v.* Southern R. Co., 147 N. C. 68, 60 S. E. 722.

Where goods are shipped under an open bill of lading, and the contract between the shipper and the consignee provides that the goods are not to be paid for until received, inspected, and weighed at the point of destination, and the stipulation is inserted to ascertain the quantity of the goods and the price therefor, the title remains in the shipper, who is the "party aggrieved" by the carrier's delay in transportation, and he alone may sue for the penalty though the carrier is ignorant of the contract. Elliott *v.* Southern R. Co., 155 N. C. 235, 71 S. E. 339.

Plaintiff loaded and received a bill of lading for a car load of wood, shipped to the consignee to be sold by him for plaintiff's benefit. Held, that plaintiff, and not the consignee, was the "party aggrieved" by the delay. Rollins *v.* Seaboard, etc., Railroad, 146 N. C. 153, 59 S. E. 671.

11. Robertson *v.* Atlantic, etc., R. Co., 148 N. C. 323, 62 S. E. 413.

12. South Carolina statute—Penalty recoverable by consignee or by owner or holder of bill of lading.—Act March 25, 1904 (24 St. at Large, pp. 671, 672.)

Under this statute, a consignee, not shown to be either the owner or the holder of the bill of lading, can not recover the penalty without proving that he was injured by the delay. Fullerton *v.* Atlantic, etc., R. Co., 82 S. C. 333, 64 S. E. 142.

But the holder of a bill of lading can recover the penalty without proving any injury by the delay. Muckenfuss Mfg. Co. *v.* Charleston, etc., R. Co., 82 S. C. 177, 63 S. E. 747; Mills *v.* Southern Railway, 82 S. C. 242, 64 S. E. 238.

A consignee, having received from the carrier satisfaction for total loss of goods, is no longer such injured consignee or owner of the bill of lading as can maintain an action under the statute. Macon *v.* Southern Railway, 81 S. C. 167, 62 S. E. 6.

§ 214. In What Cases Penalty Is Imposed.—A statute authorizing recovery of a penalty for delay in transportation of freight has no application to loss of or damage to goods.[13] A statute imposing a penalty on a railroad company failing to transport goods received by it for shipment, and billed to any place within the state, for a longer period than four days after receipt of the same, unless otherwise agreed between the parties, refers to a delay in beginning the transportation or starting the goods from the station of their receipt, and does not require a delivery at their destination within the time specified.[14] A statute imposing a penalty for delay in the transportation of freight, and requiring a delivery at destination within a time specified, does not apply to a delay in delivery to the consignee after transportation ceases, nor compel a carrier to deliver loaded cars off its own right of way onto the private track of the consignee.[15] The North Carolina statute, imposing a penalty on carriers for a failure to transport freight within a reasonable time, applies only to intrastate shipments, or those which do not require any departure from the borders of the state to execute the contract of carriage.[16]

§ 215. Time within Which Freight Must Be Transported.—Statutes imposing a penalty for delay in the transportation of freight sometimes contain express provisions as to the time within which the goods must be transported. In such case the carrier will be liable to the penalty if the transportation is delayed beyond the prescribed period.[17]

13. No application to loss of or damage to goods.—So holding as to the South Carolina statute. Macon *v.* Southern Railway, 81 S. C. 167, 62 S. E. 6; Cousar Mercantile Co. *v.* Southern R. Co., 82 S. C. 307, 64 S. E. 391.

14. Delivery at destination within time specified not required.—Walker Bros. *v.* Southern R. Co., 137 N. C. 163, 49 S. E. 84, construing Acts 1903, p. 999, c. 590.

15. Statute not applicable to delay in delivery to consignee after transportation ceases.—Brooks Mfg. Co. *v.* Southern R. Co., 152 N. C. 665, 68 S. E. 243, construing Revisal 1905, § 2632, as amended by Acts 1907, c. 461.

Revisal 1905, § 2632, providing that any railroad failing to "transport" within a reasonable time goods received shall pay a penalty, and declaring that it shall be considered that a railroad has "transported" freight within a reasonable time if it has done so in the ordinary time required, etc., imposes a penalty on a railroad for failing to reasonably "transport" goods, as distinguished from a failure to "deliver" goods to the consignee, and for a failure to perform the first the statutory penalty is imposed, while for a failure to perform the second the consignee may sue for damages. Alexander *v.* Atlantic, etc., R. Co., 144 N. C. 93, 56 S. E. 697.

16. North Carolina statute applies only to intrastate shipments.—Hickory Marble, etc., Co. *v.* Southern R. Co., 147 N. C. 53, 60 S. E. 719, construing Revisal 1905, § 2632, considered in connection with Code, §§ 1966.

17. Time within which freight must be transported—North Carolina statutes construed.—Revisal 1905, § 2632, imposing a penalty on a carrier for neglecting to transport within a reasonable time any goods received for shipment, and providing that it shall be deemed to have transported the goods in a reasonable time, if it has done so within the ordinary time required for such transportation, and that a delay of two days at the initial point and forty-eight hours at one intermediate point for each one hundred miles shall be prima facie reasonable, etc., makes a failure to transport within the ordinary time prima facie unreasonable, and, where the transportation is not within the ordinary time, the carrier is liable for the penalty imposed, less two days at the initial point and forty-eight hours at one intermediate point for each one hundred miles, but the two days at the initial point and forty-eight hours at each intermediate point are not the standards by which reasonable time is measured. Jenkins *v.* Southern R. Co., 146 N. C. 178, 59 S. E. 663. See, also, Wall-Huske Co. *v.* Southern R. Co., 147 N. C. 407, 61 S. E. 277.

The words "ordinary time," within the statute, mean the regular customary time within which, by the facilities in general use for the performance of the duty of carrying goods, the carriage should be completed. Jenkins *v.* Southern R. Co., 146 N. C. 178, 59 S. E. 663.

Where it is shown that the point of shipment is a regular station on the carrier's main line, leading directly to the point of destination, twenty-five miles away, though there is no testimony regarding the ordinary time required for a freight train between the two points, the jury may be permitted from their common observation and experience to consider and determine the question of

§ 216. When Transportation Terminates.—Transportation of freight by a carrier is not terminated so as to relieve the carrier from liability for a penalty for delay on the train hauling the freight arriving within the yard limits of the point to which the freight is consigned, nor until the relation of carrier ends, and that of warehouseman begins.[18]

§§ 217-220. Defenses—§ 217. Failure to Prepay Charges.—Where a carrier does not require prepayment of freight charges as authorized by statute, it waives such prepayment, so that failure to prepay is not a defense to an action for the penalty imposed for delay in transportation.[19]

§ 218. Notice to Shippers of Conditions Causing Delay.—That shippers were notified by a carrier of conditions which prevented delivery of shipments in the usual time is no defense to an action for the penalty for delay in transportation, as a knowledge of the existence of the facts is not sufficient to charge the shipper with notice of their effect on the carrier.[20]

§ 219. Sunday Laws.—Whether the fact that delay in the shipment or transportation of freight by a railroad company was caused by the company not running its trains on Sunday is a defense in an action for the penalty imposed for such delay, and whether Sundays are to be included in the days for which such penalty is allowed, are questions to be determined from the terms

ordinary time between the points, and, in the absence of explanation, fix the amount of the wrongful delay. Rollins *v.* Seaboard, etc., Railroad, 146 N. C. 153, 59 S. E. 671.

Where, in an action against a carrier for the penalty imposed by the statute, the evidence showed that the goods were delivered to it for transportation on December 7th, and were delivered to the consignee January 12th following, and that the distance was less than two-hundred miles, the jury were justified in finding that the time consumed was in excess of the ordinary time. Jenkins *v.* Southern R. Co., 146 N. C. 178, 59 S. E. 663.

In such an action the carrier may show that extraordinary unforeseen conditions prevented the discharge of the duty within the ordinary time, and, where such conditions are shown, the question of reasonable time must then be measured by the unusual conditions. Jenkins *v.* Southern R. Co., 146 N. C. 178, 59 S. E. 663.

A station at which a car must be taken out of a local train which comes into the station and then placed into another train leaving the station for the point of destination is not an "intermediate point," within the statute. Brooks Mfg. Co. *v.* Southern R. Co., 152 N. C. 665, 68 S. E. 243.

But where freight less than a car load destined for a point on a branch line was loaded into a car intended to go through without breaking bulk, and the car at the junction was shifted from the carrier's main to its branch line, and transported to destination, the junction point was an "intermediate point" within the statute. Wall-Huske Co. *v.* Southern R. Co., 147 N. C. 407, 61 S. E. 277.

Under the express provisions of Laws 1907, p. 669, c. 461, the time allowed for the transportation of freight by Revisal 1905, § 2632, namely, the actual running time for freight trains between the point of shipment and destination plus two days at the initial point and two days at each intermediate point, if any, must embrace within them the day of delivery if the goods were applied for, and for every day beyond that the carrier incurs the prescribed penalty. Wall-Huske Co. *v.* Southern R. Co., 147 N. C. 407, 61 S. E. 277.

Under Acts 1875, c. 240, imposing a penalty against railroad companies for allowing freight received for shipment to remain unshipped for more than five days, unless by agreement, five full running days are intended, including Sunday whenever it intervenes; and the company would not incur the penalty until the full expiration of the sixth day after receipt of the goods. Keeter *v.* Wilmington, etc., R. Co., 86 N. C. 346. See, also, Branch *v.* Wilmington, etc., R. Co., 88 N. C. 570.

18. When transportation terminates.—Wall-Huske Co. *v.* Southern R. Co., 147 N. C. 407, 61 S. E. 277, construing Revisal 1905, § 2632.

19. Failure to prepay charges no defense where prepayment is waived.—Texas Cent. R. Co. *v.* Hannay-Frerichs & Co., 104 Tex. 603, 142 S. W. 1163, modifying judgment 130 S. W. 250.

20. Notice to shippers of conditions causing delay.—Texas Cent. R. Co. *v.* Hannay-Frerichs & Co., 104 Tex. 603, 142 S. W. 1163, construing Rev. St. 1895, art. 4496.

of the statute imposing the penalty construed in connection with any statutory enactment relating to the operation of trains on Sunday.[21]

§ 220. Estoppel to Set Up Defense.—A carrier may be estopped by its conduct to set up a defense, in an action to recover the penalty prescribed by statute for a delay in the shipment of freight.[22]

§ 221. Failure to Give Notice of Arrival of Freight to Consignee.—A statute imposing a penalty on a railroad company for a failure to give notice of the arrival of freight to the consignee within a prescribed time after its arrival, and which also imposes a reciprocal demurrage on consignees for failure to remove freight, is a reasonable regulation in aid of commerce, and not a burden upon it.[23]

§§ 222-226. Refusal to Deliver Freight or Express Matter to Consignee—§ 222. Constitutionality of Statute Imposing Penalty.—A statute entitling a consignee of merchandise to recover the amount of freight charges for every day the carrier refuses to deliver after tender of freight, is not repugnant to a constitutional provision requiring fines and penalties to be appropriated for laying out public roads, where such provision refers only to

21. **Effect of Sunday laws.**—*Nebraska.*—In an action under Cobbey's Ann. St. 1907, §§ 10,606 and 10,607, for delay in shipment of live stock, where the evidence shows that the delay was caused by unloading the stock for feed and rest at a division point, and that to have continued the shipment would have compelled the carrier to operate its trains on Sunday, and resulted in delivery of said stock on Sunday, the judgment against the carrier can not be sustained. Cram *v.* Chicago, etc., R. Co., 84 Neb. 607, 122 N. W. 31, 26 L. R. A., N. S., 1022, rehearing denied, 123 N. W. 1045.

North Carolina.—Where a safe was delivered to defendant carrier on Tuesday, January 22, 1907, and arrived at its destination on January 30th after passing one intermediate point at which the carrier was entitled to two days' delay and the safe, if transported with necessary diligence, could not have arrived in time for delivery before Sunday, defendant was excused by Revisal 1905, § 2839, from making a delivery on Sunday and was therefore entitled to a deduction for that day and for the two days at such intermediate point in determining the length of time for which a penalty for delay was recoverable. Blue Ridge Collection Agency *v.* Southern R. Co. (N. C.), 61 S. E. 462.

Where freight, if transported without improper delay, should have been delivered on Friday, January 18th, and was not in fact delivered until Wednesday, the 23d, the carrier was not entitled to an allowance in the computation of penalties for delay imposed by Revisal 1905, § 2632, for the intervening Sunday, since, the default having begun on a week day, its duration was measured by the calendar not exceeding thirty days, irrespective of intervening Sundays or holidays. Wall-Huske Co. *v.* Southern R. Co., 147 N. C. 407, 61 S. E. 277.

South Carolina.—Under the act providing a penalty for failure to deliver freight in a certain number of hours, when notified that prompt shipment is required, Sunday is not to be included in the days for which the penalty is allowed, as freight trains are prohibited by law from running on Sunday. Salley *v.* Seaboard, etc., Railway, 76 S. C. 173, 56 S. E. 782. See, also, Sandford *v.* Seaboard, etc., Railway, 79 S. C. 519, 61 S. E. 74.

22. **Estoppel to set up defence.**—Where four packages were delivered to defendant railroad company for shipment under a single bill of lading, three of which were mismarked, but notwithstanding such fact they were shipped to the place where they were marked, and the package which was correctly marked was not shipped, defendant was estopped to claim, in an action to recover a penalty for its failure to ship the correctly marked package, that the four packages constituted a single shipment, and that the mismarking of the three was a sufficient excuse for not shipping the fourth. Lexington Grocery Co. *v.* Southern R. Co., 136 N. C. 396, 48 S. E. 801.

23. **Failure to give notice of arrival of freight to consignee.**—St. Louis, etc., R. Co. *v.* Edwards, 94 Ark. 374, 127 S. W. 713, so holding as to the Act of April 19, 1907 (Acts 1907, p. 453) § 3, requiring railroad companies failing to give notice of arrival to the consignee within twenty-four hours thereafter to forfeit to the interested party $5 a day per car on car load shipments, and one cent a hundred pounds per day on less than car load shipments with a minimum and maximum charge of five cents and $5 respectively, on less than car load shipments.

fines imposed as penalties for crimes or such as arise from forfeited bail bonds.[24]

§ 223. Statute Imposing Penalty Not Merely in Aid of Common Law.—A statute imposing a penalty on an express company refusing to deliver express matter at the residence of the consignee in a city of more than 2,500 inhabitants, is not merely in aid of the common law requiring carriers of goods to make personal delivery.[25]

§ 224. Where Delivery Must Be Made.—Where no depot is maintained at a certain place on a railroad, and it is the custom to deliver freight for that place from the depot at another point on the line, the conductors of freight trains acting as freight agents at the former place, tender of the charges, and demand for the goods by a consignee, can be made at the latter place where the goods are retained, and the penalty imposed, for refusing to deliver freight on tender of charges, is incurred by refusal to deliver there.[26]

§ 225. Conditions Precedent to Recovery of Penalty.—Where a statute imposes a penalty upon railroad companies for a refusal to deliver freight to a consignee upon his tendering the freight charges due as shown by the bill of lading, an owner of freight, in order to recover the penalty, must bring himself strictly within the requirements of the statute.[27] The entire freight charges due, as shown by the bill of lading, must be paid or tendered in order to fix the liability for the penalty,[28] and where the bill of lading does not represent the amount of charges that are legally demandable by the carrier to whom the tender is made, such carrier can not be held liable for the penalty.[29] But it is not necessary that the bill of lading shall be shown at the time, to make the tender of the charges effectual, unless its production is demanded;[30] and the railroad company has no right to impose, as a condition to the delivery of the freight, the surrender of the bill of lading, any custom to the contrary notwithstanding.[31] The penalty is recoverable only when the railroad company that is sought to be charged has either itself executed the bill of lading, or has authorized another company to execute it, or has ratified it by a voluntary act on

24. **Statute held not unconstitutional.**—Houston, etc., R. Co. *v.* Harry & Bros., 63 Tex. 256, construing Const., art. 16, § 24, and Gen. Laws, p. 35.

25. **Statute not merely in aid of common law.**—Railroad Comm. *v.* Adams Exp. Co., 171 Ind. 138, 85 N. E. 337, 966, construing Acts 1901, p. 97, c. 62 (Burns' Ann. St. 1901, § 3312a).

26. **Where delivery must be made.**—St. Louis, etc., R. Co. *v.* McKee (Tex.), 15 S. W. 45, 4 Willson Civ. Cas. Ct. App., § 8, construing Sayles' Civ. St., art. 4258a.

27. **To recover penalty strict compliance with statutory requirements must be shown.**—Schloss *v.* Atchison, etc., R. Co., 85 Tex. 601, 22 S. W. 1014, construing Sayles' Civ. St., art. 4258a, §§ 1, 2, 3.

28. **Freight charges, as shown by bill of lading, must be paid or tendered.**—St. Louis, etc., R. Co. *v.* Johnson, 53 Ark. 282, 13 S. W. 1096, construing Act Feb. 27, 1885, § 3; Schloss *v.* Atchison, etc., R. Co., 85 Tex. 601, 22 S. W. 1014, construing Sayles' Civ. St., art. 4258a, §§ 1, 2, 3.

Under the Arkansas statute, Act Feb. 27, 1885, § 3, where a consignee declines to receive a portion of the goods because they are damaged, and the railroad company refuses to deliver the undamaged freight upon a tender of its proportion of the charges, and it is thereupon replevied, and subsequently, after repairing the damage, the company refuses to deliver the remaining goods upon a tender of their proportion of the charges, but offers to do so upon the payment of the whole bill, no liability for the penalty is incurred. St. Louis, etc., R. Co. *v.* Johnson, 53 Ark. 282, 13 S. W. 1096.

Under the Texas statute, Sayles' Civ. St., art. 4258a, §§ 1, 2, 3, a consignee who tenders the amount of freight shown to be due by an expense account furnished by the carrier, which is no part of the bill of lading, can not maintain an action for the penalty. Schloss *v.* Atchison, etc., R. Co., 85 Tex. 601, 22 S. W. 1014.

29. Fordyce *v.* Johnson, 56 Ark. 430, 19 S. W. 1050.

30. **Bill of lading need not be shown unless production is demanded.**—Gulf, etc., R. Co. *v.* Dwyer, 75 Tex. 572, 12 S. W. 1001, 7 L. R. A. 478, 16 Am. St. Rep. 926, construing Laws 17th Leg. Sess., p. 35.

31. **Railroad company can not require surrender of bill of lading.**—Dwyer *v.* Gulf, etc., R. Co., 69 Tex. 707, 7 S. W. 504, construing Gen. Laws 17th Called Leg. Sess., p. 35, § 2.

its part; and an acceptance of freight by a company from a connecting company, where such acceptance is by statute made compulsory, will not be deemed a ratification.[32]

§ 226. Number of Penalties Recoverable.—Under a statute providing that the carrier shall inform the consignee of the amount of freight charges and deliver the freight on tender or payment thereof, and that any failure or refusal to comply with such provisions shall subject the carrier to a prescribed penalty for each such failure or refusal, only one penalty is recoverable on one shipment, though there are several demands for delivery and refusals thereof.[33]

§ 227. Failure of Consignee to Unload Cars within a Prescribed Time.—Under a statute making a consignee liable to a penalty to the railroad company for failure to unload cars within a prescribed time after delivery and notice, the consignor is not liable for failing to see that cars are unloaded at their destination.[34]

§ 228. Failure to Stop at Station.—Under statutes in some states the failure of a railroad company to stop a passenger train at a station, to discharge a passenger who has purchased a ticket to such station, will subject the company to a penalty.[35] Where a passenger goes to a flag station on a railroad at night,

32. **Carrier liable only when it has executed, authorized execution of, or ratified, bill of lading.**—Gulf, etc., R. Co. *v.* Dwyer, 75 Tex. 572, 12 S. W. 1001, 7 L. R. A. 478, 16 Am. St. Rep. 926.

Under the Texas statute, Rev. St., art. 4251, making it obligatory on a railroad company in the state, without delay, to carry over its road, cars, freight, etc., received from any connecting company, a connecting company is not bound by a through bill of lading, under which it receives freight, in ignorance of its terms, and issued by the original carrier, who had no authority to contract for it, and is therefore not liable upon its refusal to deliver goods on tender of payment or charges specified in such a bill of lading, under Laws 17th Leg. Sess., p. 35, imposing a penalty on railroad companies for refusing to deliver freight upon payment or tender of the charges shown in the bill of lading. Gulf, etc., R. Co. *v.* Dwyer, 75 Tex. 572, 12 S. W. 1001, 7 L. R. A. 478, 16 Am. St. Rep. 926.

In an action to recover the statutory penalty from a railroad company for refusing to deliver certain freight on tender of the charges shown on the bill of lading, it appeared that the freight was received for shipment, and the bill of lading executed by another road; that defendants, on receiving the goods from the connecting line, paid the charges as shown on the waybill, which were in excess of those on the bill of lading; that if the freight was shipped by the route it traveled, the shipping carrier had no authority to bind defendant and the connecting line to carry at the rate specified in the bill of lading; that if shipped at an authorized rate, it was misrouted by a preceding carrier, for whose act defendants were not responsible, and the freight came to defendants bound by the charges of their connecting line. Held, that plaintiffs must pay the rates paid by defendants to their connecting line in full, their remedy being against the railroad company which shipped goods by an unauthorized route, and defendants are entitled to hold the goods until the freight is paid. Fordyce *v.* Johnson, 56 Ark. 430, 19 S. W. 1050.

Evidence held not to show that a railroad company, against whom a suit was brought to recover the statutory penalty, authorized the execution of the bill of lading or subsequently ratified it. Gulf, etc., R. Co. *v.* Dwyer, 84 Tex. 194, 19 S. W. 470.

33. **Only one penalty recoverable on one shipment.**—Harrill Bros. *v.* Southern R. Co., 144 N. C. 532, 57 S. E. 3 3, construing Revisal 1905, § 2633.

34. **Consignor not liable.**—Judgment (Civ. App.), 40 S. W. 431, reversed. Houston, etc., R. Co. *v.* Campbell, 91 Tex. 551, 45 S. W. 2, 43 L. R. A. 225.

35. **Failure to stop at station to discharge a passenger.**—In an action against a railroad company, under the Michigan statute, How. Ann. St., § 3324, to recover a penalty for failure to discharge a passenger at his destination, it appeared that plaintiff purchased a regular passenger ticket for a station on the road; that prior to the arrival at such station the train was so full that defendant ran through the station without stopping, there being so many persons waiting for the train that defendant determined it was unsafe to stop. Held, to show no "legal or just excuse," within the statute, to excuse defendant from liability for the penalty. Hoyt *v.* Cleveland, etc., R. Co., 112 Mich. 638, 71 N. W. 172.

Under the Montana statute, Rev. Codes, § 4330, requiring railroad corporations,

intending to take a train that has been in the habit of stopping at such station when signaled so to do, and the train does not stop for him, although the usual signal is given, he may recover the penalty prescribed for the failure of the railroad company to "furnish accommodation for his transportation."[36]

§§ 229-234. Failure to Furnish, or Delay in Furnishing Cars—§ 229. Constitutionality of Statutes Imposing Penalties.—A statute imposing penalties upon carriers for failure to furnish cars, when application for such cars has been made by a shipper, must not contravene any provision of the constitution. Certain statutes imposing penalties for such derelictions of duty by carriers have been held constitutional.[37]

§ 230. Statutes Imposing Penalties Strictly Construed.—Statutes imposing a penalty for failure of a railroad company to furnish freight cars to an applicant therefor, will be strictly construed.[38]

§ 231. Powers and Duties of Railroad Commissions.—Under statutes in some states the state railroad commission is empowered to require railroad

on tender of the "regular rates of fare," to furnish tickets entitling the purchasers to ride, and providing that any railroad failing to furnish tickets or refusing the passage which the same call for, must pay to the person so refused $200, one purchasing a ticket at a reduced rate may not recover the penalty on failure of the railroad to stop at the station named in the ticket. Miley *v.* Northern Pac. R. Co., 41 Mont. 51, 108 Pac. 5.

36. **Failure to stop train when signaled.**—Freeman *v.* Detroit, etc., R. Co., 65 Mich. 577, 32 N. W. 833, construing How. Ann. St., § 3324.

37. **Statutes held constitutional.**—That the Arkansas statute, Laws 1907, Act No. 193, pp. 454, 463, §§ 1, 17, requiring railroad companies to furnish cars within six days of application therefor made the duty to furnish cars absolute, and did not expressly provide for reasonable defenses to be interposed, did not render it unconstitutional, since the whole law is not in the legislative act, but in the constitution and higher rights of property, and a violation of the act would merely be prima facie a breach of duty, which would not preclude the right to set up defenses. Oliver & Son *v.* Chicago, etc., R. Co., 89 Ark. 466, 117 S. W. 238.

The provision of the Kansas act relating to the furnishing of cars by railway companies to shippers of freight (Gen. St. 1909, § 7203), which allows shippers to recover attorney fees in action successfully prosecuted under the act, does not deny the railway companies the equal protection of the laws guaranteed by the federal constitution because they are not allowed attorney fees if they are successful in such suits, or because they are not allowed attorney fees in actions successfully prosecuted by them against shippers for the detention of cars contrary to the reciprocal provision of the act. Vosburg *v.* Atchison, etc., R. Co., 89 Kan. 114, 130 Pac. 667.

The Texas statute, Rev. Stat. 1895, arts. 4497-4502, imposes penalties and damages on carriers for failure to furnish cars at designated points within certain times after demand, and declares that the carrier shall not be bound to comply with the act provided it is prevented from doing so by strikes or other calamities. Held, that the exceptions so provided were not exclusive, and did not prevent the carrier from pleading any legitimate defense in excuse of its failure to comply with the act, and hence the same was not unconstitutional as a deprivation of the carrier's property without due process of law. Allen *v.* Texas, etc., R. Co., 100 Tex. 525, 101 S. W. 792, affirming 42 Tex. Civ. App. 331.

38. **Statutes strictly construed.**—Judgment (Tex. Civ. App.), 40 S. W. 431, reversed. Houston, etc., R. Co. *v.* Campbell, 91 Tex. 551, 45 S. W. 2, 43 L. R. A. 225; Houston, etc., R. Co. *v.* Buchanan, 42 Tex. Civ. App. 620, 94 S. W. 199; Texas, etc., R. Co. *v.* Loving (Tex. Civ. App.), 98 S. W. 451, 452, affirmed in 101 Tex. 663, no op.; Texas, etc., R. Co. *v.* Barrow, 33 Tex. Civ. App. 611, 613, 77 S. W. 643, affirmed in 101 Tex. 663, no op. See, also, Schloss *v.* Atchison, etc., R. Co., 85 Tex. 601, 22 S. W. 1014; Texas, etc., R. Co. *v.* Hughes, 99 Tex. 533, 91 S. W. 567.

A shipper desiring to recover the penalty imposed for a carrier's failure to furnish cars, must comply strictly with the law. McCarty *v.* Gulf, etc., R. Co., 79 Tex. 33, 38, 15 S. W. 164.

Statute not applicable to refusal to furnish cars.—By refusing to furnish cars on request, a railroad company did not incur the penalty imposed by the Texas statute, Rev. St. 1879, art. 279, providing that for refusing to transport goods common carriers shall incur a penalty of not less than $5 nor more than $500, to be recovered by the owner of the goods. San Antonio, etc., R. Co. *v.* Bailey, 4 Willson Civ. Cas. Ct. App., § 68, 15 S. W. 203.

companies, when cars are applied for, to furnish them within a prescribed time, and to impose a penalty for their failure to do so.[39] Under a Georgia statute, as preliminary to a suit against a railroad company for the penalty imposed for failure to furnish cars, the railroad commission is required to give the company an opportunity to present a defense before the commission, and if a sufficient defense is made the company is relieved from further liability.[40]

§ 232. Application for Cars.—Before a carrier can be held liable for the penalty prescribed for failure to furnish cars, an application must be made for such cars.[41] In determining the sufficiency of such an application the terms of the statute or commission order imposing the penalty must be considered.[42]

§ 233. Places at Which Cars Must Be Furnished.—Statutes imposing

39. Rule requiring cars to be furnished within four days reasonable.—Under the Georgia statute, Laws 1905, p. 120, §§ 1, 2, 3, 4, the Railroad Commission Storage Rule, No. 9, providing that when a shipper files with a railroad company written application for cars, stating the character of freight to be shipped and its destination, the railroad company shall furnish such cars within four days, Sundays and holidays excepted, etc., and for a violation of the rule shall, within 30 days after demand, pay the shipper $1 per day per car after expiration of free time, is a reasonable rule. Southern R. Co. *v.* Atlanta Sand, etc., Co., 135 Ga. 35, 68 S. E. 807.

40. Georgia statute—Presentation of defense before Railroad Commission.—Laws 1905, p. 121, § 3.

A shipper, acting under Railroad Commission Storage Rule No. 9, filed with the commission a complaint for delay in furnishing cars, which the secretary of the commission referred to the manager of the railroad having charge of claims, who, in reply, denied the charges, and stated that he understood that suit had been brought on the claim and he did not suppose it worth while for him to answer the complaint in detail. Held, a sufficient compliance with the statute requiring the railroad commission to give a railroad company an opportunity to present a defense before the commission so as to authorize the claimant to bring suit for the penalty imposed by Rule 9, as authorized by Laws 1905, p. 120, § 2. Southern R. Co. *v.* Atlanta Sand, etc., Co., 135 Ga. 35, 68 S. E. 807.

Railroad Commission Storage Rule, No. 9, requires railroad companies to furnish cars promptly upon request therefor, and provides that when a shipper files with a railroad company written application for cars, stating the character of freight to be shipped and its destination, the railroad company shall furnish such cars within four days, Sundays and holidays excepted, etc., and for a violation of the rule shall, within thirty days after demand, pay the shipper $1 per day per car after expiration of free time. Held that, under the statute entitling railroad companies to present defenses before the railroad commission, a decision of the commission that a company had not shown sufficient cause to relieve itself from liability did not conclude the company as to the question of such liability, upon a suit by the complaining shipper for the amount claimed by him against the company for failure to furnish cars on written demand within four days as provided by the railroad commission rule. Southern R. Co. *v.* Atlanta Sand, etc., Co., 135 Ga. 35, 68 S. E. 807.

41. Necessity of application for cars.—In Texas, cars must be furnished upon a shipper making a timely demand therefor. Rev. St. arts. 4494, 4496; Houston, etc., R. Co. *v.* Campbell, 91 Tex. 551, 560, 45 S. W. 2, 43 L. R. A. 225, reversing 40 S. W. 431.

42. Sufficiency of application for cars.—An application for freight cars under the Kansas reciprocal demurrage law (Laws 1905, p. 570, c. 345, § 2) is insufficient to permit recovery of penalty for failure to comply therewith, § 3 requiring that it shall state, among other things, the time they are desired, and the application mentioning no time, as to treat the absence of such statement to mean "now" would be legislation, and not interpretation. Cox *v.* Missouri, etc., R. Co., 81 Kan. 186, 105 Pac. 14.

A written application by a shipper to a carrier for a freight car to be furnished within two days is not a compliance with rule 9 of the North Carolina corporation commission, requiring carriers of freight to furnish cars within four days upon application in writing therefor; and hence a carrier to whom such application was made incurred no penalty for failure to comply therewith. McDuffie *v.* Seaboard, etc., Railway, 145 N. C. 397, 59 S. E. 122; S. C., 145 N. C. 399, 59 S. E. 123.

Under the Texas statute, Rev. St. 1895, arts. 4498, 4499, imposing a penalty on a carrier for failure to furnish cars, on application, and requiring the application to state the time when they are desired, an application for a car "as soon as possible" was not sufficient to bring the applicant within the statute. Texas, etc., R. Co. *v.* Hughes, 99 Tex. 533, 91 S. W. 567.

a penalty for failure to furnish cars generally prescribe the places at which cars shall be furnished. Therefore the question whether a carrier is liable for the penalty for failure to furnish cars at a particular place is to be determined by a construction of the terms of the statute.[43]

§ 234. Defenses.—In an action by a shipper against a railroad company for the penalty prescribed, for failure of the company to furnish cars for an interstate shipment upon demand, the existence of conditions for which the company is not responsible preventing the discharge of its duty to furnish the cars, is a good defense.[44] But in such an action, mere proof that the company did not have sufficient cars to comply with the demands made upon its services when cars were ordered from it would be no defense.[45] Mere proof that there is a strike on a railroad is no defense to an action for failure to furnish cars on demand, since strikes may include only an insignificant number of employees or those engaged in some department in no substantial way interfering with the furnishing of cars or upon the happening of a strike, the company may without sufficient effort, fail to conduct its business, but if a strike is of such magnitude and character as to render the company unable, by the use of proper

43. **Penalty not recoverable if carrier has no agent at point of shipment.**—The Texas statute, Rev. St. 1895, art. 4499, provides a penalty for the failure of a railroad company to furnish freight cars to one applying therefor; and art. 4500 requires such applicant to "deposit with the agent of such company," at the time of making his application, a part of the freight charges. Held that, if at the point of shipment the company has no agent, the penalty is not recoverable. Judgment (Tex. Civ. App.), 40 S. W. 431, reversed. Houston, etc., R. Co. *v.* Campbell, 91 Tex. 551, 45 S. W. 2, 43 L. R. A. 225.

Furnishing cars at switches.—The Texas statute, Rev. St. 1895, art. 4522, enacting that, where a railroad company constructs a switch, it is bound to furnish cars for the transportation of freight therefrom, and in default thereof shall be subject to the same penalties as in other cases, does not apply to an action under arts. 4497-4502, passed subsequent thereto as an independent law, which provide a penalty for failure of a railroad company to furnish freight cars to one applying therefor. Judgment (Tex. Civ. App.), 40 S. W. 431, reversed. Houston, etc., R. Co. *v.* Campbell, 91 Tex. 551, 45 S. W. 2, 43 L. R. A. 225.

Rev. St. 1895, art. 4498, which requires applicants to state where the cars are desired, which must be at "some station or switch," does not make every switch a receiving and discharging station, and a switch at which the company has no agent is not within the statute; and this, although art. 4522 enacts that, where a railroad company constructs a switch, it is bound to furnish cars for transportation of freight therefrom. Judgment (Tex. Civ. App.), 40 S. W. 431, reversed. Houston, etc., R. Co. *v.* Campbell, 91 Tex. 551, 45 S. W. 2, 43 L. R. A. 225.

Furnishing cars for shipment of grain.—Under the Minnesota statute, Gen. St. 1878, c. 124, if a railroad company itself furnishes at one of its stations suitable warehouse facilities for receiving, handling, storing, and delivering grain, on the terms fixed by statute, it may designate such warehouse or elevator as the exclusive place at which it will receive grain for shipment at that station, and may refuse to receive it and furnish cars for its shipment at any other place; but if it fails to furnish such facilities on the terms fixed it is required to furnish cars, upon reasonable notice, in which to ship grain out of any warehouse adjacent to its tracks at such station. Rhodes *v.* Northern Pac. R. Co., 34 Minn. 87, 24 N. W. 347.

S., by agreement with a railroad company, kept and maintained an adequate elevator for the reception and delivery of wheat for shipment by the railroad, but he managed it in his own name, as his own business, and not as agent for the railroad company; and he received wheat only on conditions not authorized by Gen. St. 1878, c. 124, § 7, fixing the charges, etc., of such elevators. The railroad company refused to furnish cars at any other elevator. Held, that the railroad company had not furnished suitable facilities for receiving, storing, and handling grain, or at the rates and on the terms fixed by law, and it was therefore required to furnish cars, upon reasonable notice, and when able to do so, for shipment of grain out of other warehouses adjacent to its tracks at that station. Rhodes *v.* Northern Pac. R. Co., 34 Minn. 87, 24 N. W. 347.

44. **Existence of conditions for which carrier is not responsible.**—Southern R. Co. *v.* Atlanta Sand, etc., Co., 135 Ga. 35, 68 S. E. 807.

45. **Insufficiency of cars.**—Southern R. Co. *v.* Atlanta Sand, etc., Co., 135 Ga. 35, 68 S. E. 807.

effort, to furnish cars on demand, it will be a good defense to a suit for the penalty prescribed for failure to furnish cars after written application therefor.[46] The fact that a buyer notified a railroad company not to carry any more of the seller's property consigned to the buyer does not absolve the company from its duty to the seller to furnish him with cars for transportation of the property sold.[47] Where the rules of an association of railroads governing the return of cars prove ineffectual to secure the return of a carrier's cars after passing into the possession of other carriers, such rules are not a good defense in a suit brought under the Arkansas statute, by the Attorney General, under direction of the Railroad Commission, against a carrier for failure to furnish a shipper with cars.[48]

§§ 235-247. Failure to Pay or Adjust Claims—§ 235. Power to Impose Penalty.—A statute, penalizing carriers for failing to settle a claim promptly which a judgment finds to be just, is constitutional.[49] A statute, providing for a recovery of 50 per cent interest and reasonable attorney's fees from carriers for failure to pay claims for freight lost or damaged within a prescribed number of days after the claim is filed, is a valid exercise of the state's police power.[50] The penalty imposed is not so exorbitant and unreasonable as to render the statute unconstitutional.[51]

§ 236. Existence of Statutory Conditions Essential to Imposition of Penalty.—The statutory penalty required of a carrier for its failure to adjust a claim within the statutory period after it was filed, being a creature of the statute, can be imposed only when all statutory conditions exist, and not otherwise.[52]

46. Strike.—Southern R. Co. *v.* Atlanta Sand, etc., Co., 135 Ga. 35, 68 S. E. 807.

47. Carrier notified by buyer not to carry seller's property consigned to buyer.—Judgment (Tex. Civ. App.), 40 S. W. 431, reversed. Houston, etc., R. Co. *v.* Campbell, 91 Tex. 551, 45 S. W. 2, 43 L. R. A. 225.

48. Rules of association of railroads governing return of cars.—St. Louis, etc., R. Co. *v.* State, 85 Ark. 311, 107 S. W. 1180, construing Kirby's Dig., § 6813.

49. Statute imposing penalty held constitutional.—The Mississippi statute, Laws 1908, c. 196, held constitutional. Yazoo, etc., R. Co. *v.* Jackson Vinegar Co., 226 U. S. 217, 33 S. Ct. 40.

A carrier penalized under this statute, for failure to settle a claim promptly which a judgment finds to be just, can not urge that the statute is unconstitutional as penalizing the failure to accede to an extravagant claim. Yazoo, etc., R. Co. *v.* Jackson Vinegar Co., 226 U. S. 217, 33 S. Ct. 40.

The Georgia statute, Civ. Code, 1910, § 2778, imposing a penalty on carriers for failure to adjust and pay claims, is constitutional. Southern R. Co. *v.* Lowe, 139 Ga. 362, 77 S. E. 44.

The South Carolina statute, Act 1903 (24 St. at Large, p. 81), providing a penalty to be paid the consignee by a carrier for failure to adjust and pay within a certain time a claim for loss of freight while in its possession, is constitutional. Coffey *v.* Atlantic, etc., R. Co., 79 S. C. 150, 60 S. E. 447.

50. Statute imposing penalty a valid exercise of police power.—Atlantic, etc., R. Co. *v.* Coachman, 59 Fla. 130, 52 So. 377, construing Laws 1907, c. 5618.

51. Penalty not exorbitant and unreasonable.—Atlantic, etc., R. Co. *v.* Coachman, 59 Fla. 130, 52 So. 377.

52. Existence of statutory conditions essential to imposition of penalty.—King *v.* Atlantic, etc., Railroad, 86 S. C. 510, 68 S. E. 769.

A South Carolina statute provides a penalty for delay in payment of a claim for damages to goods in transit, where the shipper recovers the full amount claimed, and declares that no such claim shall be filed until after the arrival of the shipment or some part thereof or until after the lapse of a reasonable time for arrival. Plaintiff filed a claim for $85 for damages to goods, and, on defendant's failure to pay, brought action for $500 damages for the delay in arrival, $200 damages to the goods, and $40 statutory penalties for the delay, and recovered a verdict for $90. Held, in an action for the penalty for failure to pay the claim for damages within thirty days after it was filed, that, as the verdict was general, the court could not say but that all of it was for the delay or for the statutory penalty for delay, or at least enough of it to reduce it below the amount of the claim

§ 237. Who May Recover Penalty.—The purchaser of goods shipped to the consignor's own order, with sight draft against the bill of lading, which provides that the purchaser shall be notified of their arrival, is the "consignee aggrieved," within a statute giving such person a right to recover a penalty for failure to adjust, within the statutory period, a claim for non-delivery of goods.[53]

§ 238. Where and When Cause of Action Arises.—A cause of action against a railroad company for the statutory penalty for failing to adjust a claim for lost goods within the statutory limit arises at the point of destination, when the road fails to adjust the claim.[54]

§ 239. Necessity of Filing Claim, and with Whom It May Be Filed.—Under a statute providing a penalty for failure of a carrier to adjust a claim for loss of or damage to goods within a stated time, and requiring the filing of the claim with the agent at the point of destination, such filing is a condition precedent to a recovery of the penalty, unless there is a waiver of strict compliance with the statute.[55] The claim in such case may be filed with the nearest agent who keeps the station open during reasonable business hours, and the claimant is not bound to file the claim with a nearer agent who leaves his station closed most of the time.[56] But filing a claim with an officer of the carrier other than the agent at the point of destination and forwarding the same by such officer in the discharge of his duties to the agent at the point of destination is not a filing with the agent at the point of destination.[57] Under a statute, making each carrier of goods recognizing and acting under a contract of through shipment the agent of the other connecting carriers, notice of a claim for loss of goods, served on the agent of the terminal carrier, is notice to the initial carrier, issuing its through bill of lading.[58]

filed, and also that, as there was no evidence that the shipment or some part of it had arrived when the claim was filed or that a reasonable time for arrival had elapsed, plaintiff could not recover. Price *v.* Charleston, etc., Co. (S. C.), 77 S. E. 703.

53. "Consignee aggrieved."—Brown *v.* Atlantic, etc., R. Co., 91 S. C. 377, 74 S. E. 754.

54. Where and when cause of action arises.—Smith & Co. *v.* Southern R. Co., 84 S. C. 167, 65 S. E. 1029.

55. Statutory requirement as to filing condition precedent to recovery of penalty unless waived.—King *v.* Atlantic, etc., Railroad, 86 S. C. 510, 68 S. E. 769.

Waiver of right to have claim filed.—Under the South Carolina statute, 24 Stat. at Large, p. 81, prescribing a penalty for failure of a common carrier to pay a claim for damages for loss of freight within ninety days after the filing of the claim, where defendant railroad company not only waived the right to have a claim filed, but promised to pay it, it could not thereafter contend that the claim was not filed. Goldstein *v.* Southern Railway, 80 S. C. 522, 61 S. E. 1007.

Facts held not to constitute a waiver.—In an action for goods lost by a carrier, and the statutory penalty for failure to adjust the claim within the time allowed after a claim is filed with the agent at the destination of the goods, it appeared that plaintiff had had a conversation with the carrier's local agent at the destination of the goods, who told him to send his claim to the general freight agent, which he did. In the correspondence with such agent there was no mention of the statutory penalty; and at that time defendant was not liable for it. Defendant had no right to compel plaintiff to file his claim with the local agent. Held, that the direction by such agent to send the claim to the general agent was not a waiver of the statutory requirement that the claim must be "filed" with the agent at the destination of the goods before the penalty sued for can be recovered, because waiver is the voluntary relinquishment of some existing right. King *v.* Atlantic, etc., Railroad, 86 S. C. 510, 68 S. E. 769.

56. Claim may be filed with nearest agent who keeps station open during reasonable business hours.—Sumter Pine, etc., Co. *v.* Atlantic, etc., R. Co., 90 S. C. 376, 73 S. E. 770.

57. Filing claim with officer other than agent at the point of destination.—Brown *v.* Southern Railway, 71 S. C. 273, 51 S. E. 151.

58. Notice of claim where there is a through shipment over roads of connecting carriers.—Smith & Co. *v.* Southern R. Co., 84 S. C. 167, 65 S. E. 1029, construing Act May 13, 1903 (24 St. at Large, p. 1).

Evidence that claim was filed with de-

§ 240. Sufficiency of Claim.—Under a statute providing that claims against carriers shall be "filed" with the agent at the point of destination, a verbal complaint to such agent about the loss of goods is insufficient, in order to obtain the statutory penalty for the carrier's failure to adjust the claim within the statutory period after it is filed.[59] The term "filing a claim" necessarily implies the placing of some written or printed paper showing the nature and amount of the claim and the person to whom due with the proper custodian.[60] But any form of statement which shows the nature of the claim, the amount of the loss, and in whose behalf presented, is sufficient, without proof that the claim is valid.[61]

fendant at point of destination.—Evidence that G., the agent of the terminal carrier, received plaintiff's claim for lost goods and forwarded it, under the instructions of defendant initial carrier's agent, to defendant's general claim agent, and that the latter not only received and considered the claim, but returned it to G., and received it from him again with further information, was evidence that the claim was filed with defendant at the point of destination, in an action to recover the statutory penalty for failing to adjust the claim. Smith & Co. *v.* Southern R. Co., 84 S. C. 167, 65 S. E. 1029.

59. Verbal claim insufficient.—King *v.* Atlantic, etc., Railroad, 86 S. C. 510, 68 S. E. 769.

60. What term "filing a claim" implies.—King *v.* Atlantic, etc., Railroad, 86 S. C. 510, 68 S. E. 769.

The North Carolina statute, Revisal 1905, § 2634, providing that every claim for loss or damage to property while in possession of a carrier shall be adjusted and paid within sixty days after the filing of such claim with the agent of the carrier at the point of destination, and that failure to adjust and pay the claim within the period prescribed shall subject the carrier to a penalty of $50, etc., is a penal statute, and the claimant must present his demand in writing in order to recover the penalty, a verbal demand being insufficient, the words "to file" meaning "receiving a paper into custody." Thompson *v.* Southern Exp. Co. (N. C.), 61 S. E. 182.

61. What form of statement is sufficient.—Hawes *v.* Southern R. Co., 73 S. C. 274, 53 S. E. 285, so held where the action was brought under 24 St. at Large, p. 81.

Claims filed held sufficient.—Under the North Carolina statute, Revisal 1905, § 2634, which provides a penalty for the failure to adjust claims for loss or damage to property while in possession of a carrier within a specified time after presentation of a demand in writing, a written statement setting forth the purchase of the article claimed to have been lost, with the price, quantity, name of vendor and shipping point, is, when handed to the company's agent within the time specified by the statute, with a statement that it was for the goods lost, sufficiently definite to enable the company to investigate the claim, and will satisfy the requirements of the statute. Currie *v.* Seaboard, etc., R. Co., 156 N. C. 432, 72 S. E. 493.

The South Carolina statute, 24 Stat. at Large, p. 81, provides that every claim for loss of or damage to freight shall be adjusted and paid within ninety days, in case of shipments from without the state, after the filing of such claim, and prescribes a penalty for failure to comply therewith. Held, that where plaintiff filed with defendant's railroad agent the bill of lading, invoice of goods, and a list of the shortage as a claim, there was a sufficient filing, no form for setting out the claim being prescribed by the statute. Goldstein *v.* Southern Railway, 80 S. C. 522, 61 S. E. 1007.

It is not essential under such statute, if the claim filed is otherwise sufficient, that the claimant should attach thereto the freight bill or receipt and bill of lading. Hawes *v.* Southern R. Co., 73 S. C. 274, 53 S. E. 285.

Where plaintiff called defendant railroad agent's attention to the damaged condition of five sacks of rice shipped plaintiff, and stated that he would sell the rice for what he could get, and claim the difference, and the agent had knowledge that the amount mentioned in the claim filed by plaintiff was for damages to all the sacks, the fact that only three sacks were stated in the claim filed could not defeat a recovery for the statutory penalty for failing to adjust the claim within the time required by law. Bolen *v.* Seaboard, etc., Railway, 81 S. C. 78, 61 S. E. 1024.

The North Carolina statute, Revisal 1905, §§ 2642, 2643, 2644, regulating railroad rates, provides that, in case of an overcharge, the person aggrieved may file a written demand for a return of the amount, supported by the freight bill and original bill of lading, and prescribes a penalty for noncompliance. Plaintiff made two shipments, on which distinct overcharges were made and collected, and filed this claim: "Inclosed please find claim. Overcharge in freight to Lexington, N. C., $7.96: overcharge in freight to Salisbury, N. C., $139—total $9.35. Please let us have prompt adjustment." Held, that the claim filed, accompanied in each case with the freight bill and bill

§ 241. Place of Payment of Claim.—A statute, requiring claims for damages to freight to be presented to the agent at destination, does not provide for the place of payment. The carrier as the debtor must find the claimant and tender payment to him within the statutory period in order to avoid the penalty for nonpayment, but may require the claimant to state where he desires payment to be made, when payment at that place within the required time will prevent the penalty from attaching.[62]

§ 242. Who Is Liable for Penalty.—The delivering carrier is not liable for the penalty prescribed for failure to adjust or settle a claim arising out of the loss of freight which has never been delivered to it;[63] and this is so though the bill of lading introduced as a contract of shipment does not provide that the responsibility of any carrier shall cease on delivery to the connecting line in good order:[64] and in such cases, the fact that the price of the goods lost was tendered by the delivering carrier with intent to collect from the connecting carrier does not render it liable for the penalty for failure to settle the claim.[65] Where a bill of lading limits the carrier's liability to loss sustained on its own line, a connecting carrier on whose line a loss did not occur can not be charged with the penalty imposed for refusal to pay the loss.[66] Where a statute subjects a receiver of a railroad to the duties, liabilities, and restrictions arising from the operation of the road which are attached to the corporation, receivers of a railroad appointed by a federal court are subject to the penalty prescribed for failing to adjust and pay a claim for loss of, or damage to, freight.[67]

§ 243. Immaterial in What Manner Loss Was Caused.—Under a statute, providing that every common carrier failing to adjust any claim for loss of or damage to interstate freight within ninety days shall pay a penalty in addition to actual damage, it is immaterial in what manner the loss was caused; the purpose of the statute being to give the consignee a special remedy for the carrier's failure to deliver.[68]

§ 244. Amount of Penalty.—A penalty not exceeding $100 prescribed by statute, for a railroad company's failure to refund on proper demand an overcharge in freight, is not objectionable as disproportionate to a claim of $1.39, since it is not imposed to facilitate the collection of claims, but to enforce the performance of a carrier's duties.[69]

of lading, amounted to a separate written demand for each overcharge within the statute, even though the two overcharges were set out in one instrument, and demand was made for the total sum. Efland *v.* Southern R. Co., 146 N. C. 129, 59 S. E. 359.

62. **Place of payment of claim.**—Berley *v.* Columbia, etc., R. Co., 82 S. C. 232, 64 S. E. 397, construing St. 1903, 24 St. at Large, p. 81.

63. **Delivering carrier not liable where freight was not delivered to it.**—Stothard *v.* Louisiana R., etc., Co., 127 La. 383, 53 So. 658, construing Act No. 29 of 1908; McMeekin *v.* Southern Railway, 85 S. C. 381, 67 S. E. 745, construing Civ. Code 1902, § 1710.

64. McMeekin *v.* Southern Railway, 85 S. C. 381, 67 S. E. 745.

65. Stothard *v.* Louisiana R., etc., Co., 127 La. 383, 53 So. 658.

66. **Effect of bill of lading limiting carrier's liability.**—Moody *v.* Southern R. Co., 79 S. C. 297, 60 S. E. 711.

Where the court found that certain goods were never delivered to defendant, the terminal connecting carrier, and the bill of lading stipulated that no carrier shall be liable for loss not occurring on his line, defendant was not liable for a penalty under the South Carolina statute, Act Feb. 23, 1903 (24 St. at Large, 81), imposing a penalty for failure to adjust or pay for loss or damage to property while in possession of a carrier. McMeekin *v.* Southern Railway, 85 S. C. 381, 67 S. E. 745.

67. **Receivers liable for penalty.**—Huguelet *v.* Warfield, 84 S. C. 87, 65 S. E. 985, construing Act Feb. 23, 1903, 24 St. at Large, p. 81 and Civ. Code 1902, § 2025.

68. **Immaterial in what manner loss was caused.**—Wilson *v.* Atlantic, etc., R. Co., 79 S. C. 198, 60 S. E. 663, construing Act 1903 (24 St. at Large, p. 81).

69. **Penalty held not disproportionate to claim.**—Efland *v.* Southern R. Co., 146

§ 245. What One Claiming Penalty Must Show.—Under a statute authorizing the recovery of a penalty for a carrier's failure to pay for loss of freight, one seeking to recover the penalty must show that the loss occurred while the freight was in possession of the carrier, and that he is entitled to the full amount of his claim.[70]

§§ 246-247. Defenses—§ 246. Amount Recoverable by Claimant as Affecting Right to Penalty.—Under a statute imposing a penalty upon carriers for failure to pay a claim for loss of, or damage to, freight within a prescribed period, the claimant need not recover the full amount demanded by him in order to authorize the imposition of the penalty, if the statute contains no such limitation upon his right to recover it.[71] But the rule is otherwise where the statute expressly makes the right to recover the penalty depend upon the recovery by the claimant of the full amount claimed.[72]

§ 247. Effect of Voluntary Payment of Claim after Time Limited.—In North Carolina it has been held that under a statute imposing a penalty upon a carrier for failing to adjust a claim for loss of freight within a prescribed time, and providing that, unless the claimant recover the full amount claimed, no penalty shall be allowed, the penalty is recoverable though the carrier voluntarily pays the claim after the time limited.[73] But in South Carolina, in construing a

N. C. 129, 59 S. E. 359, so holding as to penalty prescribed by Revisal 1905, § 2644.

70. What one claiming penalty must show.—Smith *v.* Southern Railway, 89 S. C. 415, 71 S. E. 989.

71. Penalty recoverable though full amount demanded is not recovered.—Mobile, etc., R. Co. *v.* Brandon, 98 Miss. 461, 53 So. 957, construing Laws 1908, c. 196, § 1, amending Code 1906, § 4070.

72. Statute expressly making recovery of penalty dependent on recovery of full amount claimed.—Under the express provisions of the South Carolina statute, Act Feb. 23, 1903 (24 St. at Large, p. 81), no recovery of the penalty can be had unless there is a recovery of the full amount claimed. Bullock *v.* Charleston, etc., R. Co., 82 S. C. 375, 64 S. E. 234; Cousar Mercantile Co. *v.* Southern R. Co., 82 S. C. 307, 64 S. E. 391; Rippy & Co. *v.* Southern Railway, 80 S. C. 524, 61 S. E. 976; Price *v.* Charleston, etc., R. Co. (S. C.), 77 S. E. 703; Ray *v.* Southern R. Co. (S. C.), 77 S. E. 1012.

But where plaintiff in an action under this statute for loss and damage against a carrier filed a claim for $16.88 and proved a liability, exclusive of interest of $16.87½, it was held entitled to recover the penalty, since the addition of interest raised the recovery above the amount of the claim. White Laundry Co. *v.* Charleston, etc., R. Co., 83 S. C. 209, 65 S. E. 239. See, also, Weinberg *v.* Atlantic, etc., R. Co., 83 S. C. 470, 65 S. E. 637.

It was also entitled to recover the penalty in such case, under the maxim, "De minimis non curat lex." White Laundry Co. *v.* Charleston, etc., R. Co., 83 S. C. 209, 65 S. E. 239. See, also, Weinberg *v.* Atlantic, etc., R. Co., 83 S. C. 470, 65 S. E. 637.

Under the above statute, where the claim was for $15 damage in the aggregate for damage to several articles, the fact that the damage proved exceeded that sum was not a bar to the recovery of the penalty. Netherland *v.* Charleston, etc., R. Co., 79 S. C. 368, 60 S. E. 927.

And under such statute, the consignee may sue for the penalty, if the time has elapsed without adjustment of the claim, at the same time he sues for loss or damage to the property, though judgment for the penalty can not be rendered until he has recovered the full amount claimed for loss or damage. Jenkins *v.* Atlantic, etc., R. Co., 84 S. C. 343, 66 S. E. 409.

The South Carolina statute, 24 St. at Large, p. 1, providing for a penalty against a carrier for damage to freight, on refusal to pay the claim therefor and recovery of the amount claimed, does not require the claimant to demand interest; and where he sues for the actual amount of damage, without interest, and recovers the amount claimed, he is entitled to the penalty. Abrahams *v.* Columbia, etc., R. Co., 73 S. C. 542, 53 S. E. 819.

73. Effect of voluntary payment of claim after time limited—North Carolina doctrine.—Albritton & Co. *v.* Atlantic, etc., R. Co., 148 N. C. 485, 62 S. E. 597, construing Revisal 1905, § 2634.

The purpose of such statute, being to prevent unjust claims for losses, the fact that defendant voluntarily paid the claim

similar statute, it has been held that the acceptance by the claimant of such a voluntary payment will preclude recovery of the penalty.[74]

§ 248. Failure to Make Annual Reports.—In Texas a railroad company is liable to a penalty for failure to make an annual report to the comptroller of public accounts,[75] and it is no defense to an action by the state to recover such penalty that the failure to make the report has resulted in no special damage to the state.[76]

§§ 249-275. Procedure and Evidence—§ 249. Venue.—The venue of an action against a railroad company to recover a penalty imposed for violation of a statutory regulation is generally determined by the statute imposing the penalty. The peculiar provisions of some of these statutes have been construed by the courts to determine the venue of the action authorized by them.[77]

§ 250. Time within Which Action Must Be Brought.—An action against a carrier to recover the penalty imposed for violation of a statutory regulation must be brought within the time limited by statute.[78] The statutory cause of action against a carrier for failure to furnish cars for the shipment of freight does not arise on the written shipping contract, and therefore, provisions in such contract that an action thereon must be brought within a prescribed number of days, has no application to a cause of action for failure to furnish cars called for by the contract.[79]

§ 251. Parties—By Whom Action May Be Brought.—See ante, "Who May Recover Penalty," § 186; "Who May Recover Penalty," § 206; "Who May Recover Penalty," § 213; "Who May Recover Penalty," § 237.

§§ 252-263. Pleading—§§ 252-259. Declaration, Petition, or Complaint—§ 252. In General.—In an action against a carrier to recover the penalty imposed for violation of a statutory regulation, the declaration, petition, or complaint must state a cause of action under the statute,[80] but it need not negative

for loss upon judgment for plaintiff, and while an appeal therefrom was pending, did not prevent a recovery of the penalty. Rabon *v.* Atlantic, etc., R. Co., 149 N. C. 59, 62 S. E. 743.

74. **South Carolina doctrine.**—Best *v.* Seaboard, etc., Railway, 72 S. C. 479, 52 S. E. 223, construing Act Feb. 23, 1903 (24 St. at Large, p. 81).

75. **Failure to make annual report.**—Rev. St., arts. 4249, 4250.

76. H. & T. C. R. Co. *v.* State, 61 Tex. 342, 344.

77. **Venue.**—Under the Kansas statute, Code Civ. Proc. § 50 (Gen. St. 1901, § 4480), as amended by Laws 1903, c. 379, § 1, an action may be brought against a railroad company to enforce a liability under the Mutual Demurrage Act (Laws 1905, c. 345), in any county of the state in which the principal office or place of business of such railroad company is located. Star Grain, etc., Co. *v.* Atchison, etc., R. Co., 85 Kan. 281, 116 Pac. 906.

An action against a railroad company to recover the penalty prescribed by the Ohio statute, Rev. St., § 3376, for demanding and receiving, on sale of a ticket, a greater sum for the transportation of the passenger than that allowed by law, should, under Rev. St., § 5022, be brought in the county where the purchase of the ticket was had. Pennsylvania Co. *v.* O'Connell, 84 O. St. 218, 95 N. E. 773.

78. **Time within which action must be brought.**—The right of action given by the Iowa statute, Code, § 2130, to any one against whom a common carrier has discriminated in its rates is barred within two years, unless the discrimination is fraudulently concealed. Central Trust Co. *v.* Chicago, etc., R. Co. (Iowa), 135 N. W. 721.

79. McCarty *v.* Gulf, etc., R. Co., 79 Tex. 33, 15 S. W. 164.

80. **Pleading held to state a cause of action.**—A declaration, in an action by the state against the receivers of a railroad company to recover a penalty imposed by the railroad commissioners for violation of the Florida statute, Gen. St. 1906, § 2907, providing that all contracts and agreements between railroad companies as to use and transportation of cars shall be submitted to the railroad commissioners for inspection and correction, in order to insure that such contracts are reasonable and just, and to insure prompt delivery of freight and passengers to points of destination, held to state a cause of action. State *v.* Warfield (Fla.), 58 So. 367.

Under the Iowa statute, Acts 1890, c.

matters of defense.[81] Where an allegation in the petition in such an action is

17, § 1, which is constitutional, railroad companies who voluntarily establish joint rates are prohibited from making any unjust discrimination in such rates between the different stations on their respective lines, while § 5 prohibits any unjust and unreasonable charge. A petition to recover the penalty provided in such act, which alleges that defendant railroad companies established joint rates between all stations on their respective lines in the state, that they unjustly discriminated between the different points on their lines, to plaintiff's damage, and that the rates charged plaintiff were unjust and unreasonable, states a cause of action; and that it contains further allegations showing the different rates charged between different points does not make the action one based solely on the fact of such differences as establishing the unjust or discriminatory character of the rates charged. Blair *v.* Sioux, etc., R. Co., 109 Iowa 369, 80 N. W. 673.

Where a petition alleges that "joint rates were established by two railroad companies for all stations on either line, the rates charged for the same class of goods over like distances of road may be considered, not only in arriving at the solution of the question of unjust discrimination, but also in determining whether a rate charged was unreasonable; and an allegation that a lower rate was charged for transporting like goods over the same distance of road than was charged plaintiff makes a prima facie case of unjust discrimination. Blair *v.* Sioux, etc., R. Co., 109 Iowa 369, 80 N. W. 673.

A petition against a carrier alleged that defendant was a corporation operating a railroad between certain intrastate points as a public carrier, and that the portion of its road extending between two points was a main line one hundred and twenty-five miles long, and the other line between two other points was a branch line one hundred and four miles long; that on September 8, 1905, plaintiff delivered to defendant a car load of live stock to be transported between the most distant points named within the time provided by statute in consideration of the regular freight rate; that defendant's train left the starting point at 9 o'clock a. m. on the day of delivery, but did not arrive at destination until 4:55 a. m. of September 11th following, the time consumed being fifty-two hours and eighteen minutes longer than that permitted by statute, to plaintiff's damage in the sum of $520, as provided by the Nebraska statute, Cobbey's Ann. St. 1907, §§ 10,606, 10,607. Held, that such petition stated a cause of action. Rehearing, 84 Neb. 607, 122 N. W. 31, denied. Cram *v.* Chicago, etc., R. Co., 85 Neb. 586, 123 N. W. 1045, 26 L. R. A., N. S., 1028.

"In an action for the statutory penalty for delay in the transportation of goods, plaintiff alleged that he had consigned to him from a specified city in the state certain goods designated on the bill of lading, and that notice was given the carrier that prompt shipment was desired to his place of business in H., within the state, that about three weeks elapsed after shipment before the goods were located by plaintiff, when it was discovered that they had been negligently taken by the defendant to H., S. C., another station on defendant's line, and in violation of the provisions of an act of the Legislature of 1904 (24 St. at Large, at page 671), and allowed the goods to remain at the said station for the time and period aforesaid, wherefore plaintiff demands judgment against defendant company for the sum of $90 penalty as provided for in the act of the Legislature of South Carolina of 1904, at page 671, and for the costs of this action." Code Civ. Proc. 1902, § 88, provides that pleadings in a magistrate court need not be in any particular form, but must enable one of common understanding to know what is intended. Held, that the complaint sufficiently shows that plaintiff is suing for the per diem penalty for delay in the transportation of freight as provided in 24 St. at Large, p. 671. Farrell *v.* Atlantic, etc., R. Co., 82 S. C. 410, 64 S. E. 226.

In an action under the Texas statute, to recover the penalty prescribed for an unlawful discrimination in freight charges, the petition alleged that the defendant company had charged plaintiff twelve and one half cents per one hundred pounds freight for a carload of lumber from Houston to Wharton, Texas, while it charged one McCoy but eight cents per one hundred pounds for a carload of lumber at or about the same date. Held, sufficient. New York, etc., R. Co. *v.* Gallaher, 79 Tex. 685, 15 S. W. 694.

A declaration in an action against a carrier for charging an illegal freight rate, which alleges the weight of the freight, the time and place of delivery to the carrier for transportation, the place to which the same was to be transported, the distance, and the amount demanded and received by the carrier for freight charges, and that such amount was more than the lawful rate, contrary to the statute, states an action based on the Virginia statute, Code 1860, c. 61, §§ 1, 18, relating to railroads and imposing a penalty on a railroad charging more than the lawful rate. Hart *v.* Baltimore, etc., R. Co., 6 W. Va. 336.

81. Matters of defense need not be negatived.—The Nebraska statute, Cob-

not an allegation of fact, but a conclusion of law, it should be stricken out.[82] In an action against an express company to recover a penalty imposed for unjust discrimination against another company engaged in the same business, an allegation of a particular usage and custom, in reference to the handling of express, between defendant and other express companies, with which it refused to comply when tendered a package by the company claimed to have been discriminated against, is sufficient to show that the facilities denied to such company were those which were extended to the other companies.[83]

§§ 253-258. Necessary Allegations—§§ 253-254. In Actions for Penalty for Overcharge—§ 253. Overcharge in Passenger Rates.—A petition in an action against a railroad company to recover the penalty prescribed for demanding excessive fare, will not be held bad for failing to aver that the purchaser of the ticket was in fact transported, and that the fare was paid in due course of business, though judgment was not rendered until after the enactment of a statute taking away a right of action save in such cases.[84] In such an action it is not necessary that the complaint should set out the various enactments consolidating the several companies which make up the defendant company so as to show that the latter company is restricted to a fare of two cents per mile for each passenger; but it is enough to allege that the defendant had been duly organized, that it was entitled to demand and receive of passengers a certain rate of fare, and that it had demanded and received a higher rate.[85]

§ 254. Overcharge in Freight Rates.—In an action to recover the penalty imposed for charging freight rates in excess of the maximum rates prescribed by law, the petition must allege that the rates charged were in excess of the maximum rates fixed by statute or commission order.[86] In an action to recover the penalty

bey's Ann. St. 1907, § 10,606, provides for a specified speed in the transportation of live stock, provided that on branch lines not exceeding one hundred and twenty-five miles in length stock offered in consignments of less than six cars need only be shipped on three designated shipping days a week, and that the carrier need only conform to the schedule on the day so designated. Held, that the exceptions contained in such proviso were matters of defense which need not be negatived in a petition by the shipper. Cram *v.* Chicago, etc., R. Co., 85 Neb. 586, 123 N. W. 1045, 26 L. R. A., N. S., 1028.

The declaration in an action against a railroad company to recover penalties for over charges is sufficient if it conforms to the act under which it was drawn, though it fails to aver that defendant is not within the exceptions contained in the Virginia statute, Code 1873, c. 61, §§ 1, 58. Norfolk, etc., R. Co. *v.* Pendleton, 86 Va. 1004, 11 S. E. 1062, affirmed 156 U. S. 667, 39 L. Ed. 574, 15 S. Ct. 413.

82. An allegation which is a conclusion of law should be stricken out.—An allegation in the petition, in an action against railroad companies for unlawful discrimination between shippers, "that defendants, being railroad corporations, were at the date hereinafter set out, and are now, under the constitution and laws of the state of Texas, prohibited from willfully and unjustly discriminating in their rates and charges for the transportation of any freight, against any person or place, and any such discrimination is unlawful, and subjects any railroad corporation so doing to a penalty of $500," is not an allegation of fact, but of a conclusion of law, and should have been stricken out as such, but the refusal to do so was harmless error. New York, etc., R. Co. *v.* Gallaher, 79 Tex. 685, 15 S. W. 694.

83. Allegation sufficient to show discrimination by one express company against another.—Adams Exp. Co. *v.* State, 161 Ind. 328, 67 N. E. 1033.

84. Actions for penalty for overcharge in passenger rates—What allegations essential.—Cincinnati, etc., R. Co. *v.* Cook, 37 O. St. 265.

85. Nellis *v.* New York Cent. R. Co., 30 N. Y. 505.

86. Petition held not to state a cause of action.—The Missouri statute, Rev. St. 1889, § 2639, provides that railroad corporations shall print schedules showing the rates of freight established by them, not to exceed the maximum rates established by law; that copies shall be posted in every depot, and filed with the railroad commissioners; and that from the date of such filing the rates scheduled shall not be in excess of statutory maximum rates thereafter in force, and shall be deemed the established rates until changed as provided by this act. Section 2631 provides that all railroads of

imposed for noncompliance with an order of the railroad commission fixing freight rates, if the defendant was entitled to notice of the petition to the commission asking for the revision and fixing of rates, and an opportunity of being heard before the commission, the declaration must allege that it had such notice and opportunity.[87] In an action against a railroad company for charging an illegal freight rate, it is not necessary to allege in the declaration that the rates prescribed by the statute, fixing the rates of toll on railroads, applies to the defendant, or that different rates have not been prescribed by law.[88] In an action against a railroad company to recover the penalty prescribed for collecting greater freight charges than those stipulated in the bill of lading, if the bill of lading provides, "weight and classification subject to correction," plaintiff must allege that the freight charges specified therein were based on the actual weight of the freight.[89]

§ 255. In Actions for Penalty for Unjust Discrimination between Shippers.—Where a statute provides that no liability shall attach for the making of any charge which is authorized by the tariff of charges approved by the railroad commission and also prohibits unjust discrimination between shippers, there may be unjust discrimination between shippers, though the charges are not in excess of the rate approved by the commission; and hence in a petition to recover the penalty prescribed for unjust discrimination, it is not necessary to allege that the rate charged was higher than the maximum rate allowed by the commission.[90]

§ 256. In Actions for Penalty for Refusal to Receive or Transport Freight.—In an action against a carrier to recover the statutory penalty for refusal to receive merchandise for transportation, the complaint must contain a sufficient allegation of a tender of the merchandise.[91] In an action by railroad commissioners against a railroad company to recover a penalty for a violation of

the state shall be common carriers, and prohibits unreasonable charges. Section 2643 provides that on violation of these sections the person injured may recover three times the amount of damages sustained. Held, in an action to recover penalties for charging plaintiff unreasonable rates on coal shipped by him over defendant railroad company's line, that a petition which failed to allege that the rates charged were in excess of the rates fixed by defendant and filed with the railroad commissioners and posted in defendant's depots, and which also failed to state that the charges were in excess of the maximum rates fixed by the railroad commissioners or by the statute, stated no cause of action. McGrew *v.* Missouri Pac. R. Co., 114 Mo. 210, 21 S. W. 463.

87. **Declaration held insufficient on demurrer.**—In the record of hearings before the board of railroad commissioners on a petition asking for the revision and fixing of tariff rates for the forwarding of milk over a railroad, there was nothing to indicate that the railroad had notice of the petition, or an opportunity of being heard before the board. In an action against the railroad to recover a penalty, under the Massachusetts statute, Pub. St., c. 112, § 194, for noncompliance with the order of the board, there was no allegation in the declaration to show that the defendant had such notice or opportunity to be heard. Held, on demurrer, that, while from what occurred at the argument the court might suppose that the defendant was before the commissioners, yet it could not go outside of the record before it, and that the order was invalid for want of a notice to the defendant. Littlefield *v.* Fitchburg R. Co., 158 Mass. 1, 32 N. E. 859.

88. **Allegations held to be unnecessary.**—Hart *v.* Baltimore, etc., R. Co., 6 W. Va. 336.

89. **Necessary to allege that charges were based on actual weight of freight.**—Gulf, etc., R. Co. *v.* Loonie, 84 Tex. 259, 19 S. W. 385, following Sabine, etc., R. Co. *v.* Cruse, 83 Tex. 460, 18 S. W. 755.

90. **Unnecessary to allege that rate charged was higher than maximum allowed.**—Roberts *v.* St. Louis, etc., R. Co., 95 Ark. 249, 130 S. W. 531, construing act of 1887 (Kirby's Dig., §§ 6722, 6725), read in pari materia with the act of March 11, 1899 (Acts 1899, p. 82).

91. **Allegation of tender held sufficient.**—In an action under the North Carolina statute, a complaint alleging a tender at defendant's regular depot at a specified place on May 2, 1903, and that the defendant for two successive days, to wit, "on May 8 and 9, 1903, failed and refused to receive the same," was held to contain a sufficient allegation of tender. Currie *v.* Raleigh, etc., R. Co., 135 N. C. 535, 47 S. E. 654.

a rule of such commissioners in refusing to transport freight offered to defendant, where the declaration and the order of such commissioners attached thereto fails to set forth the point of destination to which defendant refused to transport the freight, or that such point of destination is within the state, a demurrer is properly sustained thereto.[92] But the failure of such order to show the point of destination is cured by a proper allegation in the declaration.[93]

§ 257. In Actions for Penalty for Delay in Transportation of Freight.—Where an action is brought for a penalty prescribed for delaying shipments by sidetracking in transit, a demurrer is properly sustained, where the declaration does not allege that the delay sued on was caused by such sidetracking.[94]

§ 258. In Actions for Penalty for Failure to Furnish Double-Decked Cars for Sheep.—A petition in an action against a railroad company to recover a penalty prescribed for failure to furnish double-decked cars for sheep, on request, need not state that the point to which plaintiff's sheep were to be shipped was a station on the defendant's road, where it alleges that "the defendant was conducting a general passenger and freight business over the line of its railroad" between the point of shipment and the point of destination.[95]

§ 259. Unnecessary Allegations May Be Rejected as Surplusage.—In an action against a carrier to recover the penalty imposed for violation of a statutory regulation, unnecessary allegations in the petition may be rejected as surplusage, and will not vitiate the pleading.[96]

§§ 260-263. Answer—Sufficiency—§ 260. In Actions for Penalty for Overcharge.—In an action against a railroad company to recover a statutory penalty for overcharging passengers, an answer attacking the statute as unconstitutional, in that by its terms the carrier would be obliged to operate its railway at a loss, is insufficient to raise the constitutional question, unless it shows that the rate fixed is unreasonable.[97] An allegation that a rate of passenger fare as fixed by statute is unreasonable, in that the cost of transporting passengers exceeds the rate, is insufficient to present the question whether the statute is constitutional, because it does not show that the statutory rate makes a profit on the carrier's aggregate business impossible.[98] An answer alleging that an overcharge was made

92. **Effect of failure to state point of destination.**—State *v.* Atlantic, etc., R. Co., 56 Fla. 601, 47 So. 387.

93. State *v.* Seaboard, etc., Railway, 56 Fla. 670, 47 So. 986.

94. **Action for penalty for delaying shipments by side tracking—Declaration insufficient.**—Keystone Lumber Yard *v.* Yazoo, etc., R. Co., 94 Miss. 192, 47 So. 803.

95. **Petition in action for penalty for failure to furnish double-decked cars.**—Emerson *v.* St. Louis, etc., R. Co., 111 Mo. 161, 19 S. W. 1113.

96. **Unnecessary allegations rejected as surplusage.**—Under the Indiana statute, Acts 1901, p. 149 (Burns' Rev. St. 1901, § 3312b, et seq.), prohibiting unjust discrimination by an express company against any other company engaged in the same business, and prescribing a penalty for its violation, recoverable by the state, the company discriminated against need not be incorporated, as Acts 1879, p. 146, relating to foreign express companies, declares all copartnerships, associations, and companies engaged in such business to be common carriers, and authorizes them to carry on trade, and to sue and be sued, by the name adopted by the copartnership; and hence an allegation, in an action for the penalty, that the company discriminated against was incorporated, when it was not, may be rejected as surplusage. Adams Exp. Co. *v.* State, 161 Ind. 328, 67 N. E. 1033.

A petition, in an action against a railroad company to recover the penalties prescribed by the Missouri statute, Rev. St., §§ 833-835, for overcharges, is not rendered invalid by stating the maximum rate to be less than that fixed by law. Reynolds *v.* Chicago, etc., R. Co., 85 Mo. 90.

97. **Answer must show that rate prescribed is unreasonable.**—Missouri Pac. R. Co. *v.* Smith, 60 Ark. 221, 29 S. W. 752.

98. **Allegation insufficient to present question whether statute is constitutional.**—Missouri Pac. R. Co. *v.* Smith, 60 Ark. 221, 29 S. W. 752.

Thus, in an action against a railroad

through mistake as to the distance between the stations on defendant's road between which plaintiff traveled is insufficient on demurrer.[99]

§ 261. In Actions for Penalty for Unlawful Discrimination in Rates.—In an action by a shipper against a railroad company to recover the penalty prescribed for unlawful discrimination in rates, an answer which sets up as a defense a contract between the defendant and the shipper in whose favor the alleged discrimination was made, is insufficient as a defense if it fails to allege that such shipper performed his obligation under the contract in consideration of which the alleged discrimination was made.[1]

§ 262. In Actions for Penalty for Delay in Transportation of Freight.—In an action against a carrier for a penalty prescribed for delay in transporting freight, an answer alleging that owing to the unusual conditions it was difficult to secure help in railroad offices, is subject to exception, in the absence of any allegation of how that fact contributed to the delay;[2] and in such an action, an answer alleging that there was great prosperity in the country at the time, and that trade conditions demanded a larger number of cars than had ever been required, is demurrable, in the absence of any allegation of how the ability of defendant to move freight was thereby affected.[3]

§ 263. In Actions for Penalty for Failure to Furnish Cars.—In an action against a carrier for the penalty prescribed for failure to furnish cars after demand, an answer failing to allege facts showing that the carrier had performed its duty of providing a sufficient number of cars to meet the ordinary needs of its business, which it could reasonably anticipate, or that the scarcity of cars and existing demands for them were the result of circumstances beyond its power reasonably to control and provide against, is demurrable.[4]

§§ 264-272. Evidence—§§ 264-267. Presumptions and Burden of Proof—§ 264. In Actions for Penalty for Overcharge.—In an action against a carrier to recover the penalty prescribed for overcharges consisting in the excess of the interstate rate over the rates prescribed by the railroad commission of the

company to recover the penalty provided for a violation of a statute limiting the passenger rate to three cents a mile, an allegation that the rate fixed is unreasonable, in that the actual cost of transporting each passenger and his baggage over defendant's road is more than three cents a mile, and that hence defendant is compelled to transport passengers at a loss, is bad on demurrer, it not showing but that the statutory rate permits of a profit on defendant's aggregate business. Missouri Pac. R. Co. *v.* Smith, 60 Ark. 221, 29 S. W. 752.

99. **Answer alleging overcharge through mistake held insufficient.**—Missouri Pac. R. Co. *v.* Smith, 60 Ark. 221, 29 S. W. 752.

1. **Answer in action for penalty for unlawful discrimination held insufficient.**—In an action by a shipper of coal to recover penal damages from a railroad company for unlawful discrimination in rates, the railroad company pleaded in defense a certain contract between itself and the coal company in whose favor discrimination was alleged, whereby, in consideration of the release by such company of a certain claim against defendant for damages, and its agreement to furnish coal to defendant for use in its locomotives at cost, or at a maximum price (which was alleged to have proved less than cost), defendant agreed to allow a rebate of forty cents per ton in case the coal company's shipments of coal exceeded 200,000 tons annually. Held that, in the absence of any allegations that the shipments of coal exceeded 200,000 tons annually, this answer constituted no defense. Union Pac. R. Co. *v.* Goodridge, 149 U. S. 680, 37 L. Ed. 986, 13 S. Ct. 970; Union Pac. R. Co. *v.* Taggart, 149 U. S. 698, 37 L. Ed. 905, 13 S. Ct. 977.

2. **Answer in action for penalty for delay in transporting freight.**—Texas Cent. R. Co. *v.* Hannay-Frerichs & Co., 104 Tex. 603, 142 S. W. 1163, so holding in an action under Rev. St. 1895, art. 4496.

3. Texas Cent. R. Co. *v.* Hannay-Frerichs & Co., 104 Tex. 603, 142 S. W. 1163, so holding in an action under Rev. St. 1895, art. 4496.

4. **Answer in action for penalty for failure to furnish cars.**—Judgment, Texas, etc., R. Co. *v.* Allen, 42 Tex. Civ. App. 331, 98 S. W. 450, reversed. Allen *v.* Texas, etc., R. Co., 100 Tex. 525, 101 S. W. 792, citing Texas, etc., R. Co. *v.* Barrow (Tex. Civ. App.), 94 S. W. 176.

state, the burden of proving that the shipment was a domestic shipment is on the plaintiff.[5] In an action against a railroad company under a statute which makes the company liable for a penalty, where it collects greater freight charges than those stipulated in the bill of lading, if the bill of lading provides "weight and classification subject to correction," the plaintiff must allege and prove that the freight charges specified therein were based on the actual weight of the freight.[6]

§ 265. In Actions for Penalty for Discrimination in Rates.—Where a common carrier of goods discriminates in its rates, it will be presumed that the person injured is the shipper who actually paid the freight.[7] A statute, prohibiting a railroad company from charging more for a short haul than for a longer haul, and making all such discriminating rates prima facie evidence of the unjust discriminations prohibited by the act, does not prohibit discriminations made in good faith because of differences in expenses of carriage and proportioned with reference thereto, but a railroad relying thereon must prove that a greater charge for a short haul than for a longer haul is not unjust discrimination.[8]

§ 266. In Actions for Penalty for Failure to Receive and Transport Freight.—In an action against a carrier for the penalty for failure to receive and transport an interstate shipment, plaintiff does not have to show that defendant has filed and published its schedule of freight rates as required by law, defendant being presumed to have complied with the law.[9]

§ 267. In Actions for Penalty for Delay in Transportation of Freight.—In an action against a railroad company for the penalty imposed, for a delay in the transportation of goods, the burden of showing that the time for the transportation was unreasonable rests on plaintiff,[10] but he makes a prima facie case by showing that the carrier neglected to transport the freight within the ordinary time required.[11] Where delay is shown, the burden is on the defendant to show that such delay was not negligent.[12] Where by the terms of the statute the carrier is relieved from liability if the goods are "burned, stolen or destroyed" without its fault, it has the burden of proving such defense. Mere proof of loss in such case raises a presumption of negligence.[13] Where a

5. **Burden of proving shipment was a domestic shipment.**—Gulf, etc., R. Co. *v.* Fort Grain Co. (Tex. Civ. App.), 72 S. W. 419; S. C., 73 S. W. 845.

6. **Burden of proving that charges were based on actual weight of freight.**—Gulf, etc., R. Co. *v.* Loonie, 84 Tex. 259, 19 S. W. 385, following Sabine, etc., R. Co. *v.* Cruse, 83 Tex. 460, 18 S. W. 755.

7. **Presumption that person injured is shipper who actually paid the freight.**—Central Trust Co. *v.* Chicago, etc., R. Co. (Iowa), 135 N. W. 721.

8. **Effect of statute relating to discrimination between long and short haul.**—People *v.* Baltimore, etc., R. Co., 246 Ill. 474, 92 N. E. 934, construing Hurd's Rev. St. 1909, c. 114, § 126.

Under such a statute, where a railroad company charged with unjust discrimination in charging a larger freight for hauling a shorter distance than is charged for hauling a greater distance at the same time over the same line did not deny the facts and offered no explanation, a prima facie case of unjust discrimination was made by the mere proof of the charge warranting a verdict against the railroad company. People *v.* Baltimore, etc., R. Co., 246 Ill. 474, 92 N. E. 934, construing Hurd's Rev. St. 1909, c. 114, § 126.

9. **Carrier presumed to have filed and published freight rates.**—Burlington Lumber Co. *v.* Southern R. Co., 152 N. C. 70, 67 S. E. 167.

10. **Burden of proving that time for transportation was unreasonable.**—Alexander *v.* Atlantic, etc., R. Co., 144 N. C. 93, 56 S. E. 697, and Jenkins *v.* Southern R. Co, 146 N. C. 178, 59 S. E. 663, construing Revisal 1905, § 2632.

11. **Prima facie case made by showing neglect to transport within ordinary time.**—Jenkins *v.* Southern R. Co., 146 N. C. 178, 59 S. E. 663, construing Revisal 1905, § 2632.

12. **Burden of showing delay was not negligent.**—Texas Cent. R. Co. *v.* Hannay-Frerichs & Co., 104 Tex. 603, 142 S. W. 1163, construing Rev. St. 1895, art. 4496.

13. **Burden upon carrier to prove goods were burned, stolen or destroyed.**—Robertson *v.* Atlantic, etc., R. Co., 148 N. C. 323, 62 S. E. 413, construing Revisal 1905, § 2632.

written bill of lading acknowledging the receipt of a car is admitted in evidence, the carrier is presumed to have known what it was doing when it accepted the car, and it can not be heard to say that it did not have possession thereof at the time it issued the bill of lading.[14]

§§ 268-271. Admissibility—§ 268. In Actions for Penalty for Overcharge.—Where a railroad company authorized the drayman, delivering to the consignee goods carried by the company, to collect the charges, the drayman's testimony that the consignee, on paying the charge, said he thought it was too high, is admissible in an action by the consignee to recover a statutory penalty for overcharge.[15]

§ 269. In Actions for Penalty for Discrimination in Rates.—In an action against a carrier to recover the penalty prescribed for discrimination in rates, evidence to be admissible must be relevant to the issues involved.[16]

§ 270. In Actions for Penalty for Delay in Transportation of Freight.—In an action against a carrier to recover the penalty prescribed for delay in the transportation of freight, evidence not relevant to the issues involved is not admissible,[17] but evidence of any circumstances which contributed to produce the delay in spite of ordinary diligence on the part of the carrier is admissible to disprove negligence.[18]

§ 271. In Actions for Penalty for Failure to Furnish Cars.—In an action against a railroad company for the penalty prescribed for failure to furnish cars for freight tendered, if the company complied with its duty to furnish facilities for the transportation of goods, in the ordinary conduct of its business, it is relevant to prove that at the time of the demand, the general movement of freight through the country traversed by the company's lines, was unusually large and more than was normally to have been expected, and that therefore it could not comply with the demand for cars.[19] In such an action,

14. **Presumption that carrier had possession of car when it issued bill of lading.**—Sandford *v.* Seaboard, etc., Railway, 79 S. C. 519, 61 S. E. 74.

15. **Evidence of drayman authorized to collect charges.**—Fuller *v.* Chicago, etc., R. Co., 31 Iowa 187.

16. **Evidence held relevant.**—In an action against a railroad company under the Texas statute, to recover the penalty for discriminating in freight charges, it appeared that, on December 12th, plaintiff shipped a car load of lumber, for which defendant charged him twelve and one half cents per one hundred pounds, while the person in whose favor defendant was alleged to have discriminated was charged eight cents per one hundred pounds on a car load of lumber shipped by him on December 8th, from and to the same points. Held, that a letter, written on December 9th, by defendant's freight agent to plaintiff, in which the writer says, "as regards giving rebate on your shipments, I would say that we have published rates on lumber, copies of which are on file with the commissioner of the Texas Traffic Association. As we are obliged by agreement to maintain rates, you will see how utterly impossible it is for us to go into the rebate business," is relevant and admissible, as tending to show that defendant had not changed its freight rates between December 8th and 12th. New York, etc., R. Co. *v.* Gallaher, 79 Tex. 685, 15 S. W. 694.

17. **Evidence held irrelevant.**—In an action under the North Carolina statute, Revisal 1905, § 2632, it is not relevant to the inquiry whether or not defendant knew the facts which gave plaintiff the right to sue. Cardwell *v.* Southern R. Co., 146 N. C. 218, 59 S. E. 673.

In such an action evidence that plaintiff told defendant's agent that plaintiff was shipping the goods to be sold on account, and that he could get no money until the goods were sold, is not relevant to the inquiry, since, when plaintiff establishes that he is the party aggrieved, it bears in no way upon his demand or defendant's obligation, whether defendant knew who was the party aggrieved, either at the inception of the matter or at any other time. Rollins *v.* Seaboard, etc., Railroad, 146 N. C. 153, 59 S. E. 671.

18. **Evidence admissible to disprove negligence.**—Texas Cent. R. Co. *v.* Hannay-Frerichs & Co., 104 Tex. 603, 142 S. W. 1163.

19. **Evidence that movement of freight was unusually large.**—Southern R. Co. *v.* Atlanta Sand, etc., Co., 135 Ga. 35, 68 S. E. 807.

evidence of defendant's animosity toward the consignee is admissible as strengthening plaintiff's theory that defendant refused to furnish cars, but the cause of such animosity is immaterial.[20] It is not competent for defendant to show previous delay of the intended consignee in unloading similar shipments, the carrier's remedy being not against the shipper but against the consignee for damage.[21] The exclusion of a bond entered into by plaintiff with the consignee for the performance of the contract for shipment, is not error where the contract is otherwise established.[22] Where the records kept in the train dispatcher's office show the number of cars ordered during the time in question and no effort is made to produce them or excuse offered for not doing so, there is no error in excluding the testimony of the train dispatcher to show the number of cars ordered, the witness stating that he can not give the number from memory anywhere near accurately.[23] Evidence is properly excluded where there is no pleading to warrant its admission.[24]

§ 272. Weight and Sufficiency.—In the appended note will be found numerous decisions of the courts as to the weight of the evidence and its sufficiency to prove particular facts in actions to recover the statutory penalty prescribed for an overcharge in passenger rates [25] or in freight rates [26] or for any

20. **Evidence of carrier's animosity toward consignee.**—Houston, etc., R. Co. *v.* Campbell, 91 Tex. 551, 561, 45 S. W. 2, 43 L. R. A. 225, reversing 40 S. W. 431.

Declarations of conductor. — Declarations of a conductor while switching cars for loading showing carrier's determination to furnish no cars for plaintiff's shipments to a certain consignee, are admissible. Houston, etc., R. Co. *v.* Campbell, 91 Tex. 551, 45 S. W. 2, 43 L. R. A. 225, reversing 40 S. W. 431.

21. **Evidence of previous delay of consignee in unloading inadmissible.**—Houston, etc., R. Co. *v.* Campbell, 91 Tex. 551, 45 S. W. 2, 43 L. R. A. 225, reversing 40 S. W. 431.

22. **Bond between plaintiff and consignee for performance of contract for shipment.**—Houston, etc., R. Co. *v.* Campbell, 91 Tex. 551, 45 S. W. 2, 43 L. R. A. 225.

23. **Testimony of train dispatcher to show number of cars ordered.**—Texas, etc., R. Co. *v.* Smith, 34 Tex. Civ. App. 571, 79 S. W. 614, affirmed in 98 Tex. 635, no op.

24. **No pleading to warrant admission of evidence.**—Where the answer of the defendant did not allege facts showing that it had performed the duty laid upon it by law of providing a sufficient number of cars to meet the ordinary needs of its business, which it could reasonably anticipate, nor that the scarcity of cars and the existing demands for them were the result of circumstances beyond its power reasonably to control or provide against, and was therefore demurrable, evidence offered to show the facts alleged in the answer was properly excluded, there being no pleading to warrant its admission. Allen *v.* Texas, etc., R. Co., 100 Tex. 525, 101 S. W. 792, affirming 42 Tex. Civ. App. 331.

25. **Overcharge in passenger rates.**—In an action against a carrier for the penalty imposed by Arkansas statute, Kirby's Dig., § 6620, for charging excessive passenger fare, evidence held to justify a verdict against the carrier. Chicago, etc., R. Co. *v.* Young, 102 Ark. 599, 145 S. W. 203.

In an action to enforce the penalty for overcharges, on the issue whether defendant (M. P. Co.) operated a certain railroad, the only testimony was that of two employees of the I. M. Co., that they used blanks for bills of lading, etc., apparently prepared for use of defendant, but they did not state that the blanks were used when the overcharges were made; that, as far as they knew, they were furnished by the I. M. Co.; and that the passenger tickets and baggage checks appeared to have been prepared for the I. M. Co. They were employed and paid by the I. M. Co. One of them testified that he had received notice that the road would be operated by defendant, but he did not state when the notice was given. Defendant and the I. M. Co. were shown to be distinct corporations, and the road had been leased by a third company to the I. M. Co., and the blanks were printed by defendant and furnished the lessee as a matter of economy. Held, insufficient to show that defendant operated the road either jointly or with others. Missouri Pac. R. Co. *v.* Wright, 65 Ark. 631, 47 S. W. 557.

The M. Railroad Company is not shown to have operated the L. Railroad, when plaintiff was illegally charged for transportation over the latter, by evidence that the S. Railroad Company acquired the greater part of the stock of the L. Railroad Company, and that the M. Railroad Company acquired the greater part of the stock of the S. Railroad Company, and

unlawful discrimination in rates,[27] for refusal to give transfers,[28] for refusal to receive freight for shipment,[29] and for failure to furnish cars.[30]

§§ 273-274. Questions of Law and Fact—§ 273. In Actions for Penalty for Discrimination in Freight Rates.—In an action against a carrier for the penalty prescribed for discrimination in freight rates, if the plaintiff was the consignee of the goods which he purchased, delivered at his plant, the question whether he suffered damage by reason of the discriminatory rates is one of fact.[31]

§ 274. In Actions for Penalty for Delay in Transportation of Freight.—In an action against a carrier for the penalty imposed, for delay in transport-

that several of the officers of the two last-named companies were the same; it appearing that the two companies remained separate corporations, and that they, by consent, appointed or selected the same persons officers in each company to reduce expenses. Missouri Pac. R. Co. *v.* Bolling, 66 Ark. 646, 48 S. W. 806.

On an issue whether a railroad company charged plaintiff more than the fixed statutory rate, the only evidence of the distance between the stations was given by a witness who was not a surveyor, but who measured the railway between the stations with a surveyor's chain of which he did not know the length. He measured the chain, and multiplied the number of feet in a chain by the number of chains in the distance, and divided the product by the number of feet in a mile, which he estimated "something like 5,000 feet, —5,280." Held, that the evidence as to the distance was not so conclusive as to necessitate a verdict that there had been an overcharge. Missouri Pac. R. Co. *v.* Smith, 60 Ark. 221, 29 S. W. 752.

26. Overcharge in freight rates.—Evidence in a shipper's action against a carrier to recover overcharges and statutory penalty therefor held to sustain a finding that a rate made by the railroad commission did not apply to the place to which the freight was shipped. Sabine Tram Co. *v.* Texarkana, etc., R. Co. (Tex.), 143 S. W. 143, affirming judgment Texarkana, etc., R. Co. *v.* Sabine Tram Co. (Tex. Civ. App.), 129 S. W. 198.

Under the North Carolina statute, Acts 1903, p. 999, c. 590, §§ 1, 2, prescribing penalties for making overcharges on freight, the question whether there has been an overcharge depends on whether the amount exacted is "in excess of the rates appearing in the printed tariff of said company or more than is allowed by law," and in an action for the penalties the mere unsworn declaration of defendant's agent that there was an overcharge on the goods is insufficient to sustain a finding of an overcharge. Latta Martin Pump Co. *v.* Southern R. Co., 138 N. C. 300, 50 S. E. 686.

A shipment originating on a railroad in another state was made on a bill of lading accompanying the goods specifying the shipment as a certain number of pounds and at a certain rate per hundred, and a domestic road collected only the rate specified in the bill of lading. Held not evidence of an overcharge by the domestic road within the North Carolina statute. Latta Martin Pump Co. *v.* Southern R. Co., 138 N. C. 300, 50 S. E. 686.

27. Discrimination in rates.—In an action against a common carrier for discrimination in rates, evidence held sufficient to go to the jury on the question whether the alleged discriminatory rates occurred in interstate or local shipments. Central Trust Co. *v.* Chicago, etc., R. Co. (Iowa), 135 N. W. 721.

28. Refusal to give transfers.—The Illinois statute, Rev. Code Chicago, § 1725, provides that any street railway company refusing to give transfers as provided by § 1723 shall be liable to a penalty. Evidence in an action by the city to recover penalties for refusals to give such transfers considered, and held to show that defendant corporation was the real beneficial owner of the connecting lines, and required to give transfers, though the dry legal title to one of the lines was in another corporation. Chicago Union Tract. Co. *v.* Chicago, 199 Ill. 579, 65 N. E. 470.

29. Refusal to receive freight for shipment.—Evidence held to present a question for the jury as to the sufficiency of a shipper's daily tender of freight to a carrier to entitle him to the statutory penalty for refusal to receive the freight for shipment. Wampum Cotton Mills *v.* Carolina, etc., R. Co., 150 N. C. 608, 64 S. E. 586.

30. Failure to furnish cars.—Evidence considered and held to show no valid excuse for delay in furnishing a shipper with cars within a reasonable time, and to afford no basis for a charge that if the carrier used ordinary care and diligence to furnish the cars, and could not furnish them earlier than it did, it would not be liable for damages resulting from the delay. Texas, etc., R. Co. *v.* Powell, 34 Tex. Civ. App. 575, 79 S. W. 86, affirmed in 98 Tex. 635, no op.

31. Question whether plaintiff, the consignee, suffered damage.—Central Trust Co. *v.* Chicago, etc., R. Co. (Iowa), 135 N. W. 721, so holding in action for penalty prescribed by Code, §§ 2124, 2125.

ing freight, the court should leave the question of delay and the amount of recovery to the jury, with proper instructions on the law.[32] Where, in such an action, the carrier had by its bill of lading treated the goods as those of both plaintiffs, and there is testimony in corroboration of their ownership, the issue of ownership is for the jury, though counsel for plaintiffs during the trial inadvertently stated that one of plaintiffs was the sole owner, which statement he withdrew by the consent of the trial judge.[33]

§ 275. Instructions.—Where, in an action against a carrier for penalties for delay in the transportation of goods, the evidence shows the issuance of a bill of lading on a designated date, acknowledging the receipt of a car on that date, an instruction that the jury in computing the time of delay should count from the time the shipment was actually received by the carrier or was within its control is properly refused.[34] In an action for the penalty prescribed for negligent delay of a carrier in furnishing a shipper with cars, a charge which seems to be on the weight of evidence in assuming that the delay constituted negligence will not be held error on that account where, in another paragraph, the question of whether such delay was negligence is treated as one for the determination of the jury.[35] A judgment will not be reversed because of an erroneous instruction, if the error is in favor of the appellant.[36]

§§ 276-292. Offenses by Carriers or Their Agents—§ 276. In General.—There are statutes in a number of the states making carriers or their agents who violate certain statutory regulations liable to prosecution by the state. Among the statutory enactments of this character whose validity the courts have been required to determine or whose terms they have been called upon to interpret, are provisions making a carrier liable to prosecution for failing to furnish a suitable waiting room for passengers,[37] or for failing to

32. Delay and amount of recovery for jury under proper instructions.—So held in an action to recover the penalty prescribed by the North Carolina statute, Revisal 1905, § 2632. Shelby Ice, etc., Co. *v.* Southern R. Co., 147 N. C. 66, 60 S. E. 721; S. C., 147 N. C. 61, 60 S. E. 723; Hamrick Bros. & Co. *v.* Southern R. Co., 146 N. C. 185, 59 S. E. 666.

Whether goods are transported within a reasonable time, measured by the North Carolina statute, is for the jury. Alexander *v.* Atlantic, etc., R. Co., 144 N. C. 93, 56 S. E. 697; Hamrick Bros. & Co. *v.* Southern R. Co., 146 N. C. 185, 59 S. E. 666.

It is for the jury to ascertain whether there had been an unreasonable delay measured by the ordinary time required for transportation, and how much delay there had been after making due allowance to the carrier as provided by the statute, and thus determine the amount due plaintiff, and the judge can not decide as a matter of law what amount is due though the jury should believe the evidence, for the jury must decide the time of the delay before the amount of the penalty can be ascertained. Davis *v.* Southern R. Co., 147 N. C. 68, 60 S. E. 722. See, also, Jenkins *v.* Southern R. Co., 146 N. C. 178, 59 S. E. 663; Wall-Huske Co. *v.* Southern R. Co., 147 N. C. 407, 61 S. E. 277.

But the court must define the term, "ordinary time required." Jenkins *v.* Southern R. Co., 146 N. C. 178, 59 S. E. 663.

33. Ownership of goods.—Sandford *v.* Seaboard, etc., Railway, 79 S. C. 519, 61 S. E. 74.

34. Action for penalties for delay in transportation—Instruction properly refused.—Sandford *v.* Seaboard, etc., Railway, 79 S. C. 519, 61 S. E. 74.

35. Charge on the weight of evidence—Error cured.—Texas, etc., R. Co. *v.* Powell, 34 Tex. Civ. App. 575, 79 S. W. 86, affirmed in 98 Tex. 635, no op.

36. Erroneous instruction in favor of appellant not ground for reversal.—In an action to recover a penalty against a railroad company for discrimination in rates, an instruction that if the jury believe that defendant charged plaintiff a greater rate than it did the other shipper, "for a like quantity of freight of the same class, from the same point to the same point, and in the same direction, and that such charge was unjust and willfully made, then such charge would be unlawful, and you will find for plaintiff," is not ground for reversal because it fails to define what would be an "unjust" charge, if the railroad company is the appellant. New York, etc., R. Co. *v.* Gallaher, 79 Tex. 685, 15 S. W. 694.

37. Failure to furnish suitable waiting room for passengers.—Whether a railroad sufficiently complies with the Kentucky

furnish separate coaches for white and colored passengers,[38] or making a particular officer or agent of the carrier liable to a prosecution for running freight trains on Sunday,[39] or for failing to keep the ticket office at a station open an hour before the departure of a train.[40]

statute, St. 1903, § 772, requiring railroads to provide a convenient and suitable waiting room for passengers, is a question of fact depending upon the size of the city, town, or station where the railroad's trains stop, and the number of passengers arriving at and departing therefrom. Illinois Cent. R. Co. *v.* Commonwealth, 28 Ky. L. Rep. 802, 90 S. W. 602.

In a prosecution under such statute, evidence as to the ventilation and heating of the waiting room in question should be confined to the period of thirty minutes immediately preceding the schedule time of the departure of passenger trains, during which the railroad is required by Ky. St. 1903, § 784, to keep the waiting room open and warm. Illinois Cent. R. Co. *v.* Commonwealth, 28 Ky. L. Rep. 802, 90 S. W. 602.

38. Failure to furnish separate coaches for white and colored passengers.—The Kentucky statute, St. 1903, § 801, as amended by Act March 15, 1894, provides that the provisions of § 795, requiring all railroads to furnish separate coaches for white and colored passengers, shall not apply to the transportation of passengers in a caboose car attached to a freight train. Ky. St. 1903, § 772a, provides that all railway corporations owning or operating a road exceeding five miles in length shall run at least one passenger train each way daily, provided it may run a mixed train carrying both freight and passengers. The only train run by defendant on a certain branch, and the only car in which passengers could ride, was a caboose car, and defendant sold tickets to both white and colored passengers for use on such caboose car, there being no separate compartments therein, or no sign on the car indicating which compartment was intended for white or colored passengers. The prosecution contended that, since defendant was bound to run at least one passenger train daily, the caboose car in which passengers were hauled must be considered a passenger train so as to require defendant to maintain separate compartments therein. Held, that the train was simply a freight train with a caboose attached, even though it carried passengers, and defendant did not operate any other passenger train on the road, and hence the case was within the exception contained in § 801, and defendant was not liable for failure to maintain separate compartments in such train. Southern R. Co. *v.* Commonwealth, 33 Ky. L. Rep. 430, 110 S. W. 372.

39. Running freight trains on Sunday.—The Georgia statute, Penal Code, § 420, prohibiting the running of freight trains on Sunday is an exercise of the police power of the state for the purpose of preventing a violation of the Sabbath. It does not seek to impose a penalty on the corporation for the violation of its provisions, but the statute is enforced by the indictment of a particular officer of the corporation, named in the statute, and no other than the one so named can be lawfully convicted. Vaughan *v.* State, 116 Ga. 841, 43 S. E. 249.

The statute can only be enforced by the indictment of the superintendent of transportation of the company, or the officer having charge of the business of that department of the railroad. One who is merely engaged as an employee in the running and operation of the train commits no offense under the statute. Vaughan *v.* State, 116 Ga. 841, 43 S. E. 249; Craven *v.* State, 109 Ga. 266, 34 S. E. 561.

In case there are two persons with equal authority in charge of the transportation department the provision for indictment might properly be directed against him under whose orders the train was run, but it is not contemplated that two persons occupying different relations to the company shall be equally indictable. Vaughan *v.* State, 116 Ga. 841, 43 S. E. 249.

If the act of February 28, 1874 (Code, § 4578), is to be construed as allowing freight trains not carrying live stock to be run in any case after eight o'clock on Sunday morning, such running is lawful only when the given train has been actually started on or before the previous Saturday night. A freight train not started on its schedule until 12:50 A. M. of Sunday morning can not be lawfully run either before or after eight o'clock of that day. Jackson *v.* State, 88 Ga. 787, 15 S. E. 905.

It is not justification for the running of a freight train on Sunday that the company has issued general rules and orders to its employees not to do so, without also showing either directly or by circumstances, such as calling upon employees to account for their misconduct, that in the particular instance the rules or orders were violated without the sanction or connivance of the officer indicted, that officer being one of those whose duty it was to control the running of the train in question. Heard *v.* State, 92 Ga. 477, 17 S. E. 857.

40. Failure to keep ticket office at station open.—A railroad ticket agent is not guilty, under Code, § 2359, for failing to

§ 277. Overcharge or Discrimination.—At common law it is an indictable offense for a common carrier to unjustly discriminate between members of the public;[41] and by constitutional provision or statute in a number of the states common carriers are made liable to prosecution for an overcharge or unlawful discrimination.[42] A statute making it a misdemeanor for a carrier to charge more than a fixed sum for transportating excess baggage, is not violated by a carrier's knowingly accepting merchandise as baggage, and transporting it as such, and charging therefor a rate exceeding the maximum amount allowed for carrying excess baggage.[43] A joint traffic arrangement, by which connecting carriers haul from a point on one road to a point on the other road for less than the first carrier charges from the same point on its road to its terminus, between the points, is not in violation of a statute, making it an offense for a carrier to charge more for hauling for a shorter than for a longer distance "over the same line" in the same direction, the shorter being included in the longer distance.[44] In ignoring an unconstitutional statute limiting its charges for transportation of passengers and appealing to equity for protection against criminal proceedings to compel compliance therewith, a railroad company relies on the principle allowing an injured person under some circumstances to redress by his own hands the wrong done.[45]

§ 278. Carrying More than a Prescribed Number of Passengers.—A municipal ordinance requiring a street-railway company to report to the city quarterly the number of trips made, and number of passengers carried, and punishing by fine the carrying of more than 18 passengers on the average, is a regulation reasonable in its nature, and is binding and valid.[46]

keep his office open at the station an hour before the departure of a train coming at an early hour, where the company did not sell tickets at the station for such train, but permitted the passengers to pay regular ticket fare on the train, and had given notice to the public of such practice. Brady *v.* State, 83 Tenn. (15 Lea) 628.

41. **Unjust discrimination indictable offense at common law.**—Garrison *v.* Southern R. Co., 150 N. C. 575, 64 S. E. 578.

42. **Unjust discrimination an indictable offense.**—Under the North Carolina statute, Revisal 1905, § 3749, it is an indictable offense for a common carrier to unjustly discriminate between members of the public. Garrison *v.* Southern R. Co., 150 N. C. 575, 64 S. E. 578.

Discrimination in rates where conditions are the same.—Section 217 of the Kentucky Constitution, providing that the attorney general shall institute proceedings to enforce the provisions of § 215, prohibiting common carriers from making a discrimination in rates where the conditions are the same does not exempt a carrier from indictment for a violation of those provisions. Louisville, etc., R. Co. *v.* Commonwealth, 108 Ky. 628, 22 Ky. L. Rep. 328, 57 S. W. 508.

There can not be a violation of § 215, unless different charges be made for transporting freight of the same class from and to the same points and "upon the same condition." Louisville, etc., R. Co. *v.* Commonwealth, 105 Ky. 179, 20 Ky. L. Rep. 1099, 48 S. W. 416, 43 L. R. A. 550.

Statute applicable though conditions on several lines are not the same.—Railroad Commission (Laws 1907, p. 93, c. 53, § 48), making it an offense for any railroad company to collect for carrying one person more than it demands from another for a like contemporaneous service, which omitted the words "under substantially similar circumstances and conditions," as used in Interstate Commerce Law (Act Cong. Feb. 4, 1887, c. 104, § 2, 24 Stat. 379 [U. S. Comp. St. 1901, p. 3155]), after which § 48 was patterned, applies to the different lines of an electric railway company, though the conditions, such as the cost of construction, etc., are not the same on the several lines. Portland R., etc., Co. *v.* Railroad Comm., 56 Ore. 468, 105 Pac. 709, rehearing denied 109 Pac. 273.

43. **Charging more than fixed sum for transporting excess baggage.**—Kansas, etc., R. Co. *v.* State, 65 Ark. 363, 46 S. W. 421, 41 L. R. A. 333, 67 Am. St. Rep. 933, construing Act April 19, 1895.

44. **Charging more for short than for long haul.**—Commonwealth *v.* Chesapeake, etc., R. Co., 24 Ky. L. Rep. 1888, 72 S. W. 361, construing Ky. St., § 820.

45. **Ignoring unconstitutional statute and appealing to equity for protection against criminal proceedings.**—Coal, etc., R. Co. *v.* Conley, 67 W. Va. 129, 67 S. E. 613.

46. **Carrying more than a prescribed number of passengers—Ordinance held valid.**—St. Louis *v.* St. Louis R. Co., 89 Mo. 44, 1 S. W. 305, 58 Am. Rep. 82.

§ 279. Failure to Deliver Express Matter to Consignee.—The Indiana statute, requiring express companies to deliver express matter to persons "to whom the same is directed, living within" the limits of cities having a specified population, is not complied with by a personal delivery to the consignee at the local office.[47]

§§ 280-282. Negligence Causing Death or Injury—§ 280. In General.—In a criminal prosecution of a carrier for negligence causing the death of a passenger, the same rules of evidence and principles of law apply as in an analogous civil action for damages.[48]

§ 281. Who May Be Prosecuted.—A statute providing that, if the life of any person being a passenger shall be lost by reason of the negligence of the proprietor of any railroad, such proprietor shall be liable to fine, applies to all corporations owning and running a railroad.[49]

§ 282. Defenses.—In a prosecution of a carrier for negligence causing death the contributory negligence of the person killed is a good defense.[50] But the fact that the loss of life was caused by the improper conduct of third persons, and that the accident would not otherwise have happened, is not a good defense, if the carrier or its servants did not do all that could be done to restrain such improper conduct.[51] A printed indorsement on a season ticket, disclaiming liability for any personal injury to the holder, is no defense to an indictment of the corporation under a penal statute for gross negligence.[52]

§§ 283-286. Indictment—§ 283. Conditions Precedent to Indictment.—Where a constitutional provision or statute prescribes certain conditions precedent to the return of an indictment against a carrier for a criminal offense, as that such an indictment can only be found upon the recommendation or request of the state railroad commission, or after such commission has refused to exonerate the carrier, the performance of such conditions are essential to the return of a valid indictment.[53]

47. **Failure to deliver express matter to consignee.**—United States Exp. Co. *v.* State, 164 Ind. 196, 73 N. E. 101, construing Burns' Ann. St. 1901, § 3312a.

48. **Rules of evidence and principles of law applicable.**—On trial of a railroad corporation under the Maine statute, Rev. St. 1857, c. 51, § 42, providing that a railroad company may be prosecuted and fined for carelessly killing a person who is exercising due care, it appeared that deceased took passage from A. to B., but got off at an intermediate station when the train had stopped, and was killed, while attempting to re-enter the cars, by an express train passing on an intervening track, and defendant requested the court to charge that, if the track was for the continuous transportation from A. to B., defendant was not bound at any intermediate station to furnish ingress and egress to deceased, and the court gave the charge, but said that it would apply only in a civil suit for damages, and had nothing to do with the present prosecution. Held error, on the ground that the same rules of evidence and principles of law apply in such prosecution as in analogous civil actions for damages. State *v.* Grand Trunk R. Co., 58 Me. 176, 4 Am. Rep. 258.

49. **Statute applicable to all corporations owning and running a railroad.**—Commonwealth *v.* Boston, etc., R. Corp., 65 Mass. (11 Cush.) 512, construing St. 1840, c. 80.

50. **Contributory negligence.**—State *v.* Maine Cent. R. Co., 81 Me. 84, 16 Atl. 368.

But it is no defense to an indictment against a railroad company under the Massachusetts statute, St. 1874, c. 372, § 163, providing that if, by reason of the negligence of such a company, or of the unfitness or gross negligence of its servants or agents while engaged in its business, "the life of any person being a passenger is lost or the life of any person being in the exercise of due diligence and not being a passenger or in the employment of such corporation, is lost," the corporation shall be punished, that the passenger was not in the exercise of due care. Commonwealth *v.* Boston, etc., R. Corp., 134 Mass. 211.

51. **Improper conduct of third persons.**—Commonwealth *v.* Coburn, 132 Mass. 555, so holding in a prosecution under Gen. St., c. 160, § 34.

52. **Indorsement on ticket disclaiming liability for injury to holder.**—Commonwealth *v.* Vermont, etc., R. Co., 108 Mass. 7, 11 Am. Rep. 301.

53. **Conditions precedent to return of indictment.**—As to the validity and con-

§ 284. Necessary Allegations.—An indictment of a carrier for an offense defined by constitutional or statutory enactment must allege facts that will constitute the offense as defined by such enactment, including all its essential elements, and it must, of course, conform in its allegations to any statutory requirement as to indictment.[54] In an indictment against a carrier of

struction of the terms of certain provisions of the constitution and statutes of Kentucky, Const., §§ 217, 218; St., §§ 819, 820, see the following cases. Commonwealth *v.* Louisville, etc., R. Co., 112 Ky. 75, 23 Ky. L. Rep. 1382, 65 S. W. 158; Illinois Cent. R. Co. *v.* Commonwealth, 23 Ky. L. Rep. 544, 63 S. W. 448; S. C., 23 Ky. L. Rep. 1159, 64 S. W. 975; Louisville, etc., R. Co. *v.* Commonwealth, 104 Ky. 226, 20 Ky. L. Rep. 1102, 1380, 46 S. W. 707, 47 S. W. 210, 598, 43 L. R. A. 541; S. C., 114 Ky. 787, 24 Ky. L. Rep. 1593, 1779, 71 S. W. 910.

54. Necessary allegations in indictment for discrimination.—An indictment against a railroad company for an unlawful discrimination in the transportation of passengers, alleging the giving of a free pass over its road, does not show an undue preference when it fails to allege that by virtue thereof the holder received free transportation. State *v.* Southern R. Co., 125 N. C. 666, 34 S. E. 527.

In Kentucky, an indictment against a railroad company for unjust discrimination must allege that the offense was willfully or knowingly committed, as Const., § 217, makes that an essential element of the offense. Louisville, etc., R. Co. *v.* Commonwealth (Ky.), 46 S. W. 702.

As the constitution of Kentucky, § 215, requires a railroad company to charge the same amount of compensation for transporting from and to the same points freight of the same class or kind, an indictment for violating that section must allege that the freight in question was of the same class or kind, or not of different classes or kinds. Louisville, etc., R. Co. *v.* Commonwealth (Ky.), 46 S. W. 702; S. C., 105 Ky. 179, 20 Ky. L. Rep. 1099, 48 S. W. 416, 43 L. R. A. 550.

And as such provision further requires that the freight must be hauled on the same conditions, and in the same manner, an indictment for discriminating in charges must allege that the services to the different persons were on the same conditions. Commonwealth *v.* Chesapeake, etc., R. Co., 24 Ky. L. Rep. 1886, 72 S. W. 360; S. C., 24 Ky. L. Rep. 1888, 72 S. W. 361.

An indictment for violation of such constitutional provision which fails to allege that the discriminative rates were charged for services to the different persons "upon the same conditions," is fatally defective. Commonwealth *v.* Chesapeake, etc., R. Co., 24 Ky. L. Rep. 1887, 72 S. W. 758.

Thus, an indictment for discrimination, in violation of such provision is bad, where it charges the hauling of freight of the same class between the same points for different persons for different charges "and on different conditions." Commonwealth *v.* Chesapeake, etc., R. Co., 24 Ky. L. Rep. 1888, 72 S. W. 361.

Necessary allegations in indictment for charging more for short than for long haul.—In an indictment under the Kentucky statute, Ky. St. § 820, it is not necessary to state the precise amount charged for the longer distance, or to state the names of the persons in whose favor the discrimination was made, it being sufficient to state that the specified amount charged or received for the shorter distance was greater than that charged or received from persons generally for the longer distance. Louisville, etc., R. Co. *v.* Commonwealth, 104 Ky. 226, 20 Ky. L. Rep. 1102, 1380, 46 S. W. 707, 47 S. W. 210, 598, 43 L. R. A. 541.

Even if it is a condition precedent to such an indictment that the railroad commission shall make an investigation, followed by an order refusing to exonerate accused from the operation of the provisions of section 218 of the constitution, an indictment stating the circumstances of the offense, and reciting, "defendant at said time not having been authorized by the railroad commission of this commonwealth to charge less for a longer than for a shorter distance for transportation of coal," is sufficient. Louisville, etc., R. Co. *v.* Commonwealth, 104 Ky. 226, 20 Ky. L. Rep. 1102, 1380, 46 S. W. 707, 47 S. W. 210, 598, 43 L. R. A. 541.

Necessary allegations in indictment for negligence causing death.—Under the Massachusetts statute, St. 1840, c. 80, imposing a fine on any common carrier by whose negligence the life of a passenger is lost, to be recovered by indictment, the indictment must aver that deceased left a widow or heirs, or both, as the case may be, and an averment that defendant is liable to the fine, to the use of the administrator and heirs at law of the deceased, is insufficient. Commonwealth *v.* Eastern R. Co., 71 Mass. (5 Gray) 473.

And an indictment under such statute must also allege the taking out of administration in the state. Commonwealth *v.* Sandford, 78 Mass. (12 Gray) 174.

An indictment against a railroad corporation under the Massachusetts statute, St. 1874, c. 372, § 163, which imposes a penalty on the corporation where, by reason of its negligence, or of the unfitness or gross negligence of its servants or agents while engaged in its business, the life of any person is lost, alleged that one S. was traveling on the highway, and in the ex-

passengers for negligence causing death it would not be good pleading to set out in the indictment the evidence which tends to support the charge of negligence, and it is not necessary to allege the specific acts the neglect to do which constitute the negligence charged, if such negligence consists in the omission to perform a general duty and not in the omission to do any particular act or acts.[55] An indictment against a railroad company for an unlawful discrimination in the transportation of passengers, alleging that it transported a passenger free, is sufficient without alleging that there were other passengers on the same train paying fare.[56]

§ 285. Effect of Unnecessary Allegations.—While an indictment against a railroad company for a violation of a statute requiring railroads to provide suitable waiting rooms and to maintain the same in decent repair, is sufficient if it merely charges the railroad with a failure to keep convenient and suitable waiting rooms for passengers, yet it is not objectionable because specifying the particulars in which its waiting room was insufficient.[57]

§ 286. Offenses Covered by Indictment.—In a prosecution of a railroad company for failure to maintain separate compartments in its passenger train for white and colored passengers as required by statute, it may not be considered whether defendant has been guilty of a violation of a statute, requiring all railroads to run one passenger train each way daily on the road, even though the agreed facts show that defendant had not complied with the latter statute. The proper manner of proceeding in such case is by indictment under the latter statute.[58]

§§ 287-292. Trial—§ 287. Jurisdiction.—Where in a statute regulating carriers every transgression of its provisions is characterized as an "offense," the means by which it is to be enforced is described as a "prosecution," the verdict is called a "conviction" and the judgment a "fine," the penalties provided for thereby can be enforced only in a criminal prosecution which is not within the jurisdiction of a court having no original criminal jurisdiction.[59]

ercise of due diligence; that a locomotive engine attached to a freight train was passing the place where the highway crosses the railroad; that a locomotive engine was coming in the opposite direction; that, while defendant was thus running the last-named locomotive, it was its duty in approaching the crossing, in view of the position of the first-named locomotive, to reduce its rate of speed, and give proper signals and warnings, but it neglected to do so, and, with the last-named engine, ran over and killed S. Held that, as the negligence alleged was that of the servants of the corporation, and not of the corporation itself, the indictment was insufficient. Commonwealth *v.* Boston, etc., Railroad, 133 Mass. 383.

55. Allegations not necessary in indictment charging negligence causing death.—Commonwealth *v.* Coburn, 132 Mass. 555.

An indictment under the Massachusetts statute, Gen. St., c. 160, § 34, against a carrier of passengers on a steamboat to recover the penalty therein provided for the loss of life of a passenger, caused by its negligence, alleging that, by the negligence of defendant, the boat was permitted to be defective and unsafe, and furnished with a hurricane deck, which endangered the safety of the boat and passengers thereon, and that by defendant's negligence the deck was suffered to be, and was, overloaded with passengers, was not insufficient, as failing to allege the evidence which tended to support the charge of negligence, or the specific acts the neglect to do which constituted the negligence alleged. Commonwealth *v.* Coburn, 132 Mass. 555.

56. Indictment for unlawful discrimination in transportation of passengers.—State *v.* Southern R. Co., 125 N. C. 666, 34 S. E. 527.

57. Specification of particulars not rendering indictment objectionable.—Illinois Cent. R. Co. *v.* Commonwealth, 28 Ky. L. Rep. 802, 90 S. W. 602, so holding in an indictment for a violation of Ky. St. 1903, § 772.

58. Indictment for violation of one statute not covering violation of another statute.—Southern R. Co. *v.* Commonwealth, 33 Ky. L. Rep. 430, 110 S. W. 372.

59. Jurisdiction.—State *v.* Union Pac. R. Co., 67 Neb. 141, 93 N. W. 222; State *v.* Missouri Pac. R. Co., 64 Neb. 679, 90 N. W. 877.

The supreme court of Nebraska having no original criminal jurisdiction had no jurisdiction of a proceeding to recover

§§ 288-290. Evidence—§ 288. Presumptions and Burden of Proof.—Where a railroad company is charged with not having filed a tariff sheet within the time prescribed by the Corporation Commission, and the evidence shows that the tariff sheet has not been filed, the presumption is that the omission was wilful.[60] In a prosecution for violation of a statute prohibiting the running of freight trains on Sunday, if there was any legal excuse or justification for running the train on that day, the burden of proving the same is on the accused.[61]

§ 289. Admissibility.—On the trial of a prosecution against a railroad company for charging more for a short than for a long haul, the report of the railroad commission that defendant had been repeatedly guilty of the offense is admissible as evidence.[62]

§ 290. Weight and Sufficiency.—In the appended note will be found decisions of the courts as to the weight of the evidence, and its sufficiency to prove particular facts, in criminal prosecutions of carriers for failure to file a tariff sheet within the time prescribed,[63] for running a freight train on Sunday,[64] and for negligence resulting in the death of a passenger.[65]

the penalties prescribed by the laws of 1893, ch. 24, § 9, regulating maximum freight rates. State *v.* Union Pac. R. Co., 67 Neb. 141, 93 N. W. 222; State *v.* Missouri Pac. R. Co., 64 Neb. 679, 90 N. W. 877.

60. **Presumption that omission to file tariff sheet was willful.**—Atchison, etc., R. Co. *v.* State, 33 Okla. 371, 125 Pac. 721.

61. **Burden of proving excuse or justification for running train on Sunday.**—Jackson *v.* State, 88 Ga. 787, 15 S. E. 905.

62. **Report of railroad commission that defendant had been repeatedly guilty of offense admissible.**—Louisville, etc., R. Co. *v.* Commonwealth, 21 Ky. L. Rep. 239, 51 S. W. 167.

63. **Evidence justifying finding that failure to file tariff sheet was willful.**—Evidence held to justify the corporation commission in finding that the failure of a railroad company to file a tariff sheet within the time prescribed was willful. Atchison, etc., R. Co. *v.* State, 33 Okla. 371, 125 Pac. 721.

64. **Evidence not supporting indictment for running freight train on Sunday.**—The indictment being founded on § 4578 of the Code, and charging the running of a "freight train" on the Sabbath day, and the evidence showing that the train run consisted only of a locomotive and cab, and it not appearing that any freight was carried, offered to be carried or invited for carriage, the indictment was not supported by the evidence, a locomotive and cab, when not run for carrying freight nor intended to be presently used for such carriage, not being a freight train. McNealy *v.* State, 94 Ga. 592, 21 S. E. 581.

65. **Some evidence of negligence for jury.**—Proof that a passenger was killed in a collision of a train with a hand car which the track master had suffered to be on the track, through a mistake in time occasioned by his failure to observe correctly the hour indicated by his watch, held to be some evidence of negligence for the jury. Commonwealth *v.* Vermont, etc., R. Co., 108 Mass. 7, 11 Am. Rep. 301.

Evidence insufficient to show negligence causing death.—A passenger on a train, which was running rapidly at night on a road of frequent and sharp curves, who was last noticed alive while he was passing through a car in which there were vacant seats, about midway of the train, saying or doing nothing to indicate where on the train he was going, or the purpose of going, was found dead the next morning, lying on the track between the rails, his body being in a mutilated condition, at or near the place of a sharp curve in the road. There was at the time a saloon car hitched to the rear of the train, not annexed for the use of passengers, but presumably to be transported to a station on the road. The passenger cars were connected closely with one another, but the saloon car was attached to the train in such a manner as to leave an open space between it and the preceding car eighteen inches wide. On an indictment against the company, it was alleged that the passenger, while exercising due care, fell through the open space between cars, and was thereby killed by the negligence of the defendants. Held, that the court properly directed a nonsuit, as the evidence was insufficient to establish the alleged negligence of the defendant and that the death of the passenger was caused thereby. State *v.* Maine Cent. R. Co., 81 Me. 84, 16 Atl. 368.

It is some evidence of negligence on the part of a passenger that he undertakes, in the nighttime, to pass through a train of cars while the train is moving rapidly, unless it may be reasonably inferred that he has some excuse for so

§ 291. Questions of Law and Fact.—At the trial of an indictment against a railroad company, under a statute imposing a penalty for negligence in certain cases, the court should not take the case from the jury, on the defendant's motion, where there is more than a mere scintilla of evidence of negligence.[66]

§ 292. Charge.—In a prosecution of a railroad company for violation of a statutory regulation the charge to the jury must not be misleading.[67] Where an indictment against a railroad company for a violation of a statute, requiring railroads to provide convenient and suitable waiting rooms, alleges that the waiting room is too small, not sufficiently ventilated, nor sufficiently lighted, an instruction authorizing a conviction if the waiting room is too small or not sufficiently lighted or ventilated is not subject to the objection of pointing out in an improper manner the evidence that has been introduced.[68]

§§ 293-298. Offenses by Persons Dealing with Carriers or Using Their Conveyances—§ 293. In General.—By statute in some states certain acts by persons dealing with carriers or using their conveyances are made criminal or penal offenses. Statutes of this character, the provisions of which have been interpreted by the courts, are enactments making it a misdemeanor for a person to get on any car while in motion to obtain transportation thereon as a passenger,[69] and enactments making an evasion of fare by a passenger an indictable offense.[70]

§ 294. Sale of Passenger Tickets by Brokers.—In New York it has been held that the sale of a valid passenger ticket by a broker is not a fraud, on

doing more than mere restlessness or curiosity. State *v.* Maine Cent. R. Co., 81 Me. 84, 16 Atl. 368.

66. When case should go to jury.—Commonwealth *v.* Fitchburg R. Co., 92 Mass. (10 Allen) 189.

67. Charge held misleading.—In a prosecution of a railroad for a violation of Ky. St. 1903, § 772, requiring railroads to provide a suitable waiting room for passengers, a charge authorizing a conviction if the railroad neglected to provide a waiting room convenient and suitable "for the accommodation of the passengers and the public traveling on said railroad passenger trains," was misleading, in that it was not restricted by requiring the waiting room to be sufficient merely for the passengers who might travel to and from the station in question. Illinois Cent. R. Co. *v.* Commonwealth, 28 Ky. L. Rep. 802, 90 S. W. 602.

68. Instruction not objectionable as pointing out evidence in improper manner.—Illinois Cent. R. Co. *v.* Commonwealth, 28 Ky. L. Rep. 802, 90 S. W. 602, so holding in a prosecution for violation of Ky. St., 1903, § 772.

69. Getting on car in motion to obtain transportation as a passenger.—The New York statute, Pen. Code, § 426, subd. 2, making it is a misdemeanor for a person to get on any car while in motion, to obtain transportation thereon as a passenger, applies to a person seeking to board a car or train unauthorizedly, or intending to obtain transportation as a passenger surreptitiously, and not to one who steps on a car while in motion, in good faith, intending to become a passenger thereon. Judgment 126 App. Div. 936, 110 N. Y. S. 1127, reversed. East *v.* Brooklyn Heights R. Co., 195 N. Y. 409, 88 N. E. 751.

70. Evasion of fare.—It is not necessary, in order to convict a passenger on a railway car of an evasion of fare, under the Massachusetts statute, Pub. St., c. 112, § 197, to show moral turpitude in such act of evasion. Commonwealth *v.* Jones, 174 Mass. 401, 54 N. E. 869.

The charter of a street-railway company required it to give transfers for a continuous ride to any point on its lines. Two lines ran parallel through a street for a short distance to a transfer point, where one of the lines ended. A rule of the company required passengers on the line ending at the transfer point to receive transfers for the other line there. Defendant, knowing the rule, boarded a car on the short line, tendered his fare, and demanded a transfer to the other line immediately, which was refused. He left the car, without paying his fare, before reaching the transfer point, and boarded a car on the continuing line and paid his fare. Held, that he was guilty of an evasion of fare, within Pub. St., c. 112, § 197, prohibiting persons from leaving cars without having paid the fare for the distance traveled, though he had no intention to defraud the company, and, if he had conformed to its rules, would have been entitled to a continuous ride over the route traveled for one fare. Commonwealth *v.* Jones, 174 Mass. 401, 54 N. E. 869.

either the transportation company or the traveler, calling for protective legislation in the exercise of the police power.[71] But in Texas it has been held that a statute making it a penal offense for any other person than the agent of a railroad company to sell its tickets, is a valid exercise of the police power.[72]

§ 295. Acceptance and Use of a Pass.—In some states the acceptance and use of a railroad pass is made a criminal or penal offense.[73] Under a statute making it unlawful to use or attempt to use any pass, "which, by conditions expressed thereon, is not transferable," a conviction can not be had for the use of a pass which contains no other restriction as to transferability than the indorsement, "if presented by any other person than the person named thereon, the conductor will take up pass and collect fare."[74]

§ 296. Stealing or Attempting to Steal a Ride on Railroad Trains.—The legislature of a state has authority to pass an act making the stealing or attempting to steal a ride on railroad trains penal, as a measure conducive to the public safety, whether or not the ride so stolen is a subject-matter of larceny.[75] The provisions of certain statutes imposing a penalty for this offense have been interpreted by the courts.[76]

71. Power to prohibit sale of passenger tickets by brokers—New York doctrine.—Order 26 App. Div. 228, 50 N. Y. S. 56, reversed. Tyroler *v.* Warden of City Prison, 157 N. Y. 116, 51 N. E. 1006, 1018, 43 L. R. A. 264, 68 Am. St. Rep. 763.

Laws 1897, c. 506, § 1, prohibiting the sale of passenger tickets by persons not agents of the carrier, is not valid as a police regulation of carriers as quasi public corporations. Order 26 App. Div. 228, 50 N. Y. S. 56, reversed. Tyroler *v.* Warden of City Prison, 157 N. Y. 116, 51 N. E. 1006, 1018, 43 L. R. A. 264, 68 Am. St. Rep. 763.

Nor is such act valid as a police regulation of the manner in which the business of ticket brokerage may be conducted. Order 26 App. Div. 228, 50 N. Y. S. 56, reversed. Tyroler *v.* Warden of City Prison, 157 N. Y. 116, 51 N. E. 1006, 1018, 43 L. R. A. 264, 68 Am. St. Rep. 763.

Laws 1901, c. 639, prohibiting private individuals from selling railroad tickets, and forbidding the officers of a common carrier from supplying tickets for sale to any other than an authorized agent, is not a valid exercise of the power of the legislature to regulate the conduct of a railroad company's business because it is a creation of the legislature and a common carrier. Order 64 App. Div. 46, 71 N. Y. S. 654, affirmed. Fleischman *v.* Caldwell, 168 N. Y. 671, 61 N. E. 1132.

Nor is such statute valid as a police regulation of the ticket-brokerage business, since it does not tend to promote the health, comfort, or welfare of society. Order 64 App. Div. 46, 71 N. Y. S. 654, affirmed. Fleischman *v.* Caldwell, 168 N. Y. 671, 61 N. E. 1132.

72. Texas doctrine.—Jannin *v.* State, 42 Tex. Cr. App. 631, 51 S. W. 1126, 62 S. W. 419, 96 Am. St. Rep. 821, so holding as to Laws 1893, p. 97.

73. Acceptance and use of a railroad pass.—A contract between a railroad company and a physician, by which he is to receive for professional services rendered by him for the railroad $25 per month, and an annual pass over defendant's road, where the physician does not spend a major portion of his time in the employment of the company, is prohibited by Cobbey's St. 1907, §§ 10,664, 10,665, and the acceptance and use of such pass by the physician renders him guilty of a violation of these sections. State *v.* Martyn, 82 Neb. 225, 117 N. W. 719.

74. Use of a nontransferable pass.—Allardt *v.* People, 197 Ill. 501, 64 N. E. 533, construing Act June 10, 1897.

75. Power to make stealing a ride on trains penal.—Pressley *v.* State, 118 Ga. 315, 45 S. E. 395.

76. Interpretation of statutes penalizing stealing or attempting to steal a ride.—Accused, charged with having stolen a ride on a railroad train in violation of the Georgia statute, having admitted that he concealed himself on the train for the purpose of avoiding the payment of fare and stealing a ride, his conviction was demanded. Pressley *v.* State, 118 Ga. 315, 45 S. E. 395.

If one conceals himself on a train or in a car for the purpose of avoiding payment of his fare, he is guilty of attempting to steal a ride, within the Georgia statute, Van Epps' Code Supp., § 6662, if removed before the journey began, or of actually stealing a ride if he remained in the car until after the journey commenced. Mack *v.* State, 119 Ga. 352, 46 S. E. 437.

But if one should conceal himself in a car for some purpose other than that of avoiding the payment of his fare, he would not be guilty of stealing a ride,

§ 297. Obstructing Train and Endangering Safety of Passengers.—An indictment for obstructing a railroad train, and endangering the safety of the passengers, can not be maintained against a passenger who, from whatever motive, pulled a signal rope attached to a bell upon the engine, and thereby caused the train to be stopped and the safety of the passengers to be endangered.[77]

§ 298. Indictment, Accusation, or Complaint.—Cases passing upon the sufficiency of the indictment, accusation or complaint in prosecutions for offenses by persons dealing with carriers or using their conveyances, will be found in the appended note.[78]

within the meaning of such statute. Mack *v.* State, 119 Ga. 352, 46 S. E. 437.

Nor would one be guilty of attempting to steal a ride if he openly entered and remained in a car with no intent to pay his fare. Mack *v.* State, 119 Ga. 352, 46 S. E. 437.

Where one without fare or ticket is ordered by the conductor to leave the train, but conceals himself and continues his journey, he is guilty of violating the Georgia statute, Acts 1897, p. 116. Brazzell *v.* State, 119 Ga. 559, 46 S. E. 837.

77. **Obstructing train and endangering safety of passengers.**—Commonwealth *v.* Killian, 109 Mass. 345, 12 Am. Rep. 714.

78. **Boarding train with intent to obtain free ride—Indictment sufficient.**—Under the Texas statute, Pen. Code, art. 1010h, declaring that any person boarding a passenger, freight, or other railway train with no lawful business thereon, with intent to obtain a free ride, without the consent of the person in charge thereof, shall be guilty, etc., an indictment charging that defendant unlawfully boarded a passenger and freight train on a certain railroad was not objectionable for failure to sufficiently charge that "defendant boarded a railway train." Daugherty *v.* State, 41 Tex. Cr. App. 661, 56 S. W. 620.

Attempting to steal a ride—Accusation sufficient to withstand general demurrer.—An accusation charging M. with a misdemeanor, in that he fraudulently concealed himself in a car of a railroad company for the purpose of avoiding the payment of fare and stealing a ride, under the Georgia statute, Van Epps' Code Supp., § 6662, was sufficient to withstand a general demurrer. Mack *v.* State, 119 Ga. 352, 46 S. E. 437.

Avoiding payment of fare—Complaint insufficient.—A violation of the New Jersey statute, Revision, p. 912, § 18, cl. 2, forbidding any person who has paid his fare for a certain distance to proceed in any railway carriage beyond such distance without paying fare, and with intent to avoid payment thereof, can not be proved under a complaint alleging that the defendant traveled in a railway carriage without having previously paid his fare, with intent to avoid payment thereof, in violation of clause 1. Harris *v.* New Jersey Cent. R. Co., 58 N. J. L. 282, 33 Atl. 799.

CHAPTER III.

Rules and Regulations of Carriers.

I. Scope of Treatment, § 299.

II. Carriers of Goods, §§ 300-306.

A. General Statement, § 300.
B. Particular Rules and Regulations, § 301.
C. Changing or Modifying, § 302.
D. Operation and Effect as to Carrier, § 303.
E. Duty of Agents to Enforce, § 304.
F. Waiver of Regulations, § 305.
G. Proof of Regulations, § 306.

III. Carriers of Passengers, §§ 307-332.

A. Right to Make and Enforce Rules and Regulations, §§ 307-318.
a. In General, §§ 307-311.
(1) General Rule, § 307.
(2) Soliciting Business in Cars, § 308.
(3) Use of Station Premises by Local Carriers and Others, § 309.
(4) Tickets and Fares, § 310.
(5) Enforcement of Rules and Regulations, § 311.
b. Must Be Reasonable, § 312.
c. Must Not Be Contrary to Law, § 313.
d. Must Not Discriminate, § 314.
e. Their Reasonableness as Question of Law, § 315.
f. Their Reasonableness as Mixed Question of Law and Fact, § 316.
g. Their Reasonableness Question for Jury, § 317.
h. Their Sufficiency Is Question for Jury, § 318.
B. Notice of Rules and Regulations, §§ 319-323.
a. Passenger's Contract Rights Not Affected by Rules of Which He Was Not Chargeable with Notice, § 319.
b. Duty of Passenger to Inform Himself of Existence of Rules, § 320.
c. Sufficiency of Publication or Notice, § 321.
d. Bound by Rules of Which He Was in Ignorance, § 322.
e. Rules for Conduct of Carrier's Employees, § 323.
C. Enforcement of Rules and Regulations, §§ 324-326.
a. Enforcement Must Be Reasonable, § 324.
b. Ejection of Passengers, § 325.
c. Enforcement by Punishing Prior Breach, § 326.
D. Waiver of Rules and Regulations, §§ 327-328.
a. Habitual Failure to Enforce, § 327.
b. Passenger's Duty to Conform to Rules as Affected by Lack of Fidelity in Enforcing, § 328.
E. Contributory Negligence of Passenger in Not Conforming to Rules and Regulations, § 329.
F. Carrier Bound by Its Own Rules, §§ 330-332.
a. In General, § 330.
b. Rules Not Required by Law, § 331.
c. Rules Requiring More of Carrier than Law, § 332.

§ 299. Scope of Treatment.—This chapter is intended to include merely the bare right of carriers to make and enforce rules and regulations for the conduct of its business and for the protection of its interests. The rights of a

carrier with reference to particular rules and regulations will be taken up under the appropriate chapters.[1]

§§ 300-306. Carriers of Goods—§ 300. General Statement.—A common carrier of goods, live stock, etc., has power to make and enforce reasonable rules and regulations governing the conduct of its own business,[2] taking into consideration its duty to the public and the convenience of the public as well as the safety and expedition of its business.[3] It is well known and understood that railroad companies act only through their agents; that it is necessary for them to adopt rules and regulations for the guidance of such agents; and it is generally understood that persons dealing with such corporations are to be governed by these rules and regulations, if fair and reasonable.[4] But a carrier can not make and enforce rules and regulations which are violative of the law, without carrying liability to the persons injured by their enforcement.[5]

Reasonableness of Rules.—The most vital essential of all rules and regulations made by carriers for the conduct of their business is that they operate reasonably and without discrimination as to shippers.[6] If a rule is necessary and indispensable, it is reasonable. It might, indeed, be reasonable without being necessary. But, to be reasonable, it must be reasonable as respects both parties.[7] Rules of carriers, it has been said, are presumptively reasonable and just.[8] But it has also been said that whether or not such rules are in any case reasonable, is a question to be determined according to all the circumstances of the case.[9]

1. **Scope of treatment—Rights as to particular rules.**—As to rights in regard to receiving goods for shipment, see post, "Duty to Receive and Carry," chapter 4. As to when liability commences and as to delivery to carriers, see post, "When Liability Commences," chapter 5. As to rights in regard to bills of lading, see post, "Bills of Lading," chapter 6. As to rights in regard to transportation and delivery, see post, "Transportation and Delivery by Carrier," chapter 10. As to rights in regard to charges and liens, see post, "Charges and Liens," chapter 15. As to rules and regulations in regard to live stock, see post, "Rights, Duties and Liabilities," chapter 19. As to rules and regulations with reference to passengers, see post, "Carriers of Passengers," part IV. As to rules and regulations made and enforced by connecting carriers, see post, "Connecting Carriers," part V. As to rules and regulations as affected by the power to regulate and control interstate commerce, see post, "Interstate and International Commerce," part VI. As to rules and regulations by carriers by water, see post, "Carriers by Water," part VII.

2. **Rules and regulations.**—Harp *v.* Choctaw, etc., R. Co., 61 C. C. A. 405, 125 Fed. 445, affirming 118 Fed. 169; Robinson *v.* Baltimore, etc., R. Co., 64 C. C. A. 281, 129 Fed. 753; Chicago, etc., R. Co. *v.* Colby, 69 Neb. 572, 96 N. W. 145; Houston, etc., R. Co. *v.* Moore, 49 Tex. 31, 30 Am. Rep. 98; Platt *v.* LeCocq, 85 C. C. A. 621, 158 Fed. 723, 15 L. R. A., N. S., 558.

3. Southern Exp. Co. *v.* Rose Co., 124 Ga. 581, 53 S. E. 185, 5 L. R. A., N. S., 619; Inman & Co. *v.* Seaboard, etc., R. Co., 159 Fed. 960.

4. Chicago, etc., R. Co. *v.* Colby, 69 Neb. 572, 96 N. W. 145.

5. **Rules violative of law.**—Eddy *v.* Rider, 79 Tex. 53, 15 S. W. 113.

6. **Reasonableness — Discrimination.**—Chicago, etc., R. Co. *v.* Colby, 69 Neb. 572, 96 N. W. 145; Houston, etc., R. Co. *v.* Moore, 49 Tex. 31, 30 Am. Rep. 98.

A requirement of a railroad company which is not a reasonable one, can not be enforced. Johnson *v.* Three Hundred and Eighteen, and One-Half Tons of Coal, Fed. Cas. No. 14,010, 14 Blatchf. 453, 44 Conn. 548.

What is a reasonable provision by a carrier for the transportation of coal depends on the facts of each case. State *v.* White Oak R. Co., 65 W. Va. 15, 64 S. E. 630, 28 L. R. A., N. S., 1013.

7. Johnson *v.* Three Hundred and Eighteen and One-Half Tons of Coal, Fed. Cas. No. 14,010, 14 Blatchf. 453, 44 Conn. 548.

8. **Presumption as to reasonableness.**—Platt *v.* LeCocq, 85 C. C. A. 621, 158 Fed. 723, 15 L. R. A., N. S., 558, reversed in 150 Fed. 391.

Provisions which a carrier had determined, before the issuance of an alternative writ, to compel it to make reasonable provision for the transportation of coal, were proper, will be presumed such as may be required of the carrier, at least until a different showing is made. State *v.* White Oak R. Co., 65 W. Va. 15, 64 S. E. 630, 28 L. R. A., N. S., 1013.

9. **Dependent on circumstances.**—Texas, etc., R. Co. *v.* Currie, 33 Tex. Civ. App. 277, 76 S. W. 810.

Question of Law or Fact.—The reasonableness of rules and regulations of a common carrier for the reception and classification of freight is a question of law for the court.[10]

§ 301. Particular Rules and Regulations.—Stations and Facilities.—In the absence of statutory provision, a carrier's location of necessary stations and facilities is somewhat discretionary with it.[11]

Separation of Freight and Passengers.—A carrier may make and enforce a regulation for carrying passengers and freight on separate trains if such regulation is reasonable and sufficient accommodations furnished for each class.[12]

Time, Place, and Manner of Receiving.—A carrier may make reasonable rules in regard to time,[13] place,[14] and manner[15] of receiving such goods for shipment as it professes to carry. The carrier may provide for receiving one article at one place and require other articles to be delivered somewhere else, so long as the place of receiving is a reasonable one.[16] It has been held that a railroad has no right to make and enforce a rule which is one of general convenience only, and not made necessary by the state of the traffic at that place.[17]

Classification and Preparation.—A common carrier may make reasonable rules and regulations for the classification and suitable preparation of articles for shipment.[18] In the absence of statutory interposition and regulation, a carrier may establish and promulgate reasonable rules and regulations governing the manner in which they shall be packed and prepared for shipment.[19]

Time, Place and Manner of Delivering Freight.—The rule as to the right of carriers of goods to make reasonable regulations for the conduct of its

10. **Question of law or fact.**—Chicago, etc., R. Co. *v.* Colby, 69 Neb. 572, 96 N. W. 145.

"Their reasonableness is a question of law for the court to decide. Rorer on Railroads, 227; Illinois Cent. R. Co. *v.* Whittemore, 43 Ill. 420, 92 Am. Dec. 138; Vedder *v.* Fellows, 20 N. Y. 126; Tracy *v.* New York, etc., R. Co., 9 Bosw. 396. In Illinois Cent. R. Co. *v.* Whittemore, supra, the court said: 'The circuit court left it to the jury to say whether the rule was reasonable. This was error. It was proper to admit testimony as was done, but, either with or without this testimony, it was for the court to say whether the regulation was reasonable, and therefore obligatory upon the passengers. The necessity of holding this to be a question of law, and therefore within the province of the court to settle, is apparent from the consideration that it is only by so holding that fixed and permanent regulations can be established. If this question is to be left to juries, one rule would be applied by them to-day, and another to-morrow.'" Chicago, etc., R. Co. *v.* Colby, 69 Neb. 572, 96 N. W. 145.

11. **Stations and facilities.**—Chicago, etc., R. Co. *v.* Baugh, 175 Ind. 419, 94 N. E. 571. See post, "When Liability Commences," chapter 5.

12. **Separation of freight and passengers.**—Houston, etc., R. Co. *v.* Moore, 49 Tex. 31, 30 Am. Rep. 98. See post, "Relation of Carrier and Passenger," chapter 21.

13. **Time.**—Harp *v.* Choctaw, etc., R. Co., 61 C. C. A. 405, 125 Fed. 445; Chicago, etc., R. Co. *v.* Colby, 69 Neb. 572, 96 N. W. 145. See post, "When Liability Commences," chapter 5.

14. **Place.**—Harp *v.* Choctaw, etc., R. Co., 61 C. C. A. 405, 125 Fed. 445; Robinson *v.* Baltimore, etc., R. Co., 64 C. C. A. 281, 129 Fed. 753.

15. **Manner.**—Harp *v.* Choctaw, etc., R. Co., 61 C. C. A. 405, 125 Fed. 445; Robinson *v.* Baltimore, etc., R. Co., 64 C. C. A. 281, 129 Fed. 753; Northwestern Warehouse Co. *v.* Oregon R., etc., Co., 159 Fed. 975. See post, "Duty to Receive and Carry," chapter 4.

16. Where a carrier had designated a certain siding as the place at which it would receive coal for transportation, and such siding was not an unreasonable place, a shipper was not entitled to compel the carrier to receive coal from him at another siding, where merchandise other than coal was received, merely because the place so designated was not so accessible to such shipper. Robinson *v.* Baltimore, etc., R. Co., 64 C. C. A. 281, 129 Fed. 753.

17. **Rule of convenience.**—Johnson *v.* Three Hundred and Eighteen and One-Half Tons of Coal, Fed. Cas. N. 14,010, 14 Blatchf. 153, 44 Conn. 548.

18. **Classification and preparation.**—Chicago, etc., R. Co. *v.* Colby, 69 Neb. 572, 96 N. W. 145. See post, "Duty to Receive and Carry," chapter 4; "When Liability Commences," chapter 5.

19. **Packing and preparation.**—Northwestern Warehouse Co. *v.* Oregon R., etc., Co., 159 Fed. 975.

business, applies to the delivery of the goods by the carrier to the shipper.[20] A railway company has the right to require persons hauling freight from its depot to receive the same on the platform from its servants and not to enter the warehouse for the purpose of checking off the freight; and also to require that persons doing business with the company shall transact the same over the counter, and not enter behind it. Such regulations are reasonable.[21] But if such regulations are unnecessary and put shippers to delay and expense they are unreasonable and not enforceable.[22]

Running of Trains and Time.—Although a carrier can not refuse to carry such property as is generally carried, it must have the right to carry it on trains made up by itself and running on its own time. It can not be required to make up special trains on demand or drive such trains made up entirely by other persons, or of their cars.[23] A carrier has the right to say what time its trains take to make the trip between particular stations, but such rule must be reasonable and can not limit the carrier's liability for delay in transportation.[24]

§ 302. Changing or Modifying.—A carrier of goods has the right to change or modify the rules and regulations it has promulgated for the running of its business, provided it gives the public reasonable notice of such changes.[25] It has been held that shippers have no vested right to continue to load in a particular manner, when conditions have so changed as to render it an inconvenience to the carrier.[26]

§ 303. Operation and Effect as to Carrier.—Railroad companies may also make reasonable regulations of their own for the management and running of their trains, or they may follow general customs in such management and running which, when established, known, and acted on by the public, may impose upon the companies duties in reference to others, a breach of which, to their injury, might render such companies liable to damages.[27]

§ 304. Duty of Agents to Enforce.—It is the duty of a carrier's agent to enforce the rules and regulations prescribed by the carrier for the conduct of its business, but not to give reason why such regulations were made.[28] And if

20. Delivery of goods.—Chicago, etc., R. Co. *v.* Colby, 69 Neb. 572, 96 N. W. 145. See post, "Transportation and Delivery by Carrier," chapter 10.

21. Donovan *v.* Texas, etc., R. Co., 64 Tex. 519.

22. Unnecessary delay and expense.—Donovan *v.* Texas, etc., R. Co., 64 Tex. 519.

23. Running of trains and time.—Coup *v.* Wabash, etc., R. Co., 56 Mich. 111, 22 N. W. 215, 56 Am. Rep. 374; Chicago, etc., R. Co. *v.* Colby, 69 Neb. 572, 96 N. W. 145.

24. Time of trip.—Texas, etc., R. Co. *v.* Currie, 33 Tex. Civ. App. 277, 76 S. W. 810. See post, "Delay in Transportation and Delivery," chapter 11.

25. Notice of changes.—Harp *v.* Choctaw, etc., R. Co., 61 C. C. A. 405, 125 Fed. 445; Robinson *v.* Baltimore, etc., R. Co., 64 C. C. A. 281, 129 Fed. 753; Northwestern Warehouse Co. *v.* Oregon R., etc., Co., 159 Fed. 975.

26. No vested right.—A railroad company having a newly constructed line through a locality underlaid with coal, by permitting owners of mines to load cars with coal from wagons on its side track at two small stations for a number of months, did not give them a vested right to continue such manner of loading, nor lose its common-law right to change its regulation, and refuse longer to receive coal for shipment in such manner when the volume of its business became such that to permit the use of its station tracks for loading cars in that manner would not only interfere with the operation of its trains, and cause it loss and inconvenience, but would also, by reason of the slowness of the method, result in serious loss and inconvenience to other shippers and the public by greatly reducing the quantity of coal which the road could handle and transport below what it might if loaded by the use of modern appliances, as was the case at all other shipping points on its line. Judgment 118 Fed. 169, affirmed. Harp *v.* Choctaw, etc., R. Co., 61 C. C. A. 405, 125 Fed. 445.

27. Operation and effect as to carrier.—Texas, etc., R. Co. *v.* Murphy, 46 Tex. 356, 26 Am. Rep. 272.

28. Duty of agents to enforce.—Donovan *v.* Texas, etc., R. Co., 64 Tex. 519.

an agent in giving such reasons, use actionable language, he and not the carrier is liable.[29]

§ 305. Waiver of Regulations.—Although a carrier may make reasonable regulations for the conduct of its business it may waive a compliance therewith, and this has been held to have been done where the carrier habitually permitted the violation of such rules.[30]

§ 306. Proof of Regulations.—It will be presumed as a general rule that a carrier has some regulation or is governed uniformly by some custom, in reference to a particular purpose.[31] But the facts involved in such regulations and customs, upon which duties would arise, not being matters known to the court, have to be proved as other facts, where a breach of such duties might become the subject-matter of a suit for damages.[32]

§§ 307-332. Carriers of Passengers—§§ 307-318. Right to Make and Enforce Rules and Regulations—§§ 307-311. In General—§ 307. General Rule.—A carrier of passengers has the right to prescribe and enforce all necessary and proper regulations for the government of their trains, the transportation of passengers, and the protection of their own rights as well as those of the passengers, when such regulations are not inconsistent with the law of the land, unreasonable, or opposed to the rights of the citizen.[33]

29. **Liability for actionable language.**—Donovan *v.* Texas, etc., R. Co., 64 Tex. 519.

30. **Waiver of regulations.**—"It may be true, where a railroad company habitually permits passengers to travel on its freight trains, notwithstanding it may by regulation prohibit it, that the company will incur the same responsibility to such passengers as if they were on the regular passenger car." Houston, etc., R. Co. *v.* Moore, 49 Tex. 31, 30 Am. Rep. 98.

31. **Proof of regulations.**—Texas, etc., R. Co. *v.* Murphy, 46 Tex. 356, 26 Am. Rep. 272.

32. Texas, etc., R. Co. *v.* Murphy, 46 Tex. 356, 26 Am. Rep. 272.

33. **General rule.**—*United States.*—Gray *v.* Cincinnati, etc., R. Co., 11 Fed. 683; Railroad Co. *v.* Fraloff, 100 U. S. 24, 25 L. Ed. 531.

Alabama.—Birmingham R., etc., Co. *v.* Yielding, 155 Ala. 359, 30 R. R. R. 285, 53 Am. & Eng. R. Cas., N. S., 285, 46 So. 747; Birmingham R., etc., Co. *v.* McDonough, 153 Ala. 122, 26 R. R. R. 618, 49 Am. & Eng. R. Cas., N. S., 618, 44 So. 960, 13 L. R. A., N. S. 445; Evans *v.* Memphis, etc., R. Co., 56 Ala. 246, 28 Am. Rep. 771.

Arkansas.—Landrigan *v.* State, 31 Ark. 50, 25 Am. Rep. 547; St. Louis, etc., R. Co. *v.* Adcock, 52 Ark. 406, 12 S. W. 874.

District of Columbia.— Watkins *v.* Pennsylvania R. Co., 10 Mackey (21 D. C.), 1 52 Am. & Eng. R. Cas., N. S., 159.

Georgia.—Central, etc., R. Co. *v.* Motes, 117 Ga. 923, 43 S. E. 990, 7 R. R. R. 161, 30 Am. & Eng. R. Cas., N. S., 161, 2 L. R. A., N. S., 507; Coyle *v.* Southern R. Co., 112 Ga. 121, 37 S. E. 163; Fluker *v.* Georgia R., etc., Co., 81 Ga. 461, 8 S. E. 529, 2 L. R. A. 843, 12 Am. St. Rep. 328; Kates *v.* Atlanta Baggage, etc., Co., 107 Ga. 636, 34 S. E. 372, 46 L. R. A. 431; Nunn *v.* Georgia Railroad, 71 Ga. 710, 51 Am. Rep. 284; Central R., etc., Co. *v.* Strickland, 90 Ga. 562, 16 S. E. 352; Macon, etc., R. Co. *v.* Johnson, 38 Ga. 409; Southern R. Co. *v.* Watson, 110 Ga. 681, 18 Am. & Eng. R. Cas., N. S., 209, 36 S. E. 209.

Illinois.—Chicago, etc., R. Co. *v.* Flagg, 43 Ill. 364, 92 Am. Dec. 133; Chicago, etc., R. Co. *v.* Williams, 55 Ill. 185; Chicago, etc., R. Co. *v.* McLallen, 84 Ill. 109; Toledo, etc., R. Co. *v.* Williams, 77 Ill. 354.

Iowa.—State *v.* Chovin, 7 Iowa 204.

Kansas.—Brown *v.* Kansas City, etc., R. Co., 38 Kan. 634, 16 Pac. 942.

Kentucky.—Louisville, etc., R. Co. *v.* Miles, 100 Ky. 84, 18 Ky. L. Rep. 580, 37 S. W. 486.

Louisiana.—Decuir *v.* Benson, 27 La. Ann. 1.

Maryland.—Baltimore, etc., R. Co. *v.* Carr, 71 Md. 135, 17 Atl. 1052; Northern Cent. R. Co. *v.* O'Conner, 76 Md. 207, 24 Atl. 449, 16 L. R. A. 449, 35 Am. St. Rep. 422.

Massachusetts.—Renaud *v.* New York, etc., R. Co. (Mass.), 44 R. R. R. 632, 67 Am. & Eng. R. Cas., N. S., 632, 97 N. E. 98; Commonwealth *v.* Power (Mass.), Hull *v.* Boston, etc., Railroad, 210 Mass. 159, 96 N. E. 58, 44 R. R. R. 15, 67 Am. & Eng. R. Cas., N. S., 15, 36 L. R. A., N. S., 406, Ann. Cas. 1912 C, 1147; Tompkins *v.* Boston, etc., R. Co., 201 Mass. 114, 32 R. R. R. 487, 55 Am. & Eng. R. Cas., N. S., 487, 87 N. E. 488, 20 L. R. A., N. S., 1063.

Michigan.—Day *v.* Owen, 5 Mich. 520, 72 Am. Dec. 62; Kalamazoo Hack, etc., Co. *v.* Sootsma, 84 Mich. 194, 47 N. W. 667, 10 L. R. A. 819, 22 Am. St. Rep. 693; Greenfield *v.* Detroit, etc., R. Co., 133

Benefit of Passengers.—Whatever rules tend to promote the comfort, order, and safety of railroad passengers, the company is authorized to make and enforce.[34]

Government of Carrier's Employees.—A railroad company has a right to prescribe reasonable rules for the government of its employees in the conduct of its business upon its trains.[35]

Need Not Be Embraced in By-Laws.—A railroad company has authority to make and enforce reasonable regulations for the conduct of all persons using the railroad or resorting to its depots, without prescribing such regulations by by-laws.[36]

Authority of Superintendent.—The superintendent of a railroad has authority, by delegation, to make and enforce reasonable regulations for the conduct of all persons using the railroad or resorting to its depots.[37]

§ 308. Soliciting Business in Cars.—A railroad company, for its own convenience in carrying on its business in an orderly manner, and to prevent its passengers from being annoyed, may make and enforce a reasonable regulation prohibiting persons from entering its cars to solicit business from passengers.[38] The dominion of a railroad corporation over its trains, tracks and "right of way" is no less complete or exclusive than that which every owner has

Mich. 557, 8 R. R. R. 271, 31 Am. & Eng. R. Cas., N. S., 271, 95 N. W. 546.

Montana.—Doherty *v.* Northern Pac. R. Co., 43 Mont. 294, 41 R. R. R. 210, 64 Am. & Eng. R. Cas., N. S., 210, 115 Pac. 401, 36 L. R. A., N. S., 1139.

New Hampshire.—Johnson *v.* Concord R. Corp., 46 N. H. 213, 88 Am. Dec. 199.

New York.—Avery *v.* New York Cent. R. Co., 121 N. Y. 31, 24 N. E. 20; Peck *v.* New York, etc., R. Co., 70 N. Y. 587; Rowe *v.* Brooklyn Heights R. Co., 71 App. Div. 474, 75 N. Y. S. 893.

North Carolina.—McRae *v.* Wilmington, etc., R. Co., 88 N. C. 526, 43 Am. Rep. 745.

Ohio.—Crawford *v.* Cincinnati, etc., R. Co., 26 O. St. 580; Cleveland, etc., R. Co. *v.* Bartram, 11 O. St. 457; Shelton *v.* Lake Shore, etc., R. Co., 7 O. Dec. 161, 1 W. L. Bull. 190, affirmed in 29 O. St. 214; Corry *v.* Cincinnati, etc., R. Co., 3 O. Dec. 82; L. S. & M. S. R. Co. *v.* Mortal, 18 O. C. C. 562, 8 O. C. D. 134.

Oklahoma.—Decker *v.* Atchison, etc., R. Co., 3 Okla. 553, 41 Pac. 610; St. Louis, etc., R. Co. *v.* Johnson, 25 Okla. 833, 108 Pac. 378, 36 R. R. R. 165, 59 Am. & Eng. R. Cas., N. S., 165.

Pennsylvania.—Muldowney *v.* Pittsburg etc., Tract. Co., 8 Pa. Super. Ct. 335; Reese *v.* Pennsylvania R. Co., 131 Pa. 422, 19 Atl. 72, 6 L. R. A. 529, 17 Am. St. Rep. 818; Robb *v.* Pittsburg, etc., R. Co., 14 Pa. Super. Ct. 282; West Chester, etc., R. Co. *v.* Miles, 55 Pa. 209, 93 Am. Dec. 744.

South Carolina.—Black *v.* Atlantic, etc., R. Co., 82 S. C. 478, 32 R. R. R. 603, 55 Am. & Eng. R. Cas., N. S., 603, 64 S. E. 418; Funderburg *v.* Augusta, etc., R. Co., 81 S. C. 141, 30 R. R. R. 281, 53 Am. & Eng. R. Cas., N. S., 281, 21 L. R. A., N. S., 868, 61 S. E. 1075.

Tennessee.—Knoxville Tract. Co. *v.* Wilkerson, 117 Tenn. 482, 22 R. R. R. 763, 45 Am. & Eng. R. Cas., N. S., 763, 99 S. W. 992, 10 Am. & Eng. Ann. Cas. 641, 9 L. R. A., N. S., 579; Louisville, etc., R. Co. *v.* Turner, 100 Tenn. 213, 47 S. W. 223, 43 L. R. A. 140; Summitt *v.* State, 76 Tenn. (8 Lea) 413, 41 Am. Rep. 637; Trotlinger *v.* East Tennessee, etc., R. Co., 79 Tenn. (11 Lea) 533.

Texas.—Eddy *v.* Rider, 79 Tex. 53, 15 S. W. 113; Gulf, etc., R. Co. *v.* Moody, 3 Tex. Civ. App. 622, 22 S. W. 1009; Houston, etc., R. Co. *v.* Moore, 49 Tex. 31, 30 Am. Rep. 98; Texas, etc., R. Co. *v.* Hayden, 6 Tex. Civ. App. 745, 26 S. W. 331; Texas, etc., R. Co. *v.* Pearl, 3 Texas App. Civ. Cas., § 4.

Virginia.—Norfolk, etc., R. Co. *v.* Wysor, 82 Va. 250.

Washington.—Kirk *v.* Seattle Elect. Co., 58 Wash. 283, 37 R. R. R. 493, 60 Am. & Eng. R. Cas., N. S., 493, 108 Pac. 604, 31 L. R. A., N. S., 991; Olson *v.* Northern Pac. R. Co., 49 Wash. 626, 29 R. R. R. 705, 52 Am. & Eng. R. Cas., N. S., 705, 96 Pac. 150, 18 L. R. A., N. S., 209.

West Virginia.—Boston *v.* Chesapeake, etc., R. Co., 36 W. Va. 318.

Wisconsin.—Plott *v.* Chicago, etc., R. Co., 63 Wis. 511, 23 N. W. 412.

34. **Benefit of passengers.**—Chicago, etc., R. Co. *v.* Williams, 55 Ill. 185.

35. **Government of carrier's employees.**—Crawford *v.* Cincinnati, etc., R. Co., 26 O. St. 580.

36. **By-Laws.**—Commonwealth *v.* Power (Mass.), 7 Metc. 596, 41 Am. Dec. 465.

37. **Authority of superintendent.**—Commonwealth *v.* Power (Mass.), 7 Metc. 596, 41 Am. Dec. 465.

38. **Soliciting business in cars.**—Jencks *v.* Coleman, Fed. Cas. No. 7258, 2 Sumn. 221; Commonwealth *v.* Power (Mass.), 7 Metc. 596, 41 Am. Dec. 465.

over his own property. Hence, the corporation may exclude whom it pleases, when they come to transact their own private business with passengers or other third persons, and admit whom it pleases, when they come to transact such business. This applies to selling lunches to, or soliciting orders from, passengers for the sale of lunches.[39]

§ 309. Use of Station Premises by Local Carriers and Others.—In General.—A railroad company may either exclude hackmen and other local carriers from its depot premises or regulate, in a reasonable manner, their use of such premises.[40] And the company has also the right to exclude from its premises all persons going thereon for the purpose of transacting private business, or it may extend the privilege of so doing to one and refuse it to another without violating any principle of law which governs the conduct of carriers and regulates their duty to the public.[41]

Exclusion of Local Carriers from Depot.—A regulation forbidding hackmen and expressmen from coming within a passenger depot is reasonable.[42]

Soliciting Patronage for Hotel on Depot Platform.—Where an innkeeper, or his agent in violation of a regulation of the railroad company, comes upon its depot platform for the purpose of soliciting patronage for his hotel, he may be ejected.[43]

Peddlers and Loafers.—And a regulation forbidding peddlers and loafers from coming within a passenger depot is reasonable and enforceable.[44]

Exclusion from Depot for Supposed Violation of Regulations.—The superintendent of a railroad depot, however, has no right to order a person to leave the depot, and not come there any more, and to remove him therefrom by force, if he does come, merely because such person, in the judgment of the superintendent, but without proof of the fact, had violated regulations established by the railroad company.[45]

Grant of Exclusive Privileges to Local Carriers.—If a railway company in good faith complies with its duty to afford proper facilities for persons entering its stations to purchase tickets and take passage and to check their baggage, and also like facilities for leaving the station and securing their baggage, it does not violate any public duty or deprive any citizen of any lawful right by granting to a single corporation or individual the exclusive right of entering its trains to solicit the transportation of passengers and baggage, or by renting to such corporation or individual a portion of its baggage room and conceding

39. **Soliciting orders for lunches.**—Fluker *v.* Georgia R., etc., Co., 81 Ga. 461, 8 S. E. 529, 2 L. R. A., 843, 12 Am. St. Rep. 328.

40. *England.*—Beadell *v.* Eastern Counties R. Co. (Eng.), 2 C. B., N. S., 509; Painter *v.* London, etc., R. Co. (Eng.), 2 C. B., N. S., 702.

Indiana.—Lucas *v.* Herbert, 148 Ind. 64, 47 N. E. 146, 37 L. R. A. 376.

Massachusetts.—Old Colony R. Co. *v.* Tripp, 147 Mass. 35, 17 N. E. 89, 9 Am. St. Rep. 661.

Michigan.—Cole *v.* Rowen, 88 Mich. 219, 50 N. W. 138, 13 L. R. A. 848; Kalamazoo Hack, etc., Co. *v.* Sootsma, 84 Mich. 194, 47 N. W. 667, 10 L. R. A. 819, 22 Am. St. Rep. 693.

New York.—Barney *v.* Oyster Bay, etc., Co., 67 N. Y. 301, 23 Am. Rep. 115.

Ohio.—State *v.* Union Depot Co., 71 O. St. 379, 16 R. R. R. 614, 39 Am. & Eng. R. Cas., N. S., 614, 73 N. E. 633, 68 L. R. A. 792.

Pennsylvania.—Smith *v.* New York, etc., R. Co., 149 Pa. 249, 24 Atl. 304.

Rhode Island.—Griswold *v.* Webb, 16 R. I. 649, 19 Atl. 143, 7 L. R. A. 302.

Tennessee.—Summitt *v.* State, 76 Tenn. (8 Lea) 413, 41 Am. Rep. 637.

Vermont.—Harris *v.* Stevens, 31 Vt. 79, 73 Am. Dec. 337.

41. Fluker *v.* Georgia R., etc., Co., 81 Ga. 461, 8 S. E. 529, 2 L. R. A. 843, 12 Am. St. Rep. 328; Kates *v.* Atlanta Baggage, etc., Co., 107 Ga. 636, 34 S. E. 372, 46 L. R. A. 431.

42. **Exclusion of local carriers from depot.**—Summitt *v.* State, 76 Tenn. (8 Lea) 413, 41 Am. Rep. 637.

43. **Soliciting patronage for hotel on depot platform.**—Landrigan *v.* State, 31 Ark. 50, 25 Am. Rep. 547.

44. **Peddlers and loafers.**—Summitt *v.* State, 76 Tenn. (8 Lea) 413, 41 Am. Rep. 637.

45. **Exclusion from depot for supposed violation of regulations.**—Hall *v.* Power (Mass.), 12 Metc. 482, 46 Am. Dec. 698.

to it or him the privileges necessarily incident to the occupancy and use thereof, provided that so doing does not interfere with the exercise by any other person of any right which he may lawfully demand of the company as a common carrier.[46] This is especially so when the grant is made in pursuance of a reasonable and proper regulation which in effect operates beneficially to its patrons.[47] Thus, a union depot company may grant to a transfer company the exclusive privilege of using the grounds, buildings and platforms of the station for the purpose of soliciting customers, and a regulation excluding therefrom all others engaged in a like business, excepting only for the purpose of delivering passengers or of calling for persons who have previously engaged them, is not unreasonable or invalid.[48]

Can Not Deprive Passenger of Choice of Vehicles.—Though a common carrier owning or controlling its terminals may exclude from them persons soliciting trade or hacking or expressing without its license, it can not deprive a passenger of the privilege of being carried from the terminus in a convenient and usual way, nor can it compel a passenger to take certain vehicles or none.[49]

§ 310. Tickets and Fares.—See post, "Fares, Tickets, Special Contracts, Transfers, etc.," chapter 22.

§ 311. Enforcement of Rules and Regulations.—See post, "Enforcement of Rules and Regulations," §§ 324-326.

§ 312. Must Be Reasonable.—To be binding upon a passenger, a rule or regulation of the carrier must be reasonable, and reasonably necessary to the proper conduct of the carrier's business.[50] And it may be stated that a carrier

46. Grant of exclusive privileges to local carriers.—Kates *v.* Atlanta Baggage, etc., Co., 107 Ga. 636, 34 S. E. 372, 46 L. R. A. 431.

47. Kates *v.* Atlanta Baggage, etc., Co., 107 Ga. 636, 34 S. E. 372, 46 L. R. A. 431.

48. Snyder *v.* Union Depot Co., 19 O. C. C. 368, 10 O. C. D. 645.

A union depot company organized under the Ohio statute in question, may grant a transfer company the exclusive right to use a designated portion of its depot grounds for the purpose of standing thereon its hacks and other vehicles, and of soliciting thereon the patronage of incoming passengers; and a rule of such depot company excluding therefrom all others engaged in a like business, except for the purpose of delivering passengers or of receiving passengers who shall have previously employed them, is a reasonable rule, and may be enforced so long as such transfer company provides and furnishes at such depot adequate accommodations in the way of vehicles to meet the reasonable requirements of the traveling public, and shall make no greater charge for its services than is made or may be permitted to be made by others for like services. State *v.* Union Depot Co., 71 O. St. 379, 16 R. R. R. 614, 39 Am. & Eng. R. Cas., N. S., 614, 73 N. E. 633, 68 L. R. A. 792.

49. Can not deprive passenger of choice of vehicles.—Griswold *v.* Webb, 16 R. I. 649, 19 Atl. 143, 7 L. R. A. 302.

50. Must be reasonable.—*England.*—Marriott *v.* London, etc., R. Co. (Eng.), 1 C. B., N. S, 499.

United States.—Railroad Co. *v.* Fraloff, 100 U. S. 24, 25 L. Ed. 531.

California.—Barrett *v.* Market St. R. Co., 81 Cal. 296, 22 Pac. 859, 6 L. R. A. 336, 15 Am. St. Rep. 61.

Florida.—Florida So. R. Co. *v.* Hirst, 30 Fla. 1, 11 So. 506, 16 L. R. A. 631, 32 Am. St. Rep. 17; South Florida R. Co. *v.* Rhoads, 25 Fla. 40, 5 So. 633, 3 L. R. A. 733, 23 Am. St. Rep. 506.

Georgia.—Central R., etc., Co. *v.* Strickland, 90 Ga. 562, 16 S. E. 352; Southern R. Co. *v.* Watson, 110 Ga. 681, 36 S. E. 209, 18 Am. & Eng. R. Cas., N. S., 209.

Illinois.—Chicago, etc., R. Co. *v.* Williams, 55 Ill. 185.

Iowa.—State *v.* Chovin, 7 Iowa 204.

Maryland.—Northern Cent. R. Co. *v.* O'Conner, 76 Md. 207, 24 Atl. 449, 16 L. R. A. 449, 35 Am. St. Rep. 422.

New Hampshire.—Johnson *v.* Concord R. Corp., 46 N. H. 213, 88 Am. Dec. 199.

New Jersey.—State *v.* Overton, 24 N. J. L. 435, 61 Am. Dec. 671.

New York. — Jenkins *v.* Brooklyn Heights R. Co., 29 App. Div. 8, 51 N. Y. S. 216, 5 N. Y. Ann. Cas. 315.

North Carolina.—McRae *v.* Wilmington, etc., R. Co., 88 N. C. 526, 43 Am. Rep. 745.

Pennsylvania.—Pittsburgh, etc., R. Co. *v.* Lyon, 123 Pa. 140, 16 Atl. 607, 2 L. R. A. 489, 10 Am. St. Rep. 517.

South Carolina.—Funderburg *v.* Au-

is entitled to make only such rules for conducting its affairs as are reasonable, not conflicting with any legal liability, and not exempting from liability for negligence or improper conduct. If the rules be such as described, they are binding on persons dealing with the carrier when notified thereof.[51] All regulations of a railroad company, however, will be deemed reasonable which are suitable to enable the company to perform the duties it undertakes, and to secure its own just rights in such employment, and also such as are necessary and proper to insure the safety and promote the comfort of passengers.[52]

Regulations Must Be Reasonable under the Existing Circumstances.—Regulations as to the time and manner in which passengers shall be transported will not be enforced by the courts except where they are reasonable, and whether or not they are in any case reasonable is a question to be determined according to all the circumstances of the case.[53]

Distinction between Right to Transportation and Right to Accommodation.—The right to be carried by a common carrier of passengers is a right superior to the rules and regulations of the carrier and can not be affected by them, but the accommodation of passengers, while being transported, is subject to such rules and regulations as the carrier may think proper to make, provided they be reasonable.[54]

Sleeping in Waiting Rooms.—In the absence of any duty devolving upon a railroad company to provide at its stations a place wherein its patrons may sleep while awaiting the arrival or departure of trains, a regulation forbidding passengers from going to sleep in its waiting rooms, or lying down on the benches therein, is not, in a legal sense, unreasonable.[55]

Carrier's Employees Forbidden to Occupy Front Seat of Open Car.—A rule of a street railway company that no employee of the company wearing its uniform shall occupy the front seat of one of its open cars while it is in operation is reasonable, in that it promotes the safety of passengers by preventing persons who, by reason of their common employment, are likely to converse with motorman, from doing so, and thus divert his attention from his duties.[56]

Wearing Uniform of Competitors Prohibited.—But a rule, adopted by a railroad company, which prohibited passengers from wearing the uniform cap of a line of steamers running in opposition to a line of steamers running in connection with the company's railroad was not reasonable, and therefore not binding on the public.[57]

§ 313. Must Not Be Contrary to Law.—It is essential to the validity of a rule or regulation for the conduct of the business of a common carrier of passengers that it should not be repugnant either to a statute or the common-law.[58]

gusta, etc., R. Co., 81 S. C. 141, 30 R. R. R. 281, 53 Am. & Eng. R. Cas., N. S., 281, 21 L. R. A., N. S., 868, 61 S. E. 1075.

Tennessee.—Summitt *v.* State, 76 Tenn. (8 Lea) 413, 41 Am. Rep. 637; Trotlinger *v.* East Tennessee, etc., R. Co., 79 Tenn. (11 Lea), 533.

Texas.—Houston, etc., R. Co. *v.* Moore, 49 Tex. 31, 30 Am. Rep. 98.

Virginia.—Norfolk, etc., R. Co. *v.* Wysor, 82 Va. 250.

West Virginia.—Boston *v.* Chesapeake, etc., R. Co., 36 W. Va. 318.

51. Norfolk, etc., R. Co. *v.* Wysor, 82 Va. 250.

52. State *v.* Chovin, 7 Iowa 204.

53. Existing circumstances. — Texas, etc., R. Co. *v.* Currie, 33 Tex. Civ. App. 277, 76 S. W. 810, affirmed in 97 Tex. 648, no op.

54. Distinction between right to transportation and right to accommodation. —Day *v.* Owen, 5 Mich. 520, 72 Am. Dec. 62.

55. Central, etc., R. Co. *v.* Motes, 117 Ga. 923, 43 S. E. 990, 7 R. R. R. 161, 30 Am. & Eng. R. Cas., N. S., 161, 62 L. R. A., N. S., 507.

56. Carrier's employees forbidden to occupy front seat of open car.—Rowe *v.* Brooklyn Heights R. Co., 71 App. Div. 474, 75 N. Y. S. 893.

57. Wearing uniform of competitors prohibited.—South Florida R. Co. *v.* Rhoads, 25 Fla. 40, 5 So. 633, 3 L. R. A. 733, 23 Am. St. Rep. 506.

58. Must not be contrary to law.—*England.*—Marriott *v.* London, etc., R. Co. (Eng.), 1 C. B., N. S., 499.

United States.—Baltimore, etc., R. Co.

Made and Enforced in Violation of Law.—A railroad company may make reasonable rules and regulations for the conduct of its business as a carrier, but if made and enforced in violation of law it will be liable to persons injured thereby.[59]

Forbidding Sale of Ticket to Persons Unable to Take Care of Themselves.—A rule of a railroad company forbidding the sale of tickets to persons physically unable to take care of themselves, unless accompanied by an attendant, is only for the guidance of its servants, and can not limit its responsibility to the public, unless the rule can be justified by the principles governing the duties of carriers of passengers.[60]

Fares as Affected by Rule Requiring Purchase of Tickets.—The right of a passenger on a suburban electric railway to be carried at the rate of fare prescribed in the company's franchise can not be made dependent upon compliance with a rule of the carrier requiring the purchase of tickets at regular stations.[61]

Rights to Stop Over—Rule Opposed to Statute.—And the purchaser of a ticket conferring the right to ride between two stations by way of an intermediate station can not be deprived of his right to stop over at the intermediate station, by reason of a rule of the carrier to issue only alternative tickets, making the intermediate station one terminus named in the ticket, and the passenger is not bound to take notice of any rule or regulation of the railroad company requiring the passenger to ride from the intermediate station by the longer route without stop over, in contravention of a statute of the state.[62]

Wrongful Ejection—Rule Prescribing Duties of Employees.—The right of a passenger ejected from a train, in violation of his rights, to recover damages therefor can not be affected by any rule of the carrier prescribing the duties of its agents or conductors.[63]

v. Thornton, 110 C. C. A. 502, 188 Fed. 868, 43 R. R. R. 13, 66 Am. & Eng. R. Cas., N. S., 13; Railroad Co. *v.* Fraloff, 100 U. S. 24, 25 L. Ed. 531.

California.—Robinson *v.* Southern Pac. Co., 105 Cal. 526, 38 Pac. 94, 722, 28 L. R. A. 773.

Kansas.—Atchison, etc., R. Co. *v.* Dickerson, 4 Kan. App. 345, 45 Pac. 975.

Kentucky.—Illinois Cent. R. Co. *v.* Allen, 121 Ky. 138, 26 R. R. R. 49, 43 Am. & Eng. R. Cas., N. S., 49, 11 Am. & Eng. Ann. Cas. 1024, 89 S. W. 150.

Louisiana.—Decuir *v.* Benson, 27 La. Ann. 1.

Michigan.—Coy *v.* Detroit, etc., Railway, 125 Mich. 616, 85 N. W. 6; Day *v.* Owen, 5 Mich. 520, 72 Am. Dec. 62.

Tennessee.—Louisville, etc., R. Co. *v.* Turner, 100 Tenn. 213, 47 S. W. 223, 43 L. R. A. 140.

Texas.—Eddy *v.* Rider, 79 Tex. 53, 15 S. W. 113.

Virginia.—Norfolk, etc., R. Co. *v.* Wysor, 82 Va. 250.

West Virginia.—Boston *v.* Chesapeake, etc., R. Co., 36 W. Va. 318.

Wyoming.—Chicago, etc., R. Co. *v.* Lampman, 18 Wyo. 106, 34 R. R. R. 28, 57 Am. & Eng. R. Cas., N. S., 28, 104 Pac. 533, 25 L. R. A., N. S., 217, Ann. Cas. 1912 C, 788.

59. **Made and enforced in violation of law.**—Eddy *v.* Rider, 79 Tex. 53, 15 S. W. 113.

60. **Forbidding sale of ticket to persons unable to take care of themselves.**—Illinois Cent. R. Co. *v.* Allen, 121 Ky. 138, 26 R. R. R. 49, 43 Am. & Eng. R. Cas., N. S., 49, 11 Am. & Eng. Ann. Cas. 1024, 89 S. W. 150.

61. **Fares as affected by rule requiring purchase of ticket.**—Coy *v.* Detroit, etc., Railway, 125 Mich. 616, 85 N. W. 6.

62. **Right to stop over—Rule opposed to statute.**—Robinson *v.* Southern Pac Co., 105 Cal. 526, 38 Pac. 94, 722, 28 L. R. A. 773.

63. **Wrongful ejection—Rule prescribing duties of employees.**—Baltimore, etc., R. Co. *v.* Thornton, 110 C. C. A. 502, 188 Fed. 868, 43 R. R. R. 13, 66 Am. & Eng. R. Cas., N. S., 13.

Requiring performance of acts not required by law—Evidence.—Where the rules of a railroad company for the conduct of trainmen with respect to passengers do not require more than the law requires of the carrier, the admission in evidence of the rules is not prejudicial, but, where such rules require more than the law requires, or require the performance of acts which the law does not recognize as a duty imposed on the carrier, they are inadmissible. Chicago, etc., R. Co. *v.* Lampman, 18 Wyo. 106, 34 R. R. R. 28, 57 Am. & Eng. R. Cas., N. S., 28, 104 Pac. 533, 25 L. R. A., N. S., 217, Ann. Cas. 1912 C, 788.

§ 314. Must Not Discriminate.—Of course, a common carrier is bound to treat all of its passengers of the same class alike so long as they conduct themselves properly, and has no right to discriminate in making or enforcing regulations for their government.[64]

Made for Particular Occasion.—The rules and regulations of a common carrier must have for their object the accommodation of passengers generally, and they must be of a permanent nature, and not made for a particular occasion or emergency.[65]

§ 315. Their Reasonableness as Question of Law.—It is generally held that the reasonableness, and consequent validity, of a rule or regulation of a carrier of passengers is a question of law for the determination of the court.[66]

Facts Not Disputed.—Where the facts are not disputed, the reasonableness of a regulation of a carrier affecting the transportation of passengers is one of law for the court, not a question of fact for the jury.[67]

Exclusion from Certain Trains.—The reasonableness of a railroad company's regulation restricting the right of passengers to carriage on certain trains is for the court.[68]

Exclusion of Animals from Passenger Cars.—The reasonableness of a regulation of a street railway forbidding the carrying of live animals into its cars is a question for the trial court, and it is error to submit it to the jury.[69]

64. **Must not discriminate.**—*Illinois.*—Illinois Cent. R. Co. *v.* Whittemore, 43 Ill. 420, 92 Am. Dec. 138; Chicago, etc., R. Co. *v.* Williams, 55 Ill. 185.

Kansas.—Brown *v.* Kansas City, etc., R. Co., 38 Kan. 634, 16 Pac. 942.

Michigan.—Day *v.* Owen, 5 Mich. 520, 72 Am. Dec. 62; Kalamazoo Hack, etc., Co. *v.* Sootsma, 84 Mich. 194, 47 N. W. 667, 10 L. R. A. 819, 22 Am. St. Rep. 693.

New York.—O'Gorman *v.* New York, etc., R. Co., 96 App. Div. 594, 89 N. Y. S. 589; Ray *v.* United Tract. Co., 96 App. Div. 48, 89 N. Y. S. 49.

65. **Made for particular occasion.**—Day *v.* Owen, 5 Mich. 520, 72 Am. Dec. 62.

66. **Question of law.**—*Alabama.*—Birmingham R., etc., Co. *v.* McDonough, 153 Ala. 122, 26 R. R. R. 618, 49 Am. & Eng. R. Cas., N. S., 618, 44 So. 960, 13 L. R. A., N. S., 445.

Arkansas.—St. Louis, etc., R. Co. *v.* Adcock, 52 Ark. 405, 12 S. W. 874.

Florida.—South Florida R. Co. *v.* Rhoads, 25 Fla. 40, 5 So. 633, 3 L. R. A., 62 L. R. A., N. S., 507, 733, 23 Am. St. Rep. 506.

Georgia.—Central, etc., R. Co. *v.* Motes, 117 Ga. 923, 7 R. R. R. 161, 30 Am. & Eng. R. Cas., N. S., 161, 43 S. E. 990; Southern R. Co. *v.* Watson, 110 Ga. 681, 36 S. E. 209, 18 Am. & Eng. R. Cas., N. S., 209.

Illinois.—Chicago, etc., R. Co. *v.* McLallen, 84 Ill. 109; Illinois Cent. R. Co. *v.* Whittemore, 43 Ill. 420, 92 Am. Dec. 138.

Iowa.—Gregory *v.* Chicago, etc., R. Co., 100 Iowa 345, 69 N. W. 532; Hoffbauer *v.* Delhi, etc., R. Co., 52 Iowa 342, 3 N. W. 121, 35 Am. Rep. 278.

Missouri.—Chilton *v.* St. Louis, etc., R. Co., 114 Mo. 88, 21 S. W. 457, 19 L. R. A. 269.

Montana.—Doherty *v.* Northern Pac. R. Co., 43 Mont. 294, 41 R. R. R. 210, 64 Am. & Eng. R. Cas., N. S., 210, 115 Pac. 401, 36 L. R. A., N. S., 1139.

New Jersey.—Daniel *v.* North Jersey St. R. Co., 64 N. J. L. 603, 46 Atl. 625.

New York.—Barker *v.* Central Park, etc., R. Co., 151 N. Y. 237, 45 N. E. 550, 35 L. R. A. 489, 56 Am. St. Rep. 626; Avery *v.* New York Cent. R. Co., 121 N. Y. 31, 24 N. E. 20; Dowd *v.* Albany Railway, 47 App. Div. 202, 62 N. Y. S. 179; O'Gorman *v.* New York, etc., R. Co., 96 App. Div. 594, 89 N. Y. S. 589.

Pennsylvania.—Muldowney *v.* Pittsburg, etc., Tract. Co., 8 Pa. Super. Ct. 335; Pittsburgh, etc., R. Co. *v.* Lyon, 123 Pa. 140, 16 Atl. 607, 2 L. R. A. 489, 10 Am. St. Rep. 517.

South Carolina.—Weber *v.* Southern R. Co., 65 S. C. 356, 43 S. E. 888, 6 R. R. R. 932, 29 Am. & Eng. R. Cas., N. S., 932.

Tennessee.—Louisville, etc., R. Co. *v.* Fleming, 82 Tenn. (14 Lea) 128; Louisville, etc., R. Co. *v.* Turner, 100 Tenn. 213, 47 S. W. 223, 43 L. R. A. 140.

Virginia.—Norfolk, etc., R. Co. *v.* Wysor, 82 Va. 250.

67. **Facts not disputed.**—Barker *v.* Central Park, etc., R. Co., 151 N. Y. 237, 45 N. E. 550, 35 L. R. A. 489, 56 Am. St. Rep. 626; Southern R. Co. *v.* Watson, 110 Ga. 681, 36 S. E. 209, 18 Am. & Eng. R. Cas., N. S., 209.

68. **Exclusion from certain trains.**—Doherty *v.* Northern Pac. R. Co., 43 Mont. 294, 41 R. R. R. 210, 64 Am. & Eng. R. Cas., N. S., 210, 115 Pac. 401, 36 L. R. A., N. S., 1139.

69. Daniel *v.* North Jersey St. R. Co., 64 N. J. L. 603, 46 Atl. 625.

And the reasonableness of a rule of a railway company prohibiting a passenger from having a dog with him in its passenger coach, and exacting a charge for carrying dogs in the baggage car, is a question of law for the court.[70]

§ 316. Their Reasonableness as Mixed Question of Law and Fact.—In some cases, however, it has been held that the peculiar circumstances involved made the reasonableness of such a rule a mixed question of law and fact.[71]

Woman Excluded from "Ladies' Cars."—Where a woman was excluded from the "ladies' car" because she was of notoriously bad character, the defendant pleaded a reasonable regulation authorizing the exclusion, and that the plaintiff came within it; and it was held that it is a mixed question of law and fact whether such a regulation is reasonable or not, to be submitted to the jury, on proper instructions.[72]

§ 317. Their Reasonableness Question for Jury.—When the reasonableness or unreasonableness of a rule of a railroad company depends upon the existence of particular facts and circumstances, it is a question for the jury, under proper instructions.[73] Thus, it is not error for the court in charging the jury, to say that a given regulation of a carrier of passengers is unreasonable, when the court explains to the jury what would be the rules of law by which the reasonableness or unreasonableness of such a regulation is to be tested, and leaves to the jury the determination of the facts of the particular case.[74]

§ 318. Their Sufficiency Is Question for Jury.—Whether a rule or regulation of a carrier of passengers is sufficient to accomplish its purpose is a question of fact to be determined by the jury.[75]

§§ 319-323. Notice of Rules and Regulations—§ 319. Passenger's Contract Rights Not Affected by Rules of Which He Was Not Chargeable with Notice.—The rules and regulations which a railroad company may adopt and enforce in the transaction of its business do not become effective until the public or the party to be affected thereby has actual knowledge thereof, or such reasonable notice that the law will, under the particular circumstances, infer knowledge.[76]

70. Gregory *v.* Chicago, etc., R. Co., 100 Iowa 345, 69 N. W. 532.

71. Mixed question of law and fact.—Brown *v.* Memphis, etc., R. Co., 4 Fed. 37; Day *v.* Owen, 5 Mich. 520, 72 Am. Dec. 62; Harris *v.* Stevens, 31 Vt. 79, 73 Am. Dec. 337; Bass *v.* Chicago, etc., R. Co., 36 Wis. 450, 17 Am. Rep. 495.

72. Woman excluded from "ladies' car."—Brown *v.* Memphis, etc., R. Co., 4 Fed. 37.

Negro passengers excluded from cabins.—In an action against a common carrier of passengers for refusing plaintiff a cabin passage, the notice of defense was that, by the regulations and established course of business of the boat, persons of plaintiff's race were not allowed the use of the cabin as passengers, which regulation and course of business were averred to be reasonable. There was a demurrer to this defense. It was held that the demurrer was not well taken, that the reasonableness of such regulation was a mixed question of law and fact, to be found by the jury on the trial, under the instructions of the court, and could not be determined on demurrer. Day *v.* Owen, 5 Mich. 520, 72 Am. Dec. 62.

73. Pittsburgh, etc., R. Co. *v.* Lyon, 123 Pa. 140, 16 Atl. 607, 2 L. R. A. 489, 10 Am. St. Rep. 517.

74. Brown *v.* Memphis, etc., R. Co., 7 Fed. 51.

75. Chicago, etc., R. Co. *v.* McLallen, 84 Ill. 109.

76. *United States.*—Railroad Co. *v.* Fraloff, 100 U. S. 24, 25 L. Ed. 531.

Alabama.—Armstrong *v.* Montgomery St. R. Co., 123 Ala. 233, 26 So. 349.

California.—Wright *v.* California Cent. R. Co., 78 Cal. 360, 20 Pac. 740.

Indiana.—Ft. Wayne Tract. Co. *v.* Hardendorf, 164 Ind. 403, 15 R. R. R. 738, 38 Am. & Eng. R. Cas., N. S., 738, 72 N. E. 593.

Maryland.—Baltimore City Pass. R. Co. *v.* Wilkinson, 30 Md. 224.

Massachusetts.—Maroney *v.* Old Colony, etc., R. Co., 106 Mass. 153, 8 Am. Rep. 305; Renaud *v.* New York, etc., R. Co. (Mass.), 44 R. R. R. 632, 67 Am. & Eng. R. Cas., N. S., 632, 97 N. E. 98.

Missouri.—McGee *v.* Missouri Pac. R.

Required to Take Direct Route.—A passenger is not bound by a rule of the railroad company, of which she has no knowledge, requiring passengers to travel by a direct route.[77]

Relation of Carrier and Passenger.—See post, "Relation of Carrier and Passenger," chapter 21.

Ejection of Passengers.—See post, "Ejection of Passengers," chapter 25.

Presumption as to Knowledge of Rules.—The law does not presume that one about to become a passenger, or one who has become a passenger, on a railroad train knows the rules and regulations of the railroad company.[78] But it has been held that if a notice prohibiting passengers from standing on the platform be proven to have been posted in large metal letters, upon the doors of the passenger cars of a railroad company, a passenger will be presumed to know the rules, and if that knowledge be denied, the burden of establishing such want of knowledge is upon the party denying it.[79]

§ 320. Duty of Passenger to Inform Himself of Existence of Rules.—It is the legal duty of a passenger to use the care and diligence which a reasonably prudent man would use under the same circumstances to make inquiries in regard to and inform himself of the existence and nature of the carrier's rules and regulations relating to the carriage and conduct of passengers.[80]

Conduct of Trains and Rights of Passengers.—A passenger's railroad ticket is evidence of the payment of his fare and his right to be carried according to its terms, but it does not express the whole contract, and what it does not set forth may be ascertained from the reasonable rules and regulations of the railroad company, and he is bound to inform himself of such regulations respecting the conduct of trains and the rights of passengers.[81]

Purchase of Tickets, and Train Schedules.—If a passenger disregards the regulations of the railroad company as to the purchase of tickets or the running of trains, by failure upon his part to make any inquiries, and such neglect is not induced by the company's agent who has authority in the matter, the company is not liable for the consequences of such neglect.[82]

Rights Not Increased by Ignorance of Rules.—One who neglects to inform himself as to the rules and regulations of the railroad company has no

Co., 92 Mo. 208, 4 S. W. 739, 1 Am. St. Rep. 706; Burke *v.* Missouri Pac. R. Co., 51 Mo. App. 491.

Pennsylvania.—Lake Shore, etc., R. Co. *v.* Greenwood, 79 Pa. 373.

Tennessee.—Louisville, etc., R. Co. *v.* Turner, 100 Tenn. 213, 47 S. W. 223, 43 L. R. A. 140.

Virginia.—Norfolk, etc., R. Co. *v.* Wysor, 82 Va. 250.

Alighting from moving cars.—In Armstrong *v.* Montgomery St. R. Co., 123 Ala. 233, 26 So. 349, it is held that while a rule of a street railway that passengers must not leave its cars while they are in motion is a reasonable rule, a passenger can not be charged with the nonobservance of such rule unless he knew of it.

77. **Required to take direct route.**—Illinois Cent. R. Co. *v.* Harper, 83 Miss. 560, 35 So. 764, 10 R. R. R. 612, 33 Am. & Eng. R. Cas., N. S., 812, 64 L. R. A. 283, 102 Am. St. Rep. 469.

78. **Presumption as to knowledge of rules.**—Lake Shore, etc., R. Co. *v.* Rosenzweig, 113 Pa. 519, 6 Atl. 545.

79. **Posted upon car doors.**—Macon, etc., R. Co. *v.* Johnson, 38 Ga. 409.

80. **Duty of passenger to inform himself of existence of rules.**—*Kansas.*—Atchison, etc., R. Co. *v.* Gants, 38 Kan. 608, 17 Pac. 54, 5 Am. St. Rep. 780.

Kentucky.—Louisville, etc., R. Co. *v.* Miles, 100 Ky. 84, 18 Ky. L. Rep. 580, 37 S. W. 486.

Oklahoma.—Noble *v.* Atchison, etc., R. Co., 4 Okla. 534, 46 Pac. 483.

Pennsylvania.—Lake Shore, etc., R. Co. *v.* Rosenzweig, 113 Pa. 519, 6 Atl. 545.

Tennessee.—Trotlinger *v.* East Tennessee, etc., R. Co., 79 Tenn. (11 Lea) 533.

Texas.—Gulf, etc., R. Co. *v.* Moody, 3 Tex. Civ. App. 622, 22 S. W. 1009; Houston, etc., R. Co. *v.* Moore, 49 Tex. 31, 30 Am. Rep. 98.

81. **Conduct of trains and rights of passengers.**—Southern Kan. R. Co. *v.* Hinsdale, 38 Kan. 507, 16 Pac. 937; Lake Shore, etc., R. Co. *v.* Rosenzweig, 113 Pa. 519, 6 Atl. 545.

82. **Purchase of tickets and train schedules.**—Southern Kan. R. Co. *v.* Hinsdale, 38 Kan. 507, 16 Pac. 937.

greater rights under his ticket than if he had acquired actual knowledge of them.[83]

§ 321. Sufficiency of Publication or Notice.—It is not essential, in order to bind the passenger, that he should be directly notified of the existence of a reasonable rule or regulation of the carrier. It is sufficient that it be so posted or otherwise published that a reasonably prudent and diligent man, under the same circumstances, would be put on inquiry and inform himself in regard to the existence and nature of the regulation.[84]

Posted Regulations for Running of Trains.—A railroad company has the right to make reasonable regulations for running its trains; and if a purchaser of a ticket has notice of, or the company had given such publicity to them in the ticket office, and by posters in the cars, that a person of ordinary intelligence, by the use of reasonable care and caution, would or might have obtained all requisite information, he is bound by the regulations.[85]

Riding on Front Platform with Knowledge of Notice on Other Cars.—Where a passenger knew that on certain cars of a street railway company there was a notice stating that passengers choosing to ride on the front platform did so at their own risk, it was not necessary for the company, in order to defeat an action by the passenger for injuries received while alighting from the

83. **Rights not increased by ignorance of rules.**—Lake Shore, etc., R. Co. *v.* Rosenzweig, 113 Pa. 519, 6 Atl. 545.

84. **Sufficiency of publication or notice.**—*England.*—Motteran *v.* Eastern Counties R. Co. (Eng.), 7 C. B., N. S., 58, 6 Jur. N. S., 583, 29 L. J. M. 59.

Georgia.—Macon, etc., R. Co. *v.* Johnson, 38 Ga. 409.

Illinois.—Lake Shore, etc., R. Co. *v.* Kelsey, 180 Ill. 530, 54 N. E. 608.

Kansas.—Southern Kan. R. Co. *v.* Hinsdale, 38 Kan. 507, 16 Pac. 937.

Maine.—State *v.* Goold, 53 Me. 279.

Maryland.—Baltimore City Pass. R. Co. *v.* Wilkinson, 30 Md. 224.

Massachusetts.—McDonough *v.* Boston, etc., R. Co., 191 Mass. 509, 20 R. R. R. 641, 43 Am. & Eng. R. Cas., N. S., 641, 78 N. E. 141.

New York.—Barker *v.* Central Park, etc., R. Co., 151 N. Y. 237, 45 N. E. 550, 35 L. R. A. 489, 56 Am. St. Rep. 626.

Pennsylvania.—Drake *v.* Pennsylvania R. Co., 137 Pa. 352, 20 Atl. 994, 21 Am. St. Rep. 883.

South Carolina.—Funderburg *v.* Augusta, etc., R. Co., 81 S. C. 141, 30 R. R. R. 281, 53 Am. & Eng. R. Cas., N. S., 281, 21 L. R. A., N. S., 868, 61 S. E. 1075.

Tennessee.—Trotlinger *v.* East Tenn., etc., R. Co., 79 Tenn. (11 Lea) 533.

Riding on platform—Posted on doors of cars.—If a notice prohibiting passengers from riding on the platforms of cars be proven to have been posted in large metal letters upon the doors of the passenger car of a railroad company, a passenger will be presumed to know of such rule, and if such knowledge be denied, the burden of showing such want of knowledge is upon the party denying it. Macon, etc., R. Co. *v.* Johnson, 38 Ga. 409.

Entry and exit by rear platform only—Use of such cars on prior occasions.—The fact that a notice of a regulation requiring passengers to enter and leave defendant's street cars by the rear platform only, was put up inside of all such cars, and legible to all who entered them, and the fact that plaintiff had often previously ridden in the cars, was evidence from which it might be inferred that he had notice of the existence of the regulation. Baltimore City Pass. R. Co. *v.* Wilkinson, 30 Md. 224.

Use of station platforms for boarding and alighting—Platform on one side of track only.—When a passenger knows that on one side of the track no platform or place for alighting from trains has been provided, and that there is a safe and convenient platform, upon the other side for the use of passengers in entering and leaving trains, such knowledge is notice of a rule of the company that they shall get on and off trains at said platform. Drake *v.* Pennsylvania R. Co., 137 Pa. 352, 20 Atl. 994, 21 Am. St. Rep. 883.

Copy of carriers by-laws affixed at stations.—In Motteram *v.* Eastern Counties R. Co. (Eng.), 7 C. B., N. S., 58, 6 Jur., N. S., 583, 29 L. J. M. C. 59, it is held that proof that a copy of the by-laws of the company was affixed at the stations at which the passengers against which it was attempted to enforce them got into and left the train, is sufficient proof of the publication of such by-laws under § 110 of the Railway Clauses Act of 1845, without showing that copies were affixed at all other stations.

85. **Postal regulations for running of trains.**—Trotlinger *v.* East Tennessee, etc., R. Co., 79 Tenn. (11 Lea) 533.

front platform of a car, to prove that he had also seen such notice on the particular car on which he was riding.[86]

Required to Ride in Caboose—Not Posted as Required by Statute.—If a passenger on a freight train is injured while riding on a freight car by reason of an accident to the train, the company will be liable if the rule prohibiting passengers from riding elsewhere than in the caboose is not conspicuously posted as required by law.[87]

Fares, Tickets, Special Contracts, Transfers, etc.—See post, "Fares, Tickets, Special Contracts, Transfers, etc.," chapter 22.

§ 322. Bound by Rules of Which He Was in Ignorance.—A rule or regulation may be so reasonable and so essential to the proper conduct of the carrier's business as to be enforceable, even by expulsion, against a passenger who acquired his contract rights and boarded the train or street car without being chargeable with notice of the existence of the regulation.[88]

Rules for Freight Trains.—A person who enters a freight train, knowing it to be such and intending to take passage thereon, is charged with notice that the railroad company is authorized under the law to make reasonable rules and regulations in reference to the carrying of passengers thereon.[89]

§ 323. Rules for Conduct of Carrier's Employees.—A passenger is not presumed to know the private or secret rules given by a railroad to its conductors or other employees, but has the right to rely upon their statements as to what the rules are, in contracting with them.[90]

§§ 324-326. Enforcement of Rules and Regulations—§ 324. Enforcement Must Be Reasonable.—Regulations of common carriers of passengers must not only be legal and reasonable, but the carrier must, at its peril, enforce them against passengers in a reasonable manner and without undue and unnecessary severity.[91]

Exclusion from "Ladies' Car."—Thus, if there be no sitting room in the regular passenger cars for passengers excluded by a reasonable regulation from the "ladies' car," and there be room to seat them in such car, they can not be

86. Riding on front platform with knowledge of notice on other cars.—McDonough *v.* Boston, etc., R. Co., 191 Mass. 509, 20 R. R. R. 641, 43 Am. & Eng. R. Cas., N. S., 641, 78 N. E. 141.

87. Required to ride in caboose—Not posted as required by statute.—Sherman *v.* Hannibal, etc., R. Co., 72 Mo. 62, 37 Am. Rep. 423.

88. Bound by rules of which he was in ignorance.—Faber *v.* Chicago, etc., R. Co., 62 Minn. 433, 64 N. W. 918, 36 L. R. A. 789; Doherty *v.* Northern Pac. R. Co., 43 Mont. 294, 41 R. R. R. 210, 64 Am. & Eng. R. Cas., N. S., 210, 115 Pac. 401, 36 L. R. A., N. S., 1139; Ellis *v.* Houston, etc., R. Co., 30 Tex. Civ. App. 172, 70 S. W. 114; Gulf, etc., R. Co. *v.* Moody, 3 Tex. Civ. App. 622, 22 S. W. 1009.

89. Rules for freight trains.—Ellis *v.* Houston, etc., R. Co., 30 Tex. Civ. App. 172, 70 S. W. 114.

90. Georgia R., etc., Co. *v.* Murden, 86 Ga. 434, 12 S. E. 630; Ft. Wayne Tract. Co. *v.* Hardendorf, 164 Ind. 403, 15 R. R. R. 738, 38 Am. & Eng. R. Cas., N. S., 738, 72 N. E. 593; Lake Shore, etc., R. Co. *v.* Foster, 104 Ind. 293, 4 N. E. 20, 54 Am. Rep. 319; Hufford *v.* Grand Rapids, etc., R. Co., 64 Mich. 631, 31 N. W. 544, 8 Am. St. Rep. 859.

91. *Alabama.*—Birmingham R., etc., Co. *v.* McDonough, 153 Ala. 122, 26 R. R. R. 618, 49 Am. & Eng. R. Cas., N. S., 618, 44 So. 960, 13 L. R. A., N. S., 445.

Florida.—Louisville, etc., R. Co. *v.* Berry, 58 Fla. 300, 50 So. 579, 33 R. R. R. 227, 56 Am. & Eng. R. Cas., N. S., 227.

Iowa.—McKinley *v.* Chicago, etc., R. Co., 44 Iowa 314, 24 Am. Rep. 748.

Maryland.—Baltimore, etc., R. Co. *v.* Carr, 71 Md. 135, 17 Atl. 1052; Northern Cent. R. Co. *v.* O'Conner, 76 Md. 207, 24 Atl. 449, 16 L. R. A. 449, 35 Am. St. Rep. 422.

Pennsylvania.—Pittsburgh, etc., R. Co. *v.* Pillow, 76 Pa. 510, 18 Am. Rep. 424.

Tennessee.—Louisville, etc., R. Co. *v.* Turner, 100 Tenn. 213, 47 S. W. 223, 43 L. R. A. 140; Nashville St. R. Co. *v.* Griffin, 104 Tenn. 81, 57 S. W. 153, 49 L. R. A. 451.

West Virginia.—Boston *v.* Chesapeake, etc., R. Co., 36 W. Va. 318.

Wisconsin.—Bass *v.* Chicago, etc., R. Co., 36 Wis. 450, 17 Am. Rep. 495.

left standing without breach of the contract of carriage. In such a case, however, the object of such regulation requires that the selection of the persons to be admitted into the "ladies' car" shall still rest in the discretion of the proper officers of the train.[92]

Backing of Cars Prohibited.—So, where a street car after wrongfully failing to stop at a regular street crossing to take on passengers, has passed beyond the crossing from twenty to forty feet, a rule of the company forbidding the backing of cars in such cases is unreasonable, and will not justify them, on a rainy night when the road is very muddy, in refusing to back the car so as to reach the crossing for an intending passenger.[93]

Required to Enter Cars within Transfer Station.—It is an unreasonable enforcement of a reasonable regulation requiring passengers to enter street cars within a transfer station, or for failure to do so to pay an additional fare, for the company's agents to eject one who, to their knowledge, had paid regular fare, because he had entered a car, in which there was abundant room, while it was standing only a few feet beyond the station line, upon his refusal to pay an additional fare.[94]

Must Show Reason for Suspension of Rule.—A passenger has no right to complain of the enforcement of a reasonable rule by the conductor unless he has stated to the conductor an adequate reason for its suspension in his case.[95]

§ 325. Ejection of Passengers.—See post, "Ejection of Passengers," chapter 25.

Exclusion from Depot.—A superintendent of a railroad depot has authority to exclude therefrom persons who persist in violating reasonable regulations prescribed for their conduct.[96]

§ 326. Enforcement by Punishing Prior Breach.—It has been held that a common carrier of passengers may enforce observance of its regulations by prevention, but not by punishment of a breach already committed.[97]

Ejection for Refusal to Pay Fare—Rule against Re-Entering.—A railroad, however, may enforce a reasonable rule preventing a passenger who has willfully refused to pay his fare, and thereby provoked expulsion, from re-entering the train from which he was ejected.[98]

§§ 327-328. Waiver of Rules and Regulations—§ 327. Habitual Failure to Enforce.—A rule or regulation for the conduct of the business of a common carrier of passengers may be waived and rendered invalid by such open and habitual disregard and failure to enforce it as to justify the traveling public in the belief that it has been repealed, expressly or impliedly.[99]

Riding on Freight Trains.—Thus, where a railroad company, notwithstanding its rule prohibiting passengers from riding on freight trains, habitually

92. **Exclusion from "ladies' car."**—Bass *v.* Chicago, etc., R. Co., 36 Wis. 450, 17 Am. Rep. 495.

93. **Backing of cars prohibited.**—Jackson Elect. R., etc., Co. *v.* Lowry, 79 Miss. 431, 30 So. 634.

94. **Required to enter cars within transfer station.**—Nashville St. R. Co. *v.* Griffin, 104 Tenn. 81, 57 S. W. 153, 49 L. R. A. 451.

95. **Must show reason for suspension of rule.**—McMillan *v.* Federal, etc., R. Co., 172 Pa. 523, 33 Atl. 560.

96. **Exclusion from depot.**—Commonwealth *v.* Power (Mass.), 7 Metc. 596, 41 Am. Dec. 465.

97. **Enforcement by punishing prior breach.**—Smith *v.* Manhattan R. Co., 45 N. Y. St. Rep. 865, 18 N. Y. S. 759, affirmed in 138 N. Y. 623, 33 N. E. 1083.

98. Phillips *v.* Atlantic, etc., R. Co., 90 S. C. 187, 44 R. R. R. 566, 67 Am. & Eng. R. Cas., N. S., 566, 73 S. E. 75.

99. *United States.*—Chicago, etc., R. Co. *v.* Lowell, 151 U. S. 209, 38 L. Ed. 131, 14 S. Ct. 281.

Florida.—Florida So. R. Co. *v.* Hirst, 30 Fla. 1, 11 So. 506, 16 L. R. A. 631, 32 Am. St. Rep. 17.

Indiana.—Lake Shore, etc., R. Co. *v.* Foster, 104 Ind. 293, 4 N. E. 20, 54 Am. Rep. 319.

Massachusetts.—Sweetland *v.* Lynn, etc., R. Co., 177 Mass. 574, 59 N. E. 443, 51 L. R. A. 783.

Michigan.—Greenfield *v.* Detroit, etc.,

permits passengers to ride on freight trains, the fact that a passenger was on a freight train when injured is no defense in an action against the company for such injury.[1] But it has been held that repeated violations of a rule of a railroad company forbidding the carrying of passengers on freight trains, and failure to publish and practically enforce such rule, are mere fact for the consideration of the jury in determining whether a reasonably prudent person would have concluded that the rule had fallen into disuse; and, therefore, it was error to charge the jury that any particular state of facts would authorize persons to believe that such rule had been abrogated, or had been permitted to fall into disuse, and the issue should have been left to the jury.[2]

Permit for Freight Train.—A railroad company may waive a rule that a person without a permit can not ride as a passenger on a freight train, by a long-continued disregard of such rule.[3] But where a railroad company has a rule forbidding the issuance of permits to ride on freight trains by conductors, and a passenger is ejected from a freight train for want of such a permit, the company is not liable because its conductors have violated such rule, unless they have so frequently violated it as to warrant the conclusion that it is not enforced.[4]

Fares, Tickets, Special Contracts, Transfers, etc.—See post, "Fares, Tickets, Special Contracts, Transfers, etc.," chapter 22.

R. Co., 133 Mich. 557, 8 R. R. R. 271, 31 Am. & Eng. R. Cas., N. S., 271, 95 N. W. 546.

Minnesota.—Jones *v.* Chicago, etc., R. Co., 43 Minn. 279, 45 N. W. 444.

Missouri.—Burke *v.* Missouri Pac. R. Co., 51 Mo. App. 491.

Pennsylvania.—Lake Shore, etc., R. Co. *v.* Greenwood, 79 Pa. 373.

Texas.—Houston, etc., R. Co. *v.* Moore, 49 Tex. 31, 30 Am. Rep. 98; Houston, etc., R. Co. *v.* Norris (Tex. Civ. App.), 41 S. W. 708; Missouri, etc., R. Co. *v.* Huff (Tex. Civ. App.), 78 S. W. 249; Texas, etc., R. Co. *v.* Elliott, 22 Tex. Civ. App. 31, 54 S. W. 410.

1. **Riding on freight trains.**—Burke *v.* Missouri Pac. R. Co., 51 Mo. App. 491; Houston, etc., R. Co. *v.* Moore, 49 Tex. 31, 30 Am. Rep. 98.

2. San Antonio, etc., R. Co. *v.* Lynch (Tex. Civ. App.), 55 S. W. 517.

3. **Permit for freight train.**—Greenfield *v.* Detroit, etc., R. Co., 133 Mich. 557, 8 R. R. R. 271, 31 Am. & Eng. R. Cas., N. S., 271, 95 N. W. 546.

4. Houston, etc., R. Co. *v.* Jackson (Tex. Civ. App.), 61 S. W. 440; Houston, etc., R. Co. *v.* White (Tex. Civ. App.), 61 S. W. 436.

Riding on front platform.—A sign on the hood of a street railway car forbidding passengers to ride on the front platform does not affect the liability of the railway company to one riding on such front platform, who has acted in the belief, justified by the company's conduct, that the rule thus indicated was not in force. Sweetland *v.* Lynn, etc., R. Co., 177 Mass. 574, 69 N. E. 443, 51 L. R. A. 783.

Riding in express cars.—If a railroad company which has a rule prohibiting passengers from riding in the express car, or in other cars than the passenger cars, habitually permits passengers to ride in the express car, it will incur the same responsibility to passengers for injuries received by them, though the company's negligence, when riding in the express car, as if they were in a passenger car. Florida So. R. Co. *v.* Hirst, 30 Fla. 1, 11 So. 506, 16 L. R. A. 631, 32 Am. St. Rep. 17.

But the fact that a street railway company regularly permitted passengers to ride on the front platform of its cars did not show a waiver on its part of a rule providing that, if passengers chose to ride on the front platform, they did so at their own risk. McDonough *v.* Boston, etc., R. Co., 191 Mass. 509, 20 R. R. R. 641, 43 Am. & Eng. R. Cas., N. S., 641, 78 N. E. 141.

Conductor's agreement to stop train at passenger's station.—Where the time schedule and printed rules showed that a given train should not stop at a certain station, but the evidence showed that it did frequently stop there, the conductor's agreement with a passenger to put him off there was binding on the company. Texas, etc., R. Co. *v.* Elliott, 22 Tex. Civ. App. 31, 54 S. W. 410; Missouri, etc., R. Co. *v.* Huff (Tex. Civ. App.), 78 S. W. 249.

Passenger forbidden to alight on north side of tracks.—But the fact that the railroad company has permitted persons residing north of its railroad track to cross its right of way and track on foot, at different points in the vicinity of its station building, in going between different parts of the town, is not a waiver of its regulations with respect to its passenger, nor a permission to them to alight on the north side, contrary to such regulations. Drake *v.* Pennsylvania R. Co., 137 Pa. 352, 20 Atl. 994, 21 Am. St. Rep. 883.

Responsibility for Baggage Prior to Purchase of Ticket.—See post, "Passengers' Effects," chapter 29.

Concurrence of Carrier Essential.—It has been held, however, that to constitute a waiver of a rule of a carrier of passengers there must be such conduct as in effect establishes the concurrence of the carrier in the disregard of the regulation in question.[5]

Can Not Be Abrogated by Subordinate Employees.—It has also been held that a carrier of passengers rules for the control of its trains and persons thereon, for the security of its passengers and employees, and for the protection of itself from imposition and wrong, can not be abrogated by subordinate employees.[6]

Right to Resume Enforcement.—The fact that a rule has often been violated does not deprive the carrier of the right to resume its enforcement whenever it may deem it proper to do so.[7]

§ 328. Passenger's Duty to Conform to Rules as Affected by Lack of Fidelity in Enforcing.—A passenger's obligation to conform to the reasonable rules and regulations of the carrier, of the existence of which he has notice, or is chargeable with knowledge, does not depend upon the fidelity of the carrier's employees in enforcing them.[8]

Riding in Wrong Car by Consent of Trainmen.—Where a passenger

5. **Concurrence of carrier essential.**—Florida So. R. Co. *v.* Hirst, 30 Fla. 1, 11 So. 506, 16 L. R. A. 631, 32 Am. St. Rep. 17.

6. **Can not be abrogated by subordinate employees.**—Transit Co. *v.* Venable, 105 Tenn. 460, 465, 58 S. W. 861, 51 L. R. A. 866; Memphis, etc., R. Co. *v.* Benson, 85 Tenn. 627, 4 S. W. 5; Louisville, etc., R. Co. *v.* Turner, 100 Tenn. 213, 47 S. W. 223, 43 L. R. A. 140; Trotlinger *v.* East Tennessee, etc., R. Co., 79 Tenn. (11 Lea) 533.

7. **Right to resume enforcement.**—Hobbs *v.* Texas, etc., R. Co., 49 Ark. 537, 5 S. W. 586.

8. **Passenger's duty to conform to rules as affected by lack of fidelity in enforcing.**—*Florida.*—Florida So. R. Co. *v.* Hirst, 30 Fla. 1, 11 So. 506, 16 L. R. A. 631, 32 Am. St. Rep. 17.

Indiana.—Ohio, etc., R. Co. *v.* Hatton, 60 Ind. 12.

Iowa.—Weber Co. *v.* Chicago, etc., R. Co., 113 Iowa 188, 20 Am. & Eng. R. Cas., N. S., 464, 84 N. W. 1042.

Maryland.—Baltimore City Pass. R. Co. *v.* Wilkinson, 30 Md. 224.

Michigan.—Greenfield *v.* Detroit, etc., R. Co., 133 Mich. 557, 8 R. R. R. 271, 31 Am. & Eng. R. Cas., N. S., 271, 95 N. W. 546.

Texas.—Ellis *v.* Houston, etc., R. Co., 30 Tex. Civ. App. 172, 70 S. W. 114; Houston, etc., R. Co. *v.* Stell, 3 R. R. R. 722, 26 Am. & Eng. R. Cas., N. S., 722.

West Virginia.—Downey *v.* Chesapeake, etc., R. Co., 28 W. Va. 732.

Authority of conductor.—Every one is bound to know that a railway conductor has no general power to run his train except in conformity to the train rules. Lake Shore, etc., R. Co. *v.* Pierce, 47 Mich. 277, 11 N. W. 157.

Permit to ride on freight train.—A passenger who knew it was essential under the rules of the railroad company, that, in addition to his ticket, he should have a permit to ride on a freight train, and that he must get the permit before he got on the train, and that the ticket agent had no authority to say he could get it of the conductor, can not, because of such representation of the agent, recover for his ejection by the conductor. Houston, etc., R. Co. *v.* Stell (Tex.), 3 R. R. R. 722, 26 Am. & Eng. R. Cas., N. S., 722.

Where the railroad company's rules required that a person intending to become a passenger on a freight train should sign a special permit to be obtained from its ticket agent or conductor, the action of such agent in selling plaintiff a ticket that he might ride on a freight train, without mentioning the permit, did not create an unconditional contract to carry plaintiff without a permit and in violation of an established rule. Ellis *v.* Houston, etc., R. Co., 30 Tex. Civ. App. 172, 70 S. W. 114.

Agreement of conductor to stop at passenger's station.—Where a passenger has a ticket to a certain station, and takes passage upon a train which, under the regulations of the carrier, does stop at such station, the fact that the conductor takes up his ticket and agrees to stop the train at such station, and let the passenger off there, will not bind the carrier. Ohio, etc., R. Co. *v.* Hatton, 60 Ind. 12.

Agreement with carrier conflicting with train rules—Conductor.—A conductor can not be required by a passenger to deviate from his train rules on the latter's statement of an alleged agreement with the company conflicting therewith. Lake Shore, etc., R. Co. *v.* Pierce, 47 Mich. 277, 11 N. W. 157.

rides in a car, or place or position on a train or car, with knowledge of the existence of a regulation of the carrier prohibiting passengers from riding there, the fact that he is there by permission or invitation of the conductor or other trainmen will not prevent his violation of such rule from constituting contributory negligence.[9]

Riding in Dangerous Place by Consent of Conductor.—If a passenger rides where he has no right to ride by the rules of the railroad company, and where no man of ordinary prudence would attempt to ride, the mere knowledge or consent of the conductor or trainmen to his riding there will not entitle him to any greater rights against the company on account of any injury received by him while so riding, than if the conductor and trainmen had been wholly ignorant that he was so riding.[10]

Authority to Receive Other Property as Personal Baggage.—See post, "Passenger's Effects," chapter 29.

§ 329. Contributory Negligence of Passenger in Not Conforming to Rules and Regulations.—See post, "Contributory Negligence," chapter 24.

§§ 330-332. Carrier Bound by Its Own Rules—§ 330. In General.—Where a regulation of the carrier is for the protection of the rights or for the safety of passengers, a violation of it by the carrier may constitute actionable negligence for which a passenger may recover damages.[11]

9. **Riding in wrong car by consent of trainmen.**—Florida So. R. Co. *v.* Hirst, 30 Fla. 1, 11 So. 506, 16 L. R. A. 631, 32 Am. St. Rep. 17; Greenfield *v.* Detroit, etc., R. Co., 133 Mich. 557, 8 R. R. R. 271, 31 Am. & Eng. R. Cas., N. S., 271, 95 N. W. 546; Downey *v.* Chesapeake, etc., R. Co., 28 W. Va. 732.

Required to ride in passenger cars.—It is the duty of the conductor of a train to enforce a rule of the company requiring passengers to ride in the passenger cars, but the obligation upon passengers and the protection to the company of a rule of this kind is not dependent upon the fidelity of the conductor or other agent charged with the duty of its enforcement. Florida So. R. Co. *v.* Hirst, 30 Fla. 1, 11 So. 506, 16 L. R. A. 631, 32 Am. St. Rep. 17.

On freight train—Arrangement with conductor.—Plaintiff was not a passenger on defendant's freight train, if he rode thereon by an arrangement with the conductor contrary to a rule of defendant known to both. Greenfield *v.* Detroit, etc., R. Co., 133 Mich. 557, 8 R. R. R. 271, 31 Am. & Eng. R. Cas., N. S., 271, 95 N. W. 546.

In express car—Consent of conductor.—It is contributory negligence for a passenger to ride in an express car in violation of a known rule of the carrier, even with the permission, connivance or knowledge of the conductor of the train, or without his protestation against it, when the conductor is cognizant of the rule and of its infraction, if by such violation of the rule the passenger brings upon himself injury from which he would have escaped, although the negligence of the carrier produced the accident, had he remained in the passenger car set apart, and affording space, for his accommodation. Florida So. R. Co. *v.* Hirst, 30 Fla. 1, 11 So. 506, 16 L. R. A. 631, 32 Am. St. Rep. 17.

10. **Riding in dangerous place by consent of conductor.**—Downey *v.* Chesapeake, etc., R. Co., 28 W. Va. 732.

Riding on running board—Authority of conductor.—A street car conductor can not waive a rule prohibiting persons from riding on the running board. Twiss *v.* Boston, etc., R. Co., 208 Mass. 108, 40 R. R. R. 566, 63 Am. & Eng. R. Cas., N. S., 556, 94 N. E. 253, 32 L. R. A., N. S., 552.

11. **In General.**—Frizzell *v.* Omaha St. R. Co., 59 C. C. A. 382, 9 R. R. R. 714, 32 Am. & Eng. R. Cas., N. S., 714, 124 Fed. 176; Jennings *v.* Great Northern R. Co. (Eng.), 35 L. J. Q. B. 15, L. R. 1 Q. B. 7, 1 Ry. & C. T. Cas., 15; Pittsburgh, etc., R. Co. *v.* Nuzum, 50 Ind. 141, 19 Am. Rep. 703; Foley *v.* Boston, etc., St. R. Co., 198 Mass. 532, 31 R. R. R. 251, 54 Am. & Eng. R. Cas., N. S., 251, 84 N. E. 846; Sweetland *v.* Lynn, etc., R. Co., 177 Mass. 574, 59 N. E. 443, 51 L. R. A. 783.

Method of operation of street cars.—On the trial of a charge of negligence in the operation of a street car, a rule of the company which directs the method of the operation in respect of which complaint is made is competent evidence. Frizzell *v.* Omaha St. R. Co., 59 C. C. A. 382, 9 R. R. R. 714, 32 Am. & Eng. R. Cas., N. S., 714, 124 Fed. 176.

Excessive speed over frog.—Where it appeared that the rules of a street railway company required its cars to go over a certain frog at a rate not exceeding four miles an hour, evidence that one of its cars about to pass over this frog was

Right to Enforce Rule against Passenger.—Where a by-law of a railroad company imposes certain duties on passengers, and lays correlative duties on the company, the company must have strictly complied with the by-law to entitle it to enforce it against a passenger.[12]

Violation of Rules to Accommodate Single Passenger.—The duty of a railroad company to the public requires that it should run its trains according to its rules and regulations, without infringing upon them to accommodate a single passenger.[13]

§ 331. Rules Not Required by Law.—And a regulation of the carrier, made for the protection of the rights, or for the safety of passengers, may be binding on the carrier, though not required by law.[14]

§ 332. Rules Requiring More of Carrier than Law—It has been held that a rule or regulation of a common carrier of passengers which requires more of it than the law requires is not binding upon it, and its failure to conform to it does not constitute actionable negligence for which a passenger may recover damages.[15] It has been held, however, that where a street car company, according to its rules, issues transfers from and to certain lines, and the passenger presents a transfer which is not honored by the conductor, and the passenger is ejected, it is no defense to an action for the ejection that a statute does not require the issuance of a transfer between the particular lines in question.[16]

running at the rate of twelve or fifteen miles an hour was held to be evidence of negligence on the part of the company. Sweetland *v.* Lynn, etc., R. Co., 177 Mass. 574, 59 N. E. 443, 51 L. R. A. 783.

Motorman's disobedience of rules.—Disobedience by a motorman of rules established by the company is want of due care on the part of the company. Foley *v.* Boston, etc., St. R. Co., 198 Mass. 532, 31 R. R. R. 251, 54 Am. & Eng. R. Cas., N. S., 251, 84 N. E. 846.

Motorman's opportunity to read rules.—And that the motorman did not have time to read the rules of the company, where he had been in its service nearly two weeks after having been instructed for twelve days, is no excuse for his not complying with rules established by the carrier for the protection of passengers. Foley *v.* Boston, etc., St. R. Co., 198 Mass. 532, 31 R. R. R. 251, 54 Am. & Eng. R. Cas., N. S., 251, 84 N. E. 846.

12. **Right to enforce rule against passenger.**—Jennings *v.* Great Northern R. Co. (Eng.), 35 L. J. Q. B., 15 L. R., 1 Q. B. 7, 1 Ry. & C. T. Cas. 15.

13. **Violation of rules to accommodate single passenger.**—Pittsburgh, etc., R. Co *v.* Nuzum, 50 Ind. 141, 19 Am. Rep. 703.

14. Arnold *v.* Rhode Island Co. (R. I.), 23 R. R. R. 414, 46 Am. & Eng. R. Cas., N. S., 414, 66 Atl. 60.

15. Fluker *v.* Georgia R., etc., Co., 81 Ga. 461, 8 S. E. 529, 2 L. R. A. 843, 12 Am St. Rep. 328; Summitt *v.* State, 76 Tenn. (8 Lea) 413, 41 Am. Rep. 637; Chicago, etc., R. Co. *v.* Lampman, 18 Wyo. 106, 34 R. R. R. 28, 57 Am. & Eng. R. Cas., N. S., 28, 104 Pac. 533, 25 L. R. A., N. S., 217, Ann. Cas. 1912C, 788.

Starting trains—Rules requiring too high degree of care.—The failure of trainmen to comply with the carrier's rules regulating the starting of trains at stations, which rules require a higher degree of care for the safety of the passengers than the law requires, is not negligence for which the carrier is liable. Chicago, etc., R. Co. *v.* Lampman, 18 Wyo. 106, 34 R. R. R. 28, 57 Am. & Eng. R. Cas., N. S., 28, 104 Pac. 533, 25 L. R. A., N. S., 217, Ann. Cas. 1912C, 788.

16. **Issuance of street car transfers not required by law.**—Arnold *v.* Rhode Island Co. (R. I.), 23 R. R. R. 414, 46 Am. & Eng. R. Cas., N. S., 414, 66 Atl. 60.

PART II

CARRIERS OF GOODS

CHAPTER IV.

Duty to Receive and Carry.

I. General Statement and Explanation of Rule, § 333.

II. Duty to Furnish Shipping Facilities and Means of Transportation, §§ 334-341.
- A. In General, § 334.
- B. Notice to Carrier, §§ 335-338.
  - a. Time of Notice, § 335.
  - b. Requisites and Sufficiency of Demand, § 336.
  - c. To Whom Given, § 337.
  - d. Specifying Condition and Danger of Goods, § 338.
- C. Place of Furnishing Cars, § 339.
- D. Goods Ready for Shipment, § 340.
- E. Adequacy of Facilities, § 341.

III. Discrimination, §§ 342-355.
- A. Right to Discriminate Generally, § 342.
- B. Discrimination in Facilities and Cars, §§ 343-348.
  - a. In General, § 343.
  - b. Discrimination in Favor of One of Several Connecting Carriers, § 344.
  - c. Preference in Delivery and Distribution of Cars, § 345.
  - d. With Respect to Use of Tracks, §§ 346-347.
    - (1) In General, § 346.
    - (2) With Respect to Spur Tracks, Switches and Belt Lines, § 347.
  - e. Discrimination in Switch and Trackage Charges, § 348.
- C. Preference to Shipper in Order of Forwarding Goods, §§ 349-350.
  - a. In General, § 349.
  - b. Booking Freight, § 350.
- D. Remedies for Discrimination, §§ 351-355.
  - a. Form of Action, §§ 351-353.
    - (1) Injunction and Mandamus, § 351.
    - (2) Quo Warranto, § 352.
    - (3) Action at Law, § 353.
  - b. Evidence, § 354.
  - c. Damages, 355.

IV. Tender and Refusal, §§ 356-359.
- A. In General, § 356.
- B. Authority to Tender, § 357.
- C. Authority to Receive Freight and Make Contracts, § 358.
- D. Place and Time of Offer for Transportation, § 359.

V. Payment or Tender of Charges, § 360.

VI. Time and Order of Shipment, 361.

VII. Character of Goods Tendered for Shipment, § 362.

VIII. Condition and Preparation of Goods Tendered, § 363.

IX. Private Owned Trains or Cars, § 364.

X. Shipment C. O. D., § 365.

XI. Exceptional Causes Justifying Failure or Refusal, §§ 366-374.
- A. General Statement, § 366.
- B. Absence of Requisite Conveniences or Capacity, § 367.
- C. Unusual Press of Business, §§ 368-371.
  - a. In General, § 368.

b. Discrimination or Granting Privileges, § 369.
c. Duty to Advise Shipper of Delay, § 370.
d. Carriers "Embargo," § 371.
D. Causes Beyond Carrier's Control, § 372.
E. Failure of Shipper to Insure, § 373.
F. Customs and Habits of Dealing, § 374.
XII. Right to Discontinue Service to Shipper, § 375.
XIII. Destination of Goods as Affecting Duty, § 376.
XIV. Duty as to Express Companies, § 377.
XV. Enforcement of Duty, §§ 378-379.
A. By Injunction, § 378.
B. By Mandamus, § 379.
XVI. Action for Refusal, §§ 380-382.
A. Right of Action, § 380.
B. Procedure, § 381.
C. Damages, § 382.
XVII. Penalties for Wrongful Refusal, § 383.

§ 333. General Statement and Explanation of Rule.—In America, according to the early history of its settlement, the condition of the country and the habits of the people, when carrying goods scarcely existed as a separate business, it seems that the common law, requiring a carrier to transport goods at customary rates, or, upon refusing, to be held liable for a breach of public duty,[1] was never generally adopted, even within the termini of the carrier's route.[2] It may be that the failure to recognize generally the common-law rule upon this point, in America, induced some of the state legislatures to provide regulations for running cars, and making railroad companies liable in case of their refusal to carry passengers or property, or to deliver the same at the regular appointed place.[3] The conditions which existed in those early days are of no effect at the present time and the rule must necessarily be of a different and broader nature. The general rule which exists today may well be deduced from the definition of a "common carrier." Thus it may be well said that the term "common carrier" naturally brings to mind a general undertaking, which em-

1. **Common-law rule.**—Where goods are properly tendered to a common carrier for shipment, the common law requires it to receive them. Missouri, etc., R. Co. *v.* Stoner, 5 Tex. Civ. App. 50, 53, 23 S. W. 1020; Missouri, etc., R. Co. *v.* Carter, 9 Tex. Civ. App. 677, 29 S. W. 565.

It is a common-law duty of a common carrier to receive freight whenever tendered. Reid *v.* Southern R. Co., 153 N. C. 490, 69 S. E. 618.

2. **Common-law rule not applied.**—Pittsburgh, etc., R. Co. *v.* Morton, 61 Ind. 539, 28 Am. Rep. 682.

In Pittsburgh, etc., R. Co. *v.* Morton, 61 Ind. 539, 28 Am. Rep. 682, it is said in the opinion: "In the case of Gordon *v.* Hutchinson, cited below, Chief Justice Gibson, of Pennsylvania, as late as 1841, uses the following sensible remarks: 'But rules which have received their form from the business of a people whose occupations are definite, regular, and fixed, must be applied with much caution and no little qualification to the business of a people whose occupations are vague, desultory, and irregular. In England, one who holds himself out as a general carrier is bound to take employment at the current price; but it will not be thought that he is bound to do so here. Nothing was more common formerly, than for the wagoners to lie by in Philadelphia for a rise of wages. In England, the obligation to carry at request upon the carriers' particular route, is the criterion of the profession; but it is certainly not so with us. In Pennsylvania, we had no carriers exclusively between particular places, before the establishment of our public lines of transportation; and according to the English principle we could have had no carriers, for it was not pretended that a wagoner could be compelled to load for any part of the continent.'"

3. *Indiana.*—Pittsburgh, etc., R. Co. *v.* Morton, 61 Ind. 539, 28 Am. Rep. 682, 685; 1 Indiana R. S. 1876, p. 710, § 29, 30.

braces every one in the community. To make it particular, as an undertaking with a single individual, it is only necessary that he should apply, with such goods as the common carrier has undertaken to transport, in condition to be transported, at the place designated, to have the goods carried on the terms proposed in the undertaking; then the contract becomes identical with the person thus applying, and it requires no other special contract between the parties, to subject the common carrier to all legal liabilities as such, to the person applying.[4] And it follows that a common carrier of goods is bound either by statute or under the common law to receive and carry all the goods offered for transportation in his line of business, when properly prepared for shipment, subject to all the responsibilities incident to his employment.[5] And the rule may be broadly stated that, in the absence of the existence of an exceptional cause, such as the act of God, the public enemy, unavoidable accident, or an abnormal and unanticipated inrush of business which will prevent the performance of

4. **Meaning of term "common carrier."** —Doty *v.* Strong (Wis.), 1 Pin. 313, 40 Am. Dec. 773.

5. **Duty to receive and carry.**—New Jersey Steam Nav. Co. *v.* Merchants Bank (U. S.), 6 How. 344, 12 L. Ed. 465; Railroad Co. *v.* Manufacturing Co. (U. S.), 16 Wall. 318, 328, 21 L. Ed. 297; York Co. *v.* Central Railroad (U. S.), 3 Wall. 107, 112, 18 L. Ed. 170; Inman *v.* South Carolina R. Co., 129 U. S. 128, 32 L. Ed. 612, 9 S. Ct. 249; Wabash R. Co. *v.* Pearce, 192 U. S. 179, 187, 48 L. Ed. 397, 24 S. Ct. 231; Myrick *v.* Michigan Cent. R. Co., 107 U. S. 102, 106, 27 L. Ed. 325, 1 S. Ct. 425; Winona, etc., R. Co. *v.* Blake, 94 U. S. 180, 24 L. Ed. 99; Propeller Niagara *v.* Cordes (U. S.), 21 How. 7, 22, 16 L. Ed. 41; Atchison, etc., R. Co. *v.* Denver, etc., R. Co., 110 U. S. 667, 674, 28 L. Ed. 291, 4 S. Ct. 185.

United States.—Inman & Co. *v.* Seaboard, etc., R. Co., 159 Fed. 960.

Alabama.—Atlantic, etc., R. Co. *v.* Rice, 169 Ala. 265, 52 So. 918, 29 L. R. A., N. S., 1214.

Georgia.—Shelnut *v.* Central, etc., R. Co., 131 Ga. 404, 62 S. E. 294, 18 L. R. A., N. S., 494; Wallace *v.* Matthews, 39 Ga. 617, 99 Am. Dec. 473; Southern Exp. Co. *v.* Rose Co., 124 Ga. 581, 53 S. E. 185, 5 L. R. A., N. S., 619.

Idaho.—McIntosh *v.* Oregon R., etc., Co., 17 Idaho 100, 105 Pac. 66.

Illinois.—Galena, etc., R. Co. *v.* Rae, 18 Ill. 488, 68 Am. Dec. 574.

Iowa.—Illinois Cent. R. Co. *v.* Frankenberg, 54 Ill. 88, 5 Am. Rep. 92.

Kentucky.—Louisville, etc., R. Co. *v.* Queen City Coal Co., 13 Ky. L. Rep. 832.

Ohio.—Waring & Co. *v.* Baltimore, etc., R. Co., 3 Wkly. L. Bull. 893, 7 O. Dec. 553; Samms *v.* Stewart, 20 O. 69, 70, 55 Am. Dec. 445; Pittsburgh, etc., R. Co. *v.* Bingham, 29 O. St. 364, affirmed in 9 O. St. 397.

Texas.—Missouri, etc., R. Co. *v.* Carter, 9 Tex. Civ. App. 677, 29 S. W. 565; Ft. Worth, etc., R. Co. *v.* Galton, 45 Tex. Civ. App. 67, 100 S. W. 166.

He is, in general, bound to take the goods of all who offer, unless his complement for the trip is full, or the goods be of such a kind as to be liable to extraordinary danger, or such as he is unaccustomed to convey. Propeller Niagara *v.* Cordes (U. S.), 21 How. 7, 22, 16 L. Ed. 41.

A railroad company is a carrier of goods for the public, and, as such, is bound to carry safely whatever goods are intrusted to it for transportation, within the course of its business, to the end of its route, and there deposit them in a suitable place for their owners or consignees. Myrick *v.* Michigan Cent. R. Co., 107 U. S. 102, 106, 27 L. Ed. 325, 1 S. Ct. 425.

The Winona and St. Peter Railroad Company, having been incorporated as a common carrier, with all the rights and subject to all the obligations which that term implies, was bound to carry, when called upon for that purpose, and charge only a reasonable compensation therefor. Winona, etc., R. Co. *v.* Blake, 94 U. S. 180, 24 L. Ed. 99.

A railroad company is bound to receive and carry any freight properly tendered to it. Memphis News Pub. Co. *v.* Southern R. Co., 110 Tenn. 684, 75 S. W. 941, 63 L. R. A. 150.

Under Rev. St., art. 4227, providing that in case of refusal by a common carrier "to take and transport any passenger or property, or to deliver the same, or either of them, at the regular or appointed time, such corporation shall pay to the party aggrieved all damages which shall be sustained thereby, with costs of suit," a carrier is liable for receiving the goods of one shipper after rejecting those of a prior applicant. Houston, etc., R. Co. *v.* Smith, 63 Tex. 322, 22 Am. & Eng. R. Cas. 421.

Common carriers are liable for refusing to transport goods, in condition to be transported, and delivered at the place designated for receiving them. Doty *v.* Strong (Wis.), 1 Pin. 313, 40 Am. Dec. 773.

its common-law duty to shippers, a common carrier has no right to refuse to receive and transport property offered for shipment, where such property is in good condition and properly prepared for shipment, and belongs to a class of property subject to carriage by such carrier.[6]

Duty Not Dependent upon Contract.—The duty of common carriers with respect to the transportation of property is a duty independent of contract, arising by implication of law from the fact that property is received in the course of business of such employment.[7] It is not necessary to prove any special undertaking, in an action against a carrier for refusing to carry goods.[8] But this duty may arise either upon his common-law obligation to that effect or upon some express contract made by him in that behalf.[9] And in this connection it is held that the true test as to whether a party is a common carrier or not is his legal duty and obligation with reference to transportation. If it is optional with him whether he will carry or not, he is a private carrier; if he must carry for all, he is a common carrier.[10]

Carriers Public Institutions.—As a general rule, the law makes all railways public highways, open to the use of all persons for the transportation of their presons or property, under such regulations as may be prescribed by law, and it is apprehended it is unlawful to make any discrimination as to the property offered to be carried, or as to whether it belongs to a private person or to a corporation. If it is such property as is capable of being carried with the means ordinarily employed by such carriers, the obligation is imperative, and the carrier must receive the property and carry it with safety, in the way such property is usually carried.[11] By accepting a grant of corporate power from the state, a common carrier, such as a railroad, binds itself to do and perform certain things conducive to the public welfare. These things consist principally in the duty to carry and transport persons and property from one point on its road to another under reasonable rules and regulations.[12] A railroad company,

6. Brown *v.* Wabash, etc., R. Co., 18 Mo. App. 568; Potts *v.* Wabash, etc., R. Co., 17 Mo. App. 394; Hance *v.* Pacific Exp. Co., 48 Mo. App. 179; Knight *v.* Quincy, etc., R. Co., 120 Mo. App. 311, 96 S. W. 716, 720. See post, "Exceptional Causes."

Where, at the time plaintiff offered an animal to a carrier for transportation, conditions were such, owing to the delay of a train, that the animal, if shipped, would be detained a whole day at a certain point, of which plaintiff was informed, conceding that the cause of the delay which the shipment would have encountered was unavoidable, the carrier was liable for refusing to transport the animal unless it should be accompanied by a caretaker, or the shipper should sign a release for all damages and liabilities. Under the circumstances it was the duty of the carrier to receive the shipment, and to exercise reasonable care to supply the animal's wants in case it required food and water during detention. Knight *v.* Quincy, etc., R. Co., 120 Mo. App. 311, 96 S. W. 716.

7. **Duty arises independent of contract.**—Johnson *v.* East Tennessee, etc., R. Co., 90 Ga. 810, 17 S. E. 121; Delaware, etc., R. Co. *v.* Trautwein, 52 N. J. L. 169, 19 Atl. 178, 7 L. R. A. 435, 41 Am. & Eng. R. Cas. 187, 19 Am. St. Rep. 442; Adams Exp. Co. *v.* Nock (Ky.), 2 Duv. 562, 87 Am. Dec. 510; Missouri, etc., R. Co. *v.* Webb, 20 Tex. Civ. App. 431, 438, 49 S. W. 526.

8. **Special contract unnecessary.**—Doty *v.* Strong (Wis.), 1 Pin. 313, 40 Am. Dec. 773.

9. **Either by law or contract.**—Missouri, etc., R. Co. *v.* Webb, 20 Tex. Civ. App. 431, 438, 49 S. W. 526.

10. **Who are common carriers.**—Piedmont Mfg. Co. *v.* Columbia, etc., R. Co., 16 Am. & Eng. R. Cas. 194, 19 S. C. 353; Schloss *v.* Wood, 11 Colo. 287, 17 Pac. 910; Nugent *v.* Smith, 1 C. P. Div. 27; Pennewill *v.* Cullen (Del.), 5 Har. 238; Mershon *v.* Hobensack, 22 N. J. L. 372, affirmed in 23 N. J. L. 580; Herring *v.* Utley, 53 N. Car. 270; Spears *v.* Lake, etc., R. Co. (N. Y.), 67 Barb. 513; Harlan *v.* Adams Exp. Co., 19 N. Y. Super. Ct. 235; Russell *v.* Livingston (N. Y.), 19 Barb. 343; Elkins *v.* Boston, etc., R. Co., 23 N. H. 275; Fuller *v.* Bradley, 25 Pa. 120.

11. **Carriers, public institutions.**—Peoria, etc., R. Co. *v.* Chicago, etc., R. Co., 109 Ill. 135, 50 Am. Rep. 605, 18 Am. & Eng. R. Cas. 506; Powers *v.* Inferior Court, 23 Ga. 65.

12. Pittsburgh, etc., R. Co. *v.* Bingham, 29 O. St. 364, affirmed in 9 O. St. 397.

"The obligation to carry, thus assumed, can not be disregarded or rejected at pleasure. It is an indispensable condi-

as a common carrier, can not refuse to receive and carry freight provided it has expressly or impliedly offered to carry such freight if there is a proper offer to pay freight charges, and no reasonable excuse for refusing transportation.[13] It is generally held to be the duty of a railroad, subject to such

tion to the right to exercise corporate functions. The duty to carry is correlative to the existence of the corporate power of the company, and ceases only with a surrender of its corporate privileges. It is, therefore, a right that the public have to enter upon the premises of the company at points designed or designated for receiving passengers, and upon compliance with the rules governing the transportation of persons to be carried over its road to such points thereon as they may desire. The right of the public to enter is coextensive with the duty of the company to receive and carry." Pittsburgh, etc., R. Co. *v.* Bingham, 29 O. St. 364, affirmed in 9 O. St. 397.

"Transportation by a common carrier is necessarily open to the public upon equal and reasonable terms. An exclusive right granted to one is inconsistent with the rights of all others." Memphis News Pub. Co. *v.* Southern R. Co., 110 Tenn. 684, 75 S. W. 941, 63 L. R. A. 150.

Railroad companies can not, as other carriers, relieve themselves from their obligation to carry any property which they are adapted to transport. Missouri Pac. R. Co. *v.* Harris, 1 Tex. App. Civ. Cas., § 1257.

Doing business with rival company.—One railroad company is not justified in disconnecting a switch leading to a coal mine, and refusing to permit the owners of the coal mine to ship coal over its road because such owners also ship coal from the same mine over the road of another railroad company which is also connected with the mine by a switch. Chicago, etc., R. Co. *v.* Suffern, 129 Ill. 274, 38 Am. & Eng. R. Cas. 508, 21 N. E. 824.

13. Rule applied to railroads.—*United States.*—Hannibal, etc., R. Co. *v.* Swift, 12 Wall. 262, 20 L. Ed. 423; Jencks *v.* Coleman, Fed. Cas. No. 7258, 2 Sumn. 221; New Jersey Steam Nav. Co. *v.* Merchants' Bank, 6 How. 344, 12 L. Ed. 465; Pearson *v.* Duane, 4 Wall. 605, 18 L. Ed. 447; Saltonstall *v.* Stockton, Fed. Cas. No. 12271, Taney 11, affirmed in 13 Pet. 181, 20 L. Ed. 115; Southern Exp. Co. *v.* St. Louis, etc., R. Co., 5 Myers Fed. Dec., § 1511; Johnson *v.* Three Hundred and Eighteen and One-Half Tons of Coal, Fed. Cas. No. 14,010, 14 Blatchf. 453, 44 Conn. 548.

Alabama.—Mobile, etc., R. Co. *v.* Prewitt, 46 Ala. 63, 7 Am. Rep. 586; Selma, etc., R. Co. *v.* Butts, 43 Ala. 385, 94 Am. Dec. 694; South, etc., R. Co. *v.* Henlein, 52 Ala. 606, 23 Am. Rep. 578; Southwestern R. Co. *v.* Webb, 48 Ala. 585.

California.—Pfister *v.* Central Pac. R. Co., 70 Cal. 169, 11 Pac. 686, 27 Am. & Eng. R. Cas. 246, 59 Am. Rep. 404; Tarbell *v.* Central Pac. R. Co., 34 Cal. 616; Wheeler *v.* San Francisco, etc., R. Co., 31 Cal. 46, 89 Am. Dec. 147.

Connecticut.—Fuller *v.* Naugatuck R. Co., 21 Conn. 557.

Dakota.—Waldron *v.* Chicago, etc., R. Co., 1 Dak. 351, 46 N. W. 456.

Georgia.—Central R., etc., Co. *v.* Logan, 77 Ga. 804, 2 S. E. 465; Falvey *v.* Georgia Railroad, 76 Ga. 597, 2 Am. St. Rep. 58.

Illinois.—Chicago, etc., R. Co. *v.* Suffern, 129 Ill. 274, 21 N. E. 824, affirming 27 Ill. App. 404; Chicago, etc., R. Co. *v.* Bryan, 90 Ill. 126; Chicago, etc., R. Co. *v.* Gasaway, 71 Ill. 570; Chicago, etc., R. Co. *v.* Thompson, 19 Ill. 578; Galena, etc., R. Co. *v.* Rae, 18 Ill. 488, 68 Am. Dec. 574; Galena, etc., R. Co. *v.* Yarwood, 15 Ill. 468; Peoria, etc., R. Co. *v.* Chicago, etc., R. Co., 109 Ill. 135, 50 Am. Rep. 605, 18 Am. & Eng. R. Cas. 506; St. Louis, etc., R. Co. *v.* Dorman, 72 Ill. 504; Toledo, etc., R. Co. *v.* Pence, 68 Ill. 524; Wabash, etc., R. Co. *v.* Black, 11 Ill. App. 465.

Indiana.—Chicago, etc., R. Co. *v.* Wolcott, 141 Ind. 267, 39 N. E. 451, 50 Am. St. Rep. 320; Fitzgerald *v.* Adams Exp. Co., 24 Ind. 447, 87 Am. Dec. 341; Indianapolis, etc., R. Co. *v.* Rinard, 46 Ind. 293; Louisville, etc., R. Co. *v.* Flanagan, 113 Ind. 488, 3 Am. St. Rep. 674, 32 Am. & Eng. R. Cas. 532; Louisville, etc., R. Co. *v.* Godman, 104 Ind. 490, 4 N. E. 163; Pittsburgh, etc., R. Co. *v.* Morton, 61 Ind. 539, 28 Am. Rep. 682.

Iowa.—Cobb, etc., Co. *v.* Illinois Cent. R. Co., 38 Iowa 601; State *v.* Chovin, 7 Iowa 204.

Kentucky. — Louisville, etc., R. Co. *v.* Queen City Coal Co., 13 Ky. L. Rep. 832; Newport News, etc., R. Co. *v.* Mercer, 96 Ky. 475, 29 S. W. 301, 61 Am. & Eng. R. Cas. 340, 16 Ky. L. Rep. 555; Winnegar *v.* Central Pass. R. Co., 85 Ky. 547, 9 Ky. L. Rep. 156, 4 S. W. 237.

Maine.—Railroad Comm'rs *v.* Portland, etc., R. Co., 63 Me. 269, 18 Am. Rep. 208.

Maryland.—Philadelphia, etc., R. Co. *v.* Lehman, 56 Md. 209, 40 Am. Rep. 415, 6 Am. & Eng. R. Cas. 194.

Massachusetts.—Jordon *v.* Fall River R. Co., 5 Cush. (Mass.) 69, 51 Am. Dec. 44; Thomas *v.* Boston, etc., R. Corp., 10 Metc. 472, 43 Am. Dec. 444.

Michigan.—American Merchants' Union Exp. Co. *v.* Phillips, 29 Mich. 515; Lake Shore, etc., R. Co. *v.* Perkins, 25 Mich. 329, 12 Am. Rep. 275; Michigan, etc., R. Co. *v.* McDonough, 21 Mich. 165.

Mississippi. — Southern Exp. Co. *v.*

reasonable rules as may be adopted in the transaction of its business as a common carrier, to receive and transport goods to the terminus of its line,[14]

Moon, 39 Miss. 822; Vicksburg, etc., Co. *v.* United States Exp. Co., 68 Miss. 149, 8 So. 332.

Missouri.—Birney *v.* Wabash, etc., R. Co., 20 Mo. App. 470; Ballentine *v.* North Missouri R. Co., 40 Mo. 491, 93 Am. Dec. 315; White *v.* Missouri Pac. R. Co., 19 Mo. App. 400.

New Hampshire.—Bennett *v.* Dutton, 10 N. H. 481.

New Jersey.—Atwater *v.* Delaware, etc., R. Co., 48 N. J. L. 55, 57 Am. Rep. 543, 2 Atl. 803; Mershon *v.* Hobensack, 22 N. J. L. 372, affirmed in 23 N. J. L. 580; Messenger *v.* Pennsylvania R. Co., 37 N. J. L. 531, 18 Am. Rep. 754· New York, etc., R. Co. *v.* Ball, 53 N. J. L. 283, 21 Atl. 1052; Rogers Locomotive, etc., Works *v.* Erie R. Co., 20 N. J. Eq. 379.

New York.—Atlantic Mut. Ins. Co. *v.* McLoon, 48 Barb. 27; Beekman *v.* Saratoga, etc., R. Co., 3 Paige 45, 22 Am. Dec. 679; Camden, etc., Transp. Co. *v.* Burke, 13 Wend. 611, 28 Am. Dec. 488; Carroll *v.* Staten Island R. Co., 58 N. Y. 126, 17 Am. Rep. 221; Fish *v.* Clark, 2 Lans. 176, affirmed in 49 N. Y. 122; Grund *v.* Pendergast, 58 Barb. 216; Hastings *v.* New York, etc., R. Co., 53 Hun. 638, 6 N. Y. S. 836, 25 N. Y. St. Rep. 249, 3 Silvernail 422; Lamb *v.* Camden, etc., Transp. Co., 2 Daly 454; People *v.* Babcock, 16 Hun 313; People *v.* New York, etc., R. Co., 9 Am. & Eng. R. Cas. 1, 28 Hun 543, 3 Civ. Proc. R. 11, 2 McCarty Civ. Proc. 345; S. C., R. Co. 22 Hun 533; Tierney *v.* New York, etc., R. Co., 76 N. Y. 305, 67 Barb. 538, affirming 10 Hun 569.

North Carolina.—Harrell *v.* Owens, 18 N. C. 273; —— *v.* Jackson, 1 Hayw. 14.

Ohio.—Cleveland, etc., R. Co. *v.* Bartram, 11 O. St. 457; Welsh *v.* Pittsburg, etc., R. Co., 10 O. St. 65, 75 Am. Dec. 490.

Oregon.—Honeyman *v.*, Oregon, etc., R. Co., 13 Ore. 352, 25 Am. & Eng. R. Cas. 380, 10 Pac. 628, 57 Am. Rep. 20; Thompson-Houston Elect. Co. *v.* Simon, 20 Ore. 60, 23 Am. St. Rep. 86, 47 Am. & Eng. R. Cas. 51.

Pennsylvania. — Eagle *v.* White, 6 Whart. 505, 37 Am. Dec. 434.

South Carolina.—Avinger *v.* South Carolina R. Co., 29 S. C. 265, 13 Am. St. Rep. 716, 35 Am. & Eng. R. Cas. 519, 7 S. E. 493; Piedmont Mfg. Co. *v.* Columbia, etc., R. Co., 19 S. C. 353, 16 Am. & Eng. R. Cas. 194.

Tennessee.—East Tennessee, etc., Railroad *v.* Nelson, 41 Tenn. (1 Coldw.) 272.

Texas.—Gulf, etc., R. Co. *v.* Hume, 87 Tex. 211, 27 S. W. 110; Houston, etc., R. Co. *v.* Smith, 63 Tex. 322, 22 Am. & Eng. R. Cas. 421; Texas, etc., R. Co. *v.* Nicholson, 61 Tex. 491.

Vermont.—Jones *v.* Western Vermont R. Co., 27 Vt. 399, 65 Am. Dec. 206; Kimball *v.* Rutland, etc., R. Co., 26 Vt. 247, 62 Am. Dec. 567; Noyes & Co. *v.* Rutland, etc., R. Co., 27 Vt. 110; Wilder *v.* St. Johnsbury, etc., R. Co., 66 Vt. 636, 30 Atl. 41.

Virginia.—Norfolk, etc., R. Co. *v.* Galliher, 89 Va. 639, 16 S. E. 935.

Wisconsin.—Ayres *v.* Chicago, etc., R. Co., 71 Wis. 372, 37 N. W. 432, 5 Am. St. Rep. 226; Doty *v.* Strong, 1 Pin. 313, 40 Am. Dec. 773; Lawrence *v.* Milwaukee, etc., R. Co., 84 Wis. 427, 54 N. W. 797; Leonard *v.* Whitcomb, 7 Am. & Eng. R. Cas., N. S., 520.

England.—Austin *v.* Great Western R. Co., L. R. 2 Q. B. 442; Bretherton *v.* Wood, 3 Brod. & B. 54, 7 E. C. L. 345; Crouch *v.* Great Northern R. Co., 11 Exch. 742, 34 Eng. L. & Eq. 573; Crouch *v.* London, etc., R. Co., 14 C. B. 255, 78 E. C. L. 255, 23 L. J. C. P. 73; Dickson *v.* Gt. Northern Ry. Co., 18 Q. B. Div. 176; Garton *v.* Bristol, etc., R. Co., 1 B. & S. 112, 101 E. C. L. 112, 7 Jur., N. S., 1234, 9 W. R. 734; Jackson *v.* Rogers, 2 Show. 327; Johnson *v.* Midland R. Co., 6 Railw. Cas. 61, 1 Ry. & C. Y. Cas. 16; Lane *v.* Cotton, 2 Mod. 472; Morton *v.* Tibbett, 15 Q. B. 428, 69 E. C. L. 428; Oxlade *v.* Northeastern R. Co., 9 W. R. 272, 3 L. T. 671; Oxlade *v.* Northeastern R. Co., 15 C. B., N. S., 680, 109 E. C. L. 680; Palmer *v.* Grand Junction R. Co., 4 M. & W. 749; Pegler *v.* Monmouthshire R., etc., Co., 6 H. & N. 644, 39 L. J. Exch. 249; Richards *v.* London, etc., R. Co., 7 C. B. 839, 62 E. C. L. 839, 18 L. J. C. P. 251; Thomas *v.* North Staffordshire R. Co., 3 Ry. & C. T. Cas. 1; Williams *v.* Great Western R. Co., 52 L. T. 250, 49 J. P. 439.

Canada.—Greene *v.* St. John, etc., R. Co., 22 New Bruns. 252.

A railroad is a common carrier, and, as such, is bound to carry for all persons all goods offered for transportation by any person whatever. Avinger *v.* South Carolina R. Co., 29 S. Car. 265, 7 S. E. 493, 13 Am. St. Rep. 716, 35 Am. & Eng. R. Cas. 519.

A railroad must carry any kind of property which it is adapted to carry and which it has impliedly or expressly offered to carry for the public. Herring *v.* Utley, 53 N. Car. 270.

14. Subject to reasonable rules.—*Nebraska.*—Fremont, etc., R. Co. *v.* Waters, 50 Neb. 592, 70 N. W. 225.

A railway company is bound to accept goods for carriage to a place beyond the confines of England if it holds itself out as a carrier to such place, and is subject to the common-law liability of a carrier for hire. Crouch *v.* London & N. W. R. Co., 14 C. B. 255, 7 Railw. Cas. 717, 2 C. L. R. 188, 18 Jur. 148, 23 L. J. C. P. 73.

and it is held that no special contract is necessary as common carriers are bound to receive and carry for any person who tenders freight at the proper place and in the proper condition, the law implying the contract.[15] So it is held that a railroad company can not lawfully carry for one person and refuse, without a sufficient excuse, to carry for another, even though it had the right to refuse to carry for the first.[16] A contract between a railroad company and certain other persons giving such person the exclusive right to ship particular kinds of goods over the railroad has been held void.[17]

Carrier Not a Public Institution.—A carrier, not a public institution, may select the character of the goods it proposes to carry or discontinue to carry a particular class.[18]

Effort to Stifle Competition.—A railroad company is not justified in refusing to permit the owners of a coal mine to ship coal over its road because such owners also ship coal from the same mine over the road of another railroad company. It is the duty of a railroad company to carry any freight that is offered, provided its legal charges for such carriage are paid. It can not take the position that it will not carry coal from the mine upon the line of its road unless it is allowed to carry all the coal from such mine. It is for the interest of the public that there should be full and fare competition between the different railroad companies operating their lines in the state. Serious injury will result to the business interests of the country if shippers can be compelled by arbitrary measures to patronize one railroad to the exclusion of all others. No monopolies would be more odious than those which would result from the adoption of such a policy.[19]

Reason for Existence of Rule.—Railway companies have delegated to them, as part of their franchises, much of the sovereign power of the state, in consideration of their providing the means of commerce and intercourse by constructing the roads which are the avenues of that commerce, and performing the additional duty of common carriers when authorized; and if so authorized they are obliged to transport all merchandise and passengers on the terms fixed in the grant through which they obtained their franchises.[20] The privi-

15. **Special contract unnecessary.** — Doty *v.* Strong (Wis.), 1 Pin. 313, 40 Am. Dec. 773.

Public carriers are bound to carry articles within their scope of business, without any other contract than such as the law would imply. Adams Exp. Co. *v.* Nock (Ky.), 2 Duv. 562, 87 Am. Dec. 510.

16. **Must carry for all alike.**—Butchers', etc., Stock-Yards Co. *v.* Louisville, etc., R. Co., 14 C. C. A. 290, 67 Fed. 35.

17. **Exclusive right to ship.**—A contract between a railroad company operating a railroad in New Jersey, under acts of the legislature of that state, and certain individuals, the effect of which is to give the latter the exclusive right of transporting certain kinds of freight over their railroad, is void from considerations of public policy, and will not be enforced by the courts of New Jersey, notwithstanding it has been recognized as valid by the courts of another state. Union Locomotive, etc., Co. *v.* Erie R. Co., 37 N. J. L. 23; Messenger *v.* Pennsylvania R. Co., 37 N. J. L. 531, 18 Am. Rep. 754. See post, "Discrimination," §§ 342-355.

18. **Carrier, not public institution.**— Ocean, etc., Co. *v.* Savannah Locomotive, etc., Supply Co., 131 Ga. 831, 63 S. E. 577, 20 L. R. A., N. S., 867, 127 Am. St. Rep. 265, 15 Am. & Eng. Ann. Cas. 1044.

19. Chicago, etc., R. Co. *v.* Suffern, 129 Ill. 274, 21 N. E. 824.

20. **Reason for existence of rule.**—Rogers Locomotive, etc., Works *v.* Erie R. Co., 20 N. J. Eq. 379.

Railroads, as public highways, created for public use and subject to state jurisdiction, are handed over exclusively to corporate management and control, because it is for the best interests of the public that their functions should be performed for the state, as public trusts by corporate bodies; and the acceptance of such trusts on the part of the corporation makes it the agency of the state, whereby it contracts to accept the duty of carrying all persons and property, within the scope of its charter, as a public trust. The exclusive enjoyment of use to the corporation imposes the corporate duty to furnish every requisite facility for carrying passengers and freight, and to carry both in such manner and at such times as the public needs may require. People *v.* New York, etc., R. Co. (N. Y.), 9 Am. & Eng. R. Cas. 1, 28 Hun 543, 3 Civ. Proc. R. 11, 2 McCarty Civ. Proc. 345.

"Although a railroad company is a pri-

lege of making a road and taking tolls thereon is a franchise, as much as the establishment of a ferry or a public wharf and taking tolls for the use of the same. The public have an interest in the use of the railroad, and the owners may be prosecuted for the damage sustained, if they should refuse to transport an individual, or his property, without any reasonable excuse, upon being paid the usual rate of fare.[21]

Receiver of Carrier.—The receiver of a railroad company who controls its operation is no less a common carrier because the property of the road is in the custody of the court, and as such carrier he is obliged to receive and transport cars and freight, and to furnish accommodations to connecting lines, to the same extent and in the same manner as are the proper officers of other railroad companies.[22]

Freight from Connecting Lines.—See post, "Connecting Carriers," part V; "Interstate and International Commerce," part VI.

Limiting Duty.—A carrier can not relieve itself from its duty to receive and carry by unreasonable regulations.[23] Hence it is held that a common carrier has no right to refuse to receive and transport goods because the shipper will not assent to a special contract of shipment which limits his common-law responsibility.[24] Again it is held that in the absence of any statute, the court

vate corporation in one sense of the term, it is one in which the public have a very great interest, and the paramount object of the legislature in creating such a corporation is the interest of the public. It is upon the ground that such companies are incorporated for public use that the power given to them to take private property for the construction of their roads against the will of the owners has been sustained. The legislature possesses no constitutional power to authorize the seizure of private property for private purposes, even on giving just compensation. The power of the legislature to authorize municipal officers to tax the people of cities, boroughs, and counties for the payment of subscriptions to railroad corporations has been sustained, on the ground that 'a railroad is a public highway for the public benefit.' Sharpless *v.* Philadelphia, 21 Pa. 147, 59 Am. Dec. 759, 2 Am. L. Reg., O. S., 27. The nature of this peculiar and improved class of highways makes it indispensable to the public safety that the transportation on it should be placed under the strict regulation of one controlling head. This necessity has led to the usual grant of power to provide cars, locomotives, and to embark in the business of transportation of freight and passengers. When this power is assumed, the company becomes a common carrier, and thus exercises a sort of public office, and has public duties to perform. It is bound to receive and carry all the goods offered for transportation, and is liable to an action in case of refusal without sufficient cause. New Jersey Steam Navigation Company *v.* Merchants' Bank, 6 How. 382. Even lateral railroads, established by law for the purpose of enabling the proprietors to convey their minerals to the public thoroughfares, may be used by the public generally on payment of the established rates of toll. Act of May 5, 1832." Lewis, C. J., in Sandford *v.* Catawissa, etc., R. Co., 24 Pa. 378, 64 Am. Dec. 667, 669.

21. **Privilege of taking tolls.**—Beekman *v.* Saratoga, etc., R. Co. (N. Y.), 3 Paige 45, 22 Am. Dec. 679.

22. **Receiver of road.**—Beers *v.* Wabash, etc., R. Co., 34 Fed. 244, 35 Am. & Eng. R. Cas. 646.

23. **Rules limiting duty.**—Johnson *v.* Three Hundred and Eighteen and One-Half Tons of Coal, Fed. Cas. No. 14,010, 14 Blatchf. 453, 44 Conn. 548; Seasongood *v.* Tennessee, etc., Transp. 21 Ky. L. Rep. 1142, 54 S. W. 193, 49 L. R. A. 270; Alsop *v.* Southern Exp. Co., 104 N. C. 278, 40 Am. & Eng. R. Cas. 1; 10 S. E. 297, 6 L. R. A. 271; Garton *v.* Bristol, etc., R. Co., B. & S. 112, 101 E. C. L. 112, 7 Jur., N. S., 234, 30 L. J. Q. B. 273; Missouri Pac. Co. *v.* Fagan, 72 Tex. 127, 9 S. W. 749, 2 L. R. A. 75, 13 Am. St. Rep. 776; Southern Exp. Co. *v.* Moon, 39 Miss. 822. See ante, "Rules and Regulations of Carriers," chapter 3.

24. **Requiring shipper to waive rights.**—Southern Exp. Co. *v.* Moon, 39 Miss. 822; Garton *v.* Bristol & E. R. Co., 1 B. & S. 112, 7 Jur., N. S., 1234, 30 L. J. Q. B. 273, 9 W. R. 734. See McIntosh *v.* Oregon R., etc., Co., 17 Idaho 100, 105 Pac. 66.

A shipper can not be required to waive any of his right as a condition precedent to the carrier's acceptance of the freight for transportation. Missouri Pac. Co. *v.* Fagan, 72 Tex. 127, 9 S. W. 749, 2 L. R. A. 75, 13 Am. St. Rep. 776.

Carriers can not refuse to receive property for transportation, unless the consignor will agree to enter into a special contract therefor. McMillan *v.* Michigan, etc., R. Co., 16 Mich. 79, 93 Am. Dec. 208; Heffron *v.* Michigan, etc., R. Co., 16 Mich. 131; King *v.* Michigan, etc., R. Co., 16 Mich. 132.

can not hold a regulation requiring the shipper of money to retain it over night at his own risk to be reasonable, where it is made the duty of express companies to provide safe places for valuables received.[25] A regulation of a railroad company that owns a dock, that it will not receive coal from vessels landing at the dock unless the owners will employ persons in moving it, designated by the company, and at wages fixed by it, which are at the ordinary price, is unreasonable, and will not be enforced.[26] And it has been held that the fact that competing carriers have made an agreement that neither will accept freight not destined to certain points within specified limits, will not excuse one of them for refusal to receive freight destined for points within the other's territory as set apart in such contract.[27] But such rules do not apply where the carrier becomes a special or private bailee by special contract, of goods he is not otherwise compelled to transport.[28]

Common Carrier Becoming Special Bailee.—There is no doubt but what a common carrier may become a private carrier or a bailee for hire, when, as a matter of special engagement, he undertakes to carry something which it is not his business to carry. In such cases the relation is changed from that of a common carrier to that of a private carrier, and the carrier is not liable as a common carrier, and can not be proceeded against as such.[29] A vast difference exists in the powers and duties of public, or common carriers, and private carriers. A common carrier is one who hold himself out in common, that is, to all people alike, that he is engaged in the business of transporting persons, or certain kinds of property, and is prepared and ready to care for all who apply, on

25. Alsop *v.* Southern Exp. Co., 104 N. Car. 278, 10 S. E. 297, 6 L. R. A. 271, 41 Alb. L. J. 167, 40 Am. & Eng. R. Cas. 1. In this case it appeared that money was tendered to the agent of an express company at a regular station for shipment fifty-five minutes before the train would pass, going in the direction that the money was to be sent; but it was refused under a rule of the company that money should be received for shipment only in the morning before the train would pass in the afternoon: held, that the rule was in violation of the N. Car. Code, § 1964, requiring all transportation companies to receive goods of the kind and nature usually transported by them, whenever tendered.

26. **Requiring shipper to employ certain persons to load.**—Johnson *v.* Three Hundred and Eighteen and One-Half Tons of Coal, Fed. Cas. No. 14,010, 14 Blatchf. 453, 44 Conn. 548.

27. **Agreement between carriers.**—Seasongood *v.* Tennessee, etc., Transp. Co., 21 Ky. L. Rep. 1142, 54 S. W. 193, 49 L. R. A. 270.

28. **Special bailee.**—See post, this section catchline, "Common Carrier Becoming Special Bailee."

29. **Common carrier as special bailee.**—Cleveland, etc., R. Co. *v.* Henry, 170 Ind. 94, 83 N. E. 710, 712; Chicago, etc., R. Co. *v.* Wallace, 14 C. C. A. 257, 66 Fed. 506, 30 L. R. A. 161; Pittsburgh, etc., R. Co. *v.* Mahoney, 148 Ind. 196, 200, 46 N. E. 917, 47 N. E. 464, 40 L. R. A. 101, 62 Am. St. Rep. 503. See, also, Baltimore, etc., R. Co. *v.* Voight, 176 U. S. 498, 44 L. Ed. 560, 20 S. Ct. 385.

"A common carrier may, however, become a private carrier or bailee for hire, where, as a matter of accommodation or special engagement, he undertakes to carry something which it is not his business to carry Railroad Co. *v.* Lockwood (U. S.), 17 Wall. 357, 21 L. Ed. 627; Coup *v.* Wabash, etc., R. Co., 56 Mich. 111, 22 N. W. 215, 56 Am. Rep. 374; Robertson *v.* Old Colony R. Co., 156 Mass. 525, 31 N. E. 650, 32 Am. St. Rep. 482; Chicago, etc., R. Co. *v.* Wallace, 14 C. C. A. 257, 66 Fed. 506, 30 L. R. A. 161;" Louisville, etc., R. Co. *v.* Keefer, 146 Ind. 21, 44 N. E. 796, 38 L. R. A. 93, 58 Am. St. Rep. 348.

Circus property and performers.—A railroad company made a contract to haul a train consisting of cars owned by the other party, and which contained circus property and performers, on stated days, between certain points, at a rate less than the regular rates of the company. It was outside the scope of the company's regular business to haul such trains: held, that the company in hauling such trains acted as a private carrier merely, and the validity of the contract was not affected by the fact that it contained a stipulation against liability for damage. Chicago, etc., R. Co. *v.* Wallace, 14 C. C. A. 257, 66 Fed. 506, 30 L. R. A. 161.

As it is optional with a carrier to accept or refuse powder for transportation, if it chooses to accept it it can do so with such limitation of its common-law liability as it sees fit. California Powder Works *v.* Atlantic, etc., R. Co., 113 Cal. 329, 45 Pac. 691, 36 L. R. A. 648.

the same terms. From its very nature his business is one in which the people generally, or the public, acquire an interest to the extent, at least, that the business be conducted honestly, impartially, and efficiently.[30] Hence the law intervenes as to the public carrier and enforces certain regulations and limitations against him in the interest of the public welfare. Among these regulations he is held to receive and carry for all alike such goods as are in his line of business.[31]

§§ 334-341. Duty to Furnish Shipping Facilities and Means of Transportation—§ 334. In General.—A common carrier is under a legal duty to supply patrons with cars to promptly move such freight as may be expected, according to the usual volume of business offered for shipment, and if timely and reasonable demands are made for cars, and the carrier fails to furnish them, without lawful excuse, he is answerable for the proximate damage sustained by the shipper.[32] The obligation of a carrier to furnish cars may either be imposed by law or arise from a special contract between the parties.[33] Independent of statute, a railroad is under a legal duty to furnish freight cars to shippers when requested.[34] A carrier must provide reasonable facilities for

30. Cleveland, etc., R. Co. *v.* Henry, 170 Ind. 94, 83 N. E. 710.

31. Cleveland, etc., R. Co. *v.* Henry, 170 Ind. 94, 83 N. E. 710.

32. **Duty to furnish facilities in general.**—Cronan *v.* St. Louis, etc., R. Co. (Mo. App.), 130 S. W. 437.

The court, in an action for a carrier's failure to furnish cars for the transportation of perishable freight, must consider the facts in determining whether the order for cars, the offering of the property for shipment, and the notice given are reasonable. Dobbins *v.* Syracuse, etc., R. Co., 141 N. Y. S. 637, 157 App. Div. 80.

In an action against a carrier for its failure to furnish cars for the transportation of perishable freight, evidence held to support a finding that the demand for cars and the offering of the property for shipment were reasonable. Dobbins *v.* Syracuse, etc., R. Co., 157 App. Div. 80, 141 N. Y. S. 637.

33. **Obligation to furnish cars.**—Chattanooga, etc., R. Co. *v.* Thompson, 133 Ga. 127, 65 S. E. 285; Mulberry Hill Coal Co. *v.* Illinois Cent. R. Co., 161 Ill. App. 272.

Under Sayles' Rev. Civ. St. arts., 4226, 4227, requiring carriers to furnish sufficient transportation for all property, and making them liable for all damages caused by their refusal to transport such property, a shipper who shows that he was ready to pay freight charges may recover damages caused by a refusal to transport his property. Galveston, etc., R. Co. *v.* Schmidt (Tex. Civ. App.), 25 S. W. 452.

Illinois Rev. Stat. C. 114, §§ 84, 85, providing for treble damages for the failure of a railroad company to furnish cars for the transportation of such property as shall, within a reasonable time previous thereto, be ready or be offered for transportation, does not to apply to a failure to furnish cars at a mine for coal to be dug and hoisted after the cars are furnished. Illinois, etc., R. Co. *v.* People, 19 Ill. App. 141.

Act approved March 31, 1874, in force July 1, 1874, § 22 (Hurd's Rev. St. 1905, c. 114, § 84) requires railroad companies to furnish, start, and run cars for the transportation of such property as shall within a reasonable time previous thereto be ready or be offered for transportation and to take, receive, transport, and discharge such property, etc. Section 23 of the Act § 85, c. 114, Hurd's Rev. St. 1905) provides that on the refusal of a railroad company to take, receive, transport, and discharge any property within a reasonable time, the company shall pay to the party aggrieved treble the amount of damages sustained thereby, etc. Held, that the latter section is a penal statute, and hence, under the rule that penal statutes must be strictly construed, the provision of the former section that the company shall "furnish, start and run cars for the transportation of" property, etc., having been omitted from the latter, the penalty provided is not recoverable against a company which fails to perform that duty. Atchison, etc., R. Co. *v.* People, 81 N. E. 342, 227 Ill. 270, reversing judgment, 128 Ill. App. 38.

34. **Independent of statute.**—Darlington Lumber Co. *v.* Missouri Pac. R. Co., 116 S. W. 530, 216 Mo. 658; Baker *v.* St. Louis, etc., R. Co. (Kan.), 129 S. W. 436.

A shipper may sue a carrier for failure to furnish cars, as for a breach of common-law duty without any contract to furnish them. Baker *v.* St. Louis, etc., R. Co. (Kan.), 129 S. W. 436.

The common-law duty of a carrier compelled it to furnish cars for the transportation of live stock on reasonable demand of the shipper. Baker *v.* St. Louis, etc., R. Co. (Kan.), 129 S. W. 436.

the transportation of property,[35] such as it undertakes to carry,[36] for all who may apply in the regular course of business.[37] The general rule is that a carrier is not called upon to jeopardize its own business and its duty to the general public, to convenience an individual shipper by furnishing him facilities. So where a railroad company, by reason of a strike of the miners at the coal mines from which it has been accustomed to obtain a large part of the coal which it used in the operation of its road, is compelled to send to more distant fields for a supply, thus making it necessary for it to withdraw its coal engines and cars from that line of its road and use them in freighting coal for its own consumption, these facts constitute a sufficient excuse for its refusal to furnish the owners of the coal mines on that line of its road with engines and cars for the transportation of their coal. The carrier in such cases is only required to furnish cars and haul them in its regular trains according to its capacity without injury to its other business.[38] Nor is it called upon to jeopardize its business by holding in waiting a number of cars without knowing whether or when they will be used.[39] Under the common law as well as under various statutes, including the interstate commerce act, it is the duty of a carrier to provide all necessary facilities and means for transporting such property as may be offered, at least to the extent that would ordinarily be expected to seek transportation by the particular line.[40] A carrier must provide cars for normal conditions of the traffic unless it has reasons to anticipate other conditions, and during a temporary abnormal condition it is not required to furnish a car for every one sent off its line in fulfillment of a contract previously made with shippers, though cars wholly beyond the control of a carrier are the same as if not owned by it, and their places must be supplied with others.[41] In the absence of an agreement to provide cars at a particular time, a carrier is only obligated to exercise due diligence to furnish freight cars within a reasonable time.[42]

35. Reasonable facilities.—St. Louis, etc., R. Co. *v.* State, 84 Ark. 150, 104 S. W. 1106; Galena, etc., R. Co. *v.* Rae, 18 Ill. 488, 68 Am. Dec. 574; Di Giorgio, Importing, etc., Co. *v.* Pennsylvania R. Co., 104 Md. 693, 65 Atl. 425, 8 L. R. A., N. S., 108.

36. St. Louis, etc., R. Co. *v.* Wynne Hoop, etc., Co., 81 Ark. 373, 99 S. W. 375.

37. St. Louis, etc., R. Co. *v.* Wynne Hoop, etc., Co., 81 Ark. 373, 99 S. W. 375.

38. Effect coal miner's strike.—Louisville, etc., R. Co. *v.* Queen City Coal Co., 13 Ky. L. Rep. 832.

A railroad is not liable for failure to furnish cars to a coal company for shipment of such company's coal, the railroad having, by reason of a strike among the employees of all the other coal companies in that district, been obliged to take its coal trains onto another division of its road, to haul coal to supply its engines. Louisville, etc., R. Co. *v.* Queen City Coal Co., 99 Ky. 217, 18 Ky. L. Rep. 126, 35 S. W. 626.

39. Holding cars in waiting.—A carrier is not required to hold for a whole week a large number of cars for a single shipper without knowing on what day of the week or on what hour of the day a single car may be needed. Di Giorgio Importing, etc., Co. *v.* Pennsylvania R. Co., 104 Md. 693, 65 Atl. 425, 8 L. R. A., N. S., 108.

40. Duty to furnish shipping facilities.—H. & T. C. R. Co. *v.* Smith, 63 Tex. 322, 22 Am. & Eng. R. Cas. 421; San Antonio, etc., R. Co. *v.* Timon, 45 Tex. Civ. App. 47, 99 S. W. 418; Thayer *v.* Burchard, 99 Mass. 508; St. Louis, etc., R. Co. *v.* Wynne Hoop, etc., Co., 81 Ark. 373, 99 S. W. 375; State *v.* Chicago, etc., R. C., 71 Neb. 593, 99 N. W. 309.

Under the common law, Ky. St., § 783, and Interstate Commerce Act, § 1, common carrier held to be under a legal duty, subject to certain exceptions, to furnish to shippers, when seasonably requested, sufficient cars and equipment to carry all the freight offered. Illinois Cent. R. Co. *v.* River, etc., Coke Co., 150 S. W. 641, 150 Ky. 489, 44 L. R. A., N. S., 185.

It is the duty of a common carrier, independent of statutory obligation, to provide reasonable facilities and appliances to transport, when requested, such goods as it held itself out ready to carry; the law implies an agreement to furnish necessary cars on a particular day when a request has been in due time made by the shippers of a station agent, who for that purpose has the authority of a general agent. San Antonio, etc., R. Co. *v.* Timon, 45 Tex. Civ. App. 47, 99 S. W. 418.

41. Midland Valley R. Co. *v.* Hoffman Coal Co., 91 Ark. 180, 120 S. W. 380.

42. Dallenbach *v.* Illinois Cent. R. Co., 164 Ill. App. 310.

§§ 335-338. Notice to Carrier—§ 335. Time of Notice.—A railroad company is not bound to keep suitable cars constantly on hand at all stations for the use of shippers, but is entitled to reasonable time in which to furnish them after requisition is made by the shipper.[43] A shipper desiring a car or cars for transportation must, as a general rule, give the carrier reasonable notice as to the time and place when the cars will be needed,[44] and in some cases the extent of notice is fixed by statute.[45] Where the statute provides for so many days notice as a safeguard to prevent the carrier from being pressed for time, the notice may be waived.[46]

§ 336. Requisites and Sufficiency of Demand.—Demand in Writing.—Although a carrier has a rule requiring demands for cars to be in writing, if the carrier does insist on the observance of the rule it seems that it will be estopped to set the failure up to defeat a recovery.[47] In some instances statutes exist which provide for the making of a written demand upon a carrier for the furnishing of cars and which provide a penalty for the failure to comply therewith,[48] and where a shipper seeks to avail himself of the remedy provided for by such statutes he must comply with the statute and make his demand in writing.[49] But such a statute does not do away with the common-

43. Notice to carrier for facilities.—Huston Bros. *v.* Wabash R. Co., 63 Mo. App. 671.

When a shipper requires a car at a railroad station for his exclusive use, he must give notice to the railroad company, after which it will have a reasonable time in which to furnish the car. Illinois Cent. R. Co. *v.* Bundy, 97 Ill. App. 202.

44. Notice as to time.—San Antonio, etc., R. Co. *v.* Timon, 45 Tex. Civ. App. 47, 99 S. W. 418; Di Giorgio Importing, etc., Co. *v.* Pennsylvania R. Co., 104 Md. 693, 65 Atl. 425, 8 L. R. A., N. S., 108.

A requisition on a carrier to furnish cars for the transportation of perishable cargoes on the arrival of steamers required the carrier to furnish 8 cars for June 27th and to furnish others cars on further notice on the arrival of other vessels. On July 1st the carrier received notice to furnish cars. Twenty-one cars were supplied during that day and ten were supplied next morning. The twenty-one cars furnished were too late for the fast freight because of the shipper's failure to give notice of the vessels coming in when he received it. Held, that the carrier was not liable for loss sustained by deterioration of the goods due to the delay in the transportation, there being no sufficient notice to furnish cars. Di Giorgio Importing, etc., Co. *v.* Pennsylvania R. Co., 104 Md. 693, 65 Atl. 425, 8 L. R. A., N. S., 108.

In an action against a carrier for failure to furnish cars for perishable goods imported, it appeared that the carrier was as well posted about the movements of the ships carrying the perishable goods as plaintiff was; that a telegram of the arrival of vessels went to the chamber of commerce of the port, and the railroads made it their business to know every steamer that passed certain points before entering the port. Plaintiff was in a position to inform the carrier of the time when vessels were reported at such points and of the expected day and hour of their arrival. Held, that the carrier was under no obligation to keep some one on watch at the chamber of commerce for the purpose of ascertaining when vessels would arrive so as to be prepared to furnish cars for the transportation of cargoes. Di Giorgio Importing, etc., Co. *v.* Pennsylvania R. Co., 104 Md. 693, 65 Atl. 425, 8 L. R. A., N. S., 108.

It is the duty of a railroad company engaged in the business of transporting freight as a common carrier to receive cattle for transportation upon reasonable notice of the time and place where such tender will be made, and it is liable for failure to provide means of transportation after such notice. Baltimore, etc., R. Co. *v.* Whitehill, 104 Md. 295, 64 Atl. 1033.

45. International, etc., R. Co. *v.* Dimmit County, etc., Co., 5 Tex. Civ. App. 186, 23 S. W. 754.

46. Waiver.—Six days' notice allowed railways by statute in which to procure cars is a safe-guard given them to prevent them from being pressed for time in obtaining cars for transportation of property, and being a privilege granted to them, they can waive it at any time. International, etc., R. Co. *v.* Dimmit County, etc., Co., 5 Tex. Civ. App. 186, 188, 23 S. W. 754.

47. Demand in writing.—St. Louis, etc., R. Co. *v.* Wynne Hoop, etc., Co., 81 Ark. 373, 99 S. W. 375.

48. Statutes providing for written demand.—Minnesota Reciprocal Demurged Laws, 1907, chap. 23, Revised Law, Sup. 1909, § 2023—1 to 2023—13. Georgia acts of 1905, p. 120.

49. Zetterberg *v.* Great Northern R. Co., 117 Minn. 495, 136 N. W. 295; Pope *v.* Wisconsin Cent. R. Co., 112 Minn. 112, 127 N. W. 436; see, also, Ferrell & Co. *v.* Great Northern R. Co., 114 Minn. 531, 131 N. W. 1135.

law rights of the shipper to recover damages for the carrier's failure to furnish cars without such written demand.[50] The right to invoke the common-law remedy to recover damages for an unreasonable failure of a carrier to furnish cars without a written demand therefor, in the absence of contractual relations, is a valuable one, and it can not be assumed that the legislature intended to abrogate such rights unless an intention is clearly expressed.[51]

Definiteness.—An order for cars which is too indefinite as to the number of cars, etc., it does not constitute a basis for an action for failure to furnish them.[52]

§ 337. To Whom Given.—The notice of demand for shipping facilities must be given to an agent of the carrier, duly authorized to furnish the requisite facilities.[53]

§ 338. Specifying Condition and Danger of Goods.—Where the capacity of a carrier is not overtaxed, a shipper demanding cars need not in order to recover for failure to furnish cars, give notice to the carrier of the danger of the goods becoming injured unless shipped without delay.[54]

§ 339. Place of Furnishing Cars.—As long as a spur track or switch remains a part of the carrier's system, it must be operated impartially and without discrimination against parties demanding a service similar to that rendered other parties under special contracts.[55]

Delivery at Warehouse.—Where the usual course of business has been for a railroad to furnish cars at a shipper's warehouse, the shipper may demand cars for its use, giving reasonable notice of its requirements, and may recover in case of a wrongful refusal or neglect to furnish the cars.[56]

§ 340. Goods Ready for Shipment.—See post, "Tender and Refusal," §§ 356-359.

50. Zetterberg *v.* Great Northern R. Co., 117 Minn. 495, 136 N. W. 295. See Southern R. Co. *v.* Moore, 133 Ga. 806, 67 S. E. 85, 26 L. R. A., N. S., 851.

51. Zetterberg *v.* Great Northern R. Co., 117 Minn. 495, 136 N. W. 295, wherein it is held that the common-law rights of shippers have been in no manner decreased by the Reciprocal Demurged Law. Its effect is to create additional statutory rights when its divisions have been complied with.

52. **Definiteness of demand.**—In an action for damages for a breach of public duty in failing to supply cars for the shipment of lumber, whereby the only request for cars alleged was "a standing order for five cars a day," the order was too indefinite. Simmons *v.* Seaboard, etc., Railway, 133 Ga. 635, 66 S. E. 783.

53. A complaint in an action against a railroad for failure to furnish a car for a shipment alleged that plaintiff placed certain goods on defendant's side track for shipment, making a verbal demand on the agent of defendant at the nearest station, and on those operating a local freight train on the division in question, for a suitable car for the shipment, and that plaintiff also wrote the train master two or three letters. Held, that the complaint was demurrable, in that it failed to show a demand on a person authorized to furnish cars. St. Louis, etc., R. Co. *v.* Moss, 75 Ark. 64, 86 S. W. 828.

Where the petition of a shipper against a carrier for delay in furnishing cars for a shipment from P. alleged as ground for recovery that the cars were ordered of the station agent at P., and it appears that the only order was made of a station agent at another station, recovery can not be had, even if, though the station agent of another station had no implied authority to order cars for P., the order given to such other station agent would have constituted a sufficient basis for recovery under a complaint based thereon, in view of the carrier having furnished cars pursuant to such order, though tardily. Southern Kansas R. Co. *v.* Cox, 47 Tex. Civ. App. 84, 103 S. W. 1122.

54. **Condition and danger of goods.**—Hoffman, etc., Stave Co. *v.* St. Louis, etc., R. Co., 119 Mo. App. 495, 94 S. W. 597.

55. A contract between a railroad company and a lumber company for a construction of a switch track on the railroad's right of way construed, and held not to give the lumber company an exclusive privilege of the switch track; and the carrier may not refuse to furnish cars on such track to another shipper. Southern R. Co. *v.* Mather-McDowell Lumber Co. (Miss.), 60 So. 42.

56. **Delivery at warehouse.**—Richey, etc., Co. *v.* Northern Pac. R. Co., 110 Minn. 347, 125 N. W. 897.

§ 341. Adequacy of Facilities.—The duty of a carrier to furnish reasonably adequate facilities is commensurate with the powers and privileges conferred upon it and the just requirement of the public; and, in determining its obligation, its business as a whole, the character of the service required, the need of its performance, and the various rights of the public and of the carrier should be considered.[57] And the question as to what facilities and accommodations should be furnished by a common carrier in order to comply with its public duty is one of fact.[58]

Facilities for Particular Purposes.—It seems that a carrier owes to the public the duty to furnish cars and other facilities especially adapted to the preservation and protection of such goods as it holds itself out of the public as being willing and ready to carry.[59] This would seem to follow from the fact that it is more economical and more advantageous to all parties to have it transported in suitable cars or cars peculiarly adapted to such particular purposes.[60] Thus, a carrier holding itself out as a carrier of live stock is under legal obligation, arising out of the nature of its employment, to provide suitable and necessary means and facilities for receiving live stock offered for shipment over its road and connections.[61] Where large quantities of milk are produced along the line of a common carrier, and it is more advantageous to producers, distributers, and consumers to have it transported in special cars furnished with icing facilities than in ordinary cars, it is the duty of the carrier to furnish such cars.[62] And although a carrier owns no refrigerator cars it may be held liable for refusing or failing to furnish them to shippers for the transportation of garden truck after it has led such shippers to raise the truck in expectation of being furnished with such proper facilities.[63] So it has been held that a carrier can not refuse to accept fruit for transportation because refrigerator cars are necessary therefor although such cars can only be provided and furnished to it by another carrier.[64] Nor can the carrier escape liability on the ground that the trucking crop was unreasonably large, it being no larger than might reasonably have been expected from the acreage planted,

57. Railroad Comm'rs *v.* Florida, etc., R. Co., 58 Fla. 524, 50 So. 425.

Pub. St. 1901, c. 160, § 1, provides that every railroad company shall furnish to all persons reasonable and equal terms, facilities, and accommodations for the transportation of property. Held, that it was the duty of a common carrier of milk to provide reasonable facilities for its reception and delivery and care, including care during transportation. Baker *v.* Boston, etc., R. Co., 74 N. H. 100, 65 Atl. 386, 12 Am. & Eng. Ann. Cas. 1072.

58. Question of fact.—Baker *v.* Boston, etc., R. Co., 74 N. H. 100, 65 Atl. 386, 12 Am. & Eng. Ann. Cas. 1072.

59. Duty to furnish proper facilities.—St. Louis, etc., R. Co. *v.* Renfroe, 82 Ark. 143, 100 S. W. 889, 10 L. R. A., N. S., 1060.

A common carrier owes to the public the duty of providing suitable cars for the service and expeditious carriage and preservation of such freight as it undertakes to carry. New York, etc., R. Co. *v.* Cromwell, 98 Va. 227, 35 S. E. 444, 49 L. R. A. 462.

60. St. Louis, etc., R. Co. *v.* Renfroe, 82 Ark. 143, 100 S. W. 889, 10 L. R. A., N. S., 1060; Baker *v.* Boston, etc., R. Co., 74 N. H. 100, 65 Atl. 386, 12 Am. & Eng. Ann. Cas. 1072.

61. Covington Stock Yards Co. *v.* Keith, 139 U. S. 128, 133, 35 L. Ed. 73, 11 S. Ct. 461.

62. Facilities for particular purposes.—Baker *v.* Boston, etc., R. Co., 74 N. H. 100, 65 Atl. 386, 12 Am. & Eng. Ann. Cas. 1072.

63. Refrigerafor cars.—Atlantic, etc., R. Co. *v.* Geraty, 91 C. C. A. 602, 166 Fed. 10, 20 L. R. A., N. S., 370.

Where plaintiff, owning a farm in a truck region, was induced to plant cabbages by assurance of defendant railroad that refrigerator cars would be furnished to transport them to market, which it refused to do on reasonable demand, plaintiff could recover for unharvested cabbages which spoiled because of defendant's refusal to furnish refrigerator cars, plaintiff after such refusal not being bound thereafter to tender the cabbages for shipment. Atlantic, etc., R. Co. *v.* Geraty, 91 C. C. A. 602, 166 Fed. 10, 20 L. R. A., N. S., 370.

64. Mathis *v.* Southern R. Co., 65 S. C. 271, 43 S. E. 684, 61 L. R. A. 824.

notice there of being imputed to the carrier.[65] As to the duty of a carrier to carry perishable goods in refrigerator cars and to furnish suitable and safe facilities for all kinds of freight accepted for transportation, see post, "Transportation and Delivery by Carrier," chapter 10.

§§ 342-355. Discrimination—§ 342. Right to Discriminate Generally.—Independently of any statute, as a part of its common-law obligation, a carrier is required to treat its patrons impartially, and to avoid unjust discrimination,[66] such discrimination is prohibited by the soundest consideration of public policy.[67] A common carrier owes an equal duty to all and it can not be discharged if he is allowed to make unequal preferences and thereby prevent or impair the enjoyment of the common right.[68]

Railway Company.—In its character as a common carrier and relatively to duties and obligations arising therefrom, a railway company can not grant to any person, or persons, rights or privileges which it refuses to others, but must treat all alike.[69] Such a company as a common carrier is required to treat the public with equality and fairness.[70]

65. Atlantic, etc., R. Co. *v.* Geraty, 91 C. C. A. 602, 166 Fed. 10, 20 L. R. A., N. S., 370.

66. **Unjust or unreasonable discrimination.**—*United States.*—Menacho *v.* Ward, 27 Fed. 529, 23 Blatchf. 502.

Florida.—Johnson *v.* Pensacola, etc., R. Co., 16 Fla. 623, 26 Am. Rep. 731.

Indiana.—Cleveland, etc., R. Co. *v.* Closser, 126 Ind. 348, 26 N. E. 159, 22 Am. St. Rep. 593, 597, 9 L. R. A. 75.

Iowa.—Cook *v.* Chicago, etc., R. Co., 81 Iowa 551, 46 N. W. 1080, 9 L. R. A. 164, 25 Am. St. Rep. 512.

Kansas.—Missouri, etc., R. Co. *v.* New Era Milling Co. (Kan.), 100 Pac. 273.

Kentucky.—A general carrier of freight can not discriminate between shippers or classes of freight. Crescent Coal Co. *v.* Louisville, etc., R. Co., 143 Ky. 73, 135 S. W. 768, 33 L. R. A., N. S., 442.

Maine.—New England Exp. Co. *v.* Maine Cent. R. Co., 57 Me. 188, 2 Am. Rep. 31.

Massachusetts.—Fitchburg R. Co. *v.* Gage, 12 Gray 393.

A carrier is bound to treat all shippers without discrimination. Banner Grain Co. *v.* Great Northern R. Co., 119 Minn. 68, 41 L. R. A., N. S., 678, 137 N. W. 161.

Missouri.—McGrew *v.* Missouri Pac. R. Co., 132 S. W. 1076.

New Jersey.—Messenger *v.* Pennsylvania R. Co., 36 N. J. L. 407, 13 Am. Rep. 457; State *v.* Delaware, etc., R. Co., 48 N. J. L. 55, 57 Am. Rep. 543.

New York.—"The carrier can not unreasonably or unjustly discriminate in favor of one or against another where the circumstances and conditions are the same." Lough *v.* Outerbridge, 143 N. Y. 271, 38 N. E. 292, 42 Am. St. Rep. 712, 25 L. R. A. 674; Root *v.* Long Island R. Co., 114 N. Y. 300, 21 N. E. 403, 4 L. R. A. 331, 11 Am. St. Rep. 643.

Pennsylvania.—Shipper *v.* Pennsylvania R. Co., 47 Pa. 338.

67. Agreements by common carriers with shippers of goods which interfere with the performance of their duties to the public, are contrary to public policy. Edgar Lumber Co. *v.* Cornie Stave Co., 95 Ark. 449, 130 S. W. 452.

68. *Maine.*—New England Exp. Co. *v.* Maine Cent. R. Co., 57 Me. 188, 2 Am. Rep. 31.

New Hampshire.—McDuffee *v.* Portland, etc., Railroad, 52 N. H. 430, 13 Am. Rep. 72, 2 Am. Ry. Rep. 241.

New Jersey.—Messenger *v.* Pennsylvania R. Co., 37 N. J. L. 531, 18 Am. Rep. 754, 758.

Pennsylvania.—Audenried *v.* Philadelphia, etc., R. Co., 68 Pa. 370, 8 Am. Rep. 195; Sandford *v.* Catawissa, etc., R. Co., 24 Pa. 378, 64 Am. Dec. 667.

"Transportation by a common carrier is necessarily open to the public upon equal and reasonable terms. An exclusive right granted to one is inconsistent with the rights of all others." Audenried *v.* Philadelphia, etc., R. Co., 68 Pa. 370, 8 Am. Rep. 195.

Chief Justice Appleton, in the case of the New England Exp. Co. *v.* Maine Cent. R. Co., 57 Me. 188, 2 Am. Rep. 31, also says: "The very definition of a common carrier excludes the idea of the right to grant monopolies, or to give special and unequal preferences." Messenger *v.* Pennsylvania R. Co., 37 N. J. L. 531, 18 Am. Rep. 754.

69. Kates *v.* Atlanta Baggage, etc., Co., 107 Ga. 636, 34 S. E. 372, 46 L. R. A. 431; Atlanta, etc., R. Co. *v.* Holcombe & Co., 76 Ga. 590; Johnson Coal Min. Co. *v.* Hocking Valley R. Co., 1 N. P., N. S., 385, 14 O. D. N. P. 209; State *v.* Cincinnati, etc., R. Co., 47 O. St. 130, 23 N. E. 928.

Ohio statute merely declaratory of common law and confers no new rights.—Johnson Coal Min. R. Co. *v.* Hocking Valley R. Co., 1 N. P., N. S., 385, 14 O. D. N. P. 209.

70. Houston, etc., R. Co. *v.* Rust, 58 Tex. 98.

Railroad corporations occupy a peculiar

Equal Terms for All Shippers.—While it is true that at common law, and in the absence of charter or statutory regulations to the contrary, a common carrier may discriminate as to rates, so that no unreasonable charge is made, yet he must carry for all; because it is a leading principle of the common law, applicable to all common carriers, that they are bound to carry for all, and for a reasonable remuneration.[71] The tendency and undoubted weight of authority is in favor of the doctrine that a common carrier is charged with a quasi public duty to transport merchandise on equal terms for all parties, where the carrying for some shippers at a lower price than for others will create monopoly by injuring or destroying the business of those less favored.[72] Under this rule, a carrier can not discriminate by receiving and carrying for one customer and, under substantially the same circumstances, refusing to carry for another.[73]

relation to the public as invested with certain franchises for the public benefit, and they are bound to use them with fairness and for the common good. Messenger *v.* Pennsylvania R. Co., 37 N. J. L. 531, 18 Am. Rep. 754.

In the grant of a franchise of building and using a public railway, there is an implied condition that it is held as a quasi public trust for the benefit of the public, and the company possessed of the grant must exercise a perfect impartiality to all who seek the benefit of the trust. Messenger *v.* Pennsylvania R. Co., 37 N. J. L. 531, 18 Am. Rep. 754.

Railway companies derive their charter rights from the state and owe an equal duty to every citizen, and they can not exercise their charter rights in such manner as to benefit an individual, town or community, to the detriment of another. Houston, etc., R. Co. *v.* Smith, 63 Tex. 322, 22 Am. & Eng. R. Cas. 421.

A railroad company sought to evade the receiving and delivery of grain in bulk to a particular elevator to which it was consigned, on the ground that it had the right to establish its own usage in the regard, and it never held itself out as a carrier of grain in bulk, except upon the condition that it might itself choose the consignee, which had become the custom and usage of its business, and it could not be required to go beyond this limit. Held, that the company could make no such injuries or arbitrary discrimination between individuals in its dealings with the public. Chicago, etc., R. Co. *v.* People, 56 Ill. 365, 8 Am. Rep. 690.

71. Equal terms for all shippers.—Avinger *v.* South Carolina R. Co., 29 S. C. 265, 7 S. E. 493, 13 Am. St. Rep. 716, 35 Am. & Eng. R. Cas. 519.

"In Johnson *v.* Pensacola, etc., R. Co., 16 Fla. 623, 26 Am. Rep. 731, the following language was used which succinctly embodies the common-law doctrine on this subject, to wit: 'That, as against a common or public carrier, every person has the same right; that in all cases, when his common duty controls, he can not refuse A. and accommodate B.; that all—the entire public—have the right to the carriage for a reasonable price—at a reasonable charge for the services performed; and the commonness of the duty to carry for all does not involve a commonness or equality of compensation or charge; that all the shipper can ask of a common carrier is that, for services performed, he shall charge no more than a reasonable sum to him.' This principle was recognized and enforced in our case of Ex parte Benson, 18 S. C. 42, 43." Avinger *v.* South Carolina R. Co., 29 S. C. 265, 7 S. E. 493, 13 Am. St. Rep. 716, 35 Am. & Eng. R. Cas. 519.

72. Scofield *v.* Lake Shore, etc., R. Co., 43 O. St. 571, 3 N. E. 907, 54 Am. Rep. 846; Avinger *v.* South Carolina R. Co., 29 S. C. 265, 7 S. E. 493, 13 Am. St. Rep. 716, 35 Am. & Eng. R. Cas. 519.

As to discrimination in freight rates, see post, "Discrimination in Rates and Overcharge," chapter 16.

73. *England.*—Baxendale *v.* Bristol, etc., R. Co., 11 C. B., N. S., 787, 103 E. C. L. 787; Cooper *v.* London, etc., R. Co., 4 C. B. N. S. 738, 93 E. C. L. 738; Crouch *v.* Great Northern R. Co., 11 Exch. 742; Crouch *v.* London & N. W. R. Co., 23 L. J. C. P. 73; Davis *v.* Taff Vale R. Co., App. 542, 11 R. 189; Garton *v.* Bristol & E. R. Co., 30 L. J. Q. B. 273; Palmer *v.* London, etc., R. Co., L. R. 6 C. P. 194, 40 L. J. C. P. 133; Johnson *v.* Midland R. Co., 4 Exch. 327; Lees *v.* Lancashire, etc., R. Co., 18 Sol. Jour. 629; Page *v.* Great Northern R. Co., 2 Ir. Rep. (C. L.) 288; Palmer *v.* London, etc., R. Co., L. R. 1 C. P. 588, 35 L. J. C. P. 289; West *v.* London, etc., R. Co., L. R. 5 C. P. 622; Southeastern R. Co. *v.* Railway Comm'rs, 41 L. T., N. S., 760, 28 W. R. 464.

United States.—Butchers', etc., Stock Yards Co. *v.* Louisville, etc., R. Co., 14 C. C. A. 290, 67 Fed. 35.

California.—Wheeler *v.* San Francisco, etc., R. Co., 31 Cal. 46, 89 Am. Dec. 147.

Colorado.—Bayles *v.* Kansas Pac. R. Co., 13 Colo. 181, 40 Am. & Eng. R. Cas. 42, 22 Pac. 341, 5 L. R. A. 480; Kansas Pac. R. Co. *v.* Bayles, 19 Colo. 348, 61 Am. & Eng. R. Cas. 128, 35 Pac. 744.

Georgia.—Kates *v.* Atlanta Baggage, etc., Co., 107 Ga. 636, 34 S. E. 372, 46 L. R.

Special Contractual Obligations.—It is the duty of a common carrier railroad corporation to have regard for the rights of the public in the service it engages to perform under the franchises the state permits it to use primarily for the benefit of the public.[74] This requirement embraces the duty to render a service adequate to meet all the just requirements of the public, including

A. 431; Logan & Co. *v.* Central Railroad, 74 Ga. 684; Atlanta, etc., R. Co. *v.* Holcombe & Co., 76 Ga. 590.

Illinois.—Chicago, etc., R. Co. *v.* People, 67 Ill. 11, 16 Am. Rep. 599; Great Western R. Co. *v.* Burns, 60 Ill. 284, 12 Am. R. Rep. 309.

Indiana.—Chicago, etc., R. Co. *v.* Wolcott, 141 Ind. 267, 39 N. E. 451, 50 Am. St. Rep. 320; Cleveland, etc., R. Co. *v.* Closser, 126 Ind. 348, 26 N. E. 159, 22 Am. St. Rep. 593.

Maine.—New England Exp. Co. *v.* Maine Cent. R. Co., 57 Me. 188, 2 Am. Rep. 31.

Massachusetts.—Boston, etc., R. Co. *v.* Shanly, 107 Mass. 568; Vermont, etc., R. Co. *v.* Fitchburg R. Co., 14 Allen 462, 92 Am. Dec. 785.

New Hampshire.—Bennett *v.* Dutton, 10 N. H. 481; McDuffee *v.* Portland, etc., Railroad, 52 N. H. 430, 13 Am. Rep. 72, 2 Am. R. Rep. 241.

New Jersey.—Messenger *v.* Pennsylvania 104, affirmed in 47 N. Y. 525; Mallory *v.* R. Co., 37 N. J. L. 531, 18 Am. Rep. 754; New Jersey R., etc., Co. *v.* Pennsylvania R. Co., 27 N. J. L. 100.

New York.—Acheson *v.* New York, Cent., etc., R. Co., 61 N. Y. 652; Lough *v.* Outerbridge, 143 N. Y. 271, 38 N. E. 292, 25 L. R. A. 674, 42 Am. St. Rep. 712; Keeney *v.* Grand Trunk R. Co., 59 Barb. 104, affirmed in 47 N. Y. 525; Mallory *v.* Tioga R. Co., 39 Barb. 488.

Pennsylvania.—Cumberland Valley R. Co.'s Appeal, 62 Pa. 218; Sandford *v.* Catawissa, etc., R. Co., 24 Pa. 378, 64 Am. Dec. 667.

Texas.—Houston, etc., R. Co. *v.* Smith, 63 Tex. 322, 22 Am. & Eng. R. Cas. 421.

Wisconsin.—Doty *v.* Strong, 1 Pinn. 313, 40 Am. Dec. 773.

A carrier can not enact such rules discriminating against shipments as to tend to create monopolies and a right of action accrues for damages resulting from the enforcement of such a rule of a carrier of goods, requiring shipments from certain points to be unloaded from the cars of the line on which they have come, delivered in drays and again loaded on its cars before it will accept such goods for shipment over its line. Such action not only gives to the competing carrier a right of action for damages to its right of business but also gives a right of action to the shipper who is damaged by the wrongful requirement of unshipping, hauling, and reshipping and the consequent waste, delay and injury. Logan & Co. *v.* Central Railroad, 74 Ga. 684.

It was the duty of the railroad company to forward the papers tendered it, without discrimination in time or order of shipment; and it could not refuse to carry papers of the rival house on the early morning train, on the ground that it had other trains going out later in the day. Memphis News Pub. Co. *v.* Southern R. Co., 110 Tenn. 684, 75 S. W. 941, 63 L. R. A. 150.

The provision in the constitution of Colorado, that "all individuals, associations, and corporations shall have equal rights to have persons and property transported over any railroad in this state, and no undue or unreasonable discrimination shall be made in charges or facilities for transportation of freight or passengers within the state, and no railroad company, nor any lessee, manager, or employee thereof, shall give any preference to individuals, associations, or corporations in furnishing cars or motive power," imposes no greater obligation on a railroad company than the common law would have imposed upon it. Atchison, etc., R. Co. *v.* Denver, etc., R. Co., 110 U. S. 667, 28 L. Ed. 291, 4 S. Ct. 185, 16 Am. & Eng. R. Cas. 57.

Under Texas Rev. St., art. 4227, providing that in case of refusal by a common carrier "to take and transport any passenger or property, or to deliver the same, or either of them, at the regular or appointed time, such corporation shall pay to the party aggrieved all damages which shall be sustained thereby, with costs of suit," a carrier is liable for receiving the goods of one shipper after rejecting those of a prior applicant. Houston, etc., R. Co. *v.* Smith, 63 Tex. 322, 22 Am. & Eng. R. Cas. 421.

Carriers engaged in the business of carrying coal, as well as all other articles or merchandise and freight offered to it, have no right to make any discrimination between shippers, and are obliged to carry for all persons all classes and character of freight offered to them. Bassett *v.* Aberdeen Coal, etc., Co., 120 Ky. 728, 88 S. W. 318, 27 Ky. L. [illegible] 1122; Crescent Co. *v.* Louisville, etc., R. Co., 143 Ky. 73, 135 S. W. 768, 33 L. R. A., N. S., 442.

Industrial plants situated on spur tracks.—A railway company owes the same duty to carry goods to an industrial plant connected with its line by spur tracks that it does to plants situated on the main line. Crescent Coal Co. *v.* Louisville, etc., R. Co., 143 Ky. 73, 135 S. W. 768, 33 L. R. A., N. S., 442.

74. Taylor *v.* Florida, etc., R. Co., 54 Fla. 635, 45 So. 574, 14 Am. & Eng. Ann. Cas. 472, 16 L. R. A., N. S., 307.

reasonable dispatch, convenience, regularly, and promptness in the transportation of passengers, provision and maintenance of adequate depot facilities suited to the business and convenience of the communities along the road, and the performance of the duties and the rendering of the service due to the public, without unjust discrimination of any character as to persons, localities, or conditions.[75] This duty, however, does not relieve the corporation from its contract obligations to individuals, when an observance of the obligations does not materially and injuriously affect the rights of the public; and where the public, or any member of it, is so effected, the rights of the respective parties can not be arbitrarily determined by the corporation for itself. If the private rights under the contract can not be adjusted by agreement, resort should be had to the courts by proper parties, where all rights will be adjudged.[76] It is the duty of the corporation to observe the obligations of its contract with individuals that are made in good faith, and that do not necessarily directly and materially affect injuriously substantial rights of the public, until the corporation is relieved from such contract by due course of law.[77] A railroad company is allowed a reasonable discretion in the performance of its duties and in the rendering of service to the public; but such discretion should be exercised in good faith and for the public welfare, and not arbitrarily, and it is subject to control and regulation by governmental authority.[78]

Contracting to Carry for One Person Only.—The fact that one publishing company solicits the institution of certain train service and supports it by large outlay of money does not change the rule, nor make the train a special one, chartered for a special purpose.[79] Nor can such contracting parties impose, as a condition of acceptance and delivery of goods tendered, on another person an obligation to share the burden of establishing the service voluntarily assumed by the contracting house.[80]

75. Taylor *v.* Florida, etc., R. Co., 54 Fla. 635, 45 So. 574, 14 Am. & Eng. Ann. Cas. 472, 16 L. R. A., N. S., 307.

76. Taylor *v.* Florida, etc., R. Co., 54 Fla. 635, 45 So. 574, 14 Am. & Eng. Ann. Cas. 472, 16 L. R. A., N. S., 307. See post, "Bills of Lading," chapter 6; "Shipping Receipts," chapter 7; "Special Contracts," chapter 8.

77. Taylor *v.* Florida, etc., R. Co., 54 Fla. 635, 45 So. 574, 14 Am. & Eng. Ann. Cas. 472, 16 L. R. A., N. S., 307.

78. Taylor *v.* Florida, etc., R. Co., 54 Fla. 635, 45 So. 574, 14 Am. & Eng. Ann. Cas. 472, 16 L. R. A., N. S., 307; Ellis *v.* Atlantic, etc., R. Co., 53 Fla. 650, 44 So. 213, 13 L. R. A., N. S., 560.

Whether the duty a common carrier owes to the public is materially and injuriously affected by the contract obligation of the corporation to individuals cannot be arbitrarily determined by the corporation for itself. Taylor *v.* Florida, etc., R. Co., 54 Fla. 635, 45 So. 574, 14 Am. & Eng. Ann. Cas. 472, 16 L. R. A., N. S., 307.

79. Contract to carry for one only.—Memphis News Pub. Co. *v.* Southern R. Co., 110 Tenn. 684, 75 S. W. 941, 63 L. R. A. 150.

Special train for transportation of newspapers.—A railroad company contracted with a newspaper publisher, agreeing to run a special early morning train carrying only the newspapers of the publisher, in consideration of the publishing company guarantying to it a certain revenue from the operation of the train. This train became one of its scheduled trains, and was advertised as such. It was controlled exclusively by the company, and all the revenue derived from its operation in the carrying of passengers and freight was its property. It was held, that the railroad could not, relying on its contract, refuse to carry on such train newspapers tendered it by a rival publishing house, which offered to comply with all the conditions as to guaranty, indemnity, etc., complied with by the house making the contract, and such refusal constituted an illegal discrimination between persons of the same class. Memphis News Pub. Co. *v.* Southern R. Co., 110 Tenn. 684, 75 S. W. 941, 63 L. R. A. 150.

80. Contribution as condition.—Memphis News Pub. Co. *v.* Southern R. Co., 110 Tenn. 684, 75 S. W. 941, 63 L. R. A. 150.

In a suit by a publishing house against a railroad company for refusal to carry its papers on an early morning train, which was put in service by the railroad under a contract with another publishing house which stipulated that the railroad company should not forward the papers of any other house than the contractor, the contracting house could not, when made a party to the suit by its rival, file

No length of time or habit of dealing will discharge a carrier's duty to serve the public without discrimination.[81]

Unusual Rush of Business as Guise for Discrimination.—See post, "Unusual Press of Business," §§ 368-371.

§§ 343-348. Discrimination in Facilities and Cars—§ 343. In General.—A railroad company under the common law is required to extend to all persons without discrimination equal facilities for receiving and shipping freight of all kinds of the same class.[82]

§ 344. Discrimination in Favor of One of Several Connecting Carriers.—Providing Stations and Interchanging Freight.—The duty of a carrier to accept goods tendered at its station does not require it to accept cars offered by competing roads at arbitrary points near its terminus for the purpose of using its terminal station. A law requiring the carrier so to do is unconstitutional as taking property without due process of law.[83]

Requiring Delivery and Receipt of Cars between Connecting Carriers.—A provision in the constitution of a state that a carrier must deliver its cars to connecting carriers without providing adequate protection for their return, or compensation for their use, amounts to a taking of property without due process of law within the meaning of the fourteenth amendment, and so held as to §§ 213, 214, of the constitution of Kentucky.[84] And the property of a railway company is taken without due process of law where such company is compelled, upon payment simply for the service of carriage, to accept cars offered to it at an arbitrary connecting point near its terminus, by a competing road, for the purpose of reaching and using the former's terminal facilities.[85]

§ 345. Preference in Delivery and Distribution of Cars.—Where a railroad company discriminates against a shipper who has no other means of shipment than over its line, and refuses to furnish him with cars at times when it is supplying them freely to other shippers at points where it competes with other lines, it is liable.[86]

Live Stock and Merchandise over Hay.—Where a railroad distributed its freight cars so that empty cars were retained on the division where they had been unloaded until they could be loaded with outgoing freight, and it preferred shippers of live stock and merchandise over the shippers of hay located at noncompetitive points, and during a blockade at its terminals withheld cars for the

a cross bill, and thereby work out any equities that it might have against it on account of expenses incurred through the establishment and early maintenance of the train service. Memphis News Pub. Co. *v.* Southern R. Co., 110 Tenn. 684, 75 S. W. 941, 63 L. R. A. 150.

81. Crescent Coal Co. *v.* Louisville, etc., R. Co., 143 Ky. 73, 135 S. W. 768, 33 L. R. A., N. S., 442.

82. Toledo, etc., R. Co. *v.* Wren, 78 O. St. 137, 84 N. E. 785, 16 L. R. A., N. S., 914.

83. **Providing for interchanging freight.**—Louisville, etc., R. Co. *v.* Central Stock Yards Co., 212 U. S. 132, 53 L. Ed. 441, 29 S. Ct. 245.

84. **Requiring delivery and receipt of cars between connecting carrier.**—Requiring a railway company to deliver its own cars to another railway company when performing its duty under Const. Ky., § 213, to receive, deliver, and transport freight from and to any point where there is a physical connection between its track and those of any other railway company deprives the former company of its property without due process of law. Judgment in 97 S. W. 778, 30 Ky. L. Rep. 18, reversed. Louisville, etc., R. Co. *v.* Central Stock Yards Co., 212 U. S. 132, 53 L. Ed. 441, 29 S. Ct. 246.

Requiring delivery of cars to connecting carrier.—Louisville, etc., R. Co. *v.* Central Stock Yards Co., 212 U. S. 132, 53 L. Ed. 441, 29 S. Ct. 246. (Decided with reference to §§ 213, 214 of the Kentucky constitution.)

85. **Requiring receipt of cars.**—Louisville, etc., R. Co. *v.* Central Stock Yards Co., 212 U. S. 132, 53 L. Ed. 441, 29 S. Ct. 246.

86. **Refusal to furnish cars.**—Chicago, etc., R. Co. *v.* Wolcott, 141 Ind. 267, 39 N. E. 451, 50 Am. St. Rep. 320.

shipment of hay to other points until the congestion was relieved, it was an unlawful discrimination.[87]

As between Miners.—Where a railroad divides mines along its line into two districts, and rates them according to their producing capacity, and during a period of shortage gives to one coal company an excess of cars, it will be liable in damages to a coal company in the other district which has been deprived of its fair share of cars.[88]

§§ 346-347. With Respect to Use of Tracks—§ 346. In General.—A carrier by railroad in the discharge of its duties to the public must use all the tracks set apart for the transportation of freight, and treat without favor or discrimination all persons offering freight to it for carriage.[89]

Use by Express Companies.—A railroad company is bound to permit any express company to operate on its lines.[90]

§ 347. With Respect to Spur Tracks, Switches and Belt Lines.—Where a carrier received and delivered freight on private spur tracks pursuant to contracts, and the contracts offered to all of its customers were identical, there was no discrimination against any customer.[91]

Preference in Use of Belt Lines and Spur Tracks.—A railroad company may establish reasonable depots or places at which it will receive and deliver freight and can not be required to receive or handle it at other places; but it must use for the public convenience all the tracks set apart by it for the transportation of freight, and treat all patrons without discrimination.[92] A railway company can not justify discrimination in refusing to carry coal between a mine and an industrial plant on a belt line in a city while carrying other freight between points on that line on the ground that it obtains an additional haul from the other freight before or after the haul on the belt line.[93]

§ 348. Discrimination in Switch and Trackage Charges.—Lessee and Non-Lessee Coal Operators.—A coal company, which constructs a railroad switch to its mine and allows the hauling over it of coal of its lessees, does not discriminate against others, whom it charges five cents a ton trackage, by charging its tenants only eight cents a ton royalty; such charge to also cover transportation over the track.[94]

87. **Preference in delivery and distribution of cars.**—Dobney *v.* Chicago, etc., R. Co., 83 Neb. 518, 120 N. W. 165.

88. Puritan Coal Min. Co. *v.* Pennsylvania R. Co., 237 Pa. 420, 85 Atl. 426.

89. **With respect to use of tracks.**—Louisville, etc., R. Co. *v.* Higdon, 149 Ky. 321, 148 S. W. 26.

90. **Use by express companies.**—State *v.* Missouri Pac. R. Co. (Mo.), 144 S. W. 863. See post, "Duties as to Express Companies," § 377.

91. **Discrimination with respect to spur track switches and belt lines.**—Gulf Compress Co. *v.* Alabama, etc., R. Co. (Miss.), 56 So. 666.

92. **Preference in use of belt line and spur tracks.**—Crescent Coal Co. *v.* Louisville, etc., R. Co., 143 Ky. 73, 135 S. W. 768, 33 L. R. A., N. S., 442.

A railway company need not carry freight between points within ordinary switching limits at a given station; but, where it operates a belt line and carries freight between industrial plants thereon for compensation, refusal to carry coal from a mine on such line to one of such plants is unlawful discrimination, though the spur tracks involved are within what the company calls its switching limits, and regardless of the length, location, and proximity of the spur tracks and the character of the plants. Crescent Coal Co. *v.* Louisville, etc., R. Co., 143 Ky. 73, 135 S. W. 768, 33 L. R. A., N. S., 442.

93. Crescent Coal Co. *v.* Louisville, etc., R. Co., 143 Ky. 73, 135 S. W. 768, 33 L. R. A., N. S., 442.

94. **Lessee and non-lessee coal operators.**—Straight Creek Coal Min. Co. *v.* Straight Creek Coal, etc., Co. (Ky.), 122 S. W. 842.

A railroad company, which has a mortgage on the switch road of a coal company coming into its road at P., and without charge puts its empty cars on the switch for the various mineowners along it, and when they are loaded hauls them over the switch to P., making its charges from P., only, the same to all shippers, does not operate the switch as part of its general system, so as to be subject to

§§ 349-350. Preference to Shipper in Order of Forwarding Goods—§ 349. In General.—The requirement of the common law that a common carrier must receive goods offered for transportation in the order of their tender can not, on principle, be affected either by the place where the shipment originates or by the ultimate destination of the goods.[95] There is, therefore, no reason why a steamship company should prefer freight tendered in a car from one forwarding agency and deny freight similarly tendered by another forwarding agency or shipper. If a steamship company desires an inland carrier to issue through bills of lading, it may do so subject to its obligations to receive and carry freight in order of its tender. The mere fact that a particular commodity is destined to a foreign port can not justify a carrier in giving a preference to it over the same or another commodity because the latter may be a domestic shipment.[96]

Cotton.—The great value of the cotton crop and the importance of its prompt transportation gives that product no imperial rights over other products of the state, and hence does not justify a carrier in refusing to ship lumber in order that it may be enabled to ship cotton. It is not perishable in its nature, and it will not be contended that its fluctuation in price is so violent that a delay in transportation would substantially destroy its value.[97]

§ 350. Booking Freight.—The carrier's common-law obligation of indifferently serving the public in the receipt and transportation of goods does not inhibit a carrier by sea from making "booking" of freight—that is, from making specific arrangements for the transportation of goods by a particular vessel—in advance of its sailing day, provided this privilege is indifferently extended to all patrons, or if the grant of this privilege to shippers of one commodity does not interfere with the carrier's discharge of duty to the shippers of other commodities with respect to the receipt and transportation of their goods. The same rules which govern a carrier by sea in the reception of goods for transportation apply to the carrier's engagements to transport by a particular vessel, or within a specified limit of time.[98]

the charge of discrimination on account of the trackage charges made by the coal company owning the switch. Straight Creek Coal Min. Co. *v.* Straight Creek Coal, etc., Co. (Ky.), 122 S. W. 842.

95. Preferences to shipper in order of forwarding.—Ocean, etc., Co. *v.* Savannah Locomotive, etc., Supply Co., 131 Ga. 831, 63 S. E. 577, 20 L. R. A., N. S., 867, 127 Am. St. Rep. 265, 15 Am. & Eng. Ann. Cas. 1044. So held under Texas Revised Statutes of 1895, art. 4537, Hill *v.* St. Louis, etc., R. Co. (Tex. Civ. App.), 75 S. W. 874, reversed in 97 Tex. 506.

96. Ocean, etc., Co. *v.* Savannah Locomotive, etc., Supply Co., 131 Ga. 831, 63 S. E. 577, 20 L. R. A., N. S., 867, 127 Am. St. Rep. 265, 273, 15 Am. & Eng. Ann. Cas. 1044.

97. Cotton.—Ocean, etc., Co. *v.* Savannah Locomotive, etc., Supply Co., 131 Ga. 831, 63 S. E. 577, 20 L. R. A., N. S., 867, 127 Am. St. Rep. 265, 15 Am. & Eng. Ann. Cas. 1044.

98. Booking freight.—Ocean, etc., Co. *v.* Savannah Locomotive, etc., Supply Co., 131 Ga. 831, 63 S. E. 577, 20 L. R. A., N. S., 867, 127 Am. St. Rep. 265, 15 Am. & Eng. Ann. Cas. 1044.

The system of "booking," is the practice of the steamship company to make specific engagements with shippers for a reservation of space for freight to be shipped on a particular vessel, in advance of its sailing day. If the steamship company indifferently extended this privilege to all of its patrons and to all commodities, it would not violate any duty which it owed the public. "The basal principle of the requirement of the common law that a common carrier must convey the goods of all persons offering to pay his hire, unless his carriage be already full, is that there should be no unjust preference given one member of the public over another. The practice of making specific engagements in advance of the shipment, if the privilege is indifferently extended to all, is but another form of acceptance of goods tendered in the order of their application. The same impartially of service is rendered when the public notice is given by the carrier that he will 'book' the freight of all patrons, and reserves space for the goods engaged to be transported as if he had received the goods of the shipper in the order of their tender. But when a carrier reserves space in his carriage for a favored patron, or a favored commodity, not perishable in its nature, and refuses to reserve space for another patron or commod-

§§ 351-355. Remedies for Discrimination—§§ 351-353. Form of Action—§ 351. Injunction and Mandamus.—If, upon investigation by the state commission of Ohio, the rate or rates or any regulation, practice or service complained of, shall be found to be unreasonable or unjustly discriminatory, or the service shall be found to be inadequate, the commission has the power to grant relief; and in that event, if its orders are not complied with, it may compel compliance by proceedings in mandamus, injunction or by other proper civil proceedings.[99] The railroad commission of Ohio is not invested with judicial powers, either in the making of rates or determination of the distribution of cars, etc., such as will preclude courts in suits by shippers to restrain enforcement of such orders, from hearing de novo the matters in controversy; nor can such rulings effect the rights of shippers, but they may resort to inherent equity powers to have their rights determined and protected by the courts.[1]

Consolidated Railroad Extending into Several States.—Where a defendant railroad company is a corporation consolidated under the statutes of several states, including Ohio, and its road extends into several states, its acts of injurious discrimination committed or threatened in that state to the business of shippers, either on or along the line of its railroad, may be enjoined by the courts of that state.[2]

Ad Interim Injunction.—Where there is evidence authorizing a finding that the defendant carrier discriminated against the plaintiff in the reception and transportation of lumber tendered for shipment, the court does not abuse this discretion in granting an ad interim injunction.[3]

§ 352. Quo Warranto.—See post, "Discrimination in Rates and Overcharge," chapter 16.

§ 353. Action at Law.—See post, "Discrimination in Rates and Overcharge," chapter 16.

§ 354. Evidence.—At common law the party complaining was required to show that the discrimination was unjust and unreasonable,[4] but under the

ity, he fails, to afford that commonness of service which the law annexes as an incident to his business. The steamship company may discontinue to carry any particular commodity, it desires, or it may voluntarily cease to do business as a common carrier and engage in the business of a special carrier; but so long as it pursues the business of a common carrier, it is bound to render to the public the service which the law exacts of a common carrier." Ocean, etc., Co. *v.* Savannah Locomotive, etc., Supply Co., 131 Ga. 831, 63 S. E. 577, 20 L. R. A., N. S., 867, 127 Am. St. Rep. 265, 15 Am. & Eng. Ann. Cas. 1044.

99. **Injunction and mandamus.**—Ohio Dairy Co. *v.* Lake Shore, etc., R. Co., 7 N. P., N. S., 451, 457, 19 O. D. N. P. 97.

"It is further provided by the statutes of Ohio (notably by §§ 3373-1, Rev. Stat.), that the courts may grant relief in cases where railroad companies do not secure and extend to all shippers the same and equal opportunities and facilities for receiving and shipping freight. One of the most recent cases of this kind, considered by the supreme court of Ohio, is that of Toledo, etc., R. Co. *v.* Wren, 78 O. St. 137, 84 N. E. 785, 16 L. R. A., N. S., 914." Ohio Dairy Co. *v.* Lake Shore, etc., R. Co., 7 N. P., N. S., 451, 457, 19 O. D. N. P. 97.

1. Black Diamond Coal, etc., Co. *v.* Railroad Comm., 8 N. P., N. S., 585, 19 O. D. N. P. 783.

2. **Consolidated railroad extending into several states.**—Scofield *v.* Lake Shore, etc., R. Co., 43 O. St. 571, 3 N. E. 907, 54 Am. Rep. 846.

Thus, where it appeared that the plaintiff's business was such as to make them frequent shippers, and that a continuous series of shipments was necessary in conducting their business, and that a remedy sought by actions at law would lead to a multiplicity of suits, it was held that the court would intervene by injunction to prevent a multiplicity of suits, and it is not a prerequisite that the plaintiffs should have first established their rights by an action at law. Scofield *v.* Lake Shore, etc., R. Co., 43 O. St. 571, 3 N. E. 907, 54 Am. Rep. 846.

3. **Ad interim injunction.**—Ocean, etc., Co. *v.* Savannah Locomotive, etc., Supply Co., 131 Ga. 831, 63 S. E. 577, 20 L. R. A., N. S., 867, 127 Am. St. Rep. 265, 15 Am. & Eng. Ann. Cas. 1044.

4. **Presumption and burden of proof.**—Railroad Comm. *v.* Weld, 96 Tex. 394, 404, 73 S. W. 529, reversing 68 S. W. 1117.

statute of Texas, the burden of proof is upon the carrier to establish that it was reasonable and just.[5]

§ 355. Damages.—Difference in Market Value at Destination and Point of Shipment.—In an action against a railroad company by a shipper of hay, grain, and straw to recover for alleged discrimination by the company's giving to other shippers unequal preferences in the distribution and delivery of cars, plaintiff can recover as damages only such sum as will compensate him for the loss or injury, except that in such action, it shall not under Ohio Rev. St. 1906, §§ 3373-1, be less than $500.[6] In an action for discrimination against plaintiff in furnishing cars, where there is no allegation of special damage, the measure of damages is the difference between the market value of the hay and straw that would have been transported if plaintiff had received the cars at the point to which they were to have been carried when they would have reached their destination, and their value at the same time and place from which they were to have been carried, less the cost of transportation.[7]

Discrimination in Furnishing Cars for Output of Coal Mines.—In an action by a coal company against a carrier for alleged illegal discrimination in furnishing transportation facilities for shipment of coal, the measure of damages is what would have been a reasonably fair profit on the fairly probable output of the mine discriminated against, less what was actually shipped from such mine.[8] That the coal belonging to the coal company was left in the ground and might be available for future shipment is immaterial on the question of damages, in the absence of proof by defendant that the coal company would realize for its coal if shipped in the future as much as it would have realized if shipped during the period of alleged illegal discrimination.[9]

Damages for Delay in Settlement of Plaintiff's Claim.—The court, hearing a case against a railroad for unlawful discrimination, may include in the general damages additional damages for delay in settlement of plaintiff's claim.[10]

§§ 356-359. Tender and Refusal—§ 356. In General.—A common carrier can not as a general rule be rendered liable for failing to receive and carry freights or live stock until the person injured proves that the freight or stock was actually tendered to the company and that it refused to carry,[11] and the tender must be according to the carrier's usages and customs.[12] However, it seems that the carrier may waive a tender of the freight so as to become liable. Thus where a carrier agreed to receive cattle for shipment, it waived any informality or supposed insufficiency in the tender of the cattle.[13] But the

5. Railroad Comm. *v.* Weld, 96 Tex. 394, 404, 73 S. W. 529, reversing 68 S. W. 1117.

6. Toledo, etc., R. Co. *v.* Wren, 78 O. St. 137, 84 N. E. 785, 16 L. R. A., N. S., 914.

7. Toledo, etc., R. Co. *v.* Wren, 78 O. St. 137, 84 N. E. 785, 16 L. R. A., N. S., 914.

8. **Discrimination in furnishing cars.**—Hillsdale Coal, etc., Co. *v.* Pennsylvania R. Co., 229 Pa. 61, 78 Atl. 28.

9. Hillsdale Coal, etc., Co. *v.* Pennsylvania R. Co., 229 Pa. 61, 78 Atl. 28.

10. **Damages for delay in settlement of plaintiff's claim.**—Puritan Coal Min. Co. *v.* Pennsylvania R. Co., 237 Pa. 420, 85 Atl. 426.

11. **Tender and refusal.**—Northwestern Fuel Co. *v.* Burlington, etc., R. Co., 20 Fed. 712; Baltimore, etc., R. Co. *v.* Whitehill, 104 Md. 295, 64 Atl. 1033.

Damages can not be recovered from a common carrier on account of the non-shipment of certain freight because of the failure of the defendant to provide facilities, without proof that the freight in question was offered for shipment. Little Rock, etc., R. Co. *v.* Conatser, 61 Ark. 560, 33 S. W. 1057.

In Central, etc., R. Co. *v.* Morris, 68 Tex. 49, 3 S. W. 457, 28 Am. & Eng. R. Cas. 50, it is said in the opinion: "It is urged, * * * that the points to which the lumber was to be carried, and a tender of the freight upon it, should have been averred. In an ordinary case, it might be that these allegations are proper and necessary."

12. **According to usage.**—Galena, etc., R. Co. *v.* Rae, 18 Ill. 488, 68 Am. Dec. 574.

13. **Waiver.**—Red River, etc., R. Co. *v.* Eastin, 39 Tex. Civ. App. 579, 88 S. W. 530.

refusal of a carrier to transport coal for a certain firm does not, in the absence of actual tender of a definite amount for transportation, amount to a waiver of such tender, so as to subject the carrier to liability for loss of business caused by relying on such refusal.[14] At any rate all that can be done by the owner of goods or live stock, which are designed for transportation, is to place them contiguous to the railway track at some usual or properly designated place, or in the railway's cattle pens, and request the company to furnish cars and receive the goods.[15] The mere fact that a commodity or live stock intended to be shipped is not on the platform or in the pens of the carrier is not an excuse for the carrier's failure to furnish cars, when such things are under the control of the shipper, and ready for shipment in the usual way.[16] It is the duty of a company to receive freights of all persons according to its usage and custom, and where wheat is tendered for shipment, and the company is in the habit of receiving such freight by running its cars on side tracks to private warehouses, a tender accordingly, or notice and readiness to deliver the wheat in that manner, is sufficient, and the company can not require that the grain be delivered in a different manner or at a different place.[17] Where a shipper demands cars at its warehouse for the transportation of goods, the fact, particularly when communicated to the carrier, that the goods to be shipped are prepared for and immediately available for shipment is a sufficient tender to the carrier.[18] Under a statute providing that every railroad corporation shall furnish cars for the transportation of such property as shall within a reasonable time previous thereto be ready or offered for transportation at the several stations on its railroad, if the merchandise to be shipped is substantially ready for shipment at the time the order for cars is placed, the statute is complied with, and a failure to furnish the cars confers a right of action upon the shipper.[19] It follows from what has been said that an actual refusal

14. Tender of definite amount.—Wilder *v.* St. Johnsbury, etc., R. Co., 66 Vt. 636, 30 Atl. 41.

15. Louisville, etc., R. Co. *v.* Flanagan, 113 Ind. 488, 3 Am. St. Rep. 674, 32 Am. & Eng. R. Cas. 532.

Where, after cattle are placed in the stockyards of a railroad company for shipment, the company declines to ship them, the shipper is relieved from the necessity of making any further delivery or offer to deliver the cattle. Louisville, etc., R. Co. *v.* Godman, 104 Ind. 490, 4 N. E. 163.

"Within the ruling in Louisville, etc., R. Co. *v.* Godman, 104 Ind. 490, 4 N. E. 163, the refusal of the company upon demand to furnish cars for the transportation of goods, such as those described, which are alleged to have been placed at a station upon its line to be transported, relieved the plaintiff's from making any further delivery, or offer to deliver." Louisville, etc., R. Co. *v.* Flanagan, 113 Ind. 488, 3 Am. St. Rep. 674, 32 Am. & Eng. R. Cas. 532.

In an action against a carrier for breach of its common-law duty to furnish cars to transport freight without unreasonable delay, the petition alleging that defendant was a common carrier for hire, had been receiving lumber for shipment from plaintiff in the past, had held itself out as willing to receive the shipment in question, and promised from time to time to furnish cars, and that plaintiff placed the lumber at a certain point on its right of way, urged the carrier repeatedly to furnish the necessary cars, informing it of the necessity of prompt shipment and the damages which would accrue to him from delay, and that it negligently failed and refused to furnish such cars, and allowed the lumber to remain lying on the right of way from November 20, 1906, until the suit was brought, March 6, 1908, thereby causing it to be injured and damage to accrue to plaintiff, was sufficient as against a general demurrer. Southern R. Co. *v.* Moore, 133 Ga. 806, 67 S. E. 85, 26 L. R. A., N. S., 851.

16. Goods ready for shipment.—St. Louis, etc., R. Co. *v.* Leder Bros., 87 Ark. 298, 112 S. W. 744.

There was a sufficient tender of live stock for shipment to warrant a recovery for failure to furnish cars, where the shipper, acting under instructions from the railroad's agent, after request for the cars was made, kept the stock ready for shipment within a short distance of the station; there being no accommodation for keeping them at the station. St. Louis, etc., R. Co. *v.* Ozier, 86 Ark. 179, 110 S. W. 593, 17 L. R. A., N. S., 836.

17. Duty to receive according to usage or custom.—Galena, etc., R. Co. *v.* Rae, 18 Ill. 488, 68 Am. Dec. 574.

18. Goods ready at warehouse.—Richey, etc., Co. *v.* Northern Pac. R. Co., 110 Minn. 347, 125 N. W. 897.

19. Goods ready at time of offer.—Mulberry Hill Coal Co. *v.* Illinois Cent. R. Co., 161 Ill. App. 272.

by the carrier is necessary. So it has been held that a complaint against a railroad company for discriminating unjustly against a shipper by directing its agents to refuse to receive or transport any goods offered for transportation by him, except when prepaid, does not state a cause of action if it fails to aver that the agents of the company actually have refused to receive or transport his goods, and that he has actually been injured.[20] But where the carrier has refused to furnish the shipper proper facilities, the latter is not bound to prepare and offer the freight as a condition precedent to his right of action for damages.[21]

§ 357. Authority to Tender.—And such tender of the goods for shipment must be made by a person having authority to do so.[22] It would seem that in an action brought against a carrier for refusing to receive and carry goods, it would constitute a valid defense that the plaintiff had stolen them, although, at the time of offering, the carrier may not have known they had been stolen.[23] As the owner can redeem goods in the hands of the carrier, after their delivery to him, and excuse a nondelivery to the depositor,[24] it is clear that the carrier would be justified in refusing to receive them from one having a wrongful possession, although, at the time of such refusal, he might not know the manner in which they had been obtained.[25]

§ 358. Authority to Receive Freight and Make Contracts.—The local agent of a railroad at a station at which a shipper desires to have cars furnished him has authority to receive applications therefor.[26] Railroad agents are placed at stations for the express purpose of receiving and forwarding freights and making contracts with reference thereto, and where an agent has agreed to receive and ship stock at a particular time the company is bound thereby, unless a delay in shipping was due to some unforeseen event, such as the law recognizes as sufficient.[27] And an agreement by an agent of a railway company to furnish cars and receive and ship freight at a future day is not such an admission of the carrier's common-law obligation to receive and ship the freight when offered as will estop the company from denying such duty upon the freight being tendered to it for shipment, as by showing that it is discharged from such duty because its road is under government military control.[28]

Special Agreement as to Delivery.—The delivery or tender of freight to

20. Actual refusal necessary.—Allen *v.* Cape Fear, etc., R. Co., 100 N. Car. 397, 6 S. E. 105, 35 Am. & Eng. R. Cas. 532.

21. Refusal to furnish facilities.—Under Rev. St. 1895, art. 4494, requiring railroad companies to furnish accommodation for the transportation of all such property as shall be offered for transportation, etc., after a railroad company had refused to furnish transportation to the shipper, the latter was not bound to prepare and offer his freight, in order to become entitled to damages for the refusal. Judgment (Tex. Civ. App.), 40 S. W. 431, reversed Houston, etc., R. Co. *v.* Campbell, 91 Tex. 551, 45 S. W. 2, 43 L. R. A. 225.

22. Authority of shipper.—Fitch *v.* Newberry (Mich.), 1 Doug. 1, 40 Am. Dec. 33.

23. See Fitch *v.* Newberry (Mich.), 1 Doug. 1, 40 Am. Dec. 33, 38.

A common carrier need not receive for transportation goods from any person other than the owner or his duly authorized agent. Drake *v.* Nashville, etc., R. Co., 125 Tenn. 627, 148 S. W. 214.

24. "A carrier is excused for nondelivery of goods to the consignee, when they are demanded, or taken from his possession by some person having a superior title to the property." Fitch *v.* Newberry (Mich.), 1 Doug. 1, 40 Am. Dec. 33, 38.

Where the adverse title is made known to the carrier, if he is forbidden to deliver the goods to any other person, he acts at his peril; and if the adverse title is well founded and he resists it, he is liable to an action for the recovery of the goods. Fitch *v.* Newberry (Mich.), 1 Doug. 1, 40 Am. Dec. 33.

25. Fitch *v.* Newberry (Mich.), 1 Doug. 1, 40 Am. Dec. 33, 38.

26. Local agents.—Texas, etc., R. Co. *v.* Allen, 42 Tex. Civ. App. 331, 98 S. W. 450, judgment reversed Allen *v.* Texas, etc., R. Co., 100 Tex. 525, 101 S. W. 792, 11 L. R. A., N. S., 981, 15 Am. & Eng. Ann. Cas. 618.

27. Storms—Cold weather.—Pruitt *v.* Hannibal, etc., R. Co., 62 Mo. 527.

28. Phelps *v.* Illinois Cent. R. Co., 94 Ill. 548.

a carrier for shipment may be made in accordance with such arrangement between the shipper and the carrier's agent as they may choose to make in regard to the mode of delivery, and a station agent has authority to consent to such arrangement.[29]

Apparent Authority to Act as Agent of Steamboat Company—Refusal to Receive Freight.—Where one whom a steamboat carrier had permitted to act as its agent in receiving freight, for such a length of time as to justify the belief that he was an authorized agent, wrongfully refused to receive freight offered, the carrier can not escape liability on the ground that he had no authority to receive freight for shipment.[30]

§ 359. Place and Time of Offer for Transportation.—A carrier is not liable for failure to furnish cars and transport goods unless they are offered at a regular depot or other usual or designated place for receiving freight.[31] Thus, it is said that a common carrier is not bound to depart from his ordinary and usual mode of business in receiving goods to carry.[32] Where common carriers, doing an express business, only hold themselves out as carriers between certain designated points, they can not be compelled to carry from intermediate points; and where they are sued for property delivered to an agent at an intermediate point, it is competent for them to show that they were not carriers from such point, and that the agent was not authorized to receive the goods.[33] And although a carrier hauls coal and other goods for hire from one end of its line to the other, and carries goods other than coal from an intermediate station, it is not bound to carry coal from that station unless it has publicly professed to do so;[34] nor can a carrier be compelled to receive goods beyond its own terminus.[34a]

Spur Tracks and Switches.—A railroad company owes to establishments connected with its line by spur track the same duty to furnish shipping facilities as it does to persons whose shipments are situated immediately on its main road.[35]

Usage and Custom.—By a long and continuous custom of receiving for transportation cordwood left at a point on the main line of its track, not a regular station, or at a side or spur track, a railroad company may bind itself to continue the custom until it has given reasonable notice of its discontinuance; so that, where such a custom has been discontinued without reasonable notice, a carrier will be liable for special damages to a shipper who has cut and stacked wood for shipment in reliance on such custom, on refusal by the carrier to transport the wood, nor is it necessary to such recovery that the shipper shall actually deliver the wood at the point on the track where the carrier had been accustomed to receive it, when he has offered to do so and been notified by the carrier that it will not accept the shipment.[36]

29. **Special agreement as to delivery.**—St. Louis, etc., R. Co. v. Ozier, 86 Ark. 179, 183, 110 S. W. 593, 17 L. R. A., N. S., 836.

30. **Authority of agent to refuse or receive.**—Seasongood v. Tennessee, etc., Transp. Co., 21 Ky. L. Rep. 1142, 54 S. W. 193, 49 L. R. A. 270.

31. **Place and offer for shipment.**—Louisville, etc., R. Co. v. Flanagan, 113 Ind. 488, 3 Am. St. Rep. 674, 32 Am. & Eng. R. Cas. 532.

Under Railroad Act, § 84, requiring every railroad corporation in the state to furnish cars for the transportation of property offered for transportation at the several stations and at such stopping places as may be established for receiving and discharging freights, a mine which has become a part of and appurtenant to a regular station of a railroad company by reason of being connected therewith by means of a switch track and course of dealing is a station or stopping place within the meaning of this act. Mulberry Hill Coal Co. v. Illinois Cent. R. Co., 161 Ill. App. 272.

32. **Usual mode and manner.**—Pittsburgh, etc., R. Co. v. Morton, 61 Ind. 539, 28 Am. Rep. 682.

33. **Intermediate points.**—Thurman v. Wells, etc., Co. (N. Y.), 18 Barb. 500.

34. **Receiving coal.**—Johnson v. Midland R. Co. (Eng.), 6 Railw. Cas. 61, 4 Ex. 367, 18 L. J. Ex. 366.

34a. **Beyond terminus.**—Cobb, etc., Co. v. Illinois Cent. R. Co., 38 Iowa 601.

35. **Spur tracks and switches.**—Louisville, etc., R. Co. v. Higdon, 149 Ky. 321, 148 S. W. 26.

36. **Usage and custom.**—Ethridge v. Central, etc., R. Co., 136 Ga. 677, 71 S. E. 1063, 38 L. R. A., N. S., 93, Ann. Cas. 1912 D. 128.

Private Switch or Spur Track.—A common carrier can not be required to receive freight on or along a private switch, but its duty in that regard is confined and limited to its own depots or shipping and receiving points.[37] Where a carrier received and delivered freight on private spur tracks, generally under contracts between the parties, it did not show a custom, imposing on the carrier a duty to deliver or receive freight on private spur tracks, if such a duty could be created by custom.[38]

Regular Station.—A place at which there has never been any station agent, where no tickets are kept or sold, where there is no agent's office, and where no bills of lading or receipts are given, but where the conductors sometimes stopped trains and took on freight and passengers, is not a "regular depot or station" within the meaning of the provision of a statute which imposes a penalty upon any company refusing to receive freight at any "regular depot, station, wharf," etc.[39]

Time of Tender.—Where any goods or live stock are to be shipped, the carrier is not liable for failure or refusal to receive them unless they are offered for shipment at the proper time, and ready for transportation.[40] Goods or live stock for shipment must be tendered within reasonable hours and upon reasonable notice.[41] A carrier is not negligent in failing to delay its regular freight trains in order to handle a shipment of cattle.[42] Thus, it has been held that, where the stock to be shipped was not loaded upon the arrival of the train, and was not even in the yards of the company, but in a private yard, and had not been given into the possession of any authorized agent of the carrier, the carrier was not liable for refusing to delay the train until the stock could be loaded, notwithstanding the same train took cars of stock at other stations later, although in these instances the locomotive was required to assist in loading the cars, while in plaintiff's case it was not.[43]

Time of Receiving.—A common carrier must receive at reasonable times goods of the kind it undertakes to transport, but there is no duty on it to receive moneys or goods, and to assume liability for their safekeeping and insurance an unreasonable length of time before the transportation can begin.[44] The reasonableness of the time within which a carrier must receive moneys or goods for transportation is measured primarily by its relation to the transportation of the property, to the business of the carrier, and proper consideration of

37. **Private switch.**—Bedford-Bowling Green Stone Co. *v.* Oman, 134 Fed. 441, judgment affirmed in 134 Fed. 64, 67 C. C. A. 190.

A carrier, furnishing sufficient facilities of its own for the receipt and delivery of freight, is under no common-law duty to receive or deliver freight on private spur tracks. Gulf Compress Co. *v.* Alabama, etc., R. Co. (Miss.), 56 So. 666.

38. **Custom—private spurs.**—Gulf Compress Co. *v.* Alabama, etc., R. Co. (Miss.), 56 So. 666.

39. **Regular station.**—Kellogg *v.* Suffolk, etc., R. Co., 100 N. C. 158, 5 S. E. 379, 35 Am. & Eng. R. Cas. 529, construing North Carolina Statute.

40. Frazier *v.* Kansas, etc., R. Co., 48 Iowa 571.

Refusal to delay train until cars can be loaded.—A railroad company held not to be liable for refusing to delay a train until four car loads of hogs could be loaded, the same being in a private yard until the arrival of the train on time, and not having been delivered to any authorized agent of the company; and this notwithstanding the train took cars of stock at a later station, where the locomotive was required to assist in loading them. Frazier *v.* Kansas, etc., R. Co., 48 Iowa 571.

41. **Reasonable hours and notice.**—Missouri, etc., R. Co. *v.* Carter, 9 Tex. Civ. App. 677, 690, 29 S. W. 565.

Cattle must be tendered within seasonable hours and reasonable notice.—In the absence of a contract previously entered into, the carrier is bound under its common-law duty to receive for shipment cattle or other property when tendered within seasonable hours and upon reasonable notice. Missouri, etc., R. Co. *v.* Carter, 9 Tex. Civ. App. 677, 690, 29 S. W. 565.

42. **Delaying regular traffic.**—San Antonio, etc., R. Co. *v.* Turner, 42 Tex. Civ. App. 532, 94 S. W. 214.

43. **Need not delay train.**—Frazier *v.* Kansas, etc., R. Co., 48 Iowa 571.

44. **Time of receiving.**—Platt *v.* Lecocq, 85 C. C. A. 621, 158 Fed. 723, 15 L. R. A., N. S., 558, reversed, (C. C. 1906), 150 Fed. 391.

the business of its customers.[45] The rules and practice of an express company to refuse to receive money for transportation from a bank which has a burglar-proof vault and adequate facilities in the city where the packages were tendered to keep them safely over night on the day preceding the departure of the train which carried express matter are not unreasonable or unlawful.[46] But under a North Carolina statute it has been held that a rule of an express company forbidding its agents to receive money for shipment except on the day and prior to the time when trains left for the point of destination, was invalid.[47]

Carrying on Sunday.—It has been said that a railroad company is not bound to carry passengers or freight on Sunday, even when a statute permits it to do so; and if it contracts to do so and afterwards fails to carry out the contract, it is not an infraction of the company's general duty as a common carrier.[48] While on the other hand it is held that the fact that stock is offered by a connecting line for transportation on Sunday does not excuse the carrier's failure to receive and carry.[49]

§ 360. Payment or Tender of Charges.—A carrier may require a prepayment of his charges and may refuse to carry goods tendered for transportation unless such charges are paid in advance. While the law compels him, from motives of public policy, to deal with all persons, and leaves him no choice as to his customers, it does not bind him to deal on credit, and he may demand the price of his labor before it is performed.[50] Of course the carrier can waive such prepayment if he sees fit,[51] and the same rules apply where a carrier offers

45. Time of receiving money.—Platt *v.* Lecocq, 85 C. C. A. 621, 158 Fed. 723, 15 L. R. A., N. S., 558, reversed (C. C. 1906), 150 Fed. 391.

46. Platt *v.* Lecocq, 85 C. C. A. 621, 158 Fed. 723, 15 L. R. A., N. S., 558, reversed (C. C. 1906), 150 Fed. 391.

47. North Carolina Code, § 1964, provides that agents "of railroads and other transportation companies, whose duties it is to receive freights, shall receive all articles of the nature and kind received by such company for transportation, whenever tendered at a regular depot, * * * and shall forward the same by the route selected by the person tendering the freight under existing laws." Held, that the words "whenever tendered" could not be limited further than to require the tender to be made during reasonable business hours, and were not qualified by the words "under existing laws," which could be construed as qualifying the word "forward;" and that a rule of an express company forbidding its agents to receive money for shipment, except on the day and prior to the time when trains went to the point of destination, was invalid. Alsop *v.* Southern Exp. Co., 104 N. C. 278, 10 S. E. 297, 6 L. R. A. 271.

48. Carrying on Sunday.—Georgia R., etc., Co. *v.* Maddox, 116 Ga. 64, 42 S. E. 315.

49. Offer on Sunday.—Philadelphia, etc., R. Co. *v.* Lehman, 56 Md. 209, 40 Am. Rep. 415, 6 Am. & Eng. R. Cas. 194.

50. Payment or tender of charges.—Allen *v.* Cape Fear, etc., R. Co., 100 N. C. 397, 6 S. E. 105, 35 Am. & Eng. R. Cas. 532; Wyld *v.* Pickford, 8 M. & W. 443; Batson *v.* Donovan, 4 B. & Ald. 28, 6 E. C. L. 376; Bastard *v.* Bastard, 2 Show. 81; Fitch *v.* Newberry (Mich.), 1 Doug. 1, 40 Am. Dec. 33; Galena, etc., R. Co. *v.* Rae, 18 Ill. 488, 68 Am. Dec. 574; Barnes *v.* Marshall, 18 Q. B. 785, 83 E. C. L. 785; Randall *v.* Richmond, etc., R. Co., 108 N. C. 612, 13 S. E. 137, 49 Am. & Eng. R. Cas. 754; Waring & Co. *v.* Baltimore, etc., R. Co., 3 Wkly. L. Bull. 893, 7 O. Dec. 553; Samms *v.* Stewart, 20 O. 69, 55 Am. Dec. 445.

The carrier may refuse to accept the goods for transportation unless reasonable regulations requiring the prepayment of a specified freight are complied with. Lamar *v.* New York, etc., Nav. Co., 16 Ga. 558.

Common carriers are bound to receive and transport such articles as may be delivered to them in the course of their business, but may demand freight in advance, and, if not paid, refuse to carry the goods. Illinois Cent. R. Co. *v.* Frankenberg, 54 Ill. 88, 5 Am. Rep. 92.

A carrier is, in all cases, entitled to demand the price of carriage before he receives the goods, and, if not paid, he may refuse to take charge of them. Wright *v.* Snell, 5 Barn. & Ald. 353; Oppenheim *v.* Russell, 3 Bos. & Pul. 48. See post, "Charges and Liens," chapter 15.

51. Prepayment waived.—It is the duty of express companies to receive all goods offered for transportation, upon the payment or tender of their charges, but prepayment will be considered waived if not demanded. Alsop *v.* Southern Exp. Co., 40 Am. & Eng. R. Cas. 1, 104 N. C. 278, 6 L. R. A. 271, 10 S. E. 297.

goods for shipment to a connecting carrier.[52] So a person can not have a right of action against a carrier for refusing to receive and carry grain unless there has been a tender of the customary freight charges, or manifestation of readiness and willingness to pay according to the course and usage of the company, whether it is required to be paid in advance or not.[53] But prepayment of freight is not necessary to sustain an action against a carrier for refusal to carry and delay in carrying freight, unless required by the company.[54] Accordingly it is held that it is not necessary to aver the actual tender of money for the carriage; and averment that the person desiring to make the shipment was ready and willing to pay is sufficient.[55] A common carrier may require prepayment of freight charges from any shipper at its choice, although it does not require it from others,[56] or he may demand prepayment from any station and to any station.[57] So a general regulation by a carrier that it would require prepayment on all freight to certain flag stations is not only reasonable, but is a matter entirely within its powers.[58] It should appear, however, that the shipper or forwarding carrier had notice that prepayment was required.[59] So it has been held that whether a railroad company can excuse a refusal to accept and carry freight on the ground that the charges were not prepaid, will depend upon its custom in collecting charges, which is a question for the jury.[60] It

52. Randall *v.* Richmond, etc., R. Co., 108 N. C. 612, 49 Am. & Eng. R. Cas. 74, 13 S. E. 137.

"If the East Tennessee, Virginia & Georgia Railroad received prepayment of freight for shipment over both lines, and negligently failed to prepay the defendant, as required by its regulations, and the plaintiff has suffered damages by the consequent detention, he must look to the company who received his money, and with whom he contracted for the shipment. Mt. Pleasant Mfg. Co. *v.* Cape Fear, etc., R. Co., 106 N. C. 207, 10 S. E. 1046." Randall *v.* Richmond, etc., R. Co., 108 N. C. 612, 49 Am. & Eng. R. Cas. 74, 13 S. E. 137.

53. **Tender or manifestation of willingness to pay.**—Galena, etc., R. Co. *v.* Rae 18 Ill. 488, 68 Am. Dec. 574.

54. **Prepayment not necessary.**—Galena, etc., R. Co. *v.* Rae, 18 Ill. 488, 68 Am. Dec. 574.

55. **Actual tender not necessary.**—Pickford *v.* Grand Junction R. Co., 8 M. & W. 372, 9 D. P. C. 766, 2 Railw. Cas. 592, 5 Jur. 731.

56. **Right to discriminate.**—Randall *v.* Richmond, etc., R. Co., 108 N. C. 612, 49 Am. & Eng. R. Cas. 74, 13 S. E. 137; Allen *v.* Cape Fear, etc., R. Co., 100 N. C. 397, 6 S. E. 105, 35 Am. & Eng. R. Cas. 532. The supreme court of North Carolina takes the position that a carrier may discriminate among shippers in this regard, and require prepayment of some and allow credit to others. In the Allen Case it is said that this right to demand prepayment is but the exercise of a right to demand of every one, that, upon all freight conveyed, the charges must be paid in advance; and we do not perceive any legal wrong done to one to whom credit may not be given because it is given to others; it may be because of their punctuality in paying bills whenever they are presented. The statute recognizes the right, for it compels the company to furnish transportation, not generally, but "on the due payment of the freight or fare legally authorized therefor" (Code, § 1963); and therefore the exaction of prepayment of freight for goods consigned to the plaintiff is but the assertion of a right which might be, if the fact that it be not, enforced against all dealers.

57. "A common carrier can demand prepayment of freight from any one and to any station. Code, § 1963; Allen *v.* Cape Fear, etc., R. Co., 100 N. C. 397, 35 Am. & Eng. R. Cas. 532, 6 S. E. 105." Randall *v.* Richmond, etc., R. Co., 108 N. C. 612, 49 Am. & Eng. R. Cas. 74, 13 S. E. 137.

58. Randall *v.* Richmond, etc., R. Co., 108 N. C. 612, 49 Am. & Eng. R. Cas. 74, 13 S. E. 137.

59. **Notice of regulation.**—Randall *v.* Richmond, etc., R. Co., 108 N. C. 612, 49 Am. & Eng. R. Cas. 74, 13 S. E. 137; Central, etc., R. Co. *v.* Morris, 68 Tex. 49, 3 S. W. 457, 28 Am. & Eng. R. Cas. 50.

60. **Custom—question for jury.**—Reed *v.* Philadelphia, etc., R. Co. (Del.), 3 Houst. 176.

In an action by a shipper against a railway company to recover damages for overcharges and failure to furnish cars, the fact that the freight was not paid or tendered when the goods were offered for shipment was no bar to a recovery where the custom of the carrier did not require it. Chicago, etc., R. Co. *v.* Wolcott, 39 N. E. 451, 141 Ind. 267, 50 Am. St. Rep. 320.

Where a common carrier's bill of lading shows that the owner or consignee was required to pay "freight charges before delivery" merely, recovery can be had for failure to provide a shipper with cars, though the charges were not ten-

has been held that the shipper is entitled to prove that the goods were ample security for the freight, so that there was no sufficient reason for stopping the goods in transit.[61]

Operation and Construction of Statutes.—A state statute requiring railroad corporations to transport property on payment of the freight, does not contemplate a prepayment, and hence there was a payment when, on the making out of the bill of lading, a draft was given the railroad for the freight, and was forwarded with the bill of lading and paid on presentation.[62] Nor can a carrier, under a statute which provides that, on the tender of the legal and customary rates of freight on goods offered for transportation, any common carrier refusing to transport shall be liable in damages to the party injured, escape liability for failure to transport on the ground that plaintiff did not tender the freight charges at the time the freight was offered, as he was not bound to make such tender until after the carrier had loaded the goods ready for transportation.[63]

Switching and Placing Cars.—While it is the duty of a railroad to switch and place cars coming from its own line, or tendered to it with proper transfer switching charges by any connecting line, and it can not excuse itself from the performance of its duty by the existence of disputes as to the correctness of charges withheld pending adjustment, yet it is warranted in refusing to switch and place cars at the warehouse of a consignee, who has not only arbitrarily refused to pay demurrage charges accrued in the past, but has expressed his intention of persisting in his refusal even if such charges be justly incurred in the future.[64]

§ 361. Time and Order of Shipment.—This rule requires carriers to accept and transport property in the order in which it is offered, and they can not exercise partiality in accepting the property tendered by some and rejecting that offered by other persons. If this rule is violated the company is liable for all damages resulting therefrom.[65] If a carrier store freight received for transportation, on the ground that it has not facilities to forward it, and in the

dered by him at the time the goods were offered for shipment. Chicago, etc., R. Co. v. Wolcott, 141 Ind. 267, 39 N. E. 451, 50 Am. St. Rep. 320.

61. Goods as security.—Leach v. New York, etc., R. Co., 89 Hun 377, 35 N. Y. S. 305, 69 N. Y. St. Rep. 749. In this case the defense by the carrier was failure to tender freight charges.

62. Effect of state statute.—Dorrance & Co. v. International, etc., R. Co., 103 Tex. 200, 125 S. W. 561, construing Texas Rev. Stat., 1895, art. 4494.

Rev. St. 1895, art. 4494, requires railroad corporations to take and transport property on the due payment of the legal freight. Article 4496 provides that on refusal so to transport any property, or to deliver the same at the regular appointed time, the railroad shall pay to the party aggrieved all damages sustained thereby, with costs of suit, etc. Held, that the words on "the refusal," etc., "so to take," etc., refer to the preceding article and mean in case of the refusal to take under the conditions prescribed in such article. Dorrance & Co. v. International, etc., R. Co., 103 Tex. 200, 125 S. W. 561.

63. Payment at time of offer not contemplated.—Texas, etc., R. Co. v. Hays, 2 Tex. App. Civ. Cas., § 390.

64. Yazoo, etc., R. Co. v. Searles, 85 Miss. 520, 37 So. 939, 68 L. R. A. 715.

65. Order of shipment.—Houston, etc., R. Co. v. Smith, 22 Am. & Eng. R. Cas. 421, 63 Tex. 322; St. Louis, etc., R. Co. v. Hill, 14 Ill. App. 579.

It is undue prejudice for a railway company to receive goods at its station of one carrier later than it receives them of another, although the first carrier brings his goods properly classified, weighed, and prepared for loading. Garton v. Bristol, etc., R. Co., 6 C. B., N. S., 639, 5 Jur., N. S., 1313, 28 L. J. C. P. 306, 1 B. & S. 112, 7 Jur., N. S., 1234, 30 L. Q. B. 273, 9 W. R. 734.

It is the duty of a railroad company to transport freight for all persons indifferently, in the order in which its transportation is applied for. State v. Cincinnati, etc., R. Co., 47 O. St. 130, 23 N. E. 928.

A railway company can not close its office and refuse to receive goods for carriage, while at the same time it continues to receive similar goods from a particular individual. Garton v. Bristol & E. R. Co., 1 B. & S. 112, 7 Jur., N. S., 1234, 30 L. J. Q. B. 273, 9 W. R. 734.

meantime receive and forward new and subsequent freight, it is liable to parties injured thereby. Nor is it any defence that the goods of plaintiff were shipped before other freights received sooner.[66] But it is not the duty of a railroad company, as a common carrier, to ship freight in the order of time in which it was offered with reference to its entire line, but only with reference to the station where it was tendered.[67] And there is no invariable rule requiring freight to be carried in the order in which it is received, without regard to its character and condition, or its liability to perish.[68] Thus it is said that hay not being perishable merchandise, a carrier is not called upon to put forth unusual efforts to remove the same when delivered to it for transportation.[69]

Forwarding Accumulated Freight.—The same rule of preference must be observed in forwarding accumulated freight.[70]

Relief Goods for Sufferers.—And giving preference to relief goods sent to the sufferers of a great fire is not such a discrimination against shippers of other freight as to make a carrier liable as for negligence for not forwarding freight in the order in which it is received. All general rules must yield to a great public necessity.[71]

§ 362. Character of Goods Tendered for Shipment.—To What Things Applicable.—The foregoing rule is a very broad one and has a general application to every class of things that the carrier expressly or impliedly holds itself out to the public as being prepared to carry.[72] But the general duty of a carrier to receive and ship goods, etc., for all alike does not compel a carrier to accept and carry all goods that may be offered, but only such as it has undertaken to carry, either expressly, or by implication.[73] A common carrier

66. Great Western R. Co. *v.* Burns, 60 Ill. 284, 12 Am. R. Rep. 309.

67. **Refers to station only.**—Ballentine *v.* North Missouri R. Co., 40 Mo. 491, 93 Am. Dec. 315.

68. **Regard to character of freight.**—Peet *v.* Chicago, etc., R. Co., 20 Wis. 594, 91 Am. Dec. 446.

So where two kinds of property are delivered to a carrier at the same time by different owners, one of which is perishable and the other not, preference is to be given in the transportation to that which is perishable. Marshall *v.* New York Cent. R. Co. (N. Y.), 45 Barb. 502, affirmed in 48 N. Y. 600; Tierney *v.* New York, etc., R. Co., 76 N. Y. 305, 67 Barb. 538, affirming 10 Hun 569.

69. **Hay not perishable.**—Strough *v.* New York Cent. R. Co., 87 N. Y. S. 30, 92 App. Div. 584, affirmed in 73 N. E. 1133, 181 N. Y. 533.

70. **Forwarding accumulated freight.**—Tierney *v.* New York, etc., R. Co., 76 N. Y. 305, 67 Barb. 538, affirming 10 Hun 569.

71. **Relief goods for fire sufferers.**—Michigan Cent. R. Co. *v.* Burrows, 33 Mich. 6.

72. McIntosh *v.* Oregon R., etc., Co., 17 Idaho 100, 105 Pac. 66; Shelnut *v.* Central, etc., R. Co., 131 Ga. 404, 62 S. E. 294, 18 L. R. A., N. S., 494.

A corporation engaged in business as a common carrier is bound to receive all goods offered it for transportation which it is able and accustomed to carry. Southern Exp. Co. *v.* Rose Co., 53 S. E. 185, 124 Ga. 581, 5 L. R. A., N. S., 619.

73. **Excuse—Effect of general duty.**—Nitro-Glycerine Case (U. S.), 15 Wall. 524, 21 L. Ed. 206; Kuter *v.* Michigan Cent. R. Co. (U. S.), Fed. Cas. No. 7955, 1 Biss. 35; Chicago, etc., R. Co. *v.* Wallace, 14 C. C. A. 257, 66 Fed. 506, 30 L. R. A. 161; Pfister *v.* Central Pac. R. Co., 70 Cal. 169, 11 Pac. 686, 27 Am. & Eng. R. Cas. 246, 59 Am. Rep. 404; Chicago, etc., R. Co. *v.* Thompson, 19 Ill. 578; Peoria, etc., R. Co. *v.* Chicago, etc., R. Co., 109 Ill. 135, 50 Am. Rep. 605, 18 Am. & Eng. R. Cas. 506; Chicago, etc., R. Co. Adams Exp. Co., 24 Ind. 447, 87 Am. Dec. 341; Lee *v.* Burgess (Ky.), 9 Bush, 652; Boston, etc., R. Co. *v.* Shanly, 107 Mass. 568, 12 Am. L. Reg., N. S., 500; Jordon *v.* Fall River R. Co. (Mass.), 5 Cush. 69, 51 Am. Dec. 44; Lake Shore, etc., R. Co. *v.* Perkins, 25 Mich. 329, 12 Am. Rep. 275, 5 Am. R. Rep. 249; Vicksburg, etc., Co. *v.* United States Exp. Co., 68 Miss. 149, 8 So. 332; Tierney *v.* New York, etc., R. Co., 76 N. Y. 305, 67 Barb. 538, affirming 10 Hun 569; Allen *v.* Sewall (N. Y.), 6 Wend. 327; People *v.* Babcock (N. Y.), 16 Hun 313; Honeyman *v.* Oregon, etc., R. Co., 13 Ore. 352, 25 Am. & Eng. R. Cas. 380, 10 Pac. 628, 57 Am. Rep. 20; Dickson *v.* Northern R. Co., 18 Q. B. Div. 176; Thomas *v.* North Staffordshire R. Co., 3 Ry. & C. T. Cas. 1; Johnson *v.* Midland R. Co. (Eng.), 4 Ex. 367, 6 Railw. Cas. 61, 1 Ry. & C. T. Cas. 16; Herne *v.* Garton, 2 El. & El. 66,

is only such as to goods of the kind to which his business is confined, but as to them he must hold himself out to the public generally, and engage in it as a business, and not as a casual occupation.[74] A carrier who has never assumed or offered to carry goods of a certain class, except upon special terms exempting him from all the important duties and liabilities of a carrier, can not be classed among carriers of property of that kind, or be made amendable in the character of a common carrier as to such property.[75] Thus it is held that the class of carriers known as "transfer companies," engaged in receiving and transferring the baggage of passengers to and from public conveyances, by land and water, are under no obligation to accept and carry ordinary merchandise. A parcel delivery express company need not receive and deliver hay, lumber, or other articles too bulky, heavy, or otherwise inconvenient to handle and transfer by its usual facilities. In other words, the duty of the carrier is confined, as is sometimes provided by statute, to accepting and carrying property "of a kind that he undertakes or is accustomed to carry."[76] The goods offered for transportation must be of the kind to which the carrier's business is confined. A carrier does not undertake to carry all kinds of goods, but only such as are of the description which he professes to carry, and he is not liable as such, where, by special agreement or as a matter of accommodation, he undertakes to carry a class of goods which it is not his business to carry.[77]

Limitation by Public Notice.—A carrier may relieve himself from obligation to transport particular kinds of goods by giving public notice, but this privilege does not extend to railroads.[78] A railroad can not limit its business with respect to any property which it is adapted to transport, and which the public have a right to expect it to transport, since it is a common carrier for the benefit of the people as to all such property as, according to modern usage, railroads are accustomed to transport.[79]

28 L. J. M. C. 16; Irish *v.* Chapman, 2 Ga. 349.

Where a carrier holds itself out as only engaged in the carriage of specified articles, it is under no obligation to carry other things. Louisville, etc., R. Co. *v.* Higdon, 148 S. W. 26, 149 Ky. 321.

A charge that a railway company must, as a common carrier, transport goods over a branch road in use by it, whether owned or operated under a contract or lease, is erroneous, in that such liability does not depend on the mere fact of use, but on the object and purpose of the construction, and the character of the use. Avinger *v.* South Carolina R. Co., 29 S. C. 265, 7 S. E. 493, 13 Am. St. Rep. 716, 35 Am. & Eng. R. Cas. 519.

74. Missouri Pac. R. Co. *v.* Harris, 1 Tex. App. Civ. Cas., § 1257.

75. Class or character of goods.—Lake Shore, etc., R. Co. *v.* Perkins, 25 Mich. 329, 12 Am. Rep. 275, 5 Am. R. Rep. 249.

76. Transfer companies.—Pfister *v.* Central Pac. R. Co., 70 Cal. 169, 11 Pac. 686, 27 Am. & Eng. R. Cas. 246, 59 Am. Rep. 404.

77. The 86th section of the Railway Clauses Consolidation Act (8 & 9 Vict. c. 20), is an enabling provision; and if a company act as carriers they are not bound to carry all kinds of goods from and to every station on the line, but only such goods to and from such places as they have publicly professed to do and have convenience for. Johnson *v.* Midland R. Co., 4 Ex. 367, 6 Railw. Cas. 61, 1 Ry. & C. T. Cas. 16.

Cal. Civ. Code, § 2169, does not compel carriers to accept and carry all goods that may be offered, but only such as it has undertaken and is accustomed to carry. Pfister *v.* Central Pac. R. Co., 70 Cal. 169, 11 Pac. 686, 27 Am. & Eng. R. Cas. 246, 59 Am. Rep. 404.

Railway and Canal Traffic Act of 1854.—A railway company is under the same obligations as a common carrier undertaking to carry in accordance with the provisions of the Railway and Canal Traffic Act, 1854; therefore questions as to how far a sender of goods may require delivery at any station he may appoint, or as to how far a railway company is liable to carry goods of every kind, or for all persons alike, are to be determined in each case, not with reference to what a railway company may choose to do, or may ordinarily do, but with reference to what may be within its powers, and at the same time a reasonable requirement. Thomas *v.* North Staffordshire R. Co., 3 Ry. & C. T. Cas. 1.

78. Limitation by public notice.—Missouri Pac. R. Co. *v.* Harris, 1 Tex. App. Civ. Cases, § 1257.

79. Missouri Pac. R. Co. *v.* Harris, 1 Tex. App. Civ. Cases, § 1257.

Railroad companies can not, as other carriers, relieve themselves from their

Dangerous Substances or Otherwise Injurious Articles.—While the ordinary obligation of a carrier is to receive all goods offered for shipment, he may refuse to accept dangerous articles, and if there is reasonable ground to suspect their character, he may demand to examine them. Without such reasonable ground for suspicion, however, he can not force the consignor to disclose their nature.[80] It has been held that a carrier may refuse to haul powder, nitroglycerine, dynamite, aqua fortis, oil of vitriol, matches, etc.[81] But other courts hold that common carriers are under legal obligation to receive and properly carry explosives. The mere fact of such carriage does not render the carrier guilty of a nuisance.[82] A railroad must carry freight of this character over its road, and such dangers as necessarily result to others from the proper and reasonable performance of this duty must be bourne by them as an unavoidable incident of the proper transaction of legitimate business. But a nuisance may result from the negligent exercise of a right, or performance of a duty, with respect to one's own property or property in his charge. A nuisance to others may thus arise from the careless discharge by a common carrier of its duty in the transportation of such dangerous articles as are here in question. The right to carry them does not include the right to subject persons along the route to dangers from explosions for a longer time or in a greater degree than is reasonably necessary to the proper performance of the carrier's duty.[83] A carrier is not required to receive goods tendered for shipment which are injurious to the public health, peace, or morals, or likely to destroy the property of others.[84]

Prohibited Articles.—As the law neither requires nor permits common carriers to do illegal acts, they are not bound to transport and deliver commodities, if thereby they incur a penalty.[85] But it is the duty of a common

obligation to carry any property which they are adapted to transport. Missouri Pac. R. Co. *v.* Harris, 1 Tex. App. Civ. Cases, § 1257.

80. Dangerous substance.—Nitro-Glycerine Case (U. S.), 15 Wall. 524, 21 L. Ed. 206; Boston, etc., R. Co. *v.* Shanly, 107 Mass. 568, 12 Am. L. Reg., N. S., 500; Herne *v.* Garton, 2 El. & El. 66, 28 L. J. M. C. 16.

81. California Powder Works *v.* Atlantic, etc., R. Co., 113 Cal. 329, 45 Pac. 691, 36 L. R. A. 648, citing Pfister *v.* Central Pac. R. Co., 70 Cal. 169, 11 Pac. 686, 27 Am. & Eng. R. Cas. 246, 59 Am. Rep. 404; Railroad Co. *v.* Lockwood (U. S.), 17 Wall. 357, 21 L. Ed. 627; Lake Shore, etc., R. Co. *v.* Perkins, 25 Mich. 329, 12 Am. Rep. 275, 5 Am. R. Rep. 249; Piedmont Mfg. Co. *v.* Columbia, etc., R. Co., 19 S. C. 353.

In California Powder Works *v.* Atlantic, etc., R. Co., 113 Cal. 329, 45 Pac. 691, 36 L. R. A. 648, the court said: "It was thus optional with the defendant to accept the powder for transportation or not; but, if it chose to accept it, it could accept it upon such terms and with such limitation of its common-law liability as it saw fit. Piedmont Mfg. Co. *v.* Columbia, etc., R. Co., 19 S. C. 353."

82. Contrary ruling as to explosives.—Ft. Worth, etc., R. Co. *v.* Beauchamp, 95 Tex. 496, 68 S. W. 502, 58 L. R. A. 716, 93 Am. St. Rep. 864.

83. Articles injurious to public health.—Ft. Worth, etc., R. Co. *v.* Beauchamp, 95 Tex. 496, 500, 68 S. W. 502, 58 L. R. A. 716, 93 Am. St. Rep. 864.

84. Articles injurious to public health, etc.—Coweta County *v.* Central, etc., R. Co., 4 Ga. App. 94, 60 S. E. 1018.

85. Prohibited articles.—State *v.* Goss, 59 Vt. 266, 9 Atl. 829, 59 Am. Rep. 706.

A railroad is not bound, as a common carrier, to receive for transportation that which the law prohibits it from carrying. Chicago, etc., R. Co. *v.* Gasaway, 71 Ill. 570; Milwaukee Malt Extract Co. *v.* Chicago, etc., R. Co., 73 Iowa 98, 34 N. W. 761.

A railway company commits no breach of duty in refusing to carry cattle without a declaration from the owner or person in charge under the Contagious Diseases (Animals) Act, 1878, where a local authority of the county makes a regulation requiring such declaration before bringing cattle into the county. Williams *v.* Great Western R. Co., 52 L. T. 250, 49 J. P. 439.

Under Forest, Fish, and Game Law, § 8, as amended by Laws 1906, p. 1337, c. 478, § 2, prohibiting the shipment of deer, whether wild or domesticated, a common carrier may refuse to ship the meat of domesticated deer, which belong to plaintiff and are not kept in close confinement, though the deer was killed to prevent it from injuring others and to preserve the herd. Dieterich *v.* Fargo, 52 Misc. Rep. 200, 102 N. Y. S. 720.

carrier to receive and transport spirituous and malt liquors for a reasonable hire, notwithstanding the existence of the local option liquor law, according to the direction of the owner or sender, unless the transportation has been prohibited by the lawmaking power.[86] And an unconstitutional law, prohibiting railways from carrying certain cattle into or through the state,[86a] or from carrying intoxicating liquors within a city without the payment of a license fee,[87] being void, will afford no excuse for failure or refusing to carry the goods or cattle.

Quality of Goods.—A railroad company can not refuse to accept and transport coal tendered by a shipper, on the ground that it is of inferior quality to other coal also produced on its line, and that the marketing of such coal will injuriously affect the sale and consequently the shipment of the superior quality.[88]

Breakable Goods.—A common carrier is not bound to carry breakable goods, such as glassware, subject to all the common-law liabilities of a common carrier, where the uniform practice of defendant company, as well as others, has been to carry such wares only under a limited liability.[89]

Money, Bank Bills, Etc.—Where a carrier is sought to be held liable as a common carrier for refusing to receive or carry money, bankbills, etc., it must be shown that he is such, if that class of carrying is not within the ordinary business in which he is engaged.[90] This matter classifies under the general rule heretofore mentioned that a common carrier of goods is not under obligation to accept any and carry all personal property that may be offered,[91] but only such as he undertakes or is accustomed to carry.[92] It is held that it

86. Effect of local option law.—Southern Exp. Co. *v.* State, 107 Ga. 670, 33 S. E. 637, 46 L. R. A. 417, 73 Am. St. Rep. 146; Fears *v.* State, 102 Ga. 274, 29 S. E. 463.

A railroad company will be enjoined from refusing to carry from another state into South Carolina intoxicating liquors in original packages, consisting of bottles packed in wooden cases, when tendered in car-load lots, with a release of liability for waste or breakage not resulting from its own negligence. Bluthenthal *v.* Southern R. Co., 84 Fed. 920.

86a. Unconstitutional statute.—Chicago, etc., R. Co. *v.* Erickson, 91 Ill. 613, 33 Am. Rep. 70.

87. A common carrier, able and accustomed to transport intoxicating liquors from one city to another, can not lawfully refuse so to do because of the passage by one of the cities of an invalid ordinance prohibiting the transportation and delivery of liquor within the city without the payment of a license fee. Southern Exp. Co. *v.* Rose Co., 124 Ga. 581, 5 L. R. A., N. S., 619, 53 S. E. 185.

88. Quality of goods.—Olanta Coal Min. Co. *v.* Beech Creek R. Co., 144 Fed. 150, affirmed in Beech Creek R. Co. *v.* Olanta Coal Min. Co., 85 C. C. A. 148, 158 Fed. 36, 16 L. R. A., N. S., 677.

89. Breakable Goods.—A mandamus will not issue to compel an express company to carry fragile goods—as glassware—subject to all the common-law liabilities of a common carrier. People *v.* Babcock (N. Y.), 16 Hun 313.

90. Money, bank bills, etc.—Lee *v.* Burgess (Ky.), 9 Bush 652; Allen *v.* Sewall (N. Y.), 6 Wend. 335; Jordan *v.* Fall River R. Co. (Mass.), 5 Cush. 69, 51 Am. Dec. 44; Kuter *v.* Michigan Cent. R. Co., Fed. Cas. No. 7955, 1 Biss. 35; Chicago, etc., R. Co. *v.* Thompson, 19 Ill. 578.

So it has been held that where a carrier is prohibited from carrying money, or it is the usage of trade not to carry money, if a person acquainted with the prohibition or usage delivers money to the carrier, it will not be responsible for loss of money. Chouteau *v.* Steamship St. Anthony, 11 Mo. 226.

In the absence of evidence, the carriage of money is strictly speaking not in the line of the duty of a carrier holding himself out only as a carrier of goods, wares, and merchandise. Chesapeake, etc., R. Co. *v.* Hall (Ky.), 124 S. W. 372.

91. Pfister *v.* Central Pac. R. Co., 70 Cal. 169, 11 Pac. 686, 27 Am. & Eng. R. Cas. 246, 59 Am. Rep. 404.

92. The plaintiff, a county treasurer, was a passenger on a train on defendant's road, for the purpose of going from San Jose to Sacramento. He had with him, in small leather satchels, $91,952, in gold coin, due the state from the plaintiff as county treasurer, and which he was taking to deliver to the state treasurer. No objection was made by the conductor of the train, who had knowledge of the contents of the satchels, until they reached Niles, a way station on the road. Here it was necessary to change cars, and the conductor from Niles refused to permit the plaintiff and

is not the business of a railway company to carry money.[93] Nor does the charter of a railroad company, granted at a time when it was not incumbent on common carriers to carry money, requiring it to transport "all merchandise and property," make it a common carrier of money; neither does transporting money for an express company under a special contract have that effect.[94] Money and bank bills may for certain purposes be regarded as goods, but ordinarily, in speaking of "goods, wares, and merchandise," neither is included, and a common carrier of "goods, wares, and merchandise" will not necessarily be presumed to be a common carrier of money and bank bills.[95] Where there is no proof that a railroad company has at any time carried bank bills or money of any kind, or held themselves out to the public as carriers of such property, and no express contract to carry money has been proved, such contract can not be implied from the fact that the company held itself out as a carrier of "goods, freight, and passengers;" and it not being the business of the company to take bank bills as freight, before it can be liable for such there must be proof that its agent was authorized to receive them; and proof that the agent was authorized to receive "goods and freight" is not enough to show an implied power to receive bank bills at ordinary freight rates.[96] But when it is within the charter powers of a carrier by water to carry such articles as money, etc., the presumption is that the captain of a vessel employed by such common carrier has authority to carry bank bills.[97]

Cars Shipped by Builder.—It has been held that a railroad chartered with usual powers to carry persons and property, and provided with the necessary facilities for doing so, is bound to carry, as common carriers, cars shipped by a builder as freight.[98]

Cars of Other Carriers.—The rule is applied so as to bind a railway company engaged in the transportation of freights for hire as a common carrier, to transport or haul upon its road the cars of any other railroad company when requested so to do, and hold the same relation as a common carrier to such cars that it does to ordinary freight received by it for transportation. In case of loss it will be held to the same measure and character of liability to the owner of the cars so received for transportation as would attach in respect to any other property.[99] Of course the rule can only apply where the gauge of

his employees to enter the train with their treasure, and required him to deliver the same to the Wells, Fargo Express Co., to whom the defendant had given the exclusive privilege of carrying money on its trains. The plaintiff at first refused to do this, and offered to go into the baggage car and pay any charges which might be exacted for the transportation of the money. This offer was refused, and, to avoid being left at Niles, the plaintiff delivered the money to the express company, paying for the transportation $68.95. In an action against the company for refusing to carry the treasure, it was held, that the duty of the carrier is confined, both by the common law and the Code of California, to accepting and carrying property "of a kind that he undertakes or is accustomed to carry," and there could be no recovery. Pfister *v.* Central Pac. R. Co., 70 Cal. 169, 11 Pac. 686, 59 Am. Rep. 404, 27 Am. & Eng. R. Cas. 246.

93. **Railway companies.**—Jordan *v.* Fall River R. Co. (Mass.), 5 Cush. 69, 51 Am. Dec. 44.

94. **Effect of charter carrying for express companies.**—Kuter *v.* Michigan Cent. R. Co., Fed. Cas. No. 7955, 1 Biss. 35.

95. **Money not wares and merchandise.**—Lee *v.* Burgess (Ky.), 9 Bush 652.

96. **Proof of undertaking.**—Chicago, etc., R. Co. *v.* Thompson, 19 Ill. 578.

97. **Presumption as to authority.**—Farmers', etc., Bank *v.* Champlain Transp. Co., 23 Vt. 186, 56 Am. Dec. 68.

98. **Cars shipped by car builder.**—Greene *v.* St. John & M. R. Co., 22 New Burns. 252.

99. **Cars of connecting carrier.**—Peoria, etc., R. Co. *v.* Chicago, etc., R. Co., 18 Am. & Eng. R. Cas. 506, 109 Ill. 135, 50 Am. Rep. 605; Green *v.* St. John, etc., R. Co., 22 New Bruns. 252; Rogers Locomotive, etc., Works *v.* Erie R. Co., 20 N. J. Eq. 379; Atchison, etc., R. Co. *v.* Denver, etc., R. Co., 110 U. S. 667, 28 L. Ed. 291, 4 S. Ct. 185, 16 Am. & Eng. R. Cas. 57; New Jersey R., etc., Co. *v.* Pennsylvania R. Co., 27 N. J. L. 100.

In Peoria, etc., R. Co. *v.* Chicago, etc., R. Co., 109 Ill. 135, 18 Am. & Eng. R.

the road is suitable, and the cars are not defective or out of repair, or of such unusual and peculiar construction as to be unreasonably hazardous or dangerous to work with or handle.[1] But there must exist some real reason. The mere fact the cars may be filled with a different coupling apparatus does not relieve the carrier of this duty.[2] However, in the absence of a special contract or special circumstances making it the duty of a connecting carrier to continue transportation in the same cars the freight is delivered in, there is no obligation upon such carrier to carry the freight in those cars when its own cars are not in use, and the freight would not be injured by transfer to another car.[3]

Grain in Bulk.—It has been held that railroads can not disregard the custom of conveying grain in bulk over the line of their own road and delivering it at elevators thereon to which it may be consigned. If consigned to an elevator or warehouse not on their road, and beyond their terminus, or there be no elevator on the road on which the grain is carried, then they may rightfully refuse to receive it in bulk.[4]

Coal.—If a railway company does not hold itself out as a common carrier of coal, it is not obliged to carry coal from station to station, or for coal merchants, and may restrict its coal traffic to the carriage of coal for colliery owners, from the pit's mouth to stations where such colliery owners have their depots.[5] But a railroad company accustomed as a common carrier to hauling

Cas. 506, 50 Am. Rep. 605, the court said: "The question presented is one of first impression in this court. Nor have counsel cited any case where the exact question involved has been considered by any court of last resort. It leaves this court free to determine the law on principle, as shall be thought to best subserve public interests as well as the private interests of corporations concerned. No proof is needed to show the extent and the importance of the interests involved in the decision. It is a matter of so much public concern, that judicial notice may be taken of the fact that cars belonging to different companies are interchangeably used on all the principal railroads in the United States, and that no company could do any considerable freighting business that did not conform to this general usage. Without such usage, it would be difficult, if, indeed, it would be possible, to transact the commercial business of the country. Freights for shipment across the continent could not well be stopped at the terminus of each carrier's line, and reshipped in cars of the connecting carrier. That would occasion more delay than the necessities of commerce would tolerate. The extent of the usage in regard to the exchange and transportation of cars among so many different railroads would seem to require such exacting rules and regulations as would insure the strictest accountability on the part of companies that may transfer or haul cars over their respective roads."

1. **When rule unapplicable.**—Chicago, etc., R. Co. *v.* Curtis, 51 Neb. 442, 71 N. W. 42.

But a railroad company is not bound to receive and haul the car of another road so defectively constructed or otherwise unsafe as manifestly to imperil the life and limb of its employees. Texas, etc., R. Co. *v.* Carlton, 60 Tex. 397, 15 Am. & Eng. R. Cas. 350.

2. Railroad companies are obliged to receive for transportation cars of the proper gauge which are offered to them by other companies, notwithstanding difference in coupling apparatus. Not only do the necessities of commerce and their own interest require this, but it is required by statute; and it would be a flagrant breach of corporate duty to refuse. Michigan Cent. R. Co. *v.* Smithson, 45 Mich. 212, 7 N. W. 791, 1 Am. & Eng. R. Cas. 101.

3. **Change cars—Right to substitute its own cars.**—Oregon Short Line, etc., R. Co. *v.* Northern Pac. R. Co., 51 Fed. 465, 51 Am. & Eng. R. Cas. 145, affirmed in 61 Fed. 158, 9 C. C. A. 409. See post, "Connecting Carriers," Part V.

Connecting carrier may transfer live stock to its own cars.—In the absence of an express contract or special circumstances making it the duty of a connecting carrier to continue the transportation of cattle in the same cars in which they are delivered to him, he has the right to unload for the purpose of transferring them to his own cars, provided this is done without unnecessary delay. McAlister *v.* Chicago, etc., R. Co., 74 Mo. 351, 7 Am. & Eng. R. Cas. 373.

4. **Grain in bulk.**—Hempstead *v.* Chicago, etc., R. Co., 55 Ill. 95, 8 Am. Rep. 631, 640.

5. **Coal.**—Oxlade *v.* Northeastern R. Co., 15 C. B., N. S., 680.

The fact that a railway company posts up in a particular station a list of tolls, including those for coal, is not sufficient

coal over its road and to furnish cars for that purpose can not refuse to receive coal for transportation without rendering itself liable for resulting damages.[6]

Live Stock.—According to the common-law rule railroad companies are not carriers of live stock, and can only make themselves carriers of that species of property by assuming to convey it as carriers, either expressly or by implication.[7] In some of the states, notable Michigan,[8] carriers of live stock are not regarded as common carriers unless they have expressly assumed the responsibilities of common carriers by special contract.[9] And in one case an injunction was denied on the ground that the question was unsettled.[10] But in most of the states, carriers of living animals are held to be common carriers, and to be insurers to the same extent as if engaged in carrying general merchandise, subject to explanation as to loss or damage caused by animals to themselves and to each other. There is no doubt that there is some controversy in the judicial mind whether, in the conveyance of live stock, the duties and liabilities of the common law attach to the carrier, or whether the carrier, in the absence of a

evidence that it holds itself out as a common carrier of coal from that station. Oxlade *v.* Northeastern R. Co., 15 C. B., N. S., 680.

Agreement to transport coal for collieries exclusively.—A railway company, in order to prevent the obstruction of its railway, which would be caused by an unlimited coal traffic, ascertained the probable consumption of coal in the neighborhood of each of its stations, and made arrangements with the collieries for the requisite supply; it appointed depot agents to manage the sale of the coal, who from time to time ordered the quantity wanted. All the depots were in hands of these agents, who accounted to the collieries for the proceeds of the sale. No coal merchant was dealt with in this way, but only coal owners, and each dealer was treated alike and as one of the public. On a motion by a coal merchant to enjoin the company to afford him the same facilities for receiving and forwarding his coal as to those who consigned their coal to the company, held, that the arrangements of the company were not such as gave or caused any unreasonable preference or disadvantage. Oxlade *v.* North Eastern R. Co., 1 C. B., N. S., 454, 3 Jur., N. S., 637, 26 L. J. C. P. 129.

6. Custom of carrier.—Louisville, etc., R. Co. *v.* Queen City Coal Co., 13 Ky. L. Rep. 832.

7. Live stock.—White *v.* Missouri Pac. R. Co., 19 Mo. App. 400; Lawrence *v.* Milwaukee, etc., R. Co., 84 Wis. 427, 54 N. W. 797; South, etc., R. Co. *v.* Henlein, 52 Ala. 606, 23 Am. Rep. 578; Wabash, etc., R. Co. *v.* Black, 11 Ill. App. 465; Ballentine *v.* North Missouri R. Co., 40 Mo. 491, 93 Am. Dec. 315; Texas, etc., R. Co. *v.* Nicholson, 61 Tex. 491; St. Louis, etc., R. Co. *v.* Dorman, 72 Ill. 504; Newport News, etc., R. Co. *v.* Mercer, 96 Ky. 475, 29 S. W. 301, 16 Ky. L. Rep. 555, 61 Am. & Eng. R. Cas. 340; Philadelphia, etc., R. Co. *v.* Lehman, 56 Md. 209, 40 Am. Rep. 415, 6 Am. & Eng. R. Cas. 194; Lake Shore, etc., R. Co. *v.* Perkins, 25 Mich. 329, 12 Am. Rep. 275, 5 Am. R. Rep. 249.

Railroad companies are not, by the common law, common carriers of live stock, and can only make themselves common carriers of that species of property by assuming to convey it as common carriers. Lake Shore, etc., R. Co. *v.* Perkins, 25 Mich. 329, 12 Am. Rep. 275, 5 Am. R. Rep. 249.

8. Michigan rule.—Michigan, etc., R. Co. *v.* McDonough, 21 Mich. 165; Lake Shore, etc., R. Co. *v.* Perkins, 25 Mich. 329, 12 Am. Rep. 275, 5 Am. R. Rep. 249.

9. Right to refuse to carry live stock.—One who has never assumed or offered to carry live stock, except upon special terms exempting him from all the important duties and liabilities of a common carrier, can not be made amenable in the character of a common carrier as to such property, in case of a refusal to carry live stock. Lake Shore, etc., R. Co. *v.* Perkins, 25 Mich. 329, 12 Am. Rep. 275, 5 Am. R. Rep. 249. See opinion in Honeyman *v.* Oregon, etc., R. Co., 13 Ore. 352, 10 Pac. 628, 57 Am. Rep. 20, 25 Am. & Eng. R. Cas. 380.

10. The complainants, a stock-yard company, sought an injunction to compel a railroad company to receive at their yards from complainants live stock carried over the road and consigned for delivery at the defendants' yards. The injunction was denied, first, because the question whether defendants were subject to any duty to the complainants to receive such freight is an unsettled question of law; second, because the injunction asked for was mandatory, and such writs are not ordinarily granted until final hearing. Delaware, etc., R. Co. *v.* Central Stock Yard, etc., Co., 31 Am. & Eng. R. Cas. 82, 43 N. J. Eq. 71, 10 Atl. 490, affirmed in 43 N. J. Eq. 605, 12 Atl. 374, 13 Atl. 615.

special contract, is to be regarded as the bailee or special agent for the transportation of such property, bound only to furnish suitable and safe carriage and motive power, and liable only for defects in these.[11] It is the duty of a carrier who is engaged in the business of carrying live stock to receive and carry such as are duly offered for transportation.[12] It has been held that a railway company that transports cattle and live stock for hire, for such persons as choose to employ them, thereby assume and take upon themselves the relation of common carriers, and with the relation the duties and obligations which grow out of it; and they are none the less common carriers from the fact that the transportation of cattle is not their principal business or employment.[13] But evidence that a company had carried, and still offers to carry, live stock for hire for all who desired on terms, as to duties, liabilities, and relations, not recognized by the law of carriers, but in some respects variant, and in others repugnant thereto, does not tend to prove that such company is a carrier of live stock.[14]

Effect of Charter.—A charter only binds a common carrier to transport such property as was usually transported by at the time the charter was granted; and where cattle were not transported by rail at the time a charter was granted, the company is not bound to transport them as a common carrier, unless it holds itself out to the public as transporting them, or enters into a special contract to do so.[15]

Dogs.—Under the common-law rule a common carrier, unless he professes to carry dogs for people in general, is not bound to carry a dog for any particular individual; and if a carrier says he will not carry dogs, except on certain terms, he can lawfully refuse to carry any particular dog on any other terms.[16]

Live Pigeons.—It has been questioned whether or not live pigeons would be regarded in any case as common-law freight for common carriers.[17]

§ 363. Condition and Preparation of Goods Tendered.—A carrier may refuse to receive for carriage an article of property which is improperly packed or prepared for transportation,[18] or not packed or prepared at all, as in the

11. See the opinion in Honeyman *v.* Oregon, etc., R. Co., 13 Ore. 352, 10 Pac. 628, 57 Am. Rep. 20, 25 Am. & Eng. R. Cas. 380.

A railway company is required by statute to receive and forward freight, including live stock delivered to it for transportation. Ft. Worth, etc., R. Co. *v.* Galton, 45 Tex. Civ. App. 67, 100 S. W. 166.

12. Baltimore, etc., R. Co. *v.* Whitehill, 104 Md. 295, 64 Atl. 1033.

13. Kimball *v.* Rutland, etc., R. Co., 26 Vt. 247, 62 Am. Dec. 567, and see Welsh *v.* Pittsburg, etc., R. Co., 10 O. St. 65, 75 Am. Dec. 490.

14. **Carrying on special terms.**—Lake Shore, etc., R. Co. *v.* Perkins, 25 Mich. 329, 12 Am. Rep. 275, 5 Am. R. Rep. 249.

15. **Effect of charter.**—Michigan, etc., R. Co. *v.* McDonough, 21 Mich. 165.

16. **Dogs.**—Dickson *v.* Northern R. Co., 18 O. B. Div. 176.

A common carrier who does not assume to act as such in the carriage of dogs, but, upon the request of a party, consents to carry a dog on a particular occasion, cannot be sued as a common carrier for the subsequent death of the dog while under his charge, even though money may have passed to defendant's agents for the carriage. The action must be upon a private contract, if recovery is sought. Honeyman *v.* Oregon, etc., R. Co., 13 Ore. 352, 25 Am. & Eng. R. Cas. 380, 10 Pac. 628, 57 Am. Rep. 20.

17. **Live Pigeons.**—American Merchants' Union Exp. Co. *v.* Phillips, 29 Mich. 515.

18. **Goods not properly packed for transportation.**—Union Exp. Co. *v.* Graham, 26 O. St. 595; Fitzgerald *v.* Adams Exp. Co., 24 Ind. 447, 87 Am. Dec. 341; Boyd *v.* Moses (U. S.), 7 Wall. 316, 19 L. Ed. 192; Hart *v.* Baxendale (Eng.) 16 L. T. N. S. 390, 6 Exch. 769, 16 Jur. 126; Coweta County *v.* Central, etc., R. Co., 4 Ga. App. 94, 60 S. E. 1018.

A carrier may well refuse to receive property for transportation unless the same is properly packed, but if he receives it the duty attaches of exercising due care for its safe carriage. Union Exp. Co. *v.* Graham, 26 O. St. 595.

Under rule twenty-six of the railroad commission, providing that no carrier should be required to accept for carriage any goods unless they are in such condi-

case of loose hay,[19] or it may properly prepare it for shipment itself.[20] And it has been said that where ordinary observation would discover their unfitness, it is the duty of the carrier to refuse the shipment in order that the shipper may put it into a fit condition for transportation.[21] A carrier is not bound to receive goods which are so defectively packed that their condition will entail upon it extra care and extra risk.[22] So if an article is so packed as to injure the rest of the cargo the carrier has the right to refuse to transport it,[23] and it has been held that a common carrier is not bound to receive money for shipment unless it is properly secured and addressed.[24] Although a common carrier is accustomed to receive jugs of liquor in an unboxed condition, under a special arrangement voluntarily made by it with shippers, it may, at will, withdraw from the arrangement without liability to shippers who have been availing of it, though they incur increased expense by reason of the change.[25]

Live Stock Not Properly Loaded.—A railroad company is not bound to receive cars from a connecting road loaded with hogs so crowded that they are in danger from suffocation; and if it does it makes the act of that road its own, and is bound for the damages resulting to the hogs from suffocation or improper loading.[26]

§ 364. Private Owned Trains or Cars.—So far as expression has been given, there is unanimity among the courts of this county that a railroad corporation, as a common carrier, is under no legal duty to haul show cars, that is, cars owned and fitted up by showmen and used exclusively by them to house and transport their employees and show property as a complete outfit from place to place over railroads.[27] The rule rests upon the principle that such loaded cars or vehicles are not such goods as railroads hold themselves out to carry, and in respect to which they assume a public duty to serve all alike who apply for carriage, and such cars being a class of property they do not profess to carry, and the drawing of which is inconsistent with their business, they are therefore exempt from all public duty to haul them. Carriers certainly

tion and so prepared for shipment as to render the transportation reasonably safe, and under the common law a tender of a car load of such commodities as under the rules of the commission are to be loaded by the shipper is not a good tender, where the car on which the goods were when offered for transportation was the car of another line and was marked as in bad order, and, though offered several times, it was each time refused by the inspector because of such dangerous condition. Central, etc., R. Co. *v.* Cook, 62 S. E. 464, 4 Ga. App. 698.

19. **Loose hay.**—Under Revisal 1905, §§ 1066, 1099, 1112, and Acts 1907, cc. 469, 471, and the rules of the corporation commission, a carrier whose motive power is fire-driven engines may refuse to receive for transportation loose hay. Tilley *v.* Norfolk, etc., R. Co. (N. C.), 77 S. E. 994.

20. **Carrier may pack.**—Elgin, etc., R. Co. *v.* Bates Mach. Co., 98 Ill. App. 311, affirmed in 66 N. E. 326, 200 Ill. 636, 93 Am. St. Rep. 218.

21. **Duty to notify shipper of improper condition.**—Atlantic, etc., R. Co. *v.* Rice, 169 Ala. 265, 52 So. 918, 29 L. R. A., N. S., 1214.

22. **Goods defectively packed.**—Pfister *v.* Central Pac. R. Co., 70 Cal. 169, 11 Pac. 686, 27 Am. & Eng. R. Cas. 246, 59 Am. Rep. 404; Railroad Co. *v.* Lockwood (U. S.), 17 Wall. 357, 21 L. Ed. 627; Lake Shore, etc., R. Co. *v.* Perkins, 25 Mich. 329, 12 Am. Rep. 275, 5 Am. R. Rep. 249.

23. In Boyd *v.* Moses (U. S.), 7 Wall. 316, 19 L. Ed. 192, it was held that a carrier may refuse to receive for transportation lard so packed that it could not be carried without injury to the rest of the cargo.

24. **Money—Properly secured and addressed.**—Fitzgerald *v.* Adams Exp. Co., 24 Ind. 447, 87 Am. Dec. 341.

25. **Unboxed jugs of liquor.**—Vicksburg, etc., Co. *v.* United States Exp. Co., 68 Miss. 149, 8 So. 332.

26. **Live stock not properly loaded.**—Paramore *v.* Western R. Co., 53 Ga. 383.

27. Cleveland, etc., R. Co. *v.* Henry, 170 Ind. 94, 83 N. E. 710; Coup *v.* Wabash, etc., R. Co., 56 Mich. 111, 22 N. W. 215, 56 Am. Rep. 374; Chicago, etc., R. Co. *v.* Wallace, 14 C. C. A. 257, 66 Fed. 506, 30 L. R. A. 161; Robertson *v.* Old Colony R. Co., 156 Mass. 525, 31 N. E. 650, 32 Am. St. Rep. 482; Wilson *v.* Atlantic, etc., R. Co., 129 Fed. 774, affirmed in 133 Fed. 1022, 66 C. C. A. 486.

are not compelled to haul such cars over their lines at reduced rates.[28]

§ 365. Shipment C. O. D.—From a consideration of the authorities it is clear that express companies and other common carriers are under no obligation or duty at the common law to engage in the C. O. D. carriage of goods,[29] but that the obligation imposed to collect the purchase price of the article, ship and return the proceeds to the consignor is an obligation which must rest in contract and not in an obligation imposed upon by the law.[30] And this common-law liability of carriers to receive and carry has not been affected in any way by recent rate laws.[31]

Effect of Usage and Custom.—While it is undoubtedly true that express companies have for many years done C. O. D. business yet if the law is as laid down in the rule previously set out it is evident that such practice can not create a legal duty on the part of the carrier unless it consents to the engagement; not being a common-law duty, but an obligation resting on an implied contract the carrier may at any time terminate such practice and refuse to be bound by an implied agreement without its consent.[32] Such usages and customs can not be relied upon to create a legal liability where one does not otherwise exist although they may be inquired into for the purpose of interpreting an implied contract and the extent of its obligation.[33]

Effect of State Statutes.—A state statute imposing a tax upon persons carrying liquor C. O. D., is sufficient to warrant an express company in refusing to carry liquor in that manner, since it can either pay the license tax or refuse to carry the liquor.[34] The express company is not required in such a case to treat the act as unconstitutional.[35]

§§ 366-374. Exceptional Causes Justifying Failure or Refusal—§ 366. General Statement.—There are certain exceptional causes, such as the act of God, the public enemy, unavoidable accident, or an abnormal and unanticipated inrush of business which will prevent the performance of a carrier's common-law duty to shippers, to receive and transport property offered for shipment, although such property is in good condition and properly prepared for shipment, and belongs to a class of property subject to carriage by such carrier.

§ 367. Absence of Requisite Conveniences or Capacity.—Although the owner, or his agent, offers goods for carriage and tenders payment for the

28. Cleveland, etc., R. Co. *v.* Henry, 170 Ind. 94, 83 N. E. 710.

A carrier is under no common-law obligation to furnish motive power and servants to move a circus company's train over the carrier's road at reduced rates. Sager *v.* Northern Pac. R. Co., 166 Fed. 526.

29. **Duty as to C. O. D. shipment.**—Danciger *v.* Wells, Fargo & Co., 154 Fed. 379.

30. Danciger *v.* Wells, Fargo & Co., 154 Fed. 379; citing Cox *v.* Columbus, etc., R. Co., 91 Ala. 392, 8 So. 824; Adams Exp. Co. *v.* Commonwealth, 92 S. W. 935, 29 Ky. L. Rep. 230, 5 L. R. A., N. S., 630; United States Exp. Co. *v.* Keefer, 59 Ind. 263; McNichol *v.* Pacific Exp. Co., 12 Mo. App. 401; Fowler Comm. Co. *v.* Chicago, etc., R. Co., 98 Mo. App. 210, 71 S. W. 1077.

In conflict with the rule herein announced is the case of Crescent Liquor Co. *v.* Platt, 148 Fed. 894, but this case is distinguished in Danciger *v.* Wells, Fargo & Co., 154 Fed. 379, wherein it was said "the precise question, however, involved in that case, was the right of complainant to require the defendant to carry his goods."

31. Danciger *v.* Wells, Fargo & Co., 154 Fed. 379.

32. **Effect of usage and custom.**—Danciger *v.* Wells, Fargo & Co., 154 Fed. 379.

33. Danciger *v.* Wells, Fargo & Co., 154 Fed. 379.

This is clearly held in State *v.* Atchison, etc., R. Co., 176 Mo. 687, 75 S. W. 776, 63 L. R. A. 761; Ulmer *v.* Farnsworth, 80 Me. 500, 15 Atl. 65; National Bank *v.* Burkhardt, 100 U. S. 686, 692, 25 L. Ed. 766; Tilley *v.* County of Cook, 103 U. S. 155, 26 L. Ed. 374.

34. **State statute.**—Craddock & Co. *v.* Wells-Fargo Co.'s Exp. (Tex. Civ. App.), 125 S. W. 59.

35. **Need treat law as unconstitutional.**—Craddock & Co. *v.* Wells-Fargo Co.'s Exp. (Tex. Civ. App.), 125 S. W. 59.

freight in advance, still the carrier is not bound to receive them, unless he has the requisite convenience to carry them.[36] Thus, it is said that even if a carrier has held itself out as a carrier of coal from a particular station, no action for refusing to carry it will lie, unless it is shown that the company has conveniences at the station for receiving and carrying the coal.[37] Nor is he liable where a vehicle, vessel or other means used for that purpose does not have the capacity to transport safely the property tendered.[38] But a carrier will not be excused for refusal to carry goods merely because no boats passed on the line of transportation in which it was engaged. If the fact had been that boats could not possibly pass at the time of the tender of the goods for carriage, from causes beyond the control of defendants, they would then be excused for refusing to carry.[39]

§§ 368-371. Unusual Press of Business—§ 368. In General.—A railroad company which has the rolling stock and equipments to carry without delay the freights usually offered, is not bound to receive goods which it is not at the time able to carry by reason of some accidental or extraordinary increase in the public demand for transportation, which occurs without the fault of the company. In such case the company may rightfully decline to receive freights offered which it can not carry without delay; but if it does receive them it can only relieve itself from responsibility for delay resulting from a previous accumulation of freights by acquainting the shipper with the facts when he offers his goods and affording him the option of acquiescing in the delay or seeking some other line of transportation.[40] Although it is the duty of a railroad com-

36. Absence of requisite conveniences.—Fitch *v.* Newberry (Mich.), 1 Doug. 1, 40 Am. Dec. 33; see Fish *v.* Chapman, 2 Ga. 349, 46 Am. Dec. 393.

37. Refusing to carry coal.—Johnson *v.* Midland R. Co., 6 Railw. Cas. 61, 4 Ex. 367, 18 L. J. Ex. 366.

38. Vehicle of insufficient.—Houston, etc., R. Co. *v.* Smith, 63 Tex. 322, 22 Am. & Eng. R. Cas. 421.

39. Where boats do not pass.—Doty *v.* Strong (Wis.), 1 Pin. 313, 40 Am. Dec. 773.

40. Unusual press of business.—*United States.*—Bussey *v.* Memphis, etc., R. Co. (U. S.), 4 McCrary 405, 13 Fed. 330; Helliwell *v.* Grand Trunk Railway, 10 Biss. 170, 7 Fed. 68; Thomas *v.* Wabash, etc., R. Co., 63 Fed. 200, affirmed in 19 C. C. A. 88, 71 Fed. 481; Marine Ins. Co. *v.* St. Louis, etc., R. Co., 41 Fed. 643, 43 Am. & Eng. R. Cas. 79.

Alabama.—Louisville, etc., R. Co. *v.* Touart, 97 Ala. 514, 11 So. 756, 55 Am. & Eng. R. Cas. 600.

Delaware.—Truax *v.* Philadelphia, etc., R. Co. (Del.), 3 Houst. 233.

Illinois.—Cobb, etc., Co. *v.* Illinois Cent. R. Co., 88 Ill. 394; Galena, etc., R. Co. *v.* Rae, 18 Ill. 488, 68 Am. Dec. 574.

Indiana.—Pittsburgh, etc., R. Co. *v.* Racer, 5 Ind. App. 209, 31 N. E. 853.

Massachusetts.—Thayer *v.* Burchard, 99 Mass. 508.

Michigan.—Michigan Cent. R. Co. *v.* Burrows, 33 Mich. 6.

Mississippi.—Vicksburg, etc., R. Co. *v.* Ragsdale, 46 Miss. 458, 1 Am. R. Rep. 295.

Missouri.—Faulkner *v.* South. Pac. Railroad, 51 Mo. 311, 3 Am. R. Rep. 293; Dawson *v.* Chicago, etc., R. Co., 79 Mo. 296, 18 Am. & Eng. R. Cas. 521; Ballentine *v.* North Missouri R. Co., 40 Mo. 491, 93 Am. Dec. 315.

New York.—Wilbert *v.* New York, etc., R. Co. (N. Y.), 19 Barb. 36, affirmed in 12 N. Y. 245; Blackstock *v.* New York, etc., R. Co., 20 N. Y. 48, 75 Am. Dec. 372; Bouker *v.* Long Island R. Co., 89 Hun 202, 35 N. Y. S. 23.

Tennessee.—East Tennessee, etc., Railroad *v.* Nelson, 41 Tenn. (1 Coldw.) 272.

Texas.—Cross *v.* McFaden, 1 Tex. Civ. App. 461, 20 S. W. 846; Houston, etc., R. Co. *v.* Smith, 63 Tex. 322, 22 Am. & Eng. R. Cas. 421.

An unusual pressure of business may in some instances justify the refusal by the carrier to receive freight. International, etc., R. Co. *v.* Anderson, 3 Tex. Civ. App. 8, 21 S. W. 691.

If, by unprecedented and unexpected press of business, the company has already received more property than it can then transport, and the warehouses at the point are full and the company has no present means of taking care of the property offered, then it would be unreasonable to hold that under such conditions the company must accept the property when offered, or else incur the liability prescribed by the statute. Houston, etc., R. Co. *v.* Smith, 63 Tex. 322, 22 Am. & Eng. R. Cas. 421.

By arts. 2226, 2227, Texas Rev. Stat., a duty is imposed on railway companies to furnish sufficient transportation to

pany to exercise reasonable diligence to provide sufficient facilities and means of transportation for all freight, which it should reasonably expect will be offered,[41] both interstate and intrastate,[42] taking into consideration the fact that at certain seasons more cars are needed,[43] yet it is not bound to provide in advance for extraordinary occasions, nor for an unusual influx of business which is not reasonably to be expected.[44] And it has been held that the charter of a railroad company requiring it to ship property in the order it is received at the depots, way stations, and places desired by the owners thereof, is not violated by failing to carry live stock loaded at a way station, but which, owing to the amount of business, could not have been carried on the first train passing without an extra engine, which must have been sent out from a distance and at night.[45] But a railroad company can not excuse the breach of a contract to receive and transport cattle upon a certain day by the fact that it was so

carry all property offered, though when the carrier, from an unexpected and unprecedented press of business, is unable to do so, this in general, will furnish a legal excuse for refusing to accept freight. Houston, etc., R. Co. *v.* Smith, 63 Tex. 322, 22 Am. & Eng. R. Cas. 421.

41. Duty to provide facilities.—Dawson *v.* Chicago, etc., R. Co., 79 Mo. 296, 18 Am. & Eng. R. Cas. 521; Dobbins *v.* Syracuse, etc., R. Co., 141 N. Y. S. 637, 157 App. Div. 80; Southern R. Co. *v.* Atlanta, etc., Supply Co., 135 Ga. 35, 68 S. E. 807.

A common carrier is under a legal duty to supply patrons with cars to promptly move such freight as may be expected, according to the usual volume of business offered for shipment, and if timely demands are made for cars, and the carrier fails to furnish them, without lawful excuse, he is answerable for the proximate damage sustained by the shipper. Cronan *v.* St. Louis, etc., R. Co. (Mo. App.), 130 S. W. 437.

42. Interstate and intrastate.—Oliver & Son *v.* Chicago, etc., R. Co., 89 Ark. 466, 117 S. W. 238.

43. McComb *v.* Chicago, etc., R. Co., 71 Neb. 593, 99 N. W. 309.

Railroad company engaged in coal carrying trade held required to have a sufficient supply of cars to meet the normal demands of that trade during the fall and winter months when the normal demand is heaviest. Illinois Cent. R. Co. *v.* River, etc., Coke Co., 150 Ky. 489, 150 S. W. 641, 44 L. R. A., N. S., 185.

44. Extent of duty to provide facilities.—*Arkansas.*—Missouri, etc., R. Co. *v.* Sneed, 85 Ark. 293, 107 S. W. 1182; Oliver & Son *v.* Chicago, etc., R. Co., 89 Ark. 466, 117 S. W. 238.

Georgia.—Southern R. Co. *v.* Atlanta, etc., Supply Co., 135 Ga. 35, 68 S. E. 807.

Illinois.—Galena, etc., R. Co. *v.* Rae, 18 Ill. 488, 68 Am. Dec. 574; Mulberry, etc., R. Co. *v.* Ill. Cent. R. Co., 161 Ill. App. 272.

Indiana.—Pittsburgh, etc., R. Co. *v.* Morton, 61 Ind. 539, 28 Am. Rep. 682.

Kentucky.—Louisville, etc., R. Co. *v.* Coal Co., 99 Ky. 217, 35 S. W. 626.

Missouri.—Dawson *v.* Chicago, etc., R. Co., 79 Mo. 296, 18 Am. & Eng. R. Cas. 521.

A carrier is not required to keep a car equipment sufficiently extensive for maximum freight output at any time of the year, but only to meet a demand so adjusted as to utilize the equipment with regularity throughout the year. Montana, etc., R. Co. *v.* Morley, 198 Fed. 991.

Where there is an unprecedented press of business, such as the carrier could not by ordinary prudence foresee, it is excused for not having provided therefor. St. Louis, etc., R. Co. *v.* Wynne Hoop, etc., Co., 81 Ark. 373, 99 S. W. 375.

The statute requiring carriers to furnish, without discrimination or delay, sufficient facilities for the carriage of freight does not make the duty an absolute one, and does not require the carrier to provide in advance for an unprecedented and unexpected rush of business. Cumbie *v.* St. Louis, etc., R. Co. (Ark.), 151 S. W. 240.

In an action under the railroad demurrage law for failure to furnish cars, an answer setting forth that defendant had a large amount of equipment unused during all the period of ordinary business, that in the fall there is an unusually heavy traffic, that at the time application by plaintiff for cars the demand for cars was exceptional, that defendant had apportioned its equipment equitably so that every portion of its line, had a just share thereof, and that plaintiff was furnished with cars at the earliest dates at which defendant could furnish them, consistent with its duty to serve all applicants equally, states a good defense. Martin *v.* Great Northern R. Co., 110 Minn. 118, 124 N. W. 825.

An extraordinary increase of business, which could not have been anticipated by using judgment and diligence, and which prevents a railroad from furnishing cars, is a defense to an action for failure to furnish the cars. Shoptaugh *v.* St. Louis, etc., R. Co. (Mo. App.), 126 S. W. 752.

45. Necessity extra engine service.—Michigan, etc., R. Co. *v.* McDonough, 21 Mich. 165.

crowded with business upon that day and during the time of the subsequent delay that it had no empty cars in which to receive the cattle.[46] And if a carrier contracts to deliver cars to another at another place, and does not so deliver them by reason of a shortage in the cars at the time, the fact of such shortage will not relieve him from performance of the contract, whether known to the other party or not.[47]

§ 369. Discrimination or Granting Privileges.—A carrier will not be allowed to discriminate in favor of an individual shipper, where the demand exceed its capacity and the anticipated calls upon it.[48] A carrier will not be allowed to take advantage of such a condition, so as to extend advantages to one customer to the injury of another. It must, under such circumstances, as at all other times in dealing with the public, act upon the rule of equality. To permit the company to take advantage of a press of business to deal out favors to certain customers to the detriment of others, might result in perpetuating that condition upon the line. For instance, suppose the property offered for transportation by other customers was more than could be transported promptly by the particular line, that would not authorize the company to refuse to take and transport, in the order tendered, the property of others, as soon as this could be reasonably done.[49] And in case of an unusual rush of business a shipper is only entitled to an equitable share of the cars for shipper's uses in transportation.[50] During a temporary scarcity of cars a railroad company is entitled to consider, in apportioning them among grain dealers, their relative volume of business; and, though there may be a difference in the number furnished to different grain dealers at the same station, still, if no discrimination is shown, no shipper has a right to complain, though he may not obtain all the cars he deems necessary.[51]

46. Contract to transport on certain day.—Gulf, etc., R. Co. *v.* McCorquodale, 71 Tex. 41, 9 S. W. 80, 35 Am. & Eng. R. Cas. 653.

Where a contract is made by a carrier to furnish cars to transport cattle on a certain day, the failure to furnish them renders the carrier liable for consequent damage to the cattle. Texas, etc., R. Co. *v.* Scott & Co. (Tex. Civ. App.), 86 S. W. 1065.

In a suit against a railroad for breach of a contract to furnish cars at a given time for the shipment of cattle, an answer setting up as an excuse "an unexpected and unprecedented rush of business" was clearly insufficient. Southern Kansas R. Co. *v.* Samples (Tex. Civ. App.), 109 S. W. 417.

47. Excuse for breach of contract.—Williams *v.* Armour Car Lines (Del.), 79 Atl. 919.

48. Discrimination or granting of privileges.—Judgment (1904) 87 N. Y. S. 30, 92 App. Div. 584, affirmed. Strough *v.* New York Cent. R. Co., 181 N. Y. 533, 73 N. E. 1133.

49. Does not permit privileges to others.—Houston, etc., R. Co. *v.* Smith, 63 Tex. 322, 327, 22 Am. & Eng. R. Cas. 421; State *v.* Chicago, etc., R. Co., 71 Neb. 593, 99 N. W. 309.

A carrier must exercise reasonable diligence to furnish cars adequate for the transportation of freight, and not discriminate in favor of one shipper when the demand exceeds the capacity of the carrier and the anticipated and ordinary calls on it. Dobbins *v.* Syracuse, etc., R. Co., 141 N. Y. S. 637, 157 App. Div. 80.

Where a shipper honestly attempted to procure cars for transportation of perishable freight, and the carrier refused reasonable demands for cars, and cars were furnished competing shippers, the shipper could recover for the refusal to furnish cars, and the fact that he had held the goods for speculative purposes was immaterial. Dobbins *v.* Syracuse, etc., R. Co., 141 N. Y. S. 637, 157 App. Div. 80.

50. Right of shippers to cars.—A shipper maintained mandamus against a railroad company requiring it to furnish 50 cars at the rate of at least 5 cars a day for his use. There was a general shortage of cars and locomotives, but the railroad exercised diligence to provide adequate equipment for its business. Held, that the shipper was only entitled to a just division of the empty cars that should have been apportioned to the station where the shipper was in business. Dobney *v.* Chicago, etc., R. Co., 83 Neb. 518, 120 N. W. 165.

51. Apportioning cars.—State *v.* Chicago, etc., R. Co., 71 Neb. 593, 99 N. W. 309.

§ 370. Duty to Advise Shipper of Delay.—It is the duty of the carrier, when applied to for cars, to advise the shipper of the situation and circumstances which are likely to occasion any unreasonable delay.[52] An extraordinary increase of business, which could not have been anticipated by diligence, and which prevents a railroad from furnishing cars, is a good defense to an action for its failure to furnish the cars; and, where a carrier is reasonably equipped for ordinary conditions of business, the fact of an unusual and unexpected pressure of business will excuse the delay, provided the shipper is notified of the fact at the time of the shipment; but such fact is no excuse when the carrier, with full knowledge of it, accepts goods for transportation without informing the shipper of the true situation.[53] A carrier, on having reason to anticipate inability to furnish cars after receipt of notice therefor, must advise the shipper in order to excuse itself from liability for failure to furnish cars.[54]

§ 371. Carriers "Embargo."—A carrier "embargo" is a notice, issued by a common carrier, refusing to receive or carry certain kinds of freight on its line, or between certain points, and may be for a limited and definite period, or for an unlimited or indefinite period. It is the result of a congestion of business that makes it impossible for a road to carry all the freight that is offered it.[55]

§ 372. Causes Beyond Carrier's Control.—There are certain causes which are beyond a carrier's control and which may excuse him from the fulfillment of his common-law obligations to the public. Thus a carrier may be excused by the act of God, the act of the public enemy, unavoidable accident, etc.[56] While, under ordinary conditions, a railroad is bound to accept freight tendered it, an impending flood of such a character as to fall properly within the legal definition of an act of God, and which threatens with inundation the carrier's tracks, is a sufficient excuse to justify it in refusing the goods for shipment.[57]

Interference by Public Works.—That a city had dug a small ditch under the tracks of a railroad company will not excuse a delay of six days in furnishing a car for a shipment of goods.[58]

Military Control.—Where a road is under the military control of the government and is not permitted to receive freights from individuals, except upon

52. **Duty to advise shipper of delay.**—Cronan *v.* St. Louis, etc., R. Co. (Mo. App.), 130 S. W. 437.

In an action against a common carrier for failure to furnish cars to ship timber, where the evidence showed that defendant at no time notified plaintiff it could not furnish cars because of an unexpected rush of business, but encouraged him in getting out his timber and promised to furnish cars to ship it, a declaration of law that if there was a sudden and unexpected increase in defendant's business, or if high water delayed defendant in handling its business, it was not liable whether it notified plaintiff of this condition or not was more liberal to defendant than was justified. Cronan *v.* St. Louis, etc., R. Co. (Mo. App.), 130 S. W. 437.

53. Dillender *v.* St. Louis, etc., R. Co. (Mo. App.), 130 S. W. 107.

Where the agents of a common carrier told plaintiff to get his timber out of the forest, and that cars would be furnished to take it to market, and he was not notified at any time that the carrier would be unable to furnish cars on account of an unreasonable and unexpected press of business, it was no defense to an action for failure to furnish the cars to show an unusual and unexpected press of business. Cronan *v.* St. Louis, etc., R. Co. (Mo. App.), 130 S. W. 437.

54. **Inability to furnish cars.**—Di Giorgio Importing, etc., Co. *v.* Pennsylvania R. Co., 104 Md. 693, 65 Atl. 425, 8 L. R. A., N. S., 108.

55. **Carriers "embargo."**—Chesapeake, etc., R. Co. *v.* O'Gara, etc., Co., 144 Ky. 561, 139 S. W. 803.

56. **Causes beyond carrier's control.**—Brown *v.* Wabash, etc., R. Co., 18 Mo. App. 568; Potts *v.* Wabash, etc., R. Co., 17 Mo. App. 394; Hance *v.* Pacific Exp. Co., 48 Mo. App. 179; Knight *v.* Quincy, etc., R. Co., 120 Mo. App. 311, 96 S. W. 716.

57. **Conditions beyond carrier's control.**—Gray *v.* Wabash R. Co., 119 Mo. App. 144, 95 S. W. 983.

58. **Interference by public works.**—Parish & Co. *v.* Yazoo, etc., R. Co. (Miss.), 60 So. 322.

an order of a proper army officer, it is not liable for refusing to receive freights from individuals. In such a case the fact that goods had been sold to the government does not authorize it to receive them for shipment without an order from such army officer.[59] But an order of the military power of the government that a railroad company should transport government freights to the exclusion of all private property, if necessary, will not release the company from its obligation to receive and transport private property, where it appears that the government did not actually assume control of the road and where the company still held itself out as a common carrier, and there was no evidence of a necessity to exclude private property; and especially is this so where the parties offering freight are government contractors and the freights tendered are military supplies.[60]

Strikes and Boycotts.—The fact that, in consequence of a railroad's reducing the wages of its employees, the latter struck, and prevented the company from operating its cars, does not render the latter liable for damages for failure to receive goods for transportation.[61] As a general rule railroad corporations can not refuse or neglect to perform their public duties pending a controversy with their employees over the cost and expense of doing them, where it does not appear that the employees committed any unlawful act, or

59. Military control.—Illinois Cent. R. Co. *v.* Phelps, 4 Ill. App. 238, affirmed in 94 Ill. 548; Illinois Cent. R. Co. *v.* McClellan, 54 Ill. 58, 5 Am. Rep. 83; Illinois Cent. R. Co. *v.* Ashmead, 58 Ill. 487; Illinois Cent. R. Co. *v.* Cobb, etc., Co., 64 Ill. 128.

Where a person desirous of shipping a large quantity of corn over a railroad to Cairo stored the same in a warehouse on promise of the railroad company to transport it as soon as cars could be procured for the purpose, but the company never received or receipted for the same, and was unable to forward the same for want of cars and for the reason that the road was controlled by the military authorities of the United States, who refused to give permits to ship the same, and in consequence of which the grain was injured by exposure, etc.— held, that under the circumstances the company was not liable to the owner of the grain for the delay in furnishing transportation, there being no contract to transport the same, and the same never having come to its possession for transportation. Illinois Cent. R. Co. *v.* Hornberger, 77 Ill. 457.

A railroad company under military control of the government, transporting troops and munitions to suppress the late rebellion, so as not to be in a free exercise of its franchise, was not liable as a common carrier for refusing to receive freights for transportation. Phelps *v.* Illinois Cent. R. Co., 94 Ill. 548.

60. Government not actually assuming control.—Cobb, etc., Co. *v.* Illinois Cent. R. Co., 38 Iowa 601. In this case it is said in the opinion: "If defendant held itself out to the world as a common carrier, and had permission to carry other property than that belonging to government, the mere fact that government demanded its services and at any time may have excluded all property from transportation except its own, would afford no excuse for the defendant refusing to take the grain of plaintiff offered or delivered to it. And this for the simple reason, that it would be liable for not doing that which, as a carrier, it offered to the world to do and had the power and capacity to perform. It is not at all difficult to understand that defendant may have been subject to military control, and the military officers of the government may have used the railroad to the extent of their requirements, and have had the authority at any time to have appropriated it entirely to public use, yet all the time defendant may have transacted the business of a public carrier, and held itself out to the world as such, and at the same time had the ability to carry all property offered to it, and the permission of the military authorities so to do. In that case it can not be earnestly insisted that it would not be held liable for omission or neglect of the duties it assumed."

61. Strikes and boycotts.—Pittsburgh, etc., R. Co. *v.* Hollowell, 65 Ind. 188, 32 Am. Rep. 63.

In an action against a railroad for damages for failure to receive goods for transportation, the company answered that they were prevented from operating their cars by persons in rebellion against the government. Plaintiff replied that the disturbance was caused only by defendant's employees, who had refused to work in consequence of reduction in wages. Held, that the reply meant that the employees committed the acts after they had refused to work, and hence after they ceased to be employees. Pittsburgh, etc., R. Co. *v.* Hollowell, 65 Ind. 188, 32 Am. Rep. 63.

that there was an illegal combination compelling them to stop working.[62] Nor has a railroad, doing business as a common carrier, the right to refuse to receive from a connecting railroad, cars of such connecting line, either loaded or empty, or freight of any kind which is ordinarily transported between railroad companies according to the proper and usual course of business; and it is no excuse for the action of a railroad company in so refusing cars or freight properly offered that the receiving of them might or probably would involve the company in a strike and boycott of employees, which exists on and against the road from which it so refuses to receive the cars or freight.[63]

Unavoidable Accident.—Where a carrier receiving an order for a live poultry car, and, having none, immediately ordered a car and secured it four days later, but by reason of an accident the car had to be repaired, but for which it would have arrived at the point desired in time, the carrier used reasonable diligence.[64]

Notifying Shipper.—Where the agent of a carrier, who has agreed to furnish a car for a shipper, attempts to notify the shipper that there will be a delay of several days in the arrival of the car, and is unable to find him, but requests a third person to notify the shipper of the fact, which he does on the same day that the agent receives notice that there will be delay in the furnishing of the car, the carrier exercises reasonable diligence in notifying the shipper.[65]

§ 373. Failure of Shipper to Insure.—The failure of the shipper to insure for the carrier's benefit is not a good ground for refusal to receive and carry.[66]

§ 374. Customs and Habits of Dealing.—No length of time or manner of treatment or habit of dealing will discharge a common carrier when requested from the obligation to furnish to the public the service it is engaged in performing.[67]

§ 375. Right to Discontinue Service to Shipper.—A carrier can not renounce as against some disfavored shipper the public duty which it assumed when it engaged in the kind of transportation business which it offers to conduct. Being a common carrier for all, a carrier holding itself out for that purpose must switch all cars tendered. It is equally elementary that a carrier may be compelled by mandamus to perform duties of this kind to an aggrieved shipper.[68] It seems that a carrier may discontinue all further service to a shipper on account of past infractions of reasonable rules adopted to secure better service to the public. However, a shipper ought not to be compelled to pay an unjust charge for car service with no redress, but to submit a claim for the return of his money to the manager of the association promulgating the rule or order.[69] The weight of authority seems to be that the carrier has a lien for

62. **Controversy with employees.**—People *v.* New York, etc., R. Co. (N. Y.), 9 Am. & Eng. R. Cas. 1, 28 Hun 543, 3 Civ. Proc. R. 11, 2 McCarty Civ. Proc. 345, reversing 2 Civ. Proc. 82.

63. Beers *v.* Wabash, etc., R. Co., 35 Am. & Eng. R. Cas. 646, 34 Fed. 244.

64. **Unavoidable accident.**—Wenzel *v.* Great Northern R. Co., 152 Wis. 418, 140 N. W. 81.

65. **Notifying shipper.** — Wenzel *v.* Great Northern R. Co., 152 Wis. 418, 140 N. W. 81.

66. **Failure of shipper to insure as excuse for failure to receive and carry.**—Inman *v.* South Carolina R. Co., 129 U. S. 128, 32 L. Ed. 612, 9 S. Ct. 249. See, also, Constable *v.* National Steamship Co., 154 U. S. 51, 101, 38 L. Ed. 903, 14 S. Ct. 1062.

67. **Customs and habits of dealing.**—Louisville, etc., R. Co. *v.* Higdon, 149 Ky. 321, 148 S. W. 26; Crescent Coal Co. *v.* Louisville, etc., R. Co., 143 Ky. 73, 135 S. W. 768, 33 L. R. A., N. S., 442.

A railway company operating a belt line can not refuse to transport coal between a mine and industrial plants on such line because it has never hauled coal before. Crescent Coal Co. *v.* Louisville, etc., R. Co., 143 Ky. 73, 135 S. W. 768, 33 L. R. A., N. S., 442.

68. Larabee Flour Mills Co. *v.* Missouri Pac. R. Co., 74 Kan. 808, 88 Pac. 72.

69. Larabee Flour Mills Co. *v.* Missouri Pac. R. Co., 74 Kan. 808, 88 Pac. 72, 76.

compensation for the use of cars beyond reasonable free time. If the lien be waived the courts are open. But the car service association holds no franchise to compel the payment of such claims, and then to decide for itself whether or not it will refund. And, in any event, a carrier can not justly withold its services when it is equally at fault in the matter of which it complains.[70]

Back Charges Unpaid.—A common carrier of freight can not refuse to receive freight because back charges for other shipments have not been paid.[71]

§ 376. Destination of Goods as Affecting Duty.—Destination Not Regular Station.—The fact that the place of destination is not a regular station at which is kept an agent is no valid excuse for not receiving the goods. When goods are shipped to a place where there is a side track, but no depot platform or agent of the carrier, and this is known to the parties, it has been held that, leaving the car of goods upon the side track is a good delivery, and relieves the company from further responsibility.[72] But where goods are by mistake directed to a point which has no existence in fact, the carrier is not bound to undertake their transportation.[73]

Rule Operates between Termini of Route.—The implied obligation of a common carrier, arising from his relation to the public, is limited by the termini of his own route.[74] Merely connecting with other routes, which he does not own, operate or control, will not make him a common carrier over such connecting routes.[75] By the common law, a person who holds himself out as a common carrier is not obligated thereby to carry goods at the current freights, unless he has a particular route between certain fixed termini;[76] nor is such carrier bound by his general public obligation to provide other means of transportation—as the coaches of other lines, or the cars of other roads—than such as he owns, uses or holds out to the public on his own route for that purpose.[77] The statutes nowhere lay this duty upon railroad companies beyond the termini of their respective lines or routes,[78] and the provision in the charter of a railroad

70. Larabee Flour Mills Co. *v.* Missouri Pac. R. Co., 74 Kan. 808, 88 Pac. 72, 76.

A common carrier holding itself out to the public as ready to do switching has no right to discontinue switching cars for a shipper on the ground of his refusal to pay bills for car service when a detention for which the charges were assessed was occasioned as much by the fault of the carrier as by the fault of the shipper. Larabee Flour Mills Co. *v.* Missouri Pac. R. Co., 74 Kan. 808, 88 Pac. 72.

71. **Back charges unpaid.** — Eastern Kentucky R. Co. *v.* Holbrook, 4 Ky. L. Rep. 730.

72. Reid *v.* Southern R. Co., 149 N. C. 423, 63 S. E. 112.

That a depot is or is not maintained at the point of destination, in no way affects the right of shippers to have their goods received when tendered. Normile *v.* Northern Pac. R. Co., 36 Wash. 21, 77 Pac. 1087, 67 L. R. A. 271; Alexander *v.* Atlantic, etc., R. Co., 144 N. C. 93, 56 S. E. 697; Reid *v.* Southern R. Co., 149 N. C. 423, 63 S. E. 112.

73. **Mistake as to direction.**—O'Rourke *v.* Chicago, etc., R. Co., 44 Iowa 526.

74. Pittsburgh, etc., R. Co. *v.* Morton, 61 Ind. 539, 28 Am. Rep. 682; Hempstead *v.* Chicago, etc., R. Co., 55 Ill. 95, 8 Am. Rep. 631.

A carrier may refuse to take goods if he does not carry to the place to which the owner wishes to send them. Inman *v.* St. Louis, etc., R. Co., 14 Tex. Civ. App. 39, 47, 37 S. W. 37, affirmed in 93 Tex. 643, no op. See ante, "Under Texas Statutes," II, B.

75. Pittsburgh, etc., R. Co. *v.* Morton, 61 Ind. 539, 28 Am. Rep. 682.

76. Pittsburgh, etc., R. Co. *v.* Morton, 61 Ind. 539, 28 Am. Rep. 682.

77. Pittsburgh, etc., R. Co. *v.* Morton, 61 Ind. 539, 28 Am. Rep. 682.

A railroad connected at its termination with other companies, under an arrangement by which, when furnished on its own line with cars belonging to the other companies, it shipped goods through to points beyond its own route without a transfer, but its own cars did not pass beyond its own route. Held that, in the absence of a special contract, the railroad was not bound to furnish means of transportation to points beyond its own route, and was not liable for a failure to do so. Pittsburgh, etc., R. Co. *v.* Morton, 61 Ind. 539, 28 Am. Rep. 682.

78. Pittsburgh, etc., R. Co. *v.* Morton, 61 Ind. 539, 28 Am. Rep. 682.

The following authorities will support these views: Gordon *v.* Hutchinson (Pa.), 1 Watts & S. 285, 37 Am. Dec. 464; Ballentine *v.* North Missouri R. Co., 40 Mo. 491, 93 Am. Dec. 315; Galena, etc.,

company requiring it to permit other companies to form running connections with it does not affect the rule.[79] But a common carrier which holds itself out as transporting goods offered it for shipment, to the points to which the shipper desires to ship them, it is liable to him for not receiving and shipping them, though those points are beyond its own line.[80] Where a carrier held itself out as a through carrier to the seaboard, it could not relieve itself from failure to furnish facilities to carry goods to the seaboard by reason of the fact that its terminus was an inland town, and the fact that its uniform bill of lading expressly limited its liability to its own line, where there was nothing on the bill of lading to indicate the terminus of the line.[81] The duty on the part of a railroad common carrier to receive goods for transportation beyond its terminus may be created by contract or a course of business, which would warrant those dealing with it in presuming that their goods would be received beyond such terminus.[82]

§ 377. Duty as to Express Companies.—Railroad companies are not required, by usage or common law, to transport the traffic of independent express companies over their lines, in the manner in which the traffic is usually carried and handled; and they need not, in the absence of a statute requiring it, furnish to such express companies equal facilities for doing an express business upon their passenger trains.[83] The reason is obvious why special contracts in reference to this business are necessary. The transportation required is of a kind which must, if possible, be had, for the most part, on passenger trains. It requires, not only speed, but reasonable certainty as to the quantity that will be carried at any one time. As the things carried are to be kept in the personal custody of the messenger or other employee of the express company, it is important that a certain amount of car space should be specially set apart for the business, and that this should, as far as practicable, be put in the exclusive

R. Co. *v.* Rae, 18 Ill. 488, 68 Am. Dec. 574; Illinois Cent. R. Co. *v.* Cobb, etc., Co., 64 Ill. 128; Wibert *v.* New York, etc., R. Co. (N. Y.), 19 Barb. 36, affirmed in 12 N. Y. 245; Evansville, etc., R. Co. *v.* Duncan, 28 Ind. 441; Ang. on Carriers, §§ 25-26; Oxlade *v.* N. E. R. W. Co., 15 C. B., N. S., 680; Hales *v.* The London & N. W. R. W. Co., 4 Best & S. 66; Peet *v.* Chicago, etc., R. Co., 20 Wis. 594, 91 Am. Dec. 446; Pittsburgh, etc., R. Co. *v.* Morton, 61 Ind. 539, 28 Am. Rep. 682.

79. Oregon Short Line, etc., R. Co. *v.* Northern Pac. R. Co., 51 Fed. 465, 51 Am. & Eng. R. Cas. 145, affirmed in 61 Fed. 158, 9 C. C. A. 409.

80. Effect of offer to public.—Chicago, etc., R. Co. *v.* Wolcott, 141 Ind. 267, 39 N. E. 451, 50 Am. St. Rep. 320.

"In Pittsburgh, etc., R. Co. *v.* Morton, 61 Ind. 539, 28 Am. Rep. 682, the court says: 'Doubtless, a common carrier may so hold himself out to the public as to make himself liable for not receiving and conveying goods beyond his own line.'" Chicago, etc., R. Co. *v.* Wolcott, 141 Ind. 267, 39 N. E. 451, 455, 50 Am. St. Rep. 320.

81. Pittsburgh, etc., R. Co. *v.* Wood, 45 Ind. App. 1, 84 N. E. 1009, 88 N. E. 709.

82. Duty of carrier to receive.—Cobb, etc., Co. *v.* Illinois Cent. R. Co., 38 Iowa 601.

A carrier is not ordinarily bound beyond its own line, but it may by contract become bound for delivery at the final destination of the shipment, although it extends beyond its line. Missouri, etc., R. Co. *v.* Carter, 9 Tex. Civ. App. 677, 690, 29 S. W. 565. See post, "Connecting Carriers," part 5.

83. Duties as to express companies.—Louisville, etc., R. Co. *v.* Keefer, 146 Ind. 21, 44 N. E. 796, 38 L. R. A. 93, 58 Am. St. Rep. 348; Sargent *v.* Boston, etc., R. Co., 115 Mass. 416; Express Cases, 117 U. S. 1, 29 L. Ed. 791, 6 S. Ct. 542, 628, 1190. In the case last cited, the railroad companies had undertaken to perform for the public the express business before that time done over the same line by express companies. The express companies applied for space in the express cars for their goods and messengers, and the railroad companies refused to furnish the space or carry their messengers, and these suits were brought to compel the railroad to furnish the desired express facilities. The court held that it was not the duty of railroads to carry the goods and messengers of express companies, and that a railroad in such service was not performing a duty it owed to the public, as a common carrier; that such right could only be acquired by an express company by contract with the railroad company.

possession of the expressman in charge. As the business to be done is "express," it implies access to the train for the loading at the latest, and for unloading at the earliest, convenient moment. All this is entirely inconsistent with the idea of an express business on passenger trains free to all express carriers.[84]

§§ 378-379. Enforcement of Duty—§ 378. By Injunction.—The writ of injunction should only be granted in cases of extreme necessity.[85] Where there is a continuing breach of the duty to receive and carry freight, the party injured can have an injunction issued compelling its performance.[86] The injury to the complainant, too, is of that nature, that while there may be a remedy at law, as by recovery of damages for injury, yet it is such that can not be adequately relieved by suits for damages. It is continually recurring, and will require continued and repeated suits, and continued litigation, and the expenses of each suit would make the recovery of the excess paid an inadequate remedy,[87] for in such a case continued suits for damages could not be considered an adequate remedy at law.[88] A court of equity will not assume to dictate the policy or business management of a common carrier aside from its clear duty under its charter or the statutes. That function belongs exclusively to the company itself, and will not be interfered with because changes ought to be made as apparently reasonable, necessary or otherwise. But where the common carrier itself adopts as a part of its business policy any advantageous facility for handling freight, it must not discriminate in its use by the public, but must afford the facility equally to all, and to this extent equity will interfere by injunction to

84. Louisville, etc., R. Co. *v.* Keefer, 146 Ind. 21, 44 N. E. 796, 38 L. R. A. 93, 58 Am. St. Rep. 348.

85. **Cases of extreme necessity.**—Complainant railroad company, having no connection by rail with defendant's stockyards, secured the services of a connecting road in transferring stock shipped over its road. The price of such service being raised, complainant began transferring by means of floats, but defendants refused to receive stock so transferred, or permit the floats to land at their wharves. On application for a preliminary mandatory injunction to defendants to receive its freight, held, that the facts showed no such pressing necessity as to require such writ. Delaware, etc., R. Co. *v.* Central Stock Yard, etc., Co., 43 N. J. Eq. 605, 12 Atl. 374, 13 Atl. 615.

86. **Enforcement by injunction.**—Chicago, etc., R. Co. *v.* Wolcott, 141 Ind. 267, 39 N. E. 451, 50 Am. St. Rep. 320; Gulf, etc., R. Co. *v.* Dwyer, 75 Tex. 572, 12 S. W. 1001, 7 L. R. A. 478, 16 Am. St. Rep. 926; Rogers Locomotive, etc., Works *v.* Erie R. Co., 20 N. J. Eq. 379; Toledo, etc., R. Co. *v.* Pennsylvania Co., 53 Am. & Eng. R. Cas. 203, 54 Fed. 746, 19 L. R. A. 395; Chicago, etc., R. Co. *v.* Burlington, etc., R. Co., 34 Fed. 481.

Combination to give express company monopoly.—Plaintiffs filed a bill showing that they manufacture locomotive engines, and charged a combination between a railroad company over whose road the engines must be shipped and certain directors, to organize an express company to do all the business of shipping over the road, with reduced liabilities, whereby the cost of shipping locomotives would be increased from about $31 to $250 each: held, that plaintiffs had no adequate remedy at law, and that an injunction would issue to restrain the parties from doing anything to prevent carrying such engines as ordinary freight. Rogers Locomotive, etc., Works *v.* Erie R. Co., 20 N. J. Eq. 379.

87. Rogers Locomotive, etc., Works *v.* Erie R. Co., 20 N. J. Eq. 379, 386.

Apprehension of interruption to traffic not sufficient ground.—An injunction to a company to work traffic will only be issued where there is a well-founded ground of complaint in respect of past working, and the question of proper facilities for the receipt, etc., of traffic at a junction does not arise until the junction exists. Doublin Whiskey Distillery Co. *v.* Midland, etc., R. Co., 4 Ry. & C. T. Cas. 32.

88. In a case of discrimination, where the nature of the complaining company's business consists in mining coal which necessitates long continued and indeterminable series of shipments, a remedy by damages in an action at law would lead to such a multiplicity of suits and involve such uncertainty in the measure of damages that the remedy of damages would be inadequate and resort may be had to a court of equity. Johnson Coal Min. Co. *v.* Hocking Valley R. Co., 1 N. P., N. S., 385, 14 O. D. N. P. 209.

prevent such favored use thereof and compel its equal service to all.[89] This doctrine is founded not so much upon the purely private rights of the individual as upon the general rights and benefits of the public at large whose interest it is to keep free and open the channels of trade and to prevent the building up of favored private enterprises by a quasi public corporation.[90]

§ 379. By Mandamus.—Right of State.—Even though the state has suffered no injury and the private person injured has a sufficient remedy at law, a mandamus may issue at the instance of the state to compel a railroad company to receive and carry freight.[91] The people have a right to compel the performance of the duty to receive and transport freight through the courts, by mandamus; and their attorney general is the proper officer to set the process in motion. The fact that injured individuals may have private remedies for damages sustained does not preclude the state from its remedy by mandamus, where there is a general or partial suspension of the duty of receiving or transporting freight affecting large numbers of people.[92] The remedy by mandamus has been invoked in many cases to compel the performance of the express and implied obligation of carriers arising from their charters,[93] which are no more

89. Prevention of discrimination.—Johnson Coal Min. Co. *v.* Hocking Valley R. Co., 1 N. P., N. S., 385, 14 O. D. N. P. 209; Youghiogheny, etc., Coal Co. *v.* Erie R. Co., 1 O. C. C., N. S., 333, 24 O. C. D. 289, 14 O. C. C. 289.

90. Doctrine founded upon rights of public.—Johnson Coal Min. Co. *v.* Hocking Valley R. Co., 1 N. P., N. S., 385, 14 O. D. N. P. 209.

91. Enforcement by mandamus.—State *v.* Hartford, etc., R. Co., 29 Conn. 538; Cantrell *v.* St. Louis, etc., R. Co. (Ill.), 12 Am. & Eng. R. Cas., N. S., 227; Commonwealth *v.* Eastern R. Co., 103 Mass. 254; State *v.* Spokane St. R. Co. (Wash.), 11 Am. & Eng. R. Cas., N. S., 62; State *v.* Sioux City, etc., R. Co., 7 Neb. 357; Rex *v.* Barker (Eng.), 3 Burr. 1267; Loraine *v.* Pittsburg, etc., R. Co., 205 Pa. 132, 54 Atl. 580, 61 L. R. A. 502.

Where the injury resulted from the nonperformance of a railroad company's duty as a common carrier to receive and transport freight the connecting carrier or shipper sustaining injury may obtain relief in mandamus proceedings against the carrier in fault. Toledo, etc., R. Co. *v.* Pennsylvania Co., 54 Fed. 730, 53 Am. & Eng. R. Cas. 307, 19 L. R. A., N. S., 387; Chicago, etc., R. Co. *v.* Burlington, etc., R. Co., 34 Fed. 481; Rogers Locomotive, etc., Works *v.* Erie R. Co., 20 N. J. Eq. 379. See also, Union Pac. R. Co. *v.* Hall, 91 U. S. 343, 23 L. Ed. 428.

92. Right of the people.—People *v.* New York, etc., R. Co. (N. Y.), 9 Am. & Eng. R. Cas. 1, 28 Hun 543, 3 Civ. Proc. R. 11, 2 McCarty Civ. Proc. 345, reversing 2 Civ. Proc. 82.

93. In the case of People *v.* New York, etc., R. Co. (N. Y.), 9 Am. & Eng. R. Cas. 1, 28 Hun 543, 3 Civ. Proc. R. 11, 2 McCarty Civ. Proc. 345, the court said: "The writ of mandamus has been awarded to compel a company to operate its road as one continuous line (Union Pac. R. Co. *v.* Hall, 91 U. S. 343, 23 L. Ed. 428); to compel the running of passenger trains to the terminus of the road (State *v.* Hartford, etc., R. Co., 29 Conn. 538); to compel the company to make fences and cattle guards (People *v.* Rochester, etc., R. Co., 14 Hun. 373, 76 N. Y. S. 294); to compel it to build a bridge (People *v.* Boston, etc., R. Co., 70 N. Y. 569); to compel it to construct its road across streams so as not to interfere with navigation (State *v.* Northeastern R. Co. (S. C.), 9 Rich. L. 247, 67 Am. Dec. 551); to compel it to run daily trains (Re New Brunswick, etc., R., 1 P. & B. 667); to compel the delivery of grain at a particular elevator (Chicago, etc., R. Co. *v.* People, 56 Ill. 365, 8 Am. Rep. 690); to compel the completion of its road (Farmers' Loan & Trust Co. *v.* Henning, 17 Am. L. Reg., N. S., 266); to compel the grading of its track so as to make crossings convenient and useful (People *v.* Duchess, etc., R. Co., 58 N. Y. 152; New York, etc., R. Co. *v.* People, 12 Hun 195, modified in 74 N. Y. 302; Indianapolis, etc., R. Co. *v.* State, 37 Ind. 489); to compel the re-establishment of an abandoned station (State *v.* New Haven, etc., Co., 37 Conn. 153); to compel the replacement of a track taken up in violation of its charter (Rex *v.* Severn, etc., R. Co., 2 Barn. & Ald. 646); to prevent the abandonment of a road once completed (Talcott *v.* Pine Grove, Fed. Cas. No. 13735, 1 Flip. 120, affirmed in 19 Wall. 666, 22 L. Ed. 227); and to compel a company to exercise its franchise (People *v.* Albany, etc., R. Co., 24 N. Y. 261, 82 Am. Dec. 295).

Under Code 1906, § 2364, requiring a carrier to make reasonable provision for the transportation of coal and coke, a carrier may be compelled by mandamus to construct a side track and switch where necessary. State *v.* White Oak R. Co., 65 W. Va. 15, 64 S. E. 630, 28 L. R. A., N. S., 1013.

obligations to the people than the duty to carry freight and passengers. That duty is, indeed, the ultima ratio of their existence—the great and sole public good for the attainment and accomplishment of which all the other powers and duties are given or imposed. It is strangely illogical to assert that the state, through the courts, may compel the performance of every step necessary to bring a corporation into a condition of readiness to do the very thing for which it is created, but it is then powerless to complete the doing of the thing itself.[94]

Right of Shipper.—The question arises whether a writ of mandamus to compel the performance of a public duty may be issued at the instance of a private relator. Clearly in England it may. The rule in that country is that, in general, all those who are legally capable of bringing an action are also capable of applying to the court for the writ of mandamus. This is true in all cases, it is believed, where the defendant owes a duty, in the performance of which the prosecutor has a peculiar interest; and it is equally true in case of applications to compel the performance of duties to the public by corporations.[95] And in this country it is held that a private person, who suffers damage and inconvenience special or peculiar to himself, from the failure of the company to operate its road as required by law may institute mandamus proceedings without the sanction of the attorney general.[96] When a corporation undertakes to operate a railroad franchise, it assumes all the duties and obligations which spring by law from the character of its business, and from the customs incidental to it. It tenders a continuing offer to the general public that it will perform these duties, for the benefit of each and every one of them, when demanded at its hands. When any member of the public makes a demand upon it under such general offer, there immediately results a civil obligation on the part of the company in favor of the party making the demand, enforceable in the name of such party, through the usual remedies by which contracts are enforced. The party seeking the enforcement of the obligation by mandamus can not be driven by the corporation to an action for damages, nor can it, by the payment of money, leave unperformed its specific affirmative legal duty.[97] It is not enough that a party have a plain and adequate remedy in order to deprive him of the right to the writ of mandamus. The remedy must also be one "in the ordinary course of the law."[98] And it has been said that: "A proceeding before the board of

94. People *v.* New York, etc., R. Co. (N. Y.), 9 Am. & Eng. R. Cas. 1, 28 Hun. 543, 3 Civ. Proc. R. 11, 2 McCarty Civ. Proc. 345.

95. In Rex *v.* R. Co., 2 Barn. & Ald., 646, a private individual, without any allegation of special injury to himself, obtained a rule upon the company to show cause why a mandamus should not issue commanding them to lay down again and maintain part of a railway which they had taken up. Under an act of Parliament, the railway was a public highway; and all persons were at liberty to pass and repass thereon, with wagons and other carriages, upon payment of the rates. What the prosecutor complained of was the loss by the public, and particularly by the owners of certain collieries (of which he does not appear to have been one), of the benefit of using the railway taken up. The writ was awarded. It was not even claimed that the intervention of the attorney general was needed. Other cases to the same effect are numerous. Clarke *v.* Canal Co., 6 Ad. & Ell., N. S., 898, 1 Chit. 700

96. **In United States.**—Hall *v.* Union Pac. R. Co., Fed. Cas. No. 5950, 3 Dill. 515, affirmed in 91 U. S. 343, 23 L. Ed. 428; construing the act of March 3, 187, 17 U. S. Stat. at Law 509.

This is true in all cases, it is believed, where the defendant owes a duty in the performance of which the prosecutor has a peculiar interest. Tapping on mandamus, p. 28. The right is distinctly recognized in this state in Hamilton *v.* Pittsburgh, 34 Pa. 496, and in many cases following it. Loraine *v.* Pittsburg, etc., R. Co., 205 Pa. 132, 54 Atl. 580, 61 L. R. A. 502.

In mandamus by a coal miner to compel a railroad company to furnish cars, which it refused to do unless he would sell his coal to a company controlled by the president of the railroad company, it is immaterial that other shippers were refused cars for the same reason. Loraine *v.* Pittsburg, etc., R. Co., 54 Atl. 580, 205 Pa. 132, 61 L. R. A. 502.

97. Cumberland Tel., etc., Co. *v.* Morgan's, etc., R. Co. (La.), 13 Am. & Eng. R. Cas., N. S., 71.

98. Larabee Flour Mills Co. *v.* Missouri Pac. R. Co., 74 Kan. 808, 88 Pac. 72.

railroad commissioners is sufficiently out of the ordinary course of the law to distinguish it. Its characteristic feature is that it takes a mandamus suit in this court to complete the remedy. Otherwise it might not be adequate. Hence there is no reason why, in a case involving a right not of statutory creation and not depending upon any statute for its enforcement, the complainant may not apply directly to this court for the desired relief." [99]

Discrimination.—Where a complainant seeks to force a railroad company to afford it facilities to those given a favored rival, the court may issue a mandamus to compel it to serve both alike.[1]

Strikes.—Where a railroad company refuses to carry freight and passengers on the ground that its employees refused to work except for increased wages, a mandamus may issue, at the suit of the commonwealth, represented by the attorney general, to compel it to do so, where there is no violence or force used by such employees to prevent the operation of trains; and it is no defense to such proceedings that the state has suffered no injury, and that private shippers or passengers have an adequate remedy at law in suits for damages.[2]

Failure to Offer for Transportation.—The writ of mandamus does not lie, when the relator who seeks to transport his coal over a lateral railroad has not opened or mined his coal or offered it in cars for transportations.[3]

Question of Unlawful Transportation.—Where a product is dominated "beer," with nothing to show that it is not intoxicating, and the carrier has a right to assume that it is intoxicating, and therefore prohibited, there exists a discretion in regard to the evidence whereby the carrier may be satisfied that the product if lawful, and mandamus will not lie to compel its transportation.[4]

§§ 380-382. Action for Refusal—§ 380. Right of Action.—A common carrier being bound to receive goods tendered to him in his line of business for shipment is liable to a suit for damages for refusing to take goods so tendered,[5] without good cause,[6] or for enforcing rules and regulations discriminating against the complaining shipper.[7] And the fact that, after the damages sued for had accrued, the shipper and the carrier entered into a contract for the shipment of the freight, does not affect the shipper's right to recover the damages sustained.[8]

For Whom Right Exists.—The refusal of a common carrier to take goods for a particular consignee is in violation of an obligation to the shipper, and

99. Larabee Flour Mills Co. *v.* Missouri Pac. R. Co., 74 Kan. 808, 88 Pac. 72.

1. **Discrimination.** — Cumberland Tel., etc., Co. *v.* Texas, etc., R. Co. (La.), 18 Am. & Eng. R. Cas., N. S., 399.

2. **Strikes.**—People *v.* New York, etc., R. Co. (N. Y.), 9 Am. & Eng. R. Cas. 1, 28 Hun 543, 3 Civ. Proc. R. 11, 2 McCarty Civ. Proc. 345.

3. **Failure to offer for transportation.**—Commonwealth *v.* Corey (Pa.), 2 Pittsb. 444.

4. **Question of unlawful transportation.**—Milwaukee Malt Extract Co. *v.* Chicago, etc., R. Co., 73 Iowa 98, 34 N. W. 761.

5. **Action for refusal.**—Inman & Co. *v.* Seaboard, etc., R. Co., 159 Fed. 960; Wallace *v.* Matthews, 39 Ga. 617, 99 Am. Dec. 473; Fish *v.* Chapman, 2 Ga. 349, 46 Am. Dec. 393; Louisville, etc., R. Co. *v.* Queen City Coal Co., 13 Ky. L. Rep. 832; Johnson Coal Min. Co. *v.* Hocking Valley R. Co., 1 N. P., N. S., 385, 14 O. D. N. P. 209.

6. **Liability to suit for refusal.**—For a refusal, except upon a good cause to undertake the service, a right of action exists against the carrier. Waring & Co. *v.* Baltimore, etc., R. Co., 3 Wkly. L. Bull. 893, 7 O. Dec. 553; Canal Boat Montgomery *v.* Kent, 20 O. 54.

7. **Discrimination.**—Logan & Co. *v.* Central Railroad, 74 Ga. 684.

The Georgia statutes do not contain any express provisions perhaps imposing penalties on carriers for unjust discrimination exercised to the detriment of the business of another but the scope and intent of Ga. Civil Code, §§ 2188, 2214, 2268, 2269, 2307, are broad enough to afford a remedy. Kates *v.* Atlanta Baggage, etc., Co., 107 Ga. 636, 34 S. E. 372, 46 L. R. A. 431.

Ohio Revised Statutes.—Johnson Coal Min. Co. *v.* Hocking Valley R. Co., 1 N. P., N. S., 385, 14 O. D. N. P. 209.

8. **Subsequent contract of shipment.**—St. Louis, etc., R. Co. *v.* Taylor, 87 Ark. 331, 112 S. W. 745.

not to the consignee. An action of damages in favor of the consignee will not lie in such a case.[9]

Effect of Statutory Penalty.—A statute fixing a penalty per day per car to be paid by the carrier for failure to supply cars according to the tenor of the statute, does not abrogate the common-law action for damages to a shipper by reason of a breach of the carrier's common-law duty to furnish cars for transportation of freight within a reasonable time.[10]

Delayage Charges.—The fixing of delayage charges by a state railroad commission for failure of carrier to furnish cars does not deprive the shipper of his right to damages under the common law.[11]

§ 381. Procedure.—Jurisdiction.—A suit to compel an interstate carrier to receive and transport property tendered for shipment is one to enforce performance of a duty imposed by general law, and within the jurisdiction of the courts, and the complainant is not required to resort in the first instance to the Interstate Commerce Commission.[11a]

Form and Action.—A cause of action for refusal of a common carrier to furnish means of transportation, being founded on the public duty of the carrier, and not on special contract, arises ex delicto, and not ex contractu.[12] Damages from breach of a carrier's express contract to furnish cars at a specified time are recoverable in an action on the contract; but, in the absence of an express contract, the proposing shipper has no action save for a breach of the carrier's general common-law duty to furnish cars within a reasonable time.[13]

Pleading.—In civil actions it is a rule that where a subject comprehends a multiplicity of matters and a great variety of facts, in order to avoid prolixity, the law allows general pleading.[14]

Statement of Cause of Action.—The general rule seems to be that the petition must contain a plain and concise statement of the facts constituting a cause of action.[15]

Necessary Allegations.—In a suit against a carrier for failure to receive and carry freight, or for failure to furnish cars for the transportation of freight, the complaint must set out the duty of the carrier in that respect, either as a

9. **For whom right exists.**—Lafaye *v.* Harris, 13 La. Ann. 553.

10. **Effect of statutory penalty.**—Southern R. Co. *v.* Moore, 133 Ga. 806, 67 S. E. 85, 26 L. R. A., N. S., 851. See ante, "Requisites and Sufficiency of Demand," § 336.

11. **Delayage charges.**—Yazoo, etc., R. Co. *v.* Fisher Bros. (Miss.), 59 So. 877.

11a. **Jurisdiction.**—Louisville, etc., R. Co. *v.* Cook Brewing Co., 96 C. C. A. 322, 172 Fed. 117.

12. **Form of action.**—Pittsburgh, etc., R. Co. *v.* Morton, 61 Ind. 539, 28 Am. Rep. 682.

13. **Breach of express contract.**—Central, etc., R. Co. *v.* Sigma Lumber Co., 170 Ala. 627, 54 So. 205.

A declaration, in an action against a carrier for failure to furnish cars, which alleged that plaintiff made requisition on the carrier for cars for transportation of the goods, and that the carrier received and accepted the requisition, and which charged that the loss claimed to have been sustained by plaintiff was due to the negligence of the carrier in failing to furnish the cars as requested, stated a cause of action in tort and not in contract, and a recovery must be predicated on the liability of the carrier as a common carrier to furnish cars. Di Giorgio Importing, etc., Co. *v.* Pennsylvania R. Co., 104 Md. 693, 65 Atl. 425, 8 L. R. A., N. S., 108.

14. **General pleading.**—State *v.* McCormack, 2 Ind. 305; Chicago, etc., R. Co. *v.* Wolcott, 141 Ind. 267, 39 N. E. 451, 50 Am. St. Rep. 320.

15. Under Rev. St. 1899, § 592 (Ann. St. 1906, p. 612), requiring the petition to contain a plain and concise statement of the facts constituting a cause of action, a petition, alleging that during the four months from July to October, inclusive, plaintiff offered for shipment 120,000 feet of oak logs of the value of $1,920 and 60,000 feet of cypress logs of the value of $840 from a certain station, and asked for cars, but that defendant railroad failed to furnish them, and that in consequence the logs became damaged, etc., stated a case for not furnishing cars to haul any of the logs during the months named. Shoptaugh *v.* St. Louis, etc., R. Co. (Mo. App.), 126 S. W. 752.

public duty or as the result of a contract,[16] and every fact necessary to show a breach of that public duty or of the special contract between the parties, such as a timely and sufficient tender of the goods for shipment,[17] or a request in due time of a duly authorized agent, for necessary cars,[18] and a readiness and willingness to pay the requisite freight charges.[19] But where the refusal by the carrier is not because of the non-payment of freight charges, it is not necessary to allege a tender thereof.[20] And where a railroad fails to furnish cars, plain-

16. Pleading in general.—In an action for failure to furnish cars, the allegation in the complaint that shippers at certain points at which defendant must compete with other carriers were furnished cars for shipping to points to which plaintiff wished to ship, and that the number of cars so furnished was excessively out of proportion to the number furnished plaintiff, is sufficient to charge defendant with the duty of furnishing plaintiff with his proportion of cars to points on its own lines, or to points on connecting lines, to which defendant held itself out as a through carrier. Pittsburgh, etc., R. Co. *v.* Wood, 45 Ind. App. 1, 84 N. E. 1009, 88 N. E. 709.

In an action for failure to furnish cars, a complaint alleging that defendant is a common carrier operating lines of railroad, and that it held itself out to plaintiff as a through carrier to certain points beyond its lines by traffic arrangements with connecting carriers, is not objectionable in that it fails to allege any duty which defendant owed to plaintiff. Rehearing 84 N. E. 1009, denied. Pittsburgh, etc., R. Co. Wood, 45 Ind. App. 1, 88 N. E. 709.

In an action against a carrier for failure to furnish shipping facilities, the absence of an allegation in the complaint that the defendant issued bills of lading obligating itself to carry goods to points beyond its own lines was not necessary on the issue as to its holding itself out as a through carrier to such points, though such fact might be material to support the averment that it held itself out as a through carrier. Pittsburgh, etc., R. Co. *v.* Wood, 45 Ind. App. 1, 88 N. E. 709.

17. Tender.—A complaint in an action against a railroad company for its failure to furnish a car in which to ship plaintiff's timber, which does not allege that the timber was tendered to or received for shipment by an agent authorized to ship the same, or that the plaintiff applied for a car to an agent authorized to furnish cars, is demurrable, though it alleges that the plaintiff placed the timber for shipment near the company's tracks at a certain station, and that he applied to a freight conductor and to the company's agents at other station for a car. St. Louis, etc., R. Co. *v.* Lee, 69 Ark. 584, 65 S. W. 99.

A complaint in an action against a carrier for failure to furnish cars to a shipper, which alleges that the shipper had placed saw logs along a carrier's tracks for shipment and had made repeated demands for cars, and that by the carrier's failure to furnish cars the logs deteriorated, states a cause of action; the allegations being sufficient to show a tender for shipment and demand for cars. St. Louis, etc., R. Co. *v.* Wynne Hoop, etc., Co., 81 Ark. 373, 99 S. W. 375.

18. Demand for cars.—St. Louis, etc., R. Co. *v.* Lee, 69 Ark. 584, 65 S. W. 99.

A complaint in an action against a railway company for failure to furnish cars which alleges that property was tendered for shipment and that cars were demanded in a certain month is sufficiently definite as to the time when the demands were made, where the stations were small, so that the company might ascertain whether such was the fact. Choctaw, etc., R. Co. *v.* Rolfe, 76 Ark. 220, 88 S. W. 870.

The allegation in the complaint, in an action against a carrier for failure to furnish cars to a shipper, that the shipper had made demand of the carrier for cars, was sufficient to admit proof as to the agent on whom demand was made, and that he had authority to furnish cars. St. Louis, etc., R. Co. *v.* Wynne Hoop, etc., Co., 81 Ark. 373, 99 S. W. 375.

19. As to payment of charges.—Texas, etc., R. Co. *v.* Hays, 2 Tex. App. Civ. Cases, § 390. See ante, "Payment or Tender of Charges," § 360.

In an action against a carrier for failure to furnish shipping facilities for the carriage of grain, the complaint alleged that the goods were tendered, and that plaintiffs were "willing, ready, and able to pay" the charges thereon. Held, that the complaint was not insufficient for failing to allege payment of the freight on the goods tendered, where there was no basis for computing the amount of the charges, as the quantity of grain to be shipped depended entirely on the number and capacity of cars furnished by the carrier. Pittsburgh, etc., R. Co. *v.* Wood, 45 Ind. App. 1, 84 N. E. 1009, 88 N. E. 709.

20. Allegation of tender of charges unnecessary.—The reason for the refusal of transportation is alleged to be that the Gulf, Colorado and Santa Fe Company desired that the lumber should accumulate until they completed a junction between their road and the other defendant, so that it would earn the profit on the transportation beyond the proposed point

tiff need not designate in his petition the character of cars required, defendant being presumed to know what kind were needed.[21]

Place of Delivery by Carrier—Value.—In an action against a railroad for a general refusal to transport the complainant's goods it is not necessary to allege to what place it was tendered for transportation, or its market value at such place, had it been transported by the railroad, the action being, not for failure to carry one specific lot, but a general refusal to carry.[22] Where a carrier failed to furnish cars to transport plaintiff's logs, allegations of the value of the two species of logs and a depreciation in value during the period they lay at the station for lack of cars are sufficient to enable defendant to prepare its defense so far as the measure of damages is concerned, and it is not entitled to require plaintiff to allege the market prices either at such station or at the intended destination.[23]

Excuses for Failure.—If any reason exists excusing a carrier from receiving freight for shipment or for refusing to furnish cars to a shipper, they are matters for defense to be pleaded by the defendant and not the plaintiff.[24]

Basis for Damages.—The petition in an action against a carrier for failure or refusal to receive and carry freight or furnish cars for transportation of property, must allege a basis for damages resultant from the negligence or willful act of the carrier.[25] In an action for a continuous failure to furnish transportation for freight, it is sufficient in alleging a basis for damages to charge what could have been realized from sales if transportation had been furnished and the loss which resulted from being compelled to keep it at a point where it could not be sold, with a specific statement of the expenses incident to its detention.[26]

of connection. This shows that the refusal to carry was not on account of the nonpayment of freights, and, therefore, a tender was not necessary to be alleged. Central, etc., R. Co. *v.* Morris, 68 Tex. 49, 58, 3 S. W. 457.

21. Designating kind of cars.—Shoptaugh *v.* St. Louis, etc., R. Co. (Mo. App.), 126 S. W. 752.

In an action against a carrier for failure to furnish shipping facilities, a complaint alleging that defendant was a common carrier of grain, and that plaintiffs tendered grain for shipment and demanded "suitable cars" therefor, was not open to the objection that it did not allege the class of cars demanded. Pittsburgh, etc., R. Co. *v.* Wood, 45 Ind. App. 1, 84 N. E. 1009, 88 N. E. 709.

22. General failure to transport.—Central, etc., R. Co. *v.* Morris, 68 Tex. 49, 3 S. W. 457.

In such suit allegations of tender and refusal of freight to the points to which it was desired to ship the lumber are not necessary. Central, etc., R. Co. *v.* Morris, 68 Tex. 49, 58, 3 S. W. 457.

Plaintiffs, under the circumstances, could make no contracts to deliver because they could not get the necessary transportation, and hence could not have averred the points to which it was to have been carrier. Central, etc., R. Co. *v.* Morris, 68 Tex. 49, 58, 3 S. W. 457.

23. Allegation of value—Market price.—Shoptaugh *v.* St. Louis, etc., R. Co. (Mo. App.), 126 S. W. 752.

24. Pleading matter of defense.—In an action against a common carrier to recover damages for its failure to provide a shipper with transportation on demand by him, that defendant was unable to furnish plaintiff with cars except by undue interference with its business, or with the rights of other shippers, is a matter of defense. Chicago, etc., R. Co. *v.* Wolcott, 141 Ind. 267, 39 N. E. 451, 50 Am. St. Rep. 320.

25. Basis for damages.—A complaint in an action against a carrier for failure to furnish cars to a shipper on demand, which alleges that the shipper placed logs along the carrier's tracks for shipment and demanded cars on which to ship them, and that the carrier neglected to furnish a sufficient number of cars, and that by reason thereof the logs deteriorated in value from exposure to the weather in a specified sum, and that by the carrier's negligent refusal to furnish cars the shipper was damaged, sufficiently charges that the negligence of the carrier in failing to furnish cars was the proximate cause of the shipper's injury, as against the objection that the injury was due to the exposure of the logs to the weather. St. Louis, etc., R. Co. *v.* Wynne Hoop, etc., Co., 81 Ark. 373, 99 S. W. 375.

26. Allegations in action for failure to furnish transportation.—Central, etc., R. Co. *v.* Morris, 68 Tex. 49, 3 S. W. 457.

Answer.—In an action against a carrier for failure to furnish cars after demand, an answer failing to allege facts showing that the carrier had performed its duty of providing a sufficient number of cars to meet the ordinary needs of its business, which it could reasonably anticipate, or that the scarcity of cars and existing demands for them were the result of circumstances beyond its power reasonably to control and provide against is demurrable.[27]

Variance.—There is no variance when the allegation upon which the variance is predicated is immaterial. Thus, it has been held that the date alleged in the petition was immaterial.[28]

Evidence.—As railroad companies are not required at all times and under all conditions to have sufficient cars to take care of all demands, evidence to show unusual demands at certain times, an equitable distribution of cars at such times, and that the failure to supply was justified under the conditions existing at the time, should be admitted.[29] And in such a case the plaintiff is properly allowed to prove by other shippers that in the seasons preceding the one in question there was a car shortage on defendant's road, in the district from which plaintiff was shipping.[30]

Question of Law and Fact.—In accordance with the general rule, the question as to whether a carrier has breached his public duty or his contract by failing to receive goods for shipment by failure to furnish cars, or by negligently failing to move them after receiving them is one for the jury, where there is evidence on the question upon which the minds of reasonable men might differ.[31] The rule that whether a carrier negligently failed to supply cars when demanded is for the jury applies only where a specific and definite notice of the time when the cars are required is shown.[32] The question as to whether a carrier unreason-

27. **Answer — Demurrer.** —Judgment, Texas, etc., R. Co. *v.* Allen, 42 Tex. Civ. App. 331, 98 S. W. 450, reversed. Allen *v.* Texas, etc., R. Co., 100 Tex. 525, 101 S. W. 792, 15 Am. & Eng. Ann. Cas. 618, 11 L. R. A., N. S., 981.

28. There is no variance between the allegation of a petition in an action against a carrier for failure to furnish cars that plaintiff had on hand at a station for shipment in the month of July a stated quantity of logs, that he demanded cars to load them, and that the carrier failed to furnish cars, and the proof that the logs remained at the station until November, while plaintiff was vainly requesting cars; the date alleged in the petition being immaterial. Hoffman, etc., Stave Co. *v.* St. Louis, etc., R. Co., 119 Mo. App. 495, 94 S. W. 597.

29. **Evidence—Admissibility.**—Mulberry Hill Coal Co. *v.* Illinois Cent. R. Co., 161 Ill. App. 272.

30. **Conditions preceding seasons as evidence.**—Cronan *v.* St. Louis, etc., R. Co. (Mo. App.), 130 S. W. 437.

31. Porter *v.* Raleigh, etc., R. Co., 132 N. C. 71, 43 S. E. 547.

In an action to recover damages resulting from defendant's refusal to accept plaintiff's grain for shipment, it was contended, in defense, that the negligence of plaintiff in refusing to receive and store previous shipments of grain at the point of destination prevented the carrier from receiving the later shipment. Held, that the question of plaintiff's negligence was for the jury. Cobb, etc., Co. *v.* Illinois Cent. R. Co., 38 Iowa 601.

Whether defendant, a carrier, with knowledge of all the facts, interfered with plaintiff's shipment of a monument over its line by refusing its regular service which would have been adequate to deliver the monument by the date provided for in plaintiff's contract with the purchasers, and shipped it by special service at a much greater expense, which had to be paid from the fund provided for the purchase of the monument, and hence ultimately by plaintiff, held to be a question for the jury. Harrison Granite Co. *v.* Pennsylvania R. Co., 154 Mich. 48, 117 N. W. 549.

Failure to furnish cars.—In an action against a common carrier for failure to furnish cars to ship timber, where the uncontradicted evidence showed that defendant agreed to furnish at least one car a day and several times told plaintiff that cars would be furnished, and that when he inquired as to the situation and notified defendant that he was keeping a large crew of men on hand at a large expense to have them ready to load cars, defendant notified him that the cars would be furnished, the court was justified in refusing to declare as a matter of law, that there was no evidence of an agreement to furnish cars. Cronan *v.* St. Louis, etc., R. Co. (Mo. App.), 130 S. W. 437.

32. **Negligence in furnishing cars.**—DiGiorgio Importing, etc., Co. *v.* Pennsylvania R. Co., 104 Md. 693, 65 Atl. 425, 8 L. R. A., N. S., 108.

ably neglected to provide a sufficient number of cars to forward freight is for the jury,[33] and as a general thing the validity and sufficiency of excuses made by a carrier for failure to receive goods is for the jury.[34] The shipper can not complain of the submission to the jury as a question of fact, whether or not, on account of an accumulation of freight or press of business, all the cars belonging to carrier suitable for the shipper's purpose were in use, making it impossible to furnish a car on the day in question, and whether or not the carrier was prevented by any unavoidable delay caused by the use of cars.[35]

Instructions.—In suits against carriers for failure or refusal to receive goods for shipment, the instructions are to be limited by the issues raised by the pleadings as in other cases.[36]

Nonsuit.—In an action against a carrier for the value of lumber which had been ordered by a customer from plaintiff, but which became a total loss because of the carrier's failure to accept it for transportation, a nonsuit was properly granted, where the execution of the written order for the lumber was not proven.[37]

§ 382. Damages.—Duty of Owner to Avert or Mitigate Loss.—When a railroad wrongfully refuses to take and transport property when offered, the owner must care for and preserve his property pending the delay.[38]

Enhancing Damages.—A shipper has no right to enhance his damages caused by a carrier's failure to receive his goods or to furnish facilities for shipping.[39] On breach of a contract to carry by vessel an ordinary article of merchandise, the shipper will not be justified in procuring shipment by rail, if the railroad prices would render it unprofitable, since a person has no right to put others to an expense of such a nature as he would not as a reasonable man incur on his own account.[40] In case of an article of specific utility for preservation, where the circumstances are such as to justify employing any transportation which is accessible, and to render the difference in cost in transportation a proper measure of damages, the shipper, on failure of the carrier to furnish transportation as agreed, is bound to seek other means of carriage immediately at hand, and is not permitted to await his leisure and speculate on future chances

33. Question for jury.—Judgment, 87 N. Y. S. 30, 92 App. Div. 584, affirmed. Strough *v.* New York Cent. R. Co., 181 N. Y. 533, 73 N. E. 1133.

34. Excuses for failure.—In an action against a carrier for failure to furnish plaintiff with cars, evidence held sufficient to make it a question for the jury whether there was such a sudden and unusual increase of business and demand for cars over defendant's road as to release it from its liability for failure to furnish the cars. Dillender *v.* St. Louis, etc., R. Co. (Mo. App.), 130 S. W. 107.

35. Question for jury.—Hastings *v.* New York, etc., R. Co., 53 Hun 638, 6 N. Y. S. 836, 25 N. Y. St. Rep. 249, 3 Silvernail 422.

36. Instructions.—Where a shipper based his action against carrier upon its failure to furnish cars on a given date alleged to be a reasonable time after demand, a charge authorizing a recovery on failure to furnish cars in a reasonable time generally was erroneous as submitting an issue not pleaded. Galveston, etc., R. Co. *v.* Word (Tex. Civ. App.), 124 S. W. 478.

37. Nonsuit for failure of proof.—Kent *v.* Wadley, etc., R. Co., 136 Ga. 857, 72 S. E. 413.

38. Duty of owner to mitigate.—Houston, etc., R. Co. *v.* Smith, 63 Tex. 322, 328, 22 Am. & Eng. R. Cas. 421; St. Louis, etc., R. Co. *v.* Neel, 56 Ark. 279, 19 S. W. 963.

Where plaintiff negligently left cotton with a railroad company after its refusal to take it, he can not recover for damages to it. Houston, etc., R. Co. *v.* Smith, 63 Tex. 322, 328, 22 Am. & Eng. R. Cas. 421.

39. Enhancing damages.—In an action against a railroad for failure to furnish cars to transport plaintiff's logs, where plaintiff did not know from the first that he could not ship, that after discovering such fact he continued to haul logs to the station was not a defense, but cause only for denying redress to the extent he increased his damage by accumulating logs after he knew that cars would not be available. Shoptaugh *v.* St. Louis, etc., R. Co. (Mo. App.), 126 S. W. 752.

40. Extra expenses needlessly made.—Ward's Cent., etc., Co. *v.* Elkins, 34 Mich. 439, 22 Am. Rep. 544.

by making piecemeal shipments.[41] The mere fact that a shipper loads the fresher logs first on cars furnished will not bar a recovery, unless the shipper has reason to believe that the carrier will not furnish a sufficient number of cars to remove all the logs before damage thereto will occur.[42]

Elements and Measure of Damages.—A shipper is entitled to recover only such damages as were the natural and proximate consequences of the failure of a carrier to furnish cars.[43] The elements of damages occasioned a shipper by a common carrier's refusal or failure to receive his goods would be the loss occasioned by the refusal or failure,[44] and the reasonable expense of keeping the goods during the delay.[45] And the carrier, where freight is tendered to it by delivery at the depot and wrongfully refused, is liable for the expense incurred in carrying it a second time to the depot, from which the owner had received it.[46] Where a railroad company has wrongfully failed to furnish the owners of a coal mine on its road with cars for the transportation of their coal, the expenses of the coal owners while they were expecting cars to be furnished, and any reasonable profits they could have earned during the time the miners were in their employment, may be considered in estimating damages.[47] A person sustaining loss by a carrier's refusal to transport freight on stipulated rates may recover loss sustained on contracts made on the faith of such rates.[48] But the failure of a common carrier to provide facilities for the shipment of a commodity, whereby plaintiff is prevented from selling a stock of such commodity to others for shipment, does not constitute a legal ground for the recovery of damages.[49] Nor can a dealer recover damages for a carrier's refusal

41. **Article of specific utility for preservation.**—Ward's Cent., etc., Co. *v.* Elkins, 34 Mich. 439, 22 Am. Rep. 544.

42. **Order of loading logs.**—St. Louis, etc., R. Co. *v.* Wynne Hoop, etc., Co., 81 Ark. 373, 99 S. W. 375.

43. **Proximate consequences.**—Louisville, etc., R. Co. *v.* Queen City Coal Co., 13 Ky. L. Rep. 832.

In an action against a carrier for failure to furnish cars for the transportation of logs, the evidence showed that after the logs had been cut for three months they would deteriorate; that the shipper placed logs along the carrier's tracks for shipment and demanded cars; that the carrier failed to furnish cars; that the only value of the logs consisted in their use for hoops, and to be valuable the same had to be manufactured before decay; and that, if shipped promptly, the same could have been manufactured before deterioration. Held, that any delay in the shipment which prevented the manufacture of the logs into hoops before decay began directly contributed to and was the proximate cause of any deterioration in the value of the logs. St. Louis, etc., R. Co. *v.* Wynne Hoop, etc., Co., 81 Ark. 373, 99 S. W. 375.

44. **Loss and expense.**—Houston, etc., R. Co. *v.* Smith, 63 Tex. 322, 22 Am. & Eng. R. Cas. 421; Louisville, etc., R. Co. *v.* Queen City Coal Co., 13 Ky. L. Rep. 832.

Where one failed to deliver cars at a certain place as contracted for, the measure of damages would be such a sum as would compensate the other party for the damage sustained by him from such failure. Williams *v.* Armour Car Lines (Del.), 79 Atl. 919.

A common carrier is liable to a shipper, for the failure to furnish cars, for such actual damages as were sustained by reason of any failure or default on its part to deliver the cars as requested. Yazoo, etc., R. Co. *v.* Fisher Bros. (Miss.), 59 So. 877.

Heating and spoiling of grain.—Where a carrier refused to receive and transport grain properly stored for transportation, the shipper may show that because of such refusal his grain became heated and spoiled, although this resulted from something inherent in the nature of the grain itself. Pittsburgh, etc., R. Co. *v.* Morton, 61 Ind. 539, 28 Am. Rep. 682.

45. **Expense during delay.**—Houston, etc., R. Co. *v.* Smith, 63 Tex. 322, 22 Am. & Eng. R. Cas. 421; Louisville, etc., R. Co. *v.* Queen City Coal Co., 13 Ky. L. Rep. 832; St. Louis, etc., R. Co. *v.* Neel, 56 Ark. 279, 19 S. W. 963.

46. **Expense of redelivering it to carrier.**—Inman *v.* St. Louis, etc., R. Co., 14 Tex. Civ. App. 39, 37 S. W. 37.

47. **Failure to furnish cars for shipment of coal.**—Louisville, etc., R. Co. *v.* Queen City Coal Co., 13 Ky. L. Rep. 832.

48. **Loss sustained on contracts.**—Louisville, etc., R. Co. *v.* Higdon, 149 Ky. 321, 148 S. W. 26.

49. **Failure to sell others.**—Little Rock, etc., R. Co. *v.* Conatser, 61 Ark. 560, 33 S. W. 1057; Louisville, etc., R. Co. *v.* Queen City Coal Co., 13 Ky. L. Rep. 832.

to transport coal arising from his contract to buy the coal to be carried, where the amount of coal to be delivered was optional with the seller, and it does not appear that the dealer made any contracts for resale on the faith of it that caused him loss; but as to another agreement binding the seller to deliver a specified amount the dealer can recover the enhanced cost of delivering coal under contracts for resale made on the strength of such agreement.[50]

Measure of Damages.—In an action against a carrier for refusal to receive and transport goods, plaintiff is entitled to recover the difference between the value of the property where it was tendered to the company and its value at the place to which it was to be taken, less expense of transportation if the contract required the shipper to pay the same.[51] The carrier is liable for the amount lost by a decline in the market pending delay, which is to be estimated by ascertaining its price there, when it should have arrived, had it been taken when offered, and its price at the time when it did arrive.[52]

Refusal to Furnish Cars.—Where a railroad company fails to furnish the owners of a coal mine on its road with cars for the transportation of their coal, the measure of damages is the difference between the value of the coal at the mines and on the market.[53] But in an action against a railroad for failure to provide cars for the shipment of plaintiff's corn, the latter can not recover both the profits he might have made if the corn had been shipped and the expenses incurred in preparing it for transportation.[54] And where a seller looses the benefit of the sale by the refusal of a railroad company to furnish him with cars his measure of damages is the profits lost by his inability to fulfill his

50. Contemplated sales—Enhanced cost of delivery.—Crescent Coal Co. *v.* Louisville, etc., R. Co., 143 Ky. 73, 135 S. W. 768, 33 L. R. A., N. S., 442.

51. Measure of damages.—People *v.* New York, etc., R. Co. (N. Y.), 22 Hun 533; Inman *v.* St. Louis, etc., R. Co., 14 Tex. Civ. App. 39, 37 S. W. 37; Louisville, etc., R. Co. *v.* Queen City Coal Co., 13 Ky. L. Rep. 832.

Where a carrier failed to furnish cars for the shipment of hay and the necessities of the shipper required him to sell the hay at the local price, he could recover the difference between the local price and what he could have obtained in the desired market. St. Louis, etc., R. Co. *v.* Leder Bros., 87 Ark. 298, 112 S. W. 744.

The measure of damages for failure of a carrier to furnish cars to a shipper, resulting in damage of the goods, is the difference in their value at the place of shipment when offered for transportation and their value at the same place when shipping facilities were furnished. Richey, etc., Co. *v.* Northern Pac. R. Co., 110 Minn. 347, 125 N. W. 897.

The measure of damages for the refusal of a carrier to accept and transport freight tendered to it by one who had sold it under contract, is the difference between the contract price and the value of the grain at the point of shipment, less the cost of shipment, if the contract required the shipper to pay the same, if the contract price was less than the market value at destination, whether the carrier knew of the contract or not. Missouri, etc., R. Co. *v.* Witherspoon, 18 Tex. Civ. App. 615, 45 S. W. 424.

The measure of damages for a carrier's refusal to accept goods for shipment as routed by the shipper, where the property is wanted only because of its salability, is the difference between the market value at the destination to which it was to have been carrier at the time when it should have arrived there, and its value at the same time at the place from which it was to have been carried, less the freight. Inman *v.* St. Louis, etc., R. Co., 14 Tex. Civ. App. 39, 37 S W. 37.

Where the action was brought on account of any one specific failure to transport any one lot of lumber, the difference between the price of the lumber at the point of departure and the price at its place of destination, less the freight, is the proper measure. Central, etc., R. Co. *v.* Morris, 68 Tex. 49, 60, 3 S. W. 457.

52. Decline in market.—Houston, etc., R. Co. *v.* Smith, 63 Tex. 322, 329, 22 Am. & Eng. R. Cas. 421.

53. Failure to furnish coal cars.—Louisville, etc., R. Co. *v.* Queen City Coal Co., 13 Ky. L. Rep. 832.

Instructions that measure of damages for railroad company's failure to furnish mineowner cars was difference between the cost of mining and selling price held erroneous because it should have taken into account the value of the coal left in the ground. Illinois Cent. R. Co. *v.* River, etc., Coke Co., 150 Ky. 489, 150 S. W. 641, 44 L. R. A., N. S., 185.

54. Gulf, etc., R. Co. *v.* Hodge, 10 Tex. Civ. App. 543, 30 S. W. 829.

agreement, provided he would otherwise have performed the same.[55] And it is immaterial whether the carrier has knowledge of the contract of sale.[56]

Exemplary Damages.—Where a railway company refuses to carry goods out of ill-will, or in willful disregard of the rights of the person offering them, exemplary damages may be given.[57] But the fact that a carrier is unable to furnish cars because of unprecedented amount of business is no ground for punitive damages.[58]

Excessive or Inadequate Damages.—In actions against a carrier for damages resulting from a failure or refusal to receive or carry freight properly tendered or furnish cars upon proper demand, the courts follow the general rule and will not disturb the verdict of the jury because of the amount found unless it is clearly and plainly excessive or inadequate.[59]

§ 383. Penalties for Wrongful Refusal.—As to statutory penalties for the wrongful refusal or failure to receive and carry goods properly and sufficiently offered for transportation, see ante, "Penalties for Violations of Regulations," §§ 181-275.

55. **Loss of sale or fulfillment of contract.**—Houston, etc., R. Co. *v.* Campbell, 91 Tex. 551, 45 S. W. 2, 43 L. R. A. 225.

56. **Knowledge of contract of sale.**—Houston, etc., R. Co. *v.* Campbell, 91 Tex. 551, 45 S. W. 2, 43 L. R. A. 225.

57. **Exemplary damages.**—Avinger *v.* South Carolina R. Co., 29 S. C. 265, 7 S. E. 493, 13 Am. St. Rep. 716, 35 Am. & Eng. R. Cas. 519.

58. **Press of business.**—Mauldin *v.* Seaboard, etc., Railway, 73 S. C. 9, 52 S. E. 677, 6 L. R. A., N. S., 547.

59. **Excessive or inadequate damages.**—In an action against a carrier for failure to furnish cars for the transportation of timber, the evidence showed that the shipper placed near the track 312,000 feet of elm logs for transportation. The logs at the place of shipment undamaged were worth $10 per 1,000 feet. On account of delay in the shipment, due to the failure of the carrier to furnish cars on demand, the logs were damaged to the extent of 80 per cent. of their value. Held, that a verdict for $2,496 was not excessive. St. Louis, etc., R. Co. *v.* Wynne Hoop, etc., Co., 81 Ark. 373, 99 S. W. 375.

CHAPTER V.

When Liability Commences.

I. In General, § 384.

II. Necessity for and Effect of Delivery and Acceptance, § 385.

III. What Constitutes Delivery and Acceptance, §§ 386-407.

A. In General, § 386.

B. Ordinary Course of Business as Common Carrier, § 387.

C. Place and Time of Delivery, § 388.

D. Notice of Deposit and Acceptance, §§ 389-392.

a. In General, § 389.

b. Actual and Constructive Notice and Acceptance, §§ 390-392.

(1) In General, § 390.

(2) Constructive Notice and Acceptance—Custom or Agreement, § 391.

(3) Goods Loaded on Cars, § 392.

E. Authority of Agent to Receive Goods, §§ 393-398.

a. In General, § 393.

b. Officers and Agents in General, § 394.

c. Authority of Third Persons—Special Agents, §§ 395-397.

(1) In General, § 395.

(2) Delivery to Lighterman to Be Carried to Ship, § 396.

(3) Delivery of Cotton to Compress Company, § 397.

d. Proof of Authority, § 398.

F. Complete Delivery for Immediate Shipment, §§ 399-406.

a. In General, § 399.

b. Exclusive Possession and Control, § 400.

c. Delivery for Immediate Shipment or Storage, §§ 401-406.

(1) In General, § 401.

(2) Something to Be Done Prior to Transportation, §§ 402-406.

(a) In General, § 402.

(b) Absence of Directions as to Shipment, § 403.

(c) Payment of Charges, § 404.

(d) Deposit Subject to Shipper's Order, § 405.

(e) Necessity for Loading on Cars, § 406.

G. Necessity for and Effect of Bill of Lading, § 407.

IV. Evidence of Delivery, §§ 408-411.

A. Presumptions and Burden of Proof, § 408.

B. Admissibility of Evidence to Show Delivery, § 409.

C. Sufficiency of Evidence of Delivery, §§ 410-411.

a. In General, § 410.

b. Bill of Lading or Receipt as Evidence, § 411.

V. Question of Law or Fact, § 412.

§ 384. In General.—Although common carriers are insurers of property entrusted to them for shipment, this insurance is not primary or special in its nature, but only incidental to the contract of carriage and neither begins earlier nor continues longer than is necessary to secure faithful and efficient execution of the contract of carriage.[1]

§ 385. Necessity for and Effect of Delivery and Acceptance.—The general rule is that the receipt of the goods lies at the foundation of the con-

1. **When liability commences—In general.**—Hutchinson *v.* United States Exp. Co., 63 W. Va. 128, 59 S. E. 949.

tract to carry and deliver, and if no goods are actually received there can be no valid contract to carry or deliver.[2] A contract with a common carrier for the transportation of property being one of bailment, it is necessary, in order to charge him for its loss, that it be delivered to and accepted by him for that purpose,[3] either actually or constructively.[4] The general rule is that a common carrier's liability, as such, begins as goods are delivered to and accepted by it for immediate transportation.[5]

2. Receipt of goods foundation of contract.—Pollard *v.* Vinton, 105 U. S. 7, 26 L. Ed. 998; Missouri Pac. R. Co. *v.* McFadden, 154 U. S. 155, 38 L. Ed. 944, 14 S. Ct. 990; St. Louis, etc., R. Co. *v.* Knight, 122 U. S. 79, 30 L. Ed. 1077, 7 S. Ct. 1132. See The Lady Franklin (U. S.), 8 Wall. 325, 19 L. Ed. 455.

"The liability of a carrier begins when the goods are delivered to him or his proper servant and authorized to receive them for carriage." Missouri Pac. R. Co. *v.* McFadden, 154 U. S. 155, 38 L. Ed. 944, 14 S. Ct. 990.

The liability of a common carrier attaches by virtue either of full delivery of the merchandise to be transported or by acceptance of such merchandise by the carrier. Corning & Co. *v.* Peoria, etc., R. Co., 144 Ill. App. 407; Sturdevant *v.* Tuttle, 22 O. St. 111; Dean *v.* King, 22 O. St. 118; Colburn *v.* Oberlin Bldg., etc., Ass'n, 35 O. St. 258.

In an action against a common carrier for failure to carry goods, the plaintiff must aver a delivery. It is not sufficient to aver that the carrier executed a bill of lading acknowledging the receipt of the goods. Page & Co. *v.* Sandusky, etc., R. Co., 4 West. L. M. 644, 2 O. Dec. Reprint 716; Spofford *v.* Pennsylvania R. Co., 11 Pa. Super. Ct. 97; Southern Exp. Co. *v.* McVeigh, 61 Va. (20 Gratt.) 264.

3. Contract one of bailment.—Stewart *v.* Gracy, 93 Tenn. 314, 320, 27 S. W. 664.

Depot agent acting as agent in purchasing cotton, for shipment under directions—Railroad seized by confederate government—Failure to ship.—Where it appeared that plaintiff had employed C., who was a depot agent for defendant carrier, to purchase cotton for him and to hold and ship it under his directions, it was held that C., in so dealing in cotton for plaintiff, acted solely as plaintiff's agent, and that where it also appeared that plaintiff had instructed C. not to ship until he had purchased a certain number of bales, and before C. had acquired the requisite number, the railroad was taken by the Confederate Government, but C.—thereafter acquired the requisite number of bales, defendant was not liable as a common carrier for failure to ship the cotton, and the fact that the railroad was seized by the Confederate Government, was at least some evidence that defendant never received the cotton at all, either as bailee or common carrier. Sumner *v.* Charlotte, etc., R. Co., 78 N. C. 289.

4. Actual or constructive delivery.—To make a railroad company liable as a common carrier or warehouseman for baggage lost, it must have been delivered to and accepted by the carrier, either actually or constructively. Williams *v.* Southern R. Co., 155 N. C. 260, 42 R. R. R. 105, 65 Am. & Eng. R. Cas., N. S., 105, 71 S. E. 346.

5. Acceptance for immediate transportation.—*United States.*—North Pennsylvania R. Co. *v.* Commercial Bank, 123 U. S. 727, 31 L. Ed. 287, 8 S. Ct. 266; Pratt *v.* Grand Trunk R. Co., 95 U. S. 43, 44, 24 L. Ed. 336; Hannibal, etc., R. Co. *v.* Swift (U. S.), 12 Wall. 262, 20 L. Ed. 423; Missouri Pac. R. Co. *v.* McFadden, 154 U. S. 155, 38 L. Ed. 944, 14 S. Ct. 990.

Alabama.—Southwestern R. Co. *v.* Webb, 48 Ala. 585.

Arkansas.—The liability of a drayage company as a common carrier began when it accepted and received goods situated in a car on a house track commonly used for unloading goods, when it took possession of the car and began actual removal of the goods. Arkadelphia Mill. Co. *v.* Smoker Merchandise Co., 100 Ark. 37, 42 R. R. R. 619, 65 Am. & Eng. R. Cas., N. S., 619, 139 S. W. 680.

Connecticut.—Merriam *v.* Hartford, etc., R. Co., 20 Conn. 354, 52 Am. Dec. 344, Trowbridge *v.* Chapin, 23 Conn. 595.

Delaware.—Truax *v.* Philadelphia, etc., R. Co. (Del.), 3 Houst. 233.

Georgia.—Wilson *v.* Atlanta, etc., R. Co., 82 Ga. 386, 9 S. E. 1076.

Illinois.—Michigan, etc., R. Co. *v.* Meyres, 21 Ill. 627; Illinois Cent. R. Co. *v.* Smyser, 38 Ill. 354, 87 Am. Dec. 301.

Iowa.—Green *v.* Milwaukee, etc., R. Co., 41 Iowa 410; Lennon *v.* Illinois Cent. R. Co., 127 Iowa 431, 16 R. R. R. 45, 39 Am. & Eng. R. Cas., N. S., 45, 103 N. W. 343.

Maine.—McQuesten *v.* Sanford, 40 Me. 117.

Massachusetts.—Pitlock *v.* Wells, etc., Co., 109 Mass. 452.

Michigan.—Wright *v.* Caldwell, 3 Mich. 51; Michigan, etc., R. Co. *v.* McDonough, 21 Mich. 165, 4 Am. Rep. 466.

Mississippi.—Anderson *v.* Mobile, etc., R. Co. (Miss.), 19 R. R. R. 382, 42 Am. & Eng. R. Cas., N. S., 382, 38 So. 661; Tate *v.* Yazoo, etc., R. Co., 78 Miss. 482, 29 So. 392, 20 Am. & Eng. R. Cas., N. S., 461, 84 Am. St. Rep. 649.

New York.—Ball *v.* New Jersey Steam-

Waiver of Delivery—Breach of Contract.—When a railway company announces through its agent that it will not make a shipment at a time previously contracted for, a tender of the articles to be shipped at the time previously agreed on is thereby waived and rendered unnecessary to fix the liability of the company for resulting damages.[6] And a parol contract by which a railroad company agrees to receive cattle on its cars for transportation on a certain day and which is violated by not having the cars as agreed on, may be made the basis of recovery against the company for all damages caused thereby; and it can not be claimed that its liability did not attach until the signing of a bill of lading for the cattle, which were delivered on a subsequent day, and after such violation of the contract by the carrier. The liability of the company was for a breach of contract, which made delivery impossible.[7]

Action for Refusal to Furnish Cars.—Where goods are placed at a station upon the line of a railroad to be transported, the refusal of the carrier to furnish cars for the carriage of the property relieves the owner from the necessity of making any further delivery or offer to deliver as a condition precedent to a right of action against the carrier on account of such refusal.[8]

Liability as for Money Had and Received.—Where a person left a sealed package containing treasury notes at the office of an express company to be carried to a point to which the company was not a common carrier although the package was not carried to and after demand made could not be found, the company was not liable as for money had and received.[9]

§§ 386-407. What Constitutes Delivery and Acceptance—§ 386. In General.—Delivery to, and acceptance by, the carrier is complete whenever the

boat Co. (N. Y.), 1 Daly 491; Grosvenor *v.* New York Cent. R. Co., 39 N. Y. 34, 5 Abb. Prac., N. S., 345; Packard *v.* Getman (N. Y.), 6 Cow. 757, 16 Am. Dec. 475; Salinger *v.* Simmons (N. Y.), 57 Barb. 513, 8 Abb. Prac., N. S., 409, 2 Lans. 325; Blanchard *v.* Isaacs (N. Y.), 3 Barb. 388.

North Carolina.—Wells *v.* Wilmington, etc., R. Co., 51 N. C. 47, 72 Am. Dec. 556; Williams *v.* Southern R. Co., 155 N. C. 260, 42 R. R. R. 105, 65 Am. & Eng. R. Cas., N. S., 105, 71 S. E. 346.

Pennsylvania.—Spofford *v.* Pennsylvania R. Co., 11 Pa. Super. Ct. 97.

South Carolina.—Park *v.* Southern Railway, 78 S. C. 302, 25 R. R. R. 573, 48 Am. & Eng. R. Cas., N. S., 573, 58 S. E. 931.

Tennessee.—Stewart *v.* Gracy, 93 Tenn. 314, 27 S. W. 664; Watson *v.* Memphis, etc., R. Co., 56 Tenn. (9 Heisk.) 255.

Texas.—Ft. Worth, etc., R. Co. *v.* Riley (Tex. Cr. App.), 1 S. W. 446; Houston, etc., R. Co. *v.* Hodde, 42 Tex. 467; Yoakum *v.* Dryden (Tex. Civ. App.), 26 S. W. 312; International, etc., R. Co. *v.* Dimmit County Pasture Co., 5 Tex. Civ. App. 186, 23 S. W. 754, distinguishing Texas, etc., R. Co. *v.* Nicholson, 61 Tex. 491, 495, and Gulf, etc., R. Co. *v.* McCorquodale, 71 Tex. 41, 9 S. W. 80, and following East Line, etc., R. Co. *v.* Hall, 64 Tex. 615, and Gulf, etc., R. Co. *v.* Trawick, 80 Tex. 270, 15 S. W. 568, 18 S. W. 948; Texas, etc., R. Co. *v.* Wheat, 2 Texas App. Civ. Cas., § 165.

There is an apparent conflict between the authorities above cited and the cases of Texas, etc., R. Co. *v.* Nicholson, 61 Tex. 491, 495, and Gulf, etc., R. Co. *v.* McCorquodale, 71 Tex. 41, 9 S. W. 80; but in those two cases the railway had contracted to receive and ship the cattle at certain dates, but refused to receive them when presented for shipment, and it was held that the railways were responsible as mere individuals for breach of their contract. International, etc., R. Co. *v.* Dimmit County Pasture Co., 5 Tex. Civ. App. 186, 188, 23 S. W. 754.

Virginia.—Southern Exp. Co. *v.* McVeigh, 61 Va. (20 Gratt.) 264.

West Virginia.—Dudley *v.* Chicago, etc., R. Co., 58 W. Va. 604, 52 S. E. 718.

Canada.—Kerr *v.* Grand Trunk R. Co., 24 U. C. C. P. 209.

6. **Waiver—Breach of contract.**—Texas, etc., R. Co. *v.* Nicholson, 61 Tex. 491. See ante, "Duty to Receive and Carry," chapter 4.

7. Texas, etc., R. Co. *v.* Nicholson, 61 Tex. 491.

8. **Refusal to furnish cars.**—Louisville, etc., R. Co. *v.* Flannagan, 113 Ind. 488, 32 Am. & Eng. R. Cas. 53, 14 N. E. 370, 3 Am. St. Rep. 674. See post, "Duty to Receive and Carry," Part II, chap. I.

9. **Liability as for money had and received.**—Pitlock *v.* Wells, etc., Co., 109 Mass. 452. See post, "Destination of Goods as Affecting Duty," § 376.

property comes into his possession with his assent.[10] In order to constitute a sufficient delivery, there must be, as a general rule, an actual change of possession from shipper to carrier.[11] It is essential that they be placed in a position to be cared for, and under the control of the carrier or his agent, with his knowledge and consent.[12]

Place, Time and Agent to Receive.—Generally speaking it is essential to the establishment of liability as a common carrier for the loss of goods to show delivery to the carrier at a customary place, during the usual business hours, and to an authorized agent of the carrier.[13]

§ 387. Ordinary Course of Business as Common Carrier.—The delivery must be to him or his agent in the capacity of a common carrier, and not to the agent to carry for his own profit,[14] or without compensation and contrary to the regulations of the carrier known at the time.[15]

§ 388. Place and Time of Delivery.—As a general rule, it may be said that a railroad company is not bound to receive freight except at stations; but it may, as a result of a custom, or as a consequence of an express contract, become obligated to receive freight at a point on its line of railway where there is no station, depot, platform, cars, or agent.[16] Goods which are ready, at a

10. **What constitutes delivery in general.**—Pratt *v.* Grand Trunk R. Co., 95 U. S. 43, 24 L. Ed. 336.

When an express company accepts in capacity of carrier.—When goods are delivered to parties to be forwarded and transported, and these parties are expressmen, and receive compensation for forwarding and transporting the goods are in their custody as carriers. Thus, the owner of certain goods about to arrive at the depot of a railroad station in Charlotte, North Carolina, wished them to be carried from thence to Richmond, Virginia, and an express company, by their agent at Charlotte, undertook to remove and deposit the goods in their warehouse as soon as possible on the arrival of the goods at the depot in Charlotte, and to carry them from Charlotte to Richmond within a reasonable time for the reward paid. The goods arrived at the depot, and the express company had notice of their arrival. It was held, that it was a delivery to the express company as a common carrier. Southern Exp. Co. *v.* McVeigh, 61 Va. (20 Gratt.) 264.

11. **Change of possession.**—Canal-Boat Montgomery *v.* Kent, 20 O. 54.

In custody of owner's warehouseman after carrier's receipt of warehouse coupon and order for delivery of goods.—The delivery of goods to a common carrier is not complete and, therefore, its liability for their accidental loss does not attach, where the goods are destroyed in the custody of the owner's warehouseman, after the carrier had contracted to ship the goods and had received the owner's warehouse coupon and an order for the delivery of the goods, but had not presented the same or issued a receipt or bill of lading for the goods. Stewart *v.* Gracy, 93 Tenn. 314, 27 S. W. 664.

12. **Under carrier's contract.**—Grosvenor *v.* New York Cent. R. Co., 39 N. Y. 34, 5 Abb. Prac., N. S., 345.

13. **Place, time, and agent to receive.**—Spofford *v.* Pennsylvania R. Co., 11 Pa. Super. Ct. 97; Southern Exp. Co. *v.* Newby, 36 Ga. 635, 91 Am. Dec. 783. See post, "Place and Time of Delivery," § 388.

Where a railroad company had a box car placed at the platform of depot, together with a wooden skid to use in loading the car, and the shipper without requesting aid from the company, attempted to drive a horse in the car, and in doing so the horse was injured, it was held that the horse at the time of the injury, had not been received in the custody of the carrier. Southern R. Co. *v.* Bivings, 3 Ga. App. 552, 60 S. E. 287.

14. **Parcel delivered to wagoner to carry for his own profit.**—If a parcel be given to a wagoner for him to carry for his own gain, and not for the profit of his master, a common carrier, the latter is not liable in case the parcel is lost. Butler *v.* Basing, 12 Eng. C. L. 287.

15. **Coat delivered to stage driver by one not a passenger—No charge and refusal to put on way-bill.**—Where a coat was delivered to the driver of a stage coach, by one not a passenger, to be delivered to another, in a different place, but nothing was paid for its transportation, and the driver refused to put it on the way-bill, saying he had no right to do so, and there was no proof that the coat ever came into the possession of the proprietor of the stage, or any of his agents, it was held that there was no delivery of the coat to such proprietor, and that he was not liable, as a common carrier, for its loss. Blanchard *v.* Isaacs (N. Y.), 3 Barb. 388.

16. **Place other than station.**—Georgia, etc., R. Co. *v.* Marchman, 121 Ga. 235, 48 S. E. 961.

place where the carrier may receive them, may be tendered for transportation to an agent authorized to receive or reject them, without regard to the place where the tender is made.[17]

Customary Place of Delivery.—Where goods designed for immediate shipment are placed in a condition to be carried, in the usual place of loading, in accordance with the custom of delivery between the parties, with the carrier's knowledge of the fact and purpose, or at the place of loading designated by the parties, there is both a delivery to and an acceptance by the carrier.[18] And in order to render a constructive delivery of goods to the carrier binding upon it, they must be left at a place where an established custom has made it the duty of the carrier to take possession of them for transportation.[19] It has been said that in the absence of a custom to the contrary the deposit of freight on the carrier's line may constitute a delivery to the carrier if immediate transportation of the freight is expected.[20] Thus where under the system contemplated by both the shipper and carrier it is expected that before delivery is consummated the shipper will either place the freight on the cars himself or have it done by the carrier at his expense after special request, delivery on the cars terminates the shipper's possession and is the inception of the possession by the carrier.[21]

As Dependent on Carrier's Consent.—The responsibility of a common carrier commences with the delivery of the goods to itself or agent at the place where it agrees to receive them, and if the agent agrees to receive them at the depot where they are at the time, its liability as a common carrier begins.[22] In determining whether freight has been delivered to the carrier, it matters not whether it was placed in the depot of the carrier, or on its platform or in its car, so long as it is so deposited with its consent. Nor is it material in this

17. Cobb, etc., Co. *v.* Illinois Cent. R. Co., 38 Iowa 601.

18. **Customary place of delivery.**—Southern Exp. Co. *v.* Newby, 36 Ga. 635, 91 Am. Dec. 783.

Usual place with carrier's knowledge.—Pittsburg, etc., R. Co. *v.* American Tobacco Co., 126 Ky. 582, 31 Ky. L. Rep. 1013, 104 S. W. 377, 25 R. R. R. 586, 48 Am. & Eng. R. Cas., N. S., 586.

Custom to deposit cotton on platform for next train—Failure to take on.—Where a railroad company erects a platform for shipping cotton, and its course of business is such that induces parties to store cotton on it under a promise to ship by the next freight train, and it passes and neglects to take on the cotton, and the cotton is destroyed by fire from a passing train, after the train which ought to have taken it on has passed, the company is liable, as a common carrier, for the loss of the cotton. Meyer *v.* Vicksburg, etc., R. Co., 41 La. Ann. 639, 6 So. 218.

19. *Iowa.*—Lennon *v.* Illinois Cent. R. Co., 127 Iowa 431, 16 R. R. R. 45, 39 Am. & Eng. R. Cas., N. S., 45, 103 N. W. 343.

Maine.—Witzler *v.* Collins, 70 Me. 290, 35 Am. Rep. 327.

New Hampshire.—Moses *v.* Boston, etc., Railroad, 24 N. H. 71, 55 Am. Dec. 222.

Pennsylvania.—Spofford *v.* Pennsylvania R. Co., 11 Pa. Super. Ct. 97.

Texas.—Martin *v.* Ft. Worth, etc., R. Co., 3 Tex. Civ. App. 556, 22 S. W. 1007; St. Louis, etc., R. Co. *v.* Martin (Tex. Civ. App.), 35 S. W. 28.

Delivery to vessel—Customary place.—There can be no constructive delivery of goods so as to bind the owners of a vessel for their carriage except at such a place as where by constant practice and usage they have received property left for transportation. Witzler *v.* Collins, 70 Me. 290, 35 Am. Rep. 327.

20. Wilson *v.* Atlanta, etc., R. Co., 82 Ga. 386, 9 S. E. 1076.

21. Wilson *v.* Atlanta, etc., R. Co., 82 Ga. 386, 9 S. E. 1076, distinguishing Central, etc., R. Co. *v.* Hines, etc., Co., 19 Ga. 203; Fleming *v.* Hammond, 19 Ga. 145.

22. **Carrier's consent.**—Southern Exp. Co. *v.* Newby, 36 Ga. 635, 91 Am. Dec. 783.

Delivery to stage company—Accepted by agent at postoffice.—Where a package was delivered to the agent of a stage coach company, at the postoffice where the stage was standing, and not at an office of the company, to be carried from Boston to Hartford, and was by the agent, when he received it, entered on the way-bill, he having previously directed the person who had the care of the package to bring it to the postoffice, and it was lost reaching Hartford, it was held that the owners of the coach was liable to the owner of the package for its value, the delivery at the postoffice being with the assent of their agent. Phillips *v.* Earle (Mass.), 8 Pick. 182.

connection whether the hands who deposit the freight are in the employ of the shipper or the carrier.[23]

Carrier's Direction—Place Agreed on.—If the carrier directs the freight to be deposited at a particular point agreeing to receive it there, a deposit of the freight at that point constitutes a good delivery to the carrier.[24] Thus if a railroad company, in the unrestrained exercise of its franchises, consents to the delivery of the freight in its cars or warehouse for immediate shipment, upon such delivery the liability of the company, as common carrier, at once attaches.[25]

Limits Established by Express Company.—Where an express company establishes limits in a city, beyond which it will not call for or deliver packages, it is not liable for refusing to call for or deliver packages at the store of one who, knowing of the limits, moved his store outside thereof, though the limits established in another direction were further from the company's office than such store.[26]

Time of Delivery.—Whether a shipper complies with a custom of carriers requiring shippers desiring a car to be forwarded on a certain date to deliver the shipment before a certain hour is immaterial, if the conditions are waived and the shipment is in fact accepted by the carrier for transportation and delivery to the consignee.[27]

§§ 389-392. Notice of Deposit and Acceptance—§ 389. In General.—The mere deposit of goods on the carrier's line,[28] even though made at a customary place for its acceptance for transportation can not constitute delivery to the carrier unless it is given actual or constructive notice of such deposit,[29]

23. Carriers consent.—Illinois Cent. R. Co. *v.* Smyser, 38 Ill. 354, 87 Am. Dec. 301.

24. Carriers direction place agree on.—Fleming *v.* Hammond, 19 Ga. 145.

25. Express contract for deliver in cars or warehouse.—Illinois Cent. R. Co. *v.* Ashmead, 58 Ill. 487.

26. Limits established by express company.—Bullard *v.* American Exp. Co., 107 Mich. 695, 65 N. W. 551.

27. Time of delivery.—Central, etc., R. Co. *v.* Butler, etc., Granite Co., 8 Ga. App. 1, 68 S. E. 775.

28. Mere deposit.—Central R., etc., Co. *v.* Hines, etc., Co., 19 Ga. 203.

Placing cotton on the wagon or car of a carrier, or near his boat or warehouse, without notice to him, is not a delivery, unless made so by custom, or by some regulation of the carrier. Houston, etc., R. Co. *v.* Hodde, 42 Tex. 467; Yoakum *v.* Dryden (Tex. Civ. App.), 26 S. W. 312.

Ginned cotton placed on platform built by railroad—Station agent requested by gin manager to send car—Failure of conductor to follow instructions—Fire.—Where plaintiff's cotton, after being ginned, was placed on a platform which had been built by a railroad for cotton for shipment, and, according to custom, the manager of the gin requested the railroad's agent at the nearest station to have a car sent for the cotton, but a train conductor failed to follow his instructions, so that no car was sent, and the cotton, while on such platform, was destroyed by fire, there existed no relation of carrier and shipper between plaintiff and the railroad company. Anderson *v.* Mobile, etc., R. Co. (Miss.), 19 R. R. R. 382, 42 Am. & Eng. R. Cas., N. S., 382, 38 So. 661.

Deposited in wheeled truck close to depot platform—Absence of station officials.—But where a railroad provided a regular and safe place at its depot for receiving baggage, and there was a safe road leading thereto, delivery of baggage to the railroad in such sense as to make it responsible for injury thereto could not be accomplished by unloading the baggage from a dray, in the absence of the station officials, unto a wheeled truck close to the edge of the platform near the track. Lennon *v.* Illinois Cent. R. Co., 127 Iowa 431, 16 R. R. R. 45, 39 Am. & Eng. R. Cas., N. S., 45, 103 N. W. 343.

29. Notice necessary. — *Alabama.* — Southwestern R. Co. *v.* Webb, 48 Ala. 585; Montgomery, etc., R. Co. *v.* Kolb, 73 Ala. 396, 49 Am. Rep. 54, 18 Am. & Eng. R. Cas. 512.

Arkansas.—St. Louis, etc., R. Co. *v.* Murphy, 60 Ark. 333, 30 S. W. 419.

Connecticut.—Merriam *v.* Hartford, etc., R. Co., 20 Conn. 354, 52 Am. Dec. 344.

Illinois.—Illinois Cent. R. Co. *v.* Smyser, 38 Ill. 354, 87 Am. Dec. 301.

Iowa.—Lennon *v.* Illinois Cent. R. Co., 127 Iowa 431, 16 R. R. R. 45, 39 Am. & Eng. R. Cas., N. S., 45, 103 N. W. 343.

Michigan. — Wright *v.* Caldwell, 3 Mich. 51.

New York.—Packard *v.* Getman (N.

and the goods accepted for shipment by one having authority.[30] So a carrier is not liable for freight deposited near its track on a platform;[31] or in a building which does not belong to the carrier and is not used for that purpose, when not accepted for shipment;[32] or for goods deposited alongside the roadway at a mere switch at which there is no station, agent, etc., although goods are shipped from that point by request.[33] Nor will a mere deposit in a carrier's warehouse by the shipper's agent, without authority and in an unusual manner when no one is in charge to receive it, bind the carrier.[34] But where goods are deposited at the customary place or place of agreement, and the agent's attention directed thereto, the notice is sufficient.[35]

Roadside Deposit of Freight.—Roadside deposits of freight, made to save the trouble of hauling to a regular depot, are, as a general rule, at the risk of

Y.), 6 Cow. 757, 16 Am. Dec. 475; Salinger *v.* Simmons (N. Y.), 57 Barb. 513, 8 Abb. Prac., N. S., 409, 2 Lans. 325; Grosvenor *v.* New York Cent. R. Co., 39 N. Y. 34, 5 Abb. Prac., N. S., 345.

North Carolina.—Wells *v.* Wilmington, etc., R. Co., 51 N. C. 47, 72 Am. Dec. 556.

Pennsylvania.—Spofford *v.* Pennsylvania R. Co., 11 Pa. Super. Ct. 97.

Texas.—Ft. Worth, etc., R. Co. *v.* Riley (Tex. Cr. App.), 1 S. W. 446; Houston, etc., R. Co. *v.* Hodde, 42 Tex. 467; Yoakum *v.* Dryden (Tex. Civ. App.), 26 S. W. 312.

Wisconsin.—Glass *v.* Goldsmith, 22 Wis. 488.

Canada.—Kerr *v.* Grand Trunk R. Co., 24 U. C. C. C. P. 209.

30. **Acceptance.**—Southern Exp. Co. *v.* McVeigh, 61 Va. (20 Gratt.) 264.

31. **Cotton deposited near track near depot on platform of third party—Fire.**—A railroad company is not liable, as a common carrier, for cotton merely placed by its owner near its track near a depot, on a platform which did not belong to the company, where it was burned by a spark from a passing locomotive. Brown *v.* Atlanta, etc., R. Co., 19 S. C. 39.

32. **Station agent also agent of owner of guano for purpose of its distribution among customers—Stored in building of another company on railroads right of way—Order to ship and requisition for car.**—In Horne-Andrews Comm. Co. *v.* Georgia R. Co., 136 Ga. 116, 40 R. R. R. 754, 63 Am. & Eng. R. Cas., N. S., 754, 70 S. E. 879, it is held that where the agent of a railroad company at a wayside station was also the agent of the owner of guano for the purpose of its distribution among customers, and as such was in possession of the property, which he had stored in a building on the railroad's right of way, but owned by another company, and which was separate from the railroad warehouse, the direction of the owner to such agent to ship the guano to it, and the making of a requisition by him on the proper official of the railroad company for a car, did not alone constitute a delivery to the carrier for transportation, so as to render it liable for the destruction by fire of the guano before the arrival of the car, and this is true, although the agent testified that, had the car arrived, it would have been placed in front of the house where the guano was, for the purpose of being loaded, and that the witness would have had it loaded at the expense of the owner.

33. **Deposit of goods alongside railroad at mere switch.**—A mere switch, at which there is neither agent, station, nor platform, but where shipments are made by loading upon cars placed on the switch by request, is not a depot, at which a deposit of goods alongside is such a delivery to the railroad as will make it liable as a common carrier. Kansas City, etc., R. Co. *v.* Lilly (Miss.), 8 So. 644.

34. **Deposit in railroad warehouse through door opened by shipper's agent—No one in charge.**—A delivery to a railroad warehouse about dark and after it was closed and locked for the night, by plaintiff's agent by opening the upper door and thereby putting the goods in, there being no one in charge, does not show such delivery as will charge the railroad company either as a common carrier or warehouseman, without affirmative proof of some act of negligence on its part with respect to the custody of the property. Spofford *v.* Pennsylvania R. Co., 11 Pa. Super. Ct. 97.

35. **Sacks of wool, properly directed, deposited in station building and pointed out to agents.**—Evidence that wool was delivered at the station of a common carrier, in sacks marked with the name and address of the owners whose place of business was in Boston, and with the initial of the agent who had purchased it; that the weights and numbers were upon all the sacks; that previous shipments had been made by the same agent at the same place to the same principal, during the same season, and that when the agent delivered the wool he piled it in one part of the building, pointed it out to the defendant's agents, and said, "That pile of wool is for Boston," is evidence of a delivery to the carrier for shipment to his principal at Boston. Nichols *v.* Smith, 115 Mass. 332.

the owners, until the goods are loaded on a freight car.[36] And an action can not be maintained against a railroad company, as a common carrier, for the loss or destruction of goods deposited on the road side, at a place where there was no regular station, and no agent, although a conductor of a freight train had promised to stop and take them.[37]

Merely Depositing Goods in Place Convenient for Carrier.—Merely placing goods in such a place or position that the common carrier can easily take possession of them, but without calling its attention to them, is not, under ordinary circumstances, a delivery to the carrier either actual or constructive.[38]

Mere Permission to Place Cattle in Yards—Escape.—A mere permission by the agent of a railroad company to an owner of cattle to place the cattle in the company's yards, where no bill of lading is given, does not render the company liable for the escape of the cattle, before they were accepted for shipment.[39]

§§ 390-392. Actual and Constructive Notice and Acceptance—§ 390. In General.—The acceptance may be either actual or constructive.[40] Unless there be a delivery according to an established custom of the carrier's business, or a special contract or agreement,[41] there must be actual notice and acceptance.[42] While it is the undoubted general rule that the delivery, to bind the carrier, must be made either to him or to some one with authority from him, or who may be rightfully presumed to have such authority, it is not to be understood that it is not subject to such conventional arrangements between the parties as they may choose to make in regard to the mode of delivery, or that it may not be varied by usage, or by a particular course of dealing between them. They may make such stipulations upon the subject as they see fit, and when such

36. **Roadside deposit.**—Wells *v.* Wilmington, etc., R. Co., 51 N. C. 47, 72 Am. Dec. 556.

37. **Promise of conductor.**—Wells *v.* Wilmington, etc., R. Co., 51 N. C. 47, 72 Am. Dec. 556.

38. **Deposit convenient for railroad.**—O'Bannon *v.* Southern Exp. Co., 51 Ala. 481.

Placing cotton on vehicle of carrier, or near its boat or warehouse—Rule, custom, or notice.—The placing of cotton on the wagon or car of a common carrier, or near its boat or warehouse, is not a delivery, unless some regulation of the carrier or custom existing between the carrier and the public makes it otherwise, or notice is given to the carrier, or its agent or other authorized employees. Houston, etc., R. Co. *v.* Hodde, 42 Tex. 467.

39. **Permission to place cattle in yards.**—Ft. Worth, etc., R. Co. *v.* Riley (Tex Cr. App.), 1 S. W. 446. See Brown *v.* Oregon, etc., R. Nav. Co. (Ore.), 128 Pac. 38.

40. **Actual or constructive acceptance.**—Southern Exp. Co. *v.* McVeigh, 61 Va. (20 Gratt.) 264.

Constructive delivery. — *Alabama.* — O'Bannon *v.* Southern Exp. Co., 51 Ala. 481; Montgomery, etc., R. Co. *v.* Kolb, 73 Ala. 396, 49 Am. Rep. 54, 18 Am. & Eng. R. Cas. 512.

Connecticut.—Merriam *v.* Hartford, etc., R. Co., 20 Conn. 354, 52 Am. Dec. 344.

District of Columbia.—Bowie *v.* Baltimore, etc., R. Co., 1 MacArthur (8 D. C.) 94.

Illinois.—Grand Tower Mfg., etc., Co. *v.* Ullman, 89 Ill. 244; Illinois Cent. R. Co. *v.* Ashmead, 58 Ill. 487, 11 Am. R. Rep. 59; Illinois Cent. R. Co. *v.* Smyser, 38 Ill. 354, 87 Am. Dec. 301.

Indiana.—Evansville, etc., R. Co. *v.* Keith, 8 Ind. App. 57, 35 N. E. 296.

Iowa.—Aiken *v.* Chicago, etc., R. Co., 68 Iowa 363, 27 N. W. 281, 25 Am. & Eng. R. Cas. 377; Frazier *v.* Kansas, etc., R. Co., 48 Iowa 571.

Louisiana.—Meyer *v.* Vicksburg, etc., R. Co., 41 La. Ann. 639, 6 So. 218.

Maine.—Witzler *v.* Collins, 70 Me. 290, 35 Am. Rep. 327.

New Hampshire.—Moses *v.* Boston, etc., Railroad, 24 N. H. 71, 55 Am. Dec. 222.

South Carolina.—Cone *v.* Southern Railway, 85 S. C. 524, 36 R. R. R. 179, 59 Am. & Eng. R. Cas., N. S., 179, 67 S. E. 779.

Texas.—Ft. Worth, etc., R. Co. *v.* Martin, 12 Tex. Civ. App. 464, 35 S. W. 21.

Virginia.—Southern Exp. Co. *v.* McVeigh, 61 Va. (20 Gratt.) 264.

41. See post, "Constructive Notice and Acceptance—Custom or Agreement," § 391.

42. **Actual notice and acceptance.**—Ball *v.* New Jersey Steamboat Co. (N. Y.), 1 Daly 491.

stipulations are made, they, and not the general law, are to govern.[43]

§ 391. Constructive Notice and Acceptance—Custom or Agreement. —It is not always essential that the shipper should give the carrier actual notice that goods have been deposited for transportation by the carrier at a certain customary place for receiving freight; the special circumstances being sometimes sufficient to constitute a valid constructive notice to the carrier.[44] Such an acceptance for transportation may be constructive, and may be implied from a proper delivery or tender of the goods to the carrier.[45] An implied agreement on the part of a common carrier to assume the responsibility of an insurer of goods deposited at a certain place, without actual notice to the carrier of the deposit, may be established by proof of the custom of the carrier to receive for transportation goods so deposited.[46] Proof of a constant and habitual practice and usage of the carrier to receive goods when they are deposited for him

43. Gulf, etc., R. Co. *v.* Pool, 10 Tex. Civ. App. 682, 31 S. W. 688.

The general rule is that there must be an actual delivery to the carrier, in order to create its common-law liability for carriage; but this does not mean, in all instances, an actual delivery. It may mean such a delivery as the parties among themselves may agree upon as sufficient, in placing the property under the control of the carrier, or the custom and habit of dealing in shipments of a particular character may establish the liability of the carrier, when in fact there has been no actual delivery. Missouri, etc., R. Co. *v.* Union Ins. Co. (Tex. Civ. App.), 39 S. W. 975, 976.

44. **Constructive notice.**—*Alabama.* — Montgomery, etc., R. Co. *v.* Kolb, 73 Ala. 396, 49 Am. Rep. 54, 18 Am. & Eng. R. Cas. 512.

Hence a railroad company is not liable for freight stolen or lost after a mere deposit of it on a platform at the company's station house, unless it is shown that the company or its agents had notice of such deposit and accepted the freight, for transportation as a common carrier. Southwestern R. Co. *v.* Webb, 48 Ala. 585.

Arkansas.—St. Louis, etc., R. Co. *v.* Fire Ass'n, 55 Ark. 163, 18 S. W. 43.

Connecticut.—Merriam *v.* Hartford, etc., R. Co., 20 Conn. 354, 52 Am. Dec. 344.

District of Columbia.—Bowie *v.* Baltimore, etc., R. Co., 1 MacArthur (8 D. C.) 94.

Indiana.—Evansville, etc., R. Co. *v.* Keith, 8 Ind. App. 57, 35 N. E. 296.

Iowa.—Green *v.* Milwaukee, etc., R. Co., 38 Iowa 100.

Louisiana.—Meyer *v.* Vicksburg, etc., R. Co., 41 La. Ann. 639, 6 So. 218.

Maine.—Witzler *v.* Collins, 70 Me. 290, 35 Am. Rep. 327.

New Hampshire.—Moses *v.* Boston, etc., Railroad, 24 N. H. 71, 55 Am. Dec. 222.

North Carolina.—Williams *v.* Southern R. Co., 155 N. C. 260, 42 R. R. R. 105, 65 Am. & Eng. R. Cas., N. S., 105, 71 S. E. 346.

Texas.—Martin *v.* Ft. Worth, etc., R. Co., 3 Tex. Civ. App. 556, 22 S. W. 1007; Ft. Worth, etc., R. Co. *v.* Martin, 12 Tex. Civ. App. 464, 35 S. W. 21.

Wisconsin. — Gleason *v.* Goodrich Transp. Co., 32 Wis. 85, 14 Am. Rep. 716.

45. **Implied from proper delivery.**—*Alabama.*—Montgomery, etc., R. Co. *v.* Kolb, 73 Ala. 396, 49 Am. Rep. 54, 18 Am. & Eng. R. Cas. 512.

Connecticut.—Merriam *v.* Hartford, etc., R. Co., 20 Conn. 354, 52 Am. Dec. 344.

Illinois.—Grand Tower Mfg., etc., Co. *v.* Ullman, 89 Ill. 244.

Indiana.—Evansville, etc., R. Co. *v.* Keith, 8 Ind. App. 57, 35 N. E. 296.

Louisiana.—Meyer *v.* Vicksburg, etc., R. Co., 41 La. Ann. 639, 6 So. 218.

Maine.—Witzler *v.* Collins, 70 Me. 290, 35 Am. Rep. 327.

Massachusetts.—Nichols *v.* Smith, 115 Mass. 332.

New Hampshire.—Moses *v.* Boston, etc., Railroad, 24 N. H. 71, 55 Am. Dec. 222.

Texas.—East Line, etc., R. Co. *v.* Hall, 64 Tex. 615.

46. **Custom and usage.** — *Alabama.* — Montgomery, etc., R. Co. *v.* Kolk, 73 A a. 396, 49 Am. Rep. 54, 18 Am. & Eng. R. Cas. 512.

Connecticut.—Merriam *v.* Hartford, etc., R. Co., 20 Conn. 354, 52 Am. Dec. 344.

Iowa.—Green *v.* Milwaukee, etc., R. Co., 38 Iowa 100.

Kentucky.—Pittsburg, etc., R. Co. *v.* American Tobacco Co., 126 Ky. 582, 31 Ky. L. Rep. 1013, 104 S. W. 377, 25 R. R. R. 586, 48 Am. & Eng. R. Cas., N. S., 586.

Louisiana.—Meyer *v.* Vicksburg, etc., R. Co., 41 La. Ann. 639, 6 So. 218.

New Hampshire.—Moses *v.* Boston, etc., Railroad, 24 N. H. 71, 55 Am. Dec. 222.

Texas.—Martin *v.* Ft. Worth, etc., R. Co., 3 Tex. Civ. App. 556, 22 S. W. 1067; Ft. Worth, etc., R. Co. *v.* Martin, 12 Tex. Civ. App. 464, 35 S. W. 21.

Wisconsin. — Gleason *v.* Goodrich Transp. Co., 32 Wis. 85, 14 Am. Rep. 716.

in a particular place, without special notice of such deposit, is sufficient to show a public offer by the carrier to receive goods in that mode, and to constitute an agreement between the parties by which the goods when so deposited shall be considered as delivered to him.[47] Such a practice and usage are tantamount to an open declaration, a public advertisement by the carrier, that such delivery should, of itself, be deemed an acceptance by him; and to permit him to set up, against those who had been thereby induced to omit it, the want of the formality of an express notice, which had been thus waived, would be sanctioning injustice and fraud.[48] Such a customary delivery is sufficient although no notice is given or receipt taken, and the custom itself contrary to the established regulations of the carrier.[49] But where it is not shown that the goods are by virtue of the custom or course of dealing, to be thereafter regarded as in the actual possession of the carrier, there is no sufficient delivery.[50]

Special Agreement.—If it is agreed that the deposit may be at a particular place without express notice to the carrier, such deposit amounts to notice, and is a delivery.[51] And it is the same where the goods are deposited at a desig-

47. **Constant practice.**—Yoakum *v.* Dryden (Tex. Civ. App.), 26 S. W. 312; Gulf, etc., R. Co. *v.* Pool, 10 Tex. Civ. App. 682, 31 S. W. 688; Houston, etc., R. Co. *v.* Hodde, 42 Tex. 467.

Custom to deposit cotton on depot platform before issue of bill of lading.—Plaintiff, having a verbal agreement with a railroad company for the shipment of cotton, delivered it for shipment by placing it upon its depot platform, within the knowledge of the company's agent, as was the custom of delivery at such depot; and, before a bill of lading was given, the cotton was destroyed by a fire, caused by matches being ignited on the platform by small boys allowed to play there. It was held that the company was liable as common carriers for the loss. Ft. Worth, etc., R. Co. *v.* Martin, 12 Tex. Civ. App. 464, 33 S. W. 21.

48. As where, for instance, the delivery was upon a private wharf or dock, used exclusively by the carrier, and upon which it had been its custom and constant usage to receive goods left there for transportation by it, such a deposit, in the usual and accustomed manner, would be constructive notice, and would be regarded as a sufficient delivery, though the goods were not left in charge of any of its servants. Gulf, etc., R. Co. *v.* Pool, 10 Tex. Civ. App. 682, 31 S. W. 688.

A railway company is bound by a custom acquiesced in by it under which timber is piled up on its right of way for shipment. If it is destroyed by fire originating from one of the company's trains, and without the contributory negligence of the owner of the timber, the railway company is liable in damages. Gulf, etc., R. Co. *v.* McLean, 74 Tex. 646, 12 S. W. 843.

49. **Cotton deposited in street alongside of depot platform—Custom adopted by depot agent—No receipt.**—A deposit of cotton in a street alongside of the platform of a railroad depot, or in the railroad cotton-yard, for shipment, in pursuance of a custom or usage adopted or sanctioned by the depot agent may amount to a delivery to the railroad company, although no receipt is given by the agent to the shipper, and such usage or custom is contrary to the established regulations of the company known to the shipper, and no notice thereof is traced to the superintendent or managing agent of the company. Montgomery, etc., R. Co. *v.* Kolb, 73 Ala. 396, 49 Am. Rep. 54, 18 Am. & Eng. R. Cas. 512.

50. **Extent of custom—Control of goods.**—In an action for cotton alleged to have been delivered to the defendant as a common carrier and destroyed by fire, evidence tending to show that the course of dealing and custom was to place goods to be shipped on the platform where the cotton was destroyed, and that it was the expectation and intention of the owner and also of the railway company that they were placed there for shipment, and would ultimately be shipped when instructions were given or when the party was ready for shipment, but not showing that such goods were, by virtue of the custom or course of dealing, to be thereafter regarded as in the actual possession of the railway, was insufficient to authorize submission to the jury of the question of delivery by reason of such custom. Missouri, etc., R. Co. *v.* Beard, 34 Tex. Civ. App. 188, 78 S. W. 253.

51. **Delivery according to contract.**—Pratt *v.* Grand Trunk R. Co., 95 U. S. 43, 24 L. Ed. 336; Yoakum *v.* Dryden (Tex. Civ. App.), 26 S. W. 312; Gulf, etc., R. Co. *v.* Pool, 10 Tex. Civ. App. 682, 683, 31 S. W. 688.

When goods designed for immediate shipment are placed in a condition to be carried, at the place of loading designated by the parties, there is both a delivery to and an acceptance by the carrier. Pittsburg, etc., R. Co. *v.* American Tobacco Co., 126 Ky. 582, 31 Ky. L. Rep. 1013, 104 S. W. 377, 25 R. R. R. 586, 48 Am. & Eng. R. Cas., N. S., 586.

nated place in accordance with a conventional arrangement in respect to delivery.[52] And it has been held that the delivery of inanimate property at the usual place for receiving freight for shipment, under a prior agreement for its carriage, is sufficient.[53] It is not necessary that the carrier should have actual notice of the delivery of cattle in the pens if there was a prior agreement that the shipper should deliver the cattle by putting them in the pens at the time they were put there.[54]

§ 392. Goods Loaded on Cars.—In the case of a chartered car, as in other cases of carriage of freight, the responsibility of the carrier begins with the delivery to it of the goods.[55] Where the carrier is notified of the fact that a car placed by it on a side track to receive goods for transportation is loaded and ready for shipment, its liability as a carrier will begin,[56] especially where it has adopted a custom of so receiving them.[57] But the mere loading goods on a car standing on a side track does not constitute a delivery to the railroad company, where the station agent, on being notified thereof, declines to ship the goods, and there is no custom or regulation of the railroad company making such loading a delivery.[58] Nor is the loading of a car set out for such use at a siding where the company has no station house or agent, such a delivery to the carrier as will impose liability on it for the loss of the cotton by fire at the siding, several hours before the arrival of the train, which in the regular course of business would have transported it to its destination.[59] When a loaded car

52. **Constitutional arrangement.**—Stewart *v.* Gracy, 93 Tenn. 314, 320, 27 S. W. 664.

53. **Delivery of inanimate property on the platform** of a railroad company, which is the usual place for receiving freight for shipment, and under an agreement previously made for the carriage of the same, is a sufficient delivery to charge the railroad company with responsibility as a common carrier. Bowie *v.* Baltimore, etc., R. Co., 1 MacArthur (8 D. C.) 94.

54. **Putting cattle in pens.**—Ft. Worth, etc., R. Co. *v.* Waggoner Nat. Bank, 36 Tex. Civ. App. 293, 81 S. W. 1050, affirmed in 98 Tex. 616, no op.

55. **Where car is chartered.**—Central R., etc., Co. *v.* Anderson, 58 Ga. 393.

56. **Goods loaded on car.**—Yoakum *v.* Dryden (Tex. Civ. App.), 26 S. W. 312; Houston, etc., R. Co. *v.* Hodde, 42 Tex. 467.

Cars left on side track to be loaded by shipper—Conductor's promise to remove next morning.—Defendant railroad company, according to its custom and at plaintiff's request, left two cars on its side tracks, agreeing to remove them next day, if loaded. The cars were loaded and closed, and notice thereof given to a conductor of defendant's freight train on the evening of the day they were loaded, and he promised to move them the next morning, but before doing so, the cars and contents were destroyed by fire. It was held that there had been a complete delivery of the freight contained in the cars to defendant, rendering it liable for the loss, though no bill of lading had been executed. Pine Bluff, etc., R. Co. *v.* McKenzie, 75 Ark. 100, 16 R. R. R. 50, 39 Am. & Eng. R. Cas., N. S., 50, 86 S. W. 834.

Car left on side track loaded—Carrier notified—Custom to remove before issue of bill of lading.—Where the custom of a railroad company was, when requested, to place an empty car upon its side track at a flag station to be loaded with cotton, and, when loaded, to remove the car, and subsequently issue a receipt and bill of lading, the railway company is liable for the loss of cotton so loaded, if notice has been given by the shipper of its destination, and that it was ready for removal, and nothing remained to be done by him before shipment, although no receipt or bill of lading had been given for the property, and the name of the consignees had not been furnished to the carrier. St. Louis, etc., R. Co. *v.* Murphy, 60 Ark. 333, 30 S. W. 419.

57. **Effect of custom.**—Where a railway company, engaged in switching cars over its switch tracks to and from the transfer tracks of other lines of road, for fixed system of charges, had adopted the custom of receiving loaded cars on its switching tracks, and undertaking to deliver them to the transfer tracks at other points, there was a sufficient delivery to it of certain cars where the shipper had loaded and sealed the cars and notified the carrier's agent of the fact, and directed him to move the cars out, which the agent agreed to do. Kansas, etc., R. Co. *v.* Rosebrook-Josey Grain Co., 52 Tex. Civ. App. 156, 114 S. W. 436.

58. **Loading car on side track—Refusal of station agent to ship—Custom.**—Yoakum *v.* Dryden (Tex. Civ. App.), 26 S. W. 312; Houston, etc., R. Co. *v.* Hodde, 42 Tex. 467.

59. **Car, left on siding at request, loaded with cotton.**—The plaintiffs operated a cotton gin at a town where defendant

is on a switch provided for the shipper's convenience, who has not presented a bill of lading to be signed, though ample time has elapsed, there is no sufficient delivery and acceptance.[60] But where a railroad company constructs side tracks running to various warehouses, for the purpose of running out cars to such warehouses, to be loaded by the shipper, the freight is delivered to the carrier by the shipper the moment it is loaded on such cars, although no bill of lading has been signed.[61]

Special Contract.—A shipper and carrier may contract, in relation to the use of a side track, that delivery of cars loaded by the shipper on such side track to the carrier shall be understood to have taken place whenever the carrier removes the car from the track and places it in its freight train for shipment, though such agreement would not affect the shipper's right to insist upon the carrier's promptly accepting goods tendered to it for transportation, or limit the carrier's liability for its own negligence.[62]

§§ 393-398. Authority of Agent to Receive Goods—§ 393. In General.—The delivery of freight to the carrier for immediate transportation may be made through an agent of the carrier having real or apparent authority to accept it for shipment; and such acceptance will render the carrier liable.[63]

railroad company had no station or agent. Cotton was shipped by plaintiffs notifying the conductor of a local freight train to leave a car on the siding. They loaded the car and flagged the train on which they desired to send it, the conductor of which then gave them a bill of lading. Pursuant to such plan they loaded a car with cotton in the evening after the only local freight train for the day had passed, and there would be no other until the evening of the next day. During the night the cotton was destroyed by fire. It was held that this did not constitute a delivery to and acceptance by the railroad company, so as to make them liable for the value of the cotton. Tate *v.* Yazoo, etc., R. Co., 78 Miss. 842, 29 So. 392, 20 Am. & Eng. R. Cas., N. S., 461, 84 Am. St. Rep. 649.

60. Loaded car on siding—Failure of shipper to make out bill of lading.—But where though a car was loaded and standing at the shipper's warehouse on a siding constructed for its convenience, the shipper had not made out a bill of lading and presented it to the carrier's agent to be signed, though ample time had elapsed after the car was loaded for the shipper to do so, there was no constructive delivery of the car to the carrier, so as to make it liable for the goods on its destruction by fire. American Lead Pencil Co. *v.* Nashville, etc., Railway, 124 Tenn. 57, 40 R. R. R. 202, 63 Am. & Eng. R. Cas., N. S., 202, 134 S. W. 613.

61. Side track to warehouses constructed by carrier for its convenience.—Illinois Cent. R. Co. *v.* Smyser, 38 Ill. 354, 87 Am. Dec. 301.

62. Special contract.—Bainbridge Grocery Co. *v.* Atlantic Coast Line R. Co., 8 Ga. App. 677, 70 S. E. 154.

63. Delivery to agent.—*United States.*—Strouss *v.* Wabash, etc., R. Co., 17 Fed. 209.

Alabama.—Hosea *v.* McCrory, 12 Ala. 349; Montgomery, etc., R. Co. *v.* Kolb, 73 Ala. 396, 49 Am. Rep. 54, 18 Am. & Eng. R. Cas. 512.

Dakota.—Waldron *v.* Chicago, etc., R. Co., 1 Dak. 351, 46 N. W. 456.

Delaware.—Truax *v.* Philadelphia, etc., R. Co. (Del.), 3 Houst. 233.

Indiana.—Lake Shore, etc., R. Co. *v.* Foster, 104 Ind. 293, 4 N. E. 20, 54 Am. Rep. 319.

Iowa.—Cobb, etc., Co. *v.* Illinois Cent. R. Co., 38 Iowa 601.

Kentucky.—Seasongood *v.* Tennessee, etc., Transp. Co., 21 Ky. L. Rep. 1142, 54 S. W. 193, 49 L. R. A. 270.

Louisiana.—Fisher *v.* Geddes, 15 La. Ann. 14.

Maine.—Lord *v.* Maine Cent. R. Co., 105 Me. 255, 33 R. R. R. 130, 56 Am. & Eng. R. Cas., N. S., 130, 74 Atl. 117.

Massachusetts.—Jordan *v.* Fall River R. Co. (Mass.), 5 Cush. 69, 51 Am. Dec. 44; Nichols *v.* Smith, 115 Mass. 332.

Michigan.—Wolf *v.* Grand Rapids, etc., Railway, 149 Mich. 75, 27 R. R. R. 79, 50 Am. & Eng. R. Cas., N. S., 79, 112 N. W. 732.

Missouri.—Chouteau *v.* Steamboat St. Anthony, 11 Mo. 226; Minter *v.* Pacific Railroad, 41 Mo. 503, 97 Am. Dec. 288; Pruitt *v.* Hannibal, etc., R. Co., 62 Mo. 527.

New Hampshire.—Mayall *v.* Boston, etc., Railroad, 19 N. H. 122, 49 Am. Dec. 149; Bean *v.* Sturtevant, 8 N. H. 146, 28 Am. Dec. 389.

New York.—Ball *v.* New Jersey Steamboat Co. (N. Y.), 1 Daly Prac. 491; Blanchard *v.* Isaacs (N. Y.), 3 Barb. 388; Grosvenor *v.* New York Cent. R. Co., 39 N. Y. 34, 5 Abb. Prac., N. S., 345; Rog-

§ 394. Officers and Agents in General.—A common carrier corporation is prima facie liable for all contracts for carrying made by its general agents, within the corporation's powers, and in an action for loss the onus rests upon it to show that a private contract was made with such agent, or that the credit was given to him exclusively; and it is not incumbent upon the shipper to positively prove the corporation's consent when its charter extends to the carrying of such commodities.[64]

Station agents are to be presumed to have authority to accept freight for transportation, and any limitations on their power to do so the public can not take notice of, unless they are conveyed to the public in such a manner as to authorize the inference that shippers are apprised of them.[65] A depot agent, who receives and forwards freight, in the absence of special instructions made known to the public, can bind the railroad company to receive and forward freight.[66]

Person in Apparent Charge—Custom.—A delivery of freight for carriage, to a person in apparent authority and apparently having power to receive and receipt for it, is a good delivery. Thus, where one is placed in the situation of master of a boat, a shipper may deliver freight to him for transportation.[67] And the same rules apply in the case of delivery to the captain of a steamboat in the business of carrying freight.[68] Where a shipper left goods at a carrier's

ers *v.* Long Island R. Co. (N. Y.), 38 How. Prac. 289; Rogers *v.* Wheeler, 52 N. Y. 262; Witbeck *v.* Schuyler (N. Y.), 44 Barb. 469, 31 How. Prac. 97.

North Carolina.—Williams *v.* Southern R. Co., 155 N. C. 260, 42 R. R. R. 105, 65 Am. & Eng. R. Cas., N. S., 105, 71 S. E. 346; Harrell *v.* Wilmington, etc., R. Co., 106 N. C. 258, 11 S. E. 286.

South Carolina.—Battle *v.* Columbia, etc., Railroad, 70 S. Car. 329, 14 R. R. R. 425, 37 Am. & Eng. R. Cas., N. S., 425, 49 S. E. 489; McClure *v.* Richardson (S. C.), Rice 215, 33 Am. Dec. 105.

Tennessee.—Watson *v.* Memphis, etc., R. Co., 56 Tenn. (9 Heisk.), 255, 19 Am. R. Rep. 256.

Texas.—International, etc., R. Co. *v.* Folliard, 66 Tex. 603, 1 S. W. 624; Pacific Exp. Co. *v.* Black, 8 Tex. Civ. App. 363, 27 S. W. 830; Texas, etc., R. Co. *v.* Morrison's Faust Co., 20 Tex. Civ. App. 144, 48 S. W. 1103.

Vermont.—Landon *v.* Proctor, 39 Vt. 78; Ouimit *v.* Henshaw, 35 Vt. 605, 84 Am. Dec. 646; Farmers', etc., Bank *v.* Champlain Transp. Co., 23 Vt. 186, 56 Am. Dec. 68.

West Virginia.—Quarrier *v.* Baltimore, etc., R. Co., 20 W. Va. 424.

Wisconsin. — Gleason *v.* Goodrich Transp. Co., 32 Wis. 85, 14 Am. Rep. 716.

England.—Burrill *v.* North, 61 Eng. C. L. 679.

Where a carrier places one in a depot, and holds him out to the public as qualified to receive shipments, a delivery to and an acceptance by him is a delivery to the carrier. Milne *v.* Chicago, etc., R. Co. (Mo. App.), 135 S. W. 85.

64. **Officers and agents in general.**—Farmers', etc., Bank *v.* Champlain Transp. Co., 23 Vt. 186, 56 Am. Dec. 68.

65. **Station agents.**—Pruitt *v.* Hannibal, etc., R. Co., 62 Mo. 527.

66. **Depot agent—Special instruction.**—Watson *v.* Memphis, etc., R. Co., 56 Tenn. (9 Heisk.) 255, 19 Am. R. Rep. 256.

67. **Master of boat—Occasionally carrying cotton for neighbors.**—Defendant was the owner of a boat, in which he was accustomed to carry his own cotton to Charleston, and occasionally, when he had not a load of his own, to take for his neighbors, they paying freight for the same. H. was the master of the boat, and the general habit was for those who wished to send their cotton by defendant's boat, to apply to defendant himself. On this occasion, the master of the boat had been told to take the cotton of certain other parties, which he had done, when plaintiff applied to H., in the absence of defendant, to take on board ten bales of his cotton, asking him if it was necessary to apply to the defendant himself, to which H. replied, he thought not and received the cotton. It was held that defendant was bound by such act of H., as being within the general scope of the authority conferred upon him by placing him in the situation of master of the boat, and that the defendant was consequently chargeable as a common carrier, for any loss of, or damage to, plaintiff's cotton. McClure *v.* Richardson (S. C.), Rice 215, 33 Am. Dec. 105.

68. **Captain of steamboat—Trunk—Proper agent at place.**—The defendants being the owners of a steamboat, and their regular business being the transportation of goods and merchandise thereon, the plaintiff delivered to B., the captain of such steamboat, while in charge thereof, a trunk containing clothing, for transportation from A. to N. Y. It was held that plaintiff had the right to conclude that B. was the proper person for him to treat with, in the absence

freight depot delivering it to a freight handler in apparent charge who then performed and who was accustomed to performing the duties of the receiving clerk with reference to freight delivered, there was a sufficient delivery.[69] But where there is delivery, on board a vessel, to one apparently no more than a common laborer, without making proper inquiry, the delivery is insufficient.[70] And the same rule applies to the delivery and receipt of goods to deck hands on a boat, unless such persons are authorized to receive freight generally or unless there exists a special contract or usage.[71] And the mere fact that the reception of the freight by the deck hands is such that the officers, whose duty it is to receive goods for transportation, must, if they exercise reasonably attention and care and diligence, know that the freight is on board, and receive it, can make no difference.[72]

Authority Arising from Frequent Exercise of Power.—The frequent exercise of a power, of which his principal may have been presumed to have notice, may be regarded by persons dealing with the principal as sufficient evidence of the authority of such agent, and this applies to employees of a railroad company receiving packages for an express company.[73] If in an action against a common carrier for the loss of a parcel, the defendant pleaded that it was not delivered to him to be carried, it is sufficient for the plaintiff to show that it was delivered to a person and at a house where parcels were in the habit of being left for such carrier; and it is immaterial whether such person was paid any money or not.[74]

Delivery on Wharf to Mate of Vessel.—Where goods are to be carried coast-wise, and the usage of the wharf is to deliver them on the wharf to the

of any information to the contrary; and that the defendants were liable as common carriers for the loss of the trunk and contents, although it was proved that they kept an agent at A., whose business it was to make contracts for the carriage of freight. Witbeck *v.* Schuyler (N. Y.), 44 Barb. 469, 31 How. Prac. 97.

69. Freight handler—Failure to carry.—In Lord *v.* Maine Cent. R. Co., 105 Me. 255, 33 R. R. R. 130, 56 Am. & Eng. R. Cas., N. S., 130, 74 Atl. 117, it appeared that a shipper left goods for transportation at the freight depot of defendant common carrier, delivering the same to a freight handler who was apparently in charge and who was accustomed to receive freight during the absence of the receiving clerk, and the goods were properly packed and tagged with the name of the consignee and the place of destination, and the shipper was not requested to prepay the freight, and he left the depot supposing nothing further would be required preliminary to the transportation of the goods, and they were not shipped. It was held that such circumstances sufficiently showed that the common carrier accepted the goods for transportation when received by the freight handler, and that there was a breach of duty on the part of the common carrier because of failure to transport the goods, and that therefore it was liable in damages to the shipper.

70. Goods deposited by shipper's porter at place on steamboat indicated by common laborer—Authority—Failure of porter to inquire.—But where, in an action against the owner of a steamboat, as a common carrier, it was proved that it was the duty of the clerk of such steamboat to receive freight for transportation, and property, having been taken on board such boat when lying at the wharf by a porter, was left at a place pointed out by a person on board, whose appearance and employment indicated that he was a common laborer, and no inquiry was made by such porter, either as to the authority of such person to receive property for carriage, or whether there was or was not any other person on board who had such authority, it was held that there was not sufficient evidence of delivery to render the owner of the boat liable for the loss of such property. Trowbridge *v.* Chapin, 23 Conn. 595.

71. Delivered to steamboat deck hands—Authority—Burden of proof.—Ford *v.* Mitchell, 21 Ind. 54.

72. Care and precaution of deck hand immaterial.—Ford *v.* Mitchell, 21 Ind. 54.

73. Frequent exercise of authority—Delivery to express company through railroad employee.—Seasongood *v.* Tennessee, etc., Transp. Co., 21 Ky. L. Rep. 1142, 54 S. W. 193, 49 L. R. A. 270; Pacific Exp. Co. *v.* Black, 8 Tex. Civ. App. 363, 27 S. W. 830, citing Hull *v.* East Line, etc., R. Co., 66 Tex. 619, 2 S. W. 831; Prince *v.* International, etc., R. Co., 64 Tex 144; Friedlander & Co. *v.* Cornell, 45 Tex. 585.

74. Delivery of parcel at house.—Burrill *v.* North, 61 Eng. C. L. 679.

mate of the ship by which they are to be carried, if they are delivered to the mate, the wharfinger's responsibility is at an end, and he is not liable, though the goods are lost from the wharf before they are shipped.[75]

Delivery of Cash Letter to Steamboat Clerk.—The delivery of a cash letter to the clerk of a steamboat is a delivery to the master of the vessel; and it is not necessary to show special authority in the clerk to receive such letters, when a general usage of boats in the trade is to receive them.[76]

Delivery to Clerk of Express Agent, Outside of His Office.—But it has been held that a delivery of a package of money to a clerk of an express agent outside of his office is not a delivery to the company, although the former agents of the company were accustomed to receive such packages from the plaintiff outside of their offices, and such clerk was accustomed to receive such packages in the office of the agent and receipt for them there.[77]

Authority to Receive Particular Kinds of Property.—Where by usage there is a person appointed to receive and take charge of a particular kind of property, the delivery must be to him and not to one engaged in the discharge of other duties.[78]

Delivery to a stranger apparently in charge of an express wagon, though the name of the carrier be on his cap shield, may be of such a nature as not to bind the carrier.[79]

Wagon Sent upon Carrier's Private Business.—A common carrier by wagon may send his wagon and team upon his own business, under the care of a person who never has contracted for him, and is not authorized to contract for him, without being liable for goods entrusted to such driver.[80]

§§ 395-397. Authority of Third Persons—Special Agents—§ 395. In General.—If the property is deposited with a third person, who is authorized by the carrier to execute a bill of lading in the name of the carrier, then such mode of delivery is as complete as if the property had been actually deposited with the carrier.[81]

§ 396. Delivery to Lighterman to Be Carried to Ship.—In ports where it is necessary for a vessel drawing much water to lie outside of the bar and have her cargo brought to her by lighters, and the usage is for the lighterman

75. **Delivery on wharf to mate.**—Cobban *v.* Downe (Eng. K. B.), 5 Esp. N P. 40.

76. **Delivery of cash to clerk.**—Hosea *v.* McCrory, 12 Ala. 349.

77. **Delivery to clerk outside office.**—Cronkite *v.* Wells, 32 N. Y. 247.

78. **To receive particular property.**—Ball *v.* New Jersey Steamboat Co. (N. Y.), 1 Daly 491.

79. **Delivery to stranger.**—In Abrams *v.* Platt, 23 Misc. 637, 52 N. Y. S. 153, an action where the issue was whether the plaintiff had delivered certain goods to the defendant, an express company, it appeared that he was a regular customer, furnished with a placard which he exposed when he wished an express wagon to call and also with book of blank receipts. After the plaintiff had exhibited his placard on a certain day, a stranger, who had the name of the company inscribed on a shield on his cap, came in the store, while there was, on the other side of the street, "a sort of yellow wagon" on which the company's name appeared, signed a receipt and took away the goods. It did not appear that he came from or returned to the wagon, nor was it shown who owned the wagon. The company repudiated the whole transaction, including the name of the alleged agent as signed in the book. It was held that there was no delivery to the carrier made out.

80. **Driver sent upon carrier's own business—Authority of driver.**—Jenkins *v.* Picket, 17 Tenn. (9 Yerg.) 480.

81. **Delivery to third person.**—Stewart *v.* Gracy, 93 Tenn. 314, 27 S. W. 664.

Delivery to servant or agent accustomed to accept freight—Private instruction.—A delivery to a servant or duly authorized agent of a common carrier, who is in the habit of receiving packages, for transportation is a sufficient delivery to the carrier; and the acts of the agent in this connection, within the usual scope of his employment will bind the carrier, regardless of any private instructions, unless the party delivering the package knew of the instructions. Minter *v.* Pacific Railroad, 41 Mo. 503, 97 Am. Dec. 288.

to be engaged and paid by the captain of the vessel, to give his receipt to the factor for the cotton, and to take a receipt from the captain when he delivers it on board of the vessel, delivery of goods to the lighterman is a delivery to the master, and the transportation by the lighter to the vessel the commencement of the voyage, in execution of the contract by which the master engages to carry.[82]

§ 397. Delivery of Cotton to Compress Company.—When cotton is delivered to a compress company for compression, before shipment, such delivery may or may not constitute a delivery to the carrier. Where the compress company acts as agent for the carrier, delivery to the former is a delivery to the latter,[83] but where the compress company acts as agent of the shipper, delivery to it is not a delivery to take carrier.[84]

82. Delivery to lighterman to be carried to ship.—Bulkley *v.* Naumkeag Steam Cotton Co. (U. S.), 24 How. 386, 16 L. Ed. 599.

Where a lighterman, thus employed, was conveying bales of cotton to a vessel lying outside of the bar, but before they were put on board, an explosion of the boiler threw the bales into the water, by which the cotton was damaged; the vessel was held responsible for the lost upon being libelled in a court of admiralty, the master having included these bales in the bills of lading which he signed. Bulkley *v.* Naumkeag Steam Cotton Co. (U. S.), 24 How. 386, 16 L. Ed. 599.

83. Where compress company is agent of carrier.—Arthur *v.* Texas, etc., R. Co., 204 U. S. 505, 51 L. Ed. 590, 27 S. Ct. 338, 23 R. R. R. 583, 46 Am. & Eng. R. Cas., N. S., 583.

Where all cotton received by a carrier for transportation is delivered to a compress company, which compresses it for the railroad, at the expense of the latter, and it gives its bills of lading on the faith of the receipts of the compress company, a delivery to the compress company is a delivery to the carrier, and the compress company is its agent for whose negligence the carrier is liable. Arthur *v.* Texas, etc., R. Co., 204 U. S. 505, 51 L. Ed. 590, 27 S. Ct. 338, 23 R. R. R. 583, 46 Am. & Eng. R. Cas., N. S., 583.

Where a rule of a state railroad commission requires a carrier to sign a bill of lading for cotton when receipts of a compress company are presented to it, the rule applies to a case when the cotton is tendered to the company although at the time it is upon the compress company's platform, and if the carrier does not regard the presentation of these receipts as in fact a tender, or a valid tender, it may refuse to sign the bill of lading, and where it issues a bill of lading it acknowledges the tender. Arthur *v.* Texas, etc., R. Co., 204 U. S. 505, 520, 51 L. Ed. 590, 27 S. Ct. 338, 23 R. R. R. 583, 46 Am. & Eng. R. Cas., N. S., 583.

Plaintiff delivered cotton to a compress company, which was defendant's agent for shipment when compressed, and after the cotton had been checked by the compress company, plaintiff presented the bills of lading to defendant's agent, but he refused to sign them because the insurance carried by the compress company to cover cotton on its platform for shipment, pursuant to an agreement between it and the railroad company, was not sufficient to cover the cotton then on hand, and plaintiff's cotton was destroyed before the bills of lading were signed. Held, that there was a delivery of the cotton to defendant for transportation before the fire. Texas Mid. Railroad *v.* Edwards & Co., 56 Tex. Civ. App. 643, 121 S. W. 570.

84. Compress acting as shipper's agent.—Missouri Pac. R. Co. *v.* McFadden, 154 U. S. 155, 38 L. Ed. 944, 14 S. Ct. 990; St. Louis, etc., R. Co. *v.* Knight, 122 U. S. 79, 30 L. Ed. 1077, 7 S. Ct. 1132.

Where a carrier issued a bill of lading for cotton which was in the hands of a compress company, who were the agents of the shipper, for the purpose of being compressed before shipment, and the cotton was destroyed by fire while in the possession of the compress company, it was held that the carrier was not liable to the assignee of the bill of lading although such assignee did not have notice of a custom or course of dealing between the carrier and the shipper by which it was understood by both parties that the cotton was not to be delivered at the time the bill of lading was issued but was to remain in the hands of the compress company as the agent of the shipper to be compressed. Missouri Pac. R. Co. *v.* McFadden, 154 U. S. 155, 38 L. Ed. 944, 14 S. Ct. 990.

A bought cotton and delivered it to a compress company, where it was weighed, classed and graded by A and marks put upon each bale indicating the grade or quality and the lot to which it belonged. The railroad company issued bills of lading for the cotton, sometimes before it was in the hands of the compress company at all. Compressing was to be done at the expense of the railroad company. It was held that the railroad company's liability as common carrier commenced

Custom or Special Contract.—Custom or special contract may render a railroad company liable as a common carrier for goods which have never been in its possession. Thus, where cotton is in the possession, and under the control of a compress company, but for which the carrier has issued bills of lading in exchange for the compress company's receipts, the carrier is liable.[85] A railroad company's liability, as a common carrier, for cotton begins upon its delivery to a warehouseman for compression for shipment, where by contract, express or implied, the carrier has authorized the warehouseman to receive cotton for it, at the warehouse, and give receipts therefor to owners, and to issue it for the railroad's benefit, and to hold and compress it for shipment by the railroad company, the latter issuing bills of lading to owners before taking actual custody of the cotton; upon presentation of the warehouseman's receipts.[86] And in such cases a custom of dealing between the parties, whereby the property is treated as under the control of the railroad company from the time it issues such bills of lading, will be sufficient to establish the carrier's liability.[87] But the carrier in such cases is not liable for the loss, to an assignee of the bill of lading without notice of the agreement and course of dealing be-

only when the specific cotton was delivered for the purpose of transportation into its exclusive possession and control, and only when specific lots were marked and designated to correspond to the bills of lading previously issued by the carrier. St. Louis, etc., R. Co. *v.* Knight, 122 U. S. 79, 30 L. Ed. 1077, 7 S. Ct. 1132.

85. **Custom or special contract.**—Arthur *v.* Texas, etc., R. Co., 204 U. S. 505, 51 L. Ed. 590, 23 R. R. R. 583, 46 Am. & Eng. R. Cas., N. S., 583, 27 S. Ct. 338; Marine Ins. Co. *v.* St. Louis, etc., R. Co., 41 Fed. 643, 43 Am. & Eng. R. Cas. 79; Deming *v.* Merchants' Cotton Press, etc., Co., 90 Tenn. 306, 17 S. W. 89, 13 L. R. A. 518; Missouri, etc., R. Co. *v.* Union Ins. Co. (Tex. Civ. App.), 39 S. W. 975; Amory Mfg. Co. *v.* Gulf, etc., R. Co., 89 Tex. 419, 37 S. W. 856, 59 Am. St. Rep. 65; Missouri Pac. R. Co. *v.* Douglas & Sons, 2 Texas App. Civ. Cas., § 28, 16 Am. & Eng. R. Cas. 98.

Custom to exchange bills of lading for warehouse receipts of compress company—Excessive accumulation of cotton in street—Liability.—In Marine Ins. Co. *v.* St. Louis, etc., R. Co., 41 Fed. 643, 43 Am. & Eng. R. Cas. 79, it is held that a railroad company contracting to remove cotton received by a compressing company, from its warehouse where it was received, to its compressing mill, is liable for damage occasioned by a nuisance resulting from the accumulation of the cotton in a public street owing to its failure to remove the same, especially when it had been accustomed to take up the warehouse receipts of that company and issue bills of lading for cotton covered thereby, reserving the right to have it compressed, as in the former case it would assist continuance of the nuisance, and in the latter would, as a common carrier, permit the accumulation of dangerous material, which it was bound to transport promptly.

Compression at railroad's convenience and cost—Fire while awaiting compression—Negligence of employees of compress company.—In Arthur *v.* Texas, etc., R. Co., 204 U. S. 505, 51 L. Ed. 590, 23 R. R. R. 583, 46 Am. & Eng. R. Cas., N. S., 583, 27 S. Ct. 338, it is held that a carrier which issues bills of lading to a shipper in return for receipts given by a compress company for cotton in the latter's custody is liable for loss by fire due to the negligence of the servants of the compress company in caring for the cotton while awaiting the compression and loading, which the railroad company had ordered done for its own convenience and at its own cost, where such company, if it did not regard the presentation of the receipt as a tender of the cotton, or if it were not a valid tender, could, notwithstanding the rules of the Texas state railroad commission as well as its own rules, have refused to sign the bills of lading.

Cotton on platform of compress company—Fire—Bill of lading—Limiting liability.—In Amory Mfg. Co. *v.* Gulf, etc., R. Co., 89 Tex. 419, 37 S. W. 856, 59 Am. St. Rep. 65, it appeared that cotton on the platform of a compress company near defendant's railroad track was destroyed by fire; that while it was on the platform the railroad company executed a bill of lading binding itself to transport the cotton to M., N. H., and exempting itself from liability for its loss or damage while "in transit * * *, at depot or place of trans-shipment." It was held that the railroad was liable, as a common carrier, for the loss of the cotton.

86. **Contract.**—Deming *v.* Merchants' Cotton Press, etc., Co., 90 Tenn. 306, 17 S. W. 89, 13 L. R. A. 518.

87. **Custom establishing liability.**—Missouri, etc., R. Co. *v.* Union Ins. Co. (Tex. Civ. App.), 39 S. W. 975.

tween the shipper and the carrier.[88] Nor does the mere fact that the cost of compression is included in the charge for transportation and paid by the carrier, render the carrier liable prior to the actual delivery of the cotton.[89] And a railroad company does not become liable for an injury to cotton caused by the negligence of a compress company, exercising an independent employment in the handling of the cotton, by reason merely of the fact that the railroad company has taken up the compress company's receipts for cotton received for compression and issued bills of lading therefor to the owners of the cotton, and has agreed to pay the compress company's charges for compression.[90]

A contract with a compress company to transport all cotton brought to its warehouse does not render the carrier responsible for loss to owners of part of such cotton, for which it has given no bills of lading, if it has in fact assumed no custody or control of any of the cotton, or of the place where it was kept before it was put upon the cars, although it has, as a matter of convenience, given to the owners of other parts of such cotton bills of lading in exchange for the warehouse receipts of the compress company, and although it is prohibited by statute, under a penalty, from issuing bills of lading except for goods actually received into its possession.[91]

Effect as Change of Possession.—It is held that the possession of cotton by a compress company is not so changed, by the issuance by a railroad company to the owners of the cotton of bills of lading, as to render void an insurance policy in favor of the compress company.[92]

§ 398. Proof of Authority.—Where goods are delivered for transportation to an agent of the carrier, who is clothed with apparent authority to accept them for such purpose, at a station or other regular place for the reception of freight for carriage, the presumption is in favor of the agent's authority to bind the carrier; but if the delivery to the agent is not made at or near a regular or customary place for the acceptance of freight, the shipper has the burden of proving that such agent had authority to bind the carrier by such acceptance.[93]

§§ 399-406. Complete Delivery for Immediate Shipment—§ 399. In General.—Such delivery to the carrier must be shown as to charge the latter with the duties and liabilities of a carrier with respect to such goods.[94]

§ 400. Exclusive Possession and Control.—In General.—Delivery of goods to a common carrier for transportation, whether actual or constructive,

88. **Liability to assignee of bill of lading.**—Missouri Pac. R. Co. *v.* McFadden, 154 U. S. 155, 38 L. Ed. 944, 14 S. Ct. 990.

89. **Including cost of compression in charge for transportation.**—Edwards & Co. *v.* Texas Mid. R. Co. (Tex. Civ. App.), 81 S. W. 800.

90. Martin *v.* St. Louis, etc., R. Co., 55 Ark. 510, 19 S. W. 314, 56 Am. & Eng. R. Cas. 112.

91. **Effect of contract with compress company.**—St. Louis, etc., R. Co. *v.* Commercial Union Ins. Co., 139 U. S. 223, 35 L. Ed. 154, 11 S. Ct. 554.

92. **Possession of cotton not so charged by issuance of bills of lading as to void insurance policy.**—California Ins. Co. *v.* Union Compress Co., 133 U. S. 387, 32 L. Ed. 730, 10 S. Ct. 365.

93. **Proof — Presumptions.** — Cunard Steamship Co. *v.* Kelley, 53 C. C. A. 310, 115 Fed. 678; Dwight *v.* Brewster (Mass.), 1 Pick. 50, 11 Am. Dec. 133; Missouri Coal, etc., Co. *v.* Hannibal, etc., R. Co., 35 Mo. 84; Seasongood *v.* Tennessee, etc., Transp. Co., 21 Ky. L. Rep. 1142, 54 S. W. 193, 49 L. R. A. 270; Abrams *v.* Platt, 23 Misc. 637, 52 N. Y. S. 153. See ante, "Officers and Agents in General," § 394.

Delivered at distance from railroad—Authority of agent—Burden of proof.—Where goods are claimed to have been delivered to an agent of defendant carrier, at a distance from its line of railroad, to be carried to the road and thence transported on its line, the authority of the person thus purporting to act as agent, to bind the company, must be shown. Missouri Coal, etc., R. Co. *v.* Hannibal, etc., R. Co., 35 Mo. 84.

94. **Complete delivery for immediate shipment.**—Dean *v.* King, 22 O. St. 118; Page & Co. *v.* Sandusky, etc., R. Co., 4 West. L. M. 644, 2 O. Dec. Reprint 716, 718; Despatch Line *v.* Glenny & Co., 41 O. St. 166.

being a bailment, involves exclusive possession in the carrier, and this involves a surrender of custody and control for the time being by the consignor.[95] And unless such exclusive possession and control of the goods have been surrendered to the carrier, there has been no such delivery to it as to render it responsible as a common carrier.[96] The delivery must be such as to place the goods in the custody and under the control of the carrier, and not merely in his vehicle, or other conveyance; so that if they are really in charge of the owner's servants, although they may be in the carrier's wagon or vessel, the carrier is not answerable.[97] A railroad company is not responsible as a common carrier for stock placed in its stock yards for subsequent shipment, but subject to the right of the shipper to remove the stock from such pens for feed and water, before the shipment is actually made.[98] But a ferryman is liable for loss of or damage to a carriage and horses, which is placed upon the drop of his boat, though they are driven by the owner's driver.[99]

§§ 401-406. Delivery for Immediate Shipment or Storage—§ 401. In General.—The delivery to and acceptance by the carrier must be for transportation and not for storage.[1] In order to render the carrier liable as an in-

95. Exclusive possession.—Wilson *v.* Atlanta, etc., R. Co., 82 Ga. 386, 9 S. E. 1076. See post, "Title, Custody and Control of Goods," chapter 9.

So when freight is deposited along the carrier's line for the convenience of the owner in delivering it to the carrier at some future time and the latter does not assume possession and custody to the exclusion of the owner, it can not be deemed to have accepted the goods for shipment and its responsibility will not begin until something further is done. In such a case there must be a complete surrender by the owner to the carrier for the purpose of shipment and he can not hold the carrier liable if he continues to exercise acts inconsistent with such possession and custody. Wilson *v.* Atlanta, etc., R. Co., 82 Ga. 386, 9 S. E. 1076.

And a carrier receiving lumber for shipment to Europe was held liable on its bill of lading for lumber lost after placing it on the pier of the railway company and under its exclusive control. Lewis *v.* Chesapeake, etc., R. Co., 47 W. Va. 656, 35 S. E. 908, 81 Am. St. Rep. 816.

96. *United States.*—Missouri Pac. R. Co. *v.* McFadden, 154 U. S. 155, 38 L. Ed. 944, 14 S. Ct. 990; St. Louis, etc., R. Co. *v.* Knight, 122 U. S. 79, 30 L. Ed. 1077, 7 S. Ct. 1132.

The law will not divide the duty or the obligation between the carrier and the owner of the goods; it must rest entirely upon the one or the other; and, until it has become imposed upon the carrier by a delivery and acceptance, he can not be held responsible for them. Missouri Pac. R. Co. *v.* McFadden, 154 U. S. 155, 38 L. Ed. 944, 14 S. Ct. 990.

Delaware.—Reed *v.* Philadelphia, etc., R. Co. (Del.), 3 Houst. 176; Truax *v.* Philadelphia, etc., R. Co. (Del.), 3 Houst. 233.

Georgia.—Horne-Andrews Comm. Co. *v.* Georgia R. Co., 136 Ga. 116, 40 R. R. R. 754, 63 Am. & Eng. R. Cas., N. S., 745, 70 S. E. 879; Wilson *v.* Atlanta, etc., R. Co., 82 Ga. 386, 9 S. E. 1076.

Iowa.—Frazier *v.* Kansas, etc., R. Co., 48 Iowa 571.

Mississippi.—Anderson *v.* Mobile, etc., R. Co. (Miss.), 19 R. R. R. 382, 42 Am. & Eng. R. Cas., N. S., 382, 38 So. 661; Tate *v.* Yazoo, etc., R. Co., 78 Miss. 842, 29 So. 392, 20 Am. & Eng. R. Cas., N. S., 461, 84 Am. St. Rep. 649.

Nebraska.—Burrowes *v.* Chicago, etc., R. Co., 85 Neb. 497, 35 R. R. R. 373, 58 Am. & Eng. R. Cas., N. S., 373, 123 N. W. 1028; Chicago, etc., R. Co. *v.* Powers, 73 Neb. 816, 18 R. R. R. 286, 41 Am. & Eng. R. Cas., N. S., 286, 103 N. W. 678.

New York.—Grosvenor *v.* New York Cent. R. Co., 39 N. Y. 34, 5 Abb. Prac., N. S., 345.

North Carolina.—Sumner *v.* Charlotte, etc., R. Co., 78 N. C. 289.

South Carolina.—Brown *v.* Atlanta, etc., R. Co., 19 S. C. 39.

Tennessee.—Stewart *v.* Gracy, 93 Tenn. 314, 27 S. W. 664.

97. Goods in hands of consignor's servants.—Southern Exp. Co. *v.* McVeigh, 61 Va. (20 Gratt.) 264.

98. Right of shipper to remove for feed and water.—Chicago, etc., R. Co. *v.* Powers, 73 Neb. 816, 18 R. R. R. 286, 41 Am. & Eng. R. Cas., N. S., 286, 103 N. W. 678.

99. Vehicle driven by owner's driver.—Cohen *v.* Hume (S. C.), 1 McCord 439.

1. Delivery must be for transportation.—Butler *v.* Basing, 12 Eng. C. L. 287; Western R. Co. *v.* Bunch (Eng.), 13 App. Cas. 31, 57 L. J. Q. B. 361; Edwards *v.* Sherratt (Eng.), 1 East 604; Gulf, etc., R. Co. *v.* Pool, 10 Tex. Civ. App. 682, 31 S. W. 688. See post, "Carriers as Warehouseman," chapter 13.

Whether carriers or forwarders—Effect of instrument.—Where parties, who were doing business as forwarders and also as carriers, agreed orally to transport merchandise, to be delivered to them from

surer for the safety of goods tendered it for transportation they must be delivered to, and accepted by it for immediate shipment.[2] If the deposit of the

time to time, and subsequently, on receiving a portion thereof to be transported pursuant to the contract, they executed an instrument stating that the same was received to be forwarded, it was held that they were responsible as carriers, and not as forwarders. Blossom *v.* Griffin, 13 N. Y. 569, 67 Am. Dec. 75.

2. Must be for immediate shipment.—*United States.*—Hannibal, etc., R. Co. *v.* Swift (U. S.), 12 Wall. 262, 20 L. Ed. 423, 1 Am. R. Rep. 434; St. Louis, etc., R. Co. *v.* Knight, 122 U. S. 79, 30 L. Ed. 1077, 7 S. Ct. 1132; Pratt *v.* Grand Trunk R. Co., 95 U. S. 43, 24 L. Ed. 336.

Alabama.—Central, etc., R. Co. *v.* Sigma Lumber Co., 170 Ala. 627, 40 R. R. R. 197, 63 Am. & Eng. R. Cas., N. S., 197, 54 So. 205; Mt. Vernon Co. *v.* Alabama, etc., R. Co., 92 Ala. 296, 8 So. 687; O'Bannon *v.* Southern Exp. Co., 51 Ala. 481; St. Louis, etc., R. Co. *v.* Cavander, 170 Ala. 601, 39 R. R. R. 338, 62 Am. & Eng. R. Cas., N. S., 338, 54 So. 54.

Arkansas.—Garner *v.* St. Louis, etc., R. Co., 79 Ark. 353, 20 R. R. R. 527, 48 Am. & Eng. R. Cas., N. S., 527, 96 S. W. 187, 116 Am. St. Rep. 83; Little Rock, etc., R. Co. *v.* Hunter, 42 Ark. 200, 18 Am. & Eng. R. Cas. 527; Kansas, etc., R. Co. *v.* Barnett, 69 Ark. 150, 61 S. W. 919; St. Louis, etc., R. Co. *v.* Neel, 56 Ark. 279, 19 S. W. 963; St. Louis, etc., R. Co. *v.* Burrow & Co., 89 Ark. 178, 33 R. R. R. 754, 56 Am. & Eng. R. Cas., N. S., 754, 116 S. W. 198; St. Louis, etc., R. Co. *v.* Murphy, 60 Ark. 333, 30 S. W. 419.

Connecticut.—Hickox *v.* Naugatuck R. Co., 31 Conn. 281, 83 Am. Dec. 143; Trowbridge *v.* Chapin, 23 Conn. 595; Merriam *v.* Hartford, etc., R. Co., 20 Conn. 354, 52 Am. Dec. 344.

Dakota.—Waldron *v.* Chicago, etc., R. Co., 1 Dak. 351, 46 N. W. 456.

Delaware.—Reed *v.* Philadelphia, etc., R. Co. (Del.), 3 Houst. 176; Truax *v.* Philadelphia, etc., R. Co. (Del.), 3 Houst. 233.

Georgia.—Dixon *v.* Central, etc., R. Co., 110 Ga. 173, 35 S. E. 369, 17 Am. & Eng. R. Cas., N. S., 380; Southern Exp. Co. *v.* Newby, 36 Ga. 635, 91 Am. Dec. 783.

Illinois.—Cleveland, etc., R. Co. *v.* Wilson, 99 Ill. App. 367; Illinois Cent. R. Co. *v.* Ashmead, 58 Ill. 487, 11 Am. R. Rep. 59; Illinois Cent. R. Co. *v.* Smyser, 38 Ill. 354, 87 Am. Dec. 301; St. Louis, etc., R. Co. *v.* Montgomery, 39 Ill. 335; Grand Tower Mfg., etc., Co. *v.* Ullman, 89 Ill. 244.

Indiana.—Lake Shore, etc., R. Co. *v.* Foster, 104 Ind. 293, 4 N. E. 20, 54 Am. Rep. 319; Van Gilder *v.* Chicago, etc., R. Co., 44 Iowa 548.

Kansas.—Missouri Pac. Ry. Co. *v.* Riggs, 10 Kan. App. 578, 62 Pac. 712.

Kentucky.—Louisville, etc., R. Co. *v.* Stiles, 133 Ky. 786, 32 R. R. R. 231, 55 Am. & Eng. R. Cas., N. S., 231, 119 S. W. 786; Pittsburg, etc., R. Co. *v.* American Tobacco Co., 126 Ky. 582, 31 Ky. L. Rep. 1013, 25 R. R. R. 586, 48 Am. & Eng. R. Cas., N. S., 586, 104 S. W. 377.

Louisiana.—Williams *v.* Peytavin (La.), 4 Mart., O. S., 304.

Maine.—Wilson *v.* Grand Trunk Railway, 57 Me. 138, 2 Am. Rep. 26.

Massachusetts. — Barron *v.* Eldredge, 100 Mass. 455, 1 Am. Rep. 126; Fitchburg, etc., R. Co. *v.* Hanna (Mass.), 6 Gray 539, 66 Am. Dec. 427; Gass *v.* New York, etc., R. Co., 99 Mass. 220, 96 Am. Dec. 742; Merritt *v.* Old Colony, etc., R. Co. (Mass.), 11 Allen 80; Murray *v.* International Steamship Co., 170 Mass. 166, 48 N. E. 1093, 64 Am. St. Rep. 290; Watts *v.* Boston, etc., Corp., 106 Mass. 466; Pitlock *v.* Wells, etc., Co., 109 Mass. 452.

Michigan.—Meloche *v.* Chicago, etc., R. Co., 116 Mich. 69, 74 N. W. 301, 10 Am. & Eng. R. Cas., N. S., 82; Michigan, etc., R. Co. *v.* McDonough, 21 Mich. 165, 4 Am. Rep. 466; Michigan, etc., Co. *v.* Shurtz, 7 Mich. 515; Stapleton *v.* Grand Trunk R. Co., 133 Mich. 187, 94 N. W. 739, 9 R. R. R. 332, 32 Am. & Eng. R. Cas., N. S., 332.

Mississippi.—Illinois Cent. R. Co. *v.* Tronstine, 64 Miss. 834, 2 So. 255, 31 Am. & Eng. R. Cas. 99.

Missouri.—Goodbar *v.* Wabash R. Co., 53 Mo. App. 434; McCrary *v.* Missouri, etc., R. Co., 99 Mo. App. 518, 74 S. W. 2; Tate *v.* Yazoo, etc., R. Co., 78 Miss. 842, 29 So. 392, 20 Am. & Eng. R. Cas., N. S., 461, 84 Am. St. Rep. 649.

Nebraska.—Burrowes *v.* Chicago, etc., R. Co., 85 Neb. 497, 35 R. R. R. 373, 58 Am. & Eng. R. Cas., N. S., 373, 123 N. W. 1028; S. C., 87 Neb. 142, 37 R. R. R. 450, 60 Am. & Eng. R. Cas., N. S., 450, 126 N. W. 1084; Chicago, etc., R. Co. *v.* Powers, 73 Neb. 816, 18 R. R. R. 286, 41 Am. & Eng. R. Cas., N. S., 286, 103 N. W. 678; Nelson *v.* Chicago, etc., R. Co., 78 Neb. 57, 23 R. R. R. 613, 46 Am. & Eng. R. Cas., N. S., 613, 110 N. W. 741.

New Jersey.—New Brunswick Steamboat, etc., Co. *v.* Tiers, 24 N. J. L. 697, 64 Am. Dec. 394.

New York.—Blanchard *v.* Isaacs (N. Y.), 3 Barb. 388; Ball *v.* New Jersey Steamboat Co. (N. Y.), 1 Daly 491; Blossom *v.* Griffin, 13 N. Y. 569, 67 Am. Dec. 75; Spade *v.* Hudson River R. Co. (N. Y.), 16 Barb. 383; London, etc., Fire Ins. Co. *v.* Rome, etc., R. Co., 144 N. Y. 200, 39 N. E. 79, 43 Am. St. Rep. 752; O'Neill *v.* New York, etc., R. Co., 60 N. Y. 138, 10 Am. R. Rep. 121; Wade *v.* Wheeler, 47 N. Y.

goods is a mere accessory to the carriage, that is, if they are deposited for the purpose of being carried without further orders, the responsibility of the carrier begins from the time they are received,[3] so while goods have been received by a carrier for transportation, and not for storage, it is responsible for them as a common carrier while they are in its possession before the transportation begins, if there remains nothing more for the shipper to do, and he has relinquished all control over the goods to the carrier.[4] Where live stock is de-

658; Witbeck *v.* Holland, 45 N. Y. 13, affirming 55 Barb. 443, 38 How. Prac. 273; Shelton *v.* Merchants' Dispatch Transp. Co., 59 N. Y. 258, 48 How. Prac. 257; Grosvenor *v.* New York Cent. R. Co., 39 N. Y. 34, 5 Abb. Prac., N. S., 345.

North Carolina.—Berry *v.* Southern R. Co., 122 N. C. 1002, 30 S. E. 14; Basnight *v.* Atlantic, etc., R. Co., 111 N. C. 592, 16 S. E. 323; Sumner *v.* Charlotte, etc., R. Co., 78 N. C. 289; Williams *v.* Southern R. Co., 155 N. C. 260, 42 R. R. R. 105, 65 Am. & Eng. R. Cas., N. S., 105, 71 S. E. 346.

Ohio.—Pittsburgh, etc., R. Co. *v.* Barrett, 36 O. St. 448.

Pennsylvania.—Clarke *v.* Needles, 25 Pa. St. 338.

South Carolina.—Cone *v.* Southern Railway, 85 S. C. 524, 36 R. R. R. 179, 59 Am. & Eng. R. Cas., N. S., 179, 67 S. E. 779.

Tennessee.—American Lead Pencil Co. *v.* Nashville, etc., Railway, 124 Tenn. 57, 40 R. R. R. 202, 63 Am. & Eng. R. Cas., N. S., 202, 134 S. W. 613; Southern R. Co. *v.* Bickley, etc., Co., 119 Tenn. 528, 29 R. R. R. 275, 52 Am. & Eng. R. Cas., N. S., 275, 107 S. W. 680; Watson *v.* Memphis, etc., R. Co., 56 Tenn. (9 Heisk.) 255, 19 Am. R. Rep. 256.

Texas.—East Line, etc., R. Co. *v.* Hall, 64 Tex. 615; Gulf, etc., R. Co. *v.* Compton (Tex. Civ. App.), 38 S. W. 220; Gulf, etc., R. Co. *v.* Trawick, 80 Tex. 270, 15 S. W. 568, 18 S. W. 948; International, etc., R. Co. *v.* Dimmit County Pasture Co., 5 Tex. Civ. App. 186, 23 S. W. 754; Missouri, etc., R. Co. *v.* Beard, 34 Tex. Civ. App. 188, 78 S. W. 253; Galveston, etc., R. Co. *v.* Jackson (Tex. Civ. App.), 37 S. W. 255; Gulf, etc., R. Co. *v.* Pool, 10 Tex. Civ. App. 682, 31 S. W. 688.

Virginia.—Southern Exp. Co. *v.* McVeigh, 61 Va. (20 Gratt.) 264.

Washington.—Roy *v.* Griffin, 26 Wash. 106, 66 Pac. 120.

Wisconsin.—Goldberg *v.* Ahnapee, etc., R. Co., 105 Wis. 1, 80 N. W. 920, 47 L. R. A. 221, 17 Am. & Eng. R. Cas., N. S., 65, 76 Am. St. Rep. 899; Schmidt *v.* Chicago, etc., R. Co., 90 Wis. 504, 63 N. W. 1057; White *v.* Goodrich Transp. Co., 46 Wis. 493, 1 N. W. 75, 21 Am. R. Rep. 398.

England.—Western R. Co. *v.* Bunch (Eng.), 13 App. Cas. 31, 57 L. J. Q. B. 361; Lovell *v.* London, etc., R. Co., 45 L. J. Q. B. 476, 34 L. T. 127, 24 W. R. 394, 6 R. & C. T. Cas. ixix, 3 R. & C. T. xx.

3. Absolute deposit with carrier.—Pratt *v.* Grand Trunk R. Co., 95 U. S. 43, 24 L. Ed. 336.

Where goods are delivered to a common carrier for transportation, and are placed in its depot or warehouse awaiting transportation, with nothing further to be done by the shipper, and they are burned before being shipped, the carrier so receiving them is liable as a common carrier, and not merely as a warehouseman. Grand Tower Mfg., etc., Co. *v.* Ullman, 89 Ill. 244.

Deposit mere accessory to carriage.—If a common carrier receives goods into its own warehouse for the accommodation of itself and the shipper so that the deposit there is a mere accessory to the carriage, and for the purpose of facilitating it, its liability as a common carrier begins with the receipt of the goods. Clarke *v.* Needles, 25 Pa. St. 338.

Both carrier and warehouseman.—Where a party, who is both a carrier and a warehouseman, receives goods into his warehouse to be transported by him, his responsibility as a common carrier commences when they are received. Blossom *v.* Griffin, 13 N. Y. 569, 67 Am. Dec. 75.

Liability of a railway as a common carrier attaches whenever the shipper has done all that is required of him to prepare his property for shipment, and has delivered the same to the railway company and it has been accepted. International, etc., R. Co. *v.* Dimmit County Pasture Co., 5 Tex. Civ. App. 186, 23 S. W. 754, distinguishing Texas, etc., R. Co. *v.* Nicholson, 61 Tex. 491, 495 and Gulf, etc., R. Co. *v.* McCorquodale, 71 Tex. 41, 9 S. W. 80, and following East Line, etc., R. Co. *v.* Hall, 64 Tex. 615, and Gulf, etc., R. Co. *v.* Trawick, 80 Tex. 270, 15 S. W. 568, 18 S. W. 948; Gulf, etc., R. Co. *v.* Pool, 10 Tex. Civ. App. 682, 31 S. W. 688; Martin *v.* Ft. Worth, etc., R. Co., 3 Tex. Civ. App. 556, 22 S. W. 1007; Ft. Worth, etc., R. Co. *v.* Martin, 12 Tex. Civ. App. 464, 35 S. W. 21, affirmed in 93 Tex. 660, no op.; Gulf, etc., R. Co. *v.* McCarty, 82 Tex. 608, 18 S. W. 716.

4. Carrier's possession prior to transportation.—*United States.*—Bulkley *v.* Naumkeag Steam Cotton Co., 24 How. 386, 16 L. Ed. 599; The Oregon, 1 Deady, 179 Fed. Cas. No. 10,553.

Illinois.—Grand Tower Mfg., etc., Co. *v.* Ullman, 89 Ill. 244; Illinois Cent. R.

livered to a railroad company its liability as an insurer commences as soon as the animals have been properly received into its stock pens for immediate transportation.[5] And if there is a delivery and acceptance for immediate or early transportation, the carrier is liable,[6] although it may not be able to transport them promptly, and there may be a long storage of them prior to shipment.[7] But where freight is delivered to a carrier by a shipper, knowing that the carrier's power to transport it is subject to the permission of the military authority, such delivery can only be for storage until such permission can be obtained.[8]

Co. *v.* Ashmead, 58 Ill. 487, 11 Am. R. Rep. 59.

Kentucky.—Southern R. Co. *v.* Smith, 125 Ky. 656, 25 R. R. R. 652, 48 Am. & Eng. R. Cas., N. S., 652, 102 S. W. 232.

Louisiana.—Greenwood *v.* Cooper, 10 La. Ann. 796.

Massachusetts.—Jordan *v.* Fall River R. Co. (Mass.), 5 Cush. 69, 51 Am. Dec. 44; Murray *v.* International Steamship Co., 170 Mass. 166, 48 N. E. 1093, 64 Am. St. Rep. 290; Fitchburg, etc., R. Co. *v.* Hanna (Mass.), 6 Gray 539, 66 Am. Dec. 427; Merritt *v.* Old Colony, etc., R. Co. (Mass.), 11 Allen 80.

Michigan.—Meloche *v.* Chicago, etc., R. Co., 116 Mich. 69, 74 N. W. 301, 10 Am. & Eng. R. Cas., N. S., 82.

Missouri.—Mason *v.* Missouri Pac. R. Co., 25 Mo. App. 473.

New Hampshire.—Moses *v.* Boston, etc., Railroad, 24 N. H. 71, 55 Am. Dec. 222.

New York.—Blossom *v.* Griffin, 13 N. Y. 569, 67 Am. Dec. 75; London, etc., Fire Ins. Co. *v.* Rome, etc., R. Co., 144 N. Y. 200, 39 N. E. 79, 43 Am. St. Rep. 752; Rogers *v.* Wheeler, 52 N. Y. 262.

Ohio.—Pittsburgh, etc., R. Co. *v.* Barrett, 36 O. St. 448.

Texas.—Missouri, etc., R. Co. *v.* Beard, 34 Tex. Civ. App. 188, 78 S. W. 253.

Wisconsin.—White *v.* Goodrich Transp. Co., 46 Wis. 493, 1 N. W. 75, 21 Am. R. Rep. 398.

5. In case of live stock.—*Arkansas.*—A railroad company's liability as a common carrier for damage to stock begins when it receives the animal for transportation. St. Louis, etc., R. Co. *v.* Mitchell (Ark.), 43 R. R. R. 673, 66 Am. & Eng. R. Cas., N. S., 673.

Indiana.—Louisville, etc., R. Co. *v.* Godman, 104 Ind. 490, 4 N. E. 163.

Indian Territory.—Missouri, etc., R. Co. *v.* Byrne, 3 Ind. T. 740, 49 S. W. 41, 13 Am. & Eng. R. Cas., N. S., 17.

Kentucky.—Louisville, etc., R. Co. *v.* Stiles, 133 Ky. 786, 32 R. R. R. 231, 55 Am. & Eng. R. Cas., N. S., 231, 119 S. W. 786.

Missouri.—Lackland *v.* Chicago, etc., R. Co., 101 Mo. App. 420, 11 R. R. R. 414, 34 Am. & Eng. R. Cas., N. S., 414, 74 S. W. 505; Mason *v.* Missouri Pac. R. Co., 25 Mo. App. 473; Pruitt *v.* Hannibal, etc., R. Co., 62 Mo. 527.

Nebraska.—Nelson *v.* Chicago, etc., R. Co., 78 Neb. 57, 23 R. R. R. 613, 46 Am. & Eng. R. Cas., N. S., 613, 110 N. W. 741.

Texas.—Galveston, etc., R. Co. *v.* Jackson (Tex. Civ. App.), 37 S. W. 255; Gulf, etc., R. Co. *v.* Trawick, 80 Tex. 270, 15 S. W. 568, 18 S. W. 948.

Virginia.—Norfolk, etc., R. Co. *v.* Harman, 91 Va. 601, 22 S. E. 490, 44 L. R. A. 289, 50 Am. St. Rep. 855.

England.—Moffatt *v.* Great Western R. Co., 15 L. T. 630.

6. Delivery for early transportation.—When the delivery of freight is made at the warehouse, or other place of business of the carrier, for early transportation, it becomes, the moment the delivery is made, a common carrier as to such freight, and its responsibility, as such, at once attaches. In such cases the deposit is a mere accessory to the carriage, and does not postpone its liability as a common carrier to the time when the goods shall be actually put in motion towards their place of destination; and this principle is applicable to the shipment of live stock. Mason *v.* Missouri Pac. R. Co., 25 Mo. App. 473.

Promise to ship next morning.—Where goods properly marked are placed inside of defendant's freight depot for immediate shipment, and defendant's agents agree to ship them on the following morning, defendant is liable as a common carrier. Meloche *v.* Chicago, etc., R. Co., 116 Mich. 69, 74 N. W. 301, 10 Am. & Eng. R. Cas., N. S., 82.

Letter as direction for immediate shipment—Request to mark prepaid not condition precedent to shipment.—A shipper wrote to the freight agent of a railroad company, "Will you please * * * have these three pieces marked according to the address already tacked on and forward immediately to Newport, R. I. Will you mark them prepaid? I will be at the depot tomorrow and get the bill of lading and pay the freight." It was held that this letter was direction for immediate shipment and did not make the marking of the pieces as prepaid a condition precedent to the shipment. Berry *v.* Southern R. Co., 122 N. C. 1002, 30 S. E. 14.

7. Lack of cars—Long storage—Duty to load cars when furnished.—London, etc., Fire Ins. Co. *v.* Rome, etc., R. Co., 144 N. Y. 200, 39 N. E. 79, 43 Am. St. Rep. 752.

8. Power to transport corn subject to permission of military authorities—Corn

Accepted for Immediate or Remote Shipment and Placed on Carrier's Platform.—Where goods are accepted for shipment, whether intended to be immediate or remote, the placing of the goods upon its platform renders the carrier responsible for any damages thereto from fire originating within its right of way.[9] Thus where a car on the carrier's side track is loaded, sealed, and the bill of lading issued, the carrier's liability attaches at once.[10]

No Direction or Intention to Ship Immediately.—If goods are delivered to a railroad company and received by it for shipment, they may be transmitted without the issuance of a bill of lading, and may be regarded as in the possession of the railroad, as a common carrier, from the time they are received, though there was no instruction or intention that the carrier should immediately make the shipment.[11]

§§ 402-406. Something to Be Done Prior to Transportation—§ 402. In General.—The liability of a railroad company, as a common carrier, for goods destroyed while in its possession depends on whether or not it has accepted them for transportation, and not whether all has been done that ought to precede such acceptance, and if it takes control of goods and puts its agents to preparing them for shipment, it has accepted them.[12] However, it is generally said that as long as there remains something to be done by the shipper before the entire control of the freight is surrendered to the carrier, the latter's liability as a common carrier does not begin.[13] Thus, it is held that although

delivered into cars and warehouse of carrier—No shipper's receipt.—Illinois Cent. R. Co. *v.* Ashmead, 58 Ill. 487, 11 Am. R. Rep. 59.

9. **Goods on carrier's platform.**—Griffin *v.* Atlantic, etc., R. Co., 89 S. C. 547, 72 S. E. 463.

No trains scheduled until next day—Shipper's knowledge.—A carrier received freight for transportation, though it had no trains scheduled to carry it until the following day. The shipper knew the facts, and understood that the goods would be stored in the depot until the following day. It was held that the carrier while so holding the goods at the depot was liable as a carrier, and not as a warehouseman. Southern R. Co. *v.* Smith, 125 Ky. 656, 25 R. R. R. 652, 48 Am. & Eng. R. Cas., N. S., 652, 102 S. W. 232.

10. **Loaded car on carrier's side track near grain elevator—Bill of lading sent to elevator company's office.**—A railroad company maintained a side track adjacent to a wheat elevator. A car was loaded for shipment, and a bill of lading was issued and sent to the elevator company's office. The bill of lading provided that the carrier should be liable for any loss or damage. It was held that car was received for shipment, and having burned on the side track before it was removed, the railroad was liable as a common carrier. Cincinnati Grain Co. *v.* Louisville, etc., R. Co., 146 Ky. 237, 43 R. R. R. 682, 66 Am. & Eng. R. Cas., N. S., 682, 142 S. W. 374.

11. **No direction or intention to ship immediately.**—Missouri, etc., R. Co. *v.* Beard, 34 Tex. Civ. App. 188, 78 S. W. 253.

12. **Something to be done prior to transportation.**—East Line, etc., R. Co. *v.* Hall, 64 Tex. 615.

13. **Something to be done by shipper.**—*United States.*—St. Louis, etc., R. Co. *v.* Knight, 122 U. S. 79, 30 L. Ed. 1077, 7 S. Ct. 1132.

Alabama.—St. Louis, etc., R. Co. *v.* Cavender, 170 Ala. 601, 39 R. R. R. 338, 62 Am. & Eng. R. Cas., N. S., 338, 54 So. 54.

Arkansas.—Little Rock, etc., R. Co. *v.* Hunter, 42 Ark. 200, 18 Am. & Eng. R. Cas. 527; St. Louis, etc., R. Co. *v.* Murphy, 60 Ark. 333, 30 S. W. 419; Kansas, etc., R. Co. *v.* Barnett, 69 Ark. 150, 61 S. W. 919.

Delaware.—Reed *v.* Philadelphia, etc., R. Co. (Del.), 3 Houst. 176.

District of Columbia.—Bowie *v.* Baltimore, etc., R. Co., 1 MacArthur (8 D. C.), 94.

Georgia.—Dixon *v.* Central, etc., R. Co., 110 Ga. 173, 35 S. E. 369, 17 Am. & Eng. R. Cas., N. S., 380; Wilson *v.* Atlantic, etc., R. Co., 82 Ga. 386, 9 S. E. 1076.

Illinois.—Grand Tower Mfg., etc., Co. *v.* Ullman, 89 Ill. 244; St. Louis, etc., R. Co. *v.* Montgomery, 39 Ill. 335; Toledo, etc., R. Co. *v.* Gilvin, 81 Ill. 511; Illinois Cent. R. Co. *v.* Smyser, 38 Ill. 354, 87 Am. Dec. 301.

Iowa.—Van Gilder *v.* Chicago, etc., R. Co., 44 Iowa 548.

Kansas.—Missouri Pac. R. Co. *v.* Riggs, 10 Kan. App. 578, 62 Pac. 712.

Massachusetts.—Judson *v.* Western R. Corp. (Mass.), 4 Allen 520, 81 Am. Dec. 718; Watts *v.* Boston, etc., Corp., 106 Mass. 466.

Michigan.—Stapleton *v.* Grand Trunk R. Co., 133 Mich. 187, 9 R. R. R. 332, 32 Am. & Eng. R. Cas., N. S., 332, 94 N. W. 739.

Nebraska.—Burrowes *v.* Chicago, etc.,

the shipper has delivered the goods to the carrier, if after such delivery anything required either by law or contract remains to be done by the shipper, the rights and liability of the carrier are those only of a warehouseman.[14] Where a part only of the freight is loaded, the balance to be loaded another day, after the shipper finishes using it, the carrier is not liable.[15] And a carrier is not liable for grain which is to be hauled by the shipper and loaded on board a vessel, although the weighing has been tallied by the carrier's agent.[16]

R. Co., 85 Neb. 497, 35 R. R. R. 373, 58 Am. & Eng. R. Cas., N. S., 373, 123 N. W. 1028.

New Hampshire.—Barter & Co. *v.* Wheeler, 49 N. H. 9, 6 Am. Rep. 434; Elkins *v.* Boston, etc., R. Co., 23 N. H. 275; Moses *v.* Boston, etc., Railroad, 24 N. H. 71, 55 Am. Dec. 222.

New York.—Spade *v.* Hudson River R. Co. (N. Y.), 16 Barb. 383; London, etc., Fire Ins. Co. *v.* Rome, etc., R. Co., 144 N. Y. 200, 39 N. E. 79, 43 Am. St. Rep. 752; O'Neill *v.* New York, etc., R. Co., 60 N. Y. 138, 10 Am. R. Rep. 121.

North Carolina.—Basnight *v.* Atlantic, etc., R. Co., 111 N. C. 592, 16 S. E. 323; Sumner *v.* Charlotte, etc., R. Co., 78 N. C. 289; Berry *v.* Southern R. Co., 122 N. C. 1002, 30 S. E. 14.

Ohio.—Pittsburgh, etc., R. Co. *v.* Barret, 36 O. St. 448.

Tennessee.—American Lead Pencil Co. *v.* Nashville, etc., Railway, 124 Tenn. 57, 40 R. R. R. 202, 63 Am. & Eng. R. Cas., N. S., 202, 134 S. W. 613.

Texas.—Missouri, etc., R. Co. *v.* Beard, 34 Tex. Civ. App. 188, 78 S. W. 253.

Wisconsin.—Schmidt *v.* Chicago, etc., R. Co., 90 Wis. 504, 63 N. W. 1057.

So long as anything further is to be done or orders to be given by the owner to enable the company to perform its duty, it would be a bailee of a different character than as carrier, and the question of ordinary care on the part of the company might become a prime factor in the determination of the suit. In the latter case the depository or warehouseman would only be liable for negligence or want of ordinary care of the property, and the burden would be on the plaintiff as to negligence. In the other case, the onus probandi as to due care would be upon the defendant whenever the damage is proved. International, etc., R. Co. *v.* Dimmit County Pasture Co., 5 Tex. Civ. App. 186, 23 S. W. 754.

14. Liable only as warehouseman.—Dixon *v.* Central, etc., R. Co., 110 Ga. 173, 35 S. E. 369, 17 Am. & Eng. R. Cas., N. S., 380. See post, "Carrier as Warehouseman," chapter 13. Georgia, etc., R. Co. *v.* Sizer & Co., 4 Ga. App. 126, 60 S. E. 1026; Gulf, etc., R. Co. *v.* Pool, 10 Tex. Civ. App. 682, 31 S. W. 688; Gulf, etc., R. Co. *v.* McCarty, 82 Tex. 608, 18 S. W. 716.

In Dixon *v.* Central, etc., R. Co., 110 Ga. 173, 35 S. E. 369, 17 Am. & Eng. R. Cas., N. S., 380, it is said: "Where goods to be shipped are situated upon a spur track of a railway company, and the owner has no track scales, thus rendering it necessary to move the loaded car to the company's depot for the purpose of weighing the same, so as to ascertain the proper amount of freight charges, the delivery of such cars will be treated as having been made to such company at such depot." Georgia, etc., R. Co. *v.* Sizer & Co., 4 Ga. App. 126, 60 S. E. 1026.

Can load in carrier's warehouse ready for shipment—Agent notified—Promise to furnish car next morning for shipper to load.—Plaintiff, who had goods stored in defendant's warehouse, notified its agent that he had a car load ready to be shipped, and asked him if he could get a car and load them. The agent said that it was impossible to get a car that day, but that he would load them the next morning. Plaintiff said, "All right, I will be there to load them." He took no receipt at the time because he was in the habit of being present at shipments and taking receipts then. That night the warehouse and contents were destroyed by fire without fault of the defendant. It was held that the duty of transportation had not arisen prior to the fire so as to justify the direction of a verdict for defendant. Schmidt *v.* Chicago, etc., R. Co., 90 Wis. 504, 63 N. W. 1057.

15. Part of show outfit loaded into car on Sunday—Part retained for use—Agreement to finish loading on Monday—Car burned.—The plaintiff, who was the proprietor of a tent show, loaded a part of his outfit on Sunday afternoon into a car furnished him by the railroad company, and retained the remainder for his use during the following night, under an agreement with the agent that the plaintiff would finish loading the car on the following Monday morning, when it was to be hauled to a station some 12 miles distant. The car containing the goods was destroyed by fire, without negligence on the part of the defendant carrier, before the time came for loading the remainder of plaintiff's outfit. It was held that defendant was not liable as a common carrier for the loss occasioned thereby. Burrowes *v.* Chicago, etc., R. Co., 85 Neb. 497, 35 R. R. R. 373, 58 Am. & Eng. R. Cas., N. S., 373, 123 N. W. 1028.

16. Grain weighed into cars and hauled to edge of dock by warehouseman—Tallied by mate.—The fact that a warehouse-

Cotton at Compress.—Where cotton, at the carrier's compress house, is under the shipper's control until bales are selected for shipment to correspond with the bills of lading, the carrier is liable only from the time the bales are selected and set apart.[17]

§ 403. Absence of Directions as to Shipment.—Where a carrier receives goods without directions as to destination it is liable only as a warehouseman.[18]

§ 404. Payment of Charges.—Where a common carrier receives goods which can not be transported until charges for transportation are paid the re-

man weighed grain into cars in the warehouse, which cars were then to be taken by the warehouseman's horses and men to the edge of the dock thence to be discharged into the vessel; and that "each car was tallied by the mate or other authorized officer of the vessel, in the warehouses," did not constitute delivery, there of the grain to the ship master. Glass *v.* Goldsmith, 22 Wis. 488.

17. Cotton under shipper's control while at carrier's compress house—Bales selected for shipment by shipper, to correspond with bills of lading.—In St. Louis, etc., R. Co. *v.* Knight, 122 U. S. 79, 30 L. Ed. 1077, 7 S. Ct. 1132, it appeared that plaintiff shipped by rail a large quantity of cotton at different times, and at different points south of Texarkana, Ark., to be made up into bales there at a compress house, and to be thence forwarded to various destinations North and East. The work at the compress house was to be done by the defendant carrier, but under directions of the shipper, who had control of the cotton there for that purpose, and who superintended the weighing, the closing, and the marking of it, and who selected for shipment the particular bales to fill the respective orders at the points of destination. Bills of lading for it were issued from time to time by the agents of the railroad company, sometimes in advance of the separation by plaintiff of particular bales from the mass to correspond with them. Plaintiff was in the habit of drawing against shipment with bills of lading attached, and his drafts were discounted at local banks. When shipments were heavy, drafts would often mature before the arrival of the cotton. 525 bales, marked on the margin as of a quality, were so selected, and shipped to K. at Providence, R. I. The bill of lading described them as "contents unknown," "marked and numbered as per margin." The contents of the bales on arrival were found not to correspond with the margin. The consignee had honored the draft before the arrival of the cotton. He refused to receive the cotton, and sold it on account of the railroad company, after notice to it, and sued in assumpsit, on the bill of lading, to recover from the company, as a common carrier, the amount of the loss. It was held that defendant's liability as a common carrier began only when specified lots were marked and designated and set apart to correspond with a bill of lading then or previously issued. See ante, "Delivery of Cotton to Compress Company," § 397.

18. Absence of direction as to shipment.—St. Louis, etc., R. Co. *v.* Cavender, 170 Ala. 601, 39 R. R. R. 338, 62 Am. & Eng. R. Cas., N. S., 338, 54 So. 54. See post, "Carrier as Warehouseman," chapter 13. Gulf, etc., R. Co. *v.* Pool, 10 Tex. Civ. App. 682, 31 S. W. 688.

Awaiting directions as to destination—Failure to transport.—Where goods were sent to a railroad depot and deposited on the stoop of the freight house, no one being there to receive them, and the cartman subsequently informed the freight agent that the owner of the goods would call and order where they should go, but there was no proof that any such direction ever was given by the owner, it was held that the company could not be held liable for not transporting the goods. Spade *v.* Hudson River R. Co. (N. Y.), 16 Barb. 383.

Car loaded—Failure to notify agent—Moved to another track—Awaiting orders.—In an action for damages for negligence in allowing the burning of some timber on a car intended for shipment, it appeared that plaintiff loaded the car while on defendant's track, but did not notify agent that it was ready for shipment, nor of the name of the consignee. The car was moved by defendant's agent to another track (constructed for shipper's convenience) very close to a dry-kiln, from which it took fire. The court found by consent that the timber had been left with defendant, awaiting orders for shipment, and, as a conclusion of law, that defendant was not an insurer, but a simple warehouseman with respect to plaintiff's timber. It was held that defendant was not liable as a common carrier. Basnight *v.* Atlantic, etc., R. Co., 111 N. C. 592, 16 S. E. 323.

Freight on platform awaiting instructions as to shipment.—Missouri, etc., R. Co. *v.* Beard, 34 Tex. Civ. App. 188, 78 S. W. 253.

sponsibility of the carrier is not that of an insurer, but that of a warehouseman, who is held to only ordinary care for their safety.[19]

§ 405. Deposit Subject to Shipper's Order.—When goods are deposited subject to the further order of the owner, this does not constitute a delivery so as to render the carrier responsible from that time.[20] So where the shipper requests a delay while he sees the vendee of goods on the car, the carrier is not liable other than as a warehouseman.[21]

§ 406. Necessity for Loading on Cars.—In order for a railroad company's liability as a common carrier of freight to begin, it is not necessary that the goods be loaded on the cars which are intended for their transportation to the consignee.[22] And the mere fact that it is the shipper's contract duty to load the freight on the cars does not prevent the railroad company's liability as an insurer from commencing before the goods or live stock are on the cars.[23] If such a regulation by a carrier is of any binding force, it at most always requires shippers of the specified kinds of freight to furnish the necessary help to load the freight, and does not change the company's relation to property delivered to and accepted by it for the sole purpose of being carried over its road.[24]

§ 407. Necessity for and Effect of Bill of Lading.—A carrier by occu-

19. Payment of charges.—St. Louis, etc., R. Co. *v.* Cavender, 170 Ala. 601, 39 R. R. R. 338, 62 Am. & Eng. R. Cas., N. S., 338, 54 So. 54. See post, "Carrier as Warehouseman," chapter 13.

20. Deposit with carrier subject to further orders.—Pratt *v.* Grand Trunk R. Co., 95 U. S. 43, 24 L. Ed. 336; St. Louis, etc., R. Co. *v.* Cavender, 170 Ala. 601, 54 So. 54, 39 R. R. R. 338, 62 Am. & Eng. R. Cas., N. S., 338; Gulf, etc., R. Co. *v.* McCarty, 82 Tex. 608, 18 S. W. 716; International, etc., R. Co. *v.* Dimmit County Pasture Co., 5 Tex. Civ. App. 186, 23 S. W. 754; Gulf, etc., R. Co. *v.* Pool, 10 Tex. Civ. App. 682, 31 S. W. 688.

In warehouse awaiting orders.—A railroad company is not liable as common carrier for property deposited in its warehouse, to await orders from the owner for its transportation. Michigan, etc., Co. *v.* Shurtz, 7 Mich. 515.

If the same company is both a common carrier and a warehouseman, and goods are delivered to it to be transported when it has orders from the owner, its liability in the mean time is that of a warehouseman, and not that of a common carrier. St. Louis, etc., R. Co. *v.* Montgomery, 39 Ill. 335.

21. Request for opportunity to see vendee of hay on cars.—Where a shipper delivered to a railroad company, for transportation, a quantity of hay, which was placed on platform cars, and, the next day, when the company was about to send it forward, he requested that it should not be taken away before he could first see the party to whom it was sold, which request was complied with, and the next day the hay was ignited by sparks from a passing locomotive, and a portion of it burned, it was held that from the moment the shipper requested the hay to be detained, the liability of the railroad was that of a warehouseman only. St. Louis, etc., R. Co. *v.* Montgomery, 39 Ill. 335.

22. Necessity for loading on cars.—*United States.*—Bulkley *v.* Naumkeag Steam Cotton Co. (U. S.), 24 How. 386, 16 L. Ed. 599; The Oregon (U. S.), 1 Deady 179, Fed. Cas. No. 10,553.

Louisiana.—Greenwood *v.* Cooper, 10 La. Ann. 796.

Massachusetts.—Fitchburg, etc., R. Co. *v.* Hanna (Mass.), 6 Gray 539, 66 Am. Dec. 427; Merritt *v.* Old Colony, etc., R. Co. (Mass.), 11 Allen 80.

New York.—London, etc., Fire Ins. Co. *v.* Rome, etc., R. Co., 144 N. Y. 200, 39 N. E. 79, 43 Am. St. Rep. 752.

England.—Grant *v.* Norway, 2 Eng. L. & Eq. 337, 70 E. C. L. 665.

23. Shipper's duty to load.—*United States.*—Bulkley *v.* Naumkeag Steam Cotton Co. (U. S.), 24 How. 386, 16 L. Ed. 599; The Bark Edwin (U. S.), 1 Sprague 477; The Oregon (U. S.), Deady 179, Fed. Cas. No. 10,553.

Illinois.—Pennsylvania Co. *v.* Kenwood Bridge Co., 170 Ill. 645, 49 N. E. 215.

Louisiana.—Greenwood *v.* Cooper, 10 La. Ann. 796.

Massachusetts.—Fitchburg, etc., R. Co. *v.* Hanna (Mass.), 6 Gray 539, 66 Am. Dec. 427; Merritt *v.* Old Colony, etc., R. Co. (Mass.), 11 Allen 80.

New York.—London, etc., Fire Ins. Co. *v.* Rome, etc., R. Co., 144 N. Y. 200, 39 N. E. 79, 43 Am. St. Rep. 752.

24. Effect of regulations.—London, etc., R. Co. *v.* Rome, etc., R. Co., 68 Hun 598, 23 N. Y. S. 231, 52 N. Y. St. Rep. 581, affirmed in 144 N. Y. 200, 39 N. E. 79, 43 Am. St. Rep. 752. See ante, "Rules and Regulations of Carriers," chapter 3.

pation is not relieved from all accountability because he has not signed a bill of lading.[25] Although a bill of lading has not been issued the carrier's liability as a common carrier of freight begins when he receives goods for shipment.[26] Whenever a shipper delivers property to a common carrier who receives it into his exclusive possession for transportation, there arises at once by implication of law, a contract of carriage between the parties, without regard to the issuance of a bill of lading[27] or the failure of the carrier to count, tally, book, or

25. Bill of lading.—Texas, etc., R. Co. *v.* Nicholson, 61 Tex. 491, 495. See post, "Bills of Lading," chapter 6.

26. Liability begins on receipt of goods.—*United States.*—Brower *v.* Water Witch, Fed. Cas. No. 1971, 19 How. Prac. 241; Snow *v.* Carruth, Fed. Cas. No. 13,144, 1 Spr. 324; Citizens' Bank *v.* Nantucket Steamboat Co., Fed. Cas. No. 2,730, 2 Story 16.

Alabama.—Alabama Mid. R. Co. *v.* Darby, 119 Ala. 531, 24 So. 713; Montgomery, etc., R. Co. *v.* Kolb, 73 Ala. 396, 49 Am. Rep. 54, 18 Am. & Eng. R. Cas. 512.

Arkansas.—Garner *v.* St. Louis, etc., R. Co., 79 Ark. 353, 20 R. R. R. 527, 48 Am. & Eng. R. Cas., N. S., 527, 96 S. W. 187, 116 Am. St. Rep. 83; Pine Bluff, etc., R. Co. *v.* McKenzie, 75 Ark. 100, 16 R. R. R. 50, 39 Am. & Eng. R. Cas., N. S., 50, 86 S. W. 834; St. Louis, etc., Ry. Co. *v.* Burrow & Co., 89 Ark. 178, 33 R. R. R. 754, 56 Am. & Eng. R. Cas., N. S., 754, 116 S. W. 198; St. Louis, etc., R. Co. *v.* Murphy, 60 Ark. 333, 30 S. W. 419; St. Louis, etc., R. Co. *v.* Neel, 56 Ark. 279, 19 S. W. 963.

Illinois.—Illinois Cent. R. Co. *v.* Smyser, 38 Ill. 354, 87 Am. Dec. 301; Toledo, etc., R. Co. *v.* Gilvin, 81 Ill. 511; Cleveland, etc., R. Co. *v.* Wilson, 99 Ill. App. 367.

Iowa.—Aiken *v.* Chicago, etc., R. Co., 68 Iowa 363, 27 N. W. 281, 25 Am. & Eng. R. Cas. 377.

Maine.—Lord *v.* Maine Cent. R. Co., 105 Me. 255, 33 R. R. R. 130, 56 Am. & Eng. R. Cas., N. S., 130, 74 Atl. 117.

Michigan.—Meloche *v.* Chicago, etc., R. Co., 116 Mich. 69, 74 N. W. 301, 10 Am. & Eng. R. Cas., N. S., 82.

Missouri.—Landes *v.* Pacific Railroad, 50 Mo. 346.

New York.—Coyle *v.* Western R. Corp., 47 Barb. 152; Salinger *v.* Simmons, 57 Barb. 513, 8 Abb. Prac., N. S., 409, 2 Lans. 325; Lakeman *v.* Grinnell, 18 N. Y. Super. Ct. 625; Packard *v.* Getman, 6 Cow. 757, 16 Am. Dec. 475; Rubens *v.* Ludgate Hill Steamship Co., 65 Hun 625, 20 N. Y. S. 481; Cragin *v.* New York Cent. R. Co., 51 N. Y. 63; Shelton *v.* Merchants' Dispatch Transp. Co., 36 N. Y. Super. Ct. 527; Grosvenor *v.* New York Cent. R. Co., 39 N. Y. 34, 5 Abb. Prac., N. S., 345.

North Carolina.—Berry *v.* Southern R. Co., 122 N. C. 1002, 30 S. E. 14.

Texas.—East Line, etc., R. Co. *v.* Hall, 64 Tex. 615; International, etc., R. Co. *v.* Dimmit County Pasture Co., 5 Tex. Civ. App. 186, 23 S. W. 754; Ft. Worth, etc., R. Co. *v.* Martin, 12 Tex. Civ. App. 464, 35 S. W. 21; Gulf, etc., R. Co. *v.* Compton (Tex. Civ. App.), 38 S. W. 220; Martin *v.* Ft. Worth, etc., R. Co., 3 Tex. Civ. App. 556, 22 S. W. 1007; Missouri, etc., R. Co. *v.* Beard, 34 Tex. Civ. App. 188, 78 S. W. 253; New York, etc., Co. *v.* Weiss (Tex. Civ. App.), 47 S. W. 674; Missouri Pac. R. Co. *v.* Graves (Tex.), 2 Wilson, Civ. Cas. Ct. App., § 676.

Washington.—Roy *v.* Griffin, 26 Wash. 106, 66 Pac. 120.

England.—Parker *v.* Great Western R. Co., 7 M. & G. 253, 7 Scott N. R. 835, 8 Jur. 194, 13 L. J. C. P. 105, 3 Railw. Cas. 563, 1 Ry. & C. T. Cas. 15.

Plaintiff delivered a wagon to defendant road for shipment after 5 o'clock p. m. The shipping clerk had left, but the wagon was received, and plaintiff was informed that the bill of lading would be made out the next day. Held, that the relation of carrier was assumed by defendant, though the bill of lading was not yet issued. Gulf, etc., R. Co. *v.* Compton (Tex. Civ. App.), 38 S. W. 220.

Where it is the custom of a railroad company when requested, to place an empty car upon its sidetrack at a flag station to be loaded with cotton, and when loaded, to remove the car, and subsequently issue a receipt and bill of lading, the railway company is liable for the loss of cotton so loaded, if notice has been given by the shipper of its destination, and that it is ready for removal, and nothing remains to be done by him before shipment, although no receipt or bill of lading has been given for the cotton, and the name of the consignee has not been furnished to the carrier. St. Louis, etc., R. Co. *v.* Murphy, 60 Ark. 333, 30 S. W. 419.

27. Wellborn *v.* Southern R. Co., 6 Ga. App. 151, 64 S. E. 491.

Where the evidence authorizes a finding that certain goods were delivered to the agent of a railroad company, who received them and was made acquainted with their destination, a contract of carriage may be implied, although no bill of lading or receipt for the goods be issued and delivered to the shipper. Southern R. Co. *v.* Johnson, 2 Ga. App. 36, 58 S. E. 333.

receipt for it.[28] For unless a bill of lading is demanded by the shipper none need be issued by the carrier; if he accepts the goods and puts them upon their voyage on a verbal contract, he is liable as a common carrier.[29] A carrier may enter into a contract without a bill of lading, a part of which is to be performed before the goods are in a course of actual transportation by him, and in so far as such contract would be binding upon other persons it will be binding upon him also.[30]

Promise of Bill of Lading.—When the goods were received for shipment and a bill of lading was promised to be delivered the next day, the relation of common carrier was assumed.[31]

Liability for Delay—No Receipt or Contract.—That no receipt was given and no written contract of shipment made with an express company, does not prevent a shipper from recovering damages for delay in delivery in such shipment where the carrier accepted the package for shipment.[32]

Effect of Bill of Lading as Initiating Liability.—The mere issuance of a bill of lading for goods does not constitute a constructive acceptance of them by the carrier for transportation.[33] The unauthorized issuance by an agent of a

28. Failure to count, tally, book, or receipt for.—The plaintiff delivered a quantity of beer barrels at one of defendant's freight houses at A. for transportation to B., directed to a person in that city. Plaintiff had been in the habit on former occasions of sending receipts for barrels, for defendant to sign, which was not done on this occasion. It was the duty and practice of defendant's receiving and shipping clerk, on being notified of the delivery of goods for transportation, to correct, tally and check them, and hand his account to the bookkeeper, to be entered into a book, from which goods were shipped. No goods were shipped unless receipted. The barrels in question were not tallied, counted, booked or receipted, nor did plaintiff ask to have them counted tallied, etc., but the barrels were delivered to the carrier at the usual place for transacting such business and received by persons in the employ of defendant, and defendant's agent was present when a portion of the property was delivered, and directed where it should be put. The barrels were accidently destroyed by fire on the same evening they were delivered, and while in defendant's possession, in its freight house. It was held that defendant was liable, as a common carrier, for the value of the barrels. Coyle *v.* Western R. Corp. (N. Y.), 47 Barb. 152.

29. Verbal contract sufficient.—East Line, etc., R. Co. *v.* Hall, 64 Tex. 615; Gulf, etc., R. Co. *v.* Compton (Tex. Civ. App.), 38 S. W. 220; Texas, etc., R. Co. *v.* Nicholson, 61 Tex. 491; Martin *v.* Ft. Worth, etc., R. Co., 3 Tex. Civ. App. 556, 22 S. W. 1007; Missouri Pac. R. Co. *v.* Douglas & Sons, 2 Tex. App. Civ. Cas., § 28, 16 Am. & Eng. R. Cas. 98; Ft. Worth, etc., R. Co. *v.* Martin, 12 Tex. Civ. App. 464, 35 S. W. 21, affirmed in 93 Tex. 660, no op.; Texas, etc., R. Co. *v.* Wheat, 2 Tex. App. Civ. Cas., § 165; Missouri, etc., R. Co. *v.* Beard, 34 Tex. Civ. App. 188, 78 S. W. 253; Pacific Exp. Co. *v.* Black, 8 Tex. Civ. App. 363, 27 S. W. 830; International, etc., R. Co. *v.* Dimmit County Pasture Co., 5 Tex. Civ. App. 186, 23 S. W. 754; Missouri Pac. R. *v.* Graves, 2 Tex. App. Civ. Cas., § 676; Texas, etc., R. Co. *v.* Hamm, 2 Tex. App. Civ. Cas., § 491.

If goods are delivered to a carrier and received by it for shipment, they may be transmitted without the issuance of a bill of lading, and may be regarded as in the possession of the carrier from the time received, though there was no instruction nor intention that the carrier should immediately make the shipment. Missouri, etc., R. Co. *v.* Beard, 34 Tex. Civ. App. 188, 78 S. W. 253, citing East Line, etc., R. Co. *v.* Hall, 64 Tex. 615; Gulf, etc., R. Co. *v.* Trawick, 80 Tex. 270, 15 S. W. 568, 18 S. W. 948.

30. Texas, etc., R. Co. *v.* Nicholson, 61 Tex. 491.

31. Promise to issue bill of lading next day.—In Gulf, etc., R. Co. *v.* Compton (Tex. Civ. App.), 38 S. W. 220, it appeared that plaintiff delivered a wagon to defendant railroad for shipment after 5 o'clock p. m. The shipping clerk had left, but the wagon was received for immediate transportation by its depot employees, and plaintiff was informed that the bill of lading would be made out the next day. It was held that the relation of common carrier was assumed by defendant.

32. Liability for delay—No receipt or contract.—Pacific Exp. Co. *v.* Black, 8 Tex. Civ. App. 363, 27 S. W. 830.

33. Effect of issuance of bill of Lading.—*United States.*—Missouri Pac. R. Co. *v.* McFadden, 154 U. S. 155, 38 L. Ed. 944, 14 S. Ct. 990; Robinson, etc., Co. *v.* Memphis, etc., R. Co., 9 Fed. 129; S. C., 16 Fed. 57; Pollard *v.* Vinton, 105 U. S. 7, 26 L. Ed. 998; St. Louis, etc., R. Co. *v.* Com-

steamship company of bills of lading to a purchaser of goods then in a public warehouse, subject to the orders of the seller, who is bound by the terms of the sale to deliver the same on board, does not bind the company, so as to make it responsible for the goods while in the warehouse and before their actual delivery into its custody; and an acceptance of the goods on board the ship is a ratification of the contract of carriage made by the bills of lading only from the time of such delivery.[34] And the giving a bill of lading for goods in the possession of another railroad in another state, in the course of transportation, is not a delivery of the goods named therein though the shipper surrendered the bill of lading of the latter carrier at the time.[35]

Authority of Officer.—The mere employment of an officer or agent for such boat does not clothe him with apparent authority to issue bills of lading for goods not on board, or not delivered to one authorized to receive freight on account of the boat.[36]

Effect of Statute as to Commencement of Liability—Change of Rule.—A statutory provision that the transportation of goods by a common carrier shall be considered as commenced from the time the bill of lading is signed does not preclude the liability from commencing at the time of the delivery of the goods, so as to make the carrier liable for loss when no bill is issued.[37]

mercial Union Ins. Co., 139 U. S. 223, 35 L. Ed. 154, 11 S. Ct. 554.

Arkansas.—Martin *v.* St. Louis, etc., R. Co., 55 Ark. 510, 19 S. W. 314, 56 Am. & Eng. R. Cas. 112.

Illinois.—Lake Shore, etc., R. Co. *v.* National Live Stock Bank, 178 Ill. 506, 53 N. E. 326.

Louisiana.—Hunt *v.* Mississippi Cent. R. Co., 29 La. Ann. 446; Fearn, etc., Co. *v.* Richardson, 12 La. Ann. 752.

Maryland.—Baltimore, etc., R. Co. *v.* Wilkens, 44 Md. 11, 22 Am. Rep. 26.

Minnesota.—National Bank *v.* Chicago, etc., R. Co., 44 Minn. 224, 46 N. W. 342, 9 L. R. A. 263, 20 Am. St. Rep. 566.

North Carolina.—Williams *v.* Wilmington, etc., R. Co., 93 N. Car. 42.

England.—Berkley *v.* Whitling, 7 Ad. & El. 29; Grand *v.* Norway, 70 C. B. 665, 2 Eng. L. & Eq. 337.

34. Bill of lading for goods in public warehouse—Subject to vendors order.—Cunard Steamship Co. *v.* Kelly, 53 C. C. A. 310, 113 Fed. 678.

35. Bill of lading issued for flour in possession of another railroad in another state—Bills of lading exchanged.—Where a railroad company in Missouri issues a bill of lading reciting it has received a car load of flour in apparent good condition for transportation to New Orleans, and at the time the flour is in Kansas, in the possession of another railroad company transporting it to Missouri, such bill of lading is void, under the statute in question; and the delivery of such bill of lading is not a delivery of the commodity named therein, though at the time of its issue the receiver of the bill surrendered the Kansas railroad bill of lading therefor. Ætna Nat. Bank *v.* Water Power Co., 58 Mo. App. 532.

36. Authority of officer.—The above principle is set forth in the following cases which hold that in an action by the shipper against the owners of a steamboat engaged in the business of common carriers, to recover for the nondelivery of goods as per bill of lading, the defendants are liable only for so much of the goods as was actually received on the boat or delivered to some one authorized to receive freight on her account. Dean *v.* King, 22 O. St. 118, followed in Colburn *v.* Oberlin Bldg., etc., Ass'n, 35 O. St. 258, following and approving Sturdevant *v.* Tuttle, 22 O. St. 111.

37. Art. 283, Rev. Stats., has not changed common-law rule.—Article 283 of the Revised Statutes of Texas, providing that the trip or voyage shall be considered as having commenced from the time of the signing of the bill of lading, and the liability of the common carrier shall attach as at common law from after such signing, has not changed the common-law rule. East Line, etc., R. Co. *v.* Hall, 64 Tex. 615; International, etc., R. Co. *v.* Dimmit County Pasture Co., 5 Tex. Civ. App. 186, 23 S. W. 754; Gulf, etc., R. Co. *v.* Trawick, 80 Tex. 270, 15 S. W. 568, 18 S. W. 948; S. C., 68 Tex. 314, 4 S. W. 567, 2 Am. St. Rep. 494.

There is an apparent conflict between the authorities above quoted and the cases of Texas, etc., R. Co. *v.* Nicholson, 61 Tex. 491, 495, and the Gulf, etc., R. Co. *v.* McCorquodale, 71 Tex. 41, 9 S. W. 80, but in those two cases the railway had contracted to receive and ship the cattle at certain dates, but refused to receive them when presented for shipment, and it was held that the railways were responsible as mere individuals for breach of their contract. But where there is an actual delivery to and acceptance by the railway company, its liability as a common carrier as under the common law begins at that time. International, etc., R. Co. *v.*

§§ 408-411. Evidence of Delivery—§ 408. Presumptions and Burden of Proof.—Where it is established that goods have been delivered to a common carrier, the presumption is that they were delivered for carriage, and not for storage,[38] and the burden is upon the carrier to show that it received the goods as a warehouseman, and not as a carrier.[39]

§ 409. Admissibility of Evidence to Show Delivery.—The testimony of a witness who has no independent knowledge of the weight of grain shipped, except what was contained in the certificates of weight, is inadmissible in such an action to prove the quantity of grain shipped.[40]

A certificate of weight not shown to be an exact copy of the book of original entries, or that it was given in the regular course of business, by one authorized to do so, is inadmissible in an action against a carrier for loss of grain in transit, to prove the delivery of the grain to and reception thereof by the carrier.[41]

§§ 410-411. Sufficiency of Evidence of Delivery—§ 410. In General.—In establishing the beginning of a common carrier's liability, the general rules as to weight and sufficiency, which apply in civil cases generally, are applicable. So it has been held in an action against an express company for failure to deliver a package, that evidence that the package was delivered at a railroad depot to a person in charge thereof, and that the employees of the railroad company were in the custom of so receiving packages for the express company, was sufficient to sustain an allegation that the package was received at the office of defendant, at its place of business.[42] And where cotton placed on a platform within a short distance of a depot building at which defendant's agent transacted business is destroyed by fire, the jury are warranted in finding that such agent knew of the presence of such cotton and was guilty of negligence, especially where defendant does not place him on the stand.[43]

§ 411. Bill of Lading or Receipt as Evidence.—In General.—The bill of lading and waybill made out by the authorized agent of a common carrier are competent evidence tending to prove that the articles therein described were delivered to such carrier for shipment.[44] In an action against a carrier for the loss of freight, the fact that the carrier issued a bill of lading or a receipt, for the goods, while not conclusive, is prima facie proof that they were delivered to the carrier, and accepted by it for transportation.[45] But a bill of lading or receipt acknowledging the delivery and acceptance of goods for shipment is not

Dimmit County Pasture Co., 5 Tex. Civ. App. 186, 23 S. W. 754.

When liability as warehousemen ceases.—Under Rev. St., art. 283, declaring when the liability of warehousemen ceases and that of common carriers attaches, liability as a common carrier does not attach until a bill of lading is given, or until the goods have been delivered to, and received by, the carrier. Texas, etc., R. Co. *v.* Wheat, 2 Tex. App. Civ. Cas., § 165. See, also, Missouri Pac. R. Co. *v.* Douglas & Sons, 2 Tex. App. Civ. Cas., § 28, 16 Am. & Eng. R. Cas. 98. See post, "Carrier as Warehouseman," chapter 13.

38. Presumptions and burden of proof.—Berry *v.* Southern R. Co., 122 N. C. 1002, 30 S. E. 14.

39. Burden of proof.—Berry *v.* Southern R. Co., 122 N. C. 1002, 30 S. E. 14. See post, "Carrier as Warehouseman," chapter 13.

40. Admissibility.—Emison *v.* Ohio, etc., R. Co., 12 O. C. D. 727.

41. Certificate of weight.—Emison *v.* Ohio, etc., R. Co., 12 O. C. D. 727.

42. Sufficiency of evidence.—Pacific Exp. Co. *v.* Black, 8 Tex. Civ. App. 363, 27 S. W. 830.

43. Ft. Worth, etc., R. Co. *v.* Martin, 12 Tex. Civ. App. 464, 35 S. W. 21.

44. Bill of lading.—Chicago, etc., R. Co. *v.* Johnston, 58 Neb. 236, 78 N. W. 499.

45. Prima facie evidence.—*United States.* The Titania, 65 C. C. A. 215, 131 Fed. 229; The Willie D. Sandhoval, 92 Fed. 286.

Illinois.—Lake Shore, etc., R. Co. *v.* National Live Stock Bank, 178 Ill. 506, 53 N. E. 326; Northern Transp. Co. *v.* McClary, 66 Ill. 233.

Kentucky.—Pittsburg, etc., R. Co. *v.* American Tobacco Co., 126 Ky. 582, 31 Ky. L. Rep. 1013, 25 R. R. R. 586, 48 Am.

conclusive and such delivery and acceptance may be denied.[46] Yet a common carrier having given a bill of lading for goods can not relieve himself from his liability on the ground that the goods were never received by him, except by the clearest proof of that fact.[47] It has been held that where a railroad company issues a transferable bill of lading acknowledging the receipt of goods, it is estopped to deny the receipt of the goods when the bill of lading is in the hands of innocent third parties; and where the general agent of a corporation issues such a bill, the company is also so estopped.[48]

Receipt Given to Transfer Company.—A receipt given by a railroad company to a transfer company, to whom the consignor had delivered the goods, is sufficient to show a delivery by the latter to the railroad company.[49]

Effect of Statutes Prohibiting Issuance of Bill of Lading before Delivery to Carrier.—The fact that the carrier is forbidden by statute to issue a bill of lading for goods before they are delivered to it does not affect the value of bills of lading as evidence of delivery to the carrier.[50]

§ 412. Question of Law or Fact.—Delivery of freight to a common carrier, where an action is brought to recover for loss of articles alleged to have been delivered, is a question of fact for the determination of the jury.[51]

& Eng. R. Cas., N. S., 586, 104 S. W. 377.

Louisiana.—Flower *v.* Downs, 12 Rob. 101.

Mississippi.—Southern Exp. Co. *v.* Craft, 49 Miss. 480, 19 Am. Rep. 4.

Missouri.—Smith *v.* Missouri Pac. R. Co., 74 Mo. App. 48.

Nebraska.—Chicago, etc., R. Co. *v.* Johnston, 58 Neb. 236, 78 N. W. 499.

New York.—Fasy *v.* International Nav. Co., 177 N. Y. 591, 70 N. E. 1098.

North Carolina.—Chicago, etc., R. Co. *v.* Johnston, 58 Neb. 236, 78 N. W. 499.

Upon a written receipt by which the defendants, carriers by water, acknowledged having received from the plaintiffs three hogsheads of tobacco, which they were to freight to New Orleans, and, if they bore inspection, pay the price they may sell for, the defendants are liable for the value of one of the hogsheads lost in the warehouse, and never put on board of their boat. Jones *v.* Walker, 13 Tenn. (5 Yerg.) 427.

46. Not conclusive.—Where the agent of a boat carelessly issues a bill of lading acknowledging the receipt of freight not on board or not delivered to a person authorized to receive it, the owners of the boat are not estopped, by reason of such carelessness, from denying the receipt thereof, although the shipper may have been misled thereby. Dean *v.* King, 22 O. St. 118, followed in Colburn *v.* Oberlin Bldg., etc., Ass'n, 35 O. St. 258, following and approving Sturdevant *v.* Tuttle, 22 O. St. 111.

47. Evidence to overcome bill of lading.—Little Miami, etc., R. Co. *v.* Dodds & Co., 13 O. Dec. 407, 1 Cin. R. 47.

48. Transferable bill of lading.—Smith *v.* Missouri Pac. R. Co., 74 Mo. App. 48.

49. Receipt given to transfer company.—New York, etc., Co. *v.* Weiss (Tex. Civ. App.), 47 S. W. 674.

50. Effect of statute prohibiting issuance prior to delivery.—St. Louis, etc., R. Co. *v.* Commercial Union Ins. Co., 139 U. S. 223, 35 L. Ed. 154, 11 S. Ct. 554; Jemison *v.* Birmingham, etc., R. Co., 125 Ala. 378, 28 So. 51; Martin *v.* St. Louis, etc., R. Co., 55 Ark. 510, 19 S. W. 314, 56 Am. & Eng. R. Cas. 112.

51. Question of fact.—Houston, etc., R. Co. *v.* Hodde, 42 Tex. 467, 471; Southern R. Co. *v.* Johnson, 2 Ga. App. 36, 58 S. E. 333.

CHAPTER VI.

Bills of Lading.

I. Definition and Nature Generally, § 413.
II. Form and Contents, §§ 414-424.
A. In General, § 414.
B. Writing, § 415.
C. Signature, § 416.
D. Name of Consignee, § 417.
E. Statement of Value of Goods, § 418.
F. Notations and Marginal Memoranda, § 419.
G. The Law, § 420.
H. Published Tariffs, § 421.
I. Expense Account of Carrier, § 422.
J. Recitals of Fact, § 423.
K. Special Conditions and Limitations, § 424.
III. Issuance and Acceptance, §§ 425-450.
A. Necessity for Issuance, § 425.
B. Authority to Issue, §§ 426-442.
a. Agents and Employees, §§ 426-428.
(1) Agents and Employees Who May Issue, §§ 426-427.
(a) Master of Vessel and Other Employees, § 426.
(b) Agents and Employees of Railroads, § 427.
(2) Proof or Estoppel to Deny Authority of Agent, § 428.
b. Receipt of Goods as Prerequisite to Issuance, §§ 429-442.
(1) Necessity, §§ 429-438.
(a) In General, § 429.
(b) Authority of Agents or Employees, § 430.
(c) As against Bona Fide Consignee or Transferee, §§ 431-437.
aa. Doctrine Prevailing in Most Jurisdictions, § 431.
bb. Doctrine in New York, Pennsylvania and Certain Other States, § 432.
cc. Conflict of Laws, § 433.
dd. Effect of Custom or Course of Business, § 434.
ee. Negligence of Carrier, § 435.
ff. Fraudulent Bills of Lading, § 436.
gg. Effect of State Statutes, § 437.
(d) Due Bill Promising to Issue a Bill of Lading, § 438.
(2) Subsequent Delivery to Carrier as Validating Bill, §§ 439-442.
(a) In General, § 439.
(b) Where Statute Prohibits Issuance before Receipt of Goods, § 440.
(3) Presumption as to Receipt of Goods, § 441.
(4) Proof of Nonreceipt of Goods, § 442.
C. Duty to Issue, § 443.
D. Issuance in Duplicate, § 444.
E. Acceptance and Assent to Provisions, §§ 445-450.
a. In General, § 445.
b. Assent to and Acceptance by Consignor, §§ 446-450.
(1) Effect of Acceptance, § 446.
(2) Presumption of Assent from Acceptance, §§ 447-450.
(a) In General, § 447.
(b) Rebuttal of Presumption, §§ 448-450.
aa. Failure of Shipper to Sign Bill, § 448.
bb. Failure to Read or Examine Bill, §§ 449-450.

(aa) In General, § 449.
(bb) Bill Received after Goods Shipped, § 450.
IV. Validity, §§ 451-454.
A. Fraud or Mistake, § 451.
B. Forgery, § 452.
C. No Goods Delivered to Carrier, § 453.
D. Partial Invalidity, § 454.
V. Construction, Operation and Effect, §§ 455-513.
A. General Rules of Construction, § 455.
B. Construction of Words and Phrases, § 456.
C. Notice of Contents, § 457.
D. Blanks and Unintelligible Characters, § 458.
E. Conditions on Back of Bill, § 459.
F. Usage and Custom, § 460.
G. Conflict of Laws, § 461.
H. Foreign Laws, § 462.
I. Fraudulent Bills of Lading, § 463.
J. Partial Invalidity, § 464.
K. When Bill of Lading Part of Contract, § 465.
L. Dual Character as Contract and as Receipt, §§ 466-479.
a. In General, § 466.
b. As Contract Generally, § 467.
c. As a Receipt in General, § 468.
d. Parol Evidence to Vary or Contradict Bill, §§ 469-479.
(1) As a Contract, §§ 469-470.
(a) Between the Parties, § 469.
(b) Between Consignor and Consignee, § 470.
(2) Merger of Oral Negotiations and Prior Verbal Agreements, § 471.
(3) To Explain Ambiguities and Technical Terms, § 472.
(4) Parol Evidence to Alter or Contradict Receipt Clauses of Bill, §§ 473-476.
(a) In General, § 473.
(b) Recital of Fact of Receipt and Quantity of Goods, § 474.
(c) Recital as to Quality or Condition of Goods, § 475.
(d) Recital as to Ownership of Goods, § 476.
(5) Recitals as to Rate and Receipt of Freight, § 477.
(6) Destination or Place of Delivery, § 478.
(7) Terminus of Road, § 479.
M. As Contract of Carriage, §§ 480-481.
a. As Imposing Liability of Common Carrier, § 480.
b. As Contract to Carry Specified Thing, § 481.
N. As Evidence of Fact and Time of Receipt and Acceptance of Shipment, §§ 482-483.
a. As Evidence of Fact of Receipt and Acceptance of Shipment, § 482.
b. Time of Receipt of Shipment, § 483.
O. Destination or Place of Delivery, § 484.
P. Person to Whom Delivery Authorized, §§ 485-487.
a. In General, § 485.
b. Open and Closed Shipments, § 486.
c. Direction to Notify a Named Person, § 487.
Q. As Warranty or Evidence of Quantity, Quality or Condition of Goods, §§ 488-494.
a. Effect as Warranty of Quantity, etc., §§ 488-491.
(1) In General, § 488.
(2) Recital That Contents Unknown, § 489.
(3) Recital That Goods in "Good Order," etc., § 490.
(4) Recital That "Contents Unknown and in Apparent Good Order," § 491.

b. As Evidence of Quantity, Quality or Condition of Goods, §§ 492-494.
(1) As Evidence of Quality or Condition of Goods, § 492.
(2) As Evidence of Quantity or Weight of Goods, §§ 493-494.
(a) In General, § 493.
(b) Bill Made Exclusive Evidence of Quantity by Agreement, § 494.
R. Effect of Understating Quantity, § 495.
S. As Evidence or Warranty of Title or Ownership, §§ 496-498.
a. In General, § 496.
b. As Warranty of Title of Shipper, § 497.
c. Shipment Fraudulently Procured by Person Not Owner of Goods, § 498.
T. Effect as Vesting Property in Consignee, §§ 499-510.
a. When Property Vests in Consignee, §§ 499-503.
(1) In General, § 499.
(2) Stoppage in Transitu, § 500.
(3) Consignment to Enemy or Neutral, § 501.
(4) Consignee Making Advances on Faith of Bill, § 502.
(5) Removal of Goods by Unauthorized Person, § 503.
b. When Property Does Not Vest in Consignee, §§ 504-510.
(1) In General, § 504.
(2) Bill Not Delivered to Consignee, § 505.
(3) Consignment to Be Sold on Commission, § 506.
(4) Goods Billed to Shipper's Order, §§ 507-508.
(a) In General, § 507.
(b) Bill with Draft Attached to Be Delivered to Purchaser of Goods, § 508.
(5) Bill to Another than Purchaser, § 509.
(6) Bill to A. for Use of B., § 510.
U. Stipulations as to Value, § 511.
V. Freight and Demurrage, § 512.
W. As Evidence of Carrier's Liability as Warehouseman, § 513.
VI. Transfer, §§ 514-589.
A. Negotiability, §§ 514-518.
a. General Rule, § 514.
b. Distinguished from Commercial Paper, § 515.
c. Effect of Statutes Making Bills of Lading Negotiable, § 516.
d. Bills Marked "Not Negotiable," § 517.
e. When Carrier Incurs Liability of Warehousemen, § 518.
B. Transferability or Assignability, § 519.
C. Mode of Transfer, §§ 520-536.
a. In General, § 520.
b. Delivery of Bill, §§ 521-531.
(1) In General, § 521.
(2) Intention to Pass Title, § 522.
(3) Necessity for Acceptance of Possession, § 523.
(4) Possession of Bill of Lading as Evidence of Title in Holder, §§ 524-525.
(a) In General, § 524.
(b) Rebuttal of Presumption, § 525.
(5) Exception in Favor of Stoppage in Transitu, § 526.
(6) Right of Disposal Retained by Consignor, §§ 527-528.
aa. In General, § 527.
bb. Consignor Indebted to Consignee, § 528.
(7) Necessity for Indorsement to Enable Holder to Sue, § 529.
(8) Necessity for Shipper's Order, § 530.
(9) Bill of Lading Signed in Blank, § 531.
c. Transfer by Indorsement and Delivery, §§ 532-534.
(1) In General, § 532.
(2) Necessity and Sufficiency of Indorsement or Assignment, § 533.

(3) Necessity for Delivery of Bill, § 534.
d. Sale or Payment of Draft with Bill of Lading Attached, § 535.
e. Attachment of Bill of Lading, § 536.
D. Persons Who Make Transfer, §§ 537-539.
a. In General, § 537.
b. Consignee, § 538.
c. Consignor or Agent, § 539.
E. Consideration, § 540.
F. Effect of Transfer, §§ 541-576.
a. In General, § 541.
b. As Transfer of Contract between Consignor and Consignee, § 542.
c. Operation as Constructive Delivery of Goods, § 543.
d. Rights and Title of Holder Generally, §§ 544-576.
(1) In General, § 544.
(2) No Goods Delivered to Carrier, §§ 545-546.
(a) In General, § 545.
(b) Title to Goods Not Shipped or Included in Bill, § 546.
(3) Goods Shipped Without Authority of Owner, § 547.
(4) Assignment Made After Arrival of Goods, § 548.
(5) Bona Fide Holders, §§ 549-552.
(a) General Rule, § 549.
(b) Effect of Statutes Making Bills of Lading Negotiable, § 550.
(c) Estoppel of Carrier to Deny Conditions and Representations in Bill, § 551.
(d) Duplicate or Triplicate Bill, § 552.
(6) Holder with Knowledge of Defects in Transferrer's Title, § 553.
(7) Holder of Lost or Stolen Bill of Lading, § 554.
(8) Holder of Forged Bill of Lading, § 555.
(9) Rights and Liabilities as to Carriers, §§ 556-565.
(a) As to Delivery of Goods, §§ 556-562.
aa. Duty to Deliver to Transferee, § 556.
bb. Production and Cancellation of Bill of Lading, § 557.
cc. Payment of Freight and Charges as Condition Precedent, § 558.
dd. Demand of Delivery, § 559.
ee. Liability for Misdelivery or Delay, § 560.
ff. Waiver or Rights to Indorsement of Bill, § 561.
gg. Duplicate and Triplicate Bills, § 562.
(b) Effect of Custom of Carrier, § 563.
(c) Explanation of Alteration in Bill, § 564.
(d) Liability for Freight and Demurrage, § 565.
(10) Rights and Liabilities as to Consignor, §§ 566-568.
(a) In General, § 566.
(b) As Defeating Stoppage in Transitu, § 567.
(c) Liability for Price of Goods, § 568.
(11) Rights and Liabilities as to Consignee, §§ 569-571.
(a) In General, § 569.
(b) Claim for Advances to Consignor, § 570.
(c) Liability to Consignee on Contract of Consignor, § 571.
(12) Rights and Liabilities as to Third Persons, §§ 572-576.
(a) Claims of Third Person against Transferrers, § 572.
(b) Against Vendor of Consignor, § 573.
(c) Against Subsequent Purchaser of Goods, § 574.
(d) Subsequent Liens, §§ 575-576.
aa. In General, § 575.
bb. Subsequent Attachments, § 576.
G. Pledge, Mortgage or Collateral Security, § 577.

H. Purchase or Discount of Draft with Bill of Lading Attached, §§ 578-587.
a. Recording Papers, § 578.
b. Rights and Title of Purchaser, §§ 579-584.
(1) As to Consignor and Consignee, §§ 579-582.
(a) In General, § 579.
(b) Notice That Payment to Drawer Unauthorized, § 580.
(c) Drawer Indebted to Drawee or Consignee, § 581.
(d) Right to Sue for Purchase Price or for Conversion of Goods, § 582.
(2) Rights against Carrier, § 583.
(3) Rights against Third Persons, § 584.
c. Liability of Purchaser for Shortage or Inferiority of Shipment, § 585.
d. Effect of Consignee's Accepting and Paying Draft, § 586.
e. Charging Unpaid Draft to Drawer's Account, § 587.
I. Deposit of Draft with Bill of Lading Attached for Collection, § 588.
J. Duplicate and Triplicate Bills, § 589.
VII. Effect As Binding Intermediate and Terminal Carrier, § 590.
VIII. Modification or Rescission, § 591.
IX. Surrender, Discharge or Release, § 592.
X. Actions, §§ 593-602.
A. Rights of Action and Defenses, § 593.
B. Parties, §§ 594-595.
a. Plaintiffs, § 594.
b. Defendants, § 595.
C. Pleading, §§ 596-597.
a. Bill, Petition, or Complaint, § 596.
b. Answer, § 597.
D. Production of Bill of Lading or Proof of Contents, § 598.
E. Proof of Execution of Bill, § 599.
F. Province of Court, § 600.
G. Instructions, § 601.
H. Directing Verdict, § 602.

§ 413. Definition and Nature Generally.—A "bill of lading" is a commercial instrument, and is a written acknowledgment signed by the master of a vessel or by a common carrier that he has received the goods therein described from the shipper, to be transported on the terms therein expressed to the described place of destination, and there to be delivered to the consignee or parties therein designated.[1] It is a very ancient but not exclusively a sea document, and has long been used by carrying companies in transportation on lakes and rivers by steamboats, as well as sailing vessels, on canals,[2] and for transportation by land.[3] In all such cases it has been denominated and treated as a com-

1. **Bill of lading defined.**—The Delaware (U. S.), 14 Wall. 579, 600, 20 L. Ed. 779; Pollard *v.* Vinton, 105 U. S. 7, 26 L. Ed. 998.

Michigan.—McMillan *v.* Michigan, etc., R. Co., 16 Mich. 79, 93 Am. Dec. 208.

North Dakota.—Yegen *v.* Northern Pac. R. Co., 19 N. Dak. 70, 121 N. W. 205.

Bill as "liquidation of account."—A bill of lading for goods sent to a purchaser, and not objected to by him, amounts to a liquidation of an account within the statute of Illinois, giving interest on settlement of accounts from the day of "liquidating accounts between the parties and ascertaining the balance," there being no other transaction between the parties. Cooper *v.* Coates (U. S.), 21 Wall. 105, 22 L. Ed. 481.

2. **Not exclusively a sea document.**—Baltimore, etc., R. Co. *v.* Wilkens, 44 Md. 11, 22 Am. Rep. 26.

"Strictly speaking, the term 'bill of lading' is one to be applied only to the written evidence of a contract for the carriage and delivery of goods sent by sea, though it is now in common use in connection with the affreightment of goods by water other than the sea, or carriage by rail." Sellers *v.* Savannah, etc., R. Co., 123 Ga. 386, 51 S. E. 398.

3. It may be that the name "bill of lading" is not strictly appropriate to a re-

mercial instruments.[4]

Clean Bill of Lading.—A "clean" bill of lading, that is to say, a bill of lading which is silent as to the place of stowage, imports a contract that the goods are to be stowed under deck.[5]

Blind Billing.—The act of shipping without stating the charges is called "blind billing."[6]

§§ 414-424. Form and Contents—§ 414. In General.—Any instrument embodying the features specified in the definition above is a bill of lading, so far as its legal effect is concerned, regardless of its form or the name by which it may be designated.[7]

Account for Freight or Freight Bill.—An account for freight or a mere "freight bill" does not, however, constitute a bill of lading.[8]

Due Bill Issued in Lieu of Incoming Bill of Lading.—A "due bill" issued by a carrier in lieu of a bill of lading for cotton, representing the excess of cotton called for by an incoming bill of lading on the issuance of an outgoing bill for a smaller number of bales, could not be regarded as a bill of lading.[9]

§ 415. Writing.—A bill of lading, although written with a pencil, is valid.[10]

§ 416. Signature.—A bill of lading must be signed by the master of the vessel or other agent of the carrier.[11]

Signature of Shipper.—Under the laws of Georgia it is required that the shipper sign the bill of lading in order to make the special terms of the contract of carriage effective.[12]

§ 417. Name of Consignee.—See post, "Person to Whom Delivery Authorized," §§ 485-487.

§ 418. Statement of Value of Goods.—Failure to file in a blank left in a bill of lading for the value of the shipment does not invalidate the bill of lading.[13]

ceipt given by a common carrier as the evidence of a bailment for transportation upon land, but the receipts of railroad companies are by usage so denominated, and in respect to assignability and the effect of assignment, the rule is the same touching them as touching bills of lading proper. Bass *v.* Glover, 63 Ga. 745.

4. **Commercial instrument.**—Baltimore, etc., R. Co. *v.* Wilkens, 44 Md. 11, 22 Am. Rep. 26.

5. **Clean bill of lading.**—The Delaware (U. S.), 14 Wall. 579, 20 L. Ed. 779; Niagara *v.* Cordes (U. S.), 21 How. 7, 16 L. Ed. 41.

6. **Blind billing.**—Standard Oil Co. *v.* United States, 179 Fed. 814, 103 C. C. A. 172.

7. **No particular form required.**—Coosa River Steamboat Co. *v.* Barclay, 30 Ala. 120.

8. **Account for freight or freight bill.**—Coosa River Steamboat Co. *v.* Barclay, 30 Ala. 120.

9. **Due-bill.**—St. Louis, etc., R. Co. *v.* Citizens' Bank, 87 Ark. 26, 112 S. W. 154, 30 R. R. R. 290, 53 Am. & Eng. R. Cas., N. S., 290, 128 Am. St. Rep. 17.

10. **Writing.**—Main *v.* Jarrett, 83 Ark. 426, 104 S. W. 163, 119 Am. St. Rep. 144.

11. **Signature of master of vessel.**—The Delaware (U. S.), 14 Wall. 579, 20 L. Ed. 779; Covell *v.* Hill, 6 N. Y. 374; Gage *v.* Jaqueth (N. Y.), 1 Lans. 207; Babcock *v.* Orbison, 25 Ind. 75.

12. **Signature of shipper.**—Rhodes, etc., Co. *v.* Continental Furniture Co., 2 Ga. App. 116, 58 S. E. 293.

But it has been held that the assent of a shipper to the terms of a bill of lading may be established without his signature thereto, so as to make the contract binding as between him and the carrier. Piedmont Mfg. Co. *v.* Columbia, etc., R. Co., 19 S. C. 353.

13. **Failure of shipper to state value in bill of lading.**—The failure of a shipper who fills up a bill of lading for goods of the value of more than fifty dollars, to fill in the blank left for the value of the shipment, does not constitute a fraudulent representation or concealment of the value of the goods on his part, nor a refusal to give their value when requested, although he knew that the carrier bestowed a higher degree of care on packages of the value of fifty dollars or more than on packages of less value. His mere knowledge of that fact could not change the degree of care imposed by law upon

§ 419. Notations and Marginal Memoranda.—Where there is a notation or memorandum on the margin of the bill at its execution, touching the manner of carrying, it may be regarded as part of the contract,[14] if the shipper assented to such notation;[15] but a marginal note placed on a bill of lading by the shipper is no part of the bill.[16]

§ 420. The Law.—What the law inserts is as much a part of a bill of lading as what is expressly written therein.[17]

The provisions of the Interstate Commerce Law forbidding railroads to recover a greater or less compensation for the transportation of property than is specified in the published schedule of rates is a part of every bill of lading for the shipment of interstate freight.[18]

§ 421. Published Tariffs.—Where a bill of lading by a railway company states that it is "subject to the published tariff of said company and its connections," and said tariff is well known to the shipper, rates in the tariff, when applicable, will form part of the freight contract.[19]

§ 422. Expense Account of Carrier.—An expense account, furnished by the carrier, and showing the amount of freight, constitutes no part of the bill of lading, and can not be used in aid of it unless referred to therein.[20]

§ 423. Recitals of Fact.—See post, "Dual Character as Contract and as Receipt," §§ 466-479.

§ 424. Special Conditions and Limitations.—See post, "Special Contracts," chapter 8; "Limitation of Liability," chapter 14.

§§ 425-450. Issuance and Acceptance—§ 425. Necessity for Issuance.—Shippers should in all cases require a bill of lading, whether the contract of affreightment is by charter party, or without any such customary written instrument.[21] But a bill of lading is not essential to charge the carrier with the duty of safely transporting the property delivered for carriage, although the doing of the several acts entitling the shipper to a bill of lading is necessary to charge the carrier with the safety of the articles intrusted to him.[22]

the carrier, nor imposed upon the shipper any higher duty than if he were ignorant of such fact. Adams Exp. Co. *v.* Green, 112 Va. 527, 72 S. E. 102.

14. Marginal notes.—Lawrence *v.* McGregor (O.), Wright 193.

15. Assent of shipper.—A notation, on a bill of lading issued for a car load of fruit, that the vents on the car are to be closed, is not a direction from the shipper to the carrier to close the vents, without proof that the shipper assented to such notation. Yesbik *v.* Macon, etc., R. Co., 75 S. E. 207, 11 Ga. App. 298.

16. Marginal note placed on bill by shipper.—A marginal note put by the quartermaster's department on bills of lading of vessels chartered by them, "that if on the arrival of the vessel at the port of destination the consignee should order her to another place to discharge, such order in all cases to be in writing on the bill of lading," does not make a part of the contract entered into by the vessel; and if her port of destination be plainly expressed in the body of the bill, the consignee can not, in virtue of the marginal memorandum, order her to go forward to another port. United States *v.* Kimbal (U. S.), 13 Wall. 636, 20 L. Ed. 503.

17. The law.—Ryan *v.* M. K. & T. R. Co., 65 Tex. 13, 57 Am. Rep. 589, 23 Am. & Eng. R. Cas. 703.

18. Intestate commerce law.—Southern R. Co. *v.* Harrison, 119 Ala. 539, 24 So. 552, 43 L. R. A. 385, 72 Am. St. Rep. 936.

19. Published tariffs.—Atchison, etc., R. Co. *v.* Roberts, 3 Tex. Civ. App. 370, 22 S. W. 183.

20. Expense account of carrier.—Texas, etc., R. Co. *v.* Wood (Tex. Civ. App.), 23 S. W. 744.

21. Necessity for bills of lading.—The Delaware (U. S.), 14 Wall. 579, 20 L. Ed. 779.

22. Montgomery, etc., R. Co. *v.* Kolb, 73 Ala. 396; Alabama Mid. R. Co. *v.* Darby, 119 Ala. 531, 24 So. 713; Southern R. Co. *v.* Johnson, 2 Ga. App. 36, 58 S. E. 333; Johnson *v.* Stoddard, 100 Mass. 306; Meloche *v.* Chicago, etc., R. Co., 116 Mich. 69, 74 N. W. 301; Tate *v.* Yazoo, etc., R. Co., 78 Miss. 842, 29 So. 392, 84 Am. St. Rep. 649, 651.

"Delivery of a bill of lading is not necessary to fix liability upon the defend-

§§ 426-442. Authority to Issue—§§ 426-428. Agents and Employees—§§ 426-427. Agents and Employees Who May Issue—§ 426. Master of Vessel and Other Employees.—Master of Vessel.—If the signer of a bill of lading is not the master of the vessel, the vessel is not bound, because the bill is signed by one not in privity with the owner. The taker assumes the risk, not only of the genuineness of the signature, but of the fact that the signer was the master of the vessel.[23] Evidence of authority to sign for the master is, however, admissible notwithstanding the rule.[24]

Second Clerk of Steamer.—The second clerk of a steamer may execute on behalf of the boat a bill of lading in the ordinary way and his receipt for merchandise delivered on board will be binding.[25]

§ 427. Agents and Employees of Railroads.—Railroad Freight Agent.—A railroad freight agent has authority to receive goods and issue bills of lading therefor.[26]

General Freight Agent of Railroad Company and Assistants.—A bill of lading signed by the general freight agent of a railroad company is in effect issued by the company itself, and is valid in the hands of innocent third parties, although the goods were not in fact received,[27] and the signature of an assistant general officer is as effective as that of the officer himself.[28]

§ 428. Proof or Estoppel to Deny Authority of Agent.—Express authority of the agent of a carrier to issue a bill of lading or give a receipt for goods need not be proved, when he acted as such in the proper place for receiving goods for the carrier, and was in possession of the carrier's stamp to be used on such receipts, and the carrier took possession of the goods and caused them to be shipped, presumably with knowledge of the receipt, which it

ant. Wells *v.* Wilmington, etc., R. Co., 51 N. C. 47, 72 Am. Dec. 556." Berry *v.* Southern R. Co., 122 N. C. 1002, 30 So. 14.

A carrier may enter into a contract without a bill of lading, a part of which is to be performed before the goods are in course of actual transportation by him, and in so far as such contract would be binding upon other persons it will be binding upon him also. Texas, etc., R. Co. *v.* Nicholson, 61 Tex. 491.

A parol contract by which a railway company agrees to receive cattle on its cars for transportation on a day certain, and which is violated by not having the cars as agreed on, may be made the basis of recovery against the company for all damages caused thereby. It can not claim that its liability did not attach until the signing of a bill of lading for the cattle, which were delivered at a subsequent day, and after the contract had been violated. The liability of the company for damages was for a breach of contract, which made delivery of the cattle at the time specified impossible. Texas, etc., R. Co. *v.* Nicholson, 61 Tex. 491; Texas, etc., R. Co. *v.* Hamm, 2 Texas App. Civ. Cas., § 491.

Arts. 281, 282, 283, Rev. Stat. of Texas, do not provide that a railroad is not liable as a common carrier of cattle upon a parol agreement to furnish cars, and that its liability does not attach until the signing of the bill of lading. These sections merely provide that the carriers' common-law liability as such shall commence from the time the bill of lading is signed; and that previous thereto they shall be liable only as warehousemen for goods placed in their depots or warehouses to be thereafter transported. They do not in terms or in effect exempt the carrier from such liabilities as he is subject to in common with all persons, no matter what occupation they may pursue. Texas, etc., R. Co. *v.* Nicholson, 61 Tex. 491.

23. **Who may issue.**—Pollard *v.* Vinton, 105 U. S. 7, 26 L. Ed. 998; The Schooner Freeman (U. S.), 18 How. 182, 15 L. Ed. 341; The Delaware (U. S.), 14 Wall. 579, 20 L. Ed. 779.

24. Putnam *v.* Tillotson (Mass.), 13 Metc. 517.

25. **Second clerk of steamer.**—Kirkman *v.* Bowman (La.), 8 Rob. 246.

26. **Railroad freight agent.**—St. Louis, etc., R. Co. *v.* Citizens' Bank, 87 Ark. 26, 112 S. W. 154, 30 R. R. R. 290, 53 Am. & Eng. R. Cas., N. S., 290, 128 Am. St. Rep. 17. See post, "Proof of and Estoppel to Deny Authority of Agent," § 428.

27. **General freight agent—Railroad company and assistants.**—Smith *v.* Missouri Pac. R. Co., 74 Mo. App. 48; Sealy *v.* Missouri, etc., R. Co., 84 Kan. 479, 114 Pac. 1077, 41 L. R. A., N. S., 500.

28. Sealy *v.* Missouri, etc., R. Co., 84 Kan. 479, 114 Pac. 1077, 41 L. R. A., N. S., 500.

must be presumed the carrier had before they were so shipped. No other proof of agency is necessary than that the agent's acts justify the party dealing with him in believing that he had authority.[29] In such case the carrier is estopped to deny the authority of its agent.[30]

Proof of Authority as Requisite to Admission of Bill in Evidence.—See post, "Proof of Execution of Bill," § 599.

§§ 429-442. Receipt of Goods as Prerequisite to Issuance—§§ 429-438. Necessity—§ 429. In General.—If a bill of lading is issued by a carrier before the goods are tendered it is void, and does not become effective until the goods are offered to the carrier in such condition as it should receive them.[31] The receipt of the goods is the foundation of the contract to carry and deliver expressed in a bill of lading. If no goods are actually received by the carrier there can be no valid contract to carry or deliver,[32] and the bill imposes no liability on the carrier as an insurer until the goods are actually received by it.[33] While the authorities may differ upon the point of what constitutes delivery to a carrier, the rule is nowhere questioned that when delivery has not been made to the carrier, but, on the contrary, the evidence shows that the goods remained

29. **Proof or estoppel to deny authority of agent.**—Hansen *v.* Flint, etc., R. Co., 9 Am. St. Rep. 791, 73 Wis. 346, 41 N. W. 529, so holding as to a bill of lading for a through shipment over connecting lines.

30. **Agent left in charge of station after resignation accepted.**—Though the agent of a carrier at a certain station resigned, and his resignation was accepted, yet, no one else having been appointed for a year, and the company having in the interim left the station keys with him, and he having personally seen to billing freight, though he did not sign the bills of lading, and no notice of his discharge having been given the public, but he having been permitted to act substantially as he had done before, the carrier was estopped by its acquiescence to question his authority as agent as between it and shippers who dealt with him. Louisville, etc., R. Co. *v.* Mink, 103 S. W. 294, 126 Ky. 337, 31 Ky. L. Rep. 833.

31. **Necessity.**—Central, etc., R. Co. *v.* Cook, 4 Ga. App. 698, 62 S. E. 464; Adams *v.* Brig Pilgrim, 10 West. L. J. 141, 1 O. Dec. 477. See post, "Subsequent Delivery to Carrier as Validating Bill," §§ 439-442.

Compared to bill of exchange.—Common carrier is no more bound by bill of lading given by his agent for goods not received by him, than by a bill of exchange signed with his name by one not authorized to sign it. Hunt *v.* Mississippi Cent. R. Co., 29 La. Ann. 446.

32. *United States.*—Pollard *v.* Vinton, 105 U. S. 7, 26 L. Ed. 998; Robinson *v.* Memphis, etc., R. Co., 16 Fed. 57; St. Louis, etc., R. Co. *v.* Knight, 122 U. S. 79, 30 L. Ed. 1077, 7 S. Ct. 1132; The Willie D. Sandhoval, 92 Fed. 286; The Schooner Freeman (U. S.), 18 How. 182, 15 L. Ed. 341. The Harter Act has not altered the rule. The Isola Di Procida, 124 Fed. 942.

Arkansas.—St. Louis, etc., R. Co. *v.* Citizens' Bank, 87 Ark. 26, 112 S. W. 154, 30 R. R. R. 290, 53 Am. & Eng. R. Cas., N. S., 290, 128 Am. St. Rep. 17.

Under the express provisions of Kirby's Dig., §§ 524, 532, a carrier can not issue any receipt for goods not actually received into the possession of the carrier or warehouseman. St. Louis, etc., R. Co. *v.* Citizens' Bank, 87 Ark. 26, 112 S. W. 154, 30 R. R. R. 290, 53 Am. & Eng. R. Cas., N. S., 290, 128 Am. St. Rep. 17.

Connecticut.—Relyea *v.* New Haven Rolling Mill Co., 42 Conn. 579, 75 Fed. 420.

Indiana.—Stone *v.* Wabash, etc., R. Co., 9 Ill. App. 48; Union R., etc., Co. *v.* Yeager, 34 Ind. 1.

Louisiana.—Fearn, etc., Co. *v.* Richardson, 12 La. Ann. 752; Fellows *v.* Powell, 16 La. Ann. 316, 79 Am. Dec. 581; Hunt *v.* Mississippi Cent. R. Co., 29 La. Ann. 446; Kirkman *v.* Bowman (La.), 8 Rob. 246.

Maryland.—Baltimore, etc., R. Co. *v.* Wilkins, 44 Md. 11, 22 Am. Rep. 26.

Massachusetts. — Sears *v.* Wingate (Mass.), 3 Allen 103.

Minnesota.—National Bank *v.* Chicago, etc., R. Co., 44 Minn. 224, 46 N. W. 342, 560, 9 L. R. A., N. S., 263, 20 Am. St. Rep. 566.

New York.—Miller *v.* Hannibal, etc., R. Co., 90 N. Y. 430, 43 Am. Rep. 179.

North Carolina.—Black *v.* Wilmington, etc., R. Co., 92 N. C. 42, 53 Am. Rep. 450.

Canada.—Erb *v.* Great Western Ry. Co., 5 Can. Sup. Ct. Rep. 179.

England.—Grant *v.* Norway, 2d Eng. L. & E. 337, 10 C. B. (Eng.) 665.

33. **Liability as insurer of goods.**—Pittsburg, etc., R. Co. *v.* American Tobacco Co., 126 Ky. 582, 25 R. R. R. 586, 48 Am. & Eng. R. Cas., N. S., 586, 104 S. W. 377.

in the possession of the shipper or his agent after the signing and passing of the bill of lading, the carrier is not liable as carrier under the bill.[34] In such case no action is maintainable either on the ground of contract or tort.[35]

§ 430. Authority of Agents or Employees.—It is within the scope of authority of the freight agents of a carrier to receive goods and issue bills of lading therefor,[36] but such an agent is without authority to issue a bill of lading for goods not delivered into the carrier's actual or constructive possession,[37] and it is not within the apparent scope of his authority to issue such bill when the goods have not been received.[38] This doctrine is applicable to transportation contracts made in that form by railway companies and other carriers by land, as well as carriers by sea.[39]

Particular Officers and Agents of Carrier by Water.—The master of a vessel,[40] its shipping agent,[41] the second clerk of a vessel,[42] or an officer or

34. Missouri Pac. R. Co. *v.* McFadden, 154 U. S. 155, 38 L. Ed. 944, 14 S. Ct. 990.

35. Friedlander *v.* Texas, etc., R. Co., 130 U. S. 416, 425, 32 L. Ed. 991, 9 S. Ct. 570.

36. Authority of agents or employees.—St. Louis, etc., R. Co. *v.* Citizens' Bank, 87 Ark. 26, 112 S. W. 154, 128 Am. St. Rep. 17, 53 Am. & Eng. R. Cas., N. S., 290, 30 R. R. R. 290. See ante, "Authority of Agents or Employees," § 430.

37. Authority of agent.—*United States.*—American Sugar-Refining Co. *v.* Maddock, 36 C. C. A. 42, 93 Fed. 980; Cunard, etc., Co. *v.* Kelley, 53 C. C. A. 310, 115 Fed. 678; Pollard *v.* Vinton, 105 U. S. 7, 12, 26 L. Ed. 998; Robinson *v.* Memphis, etc., R. Co., 16 Fed. 57; St. Louis, etc., R. Co. *v.* Knight, 122 U. S. 79, 30 L. Ed. 1077, 7 S. Ct. 1132; The Schooner Freeman (U. S.), 18 How. 182, 15 L. Ed. 341; The Isola Di Procida, 124 Fed. 942; The Willie D. Sandhoval, 92 Fed. 286.

Arkansas.—St. Louis, etc., R. Co. *v.* Citizens' Bank, 87 Ark. 26, 30 R. R. R. 290, 53 Am. & Eng. R. Cas., N. S., 290, 112 S. W. 154, 128 Am. St. Rep. 17.

Louisiana.—Fearn, etc., Co. *v.* Richardson, 12 La. Ann. 752; Fellows *v.* Powell, 16 La. Ann. 316, 79 Am. Dec. 581; Hunt *v.* Mississippi Cent. R. Co., 29 La. Ann. 446; Kirkman *v.* Bowman (La.), 8 Rob. 246.

Maine.—Witzler *v.* Collins, 70 Me. 290, 35 Am. Rep. 327.

Maryland.—Baltimore, etc., R. Co. *v.* Wilkens, 44 Md. 11, 22 Am. Rep. 26.

Massachusetts. — Kelley *v.* Bowker (Mass.), 11 Gray 428, 71 Am. Dec. 725; Sears *v.* Wingate (Mass.), 3 Allen 103; Shepherd *v.* Naylor (Mass.), 5 Gray 591.

Minnesota.—National Bank *v.* Chicago, etc., R. Co., 44 Minn. 224, 46 N. W. 342, 560, 9 L. R. A., N. S., 263, 20 Am. St. Rep. 566.

North Carolina.—Black *v.* Wilmington, etc., R. Co., 92 N. C. 42, 53 Am. Rep. 450.

Ohio.—Dean *v.* King, 22 O. St. 118; Little Miami, etc., R. Co. *v.* Dodds & Co., 1 C. S. C. 47, 13 O. Dec. Reprint 407.

Washington.—Roy *v.* Northern Pac. R. Co., 42 Wash. 572, 85 Pac. 53, 7 Am. & Eng. Ann. Cas. 728, 6 L. R. A., N. S., 302.

England.—Coleman *v.* Riches, 16 C. B. 104; Grant *v.* Norway, 10 C. B. (Eng.) 665, 2d Eng. L. & E. 337; Hubbersty *v.* Ward, 8 Exch. 330; Lickbarrow *v.* Mason, 2 T. R. (Eng.) 77.

Canada.—Erb *v.* Great Western Ry. Co., 5 Can. Sup. Ct. Rep. 179.

38. St. Louis, etc., R. Co. *v.* Citizens' Bank, 87 Ark. 26, 128 Am. St. Rep. 17, 112 S. W. 154, 30 R. R. R. 290, 53 Am. & Eng. R. Cas., N. S., 290.

Apparent authority of officer of cargo steamboat.—The mere employment of an officer or agent for a cargo steamboat does not clothe him with apparent authority to issue bills of lading for goods not on board, or not delivered to one authorized to receive freight on account of the boat. Dean *v.* King, 22 O. St. 118.

39. Application of rule to carriers by land.—St. Louis, etc., R. Co. *v.* Knight, 122 U. S. 79, 30 L. Ed. 1077, 7 S. Ct. 1132; The Schooner Freeman (U. S.), 18 How. 182, 15 L. Ed. 341; Pollard *v.* Vinton, 105 U. S. 7, 26 L. Ed. 998; Friedlander *v.* Texas, etc., R. Co., 130 U. S. 416, 32 L. Ed. 991, 9 S. Ct. 570; Missouri Pac. R. Co. *v.* McFadden, 154 U. S. 155, 38 L. Ed. 944, 14 S. Ct. 990; St. Louis, etc., R. Co. *v.* Commercial Union Ins. Co., 139 U. S. 223, 35 L. Ed. 154, 11 S. Ct. 554.

40. Master of vessel.—Friedlander *v.* Texas, etc., R. Co., 130 U. S. 416, 424, 32 L. Ed. 991, 9 S. Ct. 570; The Schooner Freeman (U. S.), 18 How. 182, 15 L. Ed. 341; The Lady Franklin (U. S.), 8 Wall. 325, 19 L. Ed. 455; Pollard *v.* Vinton, 105

41. Shipping agents—Rivers of interior.—Shipping agents of a vessel at points on the rivers of the interior where cargo is received and delivered, can not, by giving a bill of lading for goods not received for shipment bind the vessel or its owner. Pollard *v.* Vinton, 105 U. S. 7, 26 L. Ed. 998.

42. Second clerk of vessel.—Kirkman *v.* Bowman (La.), 8 Rob. 246.

agent for a cargo steamboat,[43] has no authority to sign a bill of lading for goods not actually put on board the vessel.

A railroad freight agent has no authority to issue a bill of lading or receipt for goods not actually received.[44]

Agreement That Shipper Shall Retain Custody Till Future Day.—The carrier's liability as such will not attach on issuing the bill in a case where not only is there a failure to deliver, but there is also an understanding between the parties that delivery shall not be made till a future day, and that the goods, until then, shall remain in the custody of the shipper.[45]

Issuance by Agent for Several Vessels in Name of Another than That in Which Goods Loaded.—Where an agent of several vessels issues a bill of lading in the name of one vessel for goods which are in fact loaded upon another, the first vessel is not liable on the bill of lading in case of loss.[46]

Application of Doctrine of Estoppel.—Where the agent of a boat carelessly issues a bill of lading acknowledging the receipt of freight not on board or not delivered to a person authorized to receive it, the owners of the boat are not estopped, by reason of such carelessness, from denying the receipt thereof, although the shipper may have been misled thereby.[47]

Burden of Proof of Authority of Agent.—The authority of the agent of a carrier to issue a bill of lading or to make a special contract so as to bind it for goods not delivered must be shown by the person asserting it.[48]

U. S. 7, 25 L. Ed. 998; St. Louis, etc., R. Co. *v.* Knight, 122 U. S. 79, 30 L. Ed. 1077, 7 S. Ct. 1132; The Delaware (U. S.), 14 Wall. 579, 20 L. Ed. 779; Missouri Pac. R. Co. *v.* McFadden, 154 U. S. 155, 38 L. Ed. 944, 14 S. Ct. 990; St. Louis, etc., R. Co. *v.* Commercial Union Ins. Co., 139 U. S. 223, 35 L. Ed. 154, 11 S. Ct. 554.

Before the power to make and deliver a bill of lading could arise, some person must have shipped goods on the vessel. Only then could there be a shipper, and only then could there be goods shipped. The goods need not have been actually placed on the deck of the vessel. If they came within the control and custody of the officers of the boat for the purpose of shipment, the contract of carriage has commenced, and the evidence of it in the form of a bill of lading would be binding. But without such a delivery there is no contract of carrying and the agent of the carrier has no authority to make one. Pollard *v.* Vinton, 105 U. S. 7, 26 L. Ed. 998; Baltimore, etc., R. Co. *v.* Wilkens, 44 Md. 11, 22 Am. Rep. 26; Adoue *v.* Seeligson & Co., 54 Tex. 593.

43. **Officer of cargo steamboat.**—Dean *v.* King, 22 O. St. 118.

44. **Railroad freight agent.**—It is beyond the scope of a railroad freight agent's authority, to issue a bill of lading or receipt for goods not actually received. St. Louis, etc., R. Co. *v.* Citizens' Bank, 87 Ark. 26, 112 S. W. 154, 30 R. R. R. 290, 53 Am. & Eng. R. Cas., N. S., 290, 128 Am. St. Rep. 17.

45. **Agreement that shipper shall retain custody till future day.**—Missouri Pac. R. Co. *v.* McFadden, 154 U. S. 155, 38 L. Ed. 944, 14 S. Ct. 990.

A carrier is not liable on a bill of lading for property which at the time of the signing of the bill remains in the hands of the shipper for the purpose of being compressed for the shipper's account, and was destroyed by fire before the delivery to the carrier had been consummated. Missouri Pac. R. Co. *v.* McFadden, 154 U. S. 155, 38 L. Ed. 944, 14 S. Ct. 990; Arthur *v.* Texas, etc., R. Co., 204 U. S. 505, 51 L. Ed. 590, 27 S. Ct. 338.

46. **Issuance of bill by agent of several vessels in name of vessel on which no goods loaded.**—The Lady Franklin (U. S.), 8 Wall. 325, 19 L. Ed. 455.

A bill of lading given by a person who was agent of several vessels all alike engaged in transporting goods brought to certain waters by a railway line, but having separate owners, and not connected by any joint undertaking to be responsible for one another's breaches of contract—the bill, through mistake of the agent, acknowledging that certain goods had been shipped on the vessel A., when, in fact, they had been previously shipped on the vessel B., and a bill of lading given accordingly—will not make the vessel A. responsible, the goods having been lost by the vessel B., and the suit being one by shippers of the merchandise against the owner of the vessel, A., and the case being thus unembarrassed by any question of a bona fide purchase on the strength of the bill of lading. The Lady Franklin (U. S.), 8 Wall. 325, 19 L. Ed. 455.

47. Dean *v.* King, 22 O. St. 118.

48. **Burden of proof of authority.**—Kirkman *v.* Bowman (La.), 8 Rob. 246, so holding as to proof of authority of second clerk on vessel.

§§ 431-437. As against Bona Fide Consignee or Transferee—§ 431. Doctrine Prevailing in Most Jurisdictions.—A bill of lading issued by a station or shipping agent of a railroad company or other common carrier, without receiving the goods named in it for transportation, imposes no liability upon the carrier. Even as against a bona fide consignee or indorsee for value, the carrier is not estopped by the statements of the bill of lading issued by his agent from showing that the goods therein described were not in fact received for transportation, unless by its usual mode of doing business it has given to its agents authority to issue bills of lading for goods not received. This doctrine is supported by an unbroken line of authorities in England[49] and Canada;[50] and is the settled doctrine of the federal courts;[51] and of the courts of most of the states among which are Alabama,[52] Arkansas,[53] Illinois,[54] Louisiana,[55] Maryland,[56]

49. English cases.—Brown *v.* Powell Coal Co., L. R. 10 C. P. 562; Coleman *v.* Riches, 16 C. B. 104; Cox, Patterson, & Co. *v.* Bruce & Co., 18 C. B. Div. 147; Grant *v.* Norway, 10 C. B. (Eng.) 665, 2d Eng. L. & E. 337; Hubbertsty *v.* Ward, 8 Exch. 330; Jessel *v.* Bath, L. R. 2, Exch. 267; Lickbarrow *v.* Mason, 2 T. R. (Eng.) 77; McLean *v.* Fleming, L. R. 2, H. L. Sc. 128; Meyer *v.* Dresser, 16 C. B., N. S., 646; Uessel *v.* Bath, 2 Exch. 267.

In Grant *v.* Norway, 10 C. B. (Eng.) 665, 2d Eng. L. & E. 337, the question was first distinctly presented for adjudication in England, whether the master of a vessel signing a bill of lading for goods which have never been shipped is to be considered the agent of the owner in that behalf, so as to make the latter responsible to an indorsee of the bill for value, and after full consideration the court of common pleas held that he was not.

"And this has not been at all changed by the Bills of Lading Act: 18 & 19 Vict., c. 111, § 3." National Bank *v.* Chicago, etc., R. Co., 44 Minn. 224, 46 N. W. 342, 9 L. R. A., N. S., 263, 20 Am. St. Rep. 566.

American cases.—The English rule is stated in Henderson *v.* Louisville, etc., R. Co., 116 La. 1047, 41 So. 252, 114 Am. St. Rep. 582; National Bank *v.* Chicago, etc., R. Co., 44 Minn. 224, 46 N. W. 342, 9 L. R. A., N. S., 263, 20 Am. St. Rep. 566.

50. Erb *v.* Great Western R. Co., 5 Can. Sup. Ct. Rep. 179.

51. Friedlander *v.* Texas, etc., R. Co., 130 U. S. 416, 9 S. Ct. 570, 32 L. Ed. 991; Missouri Pac. R. Co. *v.* McFadden, 154 U. S. 155, 38 L. Ed. 944, 14 S. Ct. 990; Pollard *v.* Vinton, 105 U. S. 7, 26 L. Ed. 998; Robinson *v.* Memphis, etc., R. Co., 16 Fed. 57; The Schooner Freeman (U. S.), 18 How. 182, 15 L. Ed. 341; St. Louis, etc., R. Co. *v.* Knight, 122 U. S. 79, 30 L. Ed. 1077, 7 S. Ct. 1132; The Lady Franklin (U. S.), 8 Wall. 325, 19 L. Ed. 455; The Delaware (U. S.), 14 Wall. 579, 20 L. Ed. 779; St. Louis, etc., R. Co. *v.* Commercial Union Ins. Co., 139 U. S. 223, 35 L. Ed. 154, 11 S. Ct. 554.

Deficiency of goods—Mistake.—The rule that the master of a vessel has no authority by virtue of his position, either actual or apparent, to sign a bill of lading for cargo not actually received on board, applies when there is only a deficiency in part through mistake, and the shipowner can not be held liable even by an innocent indorsee of the bill of lading for value, for such shortage, if the quantity actually received is delivered. American Sugar-Refining Co. *v.* Maddock, 36 C. C. A. 42, 93 Fed. 980.

52. Haas *v.* Citizens' Bank, 144 Ala. 562, 113 Am. St. Rep. 61, 39 So. 129, 1 L. R. A., N. S., 242; Jasper Trust Co. *v.* Kansas City, etc., R. Co., 99 Ala. 416, 14 So. 546, 42 Am. St. Rep. 75, 4 Am. & Eng. Enc. Law 549, 6 Cyc. Law & Proc. 426; Peck *v.* Dinsmore (Ala.), 4 Port. 212.

53. Martin *v.* St. Louis, etc., R. Co., 55 Ark. 510, 19 S. W. 314; St. Louis, etc., R. Co. *v.* Citizens' Bank, 128 Am. St. Rep. 17, 22, 87 Ark. 26, 112 S. W. 154, 30 R. R. R. 290, 53 Am. & Eng. R. Cas., N. S., 290.

54. Lake Shore, etc., R. Co. *v.* National Live Stock Bank, 178 Ill. 506, 13 Am. & Eng. R. Cas., N. S., 1, 53 N. E. 326.

Where the goods were not actually received by the carrier it is not estopped from explaining or contradicting a bill of lading or shipping receipt issued by its agent, even though the party named therein as the consignee has in good faith advanced money, relying upon the shipping receipt or bill of lading. Lake Shore, etc., R. Co. *v.* National Live Stock Bank, 178 Ill. 506, 53 N. E. 326, 13 Am. & Eng. R. Cas., N. S., 1.

In Lake Shore, etc., R. Co. *v.* National Live Stock Bank, 178 Ill. 506, 53 N. E. 326, 13 Am. & Eng. R. Cas., N. S., 1. "Appellee insists that a carrier of goods is estopped from contradicting the bill of

55. Hunt *v.* Mississippi Cent. R. Co., 29 La. Ann. 446; Fellows *v.* Powell, 16 La. Ann. 316, 79 Am. Dec. 581; Henderson *v.* Louisville, etc., R. Co., 116 La. 1047, 41 So. 252, 114 Am. St. Rep. 582; Fearn, etc., Co. *v.* Richardson, 12 La. Ann. 752.

56. Baltimore, etc., R. Co. *v.* Wilkens, 44 Md. 11, 22 Am. Rep. 26.

Massachusetts,[57] Minnesota,[58] Missouri,[59] North Carolina,[60] Ohio,[61] Texas,[62] Washington,[63] and other states.

Basis and Reasoning of Doctrine.—The reasoning by which the doctrine which prevails in England and in the federal courts and the courts of most of the states is usually supported is that a bill of lading is not negotiable in the sense in which a bill of exchange or promissory note, is negotiable, where the purchaser need not look beyond the instrument itself; that so far as it is a receipt for the goods it is susceptible of explanation or contradiction, the same as any other receipt; that the whole question is one of the law of agency; that it is not within the scope of the authority of the shipping agent of a carrier to issue bills of lading where no property is in fact received for transportation; that the extent of his authority, either real or apparent, is to issue bills of lading for freight actually received; and his real and apparent authority—i. e., the power in which his principal has clothed him in the character in which he is held out to the world—is the same, viz. to give bills of lading for goods received for transportation; and that this limitation upon his authority is known to the commercial world, and there-

lading or shipping receipt issued by an agent, against a party named therein, who has in good faith advanced money relying upon it; and cites, as sustaining this proposition, Northern Transp. Co. *v.* McClary, 66 Ill. 233, and St. Louis, etc., R. Co. *v.* Larned, 103 Ill. 293. In the McClary case it was not controverted that 100 barrels of flour were delivered by a consignor to the Chicago & Northwestern Railway Company to be shipped to Chicago, and thence by water on propellers of the Northern Transportation Company, to Ogdensburg, N. Y. and thence by rail to Barton's Landing, Vt., consigned to McClary. The agent of the Transportation company receipted the Chicago & Northwestern Railway Company for the same, and by mistake the flour was not delivered at the proper warehouse, and became lost to the consignee. Here was an actual receipt of goods for shipment, which were lost by neglect. The carriage had commenced. It was said in that case (page 236): 'Moreover, this is really a contest between two carriers, which the appellee should not be required to settle. His right of recovery from one or the other is conceded. Having established a clear prima facie liability against the appellant, it seems but just that he should be allowed to enjoy the recovery he has obtained without being harassed further to determine a question of liability as between the companies themselves. In the Larned case, certain cotton left at defendant's depot by an agent of Larned, without orders for shipment, was shipped, and wrongly delivered. The defendant issued a bill of lading, which was attached to a draft which was paid by Larned. The latter sued and recovered. Neither of these cases has any of the features of this case, as there was a clear liability in those cases for affreightments actually received by the carrier and lost to the consignees.'"

57. Sears *v.* Wingate (Mass.), 3 Allen 103.

In Sears *v.* Wingate (Mass.), 3 Allen 103, it is held that a bill of lading is conclusive evidence against the master of a vessel in favor of a consignee, not a party to the contract, who has advanced money upon faith of its statements, as to the amount and condition of the property of which it acknowledges the receipt, so far as from the whole instrument and the usage of trade the facts may be regarded as absolute statements from the master's own knowledge, but it is not conclusive against the owners, as to the property not actually shipped, because it is not within the scope of the master's authority by virtue of his position, either actual or apparent, to sign but such as is put on board.

58. National Bank *v.* Chicago, etc., R. Co., 44 Minn. 224, 46 N. W. 342, 560, 9 L. R. A., N. S., 263, 20 Am. St. Rep. 566; Swedish-American Nat. Bank *v.* Chicago, etc., R. Co., 19 R. R. R. 783, 42 Am. & Eng. R. Cas., N. S., 783, 96 Minn. 436, 105 N. W. 69, overruling McCord *v.* Western Union Tel. Co., 39 Minn. 181, 12 Am. St. Rep. 636, 39 N. W. 315, 1 L. R. A. 143; Ratzer *v.* Burlington, etc., R. Co., 58 Am. St. Rep. 530, 64 Minn. 245, 66 N. W. 988.

59. Louisiana Nat. Bank *v.* Laveille, 52 Mo. 380.

60. Black *v.* Wilmington, etc., R. Co., 92 N. C. 42, 53 Am. Rep. 450.

61. Dean *v.* King, 22 O. St. 118; Little Miami, etc., R. Co. *v.* Dodds & Co., 1 C. S. C. 47, 13 O. Dec. Reprint 407.

62. Bills of lading are not commercial or negotiable paper in the hands of an innocent party, which precludes or estops the carrier from denying that the freight was received as therein admitted. Adoue *v.* Seeligson & Co., 54 Tex. 393.

63. Roy *v.* Northern Pac. R. Co., 42 Wash. 572, 85 Pac. 53, 7 Am. & Eng. Ann. Cas. 728, 6 L. R. A., N. S., 302.

fore any person purchasing a bill of lading issued by the agent of a carrier acts at his own risk as respects the existence of the fact (the receipt of the goods) upon which alone the agent has authority to issue the bill, the rule being that if the authority of an agent is known to be open for exercise only in a certain event, or upon the happening of a certain contingency, or the performance of a certain condition, the occurrence of the event, or the happening of the contingency, or the performance of the condition must be ascertained by him who would avail himself of the results ensuing from the exercise of the authority.[64] This presumption is predicated upon the assumption that the authority of the agent is limited to issuing bills of lading for freight received before or concurrent with the issuing of the bills, which would be the presumption in the absence of evidence to the contrary. No doubt a carrier might adopt a different mode of doing business by giving his agents authority to issue bills of lading for goods not received, so as to render him liable in such cases to third parties.[65]

Bills Stating That "Weight Unknown" or "Subject to Correction."—See post, "Effect or Warranty of Quantity, etc.," §§ 488-491. See also, post, "Effect of State Statutes," § 437.

§ 432. Doctrine in New York, Pennsylvania and Certain Other States.—The courts of New York[66] hold that a railroad company is liable upon a

64. **Reason of doctrine.**—National Bank *v.* Chicago, etc., R. Co., 44 Minn. 224, 46 N. W. 342, 9 L. R. A., N. S., 263, 20 Am. St. Rep. 566.

Since the master of the ship has no authority to sign a bill of lading for goods not actually put on board, the consignee and every other party taking, or dealing with, or making advances on the faith of such an instrument which is untruthful in this particular, does so with notice of this limitation of the power of the master, and acts at his own risks both as respects the fact of shipment and the quantity of cargo purported by a bill of lading to be shipped. Baltimore, etc., R. Co. *v.* Wilkens, 44 Md. 11, 22 Am. Rep. 26.

65. National Bank *v.* Chicago, etc., R. Co., 44 Minn. 224, 46 N. W. 342, 9 L. R. A., N. S., 263, 20 Am. St. Rep. 566.

66. Armour *v.* Michigan Cent. R. Co., 65 N. Y. 111, 22 Am. Rep. 603; Bank *v.* New York, etc., R. Co., 106 N. Y. 195, 12 N. E. 433, 60 Am. Rep. 440, 32 Am. & Eng. R. Cas. 497; Byrne *v.* Weeks (N. Y.), 4 Abb. Dec. 657; Dickerson *v.* Seelye (N. Y.), 12 Barb. 99; Farmers', etc., Nat. Bank *v.* Erie R. Co., 72 N. Y. 188; Van Santen *v.* Standard Oil Co. (N. Y.), 17 Hun 140, affirmed in 81 N. Y. 171.

In Bank *v.* New York, etc., R. Co., 106 N. Y. 195, 12 N. E. 433, 60 Am. Rep. 440, 32 Am. & Eng. R. Cas. 497, it is held that a railroad company is liable upon a bill of lading issued in its name by an agent having authority to issue bills on receipt of property for transportation to one who, upon transfer by the shipper, upon the faith of the bill, has, in good faith, discounted a draft drawn upon the consignee, although no goods were delivered to the railroad or its agent.

Bills of lading issued by local freight agent—Conspiracy between agent and alleged shipper.—In Bank *v.* New York, etc., R. Co., 106 N. Y. 195, 12 N. E. 433, 60 Am. Rep. 440, 32 Am. & Eng. R. Cas. 497, it appeared that one of defendant's local freight agents, having authority to give bills of lading, specifying the terms of shipment, but having no right to issue such a bill except upon actual receipt of the property for transportation, issued bills of lading purporting to be for sixty-five barrels of beans to W., describing them as received to be forwarded to C., as consignee, but adding, with references to the packages "contents unknown." W. drew a draft on the consignee which plaintiff discounted on the faith of and on transfer of the bills of lading. No barrels of beans were in fact shipped by W. or delivered to defendant, but the bills were issued in pursuance of a conspiracy between the agent and W. to defraud. Payment of the draft was refused by the railroad. It was held that the latter was liable, and that the recital in the bills that the contents of the packages were unknown was no defense.

A recital in the bills that the "contents of the package were unknown" is no defense where nothing is shipped and the bill is wholly false. Bank *v.* New York, etc., R. Co., 60 Am. Rep. 440, 443, 106 N. Y. 195, 12 N. E. 433, 32 Am. & Eng. R. Cas. 497.

Bills issued upon forged warehouse receipt.—In Armour *v.* Michigan Cent. R. Co., 65 N. Y. 111, 22 Am. Rep. 603, it appeared that defendant's agent, having authority to issue bills of lading, upon delivery to him by M. of a forged warehouse receipt, issued to M. two bills of lading, each stating the receipt of a quantity of lard consigned to plaintiffs at New York, and to be transported and delivered to them. Such agent was in-

bill of lading, issued in its name by an agent having authority to issue such bills on receipt of property for transportation, to a bona fide consignee or transferee, who has parted with value upon the faith of the bill by discounting or paying a draft drawn upon the consignee, although no goods were delivered to the railroad or its agent. The same doctrine prevails in Pennsylvania[67] and South Carolina[68] and has been adopted by the courts of several other states among which are Connecticut,[69] Georgia,[70] Kansas,[71] and Ne-

formed by M. at the time of the delivery of the bills of lading, that he intended to use them at a bank. M. drew sight drafts on plaintiffs, to which he attached the bills of lading, these were delivered to a bank and forwarded to New York, and the drafts were paid by plaintiffs, upon the faith and credit of the bills of lading. It was held that defendant carrier was bound by the acts of its agents within his apparent authority and was estopped from denying the receipt of the lard.

67. Brooke *v.* New York, etc., R. Co., 108 Pa. 529, 1 Atl. 206, 56 Am. Rep. 235; Franklin Trust Co. *v.* Philadelphia, etc., R. Co., 222 Pa. 96, 70 Atl. 949, 22 L. R. A., N. S., 828.

Bill issued by railroad shipping clerk.—In Brooke *v.* New York, etc., R. Co., 108 Pa. 529, 1 Atl. 206, 56 Am. Rep. 235, it appeared that a shipping clerk at one of defendant's railroad stations issued a bill of lading in the name of the railroad for certain goods that it had never received; and that the bill of lading came into the possession of an innocent third person, who made advances of money upon it. In an action against the railroad to recover such advances by such third person, it was held that the railroad was estopped by the act of its agent from denying the receipt of the goods, although such clerk had no authority to give bills of lading without receiving the goods, and the railroad had never done anything to lead anyone to suppose that he had such authority.

Liability of connecting carriers.—Where connecting railroads, forming a through line, enter into an arrangement by which they employ an agent to solicit freight, and the agent issues a bill of lading before the initial carrier receives the goods, and with knowledge that the bill of lading is to accompany a draft on the consignee, and the consignee pays the draft, but the goods are never received either by the consignee or any of the railroads, the consignee can recover the amount of the draft from the terminal carrier, since, apart from the question of partnership, there is a joint liability on the part of all the companies on whose behalf the bill of lading was issued. Dulaney *v.* Philadelphia, etc., R. Co., 228 Pa. 180, 77 Atl. 507.

68. Thomas *v.* Atlantic, etc., R. Co., 85 S. C. 537, 64 S. E. 220, 34 L. R. A., N. S., 1177, 21 Am. & Eng. Ann. Cas. 223, 32 R. R. R. 250, 55 Am. & Eng. R. Cas., N. S., 250.

A carrier issuing a bill of lading for a specified quantity of freight is estopped to deny the receipt of such freight as against a consignee in good faith relying on the statement of the bill of lading, paying a draft drawn on him by the shipper for the quantity of freight designated in the bill of lading. Smith *v.* Southern Railway, 89 S. C. 415, 71 S. E. 989, 36 L. R. A., N. S., 230.

Number of packages delivered for carriage.—The recitals in a bill of lading, issued by a carrier on the actual receipt of goods, that a specified number of packages were delivered for carriage are conclusive on the carrier, as between it and the consignee or transferee of the bill of lading, who has incurred loss or liability in reliance on the correctness of such recitals. Thomas *v.* Atlantic, etc., R. Co., 85 S. C. 537, 32 R. R. R. 250, 55 Am. & Eng. R. Cas., N. S., 250, 64 S. E. 220, 34 L. R. A., N. S., 1177.

69. Relyea *v.* New Haven Rolling Mill Co., 42 Conn. 579, 75 Fed. 420.

Consignee deceived by receipt clause—Master of vessel chargeable with notice.—As between the shipper and the ship owner the receipt in a bill of lading is open to explanation, but it is otherwise where the consignee is deceived by it, and the master of the vessel knew, or had the means of knowing, that its statements were incorrect. So held in Relyea *v.* New Haven Rolling Mill Co., 42 Conn. 579, 75 Fed. 420.

70. American Nat. Bank *v.* Georgia R. Co., 96 Ga. 665, 51 Am. St. Rep. 155, 23 S. E. 898; Thomas *v.* Atlantic, etc., R. Co., 85 S. C. 537, 64 S. E. 220, 34 L. R. A., N. S., 1177, 21 Am. & Eng. Ann. Cas. 223, 32 R. R. R. 250, 55 Am. & Eng. R. Cas., N. S., 250.

Bill intended to be negotiated.—The recitals in a bill of lading as to the delivery of goods and their quality, quantity, and condition are binding on the carrier, when the bill was intended to be negotiated and is held by bona fied transferee for value. Louisville, etc., R. Co. *v.* Pferdmenges, etc., Co., 8 Ga. App. 81, 68 S. E. 617.

71. St. Louis, etc., R. Co. *v.* Adams, 4 Kan. App. 305, 45 Pac. 920; Wichita Sav. Bank *v.* Atchison, etc., R. Co., 20 Kan. 519, 20 Am. R. Rep. 299; Missouri, etc., R. Co. *v.* Sealy, 78 Kan. 758, 99 Pac. 230. See, also, Henderson *v.* Louisville, etc.,

braska.[72] In these states the carrier is held to be estopped to deny the delivery of the goods to the prejudice of third persons, who have in good faith in the ordinary course of business acted upon the representations of the agent,[73]

R. Co., 116 La. 1047, 41 So. 252, 114 Am. St. Rep. 582.

Bill of lading issued on promise of shipper to complete consignment—Fraud.—In St. Louis, etc., R. Co. *v.* Adams, 4 Kan. App. 305, 45 Pac. 920, the petition alleged that defendant railroad was a carrier of goods and owned a railway in M. county, Kansas, passing through the city of C.; that on a certain day it received of G. & W., at its station at C., in M. county, one car of poultry, 20,000 pounds, of the value of $1,000, consigned to A. B. & Co. N. O.; and that the duly authorized agent of said railroad company issued a bill of lading therefor; that G. & W. took said bill of lading to a bank at C. and drew a draft for $500 on the consignees, and attached said bill of lading thereto; that said draft, with the bill of lading attached, in due course of business was presented to the consignees at their place of business in N. O., who on the faith of the bill of lading advanced the money and paid said draft; and that the railway company neglected to ship said car of poultry to the consignees at N. O. The answer of the railway did not deny issuing the bill of lading, but alleged that its agent at its station at C. did not have authority to issue bills of lading except for property actually received; and that G. & W. did not deliver all of the poultry named in the bill of lading, but agreed to complete the load at the stations along the line of said railway; that they only placed five crates of poultry in the car at C., and were to complete the 20,000 pounds at its stations at A., O., H., and G.; that when the car containing part of the poultry arrived at the station of A., G. & W. did not furnish the poultry to complete the load, and the car was stopped there, and the said G. & W. absconded, and the poultry then in the car had to be sold to prevent great loss; and that said poultry was sold at A., for all it was worth in its then condition; and it offers to pay to the consignees the amount for which the poultry was sold, or confers judgment for the same with all costs of suit. It was held that plaintiffs below were entitled to judgment on the pleadings.

Two bills of lading issued for same consignment—Fraud—Both bills transferred for value.—In Wichita Sav. Bank *v.* Atchison, etc., R. Co., 20 Kan. 519, 20 Am. R. Rep. 299, it appeared that the agent of a railroad company, who had authority to receive grain for shipment over its road, and issue in the name of the corporation a single bill of lading for each consignment received, received 23,000 pounds of wheat as a single consignment for transportation to St. Louis, Mo., and, at the instance of the shipper, issued in the name of the railroad two original bills of lading of the same terms, tenor, and effect, for such single consignment, and the shipper negotiated one of such bills to W., and immediately thereafter negotiated and transferred by indorsement in writing the other of said bills to a bank, and the bank, knowing the custom of the railroad to issue only one bill of lading for each shipment, and relying wholly on the bill for its security, accepted the same, advanced money thereon in good faith, and in the regular course of its business, and having no knowledge of the issuance of the two bills of lading; and W., as the holder of the bill assigned to him, received all of the wheat so consigned and forwarded to St. Louis. It was held that the shipper being insolvent, and having absconded, the railroad was estopped by its statement promise in the bill of lading to deny that he had received the grain mentioned therein, and was liable to the indorsee and assignee for its advances made by the bank in good faith on the bill of lading.

72. Sioux City, etc., Co. *v.* First Nat. Bank, 10 Neb. 556, 7 N. W. 311, 35 Am. Rep. 488.

Bill of lading compared to bill of exchange.—In McNeil *v.* Hill, Fed. Cas. No. 8914, Woolw. 96, it is said in the opinion: "As civilization has advanced, and commerce extended, new and artificial modes of doing business have superseded the exchanges by barter, and otherwise, which prevail while society is in its earlier and simpler stages. The invention of the bill of exchange is a familiar illustration of this fact. A more modern, but still not recent invention, of like character, for the transfer, without the somewhat and often impossible operations of actual delivery of articles of personal property, is the indorsement, or assignment, of bills of lading and warehouse receipts. Instruments of this kind are sui generis. From long use and trade, they have come to have among commercial men a well-understood meaning, and the indorsement or assignment of them as absolutely transfers the general property of the goods and chattels therein named, as would a bill of sale, * * *. If the warehouseman gives to the party who holds such receipt a false credit, he will not be suffered to contradict his statement which he has made in the receipt, so as to injure a party who has been misled by it."

73. A bill of lading containing a statement as to the quantity of goods, issued with the understanding that the goods

and it is immaterial whether the bill of lading was negotiable or not.[74]

The reasoning of the cases which apply the doctrine which prevails in New York and a few other states is, in substance, that the question does not at all depend upon the negotiability of bills of lading, but upon the principle of estoppel in pais; that where a principal has clothed an agent with power to do an act in case of the existence of some extrinsic fact, necessarily and peculiarly within the knowledge of the agent, and of the existence of which the act of executing the power is itself a representation, the principal is estopped from denying the existence of the fact, to the prejudice of a third person who has dealt with the agent or acted on his representation in good faith, in the ordinary course of business.[75]

Where Title to Property Is Not Made Through Bill of Lading.—But the principle that a bona fide endorsee of a bill of lading, advancing his money on it, may rely on the quantity acknowledged therein, and may compel the carrier to account for that quantity, whether it was all put on board the vessel or not, does not apply to a case where the owner of the property did not purchase it while it was in the hands of the carrier, and did not make title to it through the bill of lading, but his purchase was made prior to the shipment and the goods were shipped by his agent for him.[76]

Language Guarding against Estoppel.—To guard against estoppel to deny receipt of the amount of goods stated in the bill of lading, the carrier may insert "shipper's load and count," or some like clause, and will not then be liable to an assignee for value if the carrier delivers all the goods received.[77] Where a carrier received a certain part of the goods specified in the bill of lading, but not the goods, the value of which is the basis of the action, and the bill of lading gives notice to the purchaser thereof that the carrier did not vouch for the quantity of goods, the carrier is not estopped from setting up that the missing goods were never received.[78]

§ 433. Conflict of Laws.—In an action against a carrier to recover moneys advanced on bills of lading issued by an agent of the carrier without actual receipt of the goods, an answer, alleging that the bills were delivered in another state, where, by statute and decisions of the supreme court, they were void, states a good defense.[79]

§ 434. Effect of Custom or Course of Business.—Where by the usual and customary mode of doing its business a carrier has given to its agents authority to issue bills of lading for goods not received, it is liable to a bona fide

may be transferred by transfer of the bill of lading, justifies a transferee in relying on the statement there made, and estops the carrier from showing that he has not received the quantity recited. Nashville, etc., Railway *v.* Flournoy, 139 Ga. 582, 77 S. E. 797; Henderson *v.* Louisville, etc., R. Co., 116 La. 1047, 41 So. 252, 114 Am. St. Rep. 582. See, also, National Bank *v.* Chicago, etc., R. Co., 44 Minn. 224, 46 N. W. 342, 9 L. R. A., N. S., 263, 20 Am. St. Rep. 566.

74. Dulaney *v.* Philadelphia, etc., R. Co., 228 Pa. 180, 77 Atl. 507.

75. **Reason of rule.**—National Bank *v.* Chicago, etc., R. Co., 44 Minn. 224, 46 N. W. 342, 9 L. R. A., N. S., 263, 20 Am. St. Rep. 566, overruling McCord *v.* Western Union Tel. Co., 39 Minn. 181, 39 N. W. 315, 1 L. R. A. 143, 12 Am. St. Rep. 636, in which the above principle was in effect adopted and applied.

"Considerations of this character form the basis of an equitable estoppel, without reference to negotiability or directness of representation." Bank *v.* New York, etc., R. Co., 106 N. Y. 195, 60 Am. Rep. 440, 442, 12 N. E. 433, 32 Am. & Eng. R. Cas. 497; Thomas *v.* Atlantic, etc., R. Co., 85 S. C. 537, 64 S. E. 220, 34 L. R. A., N. S., 1177, 21 Am. & Eng. Ann. Cas. 223, 32 R. R. R. 250, 55 Am. & Eng. R. Cas., N. S., 250.

76. **Title not made through bill of lading.**—Meyer *v.* Peck, 28 N. Y. 590.

77. **Language guarding against estoppel.**—Nashville, etc., Railway *v.* Flournoy, 139 Ga. 582, 77 S. E. 797.

78. Nashville, etc., Railway *v.* Flournoy, 139 Ga. 582, 77 S. E. 797.

79. **Conflict of laws.**—Missouri, etc., R. Co. *v.* Sealy, 78 Kan. 758, 99 Pac. 230.

consignee or indorsee of such bill of lading as if in fact the goods were received for transportation.[80]

Custom to Use Bills of Lading as Collateral Security for Drafts.—Neither a general nor local custom to use bills of lading as collateral security for drafts drawn against the goods purported to have been delivered to carrier for transportation can have the effect of rendering the carrier responsible on bills of lading issued by its agent for goods never delivered to the carrier.[81]

Custom of Issuing Bills of Lading for Cotton Delivered to Compress Company.—If a railroad company, for its own convenience and the convenience of its customers, is in the habit of issuing bills of lading for cotton delivered to a compress company, to be compressed before actual delivery to the carrier, with no intention on the part of the shipper or of the carrier that the liability of the carrier shall attach before delivery on the cars, and the cotton is destroyed by fire while in the hands of the compress company, the railroad company is not liable for the value of the cotton so destroyed even to an assignee of the bill of lading without notice of the agreement and course of dealing between the shipper and the carrier.[82]

§ 435. Negligence of Carrier.—Where bills of lading issued by a carrier's agent for goods never received by it come into the hands of innocent purchasers by reason of the carrier's own negligence, it is liable thereon.[83]

§ 436. Fraudulent Bills of Lading.—Collusive, Fraudulent Bill.—The rule is the same whether the bill of lading was issued fraudulently and collusively or merely by mistake.[84]

80. **Agent authorized by course of business to issue bills for goods not received.**—Swedish-American Nat. Bank *v.* Chicago, etc., R. Co., 96 Minn. 436, 105 N. W. 69, 19 R. R. R. 783, 42 Am. & Eng. R. Cas., N. S., 783; National Bank *v.* Chicago, etc., R. Co., 44 Minn. 224, 46 N. W. 342, 9 L. R. A., N. S., 263, 20 Am. St. Rep. 566.

81. **Custom to use bills of lading as collateral security for drafts.**—Robinson *v.* Memphis, etc., R. Co., 16 Fed. 57.

82. **Custom of issuing bills of lading for cotton delivered to compress company.**—Missouri Pac. R. Co. *v.* McFadden, 154 U. S. 155, 38 L. Ed. 944, 14 S. Ct. 990.

83. **Person acting as freight agent and member of firm—Bills of lading transferred by firm as collateral—Negligence of carrier.**—It appeared that a firm of merchants in A., were also engaged in the milling business in M., on the line of defendant's railway; that for their convenience defendant established a station at M. and appointed a member of the firm its agent there. It was shown that the business of the station was practically transacted in the firm's office at A., and freight charges were settled from time to time with defendant's officials. Goods shipped by the firm at A., consigned to themselves at M., were delivered without presentation of the bill of lading, and it appeared doubtful whether in the case of such shipments, there was any actual delivery of any bill of lading from hand to hand. Some of these bills of lading, after the goods were delivered to the consignees, were transferred by the firm, as collateral, to persons who had no knowledge of any irregularity. It was held that defendant was liable on these bills of lading in the hands of innocent purchasers, since it was by reason of its own negligence that they came into their hands. Walters *v.* Western, etc., R. Co., 56 Fed. 369.

84. **Collusive, fraudulent or forged bills.**—National Bank *v.* Chicago, etc., R. Co., 44 Minn. 224, 46 N. W. 342, 560, 9 L. R. A., N. S., 263, 20 Am. St. Rep. 566.

Bill of lading with drafts attached issued by one who was both freight agent and member of firm.—In Erb *v.* Great Western Ry. Co., 5 Can. Sup. Ct. Rep. 179, it appeared that C., freight agent of defendant railroad, and a partner of the firm of B. & Co., caused printed receipts in the form commonly used by the railroad company to be signed, by his name as such company's agent, in favor of B. & Co., for flour which had never been delivered to the railway company. The receipts acknowledged that defendant had received from B. & Co. the flour addressed to plaintiffs, and were attached to drafts drawn by B. & Co., and accepted by plaintiffs. C. received the proceeds of the drafts and absconded. It was held that the act of C. in issuing such receipts was not done within the scope of his authority as the company's agent, and the latter was not therefore liable.

Bill Fraudulently Signed by Agent—Advances Made by Commission Merchant.—A railroad company is not liable for advances made by a commission merchant upon the faith of a bill of lading fraudulently signed by one of its station agents, the goods therein specified never having been shipped or received at the depot for transportation.[85]

Forgery—Shipper Allowed to Fill Out Bill and Leave Blank for Quantity.—The fact that the shipper was allowed to fill the bill of lading in his own handwriting, and leave a blank which afforded opportunity for increasing the statement of the number of bales shipped, will not render the common carrier liable for loss occasioned by the forgery of the shipper in raising the bill of lading.[86]

§ 437. Effect of State Statutes.—A statute making the acknowledgment of receipt of property for transportation, contained in a bill of lading, conclusive evidence of the fact so stated, in favor of bona fide holders for value, does not prescribe a rule of evidence, so as to interfere with the constitutional power of the courts to investigate facts, and deprive the carrier of its property without due process at law,[87] and is not an unlawful regulation of interstate commerce.[88]

Effect of Statute Prohibiting Issuance of Bill of Lading Before Receipt of Goods.—Arkansas Statute.—Under Arkansas act approved March 15, 1887, prohibiting carriers from issuing bills of lading except for goods actually received into their possession, a railroad company which has issued bills of lading to the owners of cotton in the hands of a compress company is not estopped as to third persons from denying that the cotton was in its possession or control.[89]

Effect of Statute Making Bills of Lading Negotiable.—Statutes making bills of lading negotiable apply to genuine bills of lading, and not to those issued where no property has been shipped or received by the carrier.[90]

Alabama Statutes.—Under the statutes of Alabama a bill of lading, regular on its face and issued by a carrier or its authorized agent, is a certificate that the person to whom it is issued is the shipper of the property or the goods therein described, that they really exist, and are subject to the order and direction of the shipper, unless the bill of lading furnishes notice that such is not the fact. The statute is authority for any one to deal with the person to whom such bill of lading is issued, on the basis and postulate that the property

85. **Bill fraudulently signed by agent—Advances made by commission merchant.**—Baltimore, etc., R. Co. *v.* Wilkens, 44 Md. 11, 22 Am. Rep. 26.

86. **Directing verdict where evidence of forgery uncontradicted.**—See post, "Directing Verdict," § 602.

Shipper allowed to fill out bill and leave blank for quantity.—Lehman, etc., Co. *v.* Central R., etc., Co., 12 Fed. 595.

87. **Effect of state statutes—Due process of law.**—Yazoo, etc., R. Co. *v.* Bent, 94 Miss. 681, 47 So. 805, 22 L. R. A., N. S., 821.

88. **Regulation of interstate commerce.**—Franklin Trust Co. *v.* Philadelphia, etc., R. Co., 222 Pa. 96, 70 Atl. 949, 22 L. R. A., N. S., 828.

89. Martin *v.* St. Louis, etc., R. Co., 55 Ark. 510, 19 S. W. 314.

90. **Effect of statute making bills of lading negotiable.**—Henderson *v.* Louisville, etc., R. Co., 116 La. 1047, 41 So. 252, 114 Am. St. Rep. 582, following Hunt *v.* Mississippi, etc., R. Co., 29 La. Ann. 446.

This rule of law has not been abrogated or modified by article No. 150, Louisiana laws, of the year 1868, making bills of lading negotiable by indorsement, and making answerable, both civilly and criminally, any person issuing a bill of lading unless the property specified therein has been actually shipped. Henderson *v.* Louisville, etc., R. Co., 116 La. 1047, 41 So. 252, 114 Am. St. Rep. 582.

In Roy *v.* Northern Pac. R. Co., 42 Wash. 572, 85 Pac. 53, 7 Am. & Eng. Ann. Cas. 728, 6 L. R. A., N. S., 302, it is held that the act of a common carrier's agent in giving a bill of lading for goods which he knew had not been delivered to the carrier, does not bind the carrier, even as to an innocent transferee or pledgee for value, even under a certain statute making bills of lading negotiable by indorsement for certain purposes.

or goods in fact exist, are in possession of the carrier, and subject to the conditions expressed in the bill of lading. Any one to whom such bill of lading is indorsed and transferred by the person to whom it was issued, and who parts with value and becomes the innocent holder of it without notice, may hold the carrier responsible for the truth of the recitals, and for damages to the extent he may have advanced on the faith of its genuineness and truth as a bill of lading. As between the railroad company and any one who shows himself a bona fide transferee and purchaser of the bill of lading, the corporation is estopped from denying that it received and holds the goods specified in the receipt.[91] A contract indemnifying the carrier against shortage or loss resulting from the issuance of bills of lading in advance of the receipt of the goods is void.[92]

Mississippi Statute.—Under the Mississippi statute a bill of lading is conclusive evidence in the hands of a bona fide holder against the person or corporation issuing it that the property mentioned therein was actually received for shipment;[93] though above the column for the insertion of the weights the words "Weights subject to correction" were inserted.[94] An immaterial description of a shipment which weighed less than the weight stated will not prevent the carrier from showing that the shipment tendered was the identical property received, but it is liable for the shortage in weight.[95] The Mississippi

91. **Alabama statutes.**—Jasper Trust Co. *v.* Kansas City, etc., R. Co., 99 Ala. 416, 42 Am. St. Rep. 75, 14 So. 546, 4 Am. & Eng. Enc. Law 549, 6 Cyc. Law & Proc. 426.

92. Code, §§ 4219, 4223, prohibit a common carrier from issuing bills of lading in advance of the actual receipt of the goods, under penalty of liability in damages to any person injured thereby. Plaintiff railroad company declared on an agreement with defendant warehousemen whereby, in consideration of plaintiff's issuing bills of lading on defendants' warehouse receipts without requiring the actual delivery of the goods, defendants would make good any shortage in the goods, or indemnify plaintiff for any liability so incurred. Held, the contract was void, as illegal, notwithstanding defendants' part of it was not violative of the statute. Jemison *v.* Birmingham, etc., R. Co., 125 Ala. 378, 28 So. 51.

93. **Mississippi statutes.**—Hozzard *v.* Illinois, etc., R. Co., 67 Minn. 32.

Under the Mississippi statute (Code of Mississippi (1906), § 4851), where a transportation company has issued a bill of lading for so many bales of cotton, weighing so many pounds, and describes it as being marked with certain letters of the alphabet, and the company tenders to a bona fide holder of the bill of lading the specified number of bales, which in fact weigh less than the weight stated, and are marked with different letters, and the holder of the bill of lading accepts the cotton, but stipulates that he does not accept it in satisfaction of the bill of lading, and sues the carrier, and it appears that the marks on the cotton were immaterial in fixing its value, held, that the carrier may show that the cotton tendered by it was the identical cotton received by it, despite the discrepancy in marks; but it is liable for the shortage in weight. Illinois Cent. R. Co. *v.* Doughty, 10 Ga. App. 317, 73 S. E. 541.

94. **Stamping bills, "weight subject to correction."**—The effect of such a statute can not be avoided by placing upon such bills statements that the weights are subject to correction. Yazoo, etc., R. Co. *v.* Bent, 94 Miss. 681, 47 So. 805, 22 L. R. A., N. S., 821.

Under Code 1906, § 4851, providing that every bill of lading acknowledging the receipt of property for transportation shall be conclusive evidence in the hands of a bona fide holder, as against the carrier, that the property had been so received, a bill of lading by a carrier which describes a shipment of cotton as containing a designated number of pounds is conclusive on the carrier, though above the column for the insertion of the weights the words "Weights subject to correction" were inserted. Yazoo, etc., R. Co. *v.* Bent, 94 Miss. 681, 47 So. 805, 22 L. R. A., N. S., 821.

95. Under Code Miss. 1906, § 4851, providing that every bill of lading, acknowledging receipt of property for transportation, shall be conclusive evidence in the hands of a bona fide holder for value, as against the corporation issuing it, that the property has been received, where a transportation company has issued a bill of lading for so many bales of cotton, weighing so many pounds, and described it as being marked with certain letters, but tenders to a bona fide holder of the bill of lading the specified number of bales, weighing less than the weight stated, and marked with different letters, the mark being immaterial in fixing the value of the cotton, the carrier may show that the cotton tendered was the identical

statute was abrogated as to interstate shipments by the Carmack amendment to the Interstate Commerce Act.[96]

Missouri Statute.—Under the Missouri statute a railroad is bound by a bill of lading which has passed into the hands of an innocent purchaser, although no goods were in fact received by it.[97] The rule is not altered by the fact that the statute makes it a criminal offense for any agent of a railroad company to issue a bill of lading unless the goods have actually been received.[98]

Texas Statutes.—The statutes of Texas have not changed the general rules as to the invalidity in the hands of a bona fide purchaser of a bill of lading for goods never delivered to carrier.[99]

§ 438. Due Bill Promising to Issue a Bill of Lading.—Bill of Lading Surrendered for Unauthorized Due Bill.—Where a bill of lading for goods delivered by a carrier to a warehouseman was surrendered for a due bill, issued by the carrier's agent without authority and the carrier was induced to ship out the goods on other orders obtained through fraud, the liability of the carrier rests on the due bill alone and not on the bill of lading.[1] The due bill represented nothing tangible; it is a promise to issue a bill of lading, and such a promise is beyond the scope of authority of the agent making it. It is a mere symbol for another symbol; it can not be binding upon the railroad as a receipt, for no goods were received; it is not a bill of lading, and the statute relating to them can not apply. It is a promise to give a bill of lading.[2]

§§ 439-442. Subsequent Delivery to Carrier as Validating Bill—§ 439. In General.—A delivery of goods corresponding in substance with a bill of lading given previously and received to meet the bill of lading, makes the bill operative from the time of such delivery.[3] At that instant it becomes evidence

cotton received by it, but it is liable for the shortage in weight. Illinois Cent. R. Co. *v.* Doughty, 10 Ga. App. 317, 73 S. E. 541.

96. Interstate shipments.—St. Louis, etc., R. Co. *v.* Woodruff Mills (Miss.), 62 So. 171.

97. Missouri statute.—Sealy *v.* Missouri, etc., R. Co., 84 Kan. 479, 114 Pac. 1077, 41 L. R. A., N. S., 500.

98. Sealy *v.* Missouri, etc., R. Co., 41 L. R. A., N. S., 500, 84 Kan. 479, 114 Pac. 1077.

99. Texas statutes.—In Friedlander *v.* Texas, etc., R. Co., 130 U. S. 416, 32 L. Ed. 991, 9 S. Ct. 570.

1. Bill of lading surrendered for unauthorized due bill.—Where a bill of lading for cotton, assigned to plaintiff bank, was surrendered for compress receipts to a compress company to which the railroad company had delivered the cotton at destination, and the railroad company thereafter issued a duebill for the balance of the cotton called for by the compress receipt, on issuing an outgoing bill for a portion thereof, which duebill merely called for the return of 12 bales, which the railroad company never received, such duebill was a mere promise to issue a bill of lading which was beyond the scope of the authority of the agent making it; and hence the carrier was not liable thereon. St. Louis, etc., R. Co. *v.* Citizens' Bank, 87 Ark. 26, 112 S. W. 154, 30 R. R. R. 290, 53 Am. & Eng. R. Cas., N. S., 290, 128 Am. St. Rep. 17.

2. St. Louis, etc., R. Co. *v.* Citizens' Bank, 87 Ark. 26, 112 S. W. 154, 30 R. R. R. 290, 53 Am. & Eng. R. Cas., N. S., 290, 128 Am. St. Rep. 17.

Where a bill of lading for cotton delivered by a carrier to a compress company had been surrendered for compress receipts, and such receipts for a duebill issued by the carrier's agent without authority, and the carrier was induced to ship out the cotton on other orders through error or fraud, it was not estopped to deny that it ever received the cotton pursuant to the duebill. St. Louis, etc., R. Co. *v.* Citizens' Bank, 87 Ark. 26, 112 S. W. 154, 30 R. R. R. 290, 53 Am. & Eng. R. Cas., N. S., 290, 128 Am. St. Rep. 17.

3. Halliday *v.* Hamilton (U. S.), 11 Wall. 560, 20 L. Ed. 214; The Idaho, 93 U. S. 575, 23 L. Ed. 978; Robinson *v.* Memphis, etc., R. Co., 16 Fed. 57; Central, etc., R. Co. *v.* Cook, 4 Ga. App. 698, 62 S. E. 464.

The bill of lading does not become effective until the goods are offered to the carrier in such a condition as that it should receive them. Central, etc., R. Co. *v.* Cook, 4 Ga. App. 698, 62 S. E. 464; Union, etc., R. Co. *v.* Yeager, 34 Ind. 1; Witzler *v.* Collins, 70 Me. 290, 35 Am. Rep. 327; Rowley *v.* Bigelow (Mass.), 12 Pick. 307, 23 Am. Dec. 606, 607.

In Rowley *v.* Bigelow (Mass.), 12 Pick. 307, 23 Am. Dec. 606, it is held that if a bill of lading is signed before the goods are shipped or even purchased, and after-

of the ownership of the goods,[4] and will operate on the goods embraced in it as between the shipper and carrier by way of relation and estoppel and the rights and obligations of all concerned are the same as if the goods had been actually shipped before the bill of lading had been signed; whether it was signed through inadvertence or otherwise, before the goods were actually shipped, as if they were received on the wharf or sent to the warehouse of the carrier, or were delivered into the custody of the master or other agent of the owner of charterer of the vessel and were afterwards placed on board.[5]

§ 440. Where Statute Prohibits Issuance before Receipt of Goods.—A state statute prohibiting the issuance of a bill of lading in the absence of goods received for shipment, does not forbid curing an illegal bill by subsequently supplying the goods, the receipt of which is acknowledged by the bill of lading.[6]

§ 441. Presumption as to Receipt of Goods.—A bill of lading is merely evidence of delivery and acceptance of freight, and its issuance is not conclusive evidence of such delivery or acceptance nor its nonissuance conclusive that there has been no delivery or acceptance.[7] The fact that statute prohibits all warehousemen and carriers, under a penalty, from issuing receipts or bills of lading, except for goods which have been actually received into their possession, does not raise a conclusive presumption that a railroad issuing a bill of lading was in possession of the goods when it issued bills of lading.[8]

§ 442. Proof of Nonreceipt of Goods.—Necessity for Clear Proof of Nonreceipt.—A common carrier having given a bill of lading for goods can not, however, relieve himself from liability on the ground that the goods were never received by him, except by the clearest proof of that fact.[9]

Testimony of Master.—The master of a vessel, not interested directly as owner or part owner thereof, is competent as a witness to prove, on the trial of such cause, the nonshipment of the goods described in the bill of lading; also, to prove the bill of lading to be false and fraudulent by the insertion of other goods in it after he had signed it, which were never shipped or delivered on the vessel.[10]

Admission in Agreed Statement.—Recitals in bill of lading as to the weight of cotton delivered to a carrier, although prima facie correct, are overcome by an admission in an agreed statement of facts that the identical cotton received by the carrier was delivered to the consignee.[11]

wards, at any time before the vessel sails on the voyage described, goods are put on board as and for the goods embraced in the bill of lading, as against the shipper and master, the bill of lading will operate on such goods by way of relation and estoppel, and the consignee, who receives it and accepts drafts on the faith of the consignment, has as valid and effectual a title to the goods as could be obtained by an actual delivery of the goods themselves.

4. The Idaho, 93 U. S. 575, 23 L. Ed. 978; The Eddy (U. S.), 5 Wall. 481, 18 L. Ed. 486; Halliday *v.* Hamilton (U. S.), 11 Wall. 560, 20 L. Ed. 214.

5. The Delaware (U. S.), 14 Wall. 579, 20 L. Ed. 779; The Eddy (U. S.), 5 Wall. 481, 18 L. Ed. 486; Halliday *v.* Hamilton (U. S.), 11 Wall. 560, 20 L. Ed. 214.

6. **Effect of statute prohibiting issuance of bills of lading before receipt of goods.**—The Idaho, 93 U. S. 575, 23 L. Ed. 978.

7. **Presumption as to receipt of goods.**—Dunnington & Co. *v.* Louisville, etc., R. Co. (Ky.), 155 S. W. 750.

8. **Presumption as to receipt of goods before issuance of bill of lading.**—St. Louis, etc., R. Co. *v.* Commercial Union Ins. Co., 139 U. S. 223, 35 L. Ed. 154, 11 S. Ct. 554.

9. **Necessity for clear proof of nonreceipt.**—Little Miami, etc., R. Co. *v.* Dodds & Co., 1 C. S. C. 47, 13 O. Dec. Reprint 407.

10. **Testimony of master.**—Adams *v.* Brig Pilgrim, 10 West. L. J. 141, 1 O. Dec. 477.

11. **Admission in agreed statement.**—St. Louis, etc., R. Co. *v.* Woodruff Mills (Miss.), 62 So. 171.

§ 443. Duty to Issue.—A carrier is compelled to issue to the shipper a bill of lading for goods intrusted to it for shipment.[12]

§ 444. Issuance in Duplicate.—Bills of lading are usually issued in duplicate, one bill being delivered to the shipper and the other being retained by the carrier.[13] In such case, the contract between a ship and the shipper is that which is contained in the bills of lading delivered to the shipper. The bill retained by the ship or "ship's bill," as it is sometimes called, is designed only for its own information and convenience; not for evidence, as between the parties, of what their agreement was. If it differs from the others, they must be considered as the true and only evidence of the contract.[14] The right of the shipper to demand a duplicate freight receipt or bill of lading is secured by statute in Virginia.[15]

§§ 445-450. Acceptance and Assent to Provisions—§ 445. In General.—Both parties to a bill of lading impliedly assent to its provisions.[16]

§§ 446-450. Assent to and Acceptance by Consignor—§ 446. Effect of Acceptance.—The acceptance of a bill of lading by the shipper, with knowledge of its contents, makes of that instrument a binding contract, and defines the rights and liabilities of the parties to it;[17] so far as the conditions named are reasonable in the eye of the law, and not against public policy,[18] as for instance a condition giving the carrier the benefit of insurance on the freight.[19]

Change of Route.—Where a shipper accepts a bill of lading upon which the routing specified by him had been erased and another substituted, with

12. **Duty to issue.**—Atlantic, etc., R. Co. *v.* Howard Supply Co., 125 Ga. 478, 54 S. E. 530; Williamson & Co. *v.* Texas, etc., R. Co. (Tex. Civ. App.), 138 S. W. 807.

Where there is no agent.—After there has been a full and complete constructive delivery of freight to a common carrier, according to the requirements exacted by it of shippers under a local custom prevailing at a station where it has no agent, the shipper making such delivery is entitled to a receipt for the freight, notwithstanding the carrier has previously, by mistake, issued a receipt therefore to a person not entitled to be recognized as consignor. Atlantic, etc., R. Co. *v.* Howard Supply Co., 125 Ga. 478, 54 S. E. 530.

13. **Issuance in duplicate.**—The Delaware (U. S.), 14 Wall. 579, 20 L. Ed. 779.

14. **Issuance in duplicate.**—The Thames (U. S.), 14 Wall. 98, 20 L. Ed. 804; The Delaware (U. S.), 14 Wall. 579, 596, 20 L. Ed. 779.

"More than one is required by the shipper, as he usually sends one by mail to the consignee or vendee, and if four are signed he sends one to his agent or factor, and he should always retain one for his own use. Such an instrument acknowledges the bailment of the goods, and is evidence of a contract for the safe custody, due transport, and right delivery of the same, upon the terms, as to freight, therein described, the extent of the obligation being specified in the instrument." The Delaware (U. S.), 14 Wall. 579, 596, 20 L. Ed. 779.

15. **Virginia statutory requirement.**—Va. Acts, 1891-92, p. 965, Pol. Supl. Code, § 1297a, ch. 7.

16. Norfolk, etc., R. Co. *v.* Langdon, 118 Md. 268, 84 Atl. 473.

17. **Effect.**—See post, "Limitation of Liability," chapter 14.

The mere acceptance by the carrier of a bill of lading signed by a shipper is sufficient to bind both as to a special contract plainly written therein. Lefebure *v.* American Exp. Co. (Iowa), 139 N. W. 1117; Van Etten *v.* Newton, 134 N. Y. 143, 31 N. E. 334, 30 Am. St. Rep. 630; Germania Fire Ins. Co. *v.* Memphis, etc., R. Co., 72 N. Y. 90, 28 Am. Rep. 113; Cincinnati, etc., R. Co. *v.* Pontius, 19 O. St. 221, 2 Am. Rep. 391.

18. **Reasonableness and consistency with public policy.**—Davis *v.* Central, etc., R. Co., 66 Vt. 290, 29 Atl. 313, 44 Am. St. Rep. 852.

A shipper's acceptance of a bill of lading is presumptively an assent to its terms, as far as they are reasonable, and not inconsistent with public policy. Leavens *v.* American Exp. Co. (Vt.), 85 Atl. 557.

19. **Condition giving carrier benefit of insurance.**—A shipper, electing to accept a reduced rate by filling out the shipping order and accepting the bill of lading, is bound by the terms of the order making it a part of the bill of lading, and giving the carrier the benefit of insurance on the freight. Burke *v.* Erie R. Co., 134 App. Div. 413, 119 N. Y. S. 309.

knowledge of the change, he is bound by the bill as changed.[20]

Proof of Breach of Contract.—The acceptance of a bill of lading does not preclude the shipper from showing that the cars were not properly iced, as required by such bill.[21]

§§ 447-450. Presumption of Assent from Acceptance—§ 447. In General.—Where the shipper of goods accepts a bill of lading or receipt from the carrier he is conclusively presumed, in the absence of imposition, accident, or mistake, to have assented to all the terms and conditions contained in it, and he can not afterwards be heard to say that he did not read the instrument and did not know its contents; aliter where the facts show fraud, imposition or mistake. This doctrine prevails in the federal courts,[22] and in the courts of Alabama,[23] Arkansas,[24] Georgia,[25] Illinois,[26] Iowa,[27] Kentucky,[28] Maryland,[29] Massachusetts,[30] Michigan,[31] Minnesota,[32] Missouri,[33] New Hampshire,[34] New

20. Change of route.—Missouri, etc., R. Co. *v.* Thompson, 55 Tex. Civ. App. 12, 118 S. W. 618.

21. Proof of breach of contract.—Johnson *v.* Toledo, etc., R. Co., 103 Am. St. Rep. 464, 133 Mich. 596, 95 N. W. 724.

22. Presumption of assent from acceptance.—Leitch *v.* Union R. Transp. Co., Fed. Cas. No. 8,224; Wertheimer *v.* Pennsylvania R. Co., 1 Fed. 232, 17 Blatchf. 421. See ante, "Failure to Read or Examine Bill," §§ 449-450.

23. Jones *v.* Cincinnati, etc., R. Co., 89 Ala. 376, 8 So. 61, 45 Am. & Eng. R. Cas. 321; Western R. Co. *v.* Harwell, 91 Ala. 340, 8 So. 649, 45 Am. & Eng. R. Cas. 358.

24. St. Louis, etc., R. Co. *v.* Weakly, 50 Ark. 397, 8 S. W. 134, 7 Am. St. Rep. 104, 35 Am. & Eng. R. Cas. 635.

25. Central R., etc., Co. *v.* Hasselkus, 91 Ga. 382, 44 Am. St. Rep. 37, 55 Am. & Eng. R. Cas. 586, 17 S. E. 838.

When the shipper accepts a bill of lading without objecting before the goods have been shipped and permits the carrier to act upon it by proceeding with the shipment, it is to be presumed that he has accepted it as containing the contract and has assented to its terms. Central R., etc., Co. *v.* Hasselkus, 91 Ga. 382, 17 S. E. 838, 44 Am. St. Rep. 37, 55 Am. & Eng. R. Cas. 586; Bedell *v.* Richmond, etc., R. Co., 94 Ga. 22, 20 S. E. 262; Richmond, etc., R. Co. *v.* Shomo, 90 Ga. 496, 16 S. E. 220; McElveen *v.* Southern R. Co., 109 Ga. 249, 34 S. E. 281, 77 Am. St. Rep. 371; Western, etc., R. Co. *v.* Ohio Valley, etc., Co., 107 Ga. 512, 33 S. E. 821.

26. Coles *v.* Louisville, etc., R. Co., 41 Ill. App. 607; Merchants' Dispatch Transp. Co. *v.* Furthmann, 47 Ill. App. 561, affirmed in 149 Ill. 66, 36 N. E. 624, 41 Am. St. Rep. 265; St. Louis, etc., R. Co. *v.* Elgin Condensed Milk Co., 175 Ill. 557, 51 N. E. 911, 67 Am. St. Rep. 238.

27. Mulligan *v.* Illinois Cent. R. Co., 36 Iowa 181, 14 Am. Rep. 514, 2 Am. R. Rep. 322; Robinson Bros. *v.* Merchants' Dispatch Transp. Co., 45 Iowa 470.

28. Louisville, etc., R. Co. *v.* Brownlee (Ky.), 14 Bush 590.

Bill delivered shippers agent who had no knowledge of condition.—In Adams Exp. Co. *v.* Nock (Ky.), 2 Duv. 562, 87 Am. Dec. 510, it was held, where the oral testimony recited in the agreed case, and admitted, if competent, showed that the bill of lading was neither read by the shipper's agent nor its peculiar conditions understood by him or even suggested to him, and that he never signed the indorsement accepting the peculiar conditions; that such conditions were never obligatory on his principal, that testimony as to the verbal contract was therefore competent.

29. Where a bill of lading delivered by a carrier to a shipper is accepted by him, he is presumed, though he did not sign it, to have read and acquiesced in its provisions which therefore constitute a contract of carriage, in the absence of fraud, imposition, or mistake. De Wolff *v.* Adams Exp. Co., 106 Md. 472, 67 Atl. 1099.

30. Grace *v.* Adams, 100 Mass. 505, 97 Am. Dec. 117, 1 Am. Rep. 131; Hoadley *v.* Northern Transp. Co., 115 Mass. 304, 15 Am. Rep. 106.

31. McMillan *v.* Michigan, etc., R. Co., 16 Mich. 79, 93 Am. Dec. 208.

32. Christendon *v.* American Exp. Co., 15 Minn. 270, 2 Am. Rep. 122; Hutchinson *v.* Chicago, etc., R. Co., 37 Minn. 524, 35 N. W. 433.

33. Craycroft *v.* Atchison, etc., R. Co., 18 Mo. App. 487; O'Bryan *v.* Kinney, 74 Mo. 125; Patterson *v.* Kansas, etc., R. Co., 56 Mo. App. 657; St. Louis, etc., R. Co. *v.* Cleary, 77 Mo. 634, 46 Am. Rep. 13; McFadden *v.* Missouri Pac. R. Co., 1 Am. St. Rep. 721, 92 Mo. 343, 4 S. W. 689.

34. Durgin *v.* American Exp. Co., 66 N. H. 277, 20 Atl. 328, 9 L. R. A. 453, 45 Am. & Eng. R. Cas. 325.

York,[35] North Carolina,[36] Ohio,[37] Pennsylvania,[38] South Carolina,[39] Tennessee,[40] Texas,[41] Vermont,[42] and other states.

"Read This Bill," Printed in Italics on Its Face.—Where the attention of the shipper is called to the conditions printed on the face of the bill of lading by the direction, "Read this contract," printed in italics; this presumption applies with peculiar force and he will not be permitted to show that he was ignorant of the contents of the bill.[43]

Receipt Calling Attention to Conditions on Its Back.—The acceptance by a shipper of a mere receipt for freight calling attention to conditions on the back of it, will not be construed to operate as an acquiescence in such provisions.[44]

35. Belger *v.* Dinsmore, 51 N. Y. 166, 10 Am. Rep. 575; Bishop *v.* Empire Transp. Co. (N. Y.), 48 How. Prac. 119; Bostwick *v.* Baltimore, etc., R. Co. (N. Y.), 55 Barb. 137; Germania Fire Ins. Co. *v.* Memphis, etc., R. Co., 72 N. Y. 90, 28 Am. Rep. 113; Hill *v.* Syracuse, etc., R. Co., 73 N. Y. 351, 29 Am. Rep. 163; Kirkland *v.* Dinsmore, 62 N. Y. 171, 20 Am. Rep. 475; McMahon *v.* Macy, 51 N. Y. 155; Soumet *v.* National Exp. Co. (N. Y.), 66 Barb. 284; Knapp *v.* Wells, Fargo & Co., 119 N. Y. S. 117, 134 App. Div. 712.

A shipper's acceptance or a bill of lading binds him whether he reads it or not. Boyle *v.* Bush Terminal R. Co., 136 N. Y. S. 355, 151 App. Div. 551.

36. Whitehead *v.* Wilmington, etc., R. Co., 87 N. C. 255, 9 Am. & Eng. R. Cas. 168.

A through bill of lading, advantageous to both, received by the plaintiff without objection, stipulating that the cotton was to be shipped "at company's convenience," is evidence of plaintiff's assent to the restriction of defendant's common-law liability, equivalent to an express agreement, and affects plaintiff with legal notice of its terms. Whitehead *v.* Wilmington, etc., R. Co., 9 Am. & Eng. R. Cas. 168, 87 N. C. 255.

37. Cincinnati, etc., R. Co. *v.* Pontius, 19 O. St. 221, 2 Am. Rep. 391.

38. Newberger *v.* Howard & Co.'s Exp., 6 Phil. 174; Wertheimer *v.* Pennsylvania R. Co., W. N. C. (Pa.), 272.

39. Johnstone *v.* Richmond, etc., R. Co., 39 S. C. 55, 17 S. E. 512, 55 Am. & Eng. R. Cas. 346.

40. East Tennessee, etc., R. Co. *v.* Brumley, 73 Tenn. (5 Lea) 401, 6 Am. & Eng. R. Cas. 356; Merchants' Dispatch Transp. Co. *v.* Bloch, 86 Tenn. 392, 6 Am. St. Rep. 847, 35 Am. & Eng. R. Cas. 579, 6 S. W. 881.

41. Ryan *v.* M. K. & T. R. Co., 65 Tex. 13, 57 Am. Rep. 589, 23 Am. & Eng. R. Cas. 703; St. Louis, etc., Railway *v.* Gilbreath (Tex. Civ. App.), 144 S. W. 1051.

The shipper's assent to conditions inserted in the body of a bill of lading is conclusively presumed when he has had an opportunity to know its contents, has received it at the time of shipment, and the carrier has used no unfair means to deceive. Ryan *v.* M. K. & T. R. Co., 65 Tex. 13, 57 Am. Rep. 589, 23 Am. & Eng. R. Cas., 703.

42. "Where the bill of lading is received by the consignor without objection, and nothing is shown to the contrary, the law presumes he accepts it and becomes bound by its terms, as the contract for the carriage of the goods receipted for, and, if limitations are imposed upon the common-law liability of the carrier, that he consents to them and is bound by them, so far as they are, in the eye of the law, reasonable." Davis *v.* Central, etc., R. Co., 66 Vt. 290, 29 Atl. 313, 44 Am. St. Rep. 852.

Where a shipper of live stock pays the carrier the freight charges and receives a writing, without reading it, which he supposes contains merely a receipt, but which contains a contract exempting the carrier from liability for a failure to carry promptly, the shipper may show by parole a contract to deliver with dispatch. King *v.* Woodbridge, 34 Vt. 565.

43. "Read this bill" printed in italics on its face.—Mulligan *v.* Illinois Cent. R. Co., 36 Iowa 181, 14 Am. Rep. 514, 2 Am. R. Rep. 322.

Where a shipper accepts from a carrier a bill of lading containing a stipulation to the effect that the company should be exempted from injury to the goods occurring beyond the terminus of their own line, assent will be presumed upon the part of the shipper in the absence of fraud or mistake, and he will not be permitted to show that he was ignorant of the contents of the bill. Mulligan *v.* Illinois Cent. R. Co., 36 Iowa 181, 14 Am. Rep. 514, 2 Am. R. Rep. 322. In this case it appeared that the conditions of the bill of lading were printed upon its face, and the attention of the shipper was called thereto by the direction, "Read this contract," printed in italics.

44. Receipt calling attention to conditions on back.—Merchants' Dispatch Transp. Co. *v.* Furthmann, 47 Ill. App. 561, affirmed in 149 Ill. 66, 41 Am. St. Rep. 265, 36 N. E. 624. See post, "Conditions on Back of Bill," § 459.

Shipper's Testimony Showing Acceptance of Bill.—Where a railroad company's custom was to carry horses at the owner's risk, and at reduced rates for that reason, and the letters "O. R." signifying "Owner's Risk," were upon the receipt given to plaintiff for his horses, and retained and put in evidence by him; and he testified that "he did not see" those letters, but not that he did not understand their meaning, the restricted liability of the company clearly appeared from plaintiff's evidence.[45]

Possession of Bill by Shipper Prima Facie Evidence of Consent.—Proof that a shipper took a receipt from a carrier containing provisions restricting the carrier's liability is prima facie evidence of his assent to such limitations;[46] hence, is not necessary for the carrier to prove the shipper's knowledge of and assent to the condition contained therein.[47] And it is error for the court to charge that the burden is upon a carrier to prove the shipper's knowledge of and assent to the stipulations of the bill of lading which he has accepted without objection; but such error is not material where the stipulation to which the charge applied was void.[48]

Burden of Showing Assent to Change Terms.—In Ohio where a verbal contract of shipment is made by which freight is to be carried to its destination, but the bill of lading then made is merely to carry to the next carrier, the shipper not noticing this, the verbal contract is competent evidence, and the burden is on the carrier to show assent by the shipper to a change in its terms.[49]

Assent to Conditions Limiting Carriers Common Law Liability.—See ante, "Limitation of New Liability," chapter 14.

§§ 448-450. Rebuttal of Presumption—§ 448. Failure of Shipper to Sign Bill.—In the absence of fraud or mistake, a bill of lading accepted by the shipper without objection and acted upon has, though signed only by the carrier, the same effect as to being varied by parol as if it had been signed by the shipper also and must be looked to as the final repository and sole evidence of the contract of carriage.[50]

45. Shippers testimony showing acceptance of bill.—Morrison *v.* Phillips, etc., Constr. Co., 44 Wis. 405, 119 Am. R. Rep. 312, 28 Am. Rep. 599.

46. Possession of bill by shipper prima facie evidence of consent.—Strohn *v.* Detroit, etc., R. Co., 21 Wis. 554, 94 Am. Dec. 564.

Possession by a shipper of a carrier's bill of lading for the property, containing special terms, is at least prima facie evidence of his assent to them, and in most cases may be conclusive. Morrison *v.* Phillips, etc., Constr. Co., 44 Wis. 405, 119 Am. R. Rep. 312, 28 Am. Rep. 599.

47. Merchants' Dispatch Transp. Co. *v.* Bloch, 86 Tenn. 392, 6 Am. St. Rep. 847, 6 S. W. 881, 35 Am. & Eng. R. Cas. 579.

48. Merchants' Dispatch Transp. Co. *v.* Bloch, 35 Am. & Eng. R. Cas. 579, 86 Tenn. 392, 6 Am. St. Rep. 847, 6 S. W. 881.

49. Burden of showing assent to change terms.—P. C. & St. L. R. Co. *v.* Blakemore, 1 O. C. C. 42, 1 O. C. D. 26.

50. Failure of shipper to sign bill.—Central R., etc., Co. *v.* Hasselkus, 91 Ga. 382, 17 S. E. 838, 44 Am. St. Rep. 37, 55 Am. & Eng. R. Cas. 586.

Ohio.—Cincinnati, etc., R. Co. *v.* Pontius, 19 O. St. 221, 2 Am. Rep. 391; Gaines *v.* Union, etc., Ins. Co., 28 O. St. 418; Cleveland, etc., R. Co. *v.* LaTourette, 2 O. C. C. 279, 1 O. C. D. 486, approved and followed in Stevens *v.* Lake Shore, etc., R. Co., 20 O. C. C. 41, 11 O. C. D. 168.

Texas.—Wells, Fargo & Co.'s Exp. *v.* Fuller, 4 Tex. Civ. App. 213, 23 S. W. 412.

The receipt given by the express company purports to state the terms upon which the shipment was made, and though signed only by the carrier, when accepted by the shipper he became a party to it, bound by its terms. It contains all the necessary elements of a shipping contract, and under well-established principles it must be treated as the final agreement of the parties, into which all parol negotiations and understandings were merged, and by its terms the duties and liabilities of the parties thereto must be determined. "Resort can not be had to prior or contemporaneous parol negotiations or agreements to vary its terms." And this rule applies not only to its express provisions, but to the legal import of the contract—the further provisions which the law makes for the parties, such as the right of the carrier to route the shipment when the contract in its express terms is silent upon that point. Wells, Fargo & Co.'s Exp. *v.* Fuller, 4 Tex. Civ. App. 213, 222, 23 S. W. 412 (see 93 Tex. 742, no op.); Arnold *v.* Jones, 26 Tex. 335, 82 Am. Dec. 617.

§§ 449-450. Failure to Read or Examine Bill—§ 449. In General.—Where, in the absence of fraud or mistake, goods are delivered to a carrier for transportation, and a bill of lading containing special stipulations is issued therefor before the goods are shipped, the shipper is bound to examine it and ascertain its contents, and if he accepts it without objection he is bound by its terms and can not invalidate it by showing that he signed it without reading it. He can not set up ignorance of its contents and resort can not be had to prior parol agreements to vary them.[51] This doctrine prevails in the courts of the United States,[52] and in those of the states of Alabama,[53] Arkansas,[54] Georgia,[55] Illinois,[56] Iowa,[57] Kentucky,[58] Maryland,[59] Massachusetts,[60] Michigan,[61] Minnesota,[62] Missouri,[63] New Hampshire,[64] New York,[65] North Carolina,[66] Ohio,[67] Pennsylvania,[68] South Carolina,[69] Tennessee,[70] Texas,[71] Wisconsin,[72] Vermont,[73] and others.

51. Failure to read or examine bill.—See post, "In General," § 449.

52. Leitch *v.* Union R. Transp. Co., Fed. Cas. No. 8,224; Wertheimer *v.* Pennsylvania R. Co., 1 Fed. 232, 17 Blatchf. 421.

53. Western R. Co. *v.* Harwell, 45 Am. & Eng. R. Cas. 358, 91 Ala. 340, 8 So. 649; Jones *v.* Cincinnati, etc., R. Co., 89 Ala. 376, 8 So. 61, 45 Am. & Eng. R. Cas. 391.

54. St. Louis, etc., R. Co. *v.* Weakly, 50 Ark. 397, 8 S. W. 134, 7 Am. St. Rep. 104, 35 Am. & Eng. R. Cas. 635; McIlroy *v.* Buckner, 35 Ark. 555.

In St. Louis, etc., R. Co. *v.* Weakly, 50 Ark. 397, 8 S. W. 134, 35 Am. & Eng. R. Cas. 635, 7 Am. St. Rep. 104, it was said in the opinion: "It has generally been held by the courts in this country and in England that such contracts are binding on the shipper, although he did not read or hear them read before signing, provided the carrier resorted to no unfair means, and practiced no fraud or imposition, and the shipper had the opportunity to know the contents."

55. Central R., etc., Co. *v.* Hasselkus, 17 S. E. 838, 91 Ga. 382, 44 Am. St. Rep. 37, 55 Am. & Eng. R. Cas. 586.

Resort can not be had to a prior parol agreement to add or to vary, in behalf of the shipper, the terms of a special contract contained in a bill of lading accepted and signed by him before the goods were shipped, it not appearing that his signing was the result of fraud or mistake. Richmond, etc., R. Co. *v.* Shomo, 90 Ga. 496, 16 S. E. 220.

Where consignor delivers goods to a railroad company and at that time receives a bill of lading which he accepts and uses by appending to a draft drawn on the consignee, the bill of lading, and not prior stipulations whether in conversation or by letter, is the final contract of transportation, and evidence of conversations and stipulations occurring before the bill was delivered will be excluded. Bedell *v.* Richmond, etc., R. Co., 94 Ga. 22, 20 S. E. 262.

56. Coles *v.* Louisville, etc., R. Co., 41 Ill. App. 607.

57. Mulligan *v.* Illinois Cent. R. Co., 36 Iowa 181, 14 Am. Rep. 514, 2 Am. R. Rep. 322; Lefebure *v.* American Exp. Co. (Iowa), 139 N. W. 1117.

58. Adams Exp. Co. *v.* Nock (Ky.), 2 Duv. 562, 87 Am. Dec. 510.

59. De Wolff *v.* Adams Exp. Co., 106 Md. 472, 67 Atl. 1099.

60. Squire *v.* New York, etc., R. Co., 98 Mass. 239, 93 Am. Dec. 162; Rice *v.* Dwight Mfg. Co. (Mass.), 2 Cush. 80; Grace *v.* Adams, 100 Mass. 505, 97 Am. Dec. 117, 1 Am. Rep. 131.

61. McMillan *v.* Michigan, etc., R. Co., 16 Mich. 79, 93 Am. Dec. 208.

62. Hutchinson *v.* Chicago, etc., R. Co., 37 Minn. 524, 35 N. W. 433; Christendon *v.* American Exp. Co., 15 Minn. 270, 2 Am. Rep. 122.

63. Patterson *v.* Kansas, etc., R. Co., 56 Mo. App. 657.

64. Durgin *v.* American Exp. Co., 66 N. H. 277, 20 Atl. 328, 9 L. R. A. 453, 45 Am. & Eng. R. Cas. 325.

65. Bostwick *v.* Baltimore, etc., R. Co. (N. Y.), 55 Barb. 137; Long *v.* New York Cent. R. Co., 50 N. Y. 76; Hallenbeck *v.* DeWitt (N. Y.), 2 Johns. 404; Harris *v.* Story (N. Y.), 2 E. D. Smith 363.

66. Whitehead *v.* Wilmington, etc., R. Co., 87 N. C. 255, 9 Am. & Eng. R. Cas. 168.

67. Cincinnati, etc., R. Co. *v.* Pontius, 19 O. St. 221, 2 Am. Rep. 391.

68. In re Greenfield's Estate, 14 Pa. 489.

69. Johnstone *v.* Richmond, etc., R. Co., 39 S. C. 55, 17 S. E. 512, 55 Am. & Eng. R. Cas. 346.

70. East Tennessee, etc., R. Co. *v.* Brumley, 73 Tenn. (5 Lea) 401, 6 Am. & Eng. R. Cas. 356.

71. Texas, etc., R. Co. *v.* Scrivener, 2 Texas App. Civ. Cas., § 328.

72. Morrison *v.* Phillips, etc., Constr. Co., 44 Wis. 405, 119 Am. R. Rep. 312, 28 Am. Rep. 599; Fuller *v.* Madison Mut. Ins. Co., 36 Wis. 599.

73. Davis *v.* Central, etc., R. Co., 66 Vt. 290, 29 Atl. 313, 44 Am. St. Rep. 852.

Inability to Read.—An express stipulation in a bill of lading, limiting the carrier's liability to loss or injury suffered on his own road, is binding on the consignor notwithstanding his ignorance and inability to read, when it is not shown that the carrier was informed of such ignorance or was asked to read and explain the bill of lading.[74]

Stipulations Printed in Fine Type.—It has been held that the presumption of the shipper's assent to the limitations of the carrier's liability arising from acceptance of the bill of lading was rebutted by the fact that they were printed in such fine type as to be almost illegible;[75] but it has been held in Texas that the mere fact that such limitations were in fine type did not render them void.[76]

Bill of Lading Delivered in Dimly Lighted Car.—Proof that a carrier gave a bill of lading to a shipper at night, in a dimly lighted and rapidly running car, which attempts to limit the carrier's liability, is not sufficient evidence of a contract, where the provision is obscurely printed and there is nothing to show that the shipper assented to it.[77]

Agent Hurried and Lantern Only Light.—Where an agent of a carrier handed plaintiff a bill of lading to sign and told him he was in a hurry and it was dark and there was only a lantern to see by, and plaintiff signed it without reading it, the only reason given for not doing so being that the agent wanted to get home, he was bound by any special reasonable contract plainly printed therein, and can not say that it was not fairly entered into.[78]

Clause Rendered Unintelligible by Stamps.—In an action against a common carrier for the value of goods lost in his custody, evidence that often, but not invariably, he had given to the plaintiffs receipts containing a printed clause in favor of the carrier, and that in this instance, after receiving the goods, he gave to a servant of the plaintiff a receipt therefor, containing such a printed clause; but that over part of this clause in this receipt a stamp was so pasted as to render it unintelligible, and that until after the loss neither the plaintiff nor any of his agents or servants had actual knowledge of such a clause in this or any of the other receipts, is not sufficient to warrant a finding that the plaintiff assented to the stipulation.[79]

§ 450. Bill Received after Goods Shipped.—Where the goods were shipped under a previous verbal agreement, without special exemptions in favor of the carrier, and, after the goods were in transit, a bill of lading containing such exemptions was handed to the shipper, who received it without examination or objection, the shipper's acceptance of such bill of lading did not give rise to a presumption of his assent to the stipulations embraced in the bill of lading, and does not conclude him from showing the agreement under which shipment was made. This is the law in Alabama,[80] Illinois,[81] Kansas,[82] Massa-

74. **Inability to read.**—Jones *v.* Cincinnati, etc., R. Co., 45 Am. & Eng. R. Cas. 321, 89 Ala. 376, 8 So. 61.

75. **Stipulations printed in fine type.**—Brown *v.* Eastern R. Co. (Mass.), 11 Cush. 97; Blossom *v.* Dodd, 43 N. Y. 264, 3 Am. Rep. 701; Verner *v.* Sweitzer, 32 Pa. 208.

76. Ryan *v.* M. K. & T. R. Co., 65 Tex. 13, 57 Am. Rep. 589, 23 Am. & Eng. R. Cas. 703.

77. **Bill of lading delivered in dimly lighted car.**—Blossom *v.* Dodd, 43 N. Y. 264, 3 Am. Rep. 701, a case of a receipt by an express company for baggage.

78. **Agent hurried and lantern only light.**—Lefebure *v.* American Exp. Co. (Iowa), 139 N. W. 1117.

79. **Clause limiting liability rendered unintelligible by stamps.**—Perry *v.* Thompson, 98 Mass. 249.

80. **Bill of lading received without examination after goods shipped under verbal agreement.**—Louisville, etc., R. Co. *v.* Meyer, 78 Ala. 597, 27 Am. & Eng. R. Cas. 44.

81. Baker *v.* Michigan Southern, etc., R. Co., 42 Ill. 73; Merchants' Dispatch Transp. Co. *v.* Furthmann, 47 Ill. App. 561, affirmed in 149 Ill. 66, 36 N. E. 624, 41 Am. St. Rep. 265.

82. Missouri Pac. R. Co. *v.* Beeson, 30 Kan. 298, 2 Pac. 496, 12 Am. & Eng. R. Cas. 52.

chusetts,[83] Minnesota,[84] New York,[85] Ohio,[86] Texas,[87] Wisconsin,[88] and other states; and also in Canada.[89] To take the case out of the general rule it must appear that before the delivery of the bill of lading the goods had been shipped, so that the shipper could not have reclaimed them if he had objected to the terms of the bill of lading.[90]

The rule that prior negotiations are merged in a subsequently written contract does not apply to such a case as this. If the shipper had expressly assented to the terms of the bill of lading subsequently delivered to him, such assent would operate as a change of the terms of the contract originally made, and under which he had parted with his property. But after the verbal agreement had been consummated, and rights had accrued under it, the mere receipt of the bill of lading, inadvertently omitting to examine the printed conditions, is not sufficient to conclude him from showing what the actual agreement was under which the goods had been shipped.[91]

Bill of Lading Incomplete When Goods Delivered Subsequently Forwarded to Shipper.—Assent by the shipper to a provision in a bill of lading will not be presumed where the bill, being incomplete at the time of the delivery of the goods to the carrier, was not delivered to the consignor at that time, but was subsequently corrected and forwarded by mail to him at the place of destination.[92]

Bill Received without Examination after Goods Shipped under Verbal Agreement and Forwarded to Consignee.—Where goods were shipped under a verbal agreement, without special exemptions in favor of the carrier, and, after they were in transit, a bill of lading containing such exemptions

83. By the law of Massachusetts, in order to limit the carrier's common-law liability by a clause in the bill of lading, the bill of lading must be taken by the consignor, without dissent, at the time of the delivery of the property for transportation. When given a few days after the delivery of the goods, and while they are in transit, such a clause, not assented to by the consignee, will not be binding on the latter. Michigan Cent. R. Co. *v.* Boyd, 91 Ill. 268.

84. Southard *v.* Minneapolis, etc., R. Co., 60 Minn. 382, 62 N. W. 442.

85. Bostwick *v.* Baltimore, etc., R. Co., 45 N. Y. 712; Guillaume *v.* General Transatlantic Co., 100 N. Y. 491, 3 N. E. 489; Lamb *v.* Camden, etc., R. Co (N. Y.), 4 Daly 483; Swift *v.* Pacific Mail Steamship Co., 106 N. Y. 206, 12 N. E. 583, 30 Am. & Eng. R. Cas. 105; Kirkland *v.* Dinsmore, 62 N. Y. 171, 20 Am. Rep. 475.

86. Gaines *v.* Union, etc., Ins. Co., 28 O. St. 418, 14 Am. R. Rep. 158.

87. Where goods are shipped under a verbal contract, delivery afterwards to shipper of bill of lading, his attention not being called to its terms or conditions, does not conclude him from showing the agreement under which shipment was made. Atchison, etc., R. Co. *v.* Grant, 6 Tex. Civ. App. 674, 681, 26 S. W. 286, affirmed in 93 Tex. 699, no op.

88. Strohn *v.* Detroit, etc., R. Co., 21 Wis. 554, 94 Am. Dec. 564.

89. Northwestern Transp. Co. *v.* McKenzie, 25 Can. Sup. Ct. 38.

90. Germania Fire Ins. Co. *v.* Memphis, etc., R. Co., 72 N. Y. 90, 28 Am. Rep. 113, affirming 7 Hun 233; Hill *v.* Syracuse, etc., R. Co., 73 N. Y. 351, 29 Am. Rep. 163.

91. Rule as to merger of prior negotiations in subsequent written contract inapplicable.—Germania Fire Ins. Co. *v.* Memphis, etc., R. Co., 72 N. Y. 90, 28 Am. Rep. 113; Swift *v.* Pacific Mail Steamship Co., 106 N. Y. 206, 12 N. E. 583, 30 Am. & Eng. R. Cas. 105; Merchants' Dispatch Transp. Co. *v.* Furthmann, 47 Ill. App. 561, affirmed in 41 Am. St. Rep. 265, 149 Ill. 66, 36 N. E. 624.

In Swift *v.* Pacific Mail Steamship Co., 106 N. Y. 206, 12 N. E. 583, 30 Am. & Eng. R. Cas. 105, "the parties made a special contract as to the transportation of the oil. Two months after its delivery at Panama the common agent of the defendants here executed bills of lading, which were sent to plaintiffs, but were not received until after the oil had left Aspinwall. The contract, as set forth in the bills, was different from that actually made. Held, that defendants could not alter or abrogate the contract actually made by issuing bills of lading, and, in the absence of proof establishing that plaintiff consented to accept the bills in place of the prior contract, the latter must control." Merchants' Dispatch Transp. Co. *v.* Furthmann, 47 Ill. App. 561, affirmed in 41 Am. St. Rep. 265, 149 Ill. 66, 36 N. E. 624.

92. Bill of lading incomplete when goods delivered subsequently forwarded to shipper.—Louisville, etc., R. Co. *v.* Meyer, 78 Ala. 597, 27 Am. & Eng. R. Cas. 44.

were handed to the shipper, who, without examination or objection, forwarded it to the consignee, who made use of the same to receive and sell the goods not lost, and accounted to the shipper for the proceeds, such acts of the consignor and consignee did not render the conditions contained in the bill binding on the consignor, it appearing that he had no knowledge of such conditions and never, in fact, assented to them.[93]

§§ 451-454. Validity—§ 451. Fraud or Mistake.—A shipper can not allege fraud or mistake in bills of lading prepared by himself.[94]

§ 452. Forgery.—Alteration, Goods Not Received by Agent of Carrier.—See ante, "Fraudulent Bills of Lading," § 436.

Liability of Bank Collecting Draft with Forged Bill of Lading Attached.—See post, "Deposit of Draft with Bill of Lading Attached for Collection," § 588.

Liability of Purchaser of Draft with Forged Bill of Lading Attached to Drawee.—See post, "Liability of Purchaser for Shortage or Inferiority of Shipment," § 585.

§ 453. No Goods Delivered to Carrier.—See ante, "Receipt of Goods as Prerequisite to Issuance," §§ 429-442.

§ 454. Partial Invalidity.—See post, "Partial Invalidity," § 464.

§§ 455-513. Construction, Operation and Effect—§ 455. General Rules of Construction.—A bill of lading is subject to the same rules of construction as other contracts.[95]

Subject Matter and Surrounding Circumstances.—It is the right and duty of the court, in order to decide upon the meaning of a bill of lading, to look not only to the language employed, but to the subject matter and surrounding circumstances.[96]

Construed against Carrier.—In construing a bill of lading given by the carrier for the safe transportation and delivery of goods shipped by a consignor the contract will be construed most strongly against the carrier, and favorably to the consignor, in case of doubt in any matter of construction. Since its own officers or agents prepared the instrument, it is both reasonable and just that its own words should be construed most strongly against itself;[97] as, for instance, the stipulation as to the route of the shipment.[98]

93. **Bill received without examination, after goods shipped under verbal agreement and forwarded to consignor.**—Gaines *v.* Union, etc., Ins. Co., 28 O. St. 418, 14 Am. R. Rep. 158; Baltimore, etc., R. Co. *v.* Campbell, 36 O. St. 647, 38 Am. Rep. 617.

94. **Fraud or mistake.**—Bessling & Co. *v.* Houston, etc., R. Co., 35 Tex. Civ. App. 470, 80 S. W. 639, affirmed in 98 Tex. 610, no op.

95. **Rules of construction.**—Whitnack *v.* Chicago, etc., R. Co., 82 Neb. 464, 118 N. W. 67, 19 L. R. A., N. S., 1011, 130 Am. St. Rep. 692; Grieve *v.* Illinois Cent. R. Co., 104 Iowa 659, 74 N. W. 192.

96. **Subject matter and surrounding circumstances.**—Mobile, etc., R. Co. *v.* Jurey, 111 U. S. 584, 592, 28 L. Ed. 527, 4 S. Ct. 566; Barreda *v.* Silsbee (U. S.), 21 How. 146, 16 L. Ed. 86; Nash *v.* Towne (U. S.), 5 Wall. 689, 18 L. Ed. 527; Chesapeake, etc., Canal Co. *v.* Hill (U. S.), 15 Wall. 94, 21 L. Ed. 64; Queen of the Pacific, 180 U. S. 49, 45 L. Ed. 419, 21 S. Ct. 278; London Assur. *v.* Companhia De Moagens Do Barreiro, 167 U. S. 149, 42 L. Ed. 113, 17 S. Ct. 785.

97. **Construed against carrier.**—First Nat. Bank *v.* Hartford Fire Ins. Co., 95 U. S. 673, 24 L. Ed. 563; London Assur. *v.* Companhia De Moagens, Do Barreiro, 167 U. S. 149, 42 L. Ed. 113, 17 S. Ct. 785; Queen of the Pacific, 180 U. S. 49, 45 L. Ed. 419, 21 S. Ct. 278; Texas, etc., R. Co. *v.* Reiss, 183 U. S. 621, 626, 46 L. Ed. 358, 22 S. Ct. 253; Alabama, etc., R. Co. *v.* Thomas, 89 Ala. 294, 7 So. 762, 18 Am. St. Rep. 119; Louisville, etc., R. Co. *v.* Southern Flour, etc., Co., 136 Ga. 538, 71 S. E. 884; Lehigh Valley Transp. Co. *v.* Post Sugar Co., 128 Ill. App. 600, judgment affirmed in 81 N. E. 819, 228 Ill. 121.

98. Where a carrier accepts a shipment of freight to a place on its own line of railroad, and stipulates in its bill of lading that "the company agrees to carry

Obvious Prevails over Hidden Meaning.—No rule of construction binds the court to find some hidden or obscure meaning for a particular clause in a bill of lading, because the simple and plain one which is seen upon its face provides for contingencies which may also be provided for in another clause of the same bill.[99]

§ 456. Construction of Words and Phrases.—"At the Owner's Risk."—The term, "at the owner's risk," in a bill of lading, which is declared to be a special contract, taken in connection with other stipulations therein, limits the carrier to such loss or damages only as might result from ordinary neglect, which is defined to mean that want of care and diligence which prudent men usually bestow on their own concerns.[1]

"O. K." stamped on the face of a bill of lading means that the goods were received apparently in good condition.[2]

The word "release" stamped on the face of a bill of lading means exemption from the common law liability as an insurer.[3]

Notation "Inspection Allowed."—See post, "Usage and Custom," § 460.

"More or Less."—See post, "Between the Parties," § 469.

"Open" and "Closed" Shipments.—See post, "'Open' and 'Closed' Shipments," § 486.

"Contents Unknown."—See post, "Recital That Contents Unknown," § 489.

"Good Order," "Good Condition," "Apparent Good Order."—See post, "Recital That Goods in 'Good Order,' etc.," § 490; "Recital That 'Contents Unknown and in Apparent Good Order,'" § 491.

"Shipper's Load and Count," "Weight Unknown," etc.—See post, "In General," § 493.

"Quantity Guaranteed."—See post, "Bill Made Exclusive Evidence of Quantity by Agreement," § 494.

§ 457. Notice of Contents.—Both parties to a bill of lading signed by them are chargeable with notice of its contents.[4]

§ 458. Blanks and Unintelligible Characters.—Blanks.—The blanks in a bill of lading are not to be considered in construing the instrument.[5]

Unintelligible Characters.—Unintelligible characters placed on a bill of lading which convey no meaning to a person of ordinary intelligence and which are not explained to the shipper, do not bind him.[6]

said property to destination if on its road," and enters on the bill of lading, after the designation of the property, "Care W. A., which characters when endorsed on the bill of lading are proved to mean "in care of the Western and Atlantic Railroad Company," such bill of lading will be construed to mean that the receiving carrier obligates to transport the shipment over its own road to destination and there to deliver it to the Western and Atlantic Railroad Company for the benefit of the consignee, and not to mean a delivery of the shipment at a junction point outside of the place of destination to the Western & Atlantic Railroad Company to be transported to destination by the latter company. Louisville, etc., R. Co. *v.* Southern Flour, etc., Co., 136 Ga. 538, 71 S. E. 884.

99. Obvious prevails over hidden meaning.—Texas, etc., R. Co. *v.* Reiss, 183 U. S. 621, 630, 46 L. Ed. 358, 22 S. Ct. 253.

1. At the owner's risk.—Baltimore, etc., R. Co. *v.* Rathbone, 1 W. Va. 87, 88 Am. Dec. 664.

2. Morganton Mfg. Co. *v.* Ohio River, etc., R. Co., 121 N. C. 514, 28 S. E. 474, 61 Am. St. Rep. 679.

3. Morganton Mfg. Co. *v.* Ohio River, etc., R. Co., 121 N. C. 514, 28 S. E. 474, 61 Am. St. Rep. 679.

4. Notice of contents.—Norfolk, etc., R. Co. *v.* Langdon, 84 Atl. 473, 118 Md. 268. See ante, "Assent to and Acceptance by Consignor," §§ 446-450.

5. Blanks.—Grayson County Nat. Bank *v.* Nashville, etc., Railway (Tex. Civ. App.), 79 S. W. 1094.

6. Unintelligible characters.—Norfolk, etc., R. Co. *v.* Harman, 104 Va. 501, 52 S. E. 368.

The character "Rel. Val. Lts. (or Ltd.) 5 Cwt" appearing on a bill of lading of goods and live stock will not be held to mean that the shipper and the carrier have agreed that the property should be considered as worth only five dollars for

§ 459. Conditions on Back of Bill.—Conditions printed upon the back of a bill of lading are not binding upon the shipper, unless his assent thereto is established.[7]

§ 460. Usage and Custom.—In bills of lading, where the terms used have, by usage, acquired a particular signification, the parties will be presumed to have used them in that sense.[8] Such evidence of usage or custom is never considered of the character of parol evidence to contradict a written instrument but is received for the purpose of ascertaining the sense and understanding of parties by their contracts, which are made with reference to such usage or custom; for the custom then becomes a part of the contract, and may not improperly be considered the law of the contract; and it rests upon the same principles as the doctrine of the lex loci.[9] Usage and custom of railroads can not make a contract, can not prevent the effects of a settled rule of law, nor be invoked by a party and introduced into a contract evidenced by a bill of lading as an element of it, when such usage or custom is contrary to law.[10] Nor is usage admissible to control the legal effect of a state of facts which the law declares creates a contract between the parties. A case might arise in which evidence of custom may be admissible to ascertain in whom rests the title of property shipped, and which is claimed under a bill of lading.[11]

To Vary or Contradict Express Terms of Bill of Lading.—Evidence of usage or custom is not admissible to control, vary or contradict the positive stipulations,[12] or an express contract[13] contained in a bill of lading; or to substitute for the express terms or provisions of the instrument an implied agreement or usage[14] that the carrier shall not be bound to keep, transport, and deliver the goods in good order and condition;[15] or to prove a custom of stopping shipments of cotton, at a point short of the destination named in the bill of lading.[16]

every hundred pounds of weight, where there is no evidence as to what the characters stood for and that construction is glaringly inconsistent with another clause of the bill of lading in which a different and higher valuation is placed upon the stock. Norfolk, etc., R. Co. *v.* Harman, 104 Va. 501, 52 S. E. 368.

7. **Conditions on back of bill.**—Painkinsky *v.* Illinois Cent. R. Co., 165 Ill. App. 556; Merchants' Dispatch Transp. Co. *v.* Furthmann, 47 Ill. App. 561, affirmed in 149 Ill. 66, 36 N. E. 624, 41 Am. St. Rep. 265.

8. **Evidence of usage in general.**—Hostetter *v.* Park, 137 U. S. 30, 34 L. Ed. 568, 11 S. Ct. 1; Robinson *v.* United States (U. S.), 13 Wall. 363, 20 L. Ed. 653; The Delaware (U. S.), 14 Wall. 579, 20 L. Ed. 779; Wayne *v.* Steamboat General Pike, 16 O. 421, and see Jordan, etc., Co. *v.* James, 5 O. 88.

9. Babcock *v.* May, 4 O. 334.

Although the bill of lading is the contract of the parties, its execution may be affected by a common usage of the trade—such usage being supposed to have been contemplated by the parties. Lawrence *v.* McGregor (O.), Wright 193.

10. Grayson County Nat. Bank *v.* Nashville, etc., Railway (Tex. Civ. App.), 79 S. W. 1094; Gulf, etc., R. Co. *v.* McCown (Tex. Civ. App.), 25 S. W. 435; Dwyer *v.* Gulf, etc., R. Co., 69 Tex. 707, 7 S. W. 504; Missouri Pac. R. Co. *v.* Fagan, 72 Tex. 127, 9 S. W. 749, 13 Am. St. Rep. 776, 2 L. R. A., N. S., 75.

11. Mercantile Banking Co. *v.* Landa (Tex. Civ. App.), 33 S. W. 681. See, also, Moore *v.* Kennedy, 81 Tex. 144, 16 S. W. 740.

12. The Delaware (U. S.), 14 Wall. 579, 20 L. Ed. 779; Western, etc., R. Co. *v.* Ohio Valley, etc., Co., 107 Ga. 512, 33 S. E. 821; Wayne *v.* Steamboat General Pike, 16 O. 421; Lawrence *v.* McGregor (O.), Wright 193.

13. Mercantile Banking Co. *v.* Landa (Tex. Civ. App.), 33 S. W. 681; see also Moore *v.* Kennedy, 81 Tex. 144, 16 S. W. 740.

14. Lawrence *v.* McGregor (O.), Wright 193.

15. **Usage can not control express provisions.**—The Delaware (U. S.), 14 Wall. 579, 20 L. Ed. 779.

16. Parol testimony is not admissible on the trial of a case brought to recover damages growing out of an alleged breach of contract for failure to deliver cotton at the point of destination named in the bill of lading to prove a custom of stopping cotton short of the point of destination for purposes at variance with the plain, unambiguous terms of the contract of carriage. Albany, etc., R. Co. *v.* Merchants', etc., Bank, 137 Ga. 391, 73 S. E. 637.

Usage as to Stowage.—In the case of a bill of lading or a charter party, evidence of usage in a particular trade is admissible to show that certain goods in that trade may be stowed on deck.[17]

Custom as to Right of Inspection and Rejection.—Where a contract for the sale of perishable produce stipulated that the prices were f. o. b. cars and the bill of lading contained the notation "inspection allowed," evidence to show a custom that the buyer could inspect the goods on arrival, and, if not in good condition, reject them, which custom was known to the agent of the seller who made the sale, is admissible, in an action by the seller for the price, to show that the same was a part of the contract of sale, and to explain the significance of the quoted words in the bill of lading. Such custom gave the buyer the right of inspection before delivery, and to refuse acceptance on the goods being damaged.[18] The purpose of the evidence as to the custom referred to was not to create a warranty when none was created by the contract. No warranty was needed to protect the buyer. The right of inspection and rejection gave him all the protection he needed. Such a custom was not in violation of the terms of the contract and of established rules of law. The custom being known to the agent of seller, and being in fact of such a general character that the buyer, in dealing with produce dealers at the point of destination, would be required to take notice of it, became a part of the contract, which is shown to have been made with reference to it.[19] Evidence of the custom referred to was further admissible to explain the full significance of the notation on the bill of lading, "Inspection allowed." These words can have no other signification than explained by the custom referred to, that they referred to the right of inspection, and rejection if found in bad condition. They necessarily mean a right of inspection before delivery. After delivery consignee had no need of permission to inspect, and inspection before delivery would have been an idle ceremony unless some right was to accrue to him upon such inspection if the goods were not in good condition. The only reasonable interpretation to be given this language in the bill of lading taken by the shipper, and inserted of course, with his direction, is in accordance with the custom proven by consignee.[20]

§ 461. Conflict of Laws.—The laws of the state where the bill of lading was delivered will control as to the nature, interpretation, and effect of the contract for carriage;[21] and it has such qualities as are imposed upon it by the laws of that state.[22]

Laws Governing Indorsements.—Although a foreign bill of lading provided that questions arising between the owners and shipowners should be determined by the English law, the question of the effect of indorsements, where no question for or against the carrier is raised, is to be determined by the law of the place where the indorsements are made.[23]

17. **Usage as to stowage.**—The Delaware (U. S.), 14 Wall. 579, 20 L. Ed. 779.

18. **Custom as to right of inspection and rejection.**—Fort Produce Co. *v.* Dissen, 45 Tex. Civ. App. 403, 101 S. W. 477.

19. Fort Produce Co. *v.* Dissen, 45 Tex. Civ. App. 403, 101 S. W. 477.

It would not have violated any rule if the parties had contracted for inspection and rejection, and under the undisputed evidence as to the custom referred to, which became a part of the contract, this is what was done. Fort Produce Co. *v.* Dissen, 45 Tex. Civ. App. 403, 101 S. W. 477.

20. **Inspection allowed.**—Fort Produce Co. *v.* Dissen, 45 Tex. Civ. App. 403, 101 S. W. 477.

21. **Conflict of laws.**—Frank Simpson Fruit Co. *v.* Southern Pac. Co., 157 Ill. App. 158.

The law of the place where a bill of lading was made controls, where the right of the carrier to limit its common-law liability is not involved. Missouri, etc., R. Co. *v.* Sealy, 78 Kan. 758, 99 Pac. 230.

As to right of bona fide purchaser where goods not received by carrier.—See ante, "As against Bona Fide Consignee or Transferee," §§ 431-437.

22. National Bank *v.* Baltimore, etc., R. Co., 99 Md. 661, 59 Atl. 134, 105 Am. St. Rep. 321.

23. **Laws governing indorsements.**—Baker Co. *v.* Brown, 214 Mass. 196, 100 N. E. 1025.

§ 462. Foreign Laws.—In the absence of evidence as to the law relating to bills of lading of another state in which a bill of lading was issued, the court will presume that the common law prevails in that state.[24]

§ 463. Fraudulent Bills of Lading.—Consignor Not Owner of Goods.—See post, "Shipment Fraudulently Procured by Person Not Owner of Goods," § 498.

No Goods Received by Carrier.—See ante, "Receipt of Goods as Prerequisite to Issuance," §§ 429-442.

§ 464. Partial Invalidity.—While a bill of lading is to be construed as a whole, invalid conditions will not necessarily render the contract void; it may be enforced so far as it is valid.[25] Where it was clearly the intention of the parties that there should be a written contract, and one was deliberately made and entered into, the fact that the contract contains many provisions which can not be given effect and which it is apparent were never intended to be given effect; is not a sufficient reason for holding the contract invalid, or to justify setting aside and disregarding the provisions which are applicable to the subject-matter of the contract.[26]

§ 465. When Bill of Lading Part of Contract.—Where a shipping order,[27] a shipping ticket,[28] the letters[29] between a shipper and a carrier, or a receipt[30] for freight, directs the goods to be shipped[31] or declares that the shipment shall be[32] subject to the conditions of the bill of lading, the bill of lading is a part of the contract of carriage. But it must appear that a bill of

24. Foreign laws.—National Bank *v.* Baltimore, etc., R. Co., 99 Md. 661, 59 Atl. 134, 105 Am. St. Rep. 321.

25. Invalid conditions.—Whitnack *v.* Chicago, etc., R. Co., 82 Neb. 464, 118 N. W. 67, 130 Am. St. Rep. 692, 19 L. R. A., N. S., 1011; Grieve *v.* Illinois Cent. R. Co., 104 Iowa 659, 74 N. W. 192.

26. Whitnack *v.* Chicago, etc., R. Co., 130 Am. St. Rep. 692, 82 Neb. 464, 118 N. W. 67, 19 L. R. A., N. S., 1011.

27. Shipping order and bill of lading as contract of carriage.—Where a shipper delivered to a carrier his shipping order as per conditions of the carrier's bill of lading, and the carrier delivered to the shipper a bill of lading, the shipping order and the bill of lading constituted the contract of transportation. Illinois Match Co. *v.* Chicago, etc., R. Co., 95 N. E. 492, 250 Ill. 396, reversing judgment, 153 Ill. App. 568.

28. Shipping ticket and bill of lading.—Where a shipper sends with his shipment a shipping ticket directing that the goods be shipped "as per condition of company's bill of lading," and the carrier receipts for the goods on these terms, and there is a standard form of bill of lading, an express contract of shipments is created, and the terms in that bill of lading become a part of the contract. Southern R. Co. *v.* Frank & Co., 63 S. E. 656, 5 Ga. App. 574.

29. Letters and bill of lading as contract.—Where the letters between a carrier and a shipper set forth merely the rates at which the goods would be carried and the time within which a claim for damages would be settled, it will be presumed that the usage and custom of issuing bills of lading was within the contemplation of the parties, and such bills of lading, when issued, will be regarded as parts of the contract. Merchants', etc., Transp. Co. *v.* Eichberg, 109 Md. 211, 71 Atl. 993, 130 Am. St. Rep. 524.

"A similar view was held by the court of appeals of New York in the case of Donovan *v.* Standard Oil Co., 155 N. Y. 112, 49 N. E. 678, where the court said: 'This instrument [the bill of lading] must be read with the letter referred to under which the plaintiffs entered into the general arrangement, in order to ascertain the full extent of their duties and obligations as carrier.'" Merchants', etc., Transp. Co. *v.* Eichberg, 109 Md. 211, 71 Atl. 993, 130 Am. St. Rep. 524.

30. Carrier's receipt for freight and bill of lading.—A receipt by a carrier for freight, which declares that the shipment shall be subject to the conditions of the bill of lading, makes the bill of lading a part of the contract of carriage. Simmons Hardware Co. *v.* St. Louis, etc., R. Co., 140 Mo. App. 130, 120 S. W. 663.

31. Southern R. Co. *v.* Frank & Co., 5 Ga. App. 574, 63 S. E. 656.

32. Simmons Hardware Co. *v.* St. Louis, etc., R. Co., 140 Mo. App. 130, 120 S. W. 663.

lading was made out or that a standard form was in use which the parties had agreed on as part of the contract.[33]

§§ 466-479. Dual Character as Contract and as Receipt—§ 466. In General.—A bill of lading is an instrument of a twofold character. It is at once a receipt and a contract. In the former character it is an acknowledgment of the receipt of property by the carrier. In the latter it is a contract to carry them safely from the place of shipment and deliver to a person named or his order at the point of destination. It has been so held by the federal courts,[34] and the courts of Alabama,[35] Arkansas,[36] Illinois,[37] Maine,[38] Maryland,[39] Nebraska,[40] New York,[41] Ohio,[42] South Carolina,[43] Texas,[44] and other states.

§ 467. As Contract Generally.—The bill of lading establishes a contractual relation between the carrier and shipper.[45] When issued by a common

33. American Storage, etc., Co. *v.* Wabash R. Co. (Mo. App.), 123 S. W. 964.

An instrument reciting receipt by defendant carrier from plaintiff of the "following articles" to be delivered to plaintiff at destination, after which is a description of the articles, followed by the words "received subject to conditions of * * * (defendant's) bill of lading," itself constitutes the contract, in the absence of evidence by either party of anything else in the way of a bill of lading having been made out, or any form in use having been agreed on as part of the contract. American Storage, etc., Co. *v.* Wabash R. Co. (Mo. App.), 123 S. W. 964.

34. Dual character of bill of lading.—Pollard *v.* Vinton, 105 U. S. 7, 8, 26 L. Ed. 998; The Delaware (U. S.), 14 Wall. 579, 601, 20 L. Ed. 779; St. Louis, etc., R. Co. *v.* Knight, 122 U. S. 79, 87, 30 L. Ed. 1077, 7 S. Ct. 1132; Missouri Pac. R. Co. *v.* McFadden, 154 U. S. 155, 38 L. Ed. 944, 14 S. Ct. 990. See The Lady Franklin (U. S.), 8 Wall. 325, 19 L. Ed. 455; The Schooner Freeman (U. S.), 18 How. 182, 15 L. Ed. 341.

35. Wayland *v.* Mosely, 5 Ala. 430, 39 Am. Dec. 335; Alabama, etc., R. Co. *v.* Norris, 167 Ala. 311, 52 So. 891.

36. St. Louis, etc., R. Co. *v.* Citizens' Bank, 87 Ark. 26, 112 S. W. 154, 30 R. R. R. 290, 53 Am. & Eng. R. Cas., N. S., 290, 128 Am. St. Rep. 17.

37. Merchants' Dispatch Transp. Co. *v.* Furthmann, 47 Ill. App. 561, affirmed in 149 Ill. 66, 36 N. E. 624, 41 Am. St. Rep. 265.

A "bill of lading" is a written acknowledgment of the receipt of goods and an agreement, on consideration, to transport and deliver them at a specified place to a person named on his order. Illinois Match Co. *v.* Chicago, etc., R. Co., 250 Ill. 396, 95 N. E. 492, reversing judgment 153 Ill. App. 568.

38. O'Brien *v.* Gilchrist, 34 Me. 554, 56 Am. Dec. 676, 678.

39. Baltimore, etc., R. Co. *v.* Wilkens, 44 Md. 11, 22 Am. Rep. 26.

40. Whitnack *v.* Chicago, etc., R. Co., 82 Neb. 464, 118 N. W. 67, 19 L. R. A., N. S., 1011, 130 Am. St. Rep. 692.

41. Wolfe *v.* Meyers (N. Y.), 3 Sandf. 7; Miller *v.* Hannibal, etc., R. Co., 90 N. Y. 430, 43 Am. Rep. 179.

"A bill of lading has a twofold character: 1. That of a receipt; and 2. That of a contract." Van Etten *v.* Newton, 134 N. Y. 143, 30 Am. St. Rep. 630.

42. Wood *v.* Perry (O.), Wright 240; Page & Co. *v.* Sandusky, etc., R. Co., 4 West. L. M. 644, 2 O. Dec. Reprint 716.

A bill of lading is a contract including a receipt. Page & Co. *v.* Sandusky, etc., R. Co., 4 West. L. M. 644, 2 O. Dec. Reprint 716.

"The bill of lading is a contract including a receipt. It is a contract admitting the reception of certain goods, with an agreement to carry them to the port of discharge." Babcock *v.* May, 4 O. 334. And see Citizens' Nat. Bank *v.* C. N. O. & T. P. R. Co., 29 Wkly. L. Bull. 15, 11 O. Dec. Reprint 703.

43. Thomas *v.* Atlantic, etc., R. Co., 85 S. C. 537, 64 S. E. 220, 34 L. R. A., N. S., 1177, 21 Am. & Eng. Ann. Cas. 223, 32 R. R. R. 250, 55 Am. & Eng. R. Cas., N. S., 250.

44. A bill of lading is a receipt (for the shipment) as well as a contract of carriage in writing. East Line, etc., R. Co. *v.* Hall, 64 Tex. 615, 620; Dwyer *v.* Gulf, etc., R. Co., 69 Tex. 707, 710, 7 S. W. 504; Cohen Bros. *v.* Missouri, etc., R. Co., 44 Tex. Civ. App. 381, 383, 98 S. W. 437; House *v.* Holland, 42 Tex. Civ. App. 502, 94 S. W. 153.

Bills of lading are practically no more than receipts for the goods, and are contracts only in name. Kansas, etc., R. Co. *v.* Rosebrook-Josey Grain Co., 52 Tex. Civ. App. 156, 114 S. W. 436.

45. As a contract.—Pace Mule Co. *v.* Seaboard, etc., R. Co. (N. C.), 76 S. E. 513; Herring *v.* Atlantic, etc., R. Co. (N. C.), 76 S. E. 527.

A bill of lading given under art. 280 of Tex. Rev. Civil St., is a contract entered into between the parties at the time the goods are delivered, and is equally binding upon both parties. Schloss *v.* Atchison, etc., R. Co., 85 Tex. 601, 22 S. W. 1014.

carrier, and signed and accepted by the shipper, it constitutes the contract for the shipment of merchandise therein described,[46] by which for a specified sum the carrier undertakes to carry safely and deliver the goods received to the person named in the bill or his order.[47] It is a special contract, imposing the duty of transportation and delivery according to its terms as understood by the contracting parties at the time of entering into the same.[48]

§ 468. As a Receipt in General.—The bill of lading, to the extent that it acknowledges the delivery and acceptance of the goods by the carrier, is a receipt. In other respects, it is a contract.[49] This is the doctrine of the courts of the United States[50] and of the states of Alabama,[51] Arkansas,[52] Illinois,[53] Iowa,[54] Louisiana,[55] New York,[56] Texas,[57] and others.

§§ 469-479. Parol Evidence to Vary or Contradict Bill—§§ 469-470 As a Contract—§ 469. Between the Parties.—In so far as a bill of lading is a contract of carriage expressing the terms and conditions upon which the shipment is to be transported, it can not be explained, varied, added to, altered or contradicted by parol evidence. The bill of lading embodies the contract between the shipper and the carrier, and, when delivered by the carrier and received by the shipper, its terms, stipulations, and conditions are as binding on the parties thereto as are the terms, stipulations, and conditions of any other written contract. A bill of lading is, therefore, to be taken as the sole evidence of the final agreement of the parties, by which their duties and liabilities must be regulated, and in the absence of fraud or mistake, when its terms are free from ambiguity, parol evidence is inadmissible to vary its terms or legal import.[58] Where there is nothing in the nature of the business which is the subject of such contract to control the meaning of its terms, the instrument must be interpreted and its meaning gathered from the instrument itself, without resort to any parol testimony.[59] This is the settled doctrine in the federal courts[60] and in the courts of the states of Alabama,[61] Arkan-

46. Whitnack *v.* Chicago, etc., R. Co., 82 Neb. 464, 118 N. W. 67, 19 L. R. A., N. S., 1011, 130 Am. St. Rep. 692.

47. A bill of lading is a contract to safely carry and deliver. Cobb *v.* Brown, 113 C. C. A. 586, 193 Fed. 958; Williams *v.* Louisville, etc., R. Co. (Ala.), 58 So. 315.

A bill of lading in the first instance represents the contract between the shipper and the carrier, by which, for a specified sum, the carrier undertakes to deliver the goods received to the rightful owner. Gass *v.* Astoria Veneer Mills, 134 App. Div. 184, 118 N. Y. S. 982.

48. It is a special contract.—Wayne *v.* Steamboat General Pike, 16 O. 421.

49. A bill of lading is an acknowledgment of the receipt of the property by the carrier. Cobb *v.* Brown, 113 C. C. A. 586, 193 Fed. 958; Williams *v.* Louisville, etc., R. Co. (Ala.), 58 So. 315.

50. Cobb *v.* Brown, 113 C. C. A. 586, 193 Fed. 958.

51. Williams *v.* Louisville, etc., R. Co. (Ala.), 58 So. 315.

52. St. Louis, etc., R. Co. *v.* Citizens' Bank, 87 Ark. 26, 112 S. W. 154, 30 R. R. R. 290, 53 Am. & Eng. R. Cas., N. S., 290, 128 Am. St. Rep. 17.

53. Merchants' Dispatch Transp. Co. *v.* Furthmann, 47 Ill. App. 561, affirmed in 149 Ill. 66, 36 N. E. 624, 41 Am. St. Rep. 265.

54. Chapin *v.* Chicago, etc., R. Co., 79 Iowa 582, 44 N. W. 820.

55. Hunt *v.* Mississippi Cent. R. Co., 29 La. Ann. 446; Sonia Cotton Oil Co. *v.* Steamer Red River, 106 La. 42, 30 So. 303, 87 Am. St. Rep. 293.

56. Van Etten *v.* Newton, 134 N. Y. 143, 30 Am. St. Rep. 630.

57. Cohen Bros. *v.* Missouri, etc., R. Co., 44 Tex. Civ. App. 381, 383, 98 S. W. 437; House *v.* Holland, 42 Tex. Civ. App. 502, 94 S. W. 153.

58. Between parties.—Tallassee Falls Mfg. Co. *v.* Western Railway, 117 Ala. 520, 23 So. 139, 67 Am. St. Rep. 179; Louisville, etc., R. Co. *v.* Fulgham, 91 Ala. 555, 8 So. 803.

59. Wayne *v.* Steamboat General Pike, 16 O. 421.

60. The Delaware (U. S.), 14 Wall. 579, 20 L. Ed. 779; O'Rourke *v.* Two Hundred and Twenty-One Tons of Coal, 1 Fed. 619; The Lady Franklin (U. S.), 8 Wall. 325, 19 L. Ed. 455; Mobile, etc., R. Co. *v.* Jurey, 111 U. S. 584, 591, 28 L. Ed. 527, 4 S. Ct. 566; Clark *v.* Barnwell (U. S.), 12 How. 272, 13 L. Ed. 985; Niagara *v.* Cordes (U. S.), 21 How. 7, 23, 16 L. Ed. 41.

61. Wayland *v.* Mosely, 5 Ala. 430, 39

sas,[62] Connecticut,[63] Georgia,[64] Indiana,[65] Iowa,[66] Kansas,[67] Louisiana,[68] Massachusetts,[69] Minnesota,[70] Missouri,[71] Nebraska,[72] New York,[73] Ohio,[74] Pennsylvania,[75] Rhode Island,[76] Texas,[77] Vermont,[78] Wisconsin,[79] and others; and in England.[80]

Obligations Implied from Nature of Contract.—Not only is parol evidence inadmissible to vary the express terms of the contract contained in a bill of lading, but it is inadmissible to vary the obligations as to which the contract is silent, but which are implied from its nature.[81]

Proof That Bill Contract of Parties.—Before the rule excluding parol

Am. Dec. 335; Cox *v.* Peterson, 30 Ala. 608, 68 Am. Dec. 145; Louisville, etc., R. Co. *v.* Fulgham, 91 Ala. 555, 8 So. 803; Steele *v.* Townsend, 37 Ala. 247, 79 Am. Dec. 49; Tallassee Falls Mfg. Co. *v.* Western Railway, 117 Ala. 520, 23 So. 139, 67 Am. St. Rep. 179.

62. St. Louis, etc., R. Co. *v.* Citizens' Bank, 87 Ark. 26, 112 S. W. 154, 30 R. R. R. 290, 53 Am. & Eng. R. Cas., N. S., 290, 128 Am. St. Rep. 17.

63. Barber *v.* Brace, 3 Conn. 9, 8 Am. Dec. 149.

64. Richmond, etc., R. Co. *v.* Shomo, 90 Ga. 496, 16 S. E. 220; Central, etc., R. Co. *v.* Cook, 4 Ga. App. 698, 701, 62 S. E. 464; Atlantic, etc., R. Co. *v.* Cohn & Co., 6 Ga. App. 572, 573, 65 S. E. 355; McElveen *v.* Southern R. Co., 109 Ga. 249, 34 S. E. 281, 77 Am. St. Rep. 371.

65. Indianapolis, etc., R. Co. *v.* Remmy, 13 Ind. 518; Louisville, etc., R. Co. *v.* Wilson, 119 Ind. 352, 21 N. E. 341, 40 Am. & Eng. R. Cas. 85.

66. Wilde *v.* Merchants' Despatch Transp. Co., 47 Iowa 272.

67. Hopkins *v.* St. Louis, etc., R. Co., 16 Am. & Eng. R. Cas. 126.

68. Hunt *v.* Mississippi Cent. R. Co., 29 La. Ann. 446; Sonia Cotton Oil Co. *v.* Steamer Red River, 106 La. 42, 30 So. 303, 87 Am. St. Rep. 293.

69. Blanchard *v.* Page (Mass.), 8 Gray 281.

70. Minneapolis, etc., R. Co. *v.* Home Ins. Co., 55 Minn. 236, 56 N. W. 815, 22 L. R. A., N. S., 390; Norton *v.* Baxter, 41 Minn. 146, 16 Am. St. Rep. 679.

71. O'Bryan *v.* Kinney, 74 Mo. 125; St. Louis, etc., R. Co. *v.* Cleary, 77 Mo. 634, 46 Am. Rep. 13; Turner *v.* St. Louis, etc., R. Co., 20 Mo. App. 632; Milne *v.* Chicago, etc., R. Co., 155 Mo. App. 465, 135 S. W. 85.

72. Whitnack *v.* Chicago, etc., R. Co., 82 Neb. 464, 118 N. W. 67, 19 L. R. A., N. S., 1011, 130 Am. St. Rep. 692.

73. Niles *v.* Culver (N. Y.), 8 Barb. 205; Fitzhugh *v.* Wiman, 9 N. Y. 559, Seld. Notes 250; Creery *v.* Holly (N. Y.), 14 Wend. 26; White *v.* Van Kirk (N. Y.), 25 Barb. 16; Long *v.* New York Cent. R. Co., 50 N. Y. 76; Collender *v.* Dinsmore, 55 N. Y. 200, 14 Am. Rep. 224; Germania Fire Ins. Co. *v.* Memphis, etc., R. Co., 72 N. Y. 90, 28 Am. Rep. 113; Hill *v.* Syracuse, etc., R. Co., 73 N. Y. 351, 29 Am. Rep. 163; Hinckley *v.* New York Cent., etc., R. Co., 56 N. Y. 429; Van Etten *v.* Newton, 134 N. Y. 143, 31 N. E. 334, 30 Am. St. Rep. 630.

74. Lawrence *v.* McGregor (O.), Wright 193; Wayne *v.* Steamboat General Pike, 16 O. 421; Cincinnati, etc., R. Co. *v.* Pontius, 19 O. St. 221, 2 Am. Rep. 391.

A bill of lading being a special contract is not, as a general rule, to be varied or altered by parol evidence. Wayne *v.* Steamboat General Pike, 16 O. 421; Jordan, etc., Co. *v.* James, 5 O. 88; Babcock *v.* May, 4 O. 334; Cleveland, etc., R. Co. *v.* La Tourette, 2 O. C. C. 279, 1 O. C. D. 486.

75. Shaw *v.* Merchants' Nat. Bank (Pa.), 8 Wkly. Notes Cas. 221; Hostetter *v.* Baltimore, etc., R. Co. (Pa.), 14 Atl. 609, 8 Sad. 499.

76. Gardner *v.* Chace, 2 R. I. 112.

77. Cohen Bros. *v.* Missouri, etc., R. Co., 44 Tex. Civ. App. 381, 98 S. W. 437; House *v.* Holland, 42 Tex. Civ. App. 502, 94 S. W. 153, Arnold *v.* Jones, 26 Tex. 335, 82 Am. Dec. 617.

Except in the recital of the receipt of the goods, and of their quantity and condition, bills of lading are strictly written contracts, within the rule prohibiting parol evidence to contradict or vary such contracts. Galveston, etc., R. Co. *v.* Silegman (Tex. Civ. App.), 23 S. W. 298.

78. King *v.* Woodbridge, 34 Vt. 565; Davis *v.* Central, etc., R. Co., 66 Vt. 290, 29 Atl. 313, 44 Am. St. Rep. 852.

79. Hansen *v.* Flint, etc., R. Co., 73 Wis. 346, 41 N. W. 529, 9 Am. St. Rep. 791.

80. Goodrich *v.* Norris, Fed. Cas. No. 5545, 1 Abb. Adm. 196; Brabley *v.* Dunipace, 1 H. & C. 521; Butler *v.* The Steamboat Arrow, 6 McLean 470, Newb. Adm. 59.

81. Obligation implied from nature contract.—Wells, Fargo & Co.'s Exp. *v.* Fuller, 4 Tex. Civ. App. 213, 23 S. W. 412, affirmed in 93 Tex. 741, no op.; Arnold *v.* Jones, 26 Tex. 335, 82 Am. Dec. 617.

As a bill of lading for shipment of cattle raises an implied obligation to furnish suitable cars, and to transport the cattle within a reasonable time, parol evidence is inadmissible to show a parol agreement prior to the bill of lading to furnish "bedded" cars and to make close connection with another line of carriers, though it could be shown that bedded cars

evidence can be applied, the written bill of lading must be shown to be the contract of the parties.[82]

Effect of Production of Bill of Lading.—The production of the bill of lading is an admission that the contract was in writing, and upon failure to prove the written contract, evidence of a parole contract is inadmissible.[83]

A clean bill of lading imports that the goods are stowed under deck, and parol evidence that the vendor agreed that the goods should be stowed on deck can not be received.[84]

Through Bill of Lading.—If a receipt constitutes a through bill of lading of the goods parol evidence can not be given to explain or vary it; what is established by contract can not be changed or affected by custom.[85]

Words "More or Less."—The words "more or less" in a bill of lading for the shipping of a number of pieces of lumber, amounting to a specified number of tons "more or less," can not be shown by parol to have been intended to refer also to the number of pieces shipped.[86]

Additional Provisions of Waybill for Guidance of Carrier's Employees.—Proof that a waybill issued by the carrier for the guidance of its employees stipulated delivery at a certain packing house was inadmissible to add that provision to the written contract between the carrier and shipper.[87]

§ 470. Between Consignor and Consignee.—As between the consignor and the consignee, the bill of lading can not be regarded as a contract in writing, but merely as an admission or declaration on the part of the consignor as to his purpose, at the time, in making the shipment, and such admission is subject to be rebutted by other circumstances connected with the transaction.[88]

Amount Shipped.—Bills of lading for goods shipped to purchaser are prima facie but not conclusive evidence of the amount of goods shipped; and the purchaser can show that the seller had not in fact shipped the quantity purchased.[89]

§ 471. Merger of Oral Negotiations and Prior Verbal Agreements.—A bill of lading as a contract, in which the carrier agrees to transport and deliver the goods to the consignee upon the terms and conditions specified in the instrument, is a merger of all oral negotiations[90] and representations[91] leading

were the only suitable cars to be used, and that transportation with reasonable dispatch would have made the close connection. Galveston, etc., R. Co. *v.* Silegman (Tex. Civ. App.), 23 S. W. 298.

82. Writing must be contract of parties.—Mobile, etc., R. Co. *v.* Jurey, 111 U. S. 584, 28 L. Ed. 527, 4 S. Ct. 566.

Where the shipper insists that the contract between him and the railroad company is by parol, and denies that the bill of lading is the contract, and alleges that it had never been delivered to him, but only to a person who was not authorized to make a contract for him, evidence of the parol contract is perfectly competent, and it is a question to be decided by the jury whether the understanding as detailed by the witnesses or the bill of lading expresses the agreement of the parties. Mobile, etc., R. Co. *v.* Jurey, 111 U. S. 584, 28 L. Ed. 527, 4 S. Ct. 566.

83. Effect of production of bill of lading.—Peck *v.* Dinsmore (Ala.), 4 Port. 212.

84. A clean bill of lading.—The Delaware (U. S.), 14 Wall. 579, 605, 20 L. Ed. 779; Niagara *v.* Cordes (U. S.), 21 How. 7, 16 L. Ed. 41.

85. Through bill of lading.—Hansen *v.* Flint, etc., R. Co., 73 Wis. 346, 41 N. W. 529, 9 Am. St. Rep. 791.

86. The words more or less.—O'Brien *v.* Gilchrist, 34 Me. 554, 56 Am. Dec. 676.

87. Additional provisions of waybill for guidance of carrier's employees.—International, etc., R. Co. *v.* Griffith (Tex. Civ. App.), 103 S. W. 225, affirmed in 102 Tex. 585, no op.

88. Between consignor and consignee.—Emery's Sons *v.* Irving Nat. Bank, 25 O. St. 360, 18 Am. Rep. 299.

89. Amount shipped.—Reid Phosphate Co. *v.* Farmers' Fertilizer Co. (S. C.), 77 S. E. 863.

90. Merger of oral negotiations and prior verbal agreements.—Whitnack *v.* Chicago, etc., R. Co., 82 Neb. 464, 118 N. W. 67, 19 L. R. A., N. S., 1011, 130 Am. St. Rep. 692; McFadden *v.* Missouri Pac. R. Co., 92 Mo. 343, 4 S. W. 689, 1 Am. St. Rep. 721; St. Louis, etc., R. Co. *v.* Elgin Condensed Milk Co., 175 Ill. 557, 51 N. E. 911, 67 Am. St. Rep. 238.

91. In an action by the consignee for

up to its making, and all other prior and contemporaneous agreements[92] of the parties; and being in writing its terms or legal effect when free from ambiguity[93] can not, in the absence of fraud or mistake, be explained or contradicted by parol testimony and thereby changed in its legal effect;[94] but where the acceptance of the bill by the shipper is the result of fraud or mistake the verbal contract of shipment is not merged therein and it may be contradicted by parol evidence showing the agreement between the parties.[95]

Instances of Inadmissibility of Evidence of Prior Verbal Contract.—The rule which forbids the introduction of parol proof to vary the terms of a written instrument excludes evidence of a prior or contemporaneous parol agreement that the goods were received under other terms and conditions, that they were to be shipped by another route than that designated,[96] that the goods were to be delivered to a connecting railroad or steamer,[97] that the carrier should not be responsible for any risk or loss which might befall the boat or

the loss of goods shipped under a bill of lading, it was held that the carrier could not give in evidence representations, made by the consignor before the execution of the bill, as to the depth of the water at the place of landing, where there was no evidence that the representations were fraudulently made. Shaw *v.* Gardner (Mass.), 12 Gray 488.

92. *United States.*—Southern Exp. Co. *v.* Dickson, 94 U. S. 549, 24 L. Ed. 285; The Caledonia, 43 Fed. 681.

Arkansas.—All previous contracts for the transportation of property are merged in the contract evidenced by the bill of lading, signed by both parties. St. Louis, etc., R. Co. *v.* Jones, 93 Ark. 537, 125 S. W. 1025.

Georgia.—Western, etc., R. Co. *v.* Ohio Valley, etc., Co., 107 Ga. 512, 33 S. E. 821.

Indiana.—Louisville, etc., R. Co. *v.* Wilson, 119 Ind. 352, 21 N. E. 341, 40 Am. & Eng. R. Cas. 85; Snow *v.* Indiana, etc., R. Co., 109 Ind. 422, 9 N. E. 702.

Minnesota.—Norton *v.* Baxter, 41 Minn. 146, 16 Am. St. Rep. 679.

New York.—Germania Fire Ins. Co. *v.* Memphis, etc., R. Co., 72 N. Y. 90, 28 Am. Rep. 113; Hill *v.* Syracuse, etc., R. Co., 73 N. Y. 351, 29 Am. Rep. 163; Long *v.* New York Cent. R. Co., 50 N. Y. 76; Niles *v.* Culver (N. Y.), 8 Barb. 205.

Texas.—Parol evidence tending to show a prior agreement or an understanding between carrier and shipper in executing a bill of lading and which is intended to contradict or vary the terms or legal import of the written instrument is inadmissible. Arnold *v.* Jones, 26 Tex. 335, 82 Am. Dec. 617; Bessling & Co. *v.* Houston, etc., R. Co., 35 Tex. Civ. App. 470, 472, 80 S. W. 639, affirmed in 98 Tex. 610, no op.; Wells, Fargo & Co.'s Exp. *v.* Fuller, 4 Tex. Civ. App. 213, 23 S. W. 412 (see 93 Tex. 742, no op.); Galveston, etc., R. Co. *v.* Silegman (Tex. Civ. App.), 23 S. W. 298; Cross *v.* Graves, 4 Tex. App. Civ. Cas., § 100, 16 S. W. 102; International, etc., R. Co. *v.* Griffith (Tex. Civ. App.), 103 S. W. 225, affirmed in 102 Tex. 585, no op.

93. Western, etc., R. Co. *v.* Ohio Valley, etc., Co., 107 Ga. 512, 33 S. E. 821.

94. Louisville, etc., R. Co. *v.* Wilson, 119 Ind. 352, 21 N. E. 341, 40 Am. & Eng. R. Cas. 85.

If no mistake or fraud is charged in the execution of the contract it will be conclusively presumed that all oral negotiations and representations, not only as to the terms and conditions on which the goods are received, but also as to the route by which they are to be forwarded are merged in the bill of lading which will be received as the sole evidence of the agreement between the parties. McElveen *v.* Southern R. Co., 109 Ga. 249, 34 S. E. 281, 77 Am. St. Rep. 371; Richmond, etc., R. Co. *v.* Shomo, 90 Ga. 496, 16 S. E. 220.

95. Conclusiveness as to rate.—Where plaintiff claims that he entered into a verbal agreement with a railroad company for the shipment of cattle at a fixed rate, parol evidence is admissible to show what that agreement was, though plaintiff signed a bill of lading showing a different rate; both parties testifying that plaintiff received the bill of lading just as the train with the cattle, which he was to accompany, was leaving, and that he signed it on the assurance of defendant that it was all right. Galveston, etc., R. Co. *v.* House, 4 Tex. Civ. App. 263, 23 S. W. 332.

96. McElveen *v.* Southern R. Co., 109 Ga. 249, 34 S. E. 281, 77 Am. St. Rep. 371; Richmond, etc., R. Co. *v.* Shomo, 90 Ga. 496, 16 S. E. 220.

97. When under the terms of a contract for carriage the carrier obligates itself to carry the shipment to one of the termini of its road and there deliver it to a connecting line of railroad or steamer for transportation to the destination of the goods, evidence of a parol representation that the freight would be delivered to a connecting railroad and not to a steamer, is inadmissible to vary the terms of the written agreement. McElveen *v.* Southern R. Co., 109 Ga. 249, 34 S. E. 281, 77 Am. St. Rep. 371.

shipment in descending a river[98] and that the goods shall be delivered within a definite and specific time.[99]

Sufficiency of Evidence to Establish Prior Verbal Contract.—While by reason of fraud or mistake it is permissible for a shipper to offer evidence of a verbal contract of shipment not merged in the bill of lading delivered to him, such contract must be clearly proved.[1]

Contract Distinct from Bill of Lading.—A prior verbal contract between a shipper and carrier entirely distinct from the subsequent bill of lading, which limits the carrier's liability, is not merged therein.[2]

§ 472. To Explain Ambiguities and Technical Terms.—Abbreviations and technical terms in bills of lading create such ambiguity that they may be explained by parol testimony. The theory upon which parol testimony is allowed in such case is that symbols of trade having a definite meaning may be interpreted, and the interpretation becomes a part of the writing. If the testimony introduced as to the meaning of such trade symbols is conflicting, then it is for the jury to determine their proper signification.[3]

Figures.—Where figures contained in the bill of lading are ambiguous, parol evidence is properly admitted to prove their meaning.[4]

§§ 473-476. Parol Evidence to Alter or Contradict Receipt Clauses of Bill—§ 473. In General.—In so far as a bill of lading constitutes a receipt—that is, the part wherein is set out the receipt of the goods, the quantity, quality and condition—it may, like other receipts, be explained, altered, varied, or contradicted by parol evidence. As a receipt it is prima facie, and not conclusive, evidence of the facts recited, and between the parties it is impeachable for mistake, error or false statements therein.[5] This is settled rule in federal courts[6]

98. **Exclusion of liability for unavoidable losses.**—The defendants, being sued as common carriers, offered to prove by a witness that he was present when the bill of lading was executed by the defendants and that it was the express contract and understanding between them and the plaintiff that they were not to be responsible for any risk or loss that might unavoidably befall the boat or freight in descending the river. Held, that the evidence was properly excluded as tending to contradict or vary the bill of lading. Arnold *v.* Jones, 26 Tex. 335, 82 Am. Dec. 617.

99. Central R., etc., Co. *v.* Hasselkus, 91 Ga. 382, 17 S. E. 838, 44 Am. St. Rep. 37, 55 Am. & Eng. R. Cas. 586.

1. **Sufficiency of evidence to establish verbal contract.**—Evidence showing that S., some time prior to shipment, inquired of an agent of a railroad company, owning a line from Cincinnati to Dayton, the freight rate from C. to a point beyond his line, and was informed, and later loaded two cars of the company, notified the agent and sent blank bills of lading, with shipping directions, which bills of lading were returned by the agent duly signed, does not establish a verbal contract, with common-law liability, and the trial court very properly overruled a motion for a new trial on the ground that the verdict was against the weight of the evidence. Shaffer & Co. *v.* C. H. & D. R. Co., 14 O. C. C. 488, 8 O. C. D. 66.

2. **Contract distinct from bill of lading.**—St. Louis, etc., R. Co. *v.* Elgin Condensed Milk Co., 175 Ill. 557, 51 N. E. 911, 67 Am. St. Rep. 238.

3. **Symbols of trade—Technical terms.**—Louisville, etc., R. Co. *v.* Southern Flour, etc., Co., 136 Ga. 538, 71 S. E. 884.

"**Care W. A.**" has been construed to mean in care of the Western and Atlantic Railroad Company. Louisville, etc., R. Co. *v.* Southern Flour, etc., Co., 136 Ga. 538, 71 S. E. 884.

4. **Figures.**—Central R., etc., Co. *v.* Georgia Fruit, etc., Exch., 91 Ga. 389, 17 S. E. 904.

5. **Parol evidence to alter or contradict receipt clauses.**—St. Louis, etc., R. Co. *v.* Citizens' Bank, 87 Ark. 26, 112 N. W. 154, 30 R. R. R. 290, 53 Am. & Eng. R. Cas., N. S., 290, 128 Am. St. Rep. 17.

As a receipt, a bill of lading is, like other receipts, only prima facie evidence of what is expressed in it, and may be explained by aliunde evidence. Wood *v.* Perry (O.), Wright 240.

6. The Delaware (U. S.), 14 Wall. 579, 601, 20 L. Ed. 779; Clark *v.* Barnwell (U. S.), 12 How. 272, 13 L. Ed. 985; The Lady Franklin (U. S.), 8 Wall. 325, 19 L. Ed. 455; The J. W. Brown (U. S.), 1 Biss. 76; The Wellington (U. S.), 1 Biss. 279; The Joseph Grant (U. S.), 1 Biss. 193; Maryland Ins. Co. *v.* Ruden (U. S.), 6 Cranch 338, 3 L. Ed. 242; Nelson *v.* Woodruff (U. S.), 1 Black 156, 17 L. Ed. 97; Higgins *v.* United States Mail, etc.,

and in the states of Alabama,[7] Arkansas,[8] California,[9] Connecticut,[10] Georgia,[11] Illinois,[12] Iowa,[13] Louisiana,[14] Maine,[15] Maryland,[16] Massachusetts,[17] Michigan,[18] Minnesota,[19] Missouri,[20] New York,[21] North Carolina,[22] Ohio,[23] Pennsylvania,[24] Texas,[25] Vermont,[26] West Virginia,[27] Wisconsin,[28] and others; and in England.[29]

§ 474. Recital of Fact of Receipt and Quantity of Goods.—A bill of lading issued by a common carrier, as between the original parties to the contract, is, so far as it acknowledges the receipt by the common carrier of a certain quantity of goods for shipment, only prima facie and not conclusive evidence

Co., Fed. Cas. No. 6469, 3 Blatchf. 282; The Ship Howard (U. S.), 18 How. 231, 15 L. Ed. 363; The Guiding Star, 62 Fed. 407; Sutton v. Kettell, Fed. Cas. No. 13647, 1 Spr. 309.

7. Wayland v. Mosely, 5 Ala. 430, 39 Am. Dec. 335; Cox v. Peterson, 30 Ala. 608, 68 Am. Dec. 145. Compare Peck v. Dinsmore (Ala.), 4 Port. 212.

8. A bill of lading, as a receipt, is prima facie and not conclusive evidence of the facts recited, and, between the original parties, is impeachable for mistake, error, or false statements therein. St. Louis, etc., R. Co. v. Citizens' Bank, 87 Ark. 26, 30 R. R. R. 290, 53 Am. & Eng. R. Cas., N. S., 290, 112 S. W. 154, 128 Am. St. Rep. 17.

9. Pereira v. Central Pac. R. Co., 66 Cal. 92, 4 Pac. 988.

10. Relyea v. New Haven Rolling Mill Co., 42 Conn. 579, 75 Fed. 420.

11. Atlantic, etc., R. Co. v. Cohn & Co., 6 Ga. App. 572, 573, 65 S. E. 355; Central, etc., R. Co. v. Cook, 4 Ga. App. 698, 62 S. E. 464; McElveen v. Southern R. Co., 109 Ga. 249, 77 Am. St. Rep. 371, 34 S. E. 281.

12. Bissel v. Price, 16 Ill. 408; Merchants' Dispatch Transp. Co. v. Furthmann, 47 Ill. App. 561, affirmed in 149 Ill. 66, 36 N. E. 624, 41 Am. St. Rep. 265.

13. Wisconsin v. Young (Iowa), 3 G. Greene 268; Chapin v. Chicago, etc., R. Co., 79 Iowa 582, 44 N. W. 820.

14. Kirkman v. Bowman (La.), 8 Rob. 246; Hunt v. Mississippi Cent. R. Co., 29 La. Ann. 446; Sonia Cotton Oil Co. v. Steamer Red River, 106 La. 42, 30 So. 303, 87 Am. St. Rep. 293.

15. O'Brien v. Gilchrist, 34 Me. 554, 56 Am. Dec. 676; Tarbox v. Eastern Steamboat Co., 50 Me. 339; Witzler v. Collins, 70 Me. 290, 35 Am. Rep. 327.

16. Atwell v. Miller, 11 Md. 348, 69 Am. Dec. 206.

17. Shepherd v. Naylor (Mass.), 5 Gray 591; Sears v. Wingate (Mass.), 3 Allen 103; Blanchard v. Page (Mass.), 8 Gray 281; Richards v. Doe, 100 Mass. 524; Hastings v. Pepper (Mass.), 11 Pick. 41; Grace v. Adams, 100 Mass. 505, 1 Am. Rep. 131, 97 Am. Dec. 117; Chandler v. Sprague (Mass.), 5 Metc. 306, 38 Am. Dec. 404; Graves v. Lake Shore, etc., R. Co., 137 Mass. 33, 50 Am. Rep. 282.

18. Gibbons v. Robinson, 63 Mich. 146, 29 N. W. 533; McMillan v. Michigan, etc., R. Co., 16 Mich. 79, 93 Am. Dec. 208.

19. National Bank v. Chicago, etc., R. Co., 44 Minn. 224, 46 N. W. 342, 9 L. R. A., N. S., 263, 20 Am. St. Rep. 566; Norton v. Baxter, 41 Minn. 146, 16 Am. St. Rep. 679.

20. Missouri v. Webb, 9 Mo. 193; McFadden v. Missouri Pac. R. Co., 92 Mo. 343, 4 S. W. 689, 1 Am. St. Rep. 721.

21. Meyer v. Peck, 28 N. Y. 590; White v. Van Kirk (N. Y.), 25 Barb. 16; Fitzhugh v. Wiman, 9 N. Y. 559, Seld. Notes 250; Van Etten v. Newton, 134 N. Y. 143, 31 N. E. 334, 30 Am. St. Rep. 630; Wolfe v. Meyers (N. Y.), 3 Sandf. 7.

22. Black v. Wilmington, etc., R. Co., 92 N. C. 42, 53 Am. Rep. 450; Peele v. Atlantic, etc., R. Co., 149 N. C. 390, 63 S. E. 66.

23. Wood v. Perry (O.), Wright 240; May v. Babcock, 4 O. 334; Page & Co. v. Sandusky, etc., R. Co., 4 West. L. Month. 644, 2 O. Dec. Reprint 716; Dean v. King, 22 O. St. 118, followed in 35 O. St. 258, (following 22 O. St. 111).

24. Cafiero v. Welsh, Fed. Cas. No. 2286, 8 Phila. 130; Baltimore, etc., Steamboat Co. v. Brown, 54 Pa. 77; Franklin Trust Co. v. Philadelphia, etc., R. Co., 222 Pa. 96, 70 Atl. 949, 22 L. R. A., N. S., 828.

A bill of lading, in so far as it is a receipt, is not conclusive, but is open to explanation between the original parties, and, where marked "not negotiable," the same rule applies to third parties. Franklin Trust Co. v. Philadelphia, etc., R. Co., 222 Pa. 96, 70 Atl. 949, 22 L. R. A., N. S., 828.

25. Cohen Bros. v. Missouri, etc., R. Co., 44 Tex. Civ. App. 381, 383, 98 S. W. 437; House v. Holland, 42 Tex. Civ. App. 502, 94 S. W. 153; Galveston, etc., R. Co. v. Silegman (Tex. Civ. App.), 23 S. W. 298.

26. Davis v. Central, etc., R. Co., 66 Vt. 290, 29 Atl. 313, 44 Am. St. Rep. 852.

27. Baltimore, etc., R. Co. v. Rathbone, 1 W. Va. 87, 88 Am. Dec. 664.

28. Glass v. Goldsmith, 22 Wis. 488.

29. Bates v. Todd, 1 M. & Rob. 106; Goodrich v. Norris, Abb. Adm. 196; Berkley v. Watling, 7 Ad. & El. 29, 34 E. C. L. 22; Fowler v. Sterling, 3 L. Can. Jur. 103.

of such fact, and may be rebutted. It operates as a receipt only, and is open to explanation and subject to correction by proof that such merchandise was not in fact received. The bill of lading as a receipt establishes prima facie the receipt of the quantity of goods named by the carrier, having in that regard the same effect as parol testimony as to that fact, which may be overthrown by proper evidence contradicting the fact, and this may be done under the general denial.[30] This is the established doctrine in the federal courts;[31] in the courts of Georgia,[32] Iowa,[33] Kentucky,[34] Louisiana,[35] Maine,[36] Maryland,[37] Massachusetts,[38] Michigan,[39] Minnesota,[40] Missouri,[41] New York,[42] North Carolina,[43] Ohio,[44] Texas,[45] Wisconsin,[46] and others; and in the English [47] and Canadian courts.

Goods Not Delivered to Carrier.—An ordinary bill of lading is not conclusive, as to the shipment of the goods. Ordinarily, in so far as it acknowledges receipt of the goods, it is considered merely as a receipt, and extrinsic evidence may be introduced to show that the carrier did not in fact receive the goods therein described, or that no goods were in fact delivered to it for transportation, and that, therefore, its liability as a carrier never existed.[48] This doctrine prevails in the federal courts[49] and in Georgia,[50] Iowa,[51] Louisiana,[52] Maine,[53]

30. Cohen Bros. *v.* Missouri, etc., R. Co., 44 Tex. Civ. App. 381, 98 S. W. 437. See post, "As Warranty or Evidence of Quantity, Quality or Condition of Goods," §§ 488-494.

31. Recital of fact of receipt and quantity of goods.—Planters' Fertilizer Mfg. Co. *v.* Elder, 42 C. C. A. 130, 101 Fed. 1001; Brouty *v.* Five Thousand Two Hundred and Fifty-Six Bundles of Elm Staves, 21 Fed. 590; Crenshawe *v.* Pearce, 37 Fed. 432; Sutton *v.* Kettell, Fed. Cas. No. 13647, 1 Spr. 309.

32. Central, etc., R. Co. *v.* Cook, 62 S. E. 464, 4 Ga. App. 698.

33. Chapin *v.* Chicago, etc., R. Co., 79 Iowa 582, 44 N. W. 820.

34. Pittsburg, etc., R. Co. *v.* American Tobacco Co., 126 Ky. 582, 104 S. W. 377, 25 R. R. R. 586, 48 Am. & Eng. R. Cas., N. S., 586.

35. Fearn, etc., Co. *v.* Richardson, 12 La. Ann. 752; Hunt *v.* Mississippi Cent. R. Co., 29 La. Ann. 446.

36. Witzler *v.* Collins, 70 Me. 290, 35 Am. Rep. 327; O'Brien *v.* Gilchrist, 34 Me. 554, 65 Am. Dec. 676.

37. Baltimore, etc., R. Co. *v.* Wilkens, 44 Md. 11, 22 Am. Rep. 26.

38. Shepherd *v.* Naylor (Mass.), 5 Gray 591.

39. Gibbons *v.* Robinson, 63 Mich. 146, 29 N. W. 533.

40. National Bank *v.* Chicago, etc., R. Co., 44 Minn. 224, 46 N. W. 342, 9 L. R. A., N. S., 263, 20 Am. St. Rep. 566.

41. A bill of lading is only prima facie proof that the carrier received the goods, being a mere receipt which may be rebutted, not being like the contractual clauses contained therein. Milne *v.* Chicago, etc., R. Co., 155 Mo. App. 465, 135 S. W. 85.

42. Abbe *v.* Eaton, 51 N. Y. 410; Dickerson *v.* Seelye (N. Y.), 12 Barb. 99; Meyer *v.* Peck, 28 N. Y. 590; Van Santen *v.* Standard Oil Co. (N. Y.), 17 Hun 140, affirmed in 81 N. Y. 171; White *v.* Van Kirk (N. Y.), 25 Barb. 16; Rhodes *v.* Newhall, 126 N. Y. 574, 27 N. E. 947, 22 Am. St. Rep. 859; Ellis *v.* Willard, 9 N. Y. 529.

43. Black *v.* Wilmington, etc., R. Co., 92 N. C. 42, 53 Am. Rep. 450; Peele *v.* Atlantic, etc., R. Co., 149 N. C. 390, 63 S. E. 66.

44. Dean *v.* King, 22 O. St. 118.

45. Missouri, etc., R. Co. *v.* Union Ins. Co. (Tex. Civ. App.), 39 S. W. 975; Cohen Bros. *v.* Missouri, etc., R. Co., 44 Tex. Civ. App. 381, 98 S. W. 437.

46. Glass *v.* Goldsmith, 22 Wis. 488.

47. Bates *v.* Todd, 1 M. & Rob. 106.

48. Goods not delivered to carrier.—See ante, "Receipt of Goods as Prerequisite to Issuance," §§ 429-442.

49. Brouty *v.* Five Thousand Two Hundred and Fifty-Six Bundles of Elm Staves, 21 Fed. 590; Cunard, etc., Co. *v.* Kelley, 53 C. C. A. 310, 115 Fed. 678; Sutton *v.* Kettell, Fed. Cas. No. 13647, 1 Spr. 309; The Lady Franklin (U. S.), 8 Wall. 325, 19 L. Ed. 455; The Tusker, Fed. Cas. No. 14274, 1 Spr. 70; The Willie D. Sandhoval, 92 Fed. 286.

50. Central, etc., R. Co. *v.* Cook, 4 Ga. App. 698, 701, 62 S. E. 464; Atlantic, etc., R. Co. *v.* Cohn & Co., 6 Ga. App. 572, 573, 65 S. E. 355.

51. Chapin *v.* Chicago, etc., R. Co., 79 Iowa 582, 44 N. W. 820; Garden Grove Bank *v.* Humeston, etc., R. Co., 67 Iowa 526, 25 N. W. 761, 23 Am. & Eng. R. Cas. 695; Wisconsin *v.* Young (Iowa), 3 G. Green 268.

52. Hunt *v.* Mississippi Cent. R. Co., 29 La. Ann. 446.

53. O'Brien *v.* Gilchrist, 34 Me. 554, 56 Am. Dec. 676; Witzler *v.* Collins, 70 Me. 290, 35 Am. Rep. 327.

Maryland,[54] Massachusetts,[55] Missouri,[56] New York,[57] Ohio,[58] Texas,[59] Wisconsin,[60] and other states; and in England[61] and Canada.[62]

Less Goods Received than Receipted for.—In a suit on a bill of lading, in the usual form, for the nondelivery of the goods therein described, the defendant carrier may show by parol evidence that the quantity of goods received was less than that acknowledged in the bill, thereby contradicting the receipt clause of the bill.[63]

Greater Amount Received than Receipted for.—The receipt clause of a bill of lading may be contradicted by parol evidence showing that a greater amount of goods was received than that stated in the bill.[64]

§ 475. Recital as to Quality or Condition of Goods.—A bill of lading may be contradicted and explained by parol in its recital that the goods were in good order and well conditioned, by showing that their internal state and condition was bad or not such as is represented in the instrument.[65]

54. Baltimore, etc., R. Co. *v.* Wilkens, 44 Md. 11, 22 Am. Rep. 26; Lazard *v.* Merchants', etc., Transp. Co., 78 Md. 1, 26 Atl. 897.

55. Hall *v.* Mayo (Mass.), 7 Allen 454; Ryder *v.* Hall (Mass.), 7 Allen 456; Shepherd *v.* Naylor (Mass.), 5 Gray 591.

56. Missouri *v.* Webb, 9 Mo. 193.

57. Abbe *v.* Eaton, 51 N. Y. 410; Graves *v.* Harwood (N. Y.), 9 Barb. 477; Meyer *v.* Peck, 28 N. Y. 590, affirmed in 33 Barb. 532; Rhodes *v.* Newhall, 126 N. Y. 574, 27 N. E. 947, 22 Am. St. Rep. 859.

58. Dean *v.* King, 22 O. St. 118; Wood *v.* Perry (O.), Wright 240; Adams *v.* Brig Pilgrim, 10 West. L. J. 141, 1 O. Dec. 477.

59. Missouri, etc., R. Co. *v.* Union Ins. Co. (Tex. Civ. App.), 39 S. W. 975.

60. Glass *v.* Goldsmith, 22 Wis. 488.

61. Bates *v.* Todd, 1 M. & Rob. 106.

62. Horseman *v.* Grand Trunk R. Co., 31 U. C. Q. B. 535; Erb *v.* Great Western R. Co., 5 Can. Sup. Ct. Rep. 179.

63. *United States.*—American Sugar-Refining Co. *v.* Maddock, 36 C. C. A. 42, 93 Fed. 980; Planters' Fertilizer Mfg. Co. *v.* Elder, 42 C. C. A. 130, 101 Fed. 1001; St. Louis, etc., R. Co. *v.* Knight, 122 U. S. 79, 30 L. Ed. 1077, 7 S. Ct. 1132; The Isola Di Procida, 124 Fed. 942; The Querini Stamphalia, 19 Fed. 123; The Tusker, Fed. Cas. No. 142, 74, 1 Spr. 70.

Maine.—O'Brien *v.* Gilchrist, 34 Me. 554, 56 Am. Dec. 676.

Massachusetts.—Hall *v.* Mayo (Mass.), 7 Allen 454; Kelley *v.* Bowker (Mass.), 11 Gray 428, 71 Am. Dec. 725; Ryder *v.* Hall (Mass.), 7 Allen 456.

New York.—Graves *v.* Harwood (N. Y.), 9 Barb. 477; Meyer *v.* Peck (N. Y.), 33 Barb. 532, affirmed in 28 N. Y. 590; Van Santen *v.* Standard Oil Co., 17 Hun 140, affirmed in 81 N. Y. 171.

Ohio.—Dean *v.* King, 22 O. St. 118.

In an action by the shipper against the owners of a steamboat engaged in the business of common carriers, to recover for the nondelivery of goods as per bill of lading, the defendants are liable only for so much of the goods as was actually received on the boat and in such action parol evidence is admissible to contradict the terms of the bill of lading, in so far as it purports to be a receipt for freight delivered to the boat. Dean *v.* King, 22 O. St. 118, followed in 35 O. St. 258 (following and approving 22 O. St. 111).

Texas.—Cohen Bros. *v.* Missouri, etc., R. Co., 44 Tex. Civ. App. 381, 98 S. W. 437.

Thus, under its general denial, it can show that it had not in fact received fifty-five cases of shoes, as called for in the bill of lading, but only forty-nine cases, which was the number delivered by it to plaintiff. Plaintiff's cause of action was based upon the fact that the fifty-five cases had been delivered for shipment. Defendant had a right to show, notwithstanding the bill of lading, which was only, in this respect, a receipt for the goods, that only forty-nine cases had been so delivered. This necessarily involved the fact that the bill of lading, as a receipt for so many cases, had been executed by mistake. Cohen Bros. *v.* Missouri, etc., R. Co., 44 Tex. Civ. App. 381, 382, 98 S. W. 437.

Canada.—Horseman *v.* Grand Trunk R. Co., 31 U. C. Q. B. 535.

64. Greater amount received than receipted for.—Atlantic, etc., R. Co. *v.* Cohn & Co., 6 Ga. App. 572, 573, 65 S. E. 355.

65. *United States.*—The Delaware (U. S.), 14 Wall. 579, 601, 20 L. Ed. 779; Clark *v.* Barnwell (U. S.), 12 How. 272, 13 L. Ed. 985. See post, "As Warranty or Evidence of Quantity, Quality or Condition of Goods," §§ 488-494.

Alabama.—Wayland *v.* Mosely, 5 Ala. 430, 39 Am. Dec. 335.

Maine.—O'Brien *v.* Gilchrist, 34 Me. 554, 56 Am. Dec. 676.

Minnesota.—The bill as an acknowledgment of the character, and condition of the articles delivered and received, may be explained, varied, or contradicted by parol evidence like other receipts. Norton *v.* Baxter, 41 Minn. 146, 16 Am. St. Rep. 679.

§ 476. Recital as to Ownership of Goods.—An erroneous statement in a bill of lading as to the ownership of the goods may be explained or contradicted by parol.[66]

§ 477. Recitals as to Rate and Receipt of Freight.—The consideration clause in bills of lading, ordinarily, has only the force and effect of a receipt, and is open to explanation and contradiction by parol evidence.[67] A stipulation in a bill of lading for a reduced or special rate of freight is not conclusive, but only prima facie, evidence, open to explanation and contradiction. Where the bill falsely recites that a reduced rate of freight is given, in consideration of which the shipper agrees to accept a limited valuation for the property transported, in case of its loss through the negligence of the carrier, recital is not conclusive on the shipper but open to contradiction and explanation.[68]

§ 478. Destination or Place of Delivery.—Place of Delivery.—If by mistake the terms of a bill of lading bind the carrier to deliver the goods at an inconvenient and expensive place, the carrying part of the contract may be explained by parol evidence.[69]

§ 479. Terminus of Road.—Instance where parol evidence was properly admitted to show that San Antonio was the carrier's terminus instead of Junction City Kansas, misrecited as such in the shipping contract, where other provisions of the contract showed such recital to be inconsistent with the main provisions of the contract.[70]

§§ 480-481. As Contract of Carriage—§ 480. As Imposing Liability of Common Carrier.—Where the defendants, whose general business was that of common carriers, gave to the plaintiffs a bill of lading, setting forth that they had shipped, in good order and condition, certain iron, to be delivered to the plaintiffs or their assigns in like order and condition, the dangers of the seas only excepted; it was held that if not otherwise liable as common carriers, they contracted such liability by the bill of lading, which bound them to deliver the iron in good order and condition as they had received it, the dangers of the sea only excepted.[71]

§ 481. As Contract to Carry Specified Thing.—A bill of lading is a contract to carry and deliver the specific thing named therein.[72]

66. **Recital as to ownership.**—Maryland Ins. Co. *v.* Ruden (U. S.), 6 Cranch 338, 3 L. Ed. 242. See post, "As Evidence or Warranty of Title or Ownership," §§ 496-498.

67. **Recitals as to rate and receipt of freight.**—Fontaine *v.* Boatmen's Sav. Inst., 57 Mo. 552; Hollocher *v.* Hollocher, 62 Mo. 267; Edwards *v.* Smith, 63 Mo. 119; McFadden *v.* Missouri, etc., R. Co., 92 Mo. 343, 4 S. W. 689, 1 Am. St. Rep. 721.

Parol evidence is admissible to show that a lower rate of freight named in a bill of lading is the regular rate charged all persons under the same circumstances, as this does not tend to vary or contradict the written contract, but merely to explain an ambiguity. Cross *v.* Graves, 4 Tex. App. Civ. Cas., § 100, 16 S. W. 102.

68. McFadden *v.* Missouri, etc., R. Co., 92 Mo. 343, 4 S. W. 689, 1 Am. St. Rep. 721. See ante, "Stipulations as to Value," § 511.

69. **Place of delivery.**—Sonia Cotton Oil Co. *v.* Steamer Red River, 106 La. 42, 30 So. 303, 87 Am. St. Rep. 293.

Evidence of custom.—See ante, "Usage and Custom," § 460.

70. **Terminus of road.**—Swank *v.* San Antonio, etc., R. Co., 1 Tex. Civ. App. 675, 681, 23 S. W. 249.

71. **As imposing liability of common carrier.**—Stephens, etc., Transp. Co. *v.* Tuckerman, etc., Co., 33 N. J. L. 543.

72. **A contract to carry a specific thing.**—Where a common carrier receives corn in bulk for shipment in a certain designated car, and by its proper agents receipts so-called "dray tickets" therefor, and issues a bill of lading thereon at fixed price for shipment to a certain point, it is a contract to carry that specific car of corn, and it is a breach of the contract for the carrier thereafter to unload and refuse to ship it, and substitute therefor another carload of corn, though it may presumably be of the same grade and quality—no fact appearing in proof showing assent of the shipper

§§ 482-483. As Evidence of Fact and Time of Receipt and Acceptance of Shipment—§ 482. As Evidence of Fact of Receipt and Acceptance of Shipment.—A bill of lading fair on its face is prima facie evidence that the carrier received[73] and accepted the shipment.[74]

Bill Referring to Standard Form of Bill of Lading.—A bill of lading is in form only a receipt for freight, issued to the consignor, containing the contract of shipment, so that, in an action for failure to deliver part of the shipment, a paper, which had been recognized as valid by the carrier's agent at destination, all the goods which had arrived being turned over on its presentation, and which was of the same effect as a regular printed bill of lading, it, in addition to being a receipt, containing the specification, "as per conditions company's bill of lading," thus supplying the essential that a mere receipt might lack, was properly admitted against the carrier.[75]

Best Evidence Rule.—The fact of the delivery of freight to a common carrier for carriage may be proven by oral testimony, notwithstanding the existence of a receipt or bill of lading given by the carrier for such freight. Such receipt or bill of lading does not fall within the best evidence rule as proof of such fact of delivery.[76]

Burden of Proof of Falsity of Bill.—A receipt by a carrier for freight, though not conclusive, creates a presumption that it received the freight directed therein, and the burden is on it to show the contrary.[77]

§ 483. Time of Receipt of Shipment.—In the absence of convincing testimony establishing a mistake, the recital of a bill of lading showing that the carrier received a car for shipment on a specified day must control.[78]

§ 484. Destination or Place of Delivery.—The contract in a bill of lading particularly covers the obligation of carrying the goods to destination and of delivering them to the consignee. From that point of view, the carrier was

thereto. The shipper or consignee is not bound to accept such substituted corn, nor, if it arrive at its destination in a damaged condition, to bring his action therefor as to such substituted corn, but has a right of action against the carrier for the breach of the contract of shipment of the corn named in his bill of lading. Cincinnati, etc., R. Co. *v.* Parrott, 11 Wkly. L. Bull. 296, 9 O. Dec. Reprint 252, distinguishing Dean *v.* King, 22 O. St. 118.

73. **As evidence of fact of receipt and acceptance of shipment.**—Milne *v.* Chicago, etc., R. Co., 155 Mo. App. 465, 135 S. W. 85; Seigfried *v.* Chicago, etc., R. Co. (Mo.), 126 S. W. 798; Cohen Bros. *v.* Missouri, etc., R. Co., 44 Tex. Civ. App. 381, 98 S. W. 437. See ante, "Recital of Fact of Receipt and Quantity of Goods," § 474.

A bill of lading issued by a railroad company, returned to it on its demand when the shipper requested the goods to be stopped in transit, was prima facie evidence that the company received the goods for shipment. Seigfried *v.* Chicago, etc., R. Co. (Mo.), 126 S. W. 798.

The bill of lading and way-bill made by the authorized agent of a common carrier are competent evidence tending to prove that the goods described therein were delivered to the carrier for shipment. Chicago, etc., R. Co. *v.* Johnston, 58 Neb. 236, 78 N. E. 499.

74. A bill of lading fair on its face calling for the transportation of a car of lumber is prima facie proof of the carrier's receipt and acceptance of the lumber. Milne *v.* Chicago, etc., R. Co., 155 Mo. App. 465, 135 S. W. 85.

75. McMeekin *v.* Southern Railway, 82 S. C. 468, 64 S. E. 413.

76. **Best evidence rule.**—Atlantic, etc., R. Co. *v.* Dexter, 50 Fla. 180, 39 So. 634, 19 R. R. R. 787, 42 Am. & Eng. R. Cas., N. S., 787, 111 Am. St. Rep. 116.

77. **Burden of proof falsity of bill.**—Atlantic, etc., R. Co. *v.* Cohn & Co., 6 Ga. App. 572, 573, 65 S. E. 355; Musselam *v.* Cincinnati, etc., R. Co., 126 Ky. 500, 31 Ky. L. Rep. 908, 104 S. W. 337.

78. **Time of receipt of car.**—Illinois Cent. R. Co. *v.* Nelson, 30 Ky. L. Rep. 114, 97 S. W. 757.

A carrier issuing a bill of lading acknowledging the receipt of a car on a designated date, which is the date of the bill, is concluded by the bill, and is estopped from claiming that it had not received the car, in the absence of evidence that the bill was misdated. Sandford *v.* Seaboard, etc., Railway, 61 S. E. 74, 79 S. C. 519.

bound to carry the merchandise to the stipulated destination, and there deliver it in accordance with the terms of the bill of lading.[79]

Destination Blank.—If the point of destination in a bill of lading is left blank, but is clearly shown by indorsement in the end of the bill of lading that the place to which it was to be shipped is beyond the carrier's own line, it is prima facie an agreement to carry to such point in the absence of a stipulation that it was only to carry to the end of its own line.[80]

As Contract between Consignor and Consignee.—Bills of lading, and drafts attached, sent by a consignor to the consignee through a bank, on payment of which drafts the consignee received the bills of lading, and, on presentation thereof to the carrier, received the consignments in H. county pursuant to the terms thereof, constitute a written contract between the consignor and consignee to deliver the consignments in H. county.[81]

§§ 485-487. Person to Whom Delivery Authorized—§ 485. In General.—Goods are deemed to be consigned to the person named as consignee in the bill of lading, although blanks in the body of the bill for the name of the place of destination and consignee were not filed.[82] Ordinarily, the name of a consignee is inserted; and then such consignee, or his indorsee, may receive the goods and acquire a special property in them. Sometimes the shipper, or consignor, is himself named as consignee, and then the engagement of the carrier is to deliver then to him or his assigns. Sometimes no person is named, the name of the consignee being left blank, which is understood to import an engagement to deliver the goods to the person to whom the shipper or consignee shall order the delivery, or to the assignee of such person.[83]

§ 486. Open and Closed Shipments.—Upon an open shipment the consignee can obtain possession of the property without first making payment, while upon a "closed" one he can not obtain possession of the shipment without first making payment.[84]

79. **Place of delivery or destination.**—Sonia Cotton Oil Co. *v.* Steamer Red River, 106 La. 42, 30 So. 303, 87 Am. St. Rep. 293.

80. **Destination blank.**—Marshall, etc., R. Co. *v.* Kansas City, etc., R. Co., 176 Mo. 480, 75 S. W. 638.

81. **As contract between consignor and consignee.**—Callender, etc., Co. *v.* Short, 78 S. W. 366, 34 Tex. Civ. App. 364.

82. **Person to whom goods consigned.**—A bill of lading recited the receipt from the consignor of the goods to be delivered "to his or their assigns," and stipulated that each package of freight should be marked with the name of the consignee and destination, except shipments in carload lots to one consignee. In the margin was written, "S. W. 6746," indicating the number of the car, followed by the name and location of the consignee and the name of the connecting carrier. The blanks in the body of the bill for the name of the place of destination and consignee were not filed. Held, that the goods were consigned to the person named as consignee. Nashville, etc., R. Co. *v.* Grayson County Nat. Bank, 93 S. W. 431, 100 Tex. 17, reversing court of civil appeal 91 S. W. 1106, and overruling decision of same court in same case in 79 S. W. 1094.

83. Chandler *v.* Sprague (Mass.), 5 Metc. 306, 38 Am. Dec. 404.

84. **Open and closed shipments.**—Smith *v.* Landa, 45 Tex. Civ. App. 446, 101 S. W. 470.

Defendant shipped a car load of corn to R. on the order of plaintiff, the shipment being an "open" one, so that R. was able to obtain possession of the corn without payment. Defendant's clerk wrote into defendant's copy of the bill of lading, "shipper's order notify," thereby indicating a "closed" shipment, and attached the same to a draft which was paid by plaintiff. Thereafter plaintiff learned that the car had been delivered on an "open" shipment without payment, and endeavored to obtain payment from R. but before he did so R. became insolvent. Thereupon plaintiff sought to recover the value of the corn from defendant on the ground that the shipment should have been a "closed" one according to custom, but defendant claimed that the order called for an "open" shipment. Held, that plaintiff was not entitled to recover on the theory of an estoppel because of the form of the bill of lading sent to him by defendant. Smith *v.* Landa, 45 Tex. Civ. App. 446, 101 S. W. 470.

Evidence.—In such case there was no prejudice to plaintiff in permitting de-

§ 487. Direction to Notify a Named Person.—A direction in a bill of lading to "notify" a named person shows that he is not intended as the consignee.[85]

Direction to Notify Shipper of Arrival.—The direction in a bill of lading to notify the shipper of the arrival of goods at their destination does not change, modify, or qualify the duty of the carrier to deliver the goods to the shipper's order as provided by the bill of lading.[86]

§§ 488-494. As Warranty or Evidence of Quantity, Quality or Condition of Goods—§§ 488-491. Effect as Warranty of Quantity, etc.—§ 488. In General.—Persons are not entitled to assume that the master of vessel has authority, though his owners really gave him no such authority, to estimate and determine and state on the bill of lading, so as to bind his owners, the particular mercantile quality of the goods before they are put on board, as, for instance, that they are goods containing such and such a percentage of good or bad material, or of such and such a season's growth. To ascertain such matters is obviously quite outside the scope of the functions and capacities of a ship's captain and of the contract of carriage with which he has to do.[87]

§ 489. Recital That Contents Unknown.—Where a bill of lading contains no warranty that the goods described shall answer any particular quality, but on the contrary expressly specifies that the contents of the package is unknown, it does not operate as guaranty as to quantity or quality of the articles;[88] although a statute makes the carrier liable for the loss resulting from the issuance of a bill of lading when no property has been received.[89] The words "contents unknown" being annexed to a bill of lading, imply that the carrier only meant to acknowledge the shipment in good order of the cases, as to their external condition,[90] excluding any implication as to quantity or quality

fendant to testify that he had frequently made shipments to plaintiff's father-in-law, who was wealthy, and that all the shipments were "open." Smith *v.* Landa, 45 Tex. Civ. App. 446, 101 S. W. 470.

A clerk in the employ of defendant having testified that the railway agent agreed to so make the shipment that the consignee could not obtain possession thereof without first making payment and the agent having denied such agreement, it was proper to permit defendant to testify as to what shipping instructions he had given his office force. Smith *v.* Landa, 45 Tex. Civ. App. 446, 101 S. W. 470.

It was proper to refuse to permit defendant's clerk who attended to the shipment to testify that he would not have made the shipment on plaintiff's credit; it not appearing that he had authority to determine the character of shipments. Smith *v.* Landa, 45 Tex. Civ. App. 446, 101 S. W. 470.

85. Atlantic, etc., R. Co. *v.* Dahlberg Brokerage Co., 170 Ala. 617, 54 So. 168; Pisapia *v.* Hartford, etc., Transp. Co., 116 N. Y. S. 26, 62 Misc. Rep. 607.

86. Direction to notify shipper of arrival of goods at destination.—Midland Nat. Bank *v.* Missouri Pac. R. Co., 132 Mo. 492, 33 S. W. 521, 53 Am. St. Rep. 505.

87. Warranty of quality.—St. Louis, etc., R. Co. *v.* Knight, 122 U. S. 79, 30 L. Ed. 1077, 7 S. Ct. 1132.

88. Statement that contents of packages are unknown.—St. Louis, etc., R. Co. *v.* Knight, 122 U. S. 79, 89, 30 L. Ed. 1077, 7 S. Ct. 1132; Clark *v.* Barnwell (U. S.), 12 How. 272, 13 L. Ed. 985; Bank *v.* New York, etc., R. Co., 60 Am. Rep. 440, 443, 106 N. Y. 195, 12 N. E. 433, 32 Am. & Eng. R. Cas. 497.

89. Statute imposing liability for loss where no goods received.—Where a carrier's agent, on receiving a shipment of cotton, did not weigh it, but issued a bill of lading on a certificate of a compress company, which delivered the cotton in a sealed car, and the bill stated, "contents and condition of contents of packages unknown," though the cotton weighed less than the weight given in the bill, whereby the consignee, who purchased from the consignor, was deceived, to his injury, the carrier was not liable to the consignee, either under general principles or under Code 1896, § 4223, making a carrier liable for loss resulting from the issuance of a bill of lading when no property has been received. Alabama, etc., R. Co. *v.* Commonwealth Cotton Mfg. Co., 42 So. 406, 146 Ala. 388.

90. "Contents unknown" applies only to external condition.—Clark *v.* Barnwell (U. S.), 12 How. 272, 13 L. Ed. 985.

Where the bill of lading contains a clause that the contents of the packages

of the article, or condition of it at the time received, or whether properly packed or not in the cases.[91]

§ 490. Recital That Goods in "Good Order," etc.—A bill of lading in which the carrier acknowledges that the goods have been received by him in "good condition,"[92] in "good order,"[93] or in "apparent good order,"[94] is prima facie evidence of that fact and renders him prima facie liable for the damages if they are lost or injured; but do not preclude him from showing that the loss proceeded from some cause which was not apparent at the time he received the goods; for it is well settled, that statements contained in bills of lading to the effect that the goods mentioned therein were received in "good order," or "good condition," are in the nature of mere admissions—mere written declarations—not conclusive or nonexplainable as against the party making them, much less as against one who did not.[95]

Carrier Receiving Goods Knowing Them to Be in Bad Condition.—Where a carrier receives goods, knowing that some are not in good condition, and issues a bill of lading reciting that they are in good order, the carrier can not assert the contrary, where the bill of lading is in the hands of an innocent purchaser for value.[96]

Statement That Goods Were Not in Bad Order.—Where a carrier's receipt states that the goods, when received, were not in bad order, but they are damaged when delivered to consignee, the presumption is that the damage occurred while they were under the carrier's control.[97] In such case there is no requirement that the owner should prove by evidence aliunde that the goods were not damaged when the carrier received them.[98]

Evidence.—Where it was an issue whether certain cotton, receipted for by a shipper as in good order, was injured by water before being received on the

receipted for are unknown, an acknowledgment of the master as to the condition of the goods when received on board extends only to the external condition of the cases. St. Louis, etc., R. Co. *v.* Knight, 122 U. S. 79, 85, 30 L. Ed. 1077, 7 S. Ct. 1132.

91. St. Louis, etc., R. Co. *v.* Knight, 122 U. S. 79, 85, 30 L. Ed. 1077, 7 S. Ct. 1132.

92. Recital that goods in "good condition" in "good order," etc.—Bath *v.* Houston, etc., R. Co., 34 Tex. Civ. App. 234, 237, 78 S. W. 993; Missouri Pac. R. Co. *v.* Ivy, 79 Tex. 444, 15 S. W. 692; Missouri Pac. Co. *v.* Fennell, 79 Tex. 448, 15 S. W. 693.

Where defendant, a connecting carrier, receipted for certain furniture to a steamship company as received in good condition, such receipt, while subject to explanation, was evidence that the goods were received by defendant from the steamship in good condition. International, etc., R. Co. *v.* Shands (Tex. Civ. App.), 93 S. W. 1105.

93. Recital that goods were received in good order.—Nelson *v.* Woodruff (U. S.), 1 Black 156, 17 L. Ed. 97; Austin *v.* Talk, 20 Tex. 164.

94. St. Louis, etc., R. Co. *v.* Jamieson, 20 Okla. 654, 95 Pac. 417.

As a general rule, the recital in a bill of lading that the goods were received in apparent good order, makes a prima facie case against the carrier when the goods are delivered by it in an injured condition. Gulf, etc., R. Co. *v.* Holder & Co., 10 Tex. Civ. App. 223, 225, 30 S. W. 383.

If the goods are open to inspection when received by the carrier, then the production of his receipt reciting that they were in apparent good order, throws the burden upon him to rebut it. But should the goods be incased in boxes, and such are delivered without there being any external evidence of injury, and are in apparent good order, the plaintiff must show the good condition when delivered to the initial carrier. Gulf, etc., R. Co. *v.* Holder & Co., 10 Tex. Civ. App. 223, 225, 30 S. W. 383.

95. A bill of lading issued by a carrier reciting that goods were received in apparent good order is not conclusive, but it may be shown that they were not in good order. St. Louis, etc., R. Co. *v.* Jamieson, 20 Okla. 654, 95 Pac. 417.

Texas.—Bath *v.* Houston, etc., R. Co., 34 Tex. Civ. App. 234, 237, 78 S. W. 993; Missouri Pac. R. Co. *v.* Ivy, 79 Tex. 444, 15 S. W. 692; Missouri Pac. Co. *v.* Fennell, 79 Tex. 448, 15 S. W. 693.

96. Carrier receiving goods knowing them to be in bad condition.—New York Millinery, etc., Co. *v.* Hamburg, etc., Gesellschaft, 171 Fed. 577.

97. Statement that goods were not in bad order.—International, etc., R. Co. *v.* Blanton, etc., Co., 63 Tex. 109.

98. International, etc., R. Co. *v.* Blanton, etc., Co., 63 Tex. 109, 112.

ship or afterwards, it was competent for the mate of the ship to testify that he remembered some cotton being wet when loaded, though he could not state positively it was the cotton in question, and to state further that as a general rule cotton was receipted for as being in good condition if it was apparently so, although he had testified that he did not know why the cotton was receipted for in good condition.[99]

Curing Error in Admission of Bill as Evidence against Connecting Carrier.—In an action for injuries to cotton shipped, the giving of a requested instruction that bills of lading issued by the initial carrier for a part of the shipment, stating that the cotton was in good order, were not evidence in the case that the cotton was in good order, cures any error, as against a connecting carrier, by the admission of such bills containing such stipulation in the evidence.[1]

§ 491. Recital That "Contents Unknown and in Apparent Good Order."—A recital in a bill of lading that the contents of certain boxes are unknown, and "in apparent good order," does not make a prima facie case, as against the carrier, that the goods were in good order when received, and were injured during transportation, where they were not exposed to view, and the boxes were delivered in apparently the same condition as when received:[2] nor prevent proof of their actual condition when delivered.[3] The words "in apparent good order" in a bill of lading refer only to the external apparent condition of the goods, and such words create no contract with reference to the condition of the contents of the packages, bales, boxes, etc.[4]

§§ 492-494. As Evidence of Quantity, Quality or Condition of Goods —§ 492. As Evidence of Quality or Condition of Goods.—A bill of lading raises the presumption that goods were delivered to the carrier for shipment in good order.[5] So far as regards the condition of the goods shipped, it is prima facie evidence of a high nature, but not conclusive.[6] The master of a vessel or the freight agent of a railroad or other carrier is not authorized to open packages to ascertain their condition. The principle of public policy and the convenience of transportation forbid that boxes, bales, etc., should be opened and inspected before being receipted for by carriers. They, therefore, may

99. **Evidence — Admissibility.**—Bath v. Houston, etc., R. Co., 34 Tex. Civ. App. 234, 78 S. W. 993.

1. **Curing error in admission of bill as evidence against connecting carrier.**—Houston, etc., R. Co. v. Bath, 40 Tex. Civ. App. 270, 90 S. W. 55, affirmed in 101 Tex. 641, no op.

2. **Recital that "contents unknown and in apparent good order."**—Gulf, etc., R. Co. v. Holder & Co., 10 Tex. Civ. App. 223, 30 S. W. 383.

Barrels purporting to contain eggs filled with sawdust—Construction of bill of lading.—A carrier received from a person representing himself to be a member of the firm of E. W. P. & Co., thirty barrels for transportation over its road, delivered to him a bill of lading certifying that it had received of said firm, "consigned to their orders, the following described packages in apparent good order contents and value unknown." This part was printed, following it and before the signature of defendant's agent was written "articles, 30 bbls. eggs." The person receiving the bill indorsed it in blank in the name of E. W. P. & Co. and annexed it to a draft drawn upon plaintiff, who upon faith thereof, accepted and paid the draft. The barrels were filled with sawdust and contained no eggs. It was held that the description of the articles was not a representation that the barrels contained eggs, but, taking the whole bill together, it imported that defendant had received thirty packages described as containing or purporting to contain eggs, but the actual contents of which was unknown to the defendant. Miller v. Hannibal, etc., R. Co., 90 N. Y. 430, 43 Am. Rep. 179.

3. Mears v. New York, etc., R. Co., 75 Conn. 171, 56 L. R. A. 884, 52 Atl. 610, 96 Am. St. Rep. 192.

4. **"Apparent good order" refers to external conditions.**—Gulf, etc., R. Co. v. Holder & Co., 10 Tex. Civ. App. 223, 224, 30 S. W. 383.

5. **As evidence of quality or condition of goods.**—Sumrell v. Atlantic, etc., R. Co., 152 N. C. 269, 67 S. E. 585.

6. Barrett v. Rogers, 7 Mass. 297, 5 Am. Dec. 45; O'Brien v. Gilchrist, 34 Me. 554, 56 Am. Dec. 676.

show that they are damaged before coming into their possession.[7]

Burden of Proof.—The burden is upon the carrier to show that the condition stated is incorrect.[8]

§§ 493-494. As Evidence of Quantity or Weight of Goods—§ 493. In General.—The weights stated in the bill of lading are prima facie evidence of the amount received, in favor of the consignee, against the initial or connecting carrier collecting charges on such statement, though such weights were reported by the consignor to the carrier, and adopted without verification, and though the bill of lading contains the words, "Weights subject to correction."[9]

Acknowledgment Qualified by Expression "Shipper's Load and Count."—Where a bill of lading acknowledges receipt of a stated number of articles, qualified by the expression "shipper's load and count," it is prima facie evidence of the receipt of the total number of articles stated, but the carrier may overcome the prima facie case thus made by showing that it in fact received a lesser number.[10]

Weight "Subject to Correction" or "Weight Unknown."—Where bill of lading specified the quantity of cargo, but contained the statements, "weight and quantity unknown," or "weight unknown," the burden rests upon the carrier to account for any discrepancy between the quantity delivered and that specified. This burden is met by proof that the full quantity loaded was delivered, and this may be shown as against a consignee who has paid drafts drawn by the shippers for the full quantity specified, where the bills of lading were attached to the drafts.[11]

Goods Loaded by Carrier's Agent.—The carrier may show as a matter of fact that the goods described in a bill of lading were not received by it, though its agent received the goods which were shipped and loaded the car.[12]

Surrender of Warehouse Receipt after Execution of Bill of Lading.—The fact that the shipper surrendered to the warehouseman, after the execution of the bill of lading, his warehouse receipt for the full amount named in such bill, will not deprive the carrier of the right to dispute the correctness of the bill of lading in regard to the amount of goods delivered to it for transportation.[13]

Competency of Evidence.—Although it is competent to show what goods

7. Gody *v.* Lyon (Ky.), 7 B. Mon. 113; O'Brien *v.* Gilchrist, 34 Me. 534, 56 Am. Dec. 676.

8. **Burden of proof.**—Atlantic, etc., R. Co. *v.* Cohn & Co., 6 Ga. App. 572, 65 S. E. 355.

9. **Weight of shipment.**—Brown *v.* Missouri, etc., R. Co., 83 Kan. 574, 112 Pac. 147.

10. **Acknowledgment qualified by expression "shipper's load and count."**—Atlantic, etc., R. Co. *v.* Cohn & Co., 6 Ga. App. 572, 65 S. E. 355.

11. **Weights "subject to correction" or "weight unknown."**—Planters' Fertilizer Mfg. Co. *v.* Elder, 42 C. C. A. 130, 101 Fed. 1001. See ante, "As Agent Bona Fide Consignee or Transferee," §§ 431-437.

Receipt clause "subject to correction"—Weighed by weighmaster of board of trade and cars sealed—Carrier liable for shortage.—In Tibbits & Son *v.* Rock Island, etc., R. Co., 49 Ill. App. 567, it appeared that the shipper delivered to defendant railroad a quantity of corn for shipment. It was weighed by the weighmaster of the Board of Trade, properly sealed, and shipped to its destination. The shipper procured from defendant a blank bill of lading which he filled up by inserting the weight as given by the weighmaster, and defendant's agent signed it. The shipper then forwarded the bill of lading to plaintiff at the point of destination and drew upon them for the price of the corn, according to the weight as so stated, but upon opening the car a shortage of 14,336 pounds was found in the corn and for this they brought suit against the railroad company. The bill of lading contained a column at the top of which was the word "Weight," under which were the words "subject to correction." In this column the weight of the corn was set down. The bill also contained the words "contents and value unknown." It was held that plaintiff, the consignee, had a right to recover on account of the shortage against the carrier.

12. **Goods loaded by carrier's agent.**—Peele *v.* Atlantic, etc., R. Co., 63 S. E. 66, 149 N. C. 390.

13. **Surrender of warehouse receipt after execution of bill of lading.**—Glass *v.* Goldsmith, 22 Wis. 488.

were in the box when it started, and when it was delivered, and for that purpose to show the weight at the beginning and end of its transportation, and any admission which may have been made by the consignee in reference thereto, it is not error, upon objection, to refuse to allow a witness to testify that "plaintiff knowingly only paid the freight rate on two hundred and twenty-five pounds of freight" from the point of shipment to the point of delivery.[14]

§ 494. Bill Made Exclusive Evidence of Quantity by Agreement.—An express agreement between the parties may make the bill of lading conclusive evidence of the quantity of goods delivered to the carrier and to be delivered to the consignee.[15]

Agreement Must Be Clearly Expressed.—The language of such an agreement must not be in the least ambiguous, and it must clearly show it is intended by both parties to be an express agreement and a departure from the usual receipt clause of a bill of lading.[16]

"Quantity Guaranteed"—Evidence of Custom.—When a bill of lading acknowledging the receipt of a specified quantity of freight contains the words, "quantity guaranteed;" the consignee may, in an action to recover for a shortage, prove that the words, "quantity guaranteed," according to the custom of the business, meant that the bill of lading was conclusive evidence of the amount to be delivered; and that, if it fell short, the carrier was to pay for the shortage. By the bill of lading itself the carrier guaranteed to deliver the quantity specified, and he was responsible therefor.[17]

Stipulation for Deduction of Deficiency in Quantity for Freight.—A stipulation in a bill of lading, that "any damage or deficiency in quantity the consignee will deduct from balance of freight due the captain" is not a guaranty that the captain has received the whole quantity of goods specified, the words "deficiency in quantity" relating to the property shipped.[18] A bill of lading contained this provision, "all damages caused by boat or carrier, a deficiency of cargo from quantity, as herein specified, to be paid by the carrier and deducted from the freight, and any excess on the cargo to be paid for to the carrier by the consignees." It was held that this was not a guaranty of the quantity specified, or an agreement that the bill of lading should furnish the only evidence of the quantity; and that no damages could have been sustained in case the carrier delivered all he received.[19]

Where the freight was weighed into the vessel under the supervision and control of the carrier and the bill of lading contained this clause: "All the deficiency in cargo to be paid by the carrier and deducted from the freight and any excess in cargo to be paid for to the carrier by the consignee," the carrier was estopped in an action to recover freight charges from questioning the correctness of their acknowledgment and was bound to account for the precise quantity admitted by the bills of lading to have been received.[20]

14. **Competency of evidence.**—Louisville, etc., R. Co. *v.* Yudelson, 135 Ga. 731, 70 S. E. 576.

15. **A bill of lading made exclusive evidence of quantity by agreement.**—Sawyer *v.* Cleveland Iron Min. Co., 16 C. C. A. 191, 69 Fed. 211.

16. **Agreement must be clearly expressed.**—Bissel *v.* Campbell, 54 N. Y. 353; Abbe *v.* Eaton, 51 N. Y. 410; Meyer *v.* Peck, 28 N. Y. 590, affirmed in 33 Barb. 532.

17. **Quantity guaranteed—Custom.**—Bissel *v.* Campbell, 54 N. Y. 353.

18. **Stipulation for deduction of deficiencies from freight.**—Meyer *v.* Peck, 28 N. Y. 590.

19. Abbe *v.* Eaton, 51 N. Y. 410.

20. **Acknowledgment of receipt of specified quantity on board—Weighed under supervision of carrier—Action for freight charges.**—In Rhodes *v.* Newhall, 126 N. Y. 574, 27 N. E. 947, 22 Am. St. Rep. 859, it appeared that plaintiffs, as carriers, executed and delivered to the consignor bills of lading acknowledging the receipt on board their vessel of a specified quantity of wheat to be transported to B. and there delivered to defendant, the agent of the consignor, subject to charges. The wheat was weighed into the vessel under the supervision and control of the carriers. And the bills each contained this clause: "all the deficiency in cargo to be

Deficiency in Cargo to Be Paid for by Carrier.—A provision in a bill of lading that all the deficiency in cargo shall be paid by the carrier and deducted from the freight, makes the carrier an insurer that the amount called for had been delivered to it, and would be redelivered at the end of the route.[21]

§ 495. Effect of Understating Quantity.—The fact that a larger quantity of goods than that receipted for in the bill of lading was delivered to the carrier does not give the latter the right to convert the excess,[22] although the consignor fraudulently misstated the weight of the goods, and the consignee knew that the bill of lading stated the weight at less than it was, and did not notify the carrier thereof.[23]

§§ 496-498. As Evidence or Warranty of Title or Ownership—§ 496. In General.—A bill of lading is a symbol of the ownership of the goods covered by it; a representative of the goods. It is regarded as so much merchandise. The merchandise is very often sold or pledged by the transfer of the bill of lading which covers it.[24] A bill of lading is property and evidence against a carrier of valuable rights.[25] It is prima facie evidence of title in the consignor or consignee, but its recitals are not conclusive.[26]

Presumption That Consignee Owner.—Where a bill of lading declared that the consignee therein was the owner of the goods described therein, the presumption was that the consignee was the owner.[27]

§ 497. As Warranty of Title of Shipper.—A carrier, in issuing a bill of lading for property delivered to it for transportation, does not warrant the title of the shipper.[28] Hence, it is always a good defense to a carrier, even against an innocent indorsee of the bill of lading, that the property was taken from its possession by one having a paramount title.[29]

Burden of Establishing Superior Title.—The burden is on the carrier to clearly establish the superiority of the title to which it has yielded, where it

paid by the carrier and deducted from the freight, and any excess in the cargo to be paid for to the carrier by the consignee." Plaintiffs delivered 827 bushels less than the quantity specified in the bills of lading. In an action to recover the stipulated freight, plaintiffs gave evidence tending to show that they delivered all of the wheat that they received. It was held that the value of the deficiency was properly deducted; that plaintiffs were estopped from questioning the correctness of their acknowledgment and were bound to account for the precise quantity admitted by the bills of lading to have been received. In this case, however, it is said in the opinion: "The consignee in this case is but the agent of the consignor and is authorized to pay only such freight as is provided for by the bill of lading. He can hold the property only for such advances as the bill of lading directs him to make, and there is no principle upon which he can be made liable for any greater amount than that called for by the letter of his authority to pay."

21. **Deficiency in cargo to be paid for by carrier.**—Vega Steamship Co. *v.* Consolidated Elevator Co., 75 Minn. 308, 77 N. W. 973, 43 L. R. A. 843, 74 Am. St. Rep. 484.

22. **Effect of understating quantity received.**—Wiggin *v.* Boston, etc., R. Co., 120 Mass. 201; Peebles *v.* Boston, etc., R. Co., 112 Mass. 498.

23. Wiggin *v.* Boston, etc., R. Co., 120 Mass. 201.

24. **As Evidence or warranty of title of ownership.**—Yegen *v.* Northern Pac. R. Co., 19 N. Dak. 70, 121 N. W. 205. See post, "Effect of Transfer," §§ 541-576.

25. **As evidence of title and rights.**—Gulf, etc., R. Co. *v.* Brown, 4 Tex. Civ. App. 435, 23 S. W. 618.

26. Atlantic, etc., R. Co. *v.* Spires, 1 Ga. App. 22, 57 S. E. 973. See ante, "Recital as to Ownership of Goods," § 476.

Erroneous statement as to ownership of goods.—A bill of lading, stating the property to belong to A. and B., is not conclusive evidence, and does not estop A. from showing the property to belong to another. Maryland Ins. Co. *v.* Ruden (U. S.), 6 Cranch 338, 3 L. Ed. 242.

27. **Presumption that consignee owner.**—Sandford *v.* Seaboard, etc., Railway, 79 S. C. 519, 61 S. E. 74.

28. **Effect as warranty of title of shipper.**—National Bank *v.* Chicago, etc., R. Co., 44 Minn. 224, 46 N. W. 342, 9 L. R. A., N. S., 263, 20 Am. St. Rep. 566.

29. National Bank *v.* Chicago, etc., R. Co., 44 Minn. 224, 46 N. W. 342, 9 L. R. A., N. S., 263, 20 Am. St. Rep. 566.

has delivered the property to a third person claiming that the bill of lading was fraudulently obtained, or issued by mistake.[30]

§ 498. Shipment Fraudulently Procured by Person Not Owner of Goods.—The fact that a person falsely pretends to be the owner of property and procures it to be shipped in his name, a bill of lading being issued therefor, gives him no right to demand the property. A bill of lading obtained by such fraudulent representations is void, and it is the duty of the carrier on learning the facts to hold the property subject to the instructions of the actual owner.[31]

§§ 499-510. Effect as Vesting Property in Consignee—§§ 499-503. When Property Vests in Consignee—§ 499. In General.—The prima facie effect of a bill of lading, as regards the consignee, is to vest the ownership of the goods consigned by it in him,[32] and the transportation is at his risk,[33] but the proof may show that the consignor is still the owner.[34] If the bill of lading shows that the shipment is made for the benefit of the consignee, it is almost decisive of the consignor's intention to part with the ownership of the property.[35]

Right to Receive Goods.—A consignee's possession of a bill of lading gives him no title to the property therein described beyond the right to receive it from the carrier and hold it subject to an accounting with the consignor or the true owner.[36]

Right of Carrier to Treat Consignee as Owner.—The consignee named in the bill of lading is, for all purposes, considered as the owner of the goods, and the carrier is entitled to treat him as the owner until the contrary appears. The shipment in itself, until it is shown that the consignee is not the owner, vests him with the title of owner.[37]

§ 500. Stoppage in Transitu.—Where the consignor buys goods impliedly for cash, but does not in fact pay for them, and ships them to the consignee, the bill of lading being in the usual form, the person from whom the consignor bought the goods, can not, upon learning of the consignor's failure in business,

30. **Burden of establishing superior title.**—Atlantic, etc., R. Co. *v.* Spires, 1 Ga. App. 22, 23, 57 S. E. 973.

31. **Shipment fraudulently procured by person other than owner of goods.**—Where after one, who has a common-law lien on an engine for repairs, has put it on a carrier's platform, to be shipped to the owner C. O. D., the owner's agent obtains a bill of lading by fraudulently representing himself to be the shipper, the bill of lading is void, and does not deprive the real shipper, or his agent, the carrier, of right to demand payment of the lien as a condition to delivery. Pacific Aviation Co. *v.* Wells Fargo & Co. (Ore.), 128 Pac. 438.

32. **Effect as vesting property in consignee.**—Grove *v.* Brien (U. S.), 8 How. 429, 12 L. Ed. 1142; Lawrence *v.* Minturn (U. S.), 17 How. 100, 15 L. Ed. 58; The Friendschaft (U. S.), 3 Wheat. 14, 4 L. Ed. 322; The Sally Magee (U. S.), 3 Wall. 451, 18 L. Ed. 197; Halliday *v.* Hamilton (U. S.), 11 Wall. 560, 20 L. Ed. 214; Scharff *v.* Meyer, 133 Mo. 428, 34 S. W. 858, 54 Am. St. Rep. 672.

The consignee named in the bill of lading is presumptively the owner of the goods. Gass *v.* Astoria Veneer Mills, 118 N. Y. S. 982, 134 App. Div. 184; Cobb *v.* Beall, 1 Tex. 342, 349. See, also, Prendergast *v.* Williamson, 6 Tex. Civ. App. 725, 26 S. W. 421; Campbell *v.* Alford, 57 Tex. 159.

33. **Shipment pursuant oral contract of sale.**—Where there is an oral contract for the sale of wheat, and the wheat is delivered to a common carrier and the bill of lading for it is delivered to the buyer, the title rests in him, and the transportation is at his risk. Orthwein's Sons *v.* Wichita Mill, etc., Co., 32 Tex. Civ. App. 600, 75 S. W. 364, affirmed in 97 Tex. 643, no op.; Missouri Pac. R. Co. *v.* Heidenheimer, 82 Tex. 195, 17 S. W. 608, 27 Am. St. Rep. 861.

34. Craig *v.* Marx, 65 Tex. 649.

35. Scharff *v.* Meyer, 133 Mo. 428, 34 S. W. 858, 54 Am. St. Rep. 672; Emery's Sons *v.* Irving Nat. Bank, 25 O. St. 360, 18 Am. Rep. 299.

36. **Right to receive goods.**—First Nat. Bank *v.* Ege, 109 N. Y. 120, 16 N. E. 317, 4 Am. St. Rep. 431.

37. **Right of carrier to treat consignee as owner.**—Sonia Cotton Oil Co. *v.* Steamer Red River, 106 La. 42, 30 So. 303, 87 Am. St. Rep. 293.

stops the goods in transit, and if he does he is liable in damages to the consignee.[38]

§ 501. Consignment to Enemy or Neutral.—In time of war, a bill of lading consigning goods to an enemy,[39] or a neutral,[40] is evidence of the ownership, going to show a justification for condemnation in one case, and exemption from liability in the other.

§ 502. Consignee Making Advances on Faith of Bill.—Where an owner of goods delivers them to a carrier, who issues a bill of lading to a consignee, who advances money on the faith of bills, the latter becomes owner for his own sake to reimburse himself, and after reimbursement, in trust for the former owner.[41]

Consignee Bank Advancing Money for Purchase of Goods.—A bank which advances money or credit for the purchase of goods for import, taking the bills of lading in its own name, becomes the legal owner of the goods, but

38. **Seizure of goods in transit by person selling to consignor.**—Halliday *v.* Hamilton (U. S.), 11 Wall. 560, 20 L. Ed. 214. See post, "Stoppage in Transitu," § 500; "As Defecting Stoppage in Transitu," § 567.

A. in St. Louis having a standing agreement with B. & Co., in New Orleans, to ship produce to them, drawing against the shipments—the balance of any draft on one shipment not discharged by its proceeds, to be paid from the proceeds of any other shipment—bought of C., residing at Cairo, on the Mississippi, a hundred miles and more below St. Louis, a specific number of sacks of corn, then lying at a landing on the river somewhat above Cairo, though much below St. Louis, and received an order for its delivery. He did not pay for it, though the transaction was impliedly one for cash. A. delivered his order to the agents of a steamer at St. Louis, then about to go down the river to New Orleans. These gave to him a regular bill of lading, agreeing to deliver the specified number of sacks of corn to B. & Co. in New Orleans. On the same day A. drew his bill of exchange on B. & Co., in New Orleans telling them to charge the draft to the account of this specific shipment; and attaching to his bill of exchange, the bill of lading thus received, sold the draft in the market. Being forwarded, it was paid at maturity by B. & Co., in New Orleans; they having had no notice of any difficulty. They were at the time in advance to A. on account of other shipments. The steamer set off on her voyage, and stopping at the place where the sacks of corn were, took them on board. Proceeding further on her voyage she came to Cairo, C.'s residence. C. having learned that A. had failed, had not paid for the corn and was insolvent, issued an attachment, and on the arrival of the steamer seized the corn and took it off the boat. On suit brought by B. & Co., for damages, held that after the boat took the corn on board a transfer of the property to B. & Co. was effected, and that C. had made himself liable for his act of seizure and asportation. Halliday *v.* Hamilton (U. S.), 11 Wall. 560, 20 L. Ed. 214.

39. **Consignment to enemy in time of war.**—The Sally Magee (U. S.), 3 Wall. 451, 18 L. Ed. 197.

Ownership presumptively in an enemy from a bill of lading to him as consignee is not disapproved by a test affidavit in prize, stating generally that the goods consigned had been purchased for their consignee contrary to his instructions, and that he had rejected them; and that this appeared "from the correspondence of the parties," which the affiant (an asserted agent of the alleged true owner) swore that he "believed to be true," but which neither he nor any one produced, or accounted for the absence of; and where, though two years had passed between the date of the claim and that of the decree, the consignors and asserted owners, who lived at Rio Janeiro, had not manifested any interest in the result of the prize proceedings, which were at New York, nor, so far as appeared, had been even applied to in the matter. The Sally Magee (U. S.), 3 Wall. 451, 18 L. Ed. 197.

40. **Consignment to neutral in time of war.**—The Friendschaft (U. S.), 3 Wheat. 14, 4 L. Ed. 322.

Bill of lading consigning the goods to a neutral, but unaccompanied by an invoice or letter of advice, is not sufficient evidence to entitle the claimant to restitution; but is sufficient to lay a foundation for introduction of further proof. The Friendschaft (U. S.), 3 Wheat. 14, 4 L. Ed. 322.

41. **Consignee making advances on faith of bill.**—Armour *v.* Michigan Cent. R. Co., 65 N. Y. 111, 22 Am. Rep. 603; Bank *v.* Jones, 4 N. Y. 497, 55 Am. Dec. 290; Haille *v.* Smith, Bos. & Pull. 563; Allen *v.* Williams (Mass.), 12 Pick. 297; First Nat. Bank *v.* Shaw, 61 N. Y. 283.

its title is not an absolute but only a security title,[42] which is not divested by delivery of the goods to the buyer on a trust receipt so as to enable him to create a valid lien thereon.[43]

§ 503. Removal of Goods by Unauthorized Person.—The subsequent removal of the goods from the vessel by a person other than the true owner, either with or without the consent of her officers, can not divest that ownership.[44]

§§ 504-510. When Property Does Not Vest in Consignee—§ 504. In General.—The prima facie effect of a bill of lading as vesting the property shipped in the consignee may be controlled by special clauses in the bill of lading, or by evidence aliunde.[45]

§ 505. Bill Not Delivered to Consignee.—See post, "Necessity for Delivery of Bill," § 534; "Consignor or Agent," § 539.

Inserting in the bill of lading the name of a consignee gives him no property in the goods until a delivery of the bill to him by some one authorized;[46] but the fact that the seller on shipping the goods to the buyer retains

42. **Consignee advancing money for purchase of goods.**—Charavay *v.* York Silk Mfg. Co., 170 Fed. 819.

43. A bank which furnished the credit to pay for imported goods, taking bills of lading in its own name, is the legal owner of the goods, and its title was not divested by delivery of the goods to the importer on a trust receipt, so as to enable the importer to create a valid lien thereon. Century Throwing Co. *v.* Muller, 116 C. C. A. 614, 197 Fed. 252.

44. **Effect of subsequent removal.**—The Idaho, 93 U. S. 575, 23 L. Ed. 978.

45. **Special clauses or extrinsic evidence defeating consignee's title.**—Lawrence *v.* Minturn (U. S.), 17 How. 100, 15 L. Ed. 58; Grove *v.* Brien (U. S.), 8 How. 429, 12 L. Ed. 1142.

When there is a dealing between merchants, for successive cargoes of merchandise upon time, for which notes of hand were to be given, payable from the date of the ascertainment of the quantity of each cargo, and an arrangement is afterwards made for the substitution of an interest account for the notes which were to be given; and, in that arrangement, the seller stipulates that the allowance of the interest account should depend upon the continuance of the original time of credit, and that the buyer's balance on account should always be under a certain sum; and the buyer exceeds that amount and refuses to make a remittance or payment, upon the call of the seller, to bring the account within that sum, the seller may arrest the further delivery of any cargo or cargoes, though the same was in the course of being delivered to the buyer upon the seller's indorsement of the invoices and bills of lading of such cargoes. Masters *v.* Barreda (U. S.), 18 How. 489, 15 L. Ed. 466.

"In Emery's Sons *v.* Irving Nat. Bank, 25 O. St. 360, 18 Am. Rep. 299, it is said: 'If the bill of lading shows that the consignment was made for the benefit of the consignor or his order, it is very strong proof of his intention to reserve the jus disponendi.'" Scharff *v.* Meyer, 54 Am. St. Rep. 672, 133 Mo. 428, 34 S. W. 858.

46. **Bill not delivered to consignee.**—Allen *v.* Williams (Mass.), 12 Pick. 297; Buffington *v.* Curtis, 15 Mass. 528, 8 Am. Dec. 115; Skilling *v.* Bollman, 73 Mo. 665, 39 Am. Rep. 537.

Defendant contracted with C. for a car of lumber to be shipped to A. Being unable to fill the order, C. ordered the lumber of P., who loaded a car, took a bill of lading in his own name, with A. named therein as consignee, at the same time sending to C. an invoice or bill for the lumber; C., however, never having possession of the bill of lading. P. then arranged with plaintiff, a bank, to take the bill of lading, forward the car, and guarantee the amount of the bill. Plaintiff having agreed to do this had C. indorse the invoice as assigned to it and took a delivery thereof. Thereupon plaintiff, having learned that defendant ordered the lumber, sent it the bill of lading and the invoice by letter stating the inclosure of the bill of lading and invoice of shipment made by P. for C. on an order, as C. said, from defendant; that C. asked it to forward them to defendant; that P. left the bill of lading with plaintiff for collection from C., but it thought best to see C., and get his instructions, which were to forward it to defendant, and to pay P. out of defendant's remittance for the price of the lumber. Defendant wrote that plaintiff would have to look to C. for the pay, as it had paid him; but it retained the bill of lading, and thereafter on delivery of the lumber to A., the consignee, received the proceeds. Held, in an action on the bill of lading, plaintiff having paid P., that the title to the lumber never passed from P. to C., he having refused to deliver the bill of lading to C. till his bill was paid or secured, notice of which defendant had

possession of the bill of lading can not affect the title, which has already passed by the delivery of the goods to the carrier. If, under such circumstances, the consignor wishes to prevent the title from vesting in the consignee, he must, by bill of lading, make the goods deliverable to his own order.[47]

§ 506. Consignment to Be Sold on Commission.—A consignor of goods to be sold on commission does not part with his title by the consignment, but retains it until the goods are sold.[48]

§§ 507-508. Goods Billed to Shipper's Order—§ 507. In General.—Where a bill of lading is taken, deliverable to the shipper's own order, the inference that it was not intended that the property in the goods should pass, except by subsequent order of the person holding the bill, is almost conclusive, but it has been said that this presumption may be rebutted by proof.[49] This is the rule in the federal courts,[50] in Alabama,[51] Arkansas,[52] California,[53] Iowa,[54] Kentucky,[55] Massachusetts,[56] Missouri,[57] New York,[58] Rhode Island,[59] Wisconsin,[60] and other states; and in England.[61]

Where there are circumstances pointing both ways, some indicating an intent to pass the ownership immediately, notwithstanding the bill of lading, in other words, where there is anything to rebut the effect of the bill, it becomes a question for the jury, whether the property has passed.[62]

when plaintiff sent it the bill of lading, by letter indicating intention to make delivery of the lumber conditioned on payment of its price, and the invoice not being a bill of sale, or evidence of a sale, so that defendant's payment to C. was no defense. Security State Bank *v.* O'Connell Lumber Co., 64 Wash. 506, 117 Pac. 271.

47. Scharff *v.* Meyer, 133 Mo. 428, 34 S. W. 858, 54 Am. St. Rep. 672. See post, "Goods Billed to Shipper's Order," §§ 507-508.

48. Consignment to be sold on commission.—Commercial Nat. Bank *v.* Heilbronner, 108 N. Y. 439, 15 N. E. 701.

49. Bill of lading to shipper's order.—Dows *v.* National Exch. Bank, 91 U. S. 618, 633, 23 L. Ed. 214. See post, "Transferability or Assignability," § 519.

50. Dows *v.* National Exch. Bank, 91 U. S. 618, 633, 23 L. Ed. 214; The St. Jose Indiana (U. S.), 1 Wheat. 208, 4 L. Ed. 73; The John K. Shaw, 32 Fed. 491.

Taking a bill of lading deliverable to the shipper's own order, is inconsistent with an intention to pass the ownership of the cargo to the person on whose account it may have been purchased, even when the shipment has been made in the vessel of the drawee of the draft against the cargo. Dows *v.* National Exch. Bank, 91 U. S. 618, 631, 23 L. Ed. 214.

A shipment on the purchaser's own vessel is ordinarily held to pass the property to the purchaser; but not so if the bill of lading exhibits a contrary intent, it thereby the shipper reserves to himself or to his assigns the dominion over the goods shipped. Dows *v.* National Exch. Bank, 91 U. S. 618, 635, 23 L. Ed. 214.

51. McCormick *v.* Joseph, 77 Ala. 236.

52. Berger *v.* State, 50 Ark. 20, 6 S. W. 15.

53. Reynolds *v.* Scott, 65 Cal. xx, 4 Pac. 346.

54. Bill of lading on shipment to consignor's own order held to retain title in the seller. Reed *v.* Racine Boat Co. (Iowa), 137 N. W. 458.

55. Where one ships goods consigned to himself, the presumption is that he remains the owner of the goods and the bill of lading while the goods are in the carrier's possession. Cincinnati, etc., R. Co. *v.* Steele, 140 Ky. 383, 131 S. W. 22.

56. Merchants' Nat. Bank *v.* Bangs, 102 Mass. 291.

57. Bergeman *v.* Indianapolis, etc., R. Co., 104 Mo. 77, 15 S. W. 992.

58. Farmers', etc., Nat. Bank *v.* Logan, 74 N. Y. 568.

59. Hobart & Co. *v.* Littlefield Bros., 13 R. I. 341.

60. Doyle *v.* Roth Mfg. Co., 76 Wis. 48, 44 N. W. 1100.

61. Wait *v.* Baker, 2 Exch. 1; Wilmshurst *v.* Bowker, 2 M. & G. 792, 40 E. C. L. 629; Ellershaw *v.* Magniac, 6 Exch. 570; Van Casteel *v.* Booker, 2 Exch. 691; Jenkyns *v.* Brown, 14 Q. B. 496, 68 E. C. L. 495; 19 L. J., Q. B. 286; Shepherd *v.* Harrison, L. R., 4 Q. B. 196, L. R., 5 H. L. 116; Gaborron *v.* Kreeft, L. R., 10 Exch. 274, Moak's Rep. 562; Ogg *v.* Shuter, 1 C. P. Div. 47, 15 Moak's Rep. 231; Ex parte Banner, 2 Ch. Div. 278, 16 Moak's Rep. 704; Hare *v.* Browne, 4 H. & N. 822, 29 L. J. Exch. 6; Joyce *v.* Swann, 17 C. B., N. S., 84, 12 E. C. L. 83; Moakes *v.* Nicholson, 19 C. B., N. S., 290, 115 E. C. L. 290.

62. Circumstances pointing both ways.—Dows *v.* National Exch. Bank, 91 U. S. 618, 634, 23 L. Ed. 214.

Bill of Lading and Draft Attached Drawn to Shippers' Order.—Where a bill of lading and draft attached were drawn to the order of the seller, and the bill of lading could not be surrendered until the draft was paid, and the draft was not paid, the purchaser could not acquire title, under the rule that a consignor who takes a bill of lading in his own name or to his order retains title in himself until the bill is indorsed.[63]

Goods Billed to Buyer Subject to Seller's Order.—Where a seller takes a bill of lading, stipulating for delivery at the point of destination to himself, his order or assigns, it is evidence that, notwithstanding an appropriation of the goods which might be sufficient to transfer title to the buyer, the goods are retained within the seller's control, and the mere fact that the buyer is named as consignee does not pass title to him.[64] By such a bill the seller does not reserve merely a lien, but the absolute right of disposal of the goods;[65] and his assignee acquires the same rights so that the carrier is bound to deliver to his order.[66] The consignee in such cases became the mere agent or factor of the consignor or his assignee;[67] and must therefore deliver to his order even though the consignor be indebted to him (the consignee) for advances.[68]

§ 508. Bill with Draft Attached to Be Delivered to Purchaser of Goods.—A shipment of goods billed by the consignor to himself, to be delivered, with the bill of lading, to another on his payment of draft attached to it for the price, retains the title, prima facie, in the shipper till such payment, but subject to evidence of the real intent of the parties as to when title is to pass.[69] Where a bill of lading taken to the order of the seller is indorsed by him, and attached to a draft upon the purchaser for the price, and the draft is delivered to a bank for collection, or is discounted by the bank in reliance on the security of the bill of lading, title does not pass to the purchaser until, by payment of the draft, he has obtained possession of the bill.[70]

§ 509. Bill to Another than Purchaser.—When a bill of lading is taken deliverable to the order of some person designated by the shipper, other than the one on whose account they have been shipped,[71] the inference that it was not intended that the property in the goods should pass, except by subsequent order of the person holding the bill, is almost conclusive, though it has been said that it may be rebutted.[72]

63. Bill of lading and draft attached drawn to shipper's order.—Citizens, etc., Bank *v.* Southern R. Co., 153 N. C. 346, 69 S. E. 261.

64. Goods billed to buyer subject to seller's order.—Grayson County Nat. Bank *v.* Nashville, etc., Railway (Tex. Civ. App.), 79 S. W. 1094.

65. Dows *v.* National Exch. Bank, 91 U. S. 618, 23 L. Ed. 214; Ogg *v.* Shuter, 1 C. P. Div. 47, Moak's Rep. 231; Gobarron *v.* Kruft, L. R., 10 Exch. 274, 14 Moak's Rep. 562.

66. *United States.*—St. Paul Roller Mill Co. *v.* Great Western Despatch Co., 27 Fed. 434. See post, "Right of Disposal Retained by Consignor," §§ 527-528.

Massachusetts.—First Nat. Bank *v.* Dearborn, 115 Mass. 219, 15 Am. Rep. 92; First Nat. Bank *v.* Crocker, 111 Mass. 163.

New York.—Bank *v.* Jones, 4 N. Y. 497, 55 Am. Dec. 290. See, also, First Nat. Bank *v.* Kelly, 57 N. Y. 34.

Ohio.—Emery's Sons *v.* Irving Nat. Bank, 25 O. St. 360, 18 Am. Rep. 299.

Pennsylvania.—Schumacher *v.* Eby, 24 Pa. 521.

67. Michigan Cent. R. Co. *v.* Phillips, 60 Ill. 190.

68. Marine Bank *v.* Wright, 48 N. Y. 1.

69. Bill with draft attached to be delivered to purchaser of goods.—Texas Cent. R. Co. *v.* Dorsey, 30 Tex. Civ. App. 377, 70 S. W. 575.

Bill of lading as security of draft.—See Georgia Civ. Code, § 3554, Allen, etc., Co. *v.* Farmers', etc., Nat. Bank, 129 Ga. 748, 59 S. E. 813.

70. Grayson County Nat. Bank *v.* Nashville, etc., Railway (Tex. Civ. App.), 79 S. W. 1094. See post, "Purchase or Discount of Draft with Bill of Lading Attached," §§ 578-587; "Effect of Consignee's Accepting and Paying Draft," § 586.

71. Bill of lading to some one else than consignee.—Dows *v.* National Exch. Bank, 91 U. S. 618, 23 L. Ed. 214.

72. Dows *v.* National Exch. Bank, 91 U. S. 618, 23 L. Ed. 214.

§ 510. Bill to A. for Use of B.—If the bill of lading is special to deliver the goods to A for the use of B, the property vests in B, and the action must be brought in his name in case of loss or damage.[73]

§ 511. Stipulations as to Value.—A stipulation in the receipt or a bill of lading given by the carrier at the time of the shipment, as to the value of the goods shipped, is not binding upon the owner unless expressly agreed to by him; and in the event of a breach of the contract of carriage by the carrier, he is entitled to recover full damages as shown by the evidence, regardless of such statement as to the value of the goods.[74]

§ 512. Freight and Demurrage.—Freight.—A bill of lading is a written simple contract between a shipper of goods and ship owner; the latter to carry the goods, and the former to pay the stipulated compensation when the service is performed. The shipper or consignor, whether the owner of the goods shipped or not, is the party with whom the owner or master enters into the contract of affreightment. It is he that makes the bailment of the goods to be carried, and, as the bailor, he is liable for the compensation to be paid therefor.[75] The fact that the consignee takes part in the negotiation as to the rate of freight to be paid does not constitute him the shipper.[76]

Stipulation for Payment of Freight.—It is usual for the consignee to pay the freight to the ship owner. Ordinarily, the bill of lading provides that he shall do it. If he be the purchaser as well as the consignee, although treated, for commercial reasons, as the agent of the consignor in making payment, in practical effect the payment is on his account, and must necessarily be added to the price paid the consignor for the goods, in order to determine the total costs to himself. He is therefore directly interested in fixing the rate of freight, and it is not unusual for him to take part in the negotiations for it. But that act does not constitute him the shipper.[77]

Liability of Bank Collecting Draft with Bill Attached for Failure of Consignee to Pay Freight.—See post, "Deposit of Draft with Bill of Lading Attached for Collection," § 588.

Demurrage.—Where no provision is made in a bill of lading for the payment of demurrage by the consignee, it may be recovered from the consignor where he detains the vessel for loading for an unreasonable time.[78]

Stipulations for Demurrage.—When a bill of lading contains a stipulation for demurrage, the acceptance of the goods is evidence of an agreement on the

73. **Bill of lading to deliver to A for use of B.**—Grove *v.* Brien (U. S.), 8 How. 429, 12 L. Ed. 1142.

Where a manufacturer upon the upper waters of the Potomac shipped five hundred kegs of nails to Alexandria, taking from the master of the canal boat a receipt saying that the nails were "to be delivered to Fowle & Sons in Alexandria, for the use of Robert Gilmor of Baltimore," and on the same day sent a letter to the consignees, advising them that the goods were consigned for the use of Gilmor, such delivery and bill of lading operated as a transfer of the legal title to Gilmor, who was in fact the consignor. Therefore, the kegs of nails in the hands of Fowle & Sons were not subject to an attachment by the creditors of the manufacturer; nor had Fowle & Sons any valid lien upon them for previous advances to him. The title to the nails had passed to Gilmor before they came into the possession of Fowle & Sons. Grove *v.* Brien (U. S.), 8 How. 429, 12 L. Ed. 1142.

74. **Stipulation as to value.**—Southern Exp. Co. *v.* Briggs, 1 Ga. App. 294, 57 S. E. 1066. See post, "Limitation of Liability," chap. 14.

75. Wooster *v.* Tarr (Mass.), 8 Allen 270, 85 Am. Dec. 707; Blanchard *v.* Page (Mass.), 8 Gray 281; Davis *v.* Central, etc., R. Co., 66 Vt. 290, 29 Atl. 313, 44 Am. St. Rep. 852.

76. Van Etten *v.* Newton, 134 N. Y. 143, 31 N. E. 334, 30 Am. St. Rep. 630.

77. **Stipulation for payment of freight.**—Van Etten *v.* Newton, 134 N. Y. 143, 31 N. E. 334, 30 Am. St. Rep. 630.

78. **Demurrage.**—Van Etten *v.* Newton, 134 N. Y. 143, 31 N. E. 334, 30 Am. St. Rep. 630. See ante, "Freight and Demurrage," § 512.

part of the consignee to pay both freight and demurrage;[79] but in the absence of such a stipulation, it is generally held that the consignee is not bound to respond in damages in the nature of demurrage, because, not being a party to the contract in the bill of lading, the contract implied from its subsequent acceptance by him can not extend beyond the conditions upon which its delivery is made dependent. A delay at the place of delivery, occasioned by the fault of the consignee, furnishes an exception to the rule.[80]

§ 513. As Evidence of Carrier's Liability as Warehouseman.—When a carrier's responsibility as such ceases, he becomes liable for the goods as warehousemen, until they are properly delivered: and the bill of lading is evidence of that obligation.[81]

§§ 514-589. Transfer—§§ 514-518. Negotiability.—See post, "Transferability or Assignability," § 519.

§ 514. General Rule.—Bills of lading are spoken of sometimes as negotiable, and very frequently and more accurately as quasi-negotiable instruments.[82] That they are, even at the common law, invested with the attributes of negotiability, in a general sense of that term, has been frequently admitted.[83] A well-established custom has grown up in commercial circles by which such bills of lading are treated as the symbols of title to the property in transit, are taken as security for money advanced, and indorsed and delivered as a transfer of the property. The effect of this custom independent of statute is to make bills of lading to some extent and for some purposes negotiable and to give superior rights to innocent transferees for value in the usual course of business.[84]

§ 515. Distinguished from Commercial Paper.—Though transferable by indorsement, bills of lading are not negotiable in a commercial sense, as bills of exchange or promissory notes; but are only quasi negotiable.[85] When

79. Stipulations for demurrage.—Jesson *v.* Soly, 4 Taunt. 52; Wegner *v.* Smith, 15 Com. B. 285. Van Etten *v.* Newton, 134 N. Y. 143, 31 N. E. 334, 30 Am. St. Rep. 630.

80. Stipulation for demurrage.—Gage *v.* Morse (Mass.), 12 Allen 410, 90 Am. Dec. 155; Young *v.* Moeller, 5 El. & B. 755; Ford *v.* Cotesworth, L. R. 4 Q. B. 127; Crawford *v.* Mellor, 1 Fed. 638; Van Etten *v.* Newton, 134 N. Y. 143, 31 N. E. 334, 30 Am. St. Rep. 630.

81. Evidence of liability as warehousemen.—Arkansas, etc., R. Co. *v.* German Nat. Bank, 77 Ark. 482, 92 S. W. 522, 113 Am. St. Rep. 160; North Pennsylvania R. Co. *v.* Commercial Nat. Bank, 123 U. S. 727, 8 S. Ct. 266, 31 L. Ed. 287; The Thames (U. S.), 14 Wall. 98, 20 L. Ed. 804; Blumenthal *v.* Brainerd, 38 Vt. 402, 91 Am. Dec. 350.

82. Negotiability.—*Alabama.*—Voss & Co. *v.* Robertson, etc., Co., 46 Ala. 483.

Indiana.—Pattison *v.* Culton, 33 Ind. 240, 5 Am. Rep. 199.

Massachusetts.—Rowley *v.* Bigelow (Mass.), 12 Pick. 307, 23 Am. Dec. 606; Stanton *v.* Eager (Mass.), 16 Pic. 467.

Ohio.—For certain purposes, bills of lading are invested with some of the attributes of negotiability, and hence are termed in the books quasi negotiable. Page & Co. *v.* Sandusky, etc., R. Co., 4 West. L. M. 644, 2 O. Dec. Reprint 716; Adams *v.* Brig Pilgrim, 10 West. L. J. 141, 1 O. Dec. 477.

South Carolina.—First Nat. Bank *v.* McSwain, 75 S. E. 1106, 93 S. C. 30.

Texas.—Missouri Pac. R. Co. *v.* Heidenheimer, 82 Tex. 195, 17 S. W. 608, 27 Am. St. Rep. 861.

Wisconsin.—Hale *v.* Milwaukee Dock Co., 29 Wis. 482, 9 Am. Rep. 603.

83. Pollard *v.* Reardon, 13 C. C. A. 171, 65 Fed. 848; Tison *v.* Howard, 57 Ga. 410. "In a qualified and restricted sense, a bill of lading has the attribute of negotiability." Davenport Nat. Bank *v.* Homeyer, 100 Am. Dec. 363, 45 Mo. 145.

84. Ratzer *v.* Burlington, etc., R. Co., 64 Minn. 245, 58 Am. St. Rep. 530, 66 N. W. 988.

85. Not negotiable in commercial sense.—*United States.*—National Bank *v.* Merchants' Nat. Bank, 91 U. S. 92, 23 L. Ed. 208; The Carlos F. Roses, 177 U. S. 655, 44 L. Ed. 929, 20 S. Ct. 803; Pollard *v.* Vinton, 105 U. S. 7, 26 L. Ed. 998; Shaw *v.* Railroad Co., 101 U. S. 557, 25 L. Ed. 892; Lehman, etc., Co. *v.* Central R., etc., Co., 12 Fed. 595.

Alabama.—Haas *v.* Citizens' Bank, 144 Ala. 562, 39 So. 129, 113 Am. St. Rep. 61, 1 L. R. A., N. S., 242.

Arkansas.—Arkansas, etc., R. Co. *v.* Ger-

it is said that a bill of lading is negotiable, it is only meant that its true owner may transfer it by indorsement or assignment, so as to vest the legal title in the assignee;[86] and not that they are attended with all the incidents of such paper in favor of a bona fide purchaser.[87] Bills of exchange and promissory notes are representatives of money, circulating in the commercial world as such and it is essential, to enable them to perform their peculiar functions, that he who purchases them should not be bound to look beyond the instrument, and that his right to enforce them should not be defeated by anything short of bad faith on his part. But bills of lading answer a different purpose and perform different functions. They are regarded as so much cotton, grain, iron or other articles of merchandise, in that they are symbols of ownership of the goods they cover.[88] Where the common law prevails and no statutes have been passed

man Nat. Bank, 77 Ark. 482, 92 S. W. 522, 113 Am. St. Rep. 160.

Georgia.—Raleigh, etc., R. Co. *v.* Lowe, 101 Ga. 320, 28 S. E. 867.

A bill of lading in one sense is a negotiable instrument but it is simply a symbol or representative of the goods for which it is issued. Allen, etc., Co. *v.* Farmers', etc., Nat. Bank, 129 Ga. 748, 59 S. E. 813.

Illinois.—Stone *v.* Wabash, etc., R. Co., 9 Ill. App. 48.

Iowa.—Garden Grove Bank *v.* Humeston, etc., R. Co., 67 Iowa 526, 25 N. W. 761, 23 Am. & Eng. R. Cas. 695; Weyand *v.* Atchinson, etc., R. Co., 75 Iowa 573, 39 N. W. 899, 9 Am. St. Rep. 504, 1 L. R. A. 650.

Kentucky.—Douglas *v.* People's Bank, 86 Ky. 176, 5 S. W. 420, 10 Ky. L. Rep. 243, 9 Am. St. Rep. 276, 32 Am. & Eng. R. Cas. 510.

Maryland.—Baltimore, etc., R. Co. *v.* Wilkens, 44 Md. 11, 22 Am. Rep. 26.

Massachusetts.—Blanchard *v.* Page (Mass.), 8 Gray 281.

Misssouri.—Midland Nat. Bank *v.* Missouri Pac. R. Co., 132 Mo. 492, 33 S. W. 521, 53 Am. St. Rep. 505.

Nebraska.—Green *v.* Chicago, etc., R. Co., 42 Neb. 379; Union Pac. R. Co. *v.* Johnston, 45 Neb. 57, 63 N. W. 144, 50 Am. St. Rep. 540.

New York.—Batavia Bank *v.* New York, etc., R. Co., 32 Am. & Eng. R. Cas. 497, 106 N. Y. 195, 8 N. Y. St. Rep. 209, 12 N. E. 433.

Pennsylvania.—Franklin Trust Co. *v.* Philadelphia, etc., R. Co., 222 Pa. 96, 70 Atl. 949, 22 L. R. A., N. S., 828.

South Carolina.—National Bank *v.* Atlanta, etc., R. Co., 25 S. C. 216.

Texas.—Missouri Pac. R. Co. *v.* Heidenheimer, 82 Tex. 195, 17 S. W. 608, 27 Am. St. Rep. 861; Prendergast *v.* Williamson, 6 Tex. Civ. App. 725, 731, 26 S. W. 421; Campbell *v.* Alford, 57 Tex. 159; Adoue *v.* Seeligson & Co., 54 Tex. 593, 595; Osborn *v.* Koenigheim, 57 Tex. 91; National Bank *v.* Citizens' Nat. Bank, 41 Tex. Civ. App. 535, 93 S. W. 209, 210, affirmed in 101 Tex. 650, no op.

Bills of lading are not commercial or negotiable paper in the hands of an innocent party. Adoue *v.* Seeligson & Co., 54 Tex. 593, 604.

86. Douglas *v.* People's Bank, 86 Ky. 176, 5 S. W. 420, 10 Ky. L. Rep. 243, 9 Am. St. Rep. 276, 32 Am. & Eng. R. Cas. 510. See Pollard *v.* Vinton, 105 U. S. 7, 26 L. Ed. 998. See, also, Jasper Trust Co. *v.* Kansas City, etc., R. Co., 99 Ala. 416, 14 So. 546, 42 Am. St. Rep. 75, 4 Am. & Eng. Enc. Law 549, 6 Cyc. Law & Proc. 426.

"Assignment of bills of lading are not governed by the commercial law. The transferee simply acquires the title of the transferrer to the goods described in them. Commercial Bank *v.* Hurt, 99 Ala. 130, 12 So. 568, 19 L. R. A. 701, 42 Am. St. Rep. 38; Jasper Trust Co. *v.* Kansas City, etc., R. Co., 99 Ala. 416, 14 So. 546, 42 Am. St. Rep. 75, 4 Am. & Eng. Enc. Law 549, 6 Cyc. Law & Proc. 426." Cosmos Cotton Co. *v.* First Nat. Bank, 171 Ala. 392, 54 So. 621, 32 L. R. A., N. S., 1173, Ann. Cas. 1913B, 42.

87. Tison *v.* Howard, 57 Ga. 410; Haas *v.* Kansas City, etc., R. Co., 81 Ga. 792, 7 S. E. 629; Raleigh, etc., R. Co. *v.* Lowe, 101 Ga. 320, 28 S. E. 867.

88. *United States.*—**Distinguished from commercial paper.**—Friedlander *v.* Texas, etc., R. Co., 130 U. S. 416, 423, 32 L. Ed. 991, 9 S. Ct. 570; Shaw *v.* Railroad Co., 101 U. S. 557, 25 L. Ed. 892; Pollard *v.* Vinton, 105 U. S. 7, 26 L. Ed. 998; Missouri Pac. R. Co. *v.* McFadden, 154 U. S. 155, 38 L. Ed. 944, 14 S. Ct. 990; The Carlos F. Roses, 177 U. S. 655, 44 L. Ed. 929, 20 S. Ct. 803.

In the hands of the holder a bill of lading is evidence of ownership, special or general, of the property mentioned in it, and of the right to receive said property at the place of delivery. Notwithstanding it is designed to pass from hand to hand, with or without indorsement, and it is efficacious for its ordinary purposes in the hands of the holder, it is not a negotiable instrument or obligation in the sense that a bill of exchange or a promissory note is. Its transfer does not preclude, as in those cases, all inquiry into the transaction in which it originated, because it has come into hands of persons who have innocently paid value for

to better their standing, bills of lading do not enjoy the full dignity of negotiable paper proper; that is, the mere possession of them in a state apparently regular, and under circumstances apparently innocent, does not always enable the holder to negotiate them with full protection to a bona fide purchaser. If the goods are stolen, or procured from the owner by fraud, or entrusted to an agent for mere custody and safekeeping, they occupy much the same, or perhaps exactly the same, position that the property itself would occupy if it were thus dealt with instead of the bills which represent it.[89]

it. The doctrine of bona fide purchasers only applies to it in a limited sense. Pollard *v.* Vinton, 105 U. S. 7, 8, 26 L. Ed. 998; Missouri Pac. R. Co. *v.* McFadden, 154 U. S. 155, 38 L. Ed. 944, 14 S. Ct. 990.

That a bill of lading does not partake of the character of negotiable paper, so as to transfer to the assignees thereof the rights of the holder of such paper, is well settled. Missouri Pac. R. Co. *v.* McFadden, 154 U. S. 155, 38 L. Ed. 944, 14 S. Ct. 990.

It is true that while not negotiable as commercial paper is, bills of lading are commonly used as security for loans and advances; but it is only as evidence of ownership, special or general, of the property mentioned in them, and of the right to receive such property at the place of delivery. Friedlander *v.* Texas, etc., R. Co., 130 U. S. 416, 424, 32 L. Ed. 991, 9 S. Ct. 570.

Georgia.—The rule that possession carries evidence of title so as to protect bona fide purchasers in the usual course of trade is, in the absence of a statute to the contrary, limited to negotiable paper, such as bills of exchange and promissory notes, and to money, bank bills, or other recognized currency, and does not apply to bills of lading, which answer a different purpose and perform different functions. They are not the representatives of money, are not used for transmission of money, nor for the payment of debts, nor for purchases. They are regarded as so much cotton, grain, iron or other articles of merchandise, in that they are symbols of ownership of the property mentioned in them, and a transfer of the symbol does not operate more than a transfer of what it represents. Raleigh, etc., R. Co. *v.* Lowe, 101 Ga. 320, 28 S. E. 867.

Ohio.—A bill of lading is unlike a bill of exchange or promissory note, in this —the latter are choses in action, credits being property, and having a value in and of themselves, and can be sold and delivered as property; while the bill of lading is not a chose in action or property, but the mere symbol of the property designated in it, which property can be brought and sold and delivered, just as if bodily present, by the transfer of the bill of lading by the owner of the property. Its office is to effect the delivery of the possession of property bought or taken in pledge, which is not present, but in transit to some place of consignment. Pomeroy, etc., Co. *v.* Will, 2 Am. L. Rec. 1, 5 O. Dec. Reprint 34.

Bills of exchange and promissory notes are credits—valuable property in and of themselves. Not so the bill of lading; it merely represents the particular property which is described in it. The value is in that. The bill is its symbol, the transfer of which transfers the property. Its transfer is a legal mode of delivering the property itself to the transferee. Pomeroy, etc., Co. *v.* Will, 2 Am. L. Rec. 1, 5 O. Dec. Reprint 34.

Texas.—A bill of lading, even when, in terms, running to order or assigns, is not negotiable, like a bill of exchange, but a symbol or representative of the goods themselves; and the rights arising out of the transfer of a bill of lading correspond, not to those arising out of the indorsement of a negotiable promise to pay money, but to those arising out of a delivery of property itself under similar circumstances. Grayson County Nat. Bank *v.* Nashville, etc., Railway (Tex. Civ. App.), 79 S. W. 1094; Adoue *v.* Seeligson & Co., 54 Tex. 593, 594; Missouri Pac. R. Co. *v.* Heidenheimer, 82 Tex. 195, 17 S. W. 608, 27 Am. St. Rep. 861.

"While the transfer of bills of lading may pass the title to the goods, unless the common law has been modified by statute, these instruments are not negotiable, in the sense in which that term is applied to bills and notes and other negotiable instruments of a like character. Although it has sometimes been said that a bill of lading is negotiable, nothing more is meant by this than that the transfer of the bill of lading passes to the transferee the title of the transferer to the goods described therein. Negotiability may be predicated of bills of exchange and promissory notes, because they are the representatives of money, which is itself negotiable, to the extent that it can not be reclaimed from anyone who receives it in good faith for value. On the other hand, bills of lading do not stand as representatives of money, but of the goods therein described, and as chattels are not negotiable, that quality can not be given to the symbol; no greater effect can be given to the transfer of the symbol than to that of the thing which it represents." Landa *v.* Lattin, 19 Tex. Civ. App. 246, 249, 46 S. W. 48.

89. Tison *v.* Howard, 57 Ga. 410. See post, "Holder of Lost or Stolen Bill of Lading," § 554.

Use of Words of Negotiability.—Bills of lading can not be made, by any form of words, negotiable in the sense that commercial paper payable to bearer, or order or assigns, is negotiable.[90]

False Bill of Lading.—A false bill of lading is not a negotiable instrument, whether it is indorsed or not.[91]

§ 516. Effect of Statutes Making Bills of Lading Negotiable.—Although a statute makes bills of lading negotiable by indorsement and delivery, it does not follow that all the consequences incident to the indorsement of bills and notes before maturity ensue or are intended to result from such negotiation. Such statutes only prescribe the manner of negotiation, i. e., by endorsement and delivery, and are not intended to change totally their character, put them in all respects on the footing of instruments which are the representatives of money, and charge the negotiation of them with all the consequences which usually attend or follow the negotiation of bills or notes. Some of these consequences would be very strange, if not impossible. Such as the liability of indorsers, the duty of demand ad diem, notice of non-delivery by the carrier, etc., or the loss of the owner's property by the fraudulent assignment of a thief. If these were intended, surely the statute would have said something more than merely make them negotiable by indorsement. No statute is to be construed as altering the common law farther than its words import. It is not to be construed as making any innovation upon the common law which it does not fairly express. Especially is so great an innovation as would be placing bills of lading on the same footing in all respects with bills of exchange not to be inferred from words that can be fully satisfied without it. The law has most carefully protected the ownership of personal property, other than money, against misappropriation by others than the owner, even when it is out of his possession. This protection would be largely withdrawn if the misappropriation of its symbol or representative could avail to defeat the ownership, even when the person who claims under a misappropriation had reason to believe that the person from whom he took the property had no right to it.[92] The theory is that "negotiable," as used in the statute, means capable of being transferred by indorsement and delivery, so as to give the indorsee a right to sue in his own name.[93] This is the construction

90. **Not negotiable in the sense of negotiable paper.**—"If such words of negotiability be contained in them, they only indicate the intention of the shipper as to the person for whose use the consignment is made. If the goods be delivered, by the terms of the bill, to the consignee or his order, there can be no doubt that the person to whom the bill may be transferred by the consignor would be charged with notice of the rights of the consignee, and, on the other hand, if the bill be made to the use of the consignor, or his order, or his assigns, the consignee would be charged with notice of the rights of those to whom the bill may have been transferred. But, in either case, the question is open to the inquiry as to what such rights may be, and can be determined only by inquiry into the real nature and character of the transaction." Emery's Sons *v.* Irving Nat. Bank, 25 O. St. 360, 18 Am. Rep. 299, followed in 26 O. St. 641 (reversing in part 1 C. S. C. R. 76, 13 O. Dec. Reprint 425).

91. **False bill of lading.**—Jasper Trust Co. *v.* Kansas City, etc., R. Co., 99 Ala. 416, 14 So. 546, 42 Am. St. Rep. 75, 4 Am. & Eng. Enc. Law 549, 6 Cyc. Law & Proc. 426.

92. **Effect of statute making bills of lading negotiable.**—Shaw *v.* Railroad Co., 101 U. S. 557, 25 L. Ed. 892; Allen *v.* St. Louis Nat. Bank, 120 U. S. 20, 36, 30 L. Ed. 573, 7 S. Ct. 460. See Goodman *v.* Simonds (U. S.), 20 How. 343, 15 L. Ed. 934; Murray *v.* Lardner (U. S.), 2 Wall. 110, 17 L. Ed. 857; Jasper Trust Co. *v.* Kansas City, etc., R. Co., 99 Ala. 416, 14 So. 546, 42 Am. St. Rep. 75, 4 Am. & Eng. Enc. Law 549, 6 Cyc. Law & Proc. 426; Saltmarsh *v.* Tuthill, 13 Ala. 390; Matthews *v.* Poythress, 4 Ga. 287; National Bank *v.* Chicago, etc., R. Co., 44 Minn. 224, 46 N. W. 342, 9 L. R. A., N. S., 263, 20 Am. St. Rep. 566.

93. Sealy *v.* Missouri, etc., R. Co., 84 Kan. 479, 114 Pac. 1077, 41 L. R. A., N S., 500.

placed upon the statute of Alabama,[94] Iowa,[95] Minnesota,[96] and upon the statute of Missouri by the supreme court of the United States.[97]

Arkansas Statute.—Kirby's Dig., § 530, providing that bills of lading for goods actually deposited shall be transferable by indorsement, and that the transferee shall be deemed the owner of the goods, makes a bill of lading representative, so far as the delivery is concerned, of the commodity itself.[98]

Louisiana, Maryland and Missouri Statutes Doctrine of State Courts.—The state courts have held that the statutes of Louisiana,[99] Maryland,[1] and of Missouri[2] make bills of lading "negotiable" in the strictest meaning of the terms; that is, it gives them the quality of investing an innocent purchaser with greater rights than those possessed by the original holder.[3]

Necessity for Written Indorsement.—A transfer without written indorsement and delivery does not operate under the statute. In such case no better title passes by a transfer of the symbols without such indorsement than by a delivery of the goods which they represent.[4]

Bills of Lading Stamped Not Negotiable.—See post, "Bills Marked 'Not Negotiable,'" § 517.

94. Jasper Trust Co. *v.* Kansas City, etc., R. Co., 99 Ala. 416, 14 So. 546, 42 Am. St. Rep. 75, 4 Am. & Eng. Enc. Law 549, 6 Cyc. Law & Proc. 426.

95. First Nat. Bank *v.* Mt. Pleasant Mill. Co., 103 Iowa 518, 72 N. W. 689; Sealy *v.* Missouri, etc., R. Co., 84 Kan. 479, 114 Pac. 1077, 41 L. R. A., N. S., 500.

96. Minnesota Gen. St. 1878, ch. 124, § 17, does not put bills of lading on the same footing as bills of exchange. National Bank *v.* Chicago, etc., R. Co., 44 Minn. 224, 46 N. W. 342, 9 L. R. A., N. S., 263, 20 Am. St. Rep. 566. And see Sealy *v.* Missouri, etc., R. Co., 84 Kan. 479, 114 Pac. 1077, 41 L. R. A., N. S., 500.

97. By the Missouri act of 1869, all warehouse receipts and bills of lading, except those which have the words "not negotiable" plainly written or stamped on their face, are negotiable by written indorsement thereon and delivery in the same manner as bills of exchange and promissory notes. This provision, "while it doubtless gives the indorsee the right to sue thereon in his own name, does not, for the reasons fully stated by Mr. Justice Strong in delivering the judgment of the court in Shaw *v.* Railroad Co., 101 U. S. 557, 25 L. Ed. 892, attach to such an indorsement of the symbol of property the same effect which the common law gives to the indorsement of a bill of exchange or promissory note for the payment of a sum of money; nor confer upon persons making, upon a bill of lading indorsed in blank by the owner, an advance of money to a subsequent indorser whom they have reason to believe not to be the owner, the right to hold the goods against the true owner." Allen *v.* St. Louis Nat. Bank, 120 U. S. 20, 36, 30 L. Ed. 573, 7 S. Ct. 460.

98. Arkansas statute.—St. Louis, etc., R. Co. *v.* Citizens' Bank, 87 Ark. 26, 112 S. W. 154, 30 R. R. R. 290, 53 Am. & Eng. R. Cas., N. S., 290, 128 Am. St. Rep. 17.

99. Lalande *v.* His Creditors, 42 La. Ann. 705, 7 So. 895. But see Sealy *v.* Missouri, etc., R. Co., 84 Kan. 479, 114 Pac. 1077, 41 L. R. A., N. S., 500.

Under Louisiana act.—Bills of lading, under Acts 1868, p. 194, No. 150, are to be taken in the same manner and to the same extent as bills of exchange and promissory notes, and are negotiable in full. Hardie & Co. *v.* Vicksburg, etc., R. Co., 118 La. 253, 42 So. 793, overruling Lalande *v.* His Creditors, 42 La. Ann. 705, 7 So. 895, and Hart *v.* R. R., 29 La. Ann. 448, and following Degado *v.* Wilbur, 25 La. Ann. 83.

1. Tiedeman *v.* Knox, 53 Md. 612; Hardie & Co. *v.* Vicksburg, etc., R. Co., 118 La. 253, 42 So. 793.

2. Sealy *v.* Missouri, etc., R. Co., 84 Kan. 479, 114 Pac. 1077, 41 L. R. A., N. S., 500.

3. Sealy *v.* Missouri, etc., R. Co., 84 Kan. 479, 114 Pac. 1077, 41 L. R. A., N. S., 500.

The state courts proceed on the ground that the interpretation placed on such statute by the United States supreme court leaves this portion of the Missouri statute without force. In Missouri, bills of lading were already negotiable in the sense that they were transferable by indorsement and delivery (Valle *v.* Cerre, 36 Mo. 575, 88 Am. Dec. 161; Davenport Nat. Bank *v.* Homeyer, 100 Am. Dec. 363, 45 Mo. 145; Midland Nat. Bank *v.* Missouri, etc., R. Co., 62 Mo. App. 531, 1 Mo. App. Rep'r 417), and the assignee could sue in his own name. Walker *v.* Mauro, 18 Mo. 564; Merchants' Bank *v.* Union R., etc., Co., 69 N. Y. 373; Sealy *v.* Missouri, etc., R. Co., 84 Kan. 479, 114 Pac. 1077, 41 L. R. A., N. S., 500.

4. Transfer not made in accordance with statute.—Allen *v.* St. Louis Nat. Bank, 120 U. S. 20, 38, 30 L. Ed. 573, 7 S. Ct. 460.

§ 517. Bills Marked "Not Negotiable."—The restricted negotiability with which the common law invests bills of lading may be limited and still further qualified by the insertion of appropriate terms wholly destroying all negotiability. Such a result may be accomplished by simply stamping or printing across the face of the instrument the words "not negotiable." [5]

Under Statute Making Bills of Lading Negotiable.—A bill of lading on which is stamped the words, "Not negotiable unless delivery is to be made to the consignee or order," is governed by common-law principles, and is exempt from the provision of a statute, providing that bills of lading shall be negotiable provided that, where they have the words "not negotiable" plainly written or stamped on the face thereof, they shall be exempt from the provisions of the act. The sole effect of these words were to exempt such bills of lading from the provisions of statute in relation thereto. They are to be treated, then, as at common law.[6]

In View of New York Penal Statute.—A bill of lading is negotiable, being such by its written terms, though the word "nonnegotiable" is printed on its face, evidently in view of the penal statute, under which the carrier must regard every bill of lading as negotiable unless such word is printed on its face.[7]

Notice of Rights of Consignor.—The words "not negotiable" stamped on the face of a bill of lading do not simply limit the responsibility of the carrier, but give notice to purchasers of the possible rights of the consignor, and are sufficient to put a purchaser on inquiry as to the facts of the right of stoppage in transitu by the consignor.[8]

§ 518. When Carrier Incurs Liability of Warehousemen.—Where a carrier deposits the goods carried in a warehouse for safe-keeping, it incurs the liability of a warehouseman, and from that point of view the bill of lading is negotiable.[9]

§ 519. Transferability or Assignability.—In General.—See ante, "Negotiability," §§ 514-518. The bill of lading issued by a carrier to the owner or shipper is the symbol of ownership of the goods shipped, and, though not negotiable is assignable, or transferable,[10] by the custom of merchants, so as to

5. **Bills marked "not negotiable."**—National Bank *v.* Baltimore, etc., R. Co., 99 Md. 661, 59 Atl. 134, 105 Am. St. Rep. 321; Franklin Trust Co. *v.* Philadelphia, etc., R. Co., 222 Pa. 96, 70 Atl. 949, 22 L. R. A., N. S., 828.

"In Bank *v.* New York, etc., R. Co., 106 N. Y. 195, 12 N. E. 433, 60 Am. Rep. 440, 32 Am. & Eng. R. Cas. 497, speaking of the liability of the common carrier upon a bill of lading the court says (page 201 of 106 N. Y.): 'If he desires to limit his responsibility * * * to the named consignee alone, he must stamp his bills as "non-negotiable;" and, where he does not do that, he must be understood to intend a possible transfer of the bills, and to effect the action of such transferees.' This would seem to be an intimation that the New York courts would not hold the carrier estopped from showing the truth with the regard to nondelivery of the goods when a bill of lading stamped 'Not negotiable' was found in the hands of the third party." Franklin Trust Co. *v.* Philadelphia, etc., R. Co., 222 Pa. 96, 70 Atl. 949, 22 L. R. A., N. S., 828.

6. National Bank *v.* Baltimore, etc., R. Co., 99 Md. 661, 59 Atl. 134, 105 Am. St. Rep. 321; Barnum Grain Co. *v.* Great Northern R. Co., 102 Minn. 147, 112 N. W. 1030, rehearing denied id. 1049, so holding as to Linn. Gen. Stat. 1894, § 7649; Dymock *v.* Missouri, etc., R. Co., 54 Mo. App. 400.

7. **In view of New York penal statute.**—Pisapia *v.* Hartford, etc., Transp. Co., 62 Misc. Rep. 607, 116 N. Y. S. 26.

8. **Notice of rights of consignor.**—Gass *v.* Astoria Veneer Mills, 134 App. Div. 184, 118 N. Y. S. 982. See as defeating stoppage in transitu, see post, "Stoppage in Transitu," § 500.

9. **When carrier incurs liability of warehousemen.**—Hardie & Co. *v.* Vicksburg, etc., R. Co., 118 La. 253, 42 So. 793.

10. **Transferability or assignability.**—*Georgia.*—Tison *v.* Howard, 57 Ga. 410; Haas *v.* Kansas City, etc., R. Co., 81 Ga. 792, 7 S. E. 629; Raleigh, etc., R. Co. *v.* Lowe, 101 Ga. 320, 28 S. E. 867.

Iowa.—Garden Grove Bank *v.* Humeston, etc., R. Co., 67 Iowa 526, 25 N. W. 761, 23 Am. & Eng. R. Cas. 695.

Kentucky.—Douglas *v.* People's Bank, 86 Ky. 176, 10 Ky. L. Rep. 243, 5 S. W.

vest in the assignee the title of the goods which the assignor had in them,[11] in a transaction intended to have that effect.[12]

Nonnegotiable Bill of Lading.—The nonnegotiability of the bill of lading does not prevent it from being assignable. Like any other negotiable instrument, or chose in action, it may be transferred by assignment, and when thus dealt with the assignee takes a valid title to it subject, of course, to the equities existing between the original parties to it, of which, if there are any, he is held to have had notice.[13]

The words "not negotiable" stamped on the face of the bills of lading in no wise destroyed their assignability;[14] aliter where the bill of lading states that it is "not negotiable or assignable."[15]

§§ 520-536. Mode of Transfer—§ 520. In General.—At common law a bill of lading is a symbol of the property, and the interest of the consignor in the property passes either by an indorsement or a delivery of the bill of lading.[16]

§§ 521-531. Delivery of Bill—§ 521. In General.—Generally the delivery of a bill of lading by the person who, according to the terms of the bill, is entitled to the goods, without written indorsement, if made with the intention of passing title to the goods, is sufficient therefor.[17] For many pur-

420, 9 Am. St. Rep. 276, 32 Am. & Eng. R. Cas. 510.

Massachusetts.—Saltus *v.* Everett (N. Y.), 32 Am. Dec. 541, 20 Wend. 267.

Missouri.—Gratiot St. Warehouse Co. *v.* Missouri, etc., R. Co., 124 Mo. App. 545, 102 S. W. 11.

Nebraska.—Gates *v.* Chicago, etc., R. Co., 42 Neb. 379, 60 N. W. 583, 61 Am. & Eng. R. Cas. 218; Union Pac. R. Co. *v.* Johnston, 45 Neb. 57, 63 N. W. 144, 50 Am. St. Rep. 540.

New York.—Furman *v.* Union, etc., R. Co., 106 N. Y. 579, 13 N. E. 587.

Texas.—Missouri Pac. R. Co. *v.* Heidenheimer, 82 Tex. 195, 17 S. W. 608, 27 Am. St. Rep. 861; Nashville, etc., R. Co. *v.* Grayson County Nat. Bank (Tex. Civ. App.), 91 S. W. 1106, judgment reversed in 93 S. W. 431, 100 Tex. 17.

11. Saltus *v.* Everett (N. Y.), 32 Am. Dec. 541, 20 Wend. 267.

12. Tison *v.* Howard, 57 Ga. 410; Marine Nat. Bank *v.* Barringer, 46 Pa. Super. Ct. 510. See post, "Intention to Pass Title," § 522.

13. Steele *v.* Sellman, 79 Md. 1, 28 Atl. 811; National Bank *v.* Baltimore, etc., R. Co., 105 Am. St. Rep. 321, 99 Md. 661, 59 Atl. 134.

14. Dymock *v.* Missouri, etc., R. Co., 54 Mo. App. 400; National Bank *v.* Baltimore, etc., R. Co., 105 Am. St. Rep. 321, 99 Md. 661, 59 Atl. 134.

The words "not negotiable," stamped on the face of a bill of lading, do not prohibit transfer of the bill and of the contract represented thereby by indorsement and delivery, as, under Code Civ. Proc., § 449, any contract is transferable and enforceable by suit in the name of the assignee, but the transferrer of such a bill has only his common-law rights, and can not avail himself of Factors' Act (Laws 1830, p. 203, c. 179), § 3, providing that an agent intrusted with the possession of a bill of lading shall be deemed the true owner thereof so far as to give validity to any contract for the sale of goods thereunder. Gass *v.* Astoria Veneer Mills, 118 N. Y. S. 982, 134 App. Div. 184.

15. Ballinger's Ann. Codes & St., §§ 3590, 3598-3601 (Pierce's Code, §§ 6780, 8920, 6781, 6782), define a "bill of lading," make bills of lading negotiable, and provide that a bill of lading does not alter the rights or obligations of the carrier, unless it is plainly inconsistent therewith. A bill of lading acknowledged the receipt of property described from a person named, and gave the name of the consignee and destination, and stated that it was not negotiable or assignable. Held, that the bill of lading was in effect a receipt for the goods and a contract between the shipper and the carrier that it should be neither negotiated nor assigned, and a delivery of the bill of lading without indorsement, together with the invoice properly assigned, passed no title or right to the goods. Bonds-Foster Lumber Co. *v.* Northern Pac. R. Co., 53 Wash. 302, 101 Pac. 877.

16. **Mode of transfer in general.**—Bonds-Foster Lumber Co. *v.* Northern Pac. R. Co., 53 Wash. 302, 101 Pac. 877.

17. **Transfer by delivery of bill.**—*United States.*—In re Levin, 173 Fed. 119.

Colorado.—Florence, etc., R. Co. *v.* Jensen, 48 Colo. 28, 108 Pac. 974.

Georgia.—Commercial Bank *v.* Armsby Co., 120 Ga. 74, 47 S. E. 589, 65 L. R. A., N. S., 443; Orr *v.* Planters' Phosphate, etc., Co., 8 Ga. App. 59, 68 S. E. 779.

Illinois.—Michigan Cent. R. Co. *v.* Phillips, 60 Ill. 190.

Louisiana.—Croswell *v.* Va. Bibber, 18

poses it stands as representative of the shipment itself, and title to the goods may be transferred by the owner by means of a transfer of the bill of lading as long as the goods are in the possession of the carrier.[18]

§ 522. Intention to Pass Title.—The delivery of an unindorsed bill of lading constitutes a good symbolical delivery of the goods represented by the bill of lading only when such was the intent and purpose of the parties.[19]

§ 523. Necessity for Acceptance of Possession.—Delivery, in order to be effectual, should be followed by an acceptance of possession; and methods of delivery and acceptance differ, according to the subject matter and the local situation of the thing. But constructive delivery and acceptance are now much favored in such transactions. The transfer of the bill of lading of a ship at sea, or the delivery of a warehouse key, have long been esteemed sufficient for legally transferring possession of the thing so symbolized. And so, in modern times, the delivery in pledge of bills of lading of goods on transit, whether inland or by water, usually suffices to make the pledgee's title good against the world.[20]

Laches of Transferee.—No laches can be imputed to the transferee of a bill of lading who, either himself or his agent being on the lookout, either took possession of the property as soon as it arrived at its destination, or was prevented from obtaining possession by the interference of an attaching creditor of the consignor.[21]

§§ 524-525. Possession of Bill of Lading as Evidence of Title in Holder—§ 524. In General.—Mere possession of a bill of lading is evidence of title in the holder, either general or special, to the goods embraced therein, and that the bill is not made nor indorsed to such holder is not material.[22]

§ 525. Rebuttal of Presumption.—Presumption as to ownership of personal property arising from possession of a bill of lading may be explained or rebutted by other evidence showing where the real ownership lies.[23]

§ 526. Exception in Favor of Stoppage in Transitu.—There is an exception in some instances in favor of the consignor's right of stoppage in transitu.[24]

La. Ann. 637; Phillips *v.* Bank, 2 La. Ann. 19.

Massachusetts.—First Nat. Bank *v.* Crocker, 111 Mass. 163; Merchants' Nat. Bank *v.* Bangs, 102 Mass. 291; Allen *v.* Williams (Mass.), 12 Pick. 297; First Nat. Bank *v.* Dearborn, 115 Mass. 219, 15 Am. Rep. 92.

Missouri.—Scharff *v.* Meyer, 54 Am. St. Rep. 672, 133 Mo. 428, 34 S. W. 858.

Ohio.—By the rules of commercial law, bills of lading are regarded as symbols of the property therein described, and the mere delivery of such bill by one who has an interest in or a right to control the property is equivalent to a delivery of the property itself. Emery's Sons *v.* Irving Nat. Bank, 25 O. St. 360, 18 Am. Rep. 299; Pomeroy, etc., Co. *v.* Will, 2 Am. L. Rec. 1, 5 O. Dec. Reprint 34.

Oregon.—The chattels represented by a bill of lading are transferred by the delivery of such bill, if nothing else is shown. Ladd, etc., Bank *v.* Commercial State Bank (Ore.), 130 Pac. 975.

18. Orr *v.* Planters' Phosphate, etc., Co., 8 Ga. App. 59, 68 S. E. 779.

19. Intention to pass title.—In re Levin, 173 Fed. 119; Tison *v.* Howard, 57 Ga. 410; Florence, etc., R. Co. *v.* Jensen, 48 Colo. 28, 108 Pac. 974; Marine Nat. Bank *v.* Barringer, 46 Pa. Super. Ct. 510.

20. Necessity for acceptance of possession.—Campbell *v.* Alford, 57 Tex. 159, 162.

21. Winslow *v.* Norton, 29 Me. 419, 50 Am. Dec. 601.

22. As evidence of title in holder.—In re E. Reboulin Fils & Co., 165 Fed. 245.

Possession of bills of lading by the shipper is regarded as prima facie evidence of the ownership of property shipped, and their delivery upon advances made as symbolical delivery of such property. Prendergast *v.* Williamson, 6 Tex. Civ. App. 725, 26 S. W. 421; Campbell *v.* Alford, 57 Tex. 159.

23. Rebuttal of presumption from possession of bill.—Lovell *v.* Newman & Son, 192 Fed. 753, 113 C. C. A. 39, affirming 188 Fed. 534; Hentz & Co. *v.* Lovell, 192 Fed. 762, 113 C. C. A. 48, reversing Lovell *v.* Hentz & Co., 181 Fed. 555.

24. Orr *v.* Planters' Phosphate, etc.,

§§ 527-528. Right of Disposal Retained by Consignor.—See post, "Consignor or Agent," § 539.

§ 527. In General.—When goods are consigned, and the right of disposition is retained in the consignors by the bill of lading, then the delivery of the bill without indorsement for value transfers the property in the goods included in the bill. Such is the legal effect of a bill of lading for goods consigned to a factor for sale on account of the consignor, as in such case there is no sale of the property before the transfer of the bill.[25]

§ 528. Consignor Indebted to Consignee.—The delivery of a bill of lading for value though indorsed, carries with it the property in the goods covered thereby, as against the consignor's factor, though a consignee is named therein; and this is so, although the consignor was indebted to his factor for advances made on account of prior shipments.[26] The same rule applies in case of sale, if the right to dispose of the property is retained in the consignor by the bill of lading.[27] This is so without regard to the presence or absence of words of negotiability on its face.[28]

§ 529. Necessity for Indorsement to Enable Holder to Sue.—A written indorsement may be necessary to transfer the contract so as to enable the transferee to sue on it in his own name; but the delivery of the bill of lading without indorsement, for value, transfers the property in the goods.[29]

Co., 8 Ga. App. 59, 68 S. E. 779; National Bank *v.* Baltimore, etc., R. Co., 99 Md. 661, 105 Am. St. Rep. 321, 59 Atl. 134. See post, "As Defeating Stoppage in Transitu," § 567. See, also, ante, "Stoppage in Transitu," § 500.

25. Scharff *v.* Meyer, 54 Am. St. Rep. 672, 133 Mo. 428, 34 S. W. 858; Davenport Nat. Bank *v.* Homeyer, 45 Mo. 145, 100 Am. Dec. 363; Valle *v.* Cerre, 36 Mo. 575, 88 Am. Dec. 161; Holmes, etc., Co. *v.* German Security Bank, 87 Pa. 525; Bank *v.* Jones, 4 N. Y. 497, 55 Am. Dec. 290; Marine Bank *v.* Wright, 48 N. Y. 1; Allen *v.* Williams (Mass.), 12 Pick. 297; Jordan *v.* Pennsylvania Co., 31 Alb. L. J. 250; Emery's Sons *v.* Irving Nat. Bank, 25 O. St. 360, 18 Am. Rep. 299; Phillps *v.* Bank, 2 La. Ann. 19. See, also, ante, "Goods Billed to Shipper's Order," §§ 507-508.

26. Factor to whom consignor indebted for advances on prior shipments.—Bank *v.* Jones, 4 N. Y. 497, 55 Am. Dec. 290; Davenport Nat. Bank *v.* Homeyer, 45 Mo. 145, 100 Am. Dec. 363. See post, "Claim for Advances to Consignor," § 570.

27. Sale.—Weyand *v.* Atchinson, etc., R. Co., 75 Iowa 573, 39 N. W. 899, 1 L. R. A. 650, 9 Am. St. Rep. 504; Scharff *v.* Meyer, 54 Am. St. Rep. 672, 133 Mo. 428, 34 S. W. 858.

28. Emery's Sons *v.* Irving Nat. Bank, 25 O. St. 360, 18 Am. Rep. 299, reversing in part, 1 C. S. C. R. 76, 13 O. Dec. Reprint 425.

29. Necessity for written instrument to enable transferee to sue.—Buffington *v.* Curtis, 15 Mass. 528, 8 Am. Dec. 115; Davenport Nat. Bank *v.* Homeyer, 100 Am. Dec. 363, 45 Mo. 145. And see, also, In re E. Reboulin Fils & Co., 105 Fed. 245.

"In passing upon the transferability of bills of lading by delivery in Allen *v.* Williams (Mass.), 12 Pick. 297, Shaw C. J., in delivering the opinion of the court, said: 'Even a sale or pledge of the property without a formal bill of lading, by the shipper, would operate as a good assignment of the property, and the delivery of an informal or unindorsed bill of lading, or other documentary evidence of the shipper's property, would be a good symbolical delivery, so as to vest the property in the plaintiffs. That case was followed with approval in First Nat. Bank *v.* Dearborn, 115 Mass. 219, 15 Am. Rep. 92. In each of those cases the consignor had simply taken the carrier's receipt for the goods, and it was held that the transfer of the receipts by delivery without indorsement was a symbolical delivery of the goods covered by the receipts, and transferred to the transferee all interest the consignors had in the goods at the time of the transfers of the receipts.'" Scharff *v.* Meyer, 54 Am. St. Rep. 672, 133 Mo. 428, 34 S. W. 858.

"In Allen *v.* Williams (Mass.), 12 Pick. 297, it was held that where the bill of lading was filled up with the name of a particular consignee or bearer, the mere delivery of the bill by the shipper for value passed the property, as against the named consignee. And the court says that whether the transferee acquired, by delivery of the bill of lading, an absolute property in the goods, or a lien only, was immaterial." Davenport Nat. Bank *v.* Homeyer, 100 Am. Dec. 363, 45 Mo. 145.

In Missouri such indorsement was not necessary to enable the transferee to sue in his own name.[30]

§ 530. Necessity for Shipper's Order.—A carrier of property, which, by the terms of the bills of lading, is deliverable to the shipper's order, is liable for its value to the true owner if he delivers the property to the consignees, or any one else, without such order.[31] Where the bill of lading required the delivery of the goods to the consignor, and did not provide for delivery to bearer or order, the forwarding of the bill of lading to the purchaser of the goods with directions to pay a draft for the purchase price and obtain an order for the goods from a local bank, did not invest him with any right to the goods as against the consignor.[32] The fact that the vendee presented the unindorsed bill of lading was not sufficient to overcome the presumption that the terms of the bill raised, that the consignor was the owner of the goods. That such is the presumption is well established.[33]

Estoppel of Pledgee.—Where the pledgor of such bills of lading has been permitted by the pledgee to present them to the carrier as his own, and so obtain the property, the pledgee is estopped to gainsay what he has thus sanctioned.[34]

Where Bill of Lading Authorizes Delivery of Goods upon Written Order.—If a bill of lading expressly authorizes the carrier to deliver the goods upon the written order of the consignee without the bill of lading, such order, when given, has the same effect as the transfer of the bill of lading.[35]

§ 531. Bill of Lading Signed in Blank.—A bill of lading, originally signed in blank, and subsequently filled up by the authority of the shipper, so as to make the goods deliverable to a transferee, has the same effect to vest the property in him as if his name had been so intered by the direction of the shipper, when it was filled up and signed by the agent of the carrier.[36]

§§ 532-534. Transfer by Indorsement and Delivery—§ 532. In General.—At common law the title to goods while in possession of the carrier as bailee may be transferred by indorsement and delivery of the bill of lading to a third person whose title to the goods is no better than that of the person by whom the transfer is made.[37]

30. Sealy *v.* Missouri, etc., R. Co., 84 Kan. 479, 114 Pac. 1077, 41 L. R. A., N. S., 500, citing Walker *v.* Mauro, 18 Mo. 564. See ante, "Effect of Statutes Making Bills of Lading Negotiable," § 516, under catchline, "Louisiana, Maryland, and Missouri Statutes Doctrine of State Courts."

31. Necessity for shippers order.—Douglas *v.* People's Bank, 9 Am. St. Rep. 276, 86 Ky. 176, 5 S. W. 420, 10 Ky. L. Rep. 243, 32 Am. & Eng. R. Cas. 510.

32. Weyand *v.* Atchinson, etc., R. Co., 9 Am. St. Rep. 504, 75 Iowa 573, 39 N. W. 899, 1 L. R. A. 650, distinguishing Dows *v.* Greene, 24 N. Y. 638; Allen *v.* Williams (Mass.), 12 Pick. 297, and other cases on the ground that they go no further than to hold that the delivery of an unindorsed bill of lading would be a good symbolical delivery of the goods it represented, where such was the intent and purpose of the parties. Weyand *v.* Atchinson, etc., R. Co., 9 Am. St. Rep. 504, 509, 75 Iowa 573, 39 N. W. 899, 1 L. R. A. 650.

33. Weyand *v.* Atchinson, etc., R. Co., 9 Am. St. Rep. 504, 75 Iowa 573, 39 N. W. 899, 1 L. R. A. 650; Congar *v.* Galena, etc., R. Co., 17 Wis. 477; Krudler *v.* Ellison, 47 N. Y. 36, 7 Am. Rep. 402; Lawrence *v.* Minturn (U. S.), 17 How. 100, 15 L. Ed. 58; Alderman *v.* Eastern R. Co., 115 Mass. 233. See, also, Tuttle *v.* Becker, 47 Iowa 486.

34. Estoppel of pledgee.—Douglas *v.* People's Bank, 9 Am. St. Rep. 276, 86 Ky. 176, 5 S. W. 420, 10 Ky. L. Rep. 243, 32 Am. & Eng. R. Cas. 510.

35. Bill of lading authorizes delivery of goods upon written order.—Seward & Co. *v.* Miller, 106 Va. 309, 55 S. E. 681.

36. Bill of lading signed in blank.—Chandler *v.* Sprague (Mass.), 38 Am. Dec. 404, 5 Metc. 306.

37. Transfer by indorsement and delivery.—*United States.*—Dows *v.* National Exch. Bank, 91 U. S. 618, 23 L. Ed. 214; Conard *v.* Atlantic Ins. Co. (U. S.), 1 Pet. 386, 7 L. Ed. 189. See post, "Rights and Title of Holder Generally," §§ 544-576.

Law *v.* Hatcher (Ind.), 4 Blackf. 364, goes no further than to affirm the proposition that the title to goods conveyed by

§ 533. Necessity and Sufficiency of Indorsement or Assignment.—The delivery of the bill of lading without formal indorsement or assignment, in deference to the mutual intent of the parties, and the loose usages of business, is a sufficient constructive delivery.[38] While a bill of lading may be assigned in writing, such an assignment is not indispensable, for the carrier is the only party who can insist upon this formality; and if the carrier recognizes the one to whom the bill of lading has been delivered, as owner or as justly entitled to possession of the goods which the bill of lading represents, it does so at its own risk; and though the consignee might complain, a holder of the bill of lading who had used it as a means of securing possession of the shipment would certainly be estopped from saying that there was no assignment.[39]

As Creating Equitable Lien in Favor of Transferee.—A bill of lading if delivered without indorsement to a third party creates an equitable lien in his favor who has received it for value, which courts will protect.[40]

Statutes Providing for Indorsements Do Not Abrogate Common Law.—Since by the common law bills of lading are transferable by delivery, and statutes in derogation thereof are strictly construed, the statutes of a state which provide that indorsement and delivery of bills of lading shall pass title should not be construed to mean that such bills may not be transferred by delivery for a valuable consideration.[41]

Constitutionality of Statute.—State statutes regulating the transfer of bills of lading by written indorsement, and forbidding the delivery of the property except on surrender of such bill of lading, and imposing a penalty for violation of its proceedings, is not unconstitutional as imposing a burden of interstate commerce, but valid in the absence of national legislation inconsistent therewith.[42]

Where Demand for Delivery Basis of Action against Carrier.—Where

a bill of lading would pass from the consignor to a purchaser by an indorsement and delivery of the bill of lading to the vendee. This is but the common doctrine affirmed by all the cases. Davenport Nat. Bank *v.* Homeyer, 100 Am. Dec. 363, 45 Mo. 145.

Illinois.—Illinois Cent. R. Co. *v.* Southern Bank, 41 Ill. App. 287.

Massachusetts.—Chandler *v.* Sprague (Mass.), 38 Am. Dec. 404, 406, 5 Metc. 306.

Missouri.—Skilling *v.* Bollman, 6 Mo. App. 76, affirmed in 73 Mo. 665, 39 Am. Rep. 537; Kirkpatrick *v.* Kansas City, etc., R. Co., 86 Mo. 341; Valle *v.* Cerre, 36 Mo. 575, 88 Am. Dec. 161; Davenport Nat. Bank *v.* Homeyer, 45 Mo. 145, 100 Am. Dec. 363; Missouri Pac. R. Co. *v.* McLiney, 32 Mo. App. 166; Dickson *v.* Merchant's Elevator Co., 44 Mo. App. 498; Scharff *v.* Meyer, 133 Mo. 428, 34 S. W. 858, 54 Am. St. Rep. 672.

New York.—Gass *v.* Astoria Veneer Mills, 134 App. Div. 184, 118 N. Y. S. 982.

Texas.—Missouri Pac. R. Co. *v.* Heidenheimer, 82 Tex. 195, 199, 17 S. W. 608, 27 Am. St. Rep. 861.

The English bill of lading act of 1855 (18 & 19 Vict, c. 111), has been construed in the following cases: The Figlia Maggiore L. R. 2 Adm. & Eccl. 106; The Ship Freedom *v.* Simmonds, L. R. 3 P. C. 594; The Felix, L. R. 2 Adm. & Eccl. 273; Lewis *v.* M'Kee, L. R. 2 Exch. 37; The Mepoter, L. R. 1 Adm. & Eccl. 375; Dracachi *v.* Anglo-Egyption Nav. Co., L. R. 3 C. P. 190; The Helene, B. & L. 415; Short *v.* Simpson, L. R. 1 C. P. 248; Smurthwaite *v.* Wilkins, 11 C. B., N. S., 103, E. C. L. 842; Sewell *v.* Burdick, L. R. 10 App. 74; Jessel *v.* Bath, L. R. 2 Exch. 267.

38. **Necessity and sufficiency of indorsements or assignments.**—Campbell *v.* Alford, 57 Tex. 159; Adoue *v.* Seeligson & Co., 54 Tex. 593, 595; Osborn *v.* Koenigheim, 57 Tex. 91; National Bank *v.* Citizens' Nat. Bank, 41 Tex. Civ. App. 535, 93 S. W. 209, affirmed in 101 Tex. 650, no op.

The general rule is that delivery, without indorsement of a bill of lading, by one entitled thereunder to the goods, will transfer his title. McMeekin *v.* Southern Railway, 82 S. C. 468, 64 S. E. 413.

39. Orr *v.* Planters' Phosphate, etc., Co., 8 Ga. App. 59, 65, 68 S. E. 779.

40. **As creating equitable lien in favor of transferee.**—Little Miami, etc., R. Co. *v.* Dodds & Co., 1 C. S. C. 47, 13 O. Dec. Reprint 407.

41. **Statutes providing for indorsement do not abrogate common law.**—Scharff *v.* Meyer, 133 Mo. 428, 34 S. W. 858, 54 Am. St. Rep. 672.

42. **Constitutionality of statute.**—Arkansas, etc., R. Co. *v.* German Nat. Bank, 113 Am. St. Rep. 160, 77 Ark. 482, 92 S. W. 522.

a so-called demand for delivery was made by the transferee of an "order notify" bill of lading of a railroad company (which thereby agreed to transport a certain shipment from and to named points within the state), before it was indorsed by the one having the legal title thereto, such demand can not be the basis for the ascertainment of the damages for a breach of the contract of carriage.[43]

Endorsement "Deliver to A." Sufficient for Bill of Lading.—Where a bill of lading issued in the usual form by a railroad company, consigning the shipment to the shipper's order, with directions to notify another, has on its back an endorsement "Deliver to A." signed by the consignee, such endorsement is a valid and sufficient assignment of the bill of lading to A.[44]

§ 534. Necessity for Delivery of Bill.—An indorsement of the bill of lading without a delivery of it does not transfer the title to the goods.[45]

§ 535. Sale or Payment of Draft with Bill of Lading Attached—Sale of Draft with Bill of Lading Attached.—Where the owner, upon shipment of the goods to his own order at the station of the proposed purchaser, makes a draft in favor of a third person on the proposed purchaser for the price of the goods and indorses the bill of lading and delivers that, with the draft attached, to the third person, for a sufficient consideration, intending thereby to sell the goods, the delivery of such draft and bill of lading so indorsed will convey to that person the title to the goods.[46]

Payment of Draft with Bill of Lading Attached.—Where a buyer from a consignee paid the latter's draft with a bill of lading attached, the bill of lading thereafter belonged to the purchaser, though he did not receive it until subsequently.[47]

§ 536. Attachment of Bill of Lading.—An attachment of a bill of lading, while goods are in the possession of the carrier, operates to carry the title thereto.[48]

§§ 537-539. Persons Who Make Transfer—§ 537. In General.—A bill of lading can be transferred so as to vest title in the transferee only by the person to whom it is issued or by his authority. If transferred by stranger having no authority therefor no title or right to the property is passed and, the carrier is not liable to the bona fide transferee for damages for the loss he suffered thereby.[49] If a stranger obtains unauthorized possession of it, and perverts it to unauthorized uses, no one who trusts such stranger, and parts with value on the strength thereof, can claim damages of the carrier for the injuries he may thereby have suffered. It would be his own fault and folly if he dealt with one having no authority in the premises.[50] A purchaser of a bill of lading is put on inquiry as to the existence of the parties to whom it was

43. **Where demand for delivery basis of action against carrier.**—Albany, etc., R. Co. *v.* Merchants', etc., Bank, 137 Ga. 391, 73 S. E. 637.

44. **Endorsement "Deliver to A" sufficient for bill of lading.**—Allen, etc., Co. *v.* Farmers', etc., Nat. Bank, 129 Ga. 748, 59 S. E. 813.

45. **Necessity for delivery of bill.**—Buffington *v.* Curtis, 15 Mass. 528, 8 Am. Dec. 115; Davenport Nat. Bank *v.* Homeyer, 100 Am. Dec. 363, 45 Mo. 145. See post, "Consignor or Agent," § 539.

46. **Sale of draft with bill attached to third person.**—American Nat. Bank *v.* Lee, 124 Ga. 863, 53 S. E. 268.

47. **Sale or payment of draft with bill of lading attached.**—Johnson & Co. *v.* Central Vermont R. Co. (Vt.), 79 Atl. 1095.

48. **Attachment of bill of lading.**—Ayres, etc., Co. *v.* Dorsey Produce Co., 63 Am. St. Rep. 376, 101 Iowa 141, 70 N. W. 111.

49. **Person who makes transfer.**—Jasper Trust Co. *v.* Kansas City, etc., R. Co., 42 Am. St. Rep. 75, 76, 99 Ala. 416, 14 So. 546, 4 Am. & Eng. Enc. Law 549, 6 Cyc. Law & Proc. 426.

50. Jasper Trust Co. *v.* Kansas City, etc., R. Co., 42 Am. St. Rep. 75, 80, 99 Ala. 416, 14 So. 546, 4 Am. & Eng. Enc. Law 549, 6 Cyc. Law & Proc. 426.

issued, and his failure to so inquire and to obtain their indorsement is a bar to any claim for damages against the carrier issuing it.[51]

§ 538. Consignee.—In strict law, the proper person to pass a bill of lading by indorsement is the consignee, not the consignor.[52] By the well-settled principles of commercial law, the consignee is the authorized agent of the owner, whoever he may be, to receive the goods, and he may transfer the bill of lading by indorsement.[53]

§ 539. Consignor or Agent.—A consignor can only transfer title by delivery of the bill of lading while title to the property is in himself.[54] Strictly speaking, no person but the consignee can, by an indorsement on the bill of lading, pass the legal title to the goods; but if the shipper be the owner, and the shipment be on his own account and risk, although he may not pass the title, by virtue of a mere indorsement of the bill of lading, unless he be the consignee, or the goods be deliverable to his order; yet, by an assignment on the bill of lading, or by a separate instrument, he can pass the legal title to the same; and it will be good against all persons, except purchasers for a valuable consideration, without notice, by indorsement on the bill of lading itself. Such an assignment by the owner, passes the legal title against his agents or factors, and creditors, in favor of the assignee.[55]

Where Shipper Reserves Jus Disponendi.—By the rules of commercial law, a bill of lading is regarded as the symbol of the property therein described; and a consignor who has reserved the jus disponendi may effectuate a sale or pledge of the property consigned, by delivery of the bill of lading to the purchaser or pledgee, as completely as if the property were in fact, delivered. If such transfer of the bill of lading be made after the property has pass into the actual possession of the consignee, the transferee of the bill takes it subject to any right or lien which the consignee may have acquired by reason of his possession. But if the bill of lading be transferred by way of sale or pledge to a third person, before the property comes into the possession of the consignee, the consignee takes the property subject to any right which the transferee of the bill may have acquired by the symbolic delivery of the property to him.[56] If the right to control the property be reserved by the shipper, the

51. Jasper Trust Co. *v.* Kansas City, etc., R. Co., 42 Am. St. Rep. 75, 76, 99 Ala. 416, 14 So. 546, 4 Am. & Eng. Enc. Law 549, 6 Cyc. Law & Proc. 426.

52. Consignee.—Tison *v.* Howard, 57 Ga. 410. See, also, Bass *v.* Glover, 63 Ga. 745.

53. Conard *v.* Atlantic Ins. Co. (U. S.), 1 Pet. 386, 387, 7 L. Ed. 189.

Ohio.—Page & Co. *v.* Sandusky, etc., R. Co., 4 West. L. M. 644, 2 O. Dec. Reprint 716; Jordan, etc., Co. *v.* James, 5 O. 88; Little Miami, etc., R. Co. *v.* Dodds & Co., 1 C. S. C. 47, 13 O. Dec. Reprint 407.

A consignee upon a bill of lading to himself, or assigns, obtains a property in the consignment by the bill of lading, and may sell and transfer a title, while the goods are in transit, before they ever come to his actual possession, by indorseing the bill of lading, notwithstanding they have not been paid for. The moment goods are delivered by A. to a carrier, to be forwarded to B, the property vests in B. Jordan, etc., Co. *v.* James, 5 O. 88; Little Miami, etc., R. Co. *v.* Dodds & Co., 1 C. S. C. R. 47, 13 O. Dec. Reprint 407.

54. Maine Bank of Buffalo *v.* Barringer, 46 Pa. Sup. Ct. 510.

55. Conard *v.* Atlantic Ins. Co. (U. S.), 1 Pet. 386, 387, 7 L. Ed. 189.

The delivery of a bill of lading by the consignor operates as a transfer of the property or some interest therein only where there is a stipulation in the bill itself whereby an ownership is retained by the consignor. Bonds-Foster Lumber Co. *v.* Northern Pac. R. Co., 101 Pac. 877, 53 Wash. 302.

56. Where shipper reserves jus disponendi.—See ante, "Right of Disposal Retained by Consignor," §§ 527-528. Scharff *v.* Meyer, 54 Am. St. Rep. 672, 133 Mo. 428, 34 S. W. 858; Emery's Sons *v.* Irving Nat. Bank, 25 O. St. 360, 18 Am. Rep. 299.

Ohio.—Emery's Sons *v.* Irving Nat. Bank, 25 O. St. 360, 18 Am. Rep. 299, followed in 26 O. St. 641, reversing in part 1 C. S. C. R. 76, 13 O. Dec. Reprint 425; Pomeroy, etc., Co. *v.* Will, 2 Am. L. Rec. 1, 5 O. Dec. Reprint 34.

"As between the consignor and con-

carrier must be regarded as his agent; if not, then as the agent of the consignee.[57]

Question of Reservation of Jus Disponendi One of Intention.—If the consignment be made by a vendor to a vendee, the question whether the consignor reserved the jus disponendi is one of intention, to be gathered from all the facts and circumstances of the transaction.[58] On such question of intention, the terms of the bill of lading are to be taken as admissions of the consignor, and are entitled to great weight, but are not conclusive.[59] Nor is the fact that the consignee had contracted with the carrier for special rates of freight conclusive that the goods were delivered by the consignor to such carrier as the agent of the consignee.[60]

Bill of Lading Never Delivered to Consignee.—If a bill of lading in favor of the consignee, although such consignee be the agent or factor of the consignor, may be transferred by the consignor by delivery for a valuable consideration, in the absence of statutory inhibition, such bill in favor of a consignee who is a purchaser, when retained by the consignor, may be transferred in the same way. If extraneous evidence is admissible to show the real intent of the consignor as to the retention of the title of the goods covered by the bill in the one case, it must be in the other.[61]

Bill Sent to Agent for Delivery to Consignee or Payment of Purchase Price.—The consignor frequently sends to a consignee a bill not indorsed, and then sends to his own agent in or within reach of the same port an indorsed bill—it may be indorsed in blank, or to the agent, or to the party ordering the goods—and the consignor sends to his agent with the bill orders to deliver the bill to the party ordering the goods, or to receive the goods and deliver them to him, provided payment be made or secured, or such other terms as the consignor prescribes are complied with. This course secures to the consignor, be-

signee, the bill of lading can not be regarded as a contract in writing, but merely as an admission or declaration on the part of the consignor as to his purpose, at the time, in making the shipment, and such admission is subject to be rebutted by other circumstances connected with the transaction. By the rules of commercial law, bills of lading are regarded as symbols of the property therein described, and the delivery of such bill by one having an interest in or a right to control the property is equivalent to a delivery of the property itself. A consignor who has reserved the jus disponendi may effectuate a sale or pledge of the property consigned, by delivery of the bill of sale to the purchaser or pledgee, as completely as if the property were, in fact, delivered." Emery's Sons *v.* Irving Nat. Bank, 25 O. St. 360, 18 Am. Rep. 299, followed in 26 O. St. 641, reversing in part 1 C. S. C. R. 76, 13 O. Dec. Reprint 425; Hobart & Co. *v.* Littlefield Bros., 13 R. I. 341.

57. Emery's Sons *v.* Irving Nat. Bank, 25 O. St. 360, 18 Am. Rep. 299; followed in 26 O. St. 641 (reversing in part 1 C. S. C. R. 76, 13 O. Dec. Reprint 425).

58. **Question of reservation of jus disponendi one of intention.**—Emery's Sons *v.* Irving Bank, 25 O. St. 360, 18 Am. Rep. 299, followed in 26 O. St. 641 (reversing in part 1 C. S. C. R. 76, 13 O. Dec. Reprint 425).

59. Emery's Sons *v.* Irving Nat. Bank, 25 O. St. 360, 18 Am. Rep. 299, followed in 26 O. St. 641 (reversing in part 1 C. S. C. R. 76, 13 O. Dec. Reprint 425).

60. Emery's Sons *v.* Irving Nat. Bank, 25 O. St. 360, 18 Am. Rep. 299, followed in 26 O. St. 641 (reversing in part 1 C. S. C. R. 76, 13 O. Dec. Reprint 425).

61. **Bill of lading never transferred to consignee.**—Scharff *v.* Meyer, 54 Am. St. Rep. 672, 682, 133 Mo. 428, 34 S. W. 858. See ante, "Bill Not Delivered to Consignee," § 505.

If the owner of merchandise deliver it to a common carrier to be carried and delivered to a named consignee, and take from the carrier a bill of lading, consigning such merchandise absolutely to such consignee, omitting all words of negotiability, as "or bearer," etc., but does not deliver or send any bill of lading to the consignee, but retains the same himself, the carrier is his agent alone, and he may pledge or transfer the goods, by pledging or transferring the bill of lading, at any time before such goods come into the possession of the consignee, no matter what contract in relation to the goods may exist, or what the general state of accounts may be between the consignor and the consignee. Pomeroy, etc., Co. *v.* Will, 2 Am. L. Rec. 1, 5 O. Dec. Reprint 34.

yond all question, the right and power of retaining the goods until the price for them be paid or secured to him.[62]

§ 540. Consideration.—A bill of lading is a negotiable instrument, under Louisiana Acts 1868, p. 193, No. 150, and may be transferred for an antecedent or pre-existing debt, or for any consideration sufficient to support a simple contract, under Acts 1904, p. 152, No. 64, § 24.[63]

§§ 541-576. Effect of Transfer—§ 541. In General.—The transfer of a bill of lading does not create any contract relation between the transferee and the buyer, nor affect the rights of the buyer and the seller as between themselves.[64] The assignment of a bill of lading operates as a transfer of the title of the goods therein described. A transfer of the ownership of the property covered by a bill of lading as well as of the right of possession is made as effectually by the transfer of the bill as it could be by a physical delivery of the property.[65]

Effect of Indorsement and Delivery.—The indorsement of a bill of lading to a shipper's order vests the title to the goods in the transferee as purchaser or pledgee, as the case may be.[66] A transfer of a bill of lading by indorsement, accompanied by a delivery of it, passes to the transferee the title of the transferrer to the property described therein and nothing more.[67] A

62. Bill sent to agent for delivery to consignee on payment of purchase price. —Weyand *v.* Atchinson, etc., R. Co., 9 Am. St. Rep. 504, 509, 75 Iowa 573, 39 N. W. 899, 1 L. R. A. 650.

63. Consideration. — Scheuermann *v.* Monarch Fruit Co., 123 La. 55, 48 So. 647. See post, "Pledge, Mortgage or Collateral Security," § 577.

64. Hawkins *v.* Alfalfa Products Co., 152 Ky. 152, 153 S. W. 201, 44 L. R. A., N. S., 600.

65. *United States.*—Means *v.* Bank, 146 U. S. 620, 627, 36 L. Ed. 1107, 13 S. Ct. 186; Conard *v.* Atlantic Ins. Co. (U. S.), 1 Pet. 386, 7 L. Ed. 189; Dows *v.* National Exch. Bank, 91 U. S. 618, 23 L. Ed. 214; Allen *v.* St. Louis Nat. Bank, 120 U. S. 20, 36, 30 L. Ed. 573, 7 S. Ct. 460.

Alabama.—"The transferee simply acquires the title of the transferrer to the goods described in them. Commercial Bank *v.* Hurt, 99 Ala. 130, 42 Am. St. Rep. 38, 12 So. 568, 19 L. R. A. 701; Jasper Trust Co. *v.* Kansas City, etc., R. Co., 99 Ala. 416, 42 Am. St. Rep. 75, 14 So. 546, 4 Am. & Eng. Enc. Law 549, 6 Cyc. Law & Proc. 426; Haas *v.* Citizens' Bank, 113 Am. St. Rep. 61, 144 Ala. 562, 39 So. 129, 1 L. R. A., N. S., 242.

Iowa.—Garden Grove Bank *v.* Humeston, etc., R. Co., 67 Iowa 526, 25 N. W. 761, 23 Am. & Eng. R. Cas. 695; Ayres, etc., Co. *v.* Dorsey Produce Co., 63 Am. St. Rep. 376, 101 Iowa 141, 70 N. W. 111.

Maine.—Winslow *v.* Norton, 29 Me. 419, 50 Am. Dec. 601.

Massachusetts.—Rowley *v.* Bigelow (Mass.), 12 Pick. 307, 23 Am. Dec. 606; Chandler *v.* Sprague (Mass.), 38 Am. Dec. 404, 5 Metc. 306.

Missouri.—"Bills of lading, by the law merchant, are representatives of the property for which they have been given, and the indorsement and delivery of a bill of lading transfers the property from the vendor to the vendee; is a complete legal delivery of the goods; divests the vendor's lien." Skilling *v.* Bollman, 39 Am. Rep. 537, 538, 73 Mo. 665. See, "As Defeating Stoppage in Transitu," § 567

By the Missouri act of 1869, any person to whom a warehouse receipt or bill of lading may be transferred shall be deemed and held to be the owner of the goods so far as to give validity to any pledge, lien or transfer given, made or created thereby, as on the faith thereof. Allen *v.* St. Louis Nat. Bank, 120 U. S. 20, 36, 30 L. Ed. 573, 7 S. Ct. 460.

Nebraska.—Gates *v.* Chicago, etc., R. Co., 42 Neb. 379, 60 N. W. 583, 61 Am. & Eng. R. Cas. 218; Union Pac. R. Co. *v.* Johnston, 50 Am. St. Rep. 540, 546, 45 Neb. 57, 63 N. W. 144.

New York.—Farmers', etc., Nat. Bank *v.* Logan, 74 N. Y. 568; Bank *v.* Jones, 4 N. Y. 497, 55 Am. Dec. 290.

Pennsylvania.—Pennsylvania R. Co. *v.* Stern, 119 Pa. 24, 12 Atl. 756, 35 Am. & Eng. R. Cas. 551, 4 Am. St. Rep. 626; Decan *v.* Shipper, 35 Pa. 239, 78 Am. Dec. 334.

Texas.—Chandler *v.* Fulton, 10 Tex. 2, 10, 60 Am. Dec. 188; Missouri Pac. R. Co. *v.* Heidenheimer, 82 Tex. 195, 17 S. W. 608, 27 Am. St. Rep. 861.

66. Scheuermann *v.* Monarch Fruit Co., 123 La. 55, 48 So. 647.

67. *United States.*—McNeil *v.* Hill, 1 Fed. Cas. No. 8914, Woolw. 96.

Georgia.—Askew & Co. *v.* Southern R. Co., 1 Ga. App. 79, 81, 58 S. E. 242.

Ohio.—Little Miami, etc., R. Co. *v.*

title thus acquired is as effectual in law as it would be if based upon an express and completed contract of sale,[68] for the indorsement and delivery of a bill of lading are merely evidence of a sale.[69]

§ 542. As Transfer of Contract between Consignor and Consignee.—The transfer of a bill of lading is not a transfer of the contract between the original parties to it, but merely a transfer of the goods represented by it;[70] therefore, the assignee of such an instrument can not maintain an action founded upon it as a contract in his own name.[71]

Shipment in Pursuance of Contract of Sale.—Where, in a written contract between two parties, one buys from the other at a stipulated price goods to be shipped, and the carrier issues to the seller a bill of lading therefor consigning the shipment to his order, which the latter transfers to a third person, such transfer alone does not entitle such third person to sue the buyer on the contract for the purchase price.[72]

Under a statute authorizing the real party in interest to sue in his own name on any contract which has been transferred to him, the common-law rule that the assignment of a bill of lading does not transfer rights upon the contract, and that an action founded on the express contract contained in the instrument must be brought by the original party to the contract, does not apply.[73]

§ 543. Operation as Constructive Delivery of Goods.—Bills of lading when transferred operate as a delivery of the property itself investing the transferee with a constructive possession which serves all the purposes of actual possession and so continues until there is a valid and complete delivery of the property, under and in pursuance of the bill of lading, and to the persons entitled to receive the same.[74]

Dodds & Co., 1 C. S. C. 47, 13 O. Dec. Reprint 407.

Texas.—Landa *v.* Lattin, 19 Tex. Civ. App. 246, 250, 46 S. W. 48; Missouri Pac. R. Co. *v.* Heidenheimer, 82 Tex. 195, 199, 17 S. W. 608, 27 Am. St. Rep. 861; Mercantile Banking Co. *v.* Landa (Tex. Civ. App.), 33 S. W. 681.

68. Mercantile Banking Co. *v.* Landa (Tex. Civ. App.), 33 S. W. 681.

69. **Indorsement and delivery merely evidence of sale.**—Page & Co. *v.* Sandusky, etc., R. Co., 4 West. L. M. 644, 2 O. Dec. Reprint 716.

70. **As transfer between consignor and consignee.**—Orr *v.* Planters' Phosphate, etc., Co., 8 Ga. App. 59, 68 S. E. 779.

71. Baltimore, etc., R. Co. *v.* Wilkens, 44 Md. 11, 22 Am. Rep. 26; Blanchard *v.* Page (Mass.), 8 Gray 281; Adams *v.* Brig Pilgrim, 10 West L. J. 141, 1 O. Dec. 477; Second Nat. Bank *v.* Walbridge, 19 O. St. 419, 2 Am. Rep. 408.

72. **Shipment in pursuance of sale.**—Allen, etc., Co. *v.* Farmers', etc., Nat. Bank, 129 Ga. 748, 59 S. E. 813.

73. **Statute authorizing assignee to sue.**—Merchants' Bank *v.* Union R., etc., Co., 69 N. Y. 373.

74. **Operation as constructive delivery of goods.**—*United States.*—The Thames (U. S.), 14 Wall. 98, 20 L. Ed. 804.

Arkansas.—Arkansas, etc., R. Co. *v.* German Nat. Bank, 113 Am. St. Rep. 160, 77 Ark. 482, 92 S. W. 522.

Colorado.—Florence, etc., R. Co. *v.* Jensen, 48 Colo. 28, 108 Pac. 974.

Georgia.—Branan *v.* Atlanta, etc., R. Co., 108 Ga. 70, 33 S. E. 836.

The assignment of a bill of lading constitutes a symbolical delivery of the goods themselves. Branan *v.* Atlanta, etc., R. Co., 108 Ga. 70, 33 S. E. 836.

Massachusetts.—Forbes *v.* Boston, etc., R. Co., 133 Mass. 154.

Massachusetts sales act.—A negotiable bill of lading represents the property, and the receipt of it by one is equivalent to an actual delivery of the property, and this rule is recognized by the sales act (St. 1908, c. 237), making a negotiable bill of lading a document of title, which on indorsement passes the property as a direct delivery thereof. Brown *v.* Floersheim Mercantile Co., 92 N. E. 494, 206 Mass. 373.

Michigan.—Walker *v.* Detroit, etc., R. Co., 49 Mich. 446, 13 N. W. 812.

Missouri.—A bill of lading is assignable, such an assignment constituting in the law a complete legal delivery of the goods thereby evidenced to be in the hands of the carrier, as effectually as an actual sale and delivery thereof. Gratiot St. Warehouse Co. *v.* Missouri, etc., R. Co., 102 S. W. 11, 124 Mo. App. 545.

Nebraska.—Union Pac. R. Co. *v.* Johnston, 45 Neb. 57, 63 N. W. 144, 50 Am. St. Rep. 540; Gates *v.* Chicago, etc., R.

§§ 544-576. Rights and Title of Holder Generally—§ 544. In General—General Doctrine.—In the absence of any statute changing the common law a transfer of a bill of lading, where such is the intention of the parties, passes to the transferee all the title to the goods described in it that the transferror had at the time of assignment no other or better title.[75] A bill of lading not being commercial paper, the transferee merely acquires the title of the transferror to the goods described,[76] unless the true owner is estopped from asserting his titles as against the transferee.[77] A bill of lading as a mere docu-

Co., 42 Neb. 379, 60 N. W. 583, 61 Am. & Eng. R. Cas. 218.

Ohio.—Emery's Sons *v.* Irving Nat. Bank, 18 Am. Rep. 299, 303, 25 O. St. 360.

Pennsylvania.—Pennsylvania R. Co. *v.* Stern, 119 Pa. 24, 12 Atl. 756, 4 Am. St. Rep. 626, 35 Am. & Eng. R. Cas. 551.

Tennessee.—Third Nat. Bank *v.* Hays, 119 Tenn. 729, 108 S. W. 1060, 14 Am. & Eng. Ann. Cas. 1049.

Texas.—The assignment of a bill of lading, indorsed thereon, accompanied by delivery of the instrument, passes to the assignee title to the goods, though actually in transit, as complete as if they had passed through the buyer's hands and been delivered bodily to the assignee. Missouri Pac. R. Co. *v.* Heidenheimer, 82 Tex. 195, 17 S. W. 608, 27 Am. St. Rep. 861; Adoue *v.* Seeligson & Co., 54 Tex. 593.

In commercial transactions bills of lading, to a very large extent, are regarded as the representatives of the goods covered by them, and where they are indorsed and delivered with the intention of passing the title to them, it is a symbolic or constructive delivery of the goods themselves. Campbell *v.* Alford, 57 Tex. 159, 161.

The assignment of a bill of lading by the consignee, by way of sale or mortgage will pass the property, though no actual delivery of the goods be made (provided they were then at sea). Chandler *v.* Fulton, 10 Tex. 2, 60 Am. Dec. 188.

75. Effect of transfer of bill of lading.—*United States.*—The Carlos F. Roses, 177 U. S. 65, 44 L. Ed. 929, 20 S. Ct. 803; Pollard *v.* Vinton, 105 U. S. 7, 26 L. Ed. 998; Shaw *v.* Railroad Co., 101 U. S. 557, 25 L. Ed. 892; Friedlander *v.* Texas, etc., R. Co., 130 U. S. 416, 32 L. Ed. 991, 9 S. Ct. 570; Missouri Pac. R. Co. *v.* McFadden, 154 U. S. 155, 38 L. Ed. 944, 14 S. Ct. 990; North Pennsylvania R. Co. *v.* Commercial Nat. Bank, 123 U. S. 727, 31 L. Ed. 287, 8 S. Ct. 266.

Alabama.—Jasper Trust Co. *v.* Kansas City, etc., R. Co., 99 Ala. 416, 14 So. 546, 42 Am. St. Rep. 75, 4 Am. & Eng. Enc. Law 549, 6 Cyc. Law & Proc. p. 426.

Georgia.—Raleigh, etc., R. Co. *v.* Lowe, 101 Ga. 320, 28 S. E. 867; Haas *v.* Kansas City, etc., R. Co., 81 Ga. 792, 7 S. E. 629.

Except where the rules of the common law and mercantile usage have been modified by statute, the transfer of a bill of lading by indorsement and delivery passes to the indorsee only such rights to, or property in, the goods covered by the bill as the transferrer himself has and as it is the intention of the parties shall be conveyed. Raleigh, etc., R. Co. *v.* Lowe, 101 Ga. 320, 28 S. E. 867.

Maryland.—National Bank *v.* Baltimore, etc., R. Co., 105 Am. St. Rep. 321, 59 Atl. 134, 99 Md. 661.

New York.—Saltus *v.* Everett (N. Y.), 20 Wend. 267, 32 Am. Dec. 541.

Missouri.—Webster *v.* Bear, 141 Mo. App. 531, 125 S. W. 815.

In the absence of any statute, the transferee of a negotiable bill of lading acquires no better title to the goods represented thereby than his transferror had, unless the true owner is estopped from asserting his right as against the transferee, for the negotiability of a bill of lading means assignability so far as the written contract of carriage is concerned, and, so far as the goods described in the bill are concerned, a conveyance of such title thereto as the transferror had. Gass *v.* Astoria Veneer Mills, 118 N. Y. S. 982, 134 App. Div. 184.

Ohio.—Emery's Sons *v.* Irving Nat. Bank, 25 O. St. 360, 18 Am. Rep. 299, followed in 26 O. St. 641 (reversing in part 1 C. S. C. R. 76, 13 O. Dec. Reprint 425).

Pennsylvania.—A bill of lading takes the place of the property described therein, and an assignment of it gives to the person to whom it is transferred such title as the assignor had, and this only when it is the intention of the parties that such change of title shall take effect. Marine Nat. Bank of Buffalo *v.* Baringer, 46 Pa. Super. Ct. 510.

South Carolina.—Assignment of a bill of lading by the owner thereof carries the title to the goods covered by it. First Nat. Bank *v.* McSwain, 93 S. C. 30, 75 S. E. 1106.

Texas.—Landa *v.* Lattin, 19 Tex. Civ. App. 246, 46 S. W. 48; Nashville, etc., R. Co. *v.* Grayson County Nat. Bank (Tex. Civ. App.), 91 S. W. 1106, judgment reversed in 93 S. W. 431, 100 Tex. 17.

England.—Lickbarrow *v.* Mason, 6 East. 21.

76. First Nat. Bank *v.* Wilkesbarre Lace Mfg. Co., 162 Ala. 309, 50 So. 153.

77. Gass *v.* Astoria Veneer Mills, 134 App. Div. 184, 118 N. Y. S. 982.

ment is valueless, of consequence only in so far as it is evidence of title to something in somebody. Its transfer is the transfer of the title to the thing described in it, and whatever equities exist between the parties to it with respect to the title of the property which it purports to represent, will follow that property into the hands of the assignee of the bill of lading, unless some other legal or equitable principle intervenes to preclude the assertion of a prior right as against a bona fide assignee for value; but the assignee of a non-negotiable bill of lading is not subject to the equities of third persons whose claims do not appear upon and are in no way connected with the bill.[78]

Title Same as That Acquired by Transfer of Goods Themselves.—The delivery or negotiation of the bill produces no greater effect than would the delivery of the goods it represents, and the right conferred by the indorsement will be limited to that which might have been exercised by the indorsee had the goods themselves been transferred instead of the bill.[79] The transfer of a bill of lading, then, by the person in possession of the instrument, can give no higher title than would the transfer of the property itself by the same person,[80] and the presumption as to ownership arising from the bill may be explained or rebutted by evidence showing where the real ownership lies.

Goods Billed to Shipper's Order.—Seller's negotiation of bill of lading for shipment consigned to its owner's order vests the legal title to the shipment in a transferee.[81] But the indorsee or assignee must trace his title back to its true owner. He has no greater right than the true owner.[82]

Statement Showing Title of Consignor Attached to Bill.—Where a shipper attached to the bill of lading a statement showing his real interest in the goods, he is not estopped by negligence from asserting his title against the transferee of the party in possession thereof.[83]

Certified Order for Delivery.—Where the consignee of grain surrendered the bills of lading to the local freight agent, and took certified orders therefor, and obtained advances from a bank on the security of drafts accompanied by the certified orders, the title to the grain was transferred to the bank,[84] and such certified order was notice to the carrier of the bank's rights.[85]

78. National Bank *v.* Baltimore, etc., R. Co., 105 Am. St. Rep. 321, 59 Atl. 134, 99 Md. 661.

79. **Title same as acquired by transfer of goods.** — *Massachusetts.* — Rowley *v.* Bigelow (Mass.), 12 Pick. 307, 23 Am. Dec. 606; Mechanics' Bank *v.* New York, etc., R. Co., 13 N. Y. 599, 11 N. Y. Super. Ct. 570; Brower *v.* Peabody, 13 N. Y. 121; Dows *v.* Perrin, 16 N. Y. 325.

The assignee of a bill of lading can not acquire a better title to the property thus symbolically delivered, than his assignor had at the time of assignment. Emery's Sons *v.* Irving Nat. Bank, 25 O. St. 360, 18 Am. Rep. 299.

The right conferred by the indorsement of a bill of lading is limited to that which might have been exercised by the indorsee, had the goods themselves been transferred. Franklin Trust Co. *v.* Philadelphia, etc., R. Co., 222 Pa. 96, 70 Atl. 949, 22 L. R. A., N. S., 828.

80. Seward & Co. *v.* Miller, 106 Va. 309, 55 S. E. 681.

81. Reed *v.* Racine Boat Co. (Iowa), 137 N. W. 458.

82. Douglas *v.* People's Bank, 9 Am. St. Rep. 276, 86 Ky. 176, 5 S. W. 420, 10 Ky. L. Rep. 243, 32 Am. & Eng. R. Cas. 510.

83. **Statement showing consignor's interest attached to bill.**—Plaintiff sold to F. 347 cases of eggs, and, at direction of F., shipped them consigned to defendant. In the same car plaintiff shipped 52 other cases of eggs; and attached to the bill of lading, accompanying the draft for the 347 cases drawn on F., a statement showing this fact, and that the 52 cases were consigned to defendant for sale on plaintiff's account. Held, that this was such precaution to notify the consignee of the facts that plaintiff was not estopped to assert title to the 52 cases against F.'s transferee of the bill of lading. Webster *v.* Bear, 141 Mo. App. 531, 125 S. W. 815.

84. **Certified orders for delivery.**—National Newark Banking Co. *v.* Delaware, etc., R. Co., 70 N. J. L. 774, 58 Atl. 311, 66 L. R. A., N. S., 595, 103 Am. St. Rep. 825.

85. National Newark Banking Co. *v.* Delaware, etc., R. Co., 70 N. J. L. 774, 58 Atl. 311, 66 L. R. A., N. S., 595, 103 Am. St. Rep. 825.

§§ 545-546. No Goods Delivered to Carrier—§ 545. In General.—If the goods were not delivered to the agent of the carrier when he delivered the bill of lading, the carrier is not liable.[86]

§ 546. Title to Goods Not Shipped or Included in Bill.—The transferee of the bill of lading gets only the title to the thing shipped or included in the bill of lading, does not get a title to what should have been shipped, or to something which the vendor agreed to ship, and which is not embraced in the bill of lading.[87]

§ 547. Goods Shipped without Authority of Owner.—If a person without authority from the owner of goods ships them and takes a bill of lading in his own name, he can not, by assigning that bill of lading to another, divest the owner's title to the property; even in favor of a bona fide purchaser for value, without notice.[88]

§ 548. Assignment Made after Arrival of Goods.—The assignment of a bill of lading to bona fide holder for a valuable consideration will vest the legal interest of the consignee in the assignee, although the assignment be made after the arrival of the goods.[89]

§§ 549-552. Bona Fide Holders—§ 549. General Rule.—The doctrine of bona fide purchasers only applies to the transfer of a bill of lading in a limited sense.[90] By indorsement of the bill of lading to a bona fide purchaser, for a valuable consideration, without notice of any adverse interests, the latter becomes, as against all the world, the owner of the goods; so far as equities between the original parties thereto are concerned;[91] but inquiry into the transaction in which the bill originated is not precluded because it came into the hands of persons who may have innocently paid value for it.[92]

§ 550. Effect of Statutes Making Bills of Lading Negotiable.—As a general rule, where bills of lading are made negotiable by statute, the holder

86. No goods delivered to carrier.—Ratzer *v.* Burlington, etc., R. Co., 64 Minn. 245, 66 N. W. 988, 58 Am. St. Rep. 530; National Bank *v.* Chicago, etc., R. Co., 44 Minn. 224, 46 N. W. 342, 20 Am. St. Rep. 566, 9 L. R. A., N. S., 263. See ante, "As against Bona Fide Consignee or Transferee," §§ 431-437.

87. Title to goods not shipped or included in bill.—Cosmos Cotton Co. *v.* First Nat. Bank, 171 Ala. 392, 54 So. 621, 32 L. R. A., N. S., 1173, Ann. Cas. 1913 B, 42.

88. Saltus *v.* Everett (N. Y.), 20 Wend. 267, 32 Am. St. Rep. 541.

89. Assignment made after arrival of goods.—Chandler *v.* Belden, 18 John. 157, 9 Am. Dec. 193.

90. General rule.—Pollard *v.* Vinton, 105 U. S. 7, 26 L. Ed. 998.

91. *United States.*—Conard *v.* Atlantic Ins. Co. (U. S.), 1 Pet. 386, 7 L. Ed. 189; Means *v.* Bank, 146 U. S. 620, 36 L. Ed. 1107, 13 S. Ct. 186; Dows *v.* National Exch. Bank, 91 U. S. 618, 23 L. Ed. 214.

Maine.—Winslow *v.* Norton, 29 Me. 419, 50 Am. Dec. 601.

New Jersey.—"A general indorsement and delivery of a bill of lading vests in the indorsee the title to the bill and the property thereby represented, so as to enable him to transfer to a bona fide purchaser, for value, a good title, whatever secret arrangement may have existed between the original parties." Farmers', etc., Nat. Bank *v.* Hazeltine, 78 N. Y. 104, 34 Am. Rep. 518, 521.

Ohio.—Page & Co. *v.* Sandusky, etc., R. Co., 4 West. L. M. 644, 2 O. Dec. Reprint 716.

Pennsylvania.—"A bill of lading, 'regularly, fairly, and for value indorsed to another, will pass the title' to the goods to the indorsee: Schumacher *v.* Eby, 24 Pa. 521." Decan *v.* Shipper, 78 Am. Dec. 334, 35 Pa. 239.

92. The Carlos F. Roses, 177 U. S. 655, 44 L. Ed. 929, 20 S. Ct. 803; Pollard *v.* Vinton, 105 U. S. 7, 26 L. Ed. 998; Shaw *v.* Railroad Co., 101 U. S. 557, 25 L. Ed. 892; Friedlander *v.* Texas, etc., R. Co., 130 U. S. 416, 32 L. Ed. 991, 9 S. Ct. 570; Missouri Pac. R. Co. *v.* McFadden, 154 U. S. 155, 38 L. Ed. 944, 14 S. Ct. 990; North Pennsylvania R. Co. *v.* Commercial Nat. Bank, 123 U. S. 727, 31 L. Ed. 287, 8 S. Ct. 266.

While a bill of lading is in a sense a negotiable instrument, it is not such as to preclude in the hands of a bona fide purchaser all inquiries respecting its issue. Bramley *v.* Ulster, etc., R. Co., 126 N. Y. S. 854, 142 App. Div. 176.

of a bill of lading, in the absence of either title to the goods or authority to transfer them in himself, can not, by a transfer of the instrument pass the right of property in the goods, even to a bona fide purchaser for value; he can convey no greater rights than he himself has.[93] But the voluntary act of the owner of property in giving to another a bill of lading directing the carrier to deliver the goods therein described to the person named in the bill or order is sufficient to estop him from asserting any claim to the goods as against a person, dealing in good faith with the person named therein.[94]

§ 551. Estoppel of Carrier to Deny Conditions and Representations in Bill.—Where an agent has authority to issue bills of lading and issues one with certain conditions contained therein, which is negotiated to an innocent third person, the company, as between itself and such third person, is estopped to deny the conditions contained in the bill.[95]

Right to Rely on Representations in Bill.—A very large proportion of the business of the country is founded upon transfers of bills of lading; and if the transferee were required at his peril to ascertain from the carrier whether the representations made in the bill of lading are true or not, it would practically put an end to this class of transactions.[96]

Recital of Receipt of Goods, Quality, or Quantity.—See ante, "As against Bona Fide Consignee or Transferee," §§ 431-437.

§ 552. Duplicate or Triplicate Bill.—See post, "Duplicate or Triplicate Bill," § 589.

§ 553. Holder with Knowledge of Defects in Transferrer's Title.—The indorsement of a bill of lading, by a fraudulent holder, to a purchaser for value who has notice of the fraud, will not vest title to or encumber the property described in the bill.[97] The purchaser of a bill of lading with reason to believe that his vendor was not the owner of the bill, or that it was held to secure the payment of an outstanding draft, is not a bona fide purchaser, and he is not entitled to hold the merchandise covered by the bill against its true owner.[98]

93. **Effect of statutes making bills of lading negotiable.**—See ante, "Effect of Statutes Making Bills of Lading Negotiable," § 516.

Alabama.—Jasper Trust Co. *v.* Kansas City, etc., R. Co., 99 Ala. 416, 14 So. 546, 42 Am. St. Rep. 75, 4 Am. & Eng. Enc. Law 549, 6 Cyc. Law & Proc. p. 426.

Texas.—Landa *v.* Lattin, 19 Tex. Civ. App. 246, 46 S. W. 48. See Blaidsell *v.* Citizens' Nat. Bank, 96 Tex. 626, 75 S. W. 292, 62 L. R. A. 968, 97 Am. St. Rep. 944.

94. Factors' Act (Laws 1830, p. 203, c. 179), § 3, providing that every agent intrusted with the possession of any bill of lading shall be deemed the true owner thereof so far as to give validity to any contract made by the agent for the sale of the goods, and Pen. Code, §§ 628-634a, providing that the agent of any carrier who delivers to another any merchandise for which a bill of lading has been issued is punishable by imprisonment unless the receipt is surrendered at the time of delivery or unless the receipt bears on its face the words "not negotiable," give to a bill of lading a higher quality of negotiability than simply to make it transferable by indorsement and delivery, and the voluntary act of the owner of property in giving to another a bill of lading which unqualifiedly directs the carrier to deliver the goods to the person named therein or to his order is sufficient to estop such owner from making any claim to the goods as against a person dealing in good faith with the person named therein. Gass *v.* Astoria Veneer Mills, 118 N. Y. S. 982, 134 App. Div. 184.

95. **Estoppel of carrier to deny conditions and representations in bill.**—American Nat. Bank *v.* Georgia R. Co., 96 Ga. 665, 23 S. E. 898, 51 Am. St. Rep. 155.

96. **Right to rely on representations in bill.**—American Nat. Bank *v.* Georgia R. Co., 96 Ga. 665, 23 S. E. 698, 51 Am. St. Rep. 155; Askew & Co. *v.* Southern R. Co., 1 Ga. App. 79, 58 S. E. 242.

97. **Holder with knowledge of defects in transferrer's title.**—Decan *v.* Shipper, 35 Pa. 239, 78 Am. Dec. 334.

98. Shaw *v.* Railroad Co., 101 U. S. 557, 25 L. Ed. 892.

A bank discounted a draft on B, on delivery, as collateral, by B's agent, of

Indorsements on a draft attached to a bill of lading may put the drawee on notice that the bank presenting it is a holder for collection only and not a purchaser.[99]

Bill Showing Transferror to Be Agent.—A purchaser of a bill of lading from one who appears, on the face of the bill, to be an agent is not a bona fide purchaser for value, without notice; that fact is sufficient to put him upon his inquiry as to the state of the title.[1]

Fraud or Collusion between Consignee and Assignee.—Collusion or fraud between the consignee and his assignee will enable the consignor to assert his right to reclaim the goods.[2]

Assignee Having Notice of Consignee's Insolvency.—If the assignee be aware that the consignee is unable to pay, then the assignment will be deemed fraudulent as against the rights of the consignor.[3]

Proof of Notice of Title of Factor's Principal.—That a bank which bought a draft with bill of lading attached, drawn by a factor or a consignor, took with notice of the principal's title must be satisfactorily proved, for a purchaser from a factor is not put on inquiry as to the title of the particular goods.[4]

§ 554. Holder of Lost or Stolen Bill of Lading.—The rule that a bona fide purchaser of a lost or stolen bill or note indorsed in blank or payable to bearer is not bound to look beyond the instrument, has no application to the case of a lost or stolen bill of lading.[5] Merchandise is very often sold or pledged by a transfer of the bills which cover it; but as no sale of goods lost or stolen, though to a bona fide purchaser for value, can divest the ownership of the person who lost them or from whom they were stolen, so the sale of the symbol or mere representative of the goods can have no such effect, although it sometimes happens that the true owner, by negligence, has so put it into the power of another to occupy his position ostensibly, as to estop him from asserting his

a bill of lading of wheat shipped to B. On acceptance of the draft, the bank delivered the bill of lading to B, after indorsing thereon that the wheat was pledged to it for payment of the draft, was placed in B's custody "in trust for that purpose," and not to be diverted to any other use. B sold and delivered the wheat, but did not pay the draft. The purchasers knew of the bill of lading and the indorsement before his purchase. Held, that he was liable in an action for conversion of the wheat. Farmers', etc., Nat. Bank *v.* Hazeltine, 78 N. Y. 104, 34 Am. Rep. 518.

99. **Indorsements on draft to which bill attached.**—Gregory *v.* Sturgis Nat. Bank (Tex. Civ. App.), 71 S. W. 66.

Where a draft attached to a bill of lading was indorsed, "Pay to the order of American National Bank," and by the latter indorsed, "Pay any bank or banker or order American National Bank," and was presented by defendant bank to the drawee, such indorsements were sufficient to put the drawee on inquiry that defendant was a holder for collection only, and was not a purchaser of the draft payable to bearer. Gregory *v.* Sturgis Nat. Bank (Tex. Civ. App.), 71 S. W. 66.

1. **Bill showing transferror to be agent.**—Decan *v.* Shipper, 35 Pa. 239, 78 Am. Dec. 334.

2. **Fraud or collusion between consignee and assignee.**—Chandler *v.* Fulton, 10 Tex. 2, 60 Am. Dec. 188.

3. **Assignee having notice of consignee's insolvency.**—Chandler *v.* Fulton, 10 Tex. 2, 60 Am. Dec. 188.

4. **Proof of notice of title of factor's principal.**—A principal consigned goods to a factor. A company of which the factor was president procured possession of the goods and reconsigned them to a third person. A bank bought the drafts drawn on the third person for the price of the goods, on the faith of the bill of lading. Evidence examined, and held not to show that the bank bought the drafts with bills of lading attached with knowledge that the company did not own the goods and was insolvent and was going to appropriate the proceeds, instead of turning it over to the principal, and the latter could not follow the goods or the proceeds thereof into the hands of the bank. Smith *v.* Jefferson Bank, 97 S. W. 247, 120 Mo. App. 527.

5. **Holder of stolen bill.**—Shaw *v.* Railroad Co., 101 U. S. 557, 25 L. Ed. 892; The Idaho, 93 U. S. 575, 23 L. Ed. 978. See, also, Goodman *v.* Simonds (U. S.), 20 How. 343, 15 L. Ed. 934; Murray *v.* Lardner (U. S.), 2 Wall. 110, 17 L. Ed. 857; Matthews *v.* Poythress, 4 Ga. 287. See, also, Tison *v.* Howard, 57 Ga. 410.

right as against a purchaser, who has been misled to his hurt by reason of such negligence.[6] The function of a bill of lading is entirely different from that of a bill or note. It is not a representative of money, used for transmission of money, or for the payment of debts or for purchases. It does not pass from hand to hand as bank notes or coin. It is a contract for the performance of a certain duty. True, it is a symbol of ownership of the goods covered by it—a representative of these goods. But if the goods themselves be lost or stolen, no sale of them by the finder or thief, though to a bona fide purchaser for value, will divest the ownership of the person who lost them, or from whom they were stolen."[7]

§ 555. Holder of Forged Bill of Lading.—Liability of Purchaser of Draft with Forged Bill Attached to Drawee.—See post, "Liability of Purchaser for Shortage or Inferiority of Shipment," § 585.

Liability of Bank Collecting Draft with Forged Bill of Lading Attached.—See post, "Deposit of Draft with Bill of Lading Attached for Collection," § 588.

Rights against Agent Negotiating Forged Bills of Lading.—Where forged negotiable ocean bills of lading were negotiated by a third party, who acted merely as an intermediary for the owner, the bills being negotiated on the blank indorsement of the owner, the third party is not liable to the purchasers, even though he received the consideration of the bills of lading in payment of a debt due him from the owners, and though he had received assets from the owner to protect him from claims upon these bills of lading.[8]

§§ 556-565. Rights and Liabilities as to Carriers—§ 556-562. As to Delivery of Goods—§ 556. Duty to Deliver to Transferee.—When a bill of lading is transferred, it is the duty of the carrier to deliver to the assignee or transferee the property of which the bill of lading is the representative.[9] The transfer of a bill of lading makes the transferee the consignee of the goods for all lawful purposes.[10]

Notice of Owner's Rights.—A carrier must deliver goods to the true owner, claiming under the consignee, when it has notice of such owner's rights and the bill of lading has been surrendered.[11] Notice of the rights of a per-

6. Friedlander *v.* Texas, etc., R. Co., 130 U. S. 416, 32 L. Ed. 991, 9 S. Ct. 570; Shaw *v.* Railroad Co., 101 U. S. 557, 25 L. Ed. 892.

The taking possession of property by one not its owner, or authorized by him, shipping it, obtaining bills of lading from the carriers, indorsing them away, or even selling the property and obtaining a full price for it, can have no effect upon the rights of the owner, even in the case of a bona fide purchaser. The Idaho, 93 U. S. 575, 23 L. Ed. 978; Raleigh, etc., R. Co. *v.* Lowe, 101 Ga. 320, 28 S. E. 867.

7. Shaw *v.* Railroad Co., 101 U. S. 557, 25 L. Ed. 892; Weyand *v.* Atchinson, etc., R. Co., 75 Iowa 573, 39 N. W. 899, 9 Am. St. Rep. 504, 1 L. R. A. 650.

8. **Rights against agent negotiating forged bills of lading.**—Moritz *v.* Adoue (Tex. Civ. App.), 138 S. W. 1140.

9. **Duty to deliver to transferee.**—Arkansas, etc., R. Co. *v.* German Nat. Bank, 77 Ark. 482, 92 S. W. 522, 113 Am. St. Rep. 160; Allen, etc., Co. *v.* Farmers,' etc., Nat. Bank, 129 Ga. 748, 59 S. E. 813.

10. Brown *v.* Atlantic, etc., R. Co., 91 S. C. 377, 74 S. E. 754.

11. **Notice of owner's rights.**—National Newark Banking Co. *v.* Delaware, etc., R. Co., 70 N. J. L. 774, 58 Atl. 311, 66 L. R. A., N. S., 595, 103 Am. St. Rep. 825.

Certain cars of grain were contracted to be sold by the consignee prior to their arrival to different purchasers, and he surrendered the bills of lading to the local freight agent at the place of delivery, and presented orders directing the delivery of the cars to the several purchasers, "or ourselves or order, on presentation of this order." Upon these orders the local freight agent stamped the words: "Car to be delivered on this order, same as B. of L. B. of L. taken up at" the place of delivery. The consignee retained the orders thus certified, drew on the purchasers for the price of the grain, and obtained advances on plaintiff bank for the drafts, accompanied by the certified order. Held, that the contracts between the purchasers and the consignee were executory contracts,

son claiming title under consignee to have goods delivered to him, when given to the agent of a carrier charged with the duty of delivering the freight, is notice to the carrier.[12]

Nonnegotiable Bill of Lading.—A nonnegotiable bill of lading does not control the possession of the property, and a transferee thereof obtains only the title of the transferror, though by proper notice, where there are no intervening rights, the transferee may require the carrier to hold possession for him according to the bill; and hence a shipper under a nonnegotiable bill of lading for sale on commission retains title until the property is sold, and he may order that the same shall be reshipped, or delivered to a buyer procured by himself.[13]

§ 557. Production and Cancellation of Bill of Lading.—A delivery of goods by a common carrier to the consignee is made at the peril of the carrier, unless, when made, the consignee surrenders the bill of lading either made or indorsed to himself.[14] If the goods, by the terms of the bill of lading, are deliverable to the order of the shipper, the carrier should not deliver except upon production of the bill of lading properly indorsed by the shipper; for this is notice to the carrier that the shipper intends to retain in his power the ultimate disposition of the goods.[15] Whether or not the carrier can compel a surrender of the bill of lading when it delivers the goods, if the holder of the bill of lading insists on retaining it as a muniment of title, or for any other purpose, and has a legal right to do so, he can, at least, be required to produce it for cancellation, so that it will cease to be on its face a live bill of lading.[16]

Effect of Local Custom.—A local custom to deliver goods to the holder of an unindorsed bill of lading, unknown to the consignor when the goods were shipped, is no defense to an action for the value of the goods so delivered.[17]

Redelivery of Goods to Shipper.—After the carrier has received the goods and issued a bill of lading for them to the shipper, and before the transit has commenced, it is not liable for refusing to redeliver them to him without a surrender of the bill.[18]

and not a present bargain and sale. National Newark Banking Co. *v.* Delaware, etc., R. Co., 70 N. J. L. 774, 58 Atl. 311, 66 L. R. A., N. S., 595, 103 Am. St. Rep. 825.

12. National Newark Banking Co. *v.* Delaware, etc., R. Co., 70 N. J. L. 774, 58 Atl. 311, 66 L. R. A., N. S., 595, 103 Am. St. Rep. 825; Decan *v.* Shipper, 35 Pa. 239, 78 Am. Dec. 334; Landa *v.* Lattin, 19 Tex. Civ. App. 246, 249, 46 S. W. 48. See, also, Blaidsell Co. *v.* Citizens' Nat. Bank, 96 Tex. 626, 75 S. W. 292, 62 L. R. A. 968, 97 Am. St. Rep. 944; Seward & Co. *v.* Miller, 106 Va. 309, 55 S. E. 681.

13. **Nonnegotiable bill.**—The above rule is recognized by the Massachusetts rules Act St. 1908, C. 237. Brown *v.* Floershein Mercantile Co., 206 Mass. 373, 92 N. E. 494.

14. **Production and cancellation of bill of lading.**—Union Pac. R. Co. *v.* Johnston, 45 Neb. 57, 63 N. W. 144, 50 Am. St. Rep. 540; Midland Nat. Bank *v.* Missouri Pac. R. Co., 132 Mo. 492, 33 S. W. 521, 53 Am. St. Rep. 505. See post, "Liability for Misdelivery," § 560.

15. North Pennsylvania R. Co. *v.* Commercial Nat. Bank, 123 U. S. 727, 31 L. Ed. 287, 8 S. Ct. 266; The Thames (U. S.), 14 Wall. 98, 20 L. Ed. 804; Arkansas, etc., R. Co. *v.* German Nat. Bank, 113 Am. St. Rep. 160, 164, 77 Ark. 482, 92 S. W. 522; Weyand *v.* Atchinson, etc., R. Co., 75 Iowa 573, 39 N. W. 899, 9 Am. St. Rep. 504, 1 L. R. A. 650.

Bill of lading shipper's order care of third person.—If a railway company agrees to carry goods, and issues bills of lading therefor to the shipper's order in care of a third person, at the place of destination, its duty as carrier is not discharged merely by delivering the goods to such third person without the production of such bills of lading properly indorsed, and if after delivery to such third person he delivers the goods to one not entitled to receive them, the railroad company is liable to the indorsee of the bills of lading for the value of the goods. (p. 169.) Arkansas, etc., R. Co. *v.* German Nat. Bank, 113 Am. St. Rep. 160, 77 Ark. 482, 92 S. W. 522.

16. Ratzer *v.* Burlington, etc., R. Co., 58 Am. St. Rep. 530, 533, 64 Minn. 245, 66 N. W. 988.

17. **Effect of local custom.**—Weyand *v.* Atchinson, etc., R. Co., 75 Iowa 573, 39 N. W. 899, 9 Am. St. Rep. 504, 1 L. R. A. 650.

18. **Redelivery of goods to shipper.**—Trindall *v.* Taylor, 4 Ell. & B. 219; Ratzer *v.* Burlington, etc., R. Co., 64 Minn. 245, 66 N. W. 988, 58 Am. St. Rep. 530.

§ 558. Payment of Freight and Charges as Condition Precedent.—A carrier may refuse to deliver a consignment of freight to the transferee of a bill of lading until its charges and the back charges of the initial carrier are paid.[19] The burden is upon the transferee of a bill of lading to prove that the freight charges had been prepaid.

Connecting Carrier—Bill Stamped Prepaid.—Where a person claimed a shipment as purchaser of the bill of lading issued by the initial carrier, he was not entitled to recover it in replevin from the connecting carrier in the absence of any showing except the bill of lading which did not recite the class of freight shipped, the amount of charges prepaid, or the amount of charges prepaid on account, but merely in a space headed "If charges are to be prepaid, write or stamp here 'To be prepaid,'" contained the word "Prepaid;" such instrument not being prima facie proof that the freight had been fully paid.[20]

Effect of Refusal to Pay on Right of Stoppage in Transitu Under Nonnegotiable Bill.—See post, "As Defeating Stoppage in Transitu," § 567.

§ 559. Demand of Delivery.—Where a so-called demand for a shipment of freight was made by the transferee of an "order notify" bill of lading of a railroad company (which thereby agreed to transport certain cotton from and to named points within the state), before it was indorsed by the one having the legal title thereto, such demand can not be the basis for the ascertainment of the damages for a breach of the contract of carriage.[21]

§ 560. Liability for Misdelivery or Delay.—In General.—It is hardly necessary to cite authorities to the general proposition that, when a bill of lading is outstanding, the carrier delivers the goods at its peril, without a production of the bill of lading; and, if it so delivers them to some other than the bona fide holder for value of the bill of lading, it is liable to him for conversion of the goods.[22] The following authorities show the universality of the rule as applied to transportation both on land and by water:[23] The carrier in such case has been held liable to the indorsee or pledgee of the bill for delivering the goods in transit at an intermediate point before the negotiation of the bill,[24] to the shipper,[25] or consignee;[26] for delaying the transportation

19. **Payment of freight as condition precedent.**—Bramley *v.* Ulster, etc., R. Co., 142 App. Div. 176, 126 N. Y. S. 854.

20. **Connecting carrier, bill marked prepaid.**—Bramley *v.* Ulster, etc., R. Co., 126 N. Y. S. 854, 142 App. Div. 176.

21. **Demand of delivery.**—Albany, etc., R. Co. *v.* Merchants', etc., Bank, 73 S. E. 637, 137 Ga. 391.

22. **Liability for misdelivery.**—Ratzer *v.* Burlington, etc., R. Co., 64 Minn. 245, 66 N. W. 988, 58 Am. St. Rep. 530. See ante, "Production and Cancellation of Bill of Lading," § 557.

23. See The Thames (U. S.), 14 Wall. 98, 20 L. Ed. 804; North *v.* Merchants', etc., Transp. Co., 146 Mass. 315, 15 N. E. 779; Forbes *v.* Boston, etc., R. Co., 133 Mass. 154; Furman *v.* Union Pac. R. Co., 106 N. Y. 579, 13 N. E. 587; City Bank *v.* Rome, etc., R. Co., 44 N. Y. 136; Pennsylvania R. Co. *v.* Stern, 119 Pa. 24, 12 Atl. 756, 4 Am. St. Rep. 626, 35 Am. & Eng. R. Cas. 551; Boatman's Sav. Bank *v.* Western, etc., R. Co., 81 Ga. 221, 7 S. E. 125; National Bank *v.* Atlanta, etc., R. Co., 25 S. C. 216; Midland Nat. Bank *v.* Missouri Pac. R. Co., 132 Mo. 492, 33 S. W. 521, 53 Am. St. Rep. 505; Armentrout *v.* St. Louis, etc., R. Co., 1 Mo. App. 158; Gates *v.* Chicago, etc., R. Co., 42 Neb. 379, 60 N. W. 583, 61 Am. & Eng. R. Cas. 218; Garden Grove Bank *v.* Humeston, etc., R. Co., 67 Iowa 526, 25 N. W. 761, 23 Am. & Eng. R. Cas. 695; Tindall *v.* Taylor, 4 El. & B. 219. See, also, as bearing on the question: Halsey *v.* Warden, 25 Kan. 128; Meyerstein *v.* Barber, L. R. 2 Com. P. 38; Lee *v.* Bowen, 5 Biss. 154, Fed. Cas. No. 8,183; Heiskell *v.* Farmers', etc., Nat. Bank, 89 Pa. 155, 33 Am. Rep. 745; Bass *v.* Glover, 63 Ga. 745; First Nat. Bank *v.* Dearborn, 115 Mass. 219, 15 Am. Rep. 92; Dows *v.* National Exch. Bank, 91 U. S. 618, 23 L. Ed. 214; Conard *v.* Atlantic Ins. Co. (U. S.), 1 Pet. 386, 7 L. Ed. 189; Weyand *v.* Atchinson, etc., R. Co., 75 Iowa 573, 39 N. W. 899, 9 Am. St. Rep. 504, 1 L. R. A. 650.

24. Union Pac. R. Co. *v.* Johnston, 45 Neb. 57, 63 N. W. 144, 50 Am. St. Rep. 540.

25. **Delivery to shipper.**—Wells, Fargo

26. **Delivery to consignee.**—Ratzer *v.* Burlington, etc., R. Co., 64 Minn. 245, 58 Am. St. Rep. 530, 66 N. W. 988.

at the request of the shipper for a few days after it had issued the bill, thereby causing damage to the goods;[27] and for delivery to a third person where such delivery was induced by fraud,[28] and the carrier not notified of the transfer of the bill till sometime afterwards when the consignor had become insolvent.[29]

§ 561. Waiver or Right to Indorsement of Bill.—Even if delivery to plaintiff, without indorsement, of a bill of lading by the one entitled by its terms to the goods did not give a right of action thereon against the carrier, it would be some evidence of waiver of the requirement, that, without the indorsement, the carrier's agent recognized plaintiff's right to the goods, and that the carrier issued to him a voucher for the value of the lost part of the goods shipped.[30]

§ 562. Duplicate and Triplicate Bills.—See post, "Duplicate and Triplicate Bills," § 589.

§ 563. Effect of Custom of Carrier.—A custom practiced and maintained by a carrier can not prevail against the express language of his bill of lading, to affect the rights of the holder by indorsement thereof, or in anywise

& Co. *v.* Oregon R., etc., Co., 32 Fed. 51, 12 Sawy. 519.

Where a shipper consigns goods to himself and receives a bill of lading from the carrier, who delivers them with a proper way bill to a connecting carrier, who, delivers them to the shipper at an intermediate point in transit without requiring the cancellation of the bill of lading. The connecting carrier is liable to an innocent pledgee of the bill for failure to deliver the goods at their original destination, and is estopped from showing such intermediate delivery to the original shipper. Ratzer *v.* Burlington, etc., R. Co., 58 Am. St. Rep. 530, 64 Minn. 245, 66 N. W. 988.

"It is a case for the application of the doctrine of equitable estoppel, that, where one of two innocent persons must suffer by reason of the fraud of a third party, he by whose negligent act or omission such third party was enabled to commit the fraud ought to bear the loss." Ratzer *v.* Burlington, etc., R. Co., 58 Am. St. Rep. 530, 64 Minn. 245, 66 N. W. 988.

27. **Delaying transportation at request of shipper.**—Armentrout *v.* St. Louis, etc., R. Co., 1 Mo. App. 158.

28. **Delivery to third person.**—Defendant carrier transported certain cotton under bills of lading consigned to the shippers' order, with directions to notify a cotton company. On arrival of the cotton at destination, the carrier delivered it to a compress company, as a warehouseman, and the bills of lading, with drafts attached thereto, were delivered to plaintiff bank, which paid the drafts and charged the amount to the cotton company, holding the bills of lading as collateral. Plaintiff thereafter intrusted the cotton company with the bills of lading whenever it desired to replace them with the compress receipts or other bills of lading for outgoing cotton, and in some instances, where compress receipts were not returned for all the cotton called for in the bill of lading, the bill would be indorsed by the compress company and returned to stand for the bales not called for by the corresponding warehouse receipts. In some manner, through the fraud of the cotton company, defendant carrier was induced to ship out cotton represented by these remnants of the bills of lading, without any credit being given on the bills, and without any satisfaction of the bank's claim thereon. Held, that the bank was entitled to recover from the carrier for such cotton as it held bills of lading not exchanged for warehouse receipts. St. Louis, etc., R. Co. *v.* Citizens' Bank, 87 Ark. 26, 112 S. W. 154, 30 R. R. R. 290, 53 Am. & Eng. R. Cas., N. S., 290, 123 Am. St. Rep. 17.

29. **Carrier not notified of transfer till after insolvency of consignor.**—Where a bill of lading authorized delivery only on surrender of the bill properly indorsed, and the consignor, after transferring the bill to a bank, wrongfully induced the carrier to deliver to persons not named in the bill without a surrender thereof, a right of action immediately accrued against the carrier to the holder of the bill for misdelivery, which could be enforced at any time within the period of limitations, and hence it was no defense that the carrier was not notified of the transfer of the bill of lading within a reasonable time during which the consignor was solvent, and that, because of such want of notice, and the consignor's insolvency, the carrier could not recoup its loss. Sheldon *v.* New York, etc., R. Co., 113 N. Y. S. 676, 61 Misc. Rep. 274.

30. **Waiver of right to indorsement of bill.**—McMeekin *v.* Southern Railway, 82 S. C. 468, 64 S. E. 413.

limit the liability of the carrier thereon, unless such custom has been exercised, and the indorsee has purchased or received the contract with knowledge of that fact.[31]

§ 564. Explanation of Alteration in Bill.—The burden of explaining alterations in bills of lading on the faith of which one has advanced money is on him, and not on the railroad company, where the agent whose name is signed to them testifies that the alterations were made after they left his hands.[32]

§ 565. Liability for Freight and Demurrage.—See ante, "Freight and Demurrage," § 512; "Payment of Freight and Charges as Condition Precedent," § 558.

§§ 566-568. Rights and Liabilities as to Consignor—§ 566. In General.—If an assignee takes an assignment bona fide without notice of any such circumstances as would render the bill of lading not fairly and honestly assignable, he acquires a good title against the consignor,[33] especially where the person transferring the bill obtained it as a result of the fault or neglect of the consignor.[34]

§ 567. As Defeating Stoppage in Transitu.—The general rule is that the vendor of goods on credit may exercise the right of stoppage in transitu on the insolvency of the vendee at any time before there is an actual or constructive delivery of the goods to the vendee.[35] An exception to this rule is when, during the transit, the vendee transfers the bill of lading to a bona fide purchaser for value. By such transfer the right of stoppage in transitu is terminated,[36] although the bill of lading is nonnegotiable,[37] and is also a dupli-

31. **Effect of custom of carrier.**—Midland Nat. Bank *v.* Missouri Pac. R. Co., 132 Mo. 492, 33 S. W. 521, 53 Am. St. Rep. 505.

32. Franklin Trust Co. *v.* Philadelphia, etc., R. Co., 222 Pa. 96, 70 Atl. 949, 22 L. R. A., N. S., 828.

33. **Rights against consignor.**—Chandler *v.* Fulton, 10 Tex. 2, 60 Am. Dec. 188.

34. Where plaintiff transferred to another the bills of lading for goods shipped defendant, defendant having ordered the goods from such other, and having no knowledge of plaintiff's understanding with him by which the bills were turned over to him, he could pay such other for the goods. Greenville Lumber Co. *v.* National Pressed Brick Co., 133 Mo. App. 217, 113 S. W. 236.

35. **As defeating stoppage in transitu.**—Wheeling, etc., R. Co. *v.* Koontz, 15 O. C. C. 288, 9 O. C. D. 102.

36. *Alabama.*—Loeb *v.* Peters, 63 Ala. 243, 35 Am. Rep. 17.

Georgia.—Orr *v.* Planters' Phosphate, etc., Co., 8 Ga. App. 59, 68 S. E. 779.

Maryland.—The indorsement and delivery of a bill of lading by the seller to the buyer transfers the property from the vendor to the vendee; is a complete legal delivery of the goods, devests the vendor's lien. But though the vendor's lien is thus devested by reason of the complete delivery of the indicia of property, he may, if the goods have not yet reached the actual possession of the buyer, and if no third person has acquired rights by obtaining a transfer of the bill of lading from the buyer, intercept the goods in the event of the buyer's insolvency before payment, by the exercise of the right of stoppage in transitu. National Bank *v.* Baltimore, etc., R. Co., 99 Md. 661, 59 Atl. 134, 105 Am. St. Rep. 321.

Missouri.—Skilling *v.* Bollman, 73 Mo. 665, 39 Am. Rep. 537.

Ohio.—Wheeling, etc., R. Co. *v.* Koontz, 15 O. C. C. 288, 9 O. C. D. 102; Page & Co. *v.* Sandusky, etc., R. Co., 4 West. L. M. 644, 2 O. Dec. Reprint 716. And see, also, Emery's Sons *v.* Irving Nat. Bank, 25 O. St. 360, 18 Am. Rep. 299.

Texas.—Missouri Pac. R. Co. *v.* Heidenheimer, 82 Tex. 195, 199, 17 S. W. 608, 27 Am. St. Rep. 861.

The assignment of a bill of lading, bona fide, for a valuable consideration to an assignee without notice of the insolvency of the consignee, defeats the right of stoppage in transitu. Chandler *v.* Fulton, 10 Tex. 2, 60 Am. Dec. 188; Loeb *v.* Peters, 63 Ala. 243, 35 Am. Rep. 17.

In an action against a carrier for goods received, but returned by order of the consignor, it appeared that the bill of lading was sent to T. Bros. & Co., consignees, and by them transferred to plaintiff for value. Held that, though T. Bros. & Co. were insolvent, their transfer to plaintiff defeated the consignor's right of stoppage in transitu. Missouri Pac. R. Co. *v.* Heidenheimer, 82 Tex. 195, 17 S. W. 608, 27 Am. St. Rep. 861.

37. National Bank *v.* Baltimore, etc., R. Co., 105 Am. St. Rep. 321, 99 Md. 661.

cate bill.[38]

Indorsee Charged with Notice of the Facts.—While the right of stoppage in transitu may be defeated by the indorsement and delivery of an unconditional bill of lading to a bona fide indorsee for a valuable consideration without notice, yet, where the indorsee has notice of the facts or of a fact sufficient to put him on inquiry which will disclose the facts, the right may be exercised as against him. The words "not negotiable" stamped on the face of a bill of lading are sufficient to put a purchaser on inquiry as to the facts of the right of stoppage in transitu by the consignor.[39]

Knowledge of Purchaser's Insolvency.—The right of stoppage in transit is not lost where the purchaser has indorsed the bill of lading to a subpurchaser with knowledge of the original purchaser's insolvency, such knowledge bears on the question of good faith.[40]

The fact that the assignee knew that the goods were not paid for, is not sufficient to defeat his rights as against the right of the consignor to reclaim the goods. In order to defeat such right of the assignee, he must have had notice of such circumstances as would render the assignment of the bill of lading defeasible.[41]

Transfer by Way of Mortgage or Pledge.—Where the transfer of a bill of lading is by way of mortgage or pledge, or as collateral security for a loan the right to stop the goods in transit is not absolutely defeated; for if the mortgage is bona fide the seller may still resume his interest in them subject to the rights of the mortgagee and will have the right to the residue after satisfying the mortgage,[42] but can not exert that right until he has discharged the debt secured by the transfer, as his right is subject to that of the mortgagee or pledgee.[43]

Consideration a Pre-Existing Debt.—The transfer of a bill of lading, as a collateral to previous obligations, without anything advanced, given up, or lost on the part of the transferee, does not constitute such an assignment as will preclude the vendor from exercising the right of stoppage in transitu.[44] Hence an assignee in trust for creditors of the insolvent vendee is not a purchaser for

59 Atl. 134. See, also, Loeb *v.* Peters, 63 Ala. 243, 35 Am. Rep. 17.

Bill must contain negotiable words.—It seems the quasi negotiability which protects the indorsee in his title to the goods, and against stoppage in transitu, only exists where the bill contains negotiable words, such as "order," "assigns," etc. Page & Co. *v.* Sandusky, etc., R. Co., 4 West. L. M. 644, 2 O. Dec. Reprint 716.

38. Duplicate bill.—A shipper is precluded from exercising his right of "stoppage in transitu," by the transfer for value by the consignee of a duplicate bill of lading. Missouri Pac. R. Co. *v.* Heidenheimer, 82 Tex. 195, 200, 17 S. W. 608, 27 Am. St. Rep. 861; Landa *v.* Lattin, 19 Tex. Civ. App. 246, 250, 46 S. W. 48.

39. *New York.*—Gass *v.* Astoria Veneer Mills, 134 App. Div. 184, 118 N. Y. S. 982.

40. Loeb *v.* Peters, 63 Ala. 243, 35 Am. Rep. 17. And see Chandler *v.* Fulton, 10 Tex. 2, 60 Am. Dec. 188.

41. The fact that the assignee knew that the goods were not paid for.—Chandler *v.* Fulton, 10 Tex. 2, 60 Am. Dec. 188.

42. Pledge or mortgage.—Chandler *v.* Fulton, 10 Tex. 2, 60 Am. Dec. 188.

43. Chandler *v.* Fulton, 10 Tex. 2, 60 Am. Dec. 188; Missouri Pac. R. Co. *v.* Heidenheimer, 82 Tex. 195, 199, 17 S. W. 608, 27 Am. St. Rep. 861.

44. Consideration a pre-existing debt.—Loeb *v.* Peters, 63 Ala. 243, 35 Am. Rep. 17.

"Eminent jurists and judicial tribunals hold that one who for prior indebtedness receives a bill of lading of goods, either as collateral security or in payment of such indebtedness, has no such title as will avail even against the vendor's right of stoppage in transitu; in other words, that such an one, in such a controversy, is not to be regarded as a bona fide purchaser for value. Loeb *v.* Peters, 63 Ala. 243, 35 Am. Rep. 17; Harris *v.* Pratt, 17 N. Y. 249; Lesassier *v.* Southwestern, 2 Woods 35; O'Brien *v.* Norris, etc., Co., 16 Md. 122, 77 Am. Dec. 284; Naylor *v.* Dennie (Mass.), 8 Pick. 198, 19 Am. Dec. 319. And Goodman *v.* Simonds, 19 Mo. 106, and Logan *v.* Smith, 62 Mo. 455, recognize the principle announced in the foregoing cases." Skilling *v.* Bollman, 73 Mo. 665, 39 Am. Rep. 537.

value, and consequently takes subject to the exercise of any right of stoppage in transitu which may exist against the assignor.[45]

Refusal of Transferee to Pay Freight.—Where the transferee of a bill of lading containing the words "not negotiable" refuses to pay the freight, the failure to defeat the right of stoppage in transitu is due to his breach of the contract of carriage and he can not invoke the aid of equity to cancel the note given by him for the goods.[46]

Unreasonable Delay of Transferee in Obtaining Possession.—Transferee of unconditional bill of lading by indorsement and delivery for value, containing words "not negotiable," has no action against carrier for conversion, where he unreasonably delays obtaining possession until consignee has become insolvent, and consignor has exercised his right of stoppage in transitu.[47]

§ 568. Liability for Price of Goods.—Where a principal consigned goods to a factor with power to sell or reconsign, and a company reconsigned the goods to a third person, and a bank, in good faith, bought a draft drawn by the company against the new consignee, secured by a bill of lading, and took possession of the goods and retained the proceeds, if the company was empowered to reconsign the goods and draw against them, the bank was not liable to the principal.[48]

§§ 569-571. Rights and Liabilities as to Consignee—§ 569. In General.—See ante, "In General," § 544.

§ 570. Claim for Advances to Consignor.—Consignee has no lien on property consigned to him for moneys due on prior transactions between him and the consignor, as against a transferee of the bill of lading who has advanced moneys thereon in good faith.[49] Thus a consignee who accepts drafts upon the faith of the consignment acquires the right to sell the property, and apply its proceeds towards the payment of the drafts; but if these prove insufficient, he has no lien for the amount of the deficiency on subsequent consignments, as against persons who have advanced moneys upon them, and taken transfers of the bills of lading as security.[50]

Priority of Pledgee against Person Advancing Money to Shipper.—That bills of lading taken by shipper were in name of consignee is not sufficient to put a bank taking them as security on notice of claims of person advancing money to shipper. As the bills of lading were never delivered to the latter or his agent or to the consignee, they never secured title to the property by a perfected purchase, and the latter never secured a perfected lien; for they

45. **Assignee for creditors.**—Loeb *v.* Peters, 63 Ala. 243, 35 Am. Rep. 17; Harris *v.* Pratt, 17 N. Y. 249, see, also, O'Brien *v.* Norris, etc., Co., 16 Md. 122, 77 Am. Dec. 284; Naylor *v.* Dennie (Mass.), 8 Pick. 198, 19 Am. Dec. 319; Nichols *v.* Lifeware, 2 Bing. 83.

46. **Refusal of indorsee of bill stamped "not negotiable" to pay freight.**—Where one had in his possession the indorsed bill of lading stamped thereon with the words "not negotiable" and a written order from the consignee to deliver the goods to him, and delivery thereof was refused solely because of his refusal to pay the freight in cash, the failure to obtain possession of the goods and defeat the right of stoppage in transitu was due wholly to his breach of contract of carriage, and he could not invoke the aid of equity to cancel the note given by him for the goods. Gass *v.* Astoria Veneer Mills, 118 N. Y. S. 982, 134 App. Div. 184. See ante, "Payment of Freight and Charges as Condition Precedent," § 558.

47. **Unreasonable delay of transferee in obtaining possession.**—Gass *v.* Southern Pac. Co., 137 N. Y. S. 261, 152 App. Div. 412.

48. **Liability to consignor for price of goods.**—Smith *v.* Jefferson Bank, 120 Mo. App. 527, 97 S. W. 247.

49. **Consignee has no lien on property consigned to him.**—First Nat. Bank *v.* Ege, 109 N. Y. 120, 16 N. E. 317, 4 Am. St. Rep. 431, and see Commercial Bank *v.* Pfeiffer, 108 N. Y. 242, 15 N. E. 311. See ante, "Consignor Indebted to Consignee," § 528.

50. First Nat. Bank *v.* Ege, 109 N. Y. 120, 16 N. E. 317, 4 Am. St. Rep. 431.

had neither actual or symbolical possession of the property, or any instrument of writing whatever showing a valid lien.[51] The fact that bills of lading named the same persons both as consignors and consignees was not sufficient to put one taking them as security on inquiry as to a lien claimed by persons who furnished money for the purchase of the goods.[52]

Bank Making Advances on Bill of Lading.—A bank which makes advances on a bill of lading has a lien to the extent of the advances, on the property in the hands of the consignee, and can recover from him the proceeds of the property consigned, even though the consignor be indebted to the consignee on general account; and the consignee can not appropriate the property or its proceeds to his own use in payment of a prior debt.[53]

Purchaser of Draft with Bill of Lading Attached.—See post, "Drawer Indebted to Drawee or Consignee," § 581.

§ 571. Liability to Consignee on Contract of Consignor.—One who gets a bill of lading as assignee does not assume to carry out the contract of the assignor with the consignee or drawee of the draft to which it is attached; or to warrant the obligations of the shipper as to the quality or quantity. The foregoing rule applies to unconditional transfers or assignments of bills of lading; and to shipments made with bill of lading attached to a draft for the purchase money.[54]

Liability of Purchaser of Draft with Bill of Lading Attached on Warranty, of Character, Quality or Quantity of Shipment.—See post, "Liability of Purchaser for Shortage or Inferiority of Shipment," § 585.

§§ 572-576. Rights and Liabilities as to Third Persons—§ 572. Claims of Third Persons against Transferrers.—Where a transfer of a bill of lading is made to a transferee without notice of a third person's claim against the transferrer, its title to goods is not affected by such claims.[55]

§ 573. Against Vendor of Consignor.—See post, "Rights against Third Persons," § 584.

§ 574. Against Subsequent Purchaser of Goods.—The indorsement of a bill of lading by the consignee to a bona fide purchaser will vest a better ti-

51. **Priority against person advancing money to shipper.**—Campbell *v.* Alford, 57 Tex. 159; Prendergast *v.* Williamson, 6 Tex. Civ. App. 725, 731, 26 S. W. 421.

Against person subsequently advancing money to shipper.—A delivery, without indorsement, of a bill of lading of goods in transit, to the consignee, who had made advances, was a sufficient delivery of the goods to constitute a pledge, and a person afterwards advancing money on the goods to the shipper obtained no right superior to those of the consignee, although, at the time of making the advances, the goods were in the hands of a warehouseman who did not know of the consignee's rights. Campbell *v.* Alford, 57 Tex. 159.

52. Prendergast *v.* Williamson, 6 Tex. Civ. App. 725, 26 S. W. 421.

53. **Bank making advances on bill of lading.**—Means *v.* Bank, 146 U. S. 620, 627, 36 L. Ed. 1107, 13 S. Ct. 186; Conard *v.* Atlantic Ins. Co. (U. S.), 1 Pet. 386, 7 L. Ed. 189; Gibson *v.* Stevens (U. S.), 8 How. 384, 12 L. Ed. 1123. See post, "Drawer Indebted to Drawee or Consignee," § 581.

A bank paid the purchase money for cattle at the request of A., and the cattle were delivered to the bank by the seller. The cattle were shipped to another point for sale, the bill of lading being issued in A's name, who drew a draft upon the consignees which, with the bill of lading attached, was indorsed and delivered to the bank. The consignees refused payment of the draft, sold the cattle, and applied the proceeds to an old debt owing to them by A. It was held that the transfer of the bill of lading to the bank was a transfer of the property in the cattle and that the consignees were liable to the bank for the proceeds. Means *v.* Bank, 146 U. S. 620, 36 L. Ed. 1107, 13 S. Ct. 186.

54. **Liability to consignee on contract of consignor.**—Cosmos Cotton Co. *v.* First Nat. Bank, 32 L. R. A., N. S., 1173, 171 Ala. 392, 54 So. 621, Ann. Cas. 1913B, 42.

55. **Claims of third persons against transferrer.**—Freeman *v.* Bank, 3 Texas App. Civ. Cas., § 338.

tle in the indorsee than a subsequent sale of the goods by the consignor in the vendee.[56]

Delivery for Pre-Existing Debt.—The indorsement of a bill of lading and the delivery of the goods in consideration of a pre-existing debt is valid as against a subsequent innocent purchaser of the goods, whether such transfer was in payment or as collateral security.[57]

§§ 575-576. Subsequent Liens—§ 575. In General.—A delivery of a bill of lading is a symbolic delivery of the property which it represents, and a holder of a bill of lading has constructive possession of the property, and may hold it against all persons acquiring liens subsequent to the transfer thereof.[58]

§ 576. Subsequent Attachments.—Where goods which have been transferred by the delivery of a bill of lading representing them are thereafter attached by a creditor of the transferror, the attaching creditor acquires no greater right in the attached property than the attachment debtor had at the time of attachment.[59] If the indorsement was executed, after the levy of the writ, then the property was subject to the attachment, and the lien should be foreclosed.[60]

Bank Discounting or Purchasing Draft.—A bank receiving sight draft and bill of lading and crediting the shipper therefor has a right to the shipment prior to the rights of a subsequent attachment creditor, whether it was a purchaser or merely a pledgee of the draft and bill of lading.[61] In such case neither the goods nor the proceeds of the draft are subject to attachment as the property of the shipper.[62] Where a draft with bill of lading attached was indorsed by the shipper and deposited with intervener bank for credit, the bank became the owner of the draft and the shipment under the bill, as against the shipper's attaching creditors, in the absence of proof that it took the draft

56. Against subsequent purchasers of the goods.—Page & Co. *v.* Sandusky, etc., R. Co., 4 West. L. M. 644, 2 O. Dec. Reprint 716.

When triplicate bills of lading have been executed by the carrier to the order of the shipper, and one of the delivered bills of lading was indorsed for value before the shipper sold and delivered the goods covered by it to another, the indorsee of the bill can recover against the vendee of the goods the value of the goods, his bill of lading being prior to the vender's purchase and receipt of the goods from the shipper. Skilling *v.* Bollman, 73 Mo. 665, 39 Am. Rep. 537; Midland Nat. Bank *v.* Missouri Pac. R. Co., 132 Mo. 492, 33 S. W. 521, 53 Am. St. Rep. 505. See post, "Duplicate and Triplicate Bills," § 562.

57 Delivery for pre-existing debt.—Skilling *v.* Bollman, 73 Mo. 665, 39 Am. Rep. 537.

58. Priority as to subsequent liens.—Third Nat. Bank *v.* Hays, 119 Tenn. 729, 108 S. W. 1060, 14 Am. & Eng. Ann. Cas. 1049. See ante, "Operation as Constructive Delivery of Goods," § 543.

59. Priority against subsequent attachment.—Adoue *v.* Seeligson & Co., 54 Tex. 593; Mercantile Banking Co. *v.* Landa (Tex. Civ. App.), 33 S. W. 681.

In Walker *v.* Detroit, etc., R. Co., 49 Mich. 446, 13 N. W. 812, a creditor of the consignee attempted to get possession of the property by garnishment proceedings against the carrier. The supreme court of Michigan discharged the carrier from liability on the garnishment proceedings, and held: "Common carriers must recognize transfers of bill of lading and consignments of goods, and, unless protected by proper vouchers, can not always assume to deal with consignments as actually and beneficially belonging to the consignee." Union Pac. R. Co. *v.* Johnston, 50 Am. St. Rep. 540, 45 Neb. 57, 63 N. W. 144.

60. Mercantile Banking Co. *v.* Landa (Tex. Civ. App.), 33 S. W. 681.

61. Ladd, etc., Bank *v.* Commercial State Bank (Ore.), 130 Pac. 975.

62. Where automobiles were shipped under a bill of lading, with a draft on the purchaser attached, and the draft was discounted by intervener bank for the benefit of the shipper, intervener became a purchaser of the draft for value and the owner of the machines, so that neither they nor the proceeds of the draft were subject to attachment as the property of the shipper. American Thresherman *v.* De Tamble Motors Co. (Wis.), 141 N. W. 210.

for collection only.[63] A bank which purchases[64] or discounts[65] a draft with bill of lading attached or takes it to secure advancements, or money due the bank,[66] acquires a special property in the goods, it is vested with the rights

63. Cox, etc., Grocery Co. *v.* National Bank (Ark.), 156 S. W. 187.

64. Where a customer of a milling company orders flour, which is consigned by the company to itself, with a memorandum on the bill of lading to notify the customer, and the milling company draws a draft for the price of the flour on the customer, payable to a bank, and the bill of lading, indorsed in blank, is attached, and the company deposits the draft with the bill of lading attached with the bank, and the amount of the deposit is credited to the account of the depositor and drawn against, the bank is the purchaser, and the owner of the draft and bill of lading, and its title is superior to a subsequent attachment lien against the milling company. National Bank *v.* Everett, 136 Ga. 372, 71 S. E. 660.

A consignee consigned car loads of goods to his own order, with instructions to notify proposed buyers, and drew sight drafts against the goods in favor of a bank, and attached thereto the bills of lading. The cashier of the bank and the consignor testified that the bank bought the drafts outright and gave credit therefor to the consignor, who checked against the credit. The consignor was active in attempting to prevent the diversion of the goods from the claim of the bank to the claims of subsequent attaching creditors of the consignor. Held, that the bank had a special property in the goods, and was entitled to recover the amount of the drafts as against the attaching creditors. Third Nat. Bank *v.* Hays, 108 S. W. 1060, 119 Tenn. 729, 14 Am. & Eng. Ann. Cas. 1049.

65. Bank discounting draft.—Bank discounting draft to which bill of lading was attached, and depositing net proceeds to drawer's credit in extinguishment of a debt due it, held to be a purchase for value, and to have acquired title to the property represented by the bill of lading. Latham *v.* Spragins (N. C.), 78 S. E. 282.

Where a bank takes by indorsement a bill of lading and pays the draft of the shipper for value of the goods, no attachable interest remains in the shipper. Buckeye Nat. Bank *v.* Huff (Va.), 75 S. E. 769.

The consignee of fruit, who was the shipper's agent, sold the same while in transit and drew a draft for the price, which he attached to an order on the carrier for delivery as authorized by the bill of lading. The draft was discounted by a bank, and after the fruit was rejected by the purchaser, the consignee's agent resold it to another, who agreed to pay the draft; but, before he did so, the fruit was attached as the property of the consignee. Held, that the bank, on discounting the drafts, became the owner of the fruit until payment, and was vested with the rights of a mortgagee in possession as against the attaching creditors. Seward & Co. *v.* Miller, 55 S. E. 681, 106 Va. 309.

A consignee of certain fruit, after selling the same, drew a draft, attached to an order on the carrier for delivery thereof, which draft was discounted by a bank. The purchaser having refused the fruit on arrival, the consignee's agent sold the fruit to another, who agreed to pay the draft, but did not do so until an attachment was levied on the fruit as the property of the consignee. Held that, though the consignee's agent had no authority to sell the fruit after discounting the draft, the acceptance by the bank of payment of the draft from the second purchaser transferred to him all the bank's rights to the property. Seward & Co. *v.* Miller, 55 S. E. 681, 106 Va. 309.

The goods were not the property of the consignee at the time the attachment was levied. They belonged either to the bank or to the second purchaser. If payment of the draft was an essential prerequisite, to invest the second purchaser with title, then they were the property of the bank; and if the agent of the consignee had no right to make sale to the second purchaser, yet when the bank accepted payment of the draft from him, all its rights passed to him, and the attaching creditor had no greater right against him than it had against the bank. Seward & Co. *v.* Miller, 106 Va. 309, 55 S. E. 681.

66. If a live stock shipper had turned bills of lading with draft attached over to a bank which advanced the money to buy the stock shipped, in order to transfer to the bank title to the stock or to the proceeds, or to secure the bank for its advancements, or in the nature of an order on the consignee for the fund, which, when received, was to be credited on the the bank's claim, then, upon the delivery of the bills of lading, the bank obtained the right to receive the payment, and the proceeds were no longer garnishable upon the demand of a third person. What Cheer Sav. Bank *v.* Mowery, 149 Iowa 114, 128 N. W. 7, 33 L. R. A., N. S., 646.

That a bank promised the money or paid checks given by a live stock shipper for stock bought, or that he promised to pay out of the proceeds, did not give the bank any lien or rights in the stock; but

of a mortgagee in possession and is entitled to recover the amount of the drafts as against attaching creditors. As affecting a creditor's right to garnish the proceeds of a shipment, delivery of the shipment to the carrier and receipt by the shipper of a bill of lading did not transfer to the consignees title to the shipment, nor make them the shipper's debtors, where the bill of lading was not delivered or tendered to them, but was delivered to a bank for delivery to the consignees on payment of the price.[67]

Delivery of Property Where Bill of Lading Pledged.—An actual manual delivery of the goods is not necessary to pass possession, nor is it necessary that the delivery should be made to the pledgee in person in order to defeat a subsequent attachment.[68] Where property in transitu is pledged by the delivery of bills of lading therefor, such delivery is a constructive delivery of the property by which a lien in the way of pledge is created, which is superior to an attachment lien upon the property.[69] The transfer of the bill of lading to the pledgee is as effectual a transfer of goods as their manual delivery could be.[70] The special requisite of delivery is, no matter in whose hands the property was a deposit, that it be no longer subject, in fact or in law, to the dominion, possession or control of the pledgor, but to that of the pledgee.[71]

Marshaling Securities.—If goods after having been transferred to a creditor by the delivery of a bill of lading representing them are attached by another creditor of the transferrer, the former, though he has other securities, can not be compelled to exhaust them before resorting to the goods. This is not a case of two persons having a lien on the same property, one of whom has another security, also, for, by reason of the transfer before the levy of the

if the bank furnished the money on an agreement that the proceeds of the stock were to be set aside or applied to payment, or as security of the bank's claim, or if the legal effect of the manner of shipment and the delivery to the bank of the bill of lading with draft attached vested it as against the shipper with the right to receive the proceeds, another creditor could not garnish the proceeds. What Cheer Sav. Bank *v.* Mowery, 128 N. W. 7, 149 Iowa 114, 33 L. R. A., N. S., 646.

If a bank took a bill of lading with draft attached covering a shipment as security, or under an agreement express or implied that it should collect the money due or to become due from the consignee and apply it to the bank's claim against the shipper, no garnishment of the consignee could defeat the bank's right thus created; the bank's right not depending on its having taken the draft and bill of lading in payment of its claims. What Cheer Sav. Bank *v.* Mowery, 128 N. W. 7, 149 Iowa 114, 33 L. R. A., N. S., 646.

67. What Cheer Sav. Bank *v.* Mowery, 128 N. W. 7, 149 Iowa 114, 33 L. R. A., N. S., 646.

68. Delivery of property.—Adoue *v.* Seeligson & Co., 54 Tex. 593. See post, "Pledge, Mortgage or Collateral Security," § 577.

69. Campbell *v.* Alford, 57 Tex. 159, 162.

A cotton factor in Galveston procured an advance of money from a banker on "cotton in press," for which he gave his order on the press to deliver the cotton to a vessel then in port loading for Liverpool. The order was notified to the press, and the master of the vessel made and delivered to the cotton factor, as the shipper, a bill of lading for the cotton, which the factor indorsed and delivered to the banker, with his exchange on Liverpool, in favor of the banker, attached. Afterwards a third party, who was a creditor of the cotton factor, sued out an attachment against him and levied it on the cotton, which was still in press. In a contest between the banker, as claimant of the cotton, and the attaching creditor, held, the execution of the bill of lading for the cotton by the master of the vessel in favor of the cotton factor, and the transfer and delivery thereof by the factor to the banker, constituted constructive delivery of the cotton. Adoue *v.* Seeligson & Co., 54 Tex. 593.

The execution of the delivery order by the factor to the vessel for the cotton in press, and the recognition and acceptance thereof by the press, before the levy of attachment, constitutes a delivery of the cotton, so as to except it from attachment by the creditor. Adoue *v.* Seeligson & Co., 54 Tex. 593.

70. Adoue *v.* Seeligson & Co., 54 Tex. 593.

71. Adoue *v.* Seeligson & Co., 54 Tex. 593.

attachment, the property never became subject to the attachment lien.[72]

Effect of Custom.—Evidence of custom can not be given to overcome the transferee's showing of title, and give priority to the attachment lien.[73]

§ 577. Pledge, Mortgage or Collateral Security.—It is well settled that the owner of the bill of lading may pledge the same as collateral security for a debt.[74]

Who Are Pledgees, etc.—A bank advancing money to the consignee to pay for the goods and taking the bills of lading representing the same as collateral security for the loss, acquires a lien on such goods.[75]

Security for Pre-Existing Debt.—The transfer of a bill of lading as mere collateral security for a pre-existing debt does not make the transferee a purchaser for value.[76]

Rights of Pledgee, etc.—When a bill of lading is transferred and delivered as collateral security, the rights of the pledgee under it are the same as those of an actual purchaser, so far as the exercise of those rights are necessary to protect the holder.[77]

72. **Marshaling securities.**—Scharff *v.* Meyer, 54 Am. St. Rep. 672, 133 Mo. 428, 34 S. W. 858.

73. Where claimant alleges title to a carload of grain, attached as the property of the shipper and consignee, by indorsement and transfer of the bill of lading prior to the attachment, plaintiff who joins issue, in effect asserting that the indorsement was subsequent to the levy, can not give evidence of custom to overcome claimant's showing of title by such indorsement and transfer; any evidence of custom given by claimant having simply amounted to a statement of what his legal rights were by reason of the indorsement and transfer. Mercantile Banking Co. *v.* Landa (Tex. Civ. App.), 33 S. W. 681.

74. **Pledge mortgage or collateral security.**—Douglas *v.* People's Bank, 86 Ky. 176, 10 Ky. L. Rep. 243, 5 S. W. 420, 9 Am. St. Rep. 276, 32 Am. & Eng. R. Cas. 510.

A bill of lading, like any negotiable credit, may be pledged by indorsement and delivery to secure any lawful obligation, under Civ. Code, arts. 3136, 3158. Scheuermann *v.* Monarch Fruit Co., 48 So. 647, 123 La. 55.

The merchandise represented by a bill of lading is very often pledged by the transfer of the bill of lading which carries it. Yegen *v.* Northern Pac. R. Co., 19 N. Dak. 70, 121 N. W. 205.

75. The sellers of cotton took bills of lading in their own names and sent drafts for the price to a correspondent for collection, and the purchaser paid the drafts by checks on a bank, which had agreed to pay the checks and take bills of lading as security, and the purchaser, on so paying the drafts, received the bills of lading, and delivered them to the bank under the agreement. Held, that the purchaser of the cotton did not become the absolute owner thereof on paying the drafts of the seller by taking and receiving the accompanying bills of lading, and that by delivery of the bills of lading to the bank it acquired a lien on the cotton. Judgment (Tex. Civ. App.), 72 S. W. 1033, modified. First Nat. Bank *v.* San Antonio, etc., R. Co., 77 S. W. 410, 97 Tex. 201.

76. **Security for pre-existing debt.**—Loeb *v.* Peters, 35 Am. Rep. 17, 63 Ala. 243.

A mortgage or pledge of a bill of lading for a pre-existing debt is valid against subsequent purchasers of the goods. Skilling *v.* Bollman, 73 Mo. 665, 39 Am. Rep. 537, 540.

77. **Rights of pledgee.**—Means *v.* Bank, 146 U. S. 620, 36 L. Ed. 1107, 13 S. Ct. 186.

Campbell *v.* Alford, 57 Tex. 159, 162; Adoue *v.* Seeligson & Co., 54 Tex. 593; Missouri Pac. R. Co. *v.* Heidenheimer, 82 Tex. 195, 17 S. W. 608, 27 Am. St. Rep. 861.

One who makes a temporary advance to the consignee, taking the bill of lading as his security, has the same rights as the buyer of the goods. Missouri Pac. R. Co. *v.* Heidenheimer, 82 Tex. 195, 17 S. W. 608, 27 Am. St. Rep. 861.

In absence of notice of fraud.—Where the facts are not such as to put upon notice the holder of a bill to whom it had been negotiated for value as security for a draft drawn by the consignor on a third person, that a promissory note negotiated for value by the consignor to the same holder had been given after delivery of the goods, and to cover the purchase price, and where there is no evidence of any participation by the holder of the bill in the fraud of the consignor, the payment of the note by the maker does not release the carrier from liability on the bill. Boatman's Sav. Bank *v.* Western, etc., R. Co., 81 Ga. 221, 7 S. E. 125.

Title to Goods and Right of Possession.—The pledge of a bill of lading does not invest the pledgee with title to the property; the title remains in the pledgor; but the pledgee acquires a lien upon the property for the security of his debt; and this lien, as long as he retains the possession of the property, either actual or symbolical, is a legal lien, which is paramount to, and will therefore prevail against, any prior equities existing on behalf of third parties, of which the pledgee had no notice, or of which he was not required by law to take notice.[78] The transfer of a bill of lading, although the transaction is not intended to give the permanent ownership, but to furnish security for advances of money, or discount of commercial paper made upon the faith of it, confers upon the person to whom it is transferred the title to the goods and the right of possession till the debt is paid.[79]

Intention of Parties.—A pledgee to whom a bill of lading is given as security gets the legal title to the goods and the right of possession only if such is the intention of the parties, and that intention is open to explanation.[80]

78. Title to goods and right of possession.—Petitt & Co. *v.* First Nat. Bank (Ky.), 4 Bush 334; Douglas *v.* People's Bank, 86 Ky. 176, 10 Ky. L. Rep. 243, 5 S. W. 420, 9 Am. St. Rep. 276, 32 Am. & Eng. R. Cas. 510.

79. Where advances are made upon goods in transit, and the bill of lading or invoice is assigned, the title to the goods passes and vests in the assignee. Manufacturers' Commercial Co. *v.* Rochester R. Co., 126 N. Y. S. 1051, 142 App. Div. 249.

Where a bank furnished money for the purchase of cotton, and received from the railroad company by which the cotton was shipped the bills of lading to hold as security for the money expended for the cotton, the bank was entitled to hold the cotton until its debt was paid. National Bank *v.* Citizens' Nat. Bank, 93 S. W. 209, 41 Tex. Civ. App. 535; Campbell *v.* Alford, 57 Tex. 159.

A bank furnished money to a buyer of cotton and received the bills of lading for the cotton to hold as security. The railroad company deposited the cotton with a compress company, which issued receipts stating on their face that they were nonnegotiable. These receipts were exchanged by the railroad company for the bills of lading. Held, that, though the receipts were nonnegotiable, they nevertheless gave the bank a right to the possession of the cotton. National Bank *v.* Citizens' Nat. Bank, 41 Tex. Civ. App. 535, 93 S. W. 209, affirmed in 101 Tex. 650, no op.

A bank furnished money to a buyer of cotton, and received the bills of lading for the cotton to hold as security. The railroad company deposited the cotton with a compress company, which issued receipts stating on their face that they were nonnegotiable. These receipts were exchanged by the railroad company for the bills of lading. The bank sold the cotton, accepting the buyer's note, but retaining the compress company's receipts as security. Held, that, even though the note were good, the acceptance of it did not deprive the bank of the right to the possession of the cotton. National Bank *v.* Citizens' Nat. Bank, 41 Tex. Civ. App. 535, 93 S. W. 209, affirmed in 101 Tex. 650, no op.

The railroad delivered the cotton to the Cleburne Compress Company, which executed and delivered to the railroad its receipts for same. These receipts were exchanged to appellee for the bills of lading held by it. The status of the property was not changed by this exchange, except the compress became the bailee of the cotton, instead of the railroad. National Bank *v.* Citizens' Nat. Bank, 41 Tex. Civ. App. 535, 93 S. W. 209, affirmed in 101 Tex. 650, no op.

B. having received advances from C. & C., of Galveston, on the faith of his agreement to ship them certain goods, delivered the goods to a carrier to be transported to Liberty, the carrier executing duplicate bills of lading specifying that the goods were to be delivered to the care of W. at Liberty, to be forwarded to C. & C. After delivering without indorsement one of these bills of lading to C. & C., B. procured from A. & Co. advances on the same goods they having inquired of W., and being informed by him that he held the goods subject to the order of B. W. had never seen or had notice of the bill of lading. Held, that the rights of the pledgees attached when the goods were delivered to the carrier under a bill of lading declaring that the goods were to be forwarded to them; that thereafter the rights of the pledgees were superior to those of the original owner, or any acquired through him, and this, too, although the warehouseman, and forwarding agent at Liberty, having no notice of the bill of lading, held the goods subject to the order of the shipper. Campbell *v.* Alford, 57 Tex. 159.

80. The Carlos F. Roses, 177 U. S. 665, 44 L. Ed. 929, 20 S. Ct. 803; Pollard *v.* Vinton, 105 U. S. 7, 26 L. Ed. 998; Shaw

Delivery of Bill of Lading Equivalent to Actual Possession of Goods.—As it is indispensable to the validity of a pledge that the actual possession of the property pledged should pass to the pledgee, the possession of property which is sought to be pledged while it is in transit may be effected by transferring the bill of lading. Such transfer of the bill of lading is regarded as equivalent to investing the pledgee with the actual possession of the property.[81] The indorsement and delivery of a bill of lading operates the same as the delivery of the goods, and the pledgee to whom the same is delivered can hold the property to secure his debt, against the consignee or any other person.[82]

Action for Wrongful Conversion of Goods.—The transfer and delivery of an inland bill of lading of goods, by the consignee to a person who advances money upon them, is not in form or effect a mortgage, but vests in such person a property in the goods, which entitles him to maintain an action against one who wrongfully converts them; as, for instance, the carrier, if he delivers the goods to the consignee, without requiring the production of the bill of lading, but relying upon his assertion that he holds it.[83]

Priority against Assignment of Purchase Money.—Where bills of lading for property loaded and shipped under a contract of sale designated the seller as the consignor and the buyer the consignee, and an assignee made an advance on the faith of an assignment thereof while the property was in the possession of the carrier, he acquired a property interest in it, without an indorsement of the bills which was prior in right to an assignment by the consignor of the proceeds thereof to be paid by the buyer.[84] And such assignee did not lose his priority over the former assignment of the purchase price by allowing the shipment to be delivered to the buyer, who on receiving them and acknowledging that the bills of lading had been assigned to cover advances made on the faith thereof, was bound to account to the assignee of

v. Railroad Co., 101 U. S. 557, 25 L. Ed. 892; Friedlander *v.* Texas, etc., R. Co., 130 U. S. 416, 423, 32 L. Ed. 991, 9 S. Ct. 570; Missouri Pac. R. Co. *v.* McFadden, 154 U. S. 155, 38 L. Ed. 944, 14 S. Ct. 990; North Pennsylvania R. Co. *v.* Commercial Nat. Bank, 123 U. S. 727, 31 L. Ed. 287, 8 S. Ct. 266.

The passage of title to goods in transit by an assignment of the invoices or bills of lading to secure advances is controlled largely by the intention of the parties. Manufacturers' Commercial Co. *v.* Rochester R. Co., 126 N. Y. S. 1051, 142 App. Div. 249.

Intention of parties.—Manufacturers' Commercial Co. *v.* Rochester R. Co., 126 N. Y. S. 1051, 142 App. Div. 249.

81. Delivery of bill of lading equivalent to actual possession of goods.—Douglas *v.* People's Bank, 86 Ky. 176, 5 S. W. 420, 10 Ky. L. Rep. 243, 9 Am. St. Rep. 276, 32 Am. & Eng. R. Cas. 510. See ante, "Subsequent Liens," §§ 575-576.

A bill of lading represents the property, and any bona fide title, for valuable consideration, obtained through a pledge of the bill of lading, is as valid and effectual a title to the goods as could be obtained by an actual delivery of the goods themselves. Grayson County Nat. Bank *v.* Nashville, etc., Railway (Tex. Civ. App.), 79 S. W. 1094, 1096; Adoue *v.* Seeligson & Co., 54 Tex. 593, 594; Missouri Pac. R. Co. *v.* Heidenheimer, 82 Tex. 195, 17 S. W. 608, 27 Am. St. Rep. 861.

82. Campbell *v.* Alford, 57 Tex. 159, 162.

83. Action for wrongful conversion of goods.—Forbes *v.* Boston, etc., R. Co., 133 Mass. 154.

84. Priority against assignment of purchase money.—Manufacturers' Commercial Co. *v.* Rochester R. Co., 117 N. Y. S. 989, affirmed 123 N. Y. S. 1128, 137 App. Div. 882.

A lumber company, which had a contract to deliver a large number of ties to a railroad company, assigned to plaintiff, its creditor, 30,000 ties, but, no ties having been collected at the time, no title to specific ties passed. When shipments were later made, the bills of lading were indorsed by the lumber company to plaintiff to apply on the debt, and payment was made thereon to the plaintiff by the railroad company. Held, that the rights of another creditor of the lumber company, who made advances on the security of pledges of bills of lading of specific ties, to money in the hands of the company, held by it for payment for the ties represented by the pledged bills of lading, were superior to the claim of plaintiff. Manufacturers' Commercial Co. *v.* Rochester R. Co., 126 N. Y. S. 1051, 142 App. Div. 249.

the bills for the purchase price.[85]

Priority against Person Advancing Money to Shipper.—See ante, "Claim for Advances to Consignor," § 570.

Estoppel of Consignor to Assert Title.—Where a merchant ships goods to his broker, without conveying title to him but purely for the purpose of distribution to others, and sends to the broker a bill of lading, indorsed in blank, for goods the possession of which, by the general custom of trade, is regarded as evidence of the right to dispose of the property for which it is issued, he can not, in an action of trover, recover the goods from a bank which has, in good faith and without notice of the owner's title, taken the bill of lading as security for a loan of money to the broker on his individual account, and converted the property upon default in the payment of its debt.[86]

Substitution of New Security.—The surrender of bills of lading, held as collateral security for a loan, is a good consideration for the substitution therefor of new bills of lading antedating the loan. As against the carrier the holder is still a holder for value.[87]

Priority against Attachment.—See ante, "Subsequent Attachments," § 576.

Stoppage in Transitu.—See ante, "As Defecting Stoppage in Transitu," § 567.

Release or Discharge of Lien.—A sale of cotton by the pledgor of the bills of lading, pursuant to the uniform custom with the pledgee, releases the carrier issuing the bills from liability to the pledgee,[88] and the bank's lien on the cotton is terminated by the delivery of the proceeds of the sale to it.[89]

§§ 578-587. Purchase or Discount of Draft with Bill of Lading Attached—§ 578. Recording Papers.—A bank which discounts a draft with a bill of lading attached, if not the absolute owner of the goods, stands in the position of a mortgagee in possession, and is not required, in order to protect its lien, to have the papers recorded.[90]

§§ 579-584. Rights and Title of Purchaser—§§ 579-582. As to Consignor and Consignee—§ 579. In General.—A party discounting a draft and receiving therewith, deliverable to his order, a bill of lading of the goods against which the draft was drawn, acquires a special property in them and has a complete right to hold them as security for the acceptance and payment of the draft.[91] He becomes the owner of the shipment and neither the

85. Manufacturers' Commercial Co. *v.* Rochester R. Co., 117 N. Y. S. 989, affirmed 123 N. Y. S. 1128, 137 App. Div. 882.

86. **Estoppel of consignor to assert title.**—Commercial Bank *v.* Armsby Co., 120 Ga. 74, 47 S. E. 589, 65 L. R. A., N. S., 443.

87. **Substitution of new security.**—Midland Nat. Bank *v.* Missouri Pac. R. Co., 132 Mo. 492, 33 S. W. 521, 53 Am. St. Rep. 505.

88. **Release or discharge of lien.**—First Nat. Bank *v.* San Antonio, etc., R. Co. (Tex. Civ. App.), 72 S. W. 1033, affirmed in part and reversed in part in 97 Tex. 201.

89. A bank agreed with cotton dealers to advance money to them to pay for cotton purchased, taking the bills of lading as security, and the uniform course of business had been for such dealers to sell the cotton, and, after sales were made, to receive the bills from the bank, and on receiving payment, to deposit the amount in the bank. Held, that the bank's lien on cotton which was sold was terminated by the delivery of the proceeds of the sale to it. Judgment (Civ. App.), 72 S. W. 1033, modified. First Nat. Bank *v.* San Antonio, etc., R. Co., 77 S. W. 410, 97 Tex. 201.

90. **Bank discounting draft with bill of lading attached.**—Seward & Co. *v.* Miller, 106 Va. 309, 55 S. E. 681.

Where a bank discounted a draft attached to an order on a carrier for the delivery of freight, it was not necessary that it should have the papers recorded, as provided by Code, § 2465, in order to preserve its lien. Seward & Co. *v.* Miller, 55 S. E. 681, 106 Va. 309.

91. **Transfer of bill of lading with bill of exchange attached.**—Dows *v.* National Exch. Bank, 91 U. S. 618, 23 L. Ed. 214.

Georgia.—Paxson Bros. *v.* Warfield, 6 Ga. App. 315, 65 S. E. 34.

Under the express provisions of Civ.

original consignor nor the consignee or drawee has any right to control it,[92] nor can they or any one else effect the transferee's title.[93] The special property in the goods which thereby passes to such transferee is subject to be devested by the acceptance and payment of the draft. If the consignee refuses to accept and pay such draft, the title to the property included in the bill of lading becomes absolute in the indorsee as against the consignor and his creditors.[94] The indorsement and delivery of the bill of lading and drafts to which it is attached, operates as a sympolical delivery of the goods in transitu covered by such bill and transfers the title thereto to the indorsee as effectually as if the goods themselves had been delivered to him.[95] By reason of the consideration moving from him as such purchaser, he acquires a position superior to that of the drawee, and has the right to insist on the drawee's recognizing this position before delivering the bill of lading to him.[96] But he has no more rights than the shipper and if the shipper could not require acceptance of a time draft without surrendering the bill of lading, neither can the holder.[96a]

Code 1910, § 4134, when a bill of lading is attached to a draft drawn on a third person, it will be treated as security for the draft, and neither title to the goods nor right to the bill of lading will pass to the drawee until, as required therein, he accepts, or accepts and secures, or pays the draft, as the case may be. Southern R. Co. *v.* Strozier, 10 Ga. App. 157, 73 S. E. 42.

North Carolina.—The holder of a draft, who takes an attached bill of lading by assignment, as security for the amount advanced on the draft, becomes the owner of the goods, as against the acceptor, to an extent sufficient to secure and protect his claim. Mason *v.* Nelson Cotton Co., 62 S. E. 625, 148 N. C. 492, 18 L. R. A., N. S., 1221, 128 Am. St. Rep. 635.

Tennessee.—Third Nat. Bank *v.* Hays, 119 Tenn. 729, 108 S. W. 1060, 14 Am. & Eng. Ann. Cas. 1049.

West Virginia.—Neill *v.* Rogers Bros. Produce Co., 41 W. Va. 37, 23 S. E. 702.

Rights of attaching creditor.—See ante, "Subsequent Liens," §§ 575-576.

92. Paxson Bros. *v.* Warfield, 6 Ga. App. 315, 65 S. E. 34.

Goods billed to shipper's order—Consignee to be notified.—Where a carrier gives a bill of lading specifying that the goods are to be delivered to the order of the consignor at a given destination, though some other person is to be notified as consignee, and the original consignor attaches the bill of lading to the draft and sells the draft and bill of lading to a third person, that person becomes the owner of the shipment, and neither the original consignor nor the consignee has any right to control it. Paxson Bros. *v.* Warfield, 65 S. E. 34, 6 Ga. App. 315.

93. On transfer of a bill of lading with draft attached, covering a shipment intended for a buyer from the consignor's vendee, nothing said or done by the vendee, nor by the buyer or anybody else could affect the transferee's title. First Nat. Bank *v.* McSwain, 75 S. E. 1106, 93 S. C. 30.

94. American Nat. Bank *v.* Henderson, 123 Ala. 612, 26 So. 498, 82 Am. St. Rep. 147; Cosmos Cotton Co. *v.* First Nat. Bank, 171 Ala. 392, 54 So. 621, 32 L. R. A., N. S., 1173, Ann. Cas. 1913 B, 42; Loeb *v.* Peters, 63 Ala. 243, 35 Am. Rep. 17; Chandler *v.* Sprague (Mass.), 38 Am. Dec. 404, 5 Metc. 306. See ante, "Bill with Draft Attached to Be Delivered to Purchaser of Goods," § 508.

The title to property is passed to the bank upon a transaction as follows: A bill of lading describing the property, with a draft attached, is delivered to the bank, and the bank credits the amount of the draft to the drawer, and, when the draft is not paid, does not charge the amount thereof back to such drawer, but assumes, itself, the collection of the draft. First Nat. Bank *v.* Walsh, etc., Co., 131 Ill. App. 508; Third Nat. Bank *v.* Hays, 119 Tenn. 729, 108 S. W. 1060, 14 Am. & Eng. Ann. Cas. 1049.

95. American Nat. Bank *v.* Henderson, 82 Am. St. Rep. 147, 123 Ala. 612, 26 So. 498.

The indorsement and delivery by a shipper of a bill of lading to a shipment of flour, with sight draft attached, to a bank, who credited the shipper's account with the amount of the draft, operated as a symbolical delivery of the flour, and vested the title in the bank. Walsh, etc., Co. *v.* First Nat. Bank, 81 N. E. 1067, 228 Ill. 446; Third Nat. Bank *v.* Hays, 119 Tenn. 729, 108 S. W. 1060, 14 Am. & Eng. Ann. Cas. 1049.

96. Mason *v.* Nelson Cotton Co., 128 Am. St. Rep. 635, 148 N. C. 492, 62 S. E. 625, 18 L. R. A., N. S., 1221.

96a. Duty to surrender goods on acceptance of time draft.—National Bank *v.* Merchants' Nat. Bank, 91 U. S. 92, 23 L. Ed. 208.

Draft with Flat Bill of Lading Attached.—The discounting of a draft attached to a flat bill of lading does not give the discounting bank an equitable lien upon the shipment, where no act on the part of the consignor creating such a lien is shown, and where the consignee had no notice that the bank had discontinued the draft.[97]

Nothing in Bill to Show That Drawer of Draft Owner of Shipment.—Where there is nothing in the bill of lading to show that the consignor was the owner of the shipment at the time the draft was discounted, a lien can not be asserted as an inference from the fact of the delivery of the bill of lading at the time the draft is assigned to the bank.[98]

§ 580. Notice That Payment to Drawer Unauthorized.—A draft attached to a bill of lading for property purchased by the drawee, payable to the holder is prima facie notice to the drawee that the price is claimed by payee and payment to the seller and drawer is unauthorized.[99]

§ 581. Drawer Indebted to Drawee or Consignee.—When a vendor of goods ships them, taking from the carrier a bill of lading, and drawing a draft payable to his own order upon the vendee, and attaching the bill of lading and indorsing such draft to a third person for value, the title to the goods vests in the indorsee, at least to the extent of the amount advanced and the consignee can not retain the price of the goods on account of a debt due him from the consignor.[1] Thus, where a bank, for a valuable consideration, takes an assignment of a bill of lading with draft attached, the consignee of the goods takes them subject to the rights of the holder of the bill of lading for the amount of the draft, and he can not retain the price of the goods on account of a debt due him from the consignor,[2] nor can the bank's right be defeated by the shipper's subsequently giving the bank a draft for the amount due him from the consignee and paying the difference,[3] but the bank can not use

97. Maine Nat. Bank *v.* Barringer, 46 Pa. Super. Ct. 510.

98. Maine Nat. Bank *v.* Barringer, 46 Pa. Super. Ct. 510.

99. **Notice that payment to drawee unauthorized.**—Burrton State Bank *v.* Peasemoore Mill. Co., 163 Mo. App. 135, 145 S. W. 508.

1. *North Carolina.*—Mason *v.* Nelson Cotton Co., 128 Am. St. Rep. 635, 148 N. C. 492, 62 S. E. 625, 18 L. R. A., N. S., 1221; Latham *v.* Spragins (N. C.), 78 S. E. 282; Finch *v.* Gregg, 126 N. C. 176, 35 S. E. 251, 49 L. R. A. 679, cited in Willard Mfg. Co. *v.* Tierney, 133 N. C. 630, 45 S. E. 1026, in the support of this principle.

The law is thus stated in Daniels on Negotiable Instruments, § 1734 (a): "When the vendor of goods consigns them to the purchaser, taking a bill of lading from the carrier and intending to resume the right of control over them, at the same time drawing upon the purchaser for the price and delivering the bill of exchange, with the bill of lading attached, to an indorsee for a valuable consideration, the consignee, upon receipt of the goods, takes them subject to the right of the holder of the bill of lading to demand payment of the bill of exchange, and can not retain the price of the goods on account of a debt due to him from the consignor." Emery's Sons *v.* Irving Nat. Bank, 25 O. St. 360, 18 Am. Rep. 299; Dows *v.* National Exch. Bank, 91 U. S. 618, 23 L. Ed. 214. This court, in Finch *v.* Gregg, 126 N. C. 176, 35 S. E. 251, 49 L. R. A. 679, recognized this almost elementary principle, carrying it to its fullest extent. To the extent indicated in this citation from Willard Mfg. Co. *v.* Tierney, 133 N. C. 630, 45 S. E. 1026, the principal contained in Finch *v.* Gregg is sound. Mason *v.* Nelson Cotton Co., 128 Am. St. Rep. 635, 148 N. C. 492, 62 S. E. 625, 18 L. R. A., N. S., 1221; Emery's Sons *v.* Irving Nat. Bank, 18 Am. Rep. 299, 25 O. St. 360.

2. Willard Mfg. Co. *v.* Tierney, 133 N. C. 630, 45 S. E. 1026; Mason *v.* Nelson, Cotton Co., 148 N. C. 492, 62 S. E. 635, 128 Am. St. Rep. 635, 18 L. R. A., N. S., 1221.

3. On the indorsement of a bill of lading to a bank by a shipper of corn, it paid a draft drawn on the consignee for the price without any notice of claim by the drawee against the drawer on account of a previous transaction. The draft being returned unpaid it was presented to the shipper, who satisfied the same by giving the bank another draft on the consignee, for a less amount, paying the difference between the two drafts in money. Held, that the bank's right

its legal title to enable the consignor to defeat the collection by the purchaser of a debt due from the consignor.[4]

§ 582. Right to Sue for Purchase Price or for Conversion of Goods. —Right to Sue for Purchase Price.—On deposit of a draft, to which a bill of lading was attached, in the seller's bank for credit, the bank became the owner, and was entitled to sue the buyer for the price.[5]

Right of Action against Consignee for Converting Shipment.—A purchaser of a draft with bill of lading attached may sue the consignee for converting the shipment.[6]

§ 583. Rights against Carrier.—Purchaser Not a Holder in Due Course.—In an action against a carrier for injury to a shipment, in the absence of the assertion of any equities against the consignor, it is no defense to show that the plaintiff and holder of the bill of lading, drawn to the order of the consignor and attached to a draft on the purchaser, is not a holder in due course, if he took it for value, or that it was given as collateral security.[7]

§ 584. Rights against Third Persons.—Vendor of Property Shipped by Vendee.—Where a vendor put it into the power of his vendee to deal with the property as his own, and thereby enabled him to mislead a bank, which in good faith discounted his draft and accepted a bill of lading of the goods sold as collateral security, any loss arising out of the transaction must fall upon the vendor.[8]

Against Purchaser of Goods Consigned to Shipper's Order—Right to Sell to Third Person.—A purchaser of drafts, drawn by a shipper, payable to itself, and bills of lading, consigning to itself goods against which the drafts were drawn, and which goods the shipper had agreed to sell to a third person, acquires the title of the shipper with the power of jus disponendi of the shipper, and it may divert and sell the goods, and the third person may not complain thereof.[9]

Attaching Creditor.—See ante, "Subsequent Attachments," § 576.

§ 585. Liability of Purchaser for Shortage or Inferiority of Shipment.—Where a consignor of goods draws a draft or bill of exchange on

with respect to the corn was acquired by the transfer to it of the bill of lading, which was made without notice to it of the consignee's claim against the shipper, and hence its right to the corn could not be defeated in whole or in part by the consignee's claim against the shipper, nor did the subsequent change of drafts between the bank and shipper in any way interrupt or impair its rights. Freeman *v.* Bank, 3 Texas App. Civ. Cas., § 338.

4. A transfer by a consignor to a bank of a bill of lading of goods consigned to a purchaser of the consignor and a draft on the purchaser, followed by payments by the bank of the draft of the consignor by crediting the amount thereof to the depositor, placed the legal right to possession of the property in the bank subject to the duty to deliver to the purchaser on his payment of the draft, but the bank could not use the legal title to enable the consignor to defeat the collection by the purchaser of a debt due him from the consignor. Wilson Grain Co. *v.* Central Nat. Bank (Tex. Civ. App.), 139 S. W. 996.

5. Right to sue for purchase price.—Burrton State Bank *v.* Peasemoore Mill. Co., 163 Mo. App. 135, 145 S. W. 508.

6. Right of action against consignee for conversion.—Where a produce company purchased apples for another for shipment, and, by the latter's authority, delivered the bill of lading to plaintiff without indorsement as security for the payment of the purchase price draft which plaintiff discounted, title to the apples passed to plaintiff, so that it could sue the one for whom they were ordered for converting them by ordering their delivery to his customers. Canandaigua Nat. Bank *v.* Southern R. Co., 118 N. Y. S. 668, 64 Misc. Rep. 327.

7. Purchaser not a holder in due course. —Citizens', etc., Bank *v.* Southern R. Co., 69 S. E. 261, 153 N. C. 346.

8. Vendor of property shipped by vendee.—National Bank *v.* Baltimore, etc., R. Co., 59 Atl. 134, 99 Md. 661, 105 Am. St. Rep. 321.

9. Against purchaser of goods consigned to shipper's order right to sell to third person.—First Nat. Bank *v.* Felker, 185 Fed. 678.

the purchaser for the purchase price and indorses the draft or bill of exchange and assigns the bill of lading to a third person for value, the indorsee is not liable on the original contract of sale, though the purchaser was compelled to pay the draft or bill of exchange before he could inspect or get possession of the goods.[10] The transaction does not constitute a sale of the shipment to the purchaser of the draft with bill of lading attached[11] and he is not deemed to guarantee the character, quality, or quantity[12] of the goods shipped, and is not liable for any breach of a warranty made by his assignor of the goods represented by the bill of lading;[13] nor for a failure of title in the drawer of the draft to the property shipped.[14] Hence, one who has accepted and paid a draft attached to a bill of lading for property purchased by and to be delivered to him, by a bank which purchased the draft in due course of business, can not, upon failure of the consideration, recover back from the bank the amount so paid.[15] The bank does not become a warrantor of the quantity or quality of the goods described in the bill[16] and is not liable for shortage[17]

10. Liability of purchaser on warranty of character or quality or quantity of shipment.—Mason *v.* Nelson Cotton Co., 128 Am. St. Rep. 635, 148 N. C. 492, 62 S. E. 625, 18 L. R. A., N. S., 1221, overruling Finch *v.* Gregg, 126 N. C. 176, 35 S. E. 251, 49 L. R. A. 679; Lewis, etc., Co. *v.* Small & Co., 117 Tenn. 153, 96 S. W. 1051, 6 L. R. A., N. S., 887.

11. The indorsement of a draft for the price of cotton sold, with the bill of lading attached, by the seller, who was the payee, to plaintiff bank for discount, did not vest the legal title to the cotton for the sale of which the draft was drawn in the bank, nor constitute the bank seller of the cotton. Bank *v.* Jones Cotton Co., 156 Ala. 525, 46 So. 971.

12. Cosmos Cotton Co. *v.* First Nat. Bank, 32 L. R. A., N. S., 1173, 171 Ala. 392, 54 So. 621, Ann. Cas. 1913 B, 42; Central Mercantile Co. *v.* Oklahoma State Bank, 33 L. R. A., N. S., 954, 83 Kan. 504, 112 Pac. 114.

13. A buyer of a draft for the price of goods sold under a warranty with bill of lading attached, who receives payment from the buyer of the goods, is not liable for a breach of warranty, where he bought the draft for full value, in the regular course of mercantile dealing, and had no interest in the goods, and took no part in the bargain, and had no notice of its terms. Mason *v.* Nelson Cotton Co., 62 S. E. 625, 148 N. C. 492, 18 L. R. A., N. S., 1221, 128 Am. St. Rep. 635.

"Payment by the drawee to the payee of a negotiable draft with bill of lading attached can not be recovered back by the drawee on the ground that the payee has received money which it can not equitably retain because of a breach of warranty made by the drawer to the drawee on the sale of the goods for which the bill of lading was given, since any equities arising therefrom do not affect the payee when he has secured an acceptance or payment." Tolerton, etc., Co. *v.* Anglo-California Bank, 50 L. R. A. 777, 112 Iowa 706, 84 N. W. 930; Mason *v.* Nelson Cotton Co., 128 Am. St. Rep. 635, 148 N. C. 492, 62 S. E. 625, 18 L. R. A., N. S., 1221.

14. Failure of title in drawer of draft.—A consignor of grain, which was delivered to a railway company for shipment, drew a draft on the consignees, and attached thereto bills of lading issued to him by the carrier. The draft was indorsed and delivered by the payees, together with the bills of lading, to a bank, which paid to them the amount of it. The drawees accepted and paid the draft. Held, that neither the bank nor the payees were liable to the consignees of the grain (the drawees) for a failure to title in the drawer of the draft to the property shipped. Hall *v.* Keller, 67 Pac. 518, 64 Kan. 211, 62 L. R. A. 758, 91 Am. St. Rep. 209.

15. Lewis, etc., Co. *v.* Small & Co., 6 L. R. A., N. S., 887, 117 Tenn. 153, 96 S. W. 1051.

16. A seller under a warranty drew a draft on the buyer for the price, and with the bill of lading indorsed it to a bank in the ordinary course of business, and the bank gave the seller credit on its books for the amount of the draft, less the usual discount. The bank had no notice of any noncompliance with the contract on the part of the seller. Held, that the bank was an innocent purchaser for value, and it did not become a warrantor of the quality and quantity of the goods described in the bill of lading. First Nat. Bank *v.* Mineral Wells, etc., R. Co. (Tex. Civ. App.), 133 S. W. 1099.

17. Cosmos Cotton Co. *v.* First Nat. Bank, 32 L. R. A., N. S., 1173, 171 Ala. 392, 54 So. 621, Ann. Cas. 1913 B, 42.

A seller of cotton, pursuant to instructions from the buyer, shipped it to the buyer under a bill of lading, in which he was named as shipper and a bank as consignee, the bill stating that the buyer should be notified, and the seller drew a draft on the buyer, payable to the bank, and the bill of lading was attached to the draft, which was deposited by the seller.

or inferiority or deterioration of quality of the shipment;[18] although the bank when notified of the seller's failure to comply with the contract of sale had in its possession bonds of the latter more than sufficient to satisfy the demands of the buyer.[19] The only representations which can be attributed to the bank are that the papers are in the same condition when presented as when received from the drawer,[20] nor can the drawee and acceptor when sued on the draft plead failure or want of consideration as a defense.[21] In an action by the buyer to recover the proceeds of a draft attached to a bill of lading against the collecting bank, evidence of a breach of warranty in the goods for the price of which the draft was made is inadmissible in the absence of proof that the plaintiff was not a bona fide purchaser or was acting as agent for the drawer of the draft.[22] A few cases have held to the contrary but the principal ones have been overruled.[23] The general doctrine prevails in the courts

The buyer paid the draft, and subsequently it was ascertained that there was a deficiency of several pounds. Held, that the bank was not liable to the buyer. First Nat. Bank *v.* Wilkesbarre Lace Mfg. Co., 162 Ala. 309, 50 So. 153.

A bank purchasing from the shipper his draft on the consignee for the price of cotton shipped under contract of sale, secured by the assignment of the bill of lading therefor, to the shipper's order, attached to it, does not, it being accepted and paid, assume the obligations of the drawer to the drawee, nor become liable to the latter in case the property, coming to his hands after his payment of the draft, is short in weight of the amount called for in the bills and for the price of which the draft was drawn. Blaisdell Co. *v.* Citizens' Nat. Bank, 96 Tex. 626, 75 S. W. 292, 62 L. R. A. 968, 97 Am. St. Rep. 944, disapproving Landa *v.* Lattin, 19 Tex. Civ. App. 246, 46 S. W. 48. And see Blaisdell & Co. *v.* White & Co. (Tex. Civ. App.), 76 S. W. 70, 71, affirmed in 97 Tex. 626, no op.

18. A payee bank which in the ordinary course of business cashed a draft with blank indorsed bill of lading attached or placed the proceeds thereof to the credit of the consignors-drawers, and which forwarded the same for collection, did not become liable to the drawee-consignee upon payment of the draft for a breach of the contract of sale arising from a shortage in weight or deterioration in quality of the cotton covered by the bill of lading. Cosmos Cotton Co. *v.* First Nat. Bank, 171 Ala. 392, 54 So. 621, 32 L. R. A., N. S., 1173, Ann. Cas. 1913 B, 42.

Where the sellers of hay drew sight drafts on the buyers, payable to themselves, and attached each of the drafts to a bill of lading, and transferred them to a bank, this did not constitute a sale of the hay to the bank, so as to render it liable for breach of the original contract of sale in that the hay was of an inferior quality. Lewis, etc., Co. *v.* Small & Co., 117 Tenn. 153, 96 S. W. 1051, 6 L. R. A., N. S., 887.

19. The bank forwarded the draft and bill of lading to its correspondent for collection, with instructions not to surrender the bill of lading until the draft was paid. The correspondent collected the draft in full, and remitted to the bank a part thereof. After the payment to the correspondent and before the transmission thereof to the bank, the latter was notified of the failure of the seller to comply with the contract of sale, and at that time the bank had in its possession funds belonging to the seller more than sufficient to satisfy the demands of the buyer for the loss it had sustained. The bank obtained judgment against its correspondent for the amount it retained. Held, that the bank was not liable to the buyer for the loss sustained, and the seller could not claim the amount due to the bank from its correspondent; there being nothing to impeach the good faith of the transaction as between the bank and the seller. First Nat. Bank *v.* Mineral Wells, etc., R. Co. (Tex. Civ. App.), 133 S. W. 1099.

20. Cosmos Cotton Co. *v.* First Nat. Bank, 32 L. R. A., N. S., 1173, 171 Ala. 392, 54 So. 621, Ann. Cas. 1913 B, 42.

The bank held the draft as a bona fide owner, and the bill of lading as a security for said draft, which the drawee knew from inspection of the papers when presented. Cosmos Cotton Co. *v.* First Nat. Bank, 32 L. R. A., N. S., 1173, 171 Ala. 392, 54 So. 621, Ann. Cas. 1913 B, 42. See, also, Young *v.* Lehman, etc., Co., 63 Ala. 519; First Nat. Bank *v.* Wilkesbarre Lace Mfg. Co., 162 Ala. 309, 50 So. 153.

21. Where a bank discounted a draft with a bill of lading attached before maturity, in the ordinary course of business, the drawee and acceptor could not, when sued on the draft, plead failure or want of consideration. Bank *v.* Jones Cotton Co., 156 Ala. 525, 46 So. 971.

22. Felker *v.* First Nat. Bank, 196 Fed. 200, affirming 185 Fed. 678.

23. The case of Finch *v.* Gregg, 126 N. C. 176, 35 S. E. 251, 49 L. R. A. 679, overruled by Mason *v.* Nelson Cotton Co., 128 Am. St. Rep. 635, 148 N. C. 492, 62 S. E. 625, 18 L. R. A., N. S., 1221, and the two or three others of like import

of England[24] and the United States[25] and in the courts of the following states: Alabama,[26] Iowa,[27] Kansas,[28] Kentucky,[29] Massachusetts,[30] North Carolina,[31] Tennessee,[32] and Texas.[33] The contrary doctrine seems to prevail in Missis-

profess to find support in Dows *v.* National Exch. Bank, 91 U. S. 618, 23 L. Ed. 214, and Columbian Nat. Bank *v.* White, 65 Mo. App. 677, but neither of these decisions is authority for their position. Mason *v.* Nelson Cotton Co., 128 Am. St. Rep. 635, 148 N. C. 492, 62 S. E. 625, 18 L. R. A., N. S., 1221.

The court of Finch *v.* Gregg, 126 N. C. 176, 35 S. E. 251, 49 L. R. A. 679, excited much comment at the time it was announced, was the subject of adverse criticism in a note by the editor of L. R. A., in volume 49, page 679, and the principle upon which it was made to rest was condemned in a note of the case of Hall *v.* Keller, 91 Am. St. Rep. 209, 64 Kan. 211, 67 Pac. 518, 62 L. R. A. 758. Another comment of like purport will be found in a note to an Alabama case of Haas *v.* Citizens' Bank, 144 Ala. 562, 113 Am. St. Rep. 61, 39 So. 129, 1 L. R. A., N. S., 242.

24. Robertson *v.* Reynolds, 2 Q. B. 196, 1 Gale & D. 526, 3 Perry & D. 611, 9 L. J. Q. B., N. S., 249.

25. Hoffman *v.* National City Bank (U. S.), 12 Wall. 181, 20 L. Ed. 366; Goetz *v.* Bank, 119 U. S. 551, 30 L. Ed. 515, 7 S. Ct. 318; Felker *v.* First Nat. Bank, 196 Fed. 200.

26. Cosmos Cotton Co. *v.* First Nat. Bank, 32 L. R. A., N. S., 1173, 171 Ala. 392, 54 So. 621, Ann. Cas. 1913 B, 42, distinguishing and overruling it so far as it sustains a contrary doctrine. Haas *v.* Citizens' Bank, 144 Ala. 562, 39 So. 129, 1 L. R. A., N. S., 242, 113 Am. St. Rep. 61; Eufaula Grocery Co. *v.* Missouri Nat. Bank, 118 Ala. 408, 24 So. 389; Bank *v.* Jones Cotton Co., 156 Ala. 525, 46 So. 971.

The case of Haas *v.* Citizens' Bank, 144 Ala. 562, 1 L. R. A., N. S., 242, 113 Am. St. Rep. 61, 39 So. 129, reaffirmed in 157 Ala. 607, 46 So. 1036, whether sound or not, can be differentiated from all the cases cited for and against this doctrine. In the Haas case, the complaint averred not only that the bank acquired the draft and bill of lading, but purchased the account also, and on page 571, of 144 Ala. the court, speaking through Tyson, J., stresses the point that the bank purchased the account and does not fasten its liability upon the draft and bill of lading alone. In response to the contention by the bank, that it held the draft as bona fide purchaser, and was not therefore liable, the court says: "To so hold would be to give effect to only a part of the transaction—to ignore its ownership of the goods and the account transferred to it by Klyce." The purchase of the account or invoice was an important factor in the mind of the court, in reaching the conclusion in the Haas case, and one not affirming in the other cases which affirm or deny this doctrine. See Cosmos Cotton Co. *v.* First Nat. Bank, 171 Ala. 392, 54 So. 621, 32 L. R. A., N. S., 1173, Ann. Cas. 1913B, 42.

27. Tolerton, etc., Co. *v.* Anglo-California Bank, 112 Iowa 706, 50 L. R. A. 777, 84 N. W. 930.

28. Hall *v.* Keller, 64 Kan. 211, 62 L. R. A. 758, 91 Am. St. Rep. 209, 67 Pac. 518; Central Mercantile Co. *v.* Oklahoma State Bank, 33 L. R. A., N. S., 954, 83 Kan. 504, 112 Pac. 114.

29. Bank discounting a seller's draft, with bill of lading attached, as collateral security, does not assume any contractual liability toward the buyer, so that, on the seller's breach of contract, the buyer could not reclaim from the collecting bank the money he had paid on the draft. Hawkins *v.* Alfalfa Products Co., 153 S. W. 201, 152 Ky. 152, 44 L. R. A., N. S., 600.

30. Arpin *v.* Owens, 140 Mass. 144, 3 N. E. 25.

31. Mason *v.* Nelson Cotton Co., 128 Am. St. Rep. 635, 148 N. C. 492, 62 S. E. 625, 18 L. R. A., N. S., 1221, overruling Finch *v.* Gregg, 126 N. C. 176, 35 S. E. 251, 49 L. R. A. 679, and diction in Sloan *v.* Carolina Cent. R. Co., 126 N. C. 487, 36 S. E. 21.

In Mason *v.* Nelson Cotton Co., 128 Am. St. Rep. 635, 148 N. C. 492, 62 S. E. 625, 18 L. R. A., N. S., 1221, the court said: "That the case of Finch *v.* Gregg, 126 N. C. 176, 35 S. E. 251, 49 L. R. A. 679, should be overruled and the principle upon which it rests disapproved. 1. As contrary to the general current of authority on a subject where uniformity of decision is so greatly to be desired. 2. Because it puts an undesirable and injurious clog upon commercial intercourse between different sections of the country. 3. Because it may, and frequently does, work grevious wrong to parties litigant, in subjecting them to the burdens and obligations of contracts which they never made, and holding them responsible for fraud and wrongs which they did not commit and of which they had no knowledge or notice."

32. Lewis, etc., Co. *v.* Small & Co., 6 L. R. A., N. S., 887, 117 Tenn. 153, 96 S. W. 1051.

33. Blaisdell Co. *v.* Citizens' Nat. Bank, 96 Tex. 626, 75 S. W. 292, 97 Am. St. Rep. 944, 62 L. R. A. 968, 973, overruling Landa *v.* Lattin, 19 Tex. Civ. App. 246, 46 S. W. 48; First Nat. Bank *v.* Mineral Wells, etc., R. Co. (Tex. Civ. App.), 133 S. W. 1099; Blaisdell & Co. *v.* White & Co. (Tex. Civ. App.), 76 S. W. 70, 71, affirmed in 97 Tex. 626, no op.

sippi.[34]

Effect of Indorsement of Nonliability on Some and Omission from Other Drafts.—The indorsement of drafts with bill of lading attached, purchased by a bank in due course; "not responsible for the quantity, quality or delivery of the goods covered by the bill of lading," is mere surplusage and does not render it liable on other drafts, etc., received in the same transaction from which such indorsement is omitted.[35]

Fraudulent or Forged Bill of Lading.—The indorsee of a draft with bill of lading attached does not become a party of the sale, so as to be responsible to the consignee if, after he has paid the draft, the bill of lading proves to be fraudulent[36] or forged[37] so that there is a failure of consideration.

Guaranty of Payment Describing Goods.—The fact that the draft was bought in reliance upon a written guaranty of its payment, in which the bill of lading was described as covering goods of a designated quality, does not affect the rule.[38]

Intervention in Garnishment Proceedings.—Where the seller of goods ships them and makes a draft upon the purchaser with the bill of lading attached and indorses to a bona fide purchaser for value and the drawee, after paying the draft to a collecting agent, seeks to hold the proceeds by garnishment, as the property of the drawer, the owner waives no rights by intervening and asserting his title.[39]

34. The supreme court of Mississippi in Russel *v.* Smith Grain Co., 80 Miss. 688, 32 So. 287, adopts the reasoning of the court in Landa *v.* Lattin, 19 Tex. Civ. App. 246, 46 S. W. 48. See, also, Cosmos Cotton Co. *v.* First Nat. Bank, 32 L. R. A., N. S., 1173, 171 Ala. 392, 54 So. 621, Ann. Cas. 1913B, 42; Mason *v.* Nelson Cotton Co., 128 Am. St. Rep. 635, 148 N. C. 492, 62 S. E. 625, 18 L. R. A., N. S., 1221.

35. Where drafts of a seller of hay were attached to bills of lading and transferred to a national bank, the fact that the bank indorsed all but three of them with a statement that it was not responsible for the quantity, quality, or delivery of the goods covered by the bills of lading, does not render it liable for deficiency in quality of the goods covered by the three bills of lading, the indorsement being mere surplusage. Lewis, etc., Co. *v.* Small & Co., 96 S. W. 1051, 117 Tenn. 153, 6 L. R. A., N. S., 887.

36. **Fraudulent bill.**—Blaisdell Co. *v.* Citizens' Nat. Bank, 96 Tex. 626, 75 S. W. 292, 97 Am. St. Rep. 944, 62 L. R. A. 968.

37. **Forged bill of lading.**—Varney *v.* Monroe Nat. Bank, 13 L. R. A., N. S., 337, 119 La. 943, 44 So. 753.

"In Hoffman *v.* National City Bank (U. S.), 12 Wall. 181, 20 L. Ed. 366, it was held: 'A consignor who had been in the habit of drawing bills of exchange on his consignee with bills of lading attached to the drafts drawn (it being part of the agreement between the parties that such bills should always attend the drafts), drew bills on him with forged bills of lading attached to the drafts, and had the drafts with the forged bills of lading so attached discounted in the ordinary course of business by a bank ignorant of the fraud. The consignee, not knowing of the forgery of the bills of lading, paid the drafts. Held, that there was no recourse by the consignee against the bank.'" Mason *v.* Nelson Cotton Co., 128 Am. St. Rep. 635, 148 N. C. 492, 62 S. E. 625, 18 L. R. A., N. S., 1221.

38. **Guaranty of payment of describing goods.**—Central Mercantile Co. *v.* Oklahoma State Bank, 33 L. R. A., N. S., 954, 83 Kan. 504, 112 Pac. 114.

Where the seller of goods ships them and makes a draft upon the buyer with bill of lading attached, one who buys the draft and receives payment thereof from the drawee is not liable for return of any portion of the proceeds because of a defect in the quality of the goods, though the draft was bought in reliance upon a written guaranty of its payment, in which the bill of lading was described as covering goods of a designated quality. Central Mercantile Co. *v.* Oklahoma State Bank, 112 Pac. 114, 83 Kan. 504, 33 L. R. A., N. S., 954.

39. **Intervention in garnishment proceedings.**—Central Mercantile Co. *v.* Oklahoma State Bank, 33 L. R. A., N. S., 954, 83 Kan. 504, 112 Pac. 114.

Gen. St. 1909, § 5834 (Code Civ. Proc., § 241), provides that, where the answer of a garnishee discloses that any other person than defendant claims the indebtedness or property in his hands, the court may order the claimant to be made a defendant and notice to be served upon him. Held, that where goods sold were shipped on a bill of lading with draft attached and the draft was paid, and before the money was remitted by the collecting bank the buyer sued the seller for defects in quality of the goods, and the

§ 586. Effect of Consignee's Accepting and Paying Draft.—Where a bank discounts a seller's draft with bill of lading attached, the buyer's acceptance of such draft creates a new and independent contract between himself and the transferee, and the payment of the draft releases the transferee from all liability to the buyer.[40] When the consignor draws upon the consignee for the purchase money, and the draft, the bill of lading attached, is indorsed or transferred to some one who discounts the bill of exchange, the acceptance and payment by the consignee of the draft, accompanied with the bill of lading as shipping receipt, vest the title to the goods in him.[41] It is well settled that where a party consigns goods to another and thereupon draws upon the consignee for funds, accompanying the draft with the delivery of the bill of lading or shipping receipt, as collateral security for its payment, the acceptance and payment by the consignee of the draft, accompanied with the bill of lading or shipping receipt, vests in him a special property in the goods. The bill of lading in such case is a symbol of the goods, and the delivery thereof, with the intention to transfer the property in the goods, is a symbolical delivery of the goods.[42]

§ 587. Charging Unpaid Draft to Drawer's Account.—Where a bank, which discounted a draft to which was attached a bill of lading upon its return unpaid, charged it to the drawer's account, if he had a sufficient balance to pay the draft, it was thereby satisfied, and its claim on the property represented by the bill of lading extinguished.[43] The bank, by charging the unpaid draft to drawer's account, did not lose its title thereto and to the attached bill of lading, if he had nothing to his credit with which to pay it; and hence proof of such fact, although evidence of payment by the drawer, was not conclusive.[44]

§ 588. Deposit of Draft with Bill of Lading Attached for Collection.—A seller's deposit of a bill of lading with a draft against the buyer attached in bank for collection makes the bank and its correspondent his agent with full power of disposition over the goods according to the terms and tenure of the draft and bill of lading.[45]

Right of Drawer to Control Collection and Disposition of Bill.—A seller of machinery drawing a draft upon the purchaser, with the bill of lading attached, and indorsing the draft to a bank for collection, has the right to control the collection and the disposition of the bill of lading.[46]

Title of Bank to Goods.—Where a bank received for collection a draft with a bill of lading for goods in transit attached, but did not discount the draft or in any way purchase it, it was not the owner of the goods in transit,[47]

drawee of the draft, after paying it to a collecting bank, sought to hold the proceeds by garnishment as the property of the seller, the payee bank by intervening and asserting its title to the proceeds, without waiting to be served with summons, waived none of its rights. Central Mercantile Co. *v.* Oklahoma State Bank, 112 Pac. 114, 83 Kan. 504, 33 L. R. A., N. S., 954.

40. Hawkins *v.* Alfalfa Products Co., 152 Ky. 152, 153 S. W. 201, 44 L. R. A., N. S., 600.

41. **Effect of consignee accepting and paying of draft.**—American Nat. Bank *v.* Henderson, 82 Am. St. Rep. 147, 123 Ala. 612, 26 So. 498. See ante, "Bill with Draft Attached to Be Delivered to Purchaser of Goods," § 508.

42. Orr *v.* Planters' Phosphate, etc., Co., 8 Ga. App. 59, 63, 68 S. E. 779, quoting Hall on Bailments, p. 127.

43. **Charging unpaid draft to drawer's account.**—Latham *v.* Spragins (N. C.), 78 S. E. 282.

44. Latham *v.* Spragins (N. C.), 78 S. E. 282.

45. **Deposit of draft with bill of lading attached for collection.**—Veitch *v.* Atkins Grocery, etc., Co., 5 Ala. App. 444, 59 So. 746.

46. **Right of drawer to control collection and disposition of bill.**—Second Nat. Bank *v.* Bank, 99 Ark. 386, 138 S. W. 472.

47. **Title of bank to goods.**—Second Nat. Bank *v.* Bank, 99 Ark 386, 138 S. W. 472.

but a bank which is the payee of a negotiable draft, and consignee of a bill of lading attached, may prove its ownership by showing its possession of and exhibiting these documents.[48]

Fictitious or Forged Bill of Lading.—A bank which in good faith receives a draft for collection, collects the same from the drawee, and pays the proceeds to the drawer, is not liable to the payor in damages because the latter made payment in reliance upon a forged bill of lading which the drawer had attached to and forwarded with the draft;[49] but money paid by the drawee upon a draft drawn against "indorsed bills of lading" which are in fact fictitious, and accepted "against" such bills in ignorance of the fraud, may be recovered back from the payee.[50] In such case the acceptance and payment of the draft is conditional on the genuineness of the bill of lading and the payor is entitled to recover the amount from the payee, as having been paid by mistake.[51]

Liability for Failure of Consignor to Pay Freight.—A bank holding a draft attached to a bill of lading, for the price of a shipment, which holds the draft for collection only, and not as a purchaser, is not liable to the drawee after receiving payment for a deficiency in quantity of the shipment, and for the drawer's failure to pay the freight as agreed, and as shown by the invoice attached to the draft and bill of lading.[52]

Liability of Bank for Surrender of Bill of Lading without Payment of Draft.—Where a shipper consigned a shipment to shipper's orders, attaching drafts for the price to the bills of lading and making payment a prerequisite to the surrender of the bill and the bank holding the draft for collection surrendered the bill of lading to the buyer prior to judgment it is liable to the owner for conversion of the goods to the amount of the draft, less the freight charges.[53] It is no defense that the owner of the bill of lading was indebted to the purchasers of the goods for breach of warranty by the shipper.[54] The shipment having been converted by the railway company through

48. **Proof of ownership.**—Tolerton, etc., Co. *v.* Anglo-California Bank, 50 L. R. A. 777, 112 Iowa 706, 84 N. W. 930.

49. **Fictitious or forged bill of lading.**—Nebraska, etc., Grain Co. *v.* First Nat. Bank, 9 L. R. A., N. S., 251, 252, 78 Neb. 334, 110 N. W. 1019.

50. Guaranty Trust Co. *v.* Grotarian, 57 L. R. A. 689, 114 Fed. 433, 52 C. C. A. 235.

51. Dealers in Alabama contracted to sell one hundred bales of cotton to plaintiffs in Liverpool, and made a draft on plaintiffs' bank and authorized agent in Liverpool, payable to their order, "value received, and charge the same to R. S. M. I. one hundred bales of cotton;" what purported to be a bill of lading for such cotton being attached. The draft and accompanying papers were indorsed to defendant bank, and were by it presented to and accepted generally, and paid by plaintiffs' bank, acting in the belief, as did defendant, that the bill of lading was genuine. It was in fact a forgery, and no cotton was shipped. Neither plaintiffs nor their bank relied on the credit of the drawers, but on the bill of lading. Held, that the acceptance and payment of the draft was conditional on the genuineness of the bill of lading, and that plaintiffs were entitled to recover the amount from defendant as having been paid by mistake. Hannay *v.* Guaranty Trust Co., 187 Fed. 686.

52. **Liability for failure of consignor to pay freight.**—Gregory *v.* Sturgis Nat. Bank (Tex. Civ. App.), 71 S. W. 66. See ante, "Freight and Demurrage," § 512.

53. **Liability of bank for surrender of bill of lading without payment of draft.**—Gulf, etc., R. Co. *v.* North Texas Grain Co., 32 Tex. Civ. App. 93, 74 S. W. 567, so holding where a buyer of a shipment of oats after examining them thus placed under his control, refused to take them, and it appeared that he would have paid the draft but for the unauthorized surrender of the bill of lading by the bank.

54. Where a purchaser of drafts drawn by a shipper payable to itself, and bills of lading consigning to itself goods against which the drafts were drawn, and which goods the shipper had agreed to sell to a third person, forwarded the drafts and bills of lading to a banker for collection with instructions to deliver documents only on payment, and the banker delivered the goods to the third person prior to payment, and the purchaser sued the banker for conversion for the tortious delivery, the banker could not defend on the ground that the purchaser was indebted to the third person for damages for breach of warranty by the shipper because there was no warranty by the purchaser, be-

an illegal sale for the freight charges, shipper could not, since he had elected to hold the bank liable for negligence in failing to collect the draft, hold the railway company liable for conversion, but such right existed on the part of the bank.[55]

Measure of Damages.—A bank receiving from the shipper a draft on the consignee for the purchase price, with the bill of lading attached, without surrendering the draft, took from the consignee, who was insolvent, a draft for the price on third parties, and delivered the bill of lading to him. The third parties having refused payment, the bank was liable to the shipper for the loss caused by its surrender of the bill of lading but the measure of damages was not the amount of the draft, but the value of the shipment at its destination, less freight charges.[56]

§ 589. Duplicate and Triplicate Bills—Bills Marked "Original and Duplicate"—Duplicate in Hands of Consignee.—A duplicate bill of lading in the hands of a consignee possesses all the validity of the original; it is as to him an original, not a copy; the word "duplicate" stamped on the instrument indicates to him no more than that the bill of lading had been executed in duplicate; and by its transfer for value the shipper is precluded from exercising the right of stoppage in transitu.[57] Where a bill of lading is issued in duplicate, one marked "Original" and one "Duplicate," the duplicate is, in effect, an original; and the holder of the duplicate may recover the goods from the carrier, though the consignor had retained the original, and had ordered the goods returned to him.[58]

Delivery to Shipper or Consignee after Indorsement of Original Bill for Value.—Where a carrier issues original bills of lading declaring that the consignment is in its possession to be delivered only on their presentation, and not conditioned to be void in case of delivery on duplicate bills issued by it, the

cause the goods were tortiously converted before a sale; a warranty arising only out of contract. First Nat. Bank *v.* Felker, 185 Fed. 678.

55. Gulf, etc., R. Co. *v.* North Texas Grain Co., 32 Tex. Civ. App. 93, 74 S. W. 567.

56. Measure of damages.—People's Nat. Bank *v.* Brogden, 98 Tex. 360, 83 S. W. 1098, citing Thomas *v.* Morse, 80 Tex. 289, 290, 16 S. W. 48; and Brightman *v.* Reeves, 21 Tex. 70, 77, affirming People's Nat. Bank *v.* Brogden (Tex. Civ. App.). 84 S. W. 601, 602.

57. Duplicate in hands of consignee.—Missouri Pac. R. Co. *v.* Heidenheimer, 82 Tex. 195, 200, 17 S. W. 608, 27 Am. St. Rep. 861.

58. Missouri Pac. R. Co. *v.* Heidenheimer, 82 Tex. 195, 17 S. W. 608, 27 Am. St. Rep. 861. See, also, Landa *v.* Lattin, 19 Tex. Civ. App. 246, 250, 46 S. W. 48.

When the bill inclosed to the consignee was by them transferred it was not the less to be regarded by the transferrer as an original because it was stamped "duplicate." It is to be presumed that he understood the word "duplicate" according to its legal signification, and he is to be considered as being affected with such notice, and no other, as the word so interpreted would give him. In law the word "duplicate" does not mean a mere copy. It differs from a copy in that a duplicate has all the validity of an original. Instruments are executed in duplicate that the parties may each retain an original. Black's Law Dic., word "Duplicate," p. 401; see also Burrill. And so Mr. Greenleaf, volume 1, § 558, lays it down that "if the instrument was executed in duplicate or triplicate, or more parts, the loss of all the parts must be proved to let in secondary evidence of its contents," thus indicating that all the parts are upon the same plane—each is to be regarded as an original. Missouri Pac. R. Co. *v.* Heidenheimer, 82 Tex. 195, 200, 17 S. W. 608, 27 Am. St. Rep. 861.

If at that time the goods had reached the point of destination, and the consignees or any assignee from them had presented the duplicate and demanded delivery of the carrier, he could not have declined because they produced a bill of lading stamped "duplicate." The carrier could not have exacted the production of the original on the ground that it had been retained by the consignor with a view to the exercise of its right of "stoppage in transitu," in the event of the insolvency, though unsuspected, of the consignees, or of their failure to pay the remainder of the purchase money, though not due within sixty days. Missouri Pac. R. Co. *v.* Heidenheimer, 82 Tex. 195, 200, 17 S. W. 608, 27 Am. St. Rep. 861.

carrier will be liable on its original bills to one holding them as indorsee for a valuable consideration, though it previously delivered the consignment to the shipper on his presenting one of the duplicate bills.[59] Numerous cases may be found where the doctrine is announced in a general way that, when the goods are shipped under bills of lading drawn in parts, to be delivered to the consignee or his order, or assigns, the carrier is justified in delivering to the consignee, on production of part of the bill of lading, although there has been a prior indorsement for value to the holder of another part, provided the delivery be bona fide, and without notice or knowledge of such prior indorsement;[60] but it is not true that, by the rules of the common law, where bills of lading are presented by the person therein named as the party to whom the goods are to be delivered, the delivery to such person is valid, although the party presenting the bills is the holder of only the duplicate or triplicate set of bills, and the original had been surrendered to a bona fide pledgee or purchaser for value.[61] Much of the conflict of the courts on this subject has been due to an attempt to apply the rule announced in a particular case to the general doctrine governing bills of lading. The peculiar phraseology of the instrument to be construed must always be kept in mind.[62]

Nonnegotiable Bill.—Where a bill of lading bears the caveat and contract on each of the sets issued—"The one being accomplished, the other to stand void" —furnishes an ample beware to the money loaner, and at the same time a full protection by contract to the carrier. Under such circumstances, the carrier, in delivering the goods, on production and surrender of either one of the sets of three bills of lading issued, performed his contract. Such restriction and limitation on the otherwise negotiable and assignable character of such instrument are prohibited, in many of the states, by statute.[63]

Priorities Among Transferees.—The first transferee of a bill of lading, though it be only one of a set of three bills, acquires the property; and subsequent transfers of the other bills are subordinate to the first transfer.[64]

Duplicate or Triplicate Bill under Uniform Bills of Lading Act.—Under Uniform Bills of Lading Act, an owner of goods, who had made out in triplicate and indorsed one of them "Deliver to M.," and signed and gave it to M., thereby rendered it negotiable; and a bona fide assignee of M., for value, took title to the goods, regardless of the purpose of the indorsement to M. or M.'s fraud.[65] Where defendant, an owner of goods, has bills of lading made in triplicate, and indorses one to a party who assigns it to an innocent party, who in

59. Midland Nat. Bank *v.* Missouri Pac. R. Co., 132 Mo. 492, 33 S. W. 521, 53 Am. St. Rep. 505.

60. Midland Nat. Bank *v.* Missouri Pac. R. Co., 53 Am. St. Rep. 505, 511, 132 Mo. 492, 33 S. W. 521; Glyn Miller, etc., Co. *v.* East & West Indian Dock Co., L. R. 7 App. Cas. 511.

61. Midland Nat. Bank *v.* Missouri Pac. R. Co., 132 Mo. 492, 53 Am. St. Rep. 505, 33 S. W. 521, distinguishing Skilling *v.* Bollman, 73 Mo. 665, 39 Am. Rep. 537.

62. Midland Nat. Bank *v.* Missouri Pac. R. Co., 132 Mo. 492, 53 Am. St. Rep. 505, 33 S. W. 521.

63. **Nonnegotiable bill.**—Midland Nat. Bank *v.* Missouri Pac. R. Co., 132 Mo. 492, 53 Am. St. Rep. 505, 33 S. W. 521.

64. **Priorities among transferees.**—First Nat. Bank *v.* Ege, 109 N. Y. 120, 16 N. E. 317, 4 Am. St. Rep. 431.

Priorities among transferees of triplicate or duplicate bills.—Where there are several bills of lading, each is a contract in itself as to the holder, but there is one contract as to the masters and owners. Therefore, if the several numbers of the set of bills of lading be indorsed to different persons, and there be competition for the goods, the rule is that if the equities be equal the property passes by the bill first indorsed. "The usual course is to issue bills in triplicate originals, one to be retained by the carrier, one to be delivered to the shipper, and one to the consignee; and the person who first gets one of the three gets the property which it represents." Missouri Pac. R. Co. *v.* Heidenheimer, 82 Tex. 195, 199, 17 S. W. 608, 27 Am. St. Rep. 861.

65. **Duplicate or triplicate bill under bills of lading act.**—Roland, etc., Co. *v.* Brown, 214 Mass. 196, 100 N. E. 1025.

turn assigns it to plaintiff, the mere fact that defendant obtains the goods from the carrier with a second bill before the plaintiff receives the indorsed bill does not render the latter a spent bill, so as to relieve defendant from a conversion.[66]

Right of Transferee of Triplicate Bill against Subsequent Purchaser of Goods.—See ante, "Against Subsequent Purchaser of Goods," § 574.

§ 590. Effect as Binding Intermediate and Terminal Carrier.—A final carrier, having accepted a shipment for transportation from an initial carrier, under a bill of lading issued by the initial carrier, is bound by such bill in so far as the same is a contract for carriage,[67] but in so far as it is a mere receipt for the goods a final carrier, on receiving the goods for transportation from the initial carrier, is not bound by the admissions contained therein.[68] The recitals of a bill of lading are not binding upon a carrier not a party to the bill of lading.[69]

Under Texas Rev. St. 1895, arts. 331a, 331b, connecting carriers, having recognized and acted on a bill of lading providing for through shipment of cotton, were all bound by its terms.[70]

§ 591. Modification or Rescission.—A bill of lading issued by a carrier may be changed or modified by a subsequent parol agreement between the shipper and the carrier.[71]

§ 592. Surrender, Discharge or Release.—A bill of lading does not cease to be a security when the shipment has reached its destination, and the goods which it represents have been landed or warehoused,[72] nor is it functus officio

66. Roland, etc., Co. *v.* Brown, 214 Mass. 196, 100 N. E. 1025.

67. **Effect as binding intermediate and terminal carriers.**—Texas, etc., R. Co. *v.* Kelly (Tex. Civ. App.), 74 S. W. 343; International, etc., R. Co. *v.* Diamond Roller Mills, 36 Tex. Civ. App. 590, 82 S. W. 660.

A bill of lading may be used against the carrier that is not connected with its execution in some respect as a contract between the consignee and the carrier that issued the bill, as an evidence of right in the consignee to demand the shipment from the last carrier. The bill of lading is evidence of right in the consignee, and upon tender of that bill to a carrier who is not a party to it, but who has possession of the property, the shipper or consignee, as the case may be, who has possession of the bill and is the owner of the property, can demand possession of the same by virtue of the ownership displayed by the bill of lading. Grayson County Nat. Bank *v.* Nashville, etc., Railway, (Tex. Civ. App.), 79 S. W. 1094; International, etc., R. Co. *v.* Diamond Roller Mills, 36 Tex. Civ. App. 590, 82 S. W. 660.

68. Texas, etc., R. Co. *v.* Kelly (Tex. Civ. App.), 74 S. W. 343.

As said in the case of Texas, etc., R. Co. *v.* Kelly (Tex. Civ. App.) 74 S. W. 343. "As a receipt of the stoves from the shipper it was the act and admission of the carrier that so receipted, and prima facie evidence against it. It seems to us an indefensible proposition that another or connecting carrier is affected by such an admission. Chicago, etc., R. Co. *v.* Benjamin, 63 Ill. 283; Evans *v.* Atlanta, etc., R. Co., 56 Ga. 498." International, etc., R. Co. *v.* Diamond Roller Mills, 36 Tex. Civ. App. 590, 82 S. W. 660.

The bill of lading being the act of defendant railroads as partners, its recitals as to the condition of the goods when received were binding upon them. St. Louis, etc., R. Co. *v.* Watkins, 45 Tex. Civ. App. 321, 100 S. W. 162.

69. St. Louis, etc., R. Co. *v.* Watkins, 45 Tex. Civ. App. 321, 100 S. W. 162; International, etc., Co. *v.* Diamond Roller Mills, 36 Tex. Civ. App. 590, 82 S. W. 660.

70. **Under Texas Rev. St. 1805, arts. 331a, 331b.**—Elder, etc., Co. *v.* St. Louis, etc., R. Co. (Tex. Civ. App.), 154 S. W. 975.

71. **Modification or rescission.**—Lincoln Tent, etc., Co. *v.* Missouri Pac. R. Co., 125 N. W. 603, 86 Neb. 338, 27 L. R. A., N. S., 1130.

Where plaintiff delivered goods to defendant to be transported over its line to M., and there delivered to another carrier and by it taken to A., and received a bill of lading naming himself as consignee, it was competent for them to agree to a change of the contract, whereby defendant should stop them at M. and from there take them to D., especially as defendant was to receive additional compensation for the carriage to D. Cincinnati, etc., R. Co. *v.* Steele, 131 S. W. 22, 140 Ky. 383.

72. **Surrender, discharge or release.**—Heiskell *v.* Farmers', etc., Nat. Bank, 89 Pa. 155, 33 Am. Rep. 745.

because it passes into the hands of a pledgee,[73] for there can be no complete delivery of goods under a bill of lading until they come into the hands of some person who has a right to receive the same.[74]

Surrender or Taking Up Bills of Lading—Authority of Compress Company.—Where a carrier, having shipped cotton under order bills, delivered the same to a compress company at destination as a warehouseman, the compress company became the agent of the carrier to take up the carrier's bills of lading, and issue warehouse receipts therefor.[75]

Bill of Lading Surrendered for Unauthorized Due Bill.—See ante, "Due Bill Promising to Issue a Bill of Lading," § 438.

§§ 593-602. Actions—§ 593. Rights of Action and Defenses.—Action against Carrier.—Right of Indorsee.—The indorsement of a bill of lading does not vest in the indorsee the right of action at law on the contract: and hence, in action against a carrier for not carrying goods, he has the same defense against the indorsee as against the consignee.[76]

Delay in Delivery.—The bill of lading not having been indorsed to plaintiff by the party in whose favor it was issued, the former could not maintain an action against the company upon it. The assignor having received the bill of lading with the knowledge that the shipment was not at the time on the line of road of defendant, but on the line of a connecting road, he could not have recovered damages for delay in its delivery, if the connecting road was prevented from forwarding it by an armed mob.[77]

Failure to Deliver Goods.—The transferee or indorsee of a bill of lading may maintain an action ex contractu against the carrier for failure to deliver to him all or any portion of the goods specified in the bill of lading; and this is true whether the loss of the goods or the shortage occurred before or after he acquired title to the bill of lading,[78] and even though he may be but an agent or trustee of the goods for others.[79]

Action for Taking and Withholding Bills.—Bill of lading is property and evidence against a railroad company of valuable rights and taking and withholding it from plaintiff for six months warranted an action for damages.[80]

Actions against Consignee.—The Georgia Civil Code, § 2956, provides that a bill of lading may be delivered in pledge; but there is no provision that the transfer of a bill of lading by the vendor of goods sold and shipped will give the right to the transferee to sue for the purchase price of the goods.[81]

73. Where the sellers of cotton took bills of lading in their own name, and sent them, with drafts for the price, to a correspondent for collection, and the purchaser paid the drafts by checks on a bank which had agreed to pay the checks and take the bills of lading as security, and the purchaser, on so paying the drafts, received the bills of lading, and delivered them to the bank under the agreement, the bills did not become functus officio in the hands of the bank, but still represented the cotton, on which it had a lien for the advances. First Nat. Bank *v.* San Antonio, etc., R. Co. (Tex. Civ. App.), 72 S. W. 1033, modified in 77 S. W. 410, 97 Tex. 201. See ante, "Pledge, Mortgage or Collateral Security," § 577.

74. Dows *v.* National Exch. Bank, 91 U. S. 618, 23 L. Ed. 214; Heiskell *v.* Farmers', etc., Nat. Bank, 89 Pa. 155, 33 Am. Rep. 745.

75. **Authority to take up bill of lading.**—St. Louis, etc., R. Co. *v.* Citizens' Bank, 87 Ark. 26, 112 S. W. 154, 30 R. R. R. 290, 53 Am. & Eng. R. Cas., N. S., 290, 123 Am. St. Rep. 17.

76. **Right of indorsee.**—Page & Co. *v.* Sandusky, etc., R. Co., 4 West. L. M. 644, 2 O. Dec. Reprint 716.

77. **Delay in delivery.**—Haas *v.* Kansas City, etc., R. Co., 81 Ga. 792, 7 S. E. 629.

78. **Failure to deliver goods.**—Askew & Co. *v.* Southern R. Co., 1 Ga. App. 79, 58 S. E. 242.

79. The indorsee of a bill of lading may libel the vessel on which the goods are shipped, for failure to deliver them, though he may be but an agent or trustee of the goods for others; as ex gr., the cashier of a bank. The Thames (U. S.), 14 Wall. 98, 20 L. Ed. 804.

80. **Actions for taking and withholding bills.**—Gulf, etc., R. Co. *v.* Brown, 4 Tex. Civ. App. 435, 23 S. W. 618.

81. **Actions against consignee.**—Allen, etc., Co. *v.* Farmers', etc., Nat. Bank, 129 Ga. 748, 59 S. E. 813.

Where a carrier issued to a seller of

Recovery of Goods from Person Not Having Better Title.—The possession of goods acquired under a bill of lading is sufficient to maintain an action against one who does not show a better title.[82] And a bank to which a draft with bill of lading attached was sent can maintain replevin against a person receiving the goods without authority.[83]

Recovery of Value of Goods.—A person who acquired possession of goods under a bill of lading, though he had only a special property in them to secure advances made upon them, can recover the whole value of them from a purchaser for cash, and hold the surplus beyond his own interest for the general owner.[84]

§§ 594-595. Parties—§ 594. Plaintiffs.—The holder of an unindorsed bill of lading can not sue upon it in his own name.[85]

Bank Receiving Draft with Bill Attached for Collection.—See ante, "Right of Action," § 380.

§ 595. Defendants.—The shipper may sue either the master or the owner upon a bill of lading signed by the master.[86]

§§ 596-597. Pleading—§ 596. Bill, Petition or Complaint.—Allegation That Bill of Lading Purchased by Indorsee of Draft with Bill Attached.—An allegation, in an action by a consignee to recover from a bank money paid on drafts purchased by the bank from the consignor, with bills of lading attached, that the drafts and bills of lading were indorsed in blank by the consignor and transferred to and purchased by the bank, shows the transaction to have been a mere purchase of the drafts, with the bills of lading as security, and not a purchase of the bills of lading so as to in any way make the bank liable for the performance of the consignor's contract.[87]

Allegation That Bank Assumed Relation of Seller.—An allegation that the bank, by purchasing the draft, with assignment of the bill of lading of the property for the price of which it was drawn, attached to and securing it, became the owner of the property and assumed the relation of seller thereof to the person on whom the draft was drawn, is a mere conclusion of the pleader, not to be taken as an averment that the transaction was other than an ordinary purchase of a draft secured by bill of lading attached, and does not enlarge the legal effect of the facts so as to charge that the bank purchased, not only the draft, but the bill of lading,[88] such complaint is demurrable.[89]

corn under written contract a bill of lading consigning the shipment to the seller's order, which the latter transferred to a bank, such transfer alone did not entitle the bank to sue the buyer on the contract for the price. Allen, etc., Co. *v.* Farmers', etc., Nat. Bank, 59 S. E. 813, 129 Ga. 748.

82. **Recovery of goods from person not having better title.**—Adams *v.* O'Conner, 100 Mass. 515, 1 Am. Rep. 137.

83. Heiskell *v.* Farmers', etc., Nat. Bank, 89 Pa. 155, 33 Am. Rep. 745.

84. **Recovery of value of goods.**—Adams *v.* O'Conner, 100 Mass. 515, 1 Am. Rep. 137.

85. Stone *v.* Swift (Mass.), 4 Pick. 389; Davenport Nat. Bank *v.* Homeyer, 100 Am. Dec. 363, 45 Mo. 145.

86. **Defendants.**—Harvy *v.* Pike, 7 Am. Dec. 698, N. C. Term Rep. 82.

87. **Allegation that bill of lading purchased by indorsee.**—Blaisdell Co. *v.* Citizens' Nat. Bank, 75 S. W. 292, 96 Tex. 626, 62 L. R. A. 968, 97 Am. St. Rep. 944.

88. **Allegation that bank assumed relation of seller.**—Blaisdell Co. *v.* Citizens' Nat. Bank, 96 Tex. 626, 75 S. W. 292, 62 L. R. A. 968, 97 Am. St. Rep. 944.

89. Plaintiff alleged a purchase by him of cotton to be shipped with a draft accompanying a bill of lading; that after the shipment defendant bank purchased the draft, and became the actual owner of the bill of lading and of the cotton which it represented, and thereby undertook to carry out the contract of sale between plaintiff and consignor; that plaintiff was compelled to pay the draft before the arrival of the cotton; and that when the cotton arrived it was found short weight. Held, that the complaint was demurrable. Blaisdell & Co. *v.* White & Co. (Tex. Civ. App.), 76 S. W. 70.

Actions to Recover Money Paid on Draft with Forged Bill of Lading Attached.—The allegations in an action against a collecting agent to recover money paid on a draft with a forged bill of lading attached, must receive a reasonable construction.[90]

§ 597. Answer.—See ante, "Conflict of Laws," § 433.

§ 598. Production of Bill of Lading or Proof of Contents.—A bill of lading is the best evidence of its contents, and secondary evidence will not be admissible, unless its absence is accounted for.[91]

Evidence of Contract of Shipment.—The bill of lading is the best evidence of the contract for the shipment and delivery of goods and it is error to permit parol evidence thereof.[92]

Action Founded on Bill of Lading.—Where an action against a common carrier is founded on a bill of lading, then the bill of lading must be produced in evidence, or its nonproduction must be accounted for, and its substance proved as alleged.[93] When a petition alleged that a shipment was made on through bills of lading, and at agreed and through rates, for the "whole route," it was founded on special contract evidenced by bill of lading, and not on common-law liability of the carrier, and the plaintiff was not entitled to recover without introducing the same in evidence, or accounting for its nonproduction, and then establishing its substance as alleged.[94]

Where Issue as to Ownership.—Where, in an action against a carrier for injuries to a shipment, there is an issue as to ownership, it is error to permit plaintiff to testify to the contents of the bill of lading, in order to show that

90. Plaintiffs' petition alleged that Y. was indebted to a cotton seed meal company, and in payment of that debt delivered to them forged negotiable ocean bills of lading representing cotton seed meal in transit; that the cotton seed meal company indorsed these bills of lading to defendants, who in turn negotiated them; plaintiffs becoming the ultimate holders. The bill further charged that plaintiffs had sold cotton seed meal for the company, and that these sales had been rescinded for delay in delivery, and that, by means of a bonus, the cotton seed meal company induced plaintiffs to buy these negotiable ocean bills of lading; that plaintiffs paid the consideration to persons named by defendants; that the negotiations were really carried on for the benefit of defendants, the cotton seed meal company being largely indebted to them, and their only hope for payment being the sale of these bills of lading; and that this sale was made with full knowledge of the dishonor of the bills of lading by the persons on whom they were drawn. Held, that the particular allegations showed that defendants were not the owners of these bills of lading, and, as they were not parties to the transactions between plaintiffs and the cotton seed meal company, the allegations that their only hope of payment was in the sale of these negotiable bills of lading can not be taken as true on demurrer, but the petition must be construed to mean that they were not the owners, but were only interested in the sale, of the bills of lading, as they would receive the proceeds; furthermore that this sale was made with full knowledge of the dishonor of the bills of lading can not mean that defendants knew of the forgeries, but only that they were refused by the persons to whom the meal had been shipped, and hence showed no liability of defendants, so that a demurrer to the bill was properly sustained. Moritz *v.* Adoue (Tex. Civ. App.), 138 S. W. 1140.

91. Proof of contents of bill of lading. —Texas Cent. R. Co. *v.* Fowler (Tex. Civ. App.), 102 S. W. 732.

92. Evidence of contract of shipment. —St. Louis, etc., R. Co. *v.* Cates, 15 Tex. Civ. App. 135, 38 S. W. 648. See Missouri, etc., R. Co. *v.* Cocreham, 10 Tex. Civ. App. 166, 30 S. W. 1118; Missouri, etc., R. Co. *v.* Carter, 9 Tex. Civ. App. 677, 29 S. W. 565.

93. Action for damages to goods.—G., H. & S. A. R. Co. *v.* Van Winkle & Co., 3 Texas App. Civ. Cas., § 443; Texas, etc., R. Co. *v.* Logan, 3 Texas App. Civ. Cas., § 186.

Action for damages to live stock.—Texas, etc., R. Co. *v.* Wheat, 2 Texas App. Civ. Cas., § 165; Missouri Pac. R. Co. *v.* Nicholson, 2 Texas App. Civ. Cas., § 168.

94. Texas, etc., R. Co. *v.* Wheat, 2 Texas App. Civ. Cas., § 165.

he was the owner; the bill not having been produced, and no notice given to defendant to produce it.[95]

Action Based on Common-Law Liability of Carrier.—In an action against a common carrier founded on the common-law liability of such carrier, it is not necessary to produce in evidence a bill of lading of the property alleged to have been lost or injured, as, if there was a special contract restricting the common-law liability of the carrier, it devolved on the carrier to allege and prove it.[96]

§ 599. Proof of Execution of Bill.—Where Carrier Admits Receipt of Goods.—In a suit against a carrier for failure to deliver a portion of a shipment of goods alleged to have been intrusted to it for transportation, error, if any, in admitting in evidence a bill of lading covering the shipment, over objection for lack of proof of execution, becomes immaterial, where the carrier admits that it received the goods sued for, and sets up delivery.[97]

Though Bill of Lading Produced by Terminal Carrier.—Where a box of goods was shipped from New York City to a town in Georgia, and was there delivered by the last of the connecting line of carriers to the consignee, if such final carrier making the delivery received and held the through bill of lading issued by the initial carrier, on the trial of an action for damages brought by the consignee against the final carrier, on the ground that the box had been broken open and some of its contents lost and other articles damaged, the bill of lading, produced by the defendant under notice, was admissible in evidence on behalf of the plaintiff without proof of execution.[98]

Proof of Signature.—In an action against a carrier for failure to deliver freight, where the evidence sufficiently proves the bill of lading, it is not error to admit it in evidence over the objection that there was no proof of its execution, of the signature thereto, or of the agency of the person purporting to have signed it.[99]

Proof of Agency of Signer Where Bill of Lading Not Basis of Pleading.—A bill of lading is a private instrument which, if it does not constitute in whole or in part the basis of the pleading, is not admissible in evidence, if the same purports to be signed by a clerk or a servant, without proving the agency of such clerk or servant.[1]

§ 600. Province of Court.—It is in the province of the court to interpret a bill of lading.[2]

§ 601. Instructions.—The rule that instructions should be construed together and will be held unobjectionable if when so taken they are clearly not misleading, applies to suits against a carrier based upon bills of lading.[3]

95. Where issue as to ownership.—Texas Cent. R. Co. *v.* Fowler (Tex. Civ. App.), 102 S. W. 732.

96. Action based on common-law liability of carrier.—Missouri Pac. R. Co. *v.* Nicholson, 2 Texas App. Civ. Cas., § 168.

Action for injury to live stock.—Missouri Pac. R. Co. *v.* Nicholson, 2 Texas App. Civ. Cas., § 168.

97. Where carrier admits receipt of goods.—Georgia, etc., R. Co. *v.* Florida, etc., Tobacco Co., 10 Ga. App. 38, 72 S. E. 511.

98. Though bill of lading produced by terminal carrier.—Louisville, etc., R. Co. *v.* Yudelson, 135 Ga. 731, 70 S. E. 576.

99. Proof of signature.—Richmond, etc., R. Co. *v.* Benson, 86 Ga. 203, 12 S. E. 357, 22 Am. St. Rep. 446.

1. Bill of lading not basis of pleading.—Western Union Tel. Co. *v.* Bertram, 1 Texas App. Civ. Cas., § 1152.

2. Province of court.—It is the province of the court to interpret the written contract of affreightment between the parties. Savannah, etc., R. Co. *v.* Pritchard, 77 Ga. 412, 1 S. E. 261, 4 Am. St. Rep. 92.

3. Instruction.—In the suit the court instructed that if, when plaintiff discovered that the corn was delivered to R., R. was solvent, and by the exercise of ordinary prudence plaintiff could have collected the price from R. before insolvency, but did not exercise such care, he could not recover against

§ 602. Directing Verdict.—Where a so-called demand for a shipment of freight was made by the transferee of an "order notify" bill of lading of a railroad company which thereby agreed to transport certain cotton from and to named points within the state, before it was indorsed by the one having the legal title thereto, the direction of a verdict by the trial judge in favor of the plaintiff on the basis of a suit brought by the transferee to recover damages and interest from date of demand for failure to deliver cotton by virtue of the terms of the contract contained in the bill of lading before its indorsement is revisible error.[4]

Evidence of Forgery Uncontradicted.—In action against carrier to recover for negligence in issuing bills of lading for goods not actually delivered, uncontradicted evidence that the bills of lading as delivered did not include goods not received, but were fraudulently altered, required verdict for defendant.[5]

defendant on an estoppel. Held, that the instruction was not objectionable on the theory that it was confused and misleading, and calculated to induce the jury to believe that, if they found against plaintiff on the issue of the estoppel, they would find for defendant also on all the other issues, the charge preceding the portion in question having stated that, if the jury believed the shipment was ordered "closed" according to custom, they should find for plaintiff on that issue, and that, if the jury believed that the shipment was ordered "open," yet plaintiff was misled by defendant's act in transmitting a "closed" bill of lading, they should find for plaintiff on that issue. Smith *v.* Landa, 45 Tex. Civ. App. 446, 101 S. W. 470, affirmed, no op.

4. Albany, etc., R. Co. *v.* Merchants', etc., Bank, 73 S. E. 637, 137 Ga. 391.

5. Evidence of forgery uncontradicted. —Franklin Trust Co. *v.* Philadelphia, etc., R. Co., 237 Pa. 519, 85 Atl. 855.

CHAPTER VII.

Shipping Receipts.

I. Issuance, Form and Requisites, § 603.
II. Construction and Operation, §§ 604-617.
  A. As Contract of Parties, §§ 604-607.
    a. In General, § 604.
    b. Effect of Acceptance, § 605.
    c. Receipt Filled Out by Shipper, § 606.
    d. Conditions on Back, § 607.
  B. As Contract of Bailment or Mere Receipt for Goods, § 608.
  C. As to Initial or Connecting Carrier, § 609.
  D. As Agreement to Carry to Destination, § 610.
  E. As to Rate of Freight, § 611.
  F. Effect of Recitals as to Receipt, and Quantity of Goods, § 612.
  G. Effect of Admission That Goods in "Good Order," § 613.
  H. Reference to Bill of Lading to Be Thereafter Issued, § 614.
  I. Effect Where Bill of Lading Subsequently Issued, § 615.
  J. Receipt Accepted after Shipment Received, § 616.
  K. Parol Evidence to Alter, Explain or Contradict, § 617.

§ 603. Issuance, Form and Requisites.—Proof of Execution.—Proof that a receipt of goods alleged to have been delivered to an express company was signed by a clerk of the company employed to receive and deliver property at its office; that the clerk had acted in that capacity for several years; that the witness knew the clerk and had seen a large number of receipts signed by him for property delivered; and that he believed the signature to be the clerk's signature—sufficiently showed the execution of the receipt so as to bind the company.[1]

Receipt in Form of Steamboat Bill of Lading.—See post, "As Contract of Bailment or Mere Receipt for Goods," § 608.

Acceptance.—See post, "Effect of Acceptance," § 605.

Conditions on Back.—See post, "Conditions on Back," § 607.

§§ 604-617. Construction and Operation—§§ 604-607. As Contract of Parties—§ 604. In General.—In the absence of fraud or imposition, a receipt delivered by a common carrier to a person shipping goods must be held to be the contract between the parties.[2]

Receipt Made Out by Shipper and Presented to Carrier.—Where a shipper and owner of goods, at the time of delivering the same to an express company for transportation, also delivers to the express company for its signature a blank receipt, filled up by him at his office, containing the names of both parties, and a series of conditions and clauses regulating the manner of transportation and the liability of the express company in certain cases and contingencies, and such receipt, at the time of the delivery of the merchandise, is presented by the shipper to the express company for its signature, and is signed by the latter and returned to the shipper, it constitutes a special contract, binding upon both parties.[3]

Express Receipts.—A receipt given by an express company to the consignor

1. **Proof of execution.**—Armstrong *v.* Fargo (N. Y.), 8 Hun 175.

2. **As contract of parties.**—Huntington *v.* Dinsmore (N. Y.), 4 Hun 66, 6 Thomp. & C. 195.

3. **Receipt made out by shipper and presented to carrier.**—Falkenan *v.* Fargo, 44 How. Prac. 325, 35 N. Y. Super. Ct. 332, affirmed in 55 N. Y. 642.

of goods is the contract by which the obligations of the parties must be determined.[4]

§ 605. Effect of Acceptance.—A consignor, by accepting a receipt which provided for delivery without requiring the production of a receipt or bill of lading, accepted such provision as part of the contract.[5]

Express Receipt.—The acceptance of receipt by the consignor from an express company for the carriage of a package implies an accession to its terms, thereby creating a contract equally as binding as though signed by both parties.[6]

Express Receipt Accepted without Reading.—In the absence of artifice or concealment,[7] the acceptance, without objection, by a shipper, of an express company's receipt for goods delivered, though it be unread at the time, constitutes a contract between the parties, and binds them as to the conditions contained in it.[8]

§ 606. Receipt Filled Out by Shipper.—A shipper of goods who fills out a blank receipt contained in a book previously furnished by an express company for his use, and obtains the signature of the company's agent thereto upon delivering to him a package for transportation, will be presumed to know the contents of the receipt, and if he receives such receipt without objection, his assent to its conditions will, in the absence of fraud, be conclusively presumed.[9]

§ 607. Conditions on Back.—Conditions printed on the back of a receipt for goods, given by a carrier which directed the attention of the shipper to such conditions, are not binding on the shipper.[10]

§ 608. As Contract of Bailment or Mere Receipt for Goods.—An instrument delivered by a carrier's agent to the shipper, reciting the delivery of certain packages "marked and signed as stated to be shipped as per directions below, subject to the conditions and exceptions of the company's bill of lading," signed by the shipper and by the carrier's agent, was a mere receipt for the goods for the purpose of shipping them to the point named in the memorandum following the shipper's signature, and was not a contract by the carrier to ship the goods.[11] Where plaintiff contracted to sell goods to defendant to be shipped to D., via C., and delivered the goods to the carrier who signed a dray ticket, or receipt, presented by the shipper, describing the goods, and stating they were for defendant, at D., to which the carrier added the words "To M.," the receipt was not evidence of a contract to carry to D., but only to keep the goods safely and redeliver on account for their value.[12]

Contract of Bailment to Be Ascertained from Both Receipt and Verbal Agreement.—Where one of the terms indorsed on a shipper's receipt was that packages should be marked with the consignee's name, and the con-

4. **Express receipts.**—Collender *v.* Dinsmore, 55 N. Y. 200, 14 Am. Rep. 224, reversing 64 Barb. 457.

5. **Effect of acceptance.**—Singer *v.* Merchants' Despatch Transp. Co., 191 Mass. 449, 77 N. E. 191, 114 Am. St. Rep. 635.

6. **Express receipt.**—Adams Exp. Co. *v.* Carnahan, 94 Am. St. Rep. 279, 29 Ind. App. 606, 63 N. E. 245, 64 N. E. 647.

7. **Express receipt accepted without reading.**—Knapp *v.* Wells, Fargo & Co., 119 N. Y. S. 117, 134 App. Div. 712.

8. Soumet *v.* National Exp. Co. (N. Y.), 66 Barb. 284.

9. **Receipt filled out by shipper.**—Pacific Exp. Co. *v.* Foley, 46 Kan. 457, 26 Pac. 665, 26 Am. St. Rep. 107, 12 L. R. A., N. S., 799.

10. **Conditions on back.**—A carrier gave a shipper a receipt for goods which referred to a bill of lading to be given thereafter, and directed attention to certain conditions printed on the back. Held, that the conditions were a mere notice, not binding on the shipper, since the receipt did not constitute a contract of shipment. Merchants' Dispatch Transp. Co. *v.* Furthmann, 47 Ill. App. 561, affirmed in 149 Ill. 66, 36 N. E. 624, 41 Am. St. Rep. 265.

11. **As contract of bailment or mere receipt for goods.**—Pittsburgh, etc., R. Co. *v.* Bryant, 36 Ind. App. 340, 75 N. E. 829.

12. Fleming *v.* Mills, 5 Mich. 420.

signor purposely omitted the name from the boxes, and was promised by the shipper's Philadelphia agent that the Indianapolis agent should be ordered not to deliver the goods till directed, but the latter delivered them before, and the consignee failed without paying, in a suit for negligence; the contract of bailment must be ascertained by the jury from both the receipt and the verbal arrangement.[13]

Receipt in Form of Steamboat Bill of Lading.—The fact that a receipt given by a railroad company for freight received and transported over its road is in form like a steamboat bill of lading, does not affect the liability of the company, if the receipt given was intended only as a receipt.[14]

§ 609. As to Initial or Connecting Carrier.—Where a defendant railroad company gave a receipt for certain goods in controversy, reciting: "Received of National Motor Vehicle Company, by the Panhandle Railroad Company, 4 crates batteries, consigned, etc.," in the absence of any explanation of the meaning of the words "by the Panhandle Railroad Company," such receipt will not be construed to mean that such railroad was the initial carrier, and was not a branch [15] or subordinate line of defendant's system.

Receipt a Through Contract, Custom.—Through contract is created by the shipping receipt in the following form, and parol evidence is inadmissible to show a custom limiting its effect as such: "Milwaukee,—188-. —Shipped the following articles, in good order, to be delivered in like good order, as addressed without unnecessary delay. Consigned to H., Onekama, Mich.;" on the face of which the carrier's agent stamped and wrote: "F. & P. M. R. R. Co.—Rec'd Nov. 2, 1887. —By agent, P., Milwaukee." [16]

§ 610. As Agreement to Carry to Destination.—A shipping receipt for goods delivered to a carrier for transportation to a specified destination implies an agreement by the carrier to carry the goods to their destination.[17]

§ 611. As to Rate of Freight.—A dray ticket given by the carrier, acknowledging the receipt of the goods, and containing a statement as to the rate of freight, is not conclusive as to such rate.[18]

§ 612. Effect of Recitals as to Receipt, and Quantity of Goods.—A receipt given by the carrier to a transfer company, to whom consignor had delivered the goods, is sufficient to show a delivery by the consignor to the carrier.[19]

Recitals as to Quantity of Goods.—The recitals in a shipping receipt as to the quantity of the goods received does not estop the carrier from showing the quantity actually received.[20]

13. **Contract of bailment to be ascertained from both receipt and verbal agreement.**—Union R., etc., Co. *v.* Riegel, 73 Pa. 72.

14. **Receipt in form of steamboat bill of lading.**—Flash, etc., Co. *v.* New Orleans, etc., R. Co., 23 La. Ann. 353.

15. **As to initial or connecting carrier.** —Hoye *v.* Pennsylvania R. Co., 100 N. Y. S. 190, 114 App. Div. 821, affirmed in 191 N. Y. 101, 83 N. E. 586.

16. **Receipt a through-contract-custom.** —Hansen *v.* Flint, etc., R. Co., 73 Wis. 346, 41 N. W. 529, 9 Am. St. Rep. 791.

17. **As agreement to carry to destination.**—A shipper delivered goods to one railroad, to be carried to a point on another road. In an action against the latter for loss of part of the goods, a receipt for the goods was introduced signed by defendant's agent. The receipt was in the usual form issued by defendant. Held, to imply an agreement by defendant to carry the goods to their destination. Landes *v.* Pacific Railroad, 50 Mo. 346.

18. **As to rate of freight.**—Wood *v.* Fleetwood, 22 Mo. 560.

19. **Effect of recitals as to receipt and quantity of goods received.**—New York, etc., Steamship Co. *v.* Weiss (Tex. Civ. App.), 47 S. W. 674.

20. A drayman was to deliver cotton on board a steamboat. He took freight receipts, which were afterwards taken up and a bill of lading issued. 53 bales were properly delivered, and, by mistake, 20 bales were delivered aboard another steamer and a freight receipt taken in her name. The other steamer took up

As Evidence of Contents of Package.—A receipt given by an agent of an express company for a sealed package, stating that it is "said to contain" a certain sum of money, is not prima facie evidence of the amount actually inclosed in the package.[21]

§ 613. Effect of Admission That Goods in "Good Order."—A receipt given by a carrier stating that goods received by it for shipment were in good order is not, as against the carrier, conclusive on that question.[22] A shipping receipt for boxed goods, reciting that they are received "in apparent good order except as noted [contents and condition of contents of packages unknown]," raises no presumption that the goods are received in good condition.[23] And does not prevent a carrier from proving what their actual conditions was when delivered.[24]

§ 614. Reference to Bill of Lading to Be Thereafter Issued.—Where on delivery of goods to a carrier, its agent delivered a receipt describing the goods "to be shipped as per directions below, subject to the conditions and exceptions of the company's bill of lading," but no bill of lading was ever executed or delivered, the carrier's uniform bill of lading was not thereby made a part of the receipt or contract of shipment.[25]

§ 615. Effect Where Bill of Lading Subsequently Issued.—Where a temporary receipt is issued by a carrier in contemplation of the substitution of a bill of lading, the bill of lading when issued is the first and only contract between the parties.[26] While a receipt delivered to the truckman of a shipper by the carrier, upon receipt of goods containing conditions touching the conveyance thereof, if the only written evidence of the contract of shipment, is binding on the consignee, yet such receipt can not be considered as expressing the contract of the parties, where it was surrendered and a bill of lading issued in its stead,[27] and is inadmissible in an action for loss of or injury to the goods.[28] The fact that the receipt and bill of lading contained substantially the same limitations of liability on the part of the carrier does not tend to show that the receipt remained the contract between the parties.[29]

§ 616. Receipt Accepted after Shipment Received.—Where there is a verbal agreement of carriage, under which the shipper accepts and loads the

all the receipts, and issued a bill of lading for 73 bales, and afterwards the 20 bales were lost. Held, not to estop the first-named boat to show that only 53 bales were actually received. Dean *v.* King, 22 O. St. 118.

21. **As evidence of contents of package.**—Fitzgerald *v.* Adams Exp. Co., 24 Ind. 447, 87 Am. Dec. 341.

22. **Effect of admission that goods in "good order."**—Illinois Cent. R. Co. *v.* Cowles, 32 Ill. 116.

Effect of admission that goods were received in good order.—In a suit against a common carrier, the libelant makes a prima facie case by producing the receipt of the carrier, "Received in good order;" but these words do not constitute an agreement; they are a mere admission, and may be explained or contradicted by the carrier. Seller *v.* Pacific, Fed. Cas. No. 12,644, Deady 17, 1 Ore. 409.

23. Mears *v.* New York, etc., R. Co., 52 Atl. 610, 75 Conn. 171, 56 L. R. A. 884, 96 Am. St. Rep. 192.

24. Mears *v.* New York, etc., R. Co., 96 Am. St. Rep. 192, 75 Conn. 171, 52 Atl. 610, 56 L. R. A. 884.

25. **Reference to bill of lading to be thereafter issued.**—Pittsburgh, etc., R. Co. *v.* Bryant, 36 Ind. App. 340, 75 N. E. 829.

26. **Effect where bill of lading subsequently issued.**—Washburn-Crosby Co. *v.* Boston, etc., R. Co., 180 Mass. 252, 62 N. E. 590.

27. Merchants' Dispatch Transp. Co. *v.* Furthmann, 47 Ill. App. 561, affirmed in 149 Ill. 66, 36 N. E. 624, 41 Am. St. Rep. 265.

28. Receipts for goods delivered for carriage which were taken up when a bill of lading was made are inadmissible in an action for loss of the goods, they having been superseded by the bill of lading. Blanchard *v.* Page (Mass.), 8 Gray 281.

29. Merchants' Dispatch Transp. Co. *v.* Furthmann, 47 Ill. App. 561, affirmed in 149 Ill. 66, 36 N. E. 624, 41 Am. St. Rep. 265.

car, it can not be varied or modified by a receipt which the carrier's agent thereafter delivers to the shipper, folded up, and which the shipper, without knowledge of its contents, puts in his pocket.[30]

§ 617. Parol Evidence to Alter, Explain or Contradict.—A carrier's receipt is not, as against the shipper, conclusive evidence of the contract,[31] but merely prima facie evidence of the delivery of goods; and evidence is admissible to prove by parol such facts as will show that the written instrument never had any legal existence or binding force, and that it was given under such circumstances that it failed to contain the agreement of the parties[32] but not to change the legal import and effect of the writing. Thus, a carrier's receipt for merchandise "in store," to be forwarded to a city at so much per barrel, is a contract to vary which no parol evidence is admissible.[33]

Goods Sent "C. O. D."—Where the consignor retains the carrier's receipt for goods as the only contract of carriage, it can not be shown by parol that the goods were sent C. O. D.,[34] or where the receipt contains the letters "C. O. D." that the goods were to be delivered without payment pursuant to an understanding between the shipper and the consignee.[35]

Parol Evidence to Explain Ambiguity.—Ambiguous words or phrases in a shipping receipt may be explained[36] and the meaning of abbreviations proved by parol;[37] as, for instance, the letters, "C. O. D.,"[38] or the words "Care R. R. Agt. Callaham."[39]

30. **Receipt accepted after shipment received.**—Stoner *v.* Chicago, etc., R. Co., 109 Iowa 551, 80 N. W. 569.

It is competent to put in evidence the fact that goods were shipped under a parol agreement, and that the receipt of the company (the carriers) embodying different terms was not delivered to the shipper till several days after the goods had been shipped under the oral agreement, to rebut the presumption arising against the shipper from his having the receipt. Strohn *v.* Detroit, etc., R. Co., 21 Wis. 554, 94 Am. Dec. 564. See ante, "As Contracts of Bailment or Mere Receipt for Goods," § 608.

31. **Parol evidence to alter, explain or contradict.**—Pereira *v.* Central Pac. R. Co., 66 Cal. 92, 4 Pac. 988.

32. Purcell *v.* Southern Exp. Co., 34 Ga. 315.

33. Niles *v.* Culver (N. Y.), 8 Barb. 205.

34. **Goods sent "c. o. d."**—Smith *v.* Southern Exp. Co., 104 Ala. 387, 16 So. 62.

35. In an action against an express company to recover the value of a package which had been received by the company for transportation, and for which a receipt had been given by the company in which the letters "C. O. D." were used, it is not competent for the express company to prove by parol former shipments of goods by the same consignor to the same consignee, where receipts using the same letters were given and the goods delivered without payment being first required, pursuant to an understanding to that effect between the consignee and consignor, as such proof would change the legal import and effect of the written contract. American Exp. Co. *v.* Lesem, 39 Ill. 312.

36. **Parol evidence to explain ambiguity.**—Savannah, etc., R. Co. *v.* Collins, 77 Ga. 376, 3 S. E. 416, 4 Am. St. Rep. 87.

37. American Exp. Co. *v.* Lesem, 39 Ill. 312.

38. In an action against an express company to recover the value of a package which had been received by the company for transportation, for which a receipt had been given in which the letters "O. C. D." were used, parol evidence is admissible to prove the meaning of those letters. American Exp. Co. *v.* Lesem, 39 Ill. 312.

Parol evidence is admissible to explain the letters "C. O. D.," followed by an amount, in dollars, in an action for goods delivered to an express company C. O. D. Collender *v.* Dinsmore, 55 N. Y. 200, 14 Am. Rep. 224.

39. A railroad company, on receiving for transportation certain articles addressed to a point beyond its line, gave the following receipt: "* * * Received from J. * * * the following articles for shipment to W., Cedar Keys, Fla.: 1 bdl. bedding. [Name,] Care R. R. Agt., Callahan. [Signed] D., Agt." In an action to recover for the loss of the goods, held, that the words, "Care R. R. Agt., Callahan," are ambiguous, and that they may be explained by parol evidence. Savannah, etc., R. Co. *v.* Collins, 77 Ga. 376, 3 S. E. 416, 4 Am. St. Rep. 87.

CHAPTER VIII.

Special Contracts.

I. Contracts for Transportation of Goods, §§ 618-711.
  A. Power to Contract, §§ 618-621.
    a. Power to Contract as Private Carrier, § 618.
    b. Power to Contract Jointly or Severally, § 619.
    c. Power to Contract to Carry beyond Terminus, § 620.
    d. Contracts with Connecting Carrier, § 621.
  B. Authority to Make Contract, §§ 622-637.
    a. Agents of Road, §§ 622-634.
      (1) In General, § 622.
      (2) Local or Station Agent, §§ 623-631.
        (a) Business at His Own Station, §§ 623-624.
          aa. In General, § 623.
          bb. Presumption as to and Proof of Want of Authority, § 624.
        (b) As to Station Other than His Own, § 625.
        (c) Shipments to His Station from Another, § 626.
        (d) Respecting Trains in Which Shipment to Be Made, § 627.
        (e) Point Where Railroad Has No Office or Agent, § 628.
        (f) Contract to Carry beyond Carrier's Own Line, § 629.
        (g) Not to Deliver without Surrender of Bill of Lading, § 630.
        (h) Notice of Special Damages, § 631.
      (3) Traveling Freight Agent, 632.
      (4) Live Stock Agent, § 633.
      (5) Express Drivers, § 634.
    b. Receiver of Road, § 635.
    c. Power of Consignor to Bind Consignee, § 636.
    d. Agent of Owner or Shipper, § 637.
  C. Form, Requisites, and Validity, §§ 638-656.
    a. In General, § 638.
    b. Consideration, § 639.
    c. Offer and Acceptance—What Constitutes Contract, § 640.
    d. Mutuality and Meeting of Minds, § 641.
    e. Writing—Validity of Verbal Contract, §§ 642-643.
      (1) In General, § 642.
      (2) Authority of Agent, § 643.
    f. Failure or Inability of Shipper to Read Contract, § 644.
    g. Signing, § 645.
    h. Fraud, § 646.
    i. Mistake, §§ 647-648.
      (1) As to Rate, § 647.
      (2) Misclassification of Goods, § 648.
    j. Discrimination and Overcharge, § 649.
    k. Necessity for Actual Receipt of Goods, § 650.
    l. Effect of Partial Invalidity, § 651.
    m. Conformity to Rates, Rules and Classification of State Corporation Commission, § 652.
    n. Evidence as to Contract, § 653-656.
      (1) Parol Evidence, § 653.
      (2) Bill of Lading or Receipt, §§ 654-655.
        (a) In General, § 654.
        (b) Whole Document in Evidence, § 655.
      (3) Freight Account or Bill, § 656.

D. Construction, Operation and Effect, §§ 657-689.
a. In General, § 657.
b. Rules of Construction, § 658-663.
(1) In General, § 658.
(2) Practical Construction Given by Parties, § 659.
(3) Separable or Entire Contract, § 660.
(4) Alternative Conditions, § 661.
(5) Contracts Partly Written and Partly Printed, § 662.
(6) Clerical Errors, § 663.
c. Laws Governing, § 664.
d. Course of Dealing, Usage and Custom, § 665.
e. Persons Bound, § 666.
f. Persons Entitled to Benefit, § 667.
g. When Liability Accrues, § 668.
h. Duties and Obligations of Carrier and Shipper, § 669-687.
(1) Obligation as Fixed by Law, § 669.
(2) Special Contract as Superseding Common-Law Liability, § 670.
(3) Effect of Acceptance of Rate Offered, § 671.
(4) Obligation of Carrier to Receive, Transport and Deliver, § 672-675.
(a) In General, § 672.
(b) Continuing Offer to Carry, § 673.
(c) Goods to Be Carried beyond Terminus of Carrier's Line, § 674.
(d) Transportation "at Owner's Risk," § 675.
(5) Obligation of Shipper to Furnish Freight, § 676.
(6) Point Where Goods to Be Received, § 677.
(7) Destination, § 678.
(8) Property Concerning Which Parties Negotiating, § 679.
(9) Quantity to Be Shipped or Carried, § 680.
(10) Option as to Mode of Shipment, § 681.
(11) Route, § 682.
(12) Stop-Over Privilege, § 683.
(13) Loading and Unloading, § 684.
(14) Time of Delivery to Carrier, § 685.
(15) Time to Be Consumed in Transportation, § 686.
(16) Agreements for Liquidated Damages, § 687.
i. Liability as Bailee, § 688.
j. Liability as Warehouseman, § 689.
E. Transfer or Assignment, § 690.
F. Performance or Breach, §§ 691-710.
a. What Constitutes a Breach, §§ 691-692.
(1) When Special Effort to Perform Required, § 691.
(2) Shipment of Bonded Goods on Unbonded Vessel, § 692.
b. Demand of Performance, § 693.
c. Tender of Property, § 694.
d. Excuses for Breach or Nonperformance, §§ 695-709.
(1) Act of God, § 695.
(2) "Perils of River," Navigation and Fire, § 696.
(3) Mobs and Strikes, § 697.
(4) Military Occupation, § 698.
(5) Nonpayment of Freight, § 699.
(6) Merchandise Not Branded as Required by Statute, § 700.
(7) Nondelivery by Shipper, § 701.
(8) Change of Legal Rate, § 702.
(9) Particular Stipulations or Contracts, §§ 703-709.
(a) Time Contracts, § 703.
(b) Contracts to Carry by Particular Train or Vessel, § 704.

(c) Contract to Carry Perishables, § 705.
(d) Stipulation as to Destination at Which Carrier Has No Agency, § 706.
(e) Contract to Carry Beyond Terminus, § 707.
(f) Contract for Future Transportation, § 708.
(g) Contract to Carry Specific Quantity or Number, § 709.
e. Waiver of Breach, § 710.
G. Modification or Rescission, § 711.
II. Contracts for Cars or Other Means of Transportation, §§ 712-755.
A. Requisites and Validity, §§ 712-730.
a. Capacity to Contract, §§ 712-714.
(1) In General, § 712.
(2) Contract to Furnish Cars of Another Road, § 713.
(3) Contract to Furnish Cars on Line of Connecting Road, § 714.
b. Authority of Agent, §§ 715-723.
(1) Necessity, § 715.
(2) Authority of Station Agent, §§ 716-720.
(a) In General, § 716.
(b) Proof of Authority, § 717.
(c) Time When Cars to Be Furnished, § 718.
(d) Station or Place Where Cars to Be Furnished, § 719.
(e) Verbal Contract, § 720.
(3) Traveling Agent, § 721.
(4) General Freight Agent, § 722.
(5) Conductor, § 723.
c. Certainty and Definiteness, § 724.
d. Consideration, § 725.
e. Date of Contract, § 726.
f. Mutuality, § 727.
g. Offer and Acceptance, § 728.
h. Writing, § 729.
i. Effect of Partial Invalidity, § 730.
B. Construction and Operation, §§ 731-736.
a. In General, § 731.
b. Persons Bound and Persons Entitled to Benefit, § 732.
c. Time When Cars to Be Furnished, § 733.
d. Contract with Owner of Private Railroad, § 734.
e. Contract for Track Facilities, § 735.
f. Agreement to Haul Defective Car, § 736.
C. Performance or Breach, §§ 737-755.
a. What Constitutes a Breach, §§ 737-740.
(1) Refusal to Permit Use of Cars, § 737.
(2) Failure to Tender Cars in Time, § 738.
(3) Furnishing Defective Cars, § 739.
(4) Requisition Essential Where Contract to Furnish as Ordered, § 740.
b. Liability of Carrier for Breach, §§ 741-753.
(1) In General, § 741.
(2) Effect of Statute Allowing Recovery of Penalty, § 742.
(3) Tender of Property for Transportation, § 743.
(4) Road Not Owning Cars, § 744.
(5) Road Not Equipped with Cars of Character to Be Furnished, § 745.
(6) Failure to Furnish Refrigerator Cars, § 746.
(7) Effort to Procure Foreign Cars, § 747.
(8) Excuses for Breach or Nonperformance, §§ 748-753.
(a) In General, § 748.
(b) Act of God, § 749.
(c) Unavoidable Accident or Casualties, § 750.

(d) Storms, § 751.
(e) Wrecks, § 752.
(f) Unprecedented Traffic, § 753.
c. Liability of Shipper for Breach, § 754.
d. Waiver of Cause of Action Against Carrier, § 755.
III. Merger, §§ 756-760.
A. General Rule, § 756.
B. Contract Executed after Carriage Begun, §§ 757-758.
a. In General, § 757.
b. Ratification or Adoption by Negotiation of Bill of Lading, § 758.
C. Written Contract Executed after Breach of Parol Contract, § 759.
D. Receipt for Freight Accepted after Shipment Received, § 760.
IV. Modification and Rescission, § 761.
V. Actions against Carrier for Breach of Contract, §§ 762-786.
A. Nature and Form of Remedy, § 762.
B. Limitation, in Contract, of Time for Bringing Action, § 763.
C. Demand, § 764.
D. Persons Who May Sue, §§ 765-767.
a. Shipper, § 765.
b. Forwarding Agent, § 766.
c. Consignee, § 767.
E. Pleading, §§ 768-773.
a. Complaint, Declaration or Petition, §§ 768-772.
(1) Where Contract Distributive as to Time, § 768.
(2) Necessary Allegations, § 769.
(3) Sufficiency of Allegation, § 770.
(4) Theories of Case, § 771.
(5) Aider by Subsequent Pleadings and Verdict, § 772.
b. Plea or Answer, § 773.
F. Issues, Proof and Variance, § 774.
G. Questions for Jury, § 775.
H. Evidence, §§ 776-784.
a. Presumptions and Burden of Proof, § 776.
b. Admissibility, §§ 777-782.
(1) Relevancy and Competency, § 777.
(2) Parol Evidence, § 778.
(3) Best and Secondary Evidence, § 779.
(4) Custom, § 780.
(5) Necessity for Production of Bill of Lading, § 781.
(6) Evidence as to Net Profits, § 782.
c. Reception of Evidence, § 783.
d. Sufficiency of Evidence, § 784.
I. Instructions, § 785.
J. Verdict, § 786.
VI. Damages, §§ 787-798.
A. Liability, §§ 787-788.
a. In General, § 787.
b. Breach of Contract Other than That Sued on, § 788.
B. Duty of Shipper to Mitigate Damages, § 789.
C. Elements of Damage, §§ 790-793.
a. Loss of Profits, § 790.
b. Expense of Renotifying and Reshipping, § 791.
c. Increased Freight and Extra Charges, § 792.
d. Breach of Particular Contracts, § 793.
D. Measure of Damages, §§ 794-795.
a. Breach by Carrier, § 794.
b. Breach by Shipper, § 795.

E. Special Damages, § 796.
F. Proof of Damages, § 797.
G. Release of Damages, § 798.
VII. Interference by One Carrier with Contract of Another, § 799.
VIII. Contracts to Furnish Freight, § 800.
IX. Contracts for Drayage or Hauling, § 801.
X. Contracts Enlarging Carrier's Liability, § 802.

§§ 618-711. Contracts for Transportation of Goods—§§ 618-621. Power to Contract—§ 618. Power to Contract as Private Carrier.—A common carrier may become a private carrier, and by special agreement undertake for hire to carry that which he is under no obligation to carry.[1]

§ 619. Power to Contract Jointly or Severally.—There is no statute to prevent two or more persons from jointly, or jointly and severally, contracting to transport goods from one place to another.[2]

§ 620. Power to Contract to Carry beyond Terminus.—The doctrine is now firmly established, and has been long acquiesced in and acted upon, that a railroad company may, by contract, bind itself to transport property beyond its own line,[3] through another state, over other railroads,[4] and to assume the responsibility of a common carrier over the entire route,[5] unless restrained by its charter.[6] A railroad company has this power and right, independently of statute.[7] Such contract is binding,[8] when made with the proper representatives of

1. **Power to contract as private carrier.**—Judgment (App. 1907) 80 N. E. 636, reversed. Cleveland, etc., R. Co. *v.* Henry, 170 Ind. 94, 83 N. E. 710. See post, "Limitation of Liability," chapter 14.

2. **Power to contract jointly or severally.**—Hirsch *v.* New England Nav. Co., 93 N. E. 524, 200 N. Y. 263, reversing judgment, 113 N. Y. S. 395, 129 App. Div. 178.

3. **Power to contract to carry beyond terminus.**—*Kentucky.*—Louisville, etc., R. Co. *v.* Foster, 13 Ky. L. Rep. 637.

Maine.—Perkins *v.* Portland, etc., R. Co., 47 Me. 573, 74 Am. Dec. 507.

New Jersey.—Saunders *v.* Adams Exp. Co., 78 N. J. L. 441, 74 Atl. 670.

Pennsylvania.—A carrier may contract to carry goods beyond its line, and is responsible for the carriage of the goods contracted for. Baltimore, etc., Steamboat Co. *v.* Brown, 54 Pa. 77.

Texas.—Houston, etc., R. Co. *v.* Hill, 63 Tex. 381.

4. *United States.*—Michigan Cent. R. Co. *v.* Mineral Springs Mfg. Co. (U. S.), 16 Wall. 318, 21 L. Ed. 297.

A railroad company has power as a carrier to receive goods which are to be transported beyond the end of the company's own route. Camblos *v.* Philadelphia, etc., R. Co., Fed. Cas. No. 2,331, 4 Brewst. 563, 9 Phila. 411.

Kentucky.—Louisville, etc., R. Co. *v.* Foster, 13 Ky. L. Rep. 637.

Maine.—Perkins *v.* Portland, etc., R. Co., 47 Me. 573, 74 Am. Dec. 507.

Massachusetts.—Hill Mfg. Co. *v.* Boston, etc., R. Corp., 104 Mass. 122, 6 Am. Rep. 202; Feital *v.* Middlesex R. Co., 109 Mass. 398, 12 Am. Rep. 720.

Minnesota.—Stewart *v.* Erie, etc., Transp. Co., 17 Minn. 372, Gil. 348.

Missouri.—Moore & Son *v.* Henry, 18 Mo. App. 35; Loomis *v.* Wabash, etc., R. Co., 17 Mo. App. 340.

North Carolina.—Phillips *v.* North Carolina R. Co., 78 N. C. 294.

New York.—Bissell *v.* Michigan, etc., R. Co., 22 N. Y. 258; Burtis *v.* Buffalo, etc., R. Co., 24 N. Y. 269; Buffett *v.* Troy, etc., R. Co., 40 N. Y. 168; Root *v.* Great Western R. Co., 45 N. Y. 524; Ogdensburg, etc., R. Co. *v.* Pratt, 49 How. Prac. 84; Schroeder *v.* Hudson River R. Co., 12 N. Y. Super. Ct. 55.

Vermont.—Noyes & Co. *v.* Rutland, etc., R. Co., 27 Vt. 110; Morse *v.* Brainerd, 41 Vt. 550.

5. Phillips *v.* North Carolina R. Co., 78 N. C. 294.

6. Stewart *v.* Erie, etc., Transp. Co., 17 Minn. 372, Gil. 348; Phillips *v.* North Carolina R. Co., 78 N. C. 294.

7. A special contract by a railroad company for the delivery in a limited time of freight received by it, to be transported to a point on a connecting line, is valid, independently of statute, and the company is liable for a failure to comply therewith. Burtis *v.* Buffalo, etc., R. Co., 24 N. Y. 269.

8. Burtis *v.* Buffalo, etc., R. Co., 24 N. Y. 269; Noyes & Co. *v.* Rutland, etc., R. Co., 27 Vt. 110.

the company.[9] Although such power is not expressly granted by the act of incorporation, it may be conferred by implication, as necessary to the proper and profitable exercise of the powers specially enumerated in the charter.[10]

§ 621. Contracts with Connecting Carrier.—Unless restrained by its charter, a railroad corporation may make contracts with connecting carriers for through transportation over their routes, such contracts being made with a bona fide purpose to regulate traffic in a reasonable and just manner.[11]

§§ 622-637. Authority to Make Contract—§§ 622-634. Agents of Road—§ 622. In General.—The railroad companies must, in the very nature of things, have agents, and those agents must have the authority to do those things necessary to accomplish the designs of the agency.[12] Hence contracts made by shipping agents of carriers within the reasonable scope of their employment or business are binding on the carrier.[13] Aliter, as to contracts not within the apparent scope of their authority.[14] Unless some special reasons known to the shipper restrict the general powers of the agent, the public have a right to assume that the agents of carriers, whether corporations or not, and whether such agents be local or general, have the right to bind such carriers by contracts with their employers in the particular line of business in which they are employed or are represented or held out as being employed, and within the scope of the business of their principals.[15] A carrier is bound by a contract in its name, by another as agent, who has been accustomed to make similar contracts as agent for such carrier, with its knowledge and approbation, and which have been ratified or recognized by it.[16]

Delivery by Mistake to Unauthorized Agent.—Though a parcel was given to an employee of a telegraph company for delivery under the mistaken belief that he was a messenger, the mere carrying away of such parcel by the employee for delivery was not a conversion thereof; it not having been taken with intent to assert any property right therein on the part of the bailee.[17]

§§ 623-631. Local or Station Agent—§§ 623-624. Business at His Own Station—§ 623. In General.—A railroad, which places an agent in

9. **Proper parties.**—Moore & Son *v.* Henry, 18 Mo. App. 35.

10. Perkins *v.* Portland, etc., R. Co., 47 Me. 573, 74 Am. Dec. 507.

Act 1847, c. 270, assumes, by irresistible implication, that railroad companies may make valid contracts for the transportation of goods to points beyond the termini of their own line. Burtis *v.* Buffalo, etc., R. Co., 24 N. Y. 269.

11. **Contracts with connecting carrier.**—Stewart *v.* Erie, etc., Transp. Co., 17 Minn. 372, Gil. 348.

12. **Agents of road.**—San Antonio, etc., R. Co. *v.* Timon, 45 Tex. Civ. App. 47, 50, 99 S. W. 418.

13. Lincoln Tent, etc., Co. *v.* Missouri Pac. R. Co., 86 Neb. 338, 125 N. W. 603.

14. An agent of an express company did not have authority to agree for the company to pay the undertaker's charges on a corpse and ship it. Gathright *v.* Pacific Exp. Co. (Tex.), 145 S. W. 1185, affirming judgment, Pacific Exp. Co. *v.* Gathright (Tex. Civ. App.), 130 S. W. 1035.

15. McCarty *v.* Gulf, etc., R. Co., 79 Tex. 33, 37, 15 S. W. 164.

Where a shipper enters the offices of a carrier, he may assume that the person therein dealing with him has a right to bind the carrier, and, if he has not, the carrier must prove want of authority. Pecos, etc., R. Co. *v.* Cox (Tex. Civ. App.), 150 S. W. 265.

16. Texas, etc., R. Co. *v.* Nicholson, 61 Tex. 491.

17. **Delivery by mistake to unauthorized agent.**—Plaintiff had been in the habit of delivering gowns to a certain messenger, employed in the parcel delivery department of defendant telegraph company, and when he called for a package pursuant to plaintiff's request she believed that he was still a messenger, though he had meanwhile been promoted to a clerical position, and could not, in the performance of his duty, actually deliver packages; but he accepted plaintiff's package and turned it over to a messenger for delivery. Held, that the clerk did not become plaintiff's agent for the delivery of the package, but remained defendant's servant, so as to make it liable for his negligence in misdirecting it. Murray *v.* Postal Tel. Cable Co., 96 N. E. 316, 210 Mass. 188, Ann. Cas. 1912C, 1183.

charge of its business at a station and empowers him to contract for the shipment of freight, holds him out to the public as having authority to contract with reference to all the necessary and ordinary details of the business, and within the range of such business he is a general agent.[18] The authority of a local agent does not extend to the performance of any act for which he has not express authority, unless it is a thing necessary for him to do in the execution of the powers expressly given.[19]

§ 624. Presumption as to and Proof of Want of Authority.—A local station agent in charge of a railway company's business at a station is presumed to have authority to represent the company in all matters connected with the transaction of its business at that particular station.[20] Such agents are presumed to have authority to make contracts for the transportation of freight, and in the absence of any adequate notice to the public of any limitations upon their authority in that respect the corporation will be bound thereby, both as to rates and as to expedition of transportation and delivery.[21] A shipper contracting with a railroad station agent for the transportation of freight is under no legal obligation to make inquiries concerning the station agent's instructions or powers,[22] for the burden of proof of want of authority is on the railroad.[23]

§ 625. As to Station Other than His Own.—A local station agent's authority extends only to the control of the carrier's business at his own station.[24] Such agent has no implied authority to make any contract which will bind the company with reference to freight to be received at a different station than his own;[25] when he attempts to do so, his act, until ratified, will not bind the company. This is in harmony with the well-settled rule that a principal is not bound by a contract made by an agent that is not within the actual or apparent scope of the agent's authority.[26] The existence of express authority to make such contract is susceptible of proof.[27]

18. Business at his own station.—Gulf, etc., R. Co. *v.* Jackson, 99 Tex. 343, 89 S. W. 968, reversing judgment (Civ. App.), 86 S. W. 47; Gulf, etc., R. Co. *v.* Brown, 99 Tex. 349, 89 S. W. 971; reversing judgment (Civ. App.), 86 S. W. 343.

19. Gulf, etc., R. Co. *v.* Jackson, 99 Tex. 343, 89 S. W. 968, 969, reversing 86 S. W. 47; Gulf, etc., R. Co. *v.* Dinwiddie, 21 Tex. Civ. App. 344, 51 S. W. 353; Missouri, etc., R. Co. *v.* Belcher, 88 Tex. 549, 32 S. W. 518.

20. Presumption as to and proof of want of authority.—Gulf, etc., R. Co. *v.* Hodge, 10 Tex. Civ. App. 543, 30 S. W. 829; Gulf, etc., R. Co. *v.* Short (Tex. Civ. App.), 51 S. W. 261, affirmed in 93 Tex. 685, no op.; Pacific Exp. Co. *v.* Needham, 37 Tex. Civ. App. 129, 83 S. W. 22.

21. Easton *v.* Dudley, 78 Tex. 236, 14 S. W. 583.

22. San Antonio, etc., R. Co. *v.* Williams (Tex. Civ. App.), 57 S. W. 883.

23. Burden of proof of want of authority.—Gulf, etc., R. Co. *v.* Hume Bros., 6 Tex. Civ. App. 653, 24 S. W. 915.

Where a contract of shipment is entered into between a shipper and a station agent, it is not necessary for the former to prove that the latter has the authority to make the contract. Gulf, etc., R. Co. *v.* Short (Tex. Civ. App.), 51 S. W. 261, affirmed in 93 Tex. 685, no op.

In an action by a shipper for failure to furnish transportation at a time agreed on, the court properly refused to instruct the jury that the burden was on plaintiff to prove that the station master had authority to make the contract. Gulf, etc., R. Co. *v.* Wright, 1 Tex. Civ. App. 402, 21 S. W. 80, citing Easton *v.* Dudley, 78 Tex. 236, 14 S. W. 583; McCarty *v.* Gulf, etc., R. Co., 79 Tex. 33, 15 S. W. 164; Gulf, etc., R. Co. *v.* McCarty, 82 Tex. 608, 18 S. W. 716.

24. As to station other than his own.—Hunter *v.* St. Louis, etc., R. Co., 167 Mo. App. 624, 150 S. W. 733.

25. Gulf, etc., R. Co. *v.* Jackson, 99 Tex. 343, 89 S. W. 968, reversing 86 S. W. 47; Gulf, etc., R. Co. *v.* Dinwiddie, 21 Tex. Civ. App. 344, 51 S. W. 353; Missouri, etc., R. Co. *v.* Belcher, 88 Tex. 549, 32 S. W. 518.

26. Gulf, etc., R. Co. *v.* Hodge, 10 Tex. Civ. App. 543, 548, 30 S. W. 829.

27. Evidence held to require submission to the jury of the authority of a carrier's agent to contract for shipment from another station than that at which he was employed. McManus *v.* Chicago, etc., R. Co. (Iowa), 136 N. W. 769.

§ 626. Shipments to His Station from Another.—Prima facie the person in charge of a station at one place (station agent) has no power to act for the railway company in reference to the making of a contract of shipment to his station from another station on the railroad. Nor would it be the duty of the station agent receiving notice relating to a shipping contract made elsewhere, to transmit such notice to agent at the station at which the shipment was made. His failing to do so would involve the road in no liability.[28]

§ 627. Respecting Trains in Which Shipment to Be Made.—A local freight agent of a railroad had no authority to bind the railroad by an agreement that freight shall be shipped in a solid train without mixing any other freight with it or that the train shall be drawn by a single engine,[29] but he has authority to contract for shipment by a certain train.[30]

§ 628. Point Where Railroad Has No Office or Agent.—In an action for a breach of contract of carriage from a point outside defendant's line, where it appeared without dispute that defendant had no office, agent, or servant at the point of shipment, the delivery of the goods at the depot at such point to a man whose cap bore defendant's name was insufficient to establish the agency of such person.[31]

§ 629. Contract to Carry beyond Carrier's Own Line.—See post, "Connecting Carriers," Part V.

To Deliver at Place Other than His Station.—Where a contract for the carriage of goods was to deliver the goods at a place on the company's road other than a regular station, the burden was on the shipper to show that the contract was made with an agent having authority to make it.[32]

§ 630. Not to Deliver without Surrender of Bill of Lading.—A carrier's local agent, on receiving a shipment, could bind the carrier by an agreement not to deliver without surrender of the bill of lading which the shipper attached to a draft upon the consignee.[33]

§ 631. Notice of Special Damages.—Where a carrier had 35 or 40 employees in a freight office, only 3 of whom were authorized to make shipping contracts, notice of special damages likely to result from delay in a shipment

28. **Shipments to his station from another.**—Missouri, etc., R. Co. *v.* Belcher, 88 Tex. 549, 32 S. W. 518, citing Kauffman *v.* Robey, 60 Tex. 308, 310; Labbe *v.* Corbett, 69 Tex. 503, 507, 6 S. W. 808; Irvine *v.* Grady, 85 Tex. 120, 125, 19 S. W. 1028; Taylor *v.* Taylor, 88 Tex. 47, 29 S. W. 1057.

The local agent of an express company had no authority to make a contract for a shipment from another city having an office to his own city. Gathright *v.* Pacific Exp. Co. (Tex.), 145 S. W. 1185, affirming 130 S. W. 1035.

29. **Respecting trains in which shipment to be made.**—Gulf, etc., R. Co. *v.* Jackson, 99 Tex. 343, 89 S. W. 968, reversing 86 S. W. 47.

30. A shipper may rely upon the authority of a station agent to make a special contract for the shipment of fruit trees by a certain train, and need not affirmatively prove such authority. Pacific Exp. Co. *v.* Needham, 37 Tex. Civ. App. 129, 83 S. W. 22.

31. **Point where railroad has no office or agent.**—Rosenfield *v.* Central Vermont R. Co., 97 N. Y. S. 905, 111 App. Div. 371.

32. **To deliver at point other than his station.**—Newport News, etc., R. Co. *v.* Reed, 10 Ky. L. Rep. 1020; Illinois Cent. R. Co. *v.* Swanson, 92 Miss. 485, 46 So. 83.

Plaintiff shipped some goods over defendant's line, and persuaded the local agent to write on the bill of lading that the car was to be switched to a certain street at destination; the agent stating that the company had no switching facilities at that street and protesting against so billing the shipment. Held, that the agent had no authority to agree to bill the goods to that point, and plaintiff could not, under the circumstances, recover for the company's failure to deliver the goods as required by the bill of lading. Illinois Cent. R. Co. *v.* Swanson, 92 Miss. 485, 46 So. 83.

33. **Not to deliver without surrender of bill of lading.**—Sturges *v.* Detroit, etc., R. Co., 166 Mich. 231, 131 N. W. 706.

given to the person who caused the bill of lading to be executed, and who was put forward to transact the business for the carrier, was notice to it.[34]

§ 632. Traveling Freight Agent.—The traveling freight agent of a railroad company may bind his company by an agreement with a shipper to place freight on a siding of another line at a particular rate, where the agent had for several years been quoting rates to the shipper and arranging for the latter's shipments, the agreement in question was the inducement which procured the shipment and the agent's authority had never before been questioned by the company.[35]

§ 633. Live Stock Agent.—If a carrier's live stock agent did not have authority to make a contract with a shipper to ship by a certain train on a connecting line, the carrier ratified the contract by billing the car and forwarding it to its junction for shipment on the connecting line.[36]

§ 634. Express Drivers.—An express driver is the general agent of the company to collect goods for carriage and has all necessary implied powers within the scope of his authority for that purpose, so that the company is bound by his statement that a parcel which the consignor's agent offered to remark was all right without re-addressing it. There is no legal rule that carriers will take only parcels legibly addressed, or that parcels without address at all may not be given to, and taken by, the carrier's driver.[37]

§ 635. Receiver of Road.—A contract by a receiver of a railway to furnish certain transportation to a shipper, is of force only during the receivership, and does not bind the company succeeding to the control of the property.[38]

§ 636. Power of Consignor to Bind Consignee.—In a suit by a consignee against a carrier for loss or injury to goods in transit, the carrier may ordinarily show that the consignor made a special contract of shipment, and that the consignee received the shipment subject to such contract and to the risks assumed by the consignor.[39]

§ 637. Agent of Owner or Shipper.—Where the owner leaves goods with an agent to be shipped, he will be bound by the agent's contract with the carrier, though the carrier knew who the owner was.[40] Where diamonds in an unmarked package are delivered by a servant of the sender to an express company, with a note directing them to be sent C. O. D., and a receipt not for a C. O. D. package is given to the servant, who fails to show it to the sender, the company is not liable for failure to collect on delivery, as the sender is charged with notice of the contents of the receipt.[41]

34. **Notice of special damages.**—Chicago, etc., R. Co. *v.* Planters', etc., Oil Co., 88 Ark. 77, 113 S. W. 352.

35. **Traveling freight agent.**—New York Cent. & H. R. Co. *v.* Deer Creek Lumber Co., 49 Pa. Super. Ct. 453.

36. **Live stock agent.**—Kirby *v.* Chicago, etc., R. Co., 242 Ill. 418, 90 N. E. 252.

37. **Express drivers.**—Magnus *v.* Platt, 115 N. Y. S. 824, 62 Misc. Rep. 499.

38. **Receiver of road.**—Houston, etc., R. Co. *v.* Campbell, 91 Tex. 551, 45 S. W. 2, 43 L. R. A. 225, reversing 40 S. W. 431.

39. **Power of consignor to bind consignee.**—Perkins Co. *v.* American Exp. Co., 199 Mass. 561, 85 N. E. 895. See post, "Limitation of Liability," chapter 14.

40. **Agent of owner or shipper.**—Jennings *v.* Grand Trunk R. Co., 52 Hun 227, 5 N. Y. S. 140, 23 N. Y. St. Rep. 15, affirmed in 127 N. Y. 438, 28 N. E. 394.

Plaintiffs purchased meat of a packing company, requesting it to ship it to a certain point. The agent of defendant railroad company solicited the shipment, and furnished the agent of the packing company with the blank form of contract, which was filled out and signed by defendant's agent, and plaintiffs paid the freight. Held, that the contract was binding between defendant and plaintiffs, although not signed by the latter or by the packing company as their agent. Eckles *v.* Missouri Pac. R. Co., 87 S. W. 99, 112 Mo. App. 240.

41. Smith *v.* Southern Exp. Co., 104 Ala. 387, 16 So. 62.

§§ 638-656. Form, Requisites, and Validity—§ 638. In General.—A contract by a carrier which disables it to perform its duty to the public will not be enforced.[42] But a contract whereby a salt company agrees to ship 66 per cent of its output over a certain railroad, which in return agrees to ship at as low a rate as may be offered by any other road, is not void as against public policy.[43]

Form.—No particular form or solemnity of execution is required for a contract of a common carrier to transport goods.[44]

Receipt and Release.—A shipping receipt and a release signed by the shipper, exempting the carrier from loss or injury to the goods, though separate and independent papers, contain the contract of the parties and neither alone can be treated as the shipping contract.[45]

Instructions to Captain of Lighter.—Where a shipper notified a carrier that he desired to ship some lumber, and the carrier sent its own lighter to transport it to the depot; and the shipper informed the carrier that instructions as to shipment would be given to the captain of the lighter, to which arrangement, which was the usual one between the parties, the carrier assented, the instructions to the captain formed a part of the contract of affreightment.[46]

Specification of Number of Cars to Be Shipped.—A contract binding a carrier to transport as many car loads of grain as the shipper may desire to be transported is valid, at all events, as to grain already transported under it.[47]

§ 639. Consideration.—Delivery and Acceptance of Goods.—A delivery of goods to, and their acceptance by, a carrier, is sufficient consideration for his undertaking to safely carry the same.[48]

Mere Promise to Forward Freight Already en Route.—The mere promise of a common carrier, without additional consideration, to forward freight already on the route by an earlier train than usual, is not evidence from which the jury may infer a special contract to do so.[49]

Sufficiency of Statement of Consideration.—An instrument in the following form: "Lead from B. to St. L. at 22½ per 100. All lead shipped by

42. **Validity in general.**—Chouteau *v.* Union R., etc., Co., 22 Mo. App. 286.

43. Texas, etc., R. Co. *v.* Texas, etc., R. Co., 35 Tex. Civ. App. 387, 80 S. W. 567.

44. **Form.**—Mobile, etc., R. Co. *v.* Jurey, 111 U. S. 584, 591, 28 L. Ed. 527, 4 S. Ct. 566.

45. Plaintiff made a shipment on a road connecting with defendant's, and took a receipt from the agent, on which were the words, "Valuation limited to $5.00 per 100 pounds in case of total loss." On the back was printed a statement that the valuation as agreed upon should cover loss or damage from any cause whatever; also a printed statement that the owner of the goods, in accepting the receipt, agrees to be bound by all its stipulations. Plaintiff then delivered to the company a paper stating that he had voluntarily shipped at a lower rate than the general tariff, on condition that he release the company from all liability for loss or damage, and containing a formal release to the company and all other railroad or transportation companies to whom the goods should be delivered for transportation. This release was attached to the manifest, went along with the goods, and was received by defendant. The shipping receipt was not under seal, or witnessed, and was returned by plaintiff. The goods were received by defendant at a freight rate agreed on between the roads. Held, that the shipping receipt and release were separate and independent papers, prepared and signed at the instance of the company receiving the goods, and that defendant could not, in its own interest, elect which of the two should be treated as the shipping contract. Woodburn *v.* Cincinnati, etc., R. Co., 40 Fed. 731.

46. **Instructions to captain of lighter.**—Uptegrove *v.* Central R. Co., 16 Misc. Rep. 14, 37 N. Y. S. 659, 73 N. Y. St. Rep. 278.

47. **Specification of number of cars to be shipped.**—Cleveland, etc., R. Co. *v.* Closser, 126 Ind. 348, 26 N. E. 159, 22 Am. St. Rep. 593, 9 L. R. A. 754.

48. **Delivery and acceptance of goods.**—McCauley *v.* Davidson, 10 Minn. 418, Gil. 335.

49. **Mere promise to forward freight already in route.**—Memphis, etc., R. Co. *v.* Reeves (U. S.), 10 Wall. 176, 19 L. Ed. 909.

C. & R. to be forwarded by M. R. F. S. & G. R. R., at above rates from January 1, 1873 to January 1, 1874, and above rates guarantied for same time," states a valid contract upon a sufficient consideration.[50]

Stating Quantity to Be Shipped.—An offer of a carrier to ship not exceeding a certain amount at a certain rate per ton, and the acceptance by the shipper of the offer without stating the quantity he agrees to ship, do not create a contract binding on the carrier, as he receives no consideration for giving the shipper an option to ship any quantity he pleases.[51]

Contract to Transport at Rate Fixed by Railroad Commission Act.—A carrier's contract to transport freight at certain rates is not void, as being an agreement to do what it was legally required to do by the railroad commission act, and hence without consideration.[52]

Railroad Inducing Purchase by Promise of Rate.—There is a contract of carriage, on a sufficient consideration, where defendant railroad company, to induce plaintiff to buy ice, promised him to transport it from where it was to a certain point for a certain amount per ton, and on the faith of that promise he bought it.[53]

§ 640. Offer and Acceptance—What Constitutes Contract.—The mere promise by a carrier to ship certain freight at a certain rate does not constitute a contract on which an action can be based, unless the shipper accepts the offer by agreeing to ship the goods at such rate.[54]

Letter Containing Offer Shown to Third Person.—A letter from the superintendent of a railroad addressed to a certain person, offering to receive freight and transport it over his road and over the road of connecting lines, is not a contract to carry between the company and a third person to whom the letter was shown, and who on the strength of it sent freight over the road.[55]

Statements of Solicitor of Freight Shipment.—Statements by the commercial agent of a common carrier, duly authorized to solicit shipments of freight, that the time consumed in the transportation of certain live stock will be four days, and that there will be no delays, do not constitute an express contract on the part of the carrier to ship and deliver within that time.[56]

Reply an Objection to Rate Offered.—A reply by a shipper to the effect that unless a lower rate was allowed he could not do much shipping is not an acceptance.[57]

Interlineation Made by Carrier on Bill of Lading Tendered by Shipper.—Where a shipper tenders to a carrier an unsigned bill of lading which the latter alters and returns to shipper and thereafter forwards the goods, the unsigned bill was a mere proposition to ship on certain conditions which was not accepted by the carrier; and the consignor having failed to dissent to the counter proposition made by the carrier, is bound by the altered bill of lading.[58]

50. Sufficiency of statement of consideration.—Riggins *v.* Missouri, etc., R. Co., 73 Mo. 598.

51. Stating quantity to be shipped.—Chicago, etc., R. Co. *v.* Dane, 43 N. Y. 240.

52. Contract to transport at fixed rate by railroad commission act.—Thompson *v.* San Antonio, etc., R. Co., 11 Tex. Civ. App. 145, 32 S. W. 427.

53. Railroad inducing purchase by promise of rate.—Bigelow *v.* Chicago, etc., R. Co., 104 Wis. 109, 80 N. W. 95.

54. Offer and acceptance what constitutes contract.—Southern R. Co. *v.* Wilcox, 99 Va. 394, 39 S. E. 144.

55. Letter containing offer shown to third person.—East Tennessee, etc., R. Co. *v.* Montgomery, 44 Ga. 278.

56. Statements of solicitor of freight shipment.—International, etc., R. Co. *v.* Wentworth, 87 Tex. 311, 28 S. W. 277.

57. Plaintiff wrote defendant, a carrier, that he was about to lease a quarry, and wanted a quotation of rates for shipments to be made during the two years following. On defendant's answer, giving a rate, providing the shipments were reasonably distributed during the season, plaintiff replied that, unless he got a lower rate, he would not be able to do much shipping. Held, not to amount to a contract. Steffen *v.* Mississippi, etc., R. Co., 56 S. W. 1125, 156 Mo. 322.

58. Interlineation made by carrier on bill of lading tendered by shipper.—In an action by the consignee against the initial carrier, for goods forwarded to De-

Shipment from Point Other than That Named.—The shipment of the goods from another point than that named in the offer is not an acceptance.[59]

Arrangement with Peach Growers Association.—An arrangement between a railroad company and a committee of a peach-growers' convention to run a special train during a peach season so as to connect by a certain hour with another road does not constitute a special contract with any peach grower to transport peaches by such train, nor to render the company liable for any peaches not accepted for transportation by such train.[60]

Contract to Carry Over Connecting Lines.—A contract whereby the liability of a railroad company is sought to be extended beyond the carriage over its own line and safe delivery to the next connecting carrier will not be inferred from loose and doubtful expressions, but must be established by clear and satisfactory evidence. Taking a through fare on the receipt of cattle for transportation over the line of the initial carrier and a connecting line or lines does not establish such liability.[61]

§ 641. Mutuality and Meeting of Minds.—To constitute a contract of carriage, the minds of the parties must meet as to the terms and considerations of the contract.[62]

§§ 642-643. Writing—Validity of Verbal Contract—§ 642. In General.—Neither a bill of lading nor any other writing is necessary to constitute a contract of shipment, an oral contract, in the absence of fraud or imposition, when satisfactorily proved, being as obligatory on both carrier and shipper as a written one.[63] The delivery to, and the receipt by, a common carrier, of a

troit and there destroyed by fire while in the possession of the connecting carrier, it appeared that plaintiff bought the goods from the consignor at Cincinnati, who sent them to the shipper's depot with a bill of lading ready for the carrier's signature. The bill recited that the goods "are to be delivered at Detroit." The carrier interlined the bill with red ink, so that it read, "to be delivered at Toledo for Detroit," signed it, returned it to the consignor, and forwarded the goods to Detroit. The consignor made no objection to the alteration of the bill of lading. Held, that the unsigned bill was a mere proposition to ship on certain conditions which was not accepted by the carrier; and the consignor, having failed to dissent to the counter-proposition made by the carrier, was bound by the altered bill of lading. Muller *v.* Cincinnati, etc., R. Co., 13 O. Dec. 903, 2 Cin. R. 280.

59. **Shipment from point other than that named.**—A freight agent of the defendant's railroad, in answer to inquiries from plaintiff, gave him certain rates from a certain point on the road to New Orleans. Ten days afterwards, plaintiff shipped goods at a different point for New Orleans, and obtained a bill of lading from one who had no authority to bind defendant. Held, that there was no contract with defendant. Robinson *v.* St. Louis, etc., R. Co., 75 Mo. 494.

60. **Arrangement with peach growers association.**—Reed *v.* Philadelphia, etc., R. Co. (Del.), 3 Houst. 176.

61. **Contract to carry over connecting lines.**—Myrick *v.* Michigan Cent. R. Co., 107 U. S. 102, 27 L. Ed. 325, 1 S. Ct. 425; Roy *v.* Chesapeake, etc., R. Co., 61 W. Va. 616, 618, 57 S. E. 39, 31 L. R. A., N. S., 1.

62. **Mutuality and meeting of minds.**—San Antonio, etc., R. Co. *v.* Timon, 45 Tex. Civ. App. 47, 52, 99 S. W. 418.

63. **Writing.**—Judgment, Patrick *v.* Missouri, etc., R. Co., 88 S. W. 330, 5 Ind. T. 742, modified in 75 C. C. A. 434, 144 Fed. 632; Mobile, etc., R. Co. *v.* Jurey, 111 U. S. 584, 28 L. Ed. 527, 4 S. Ct. 566; Alabama, etc., R. Co. *v.* Morris, 167 Ala. 311, 52 So. 891; McNeill *v.* Atlantic, etc., R. Co., 161 Ala. 319, 49 So. 797; Missouri Pac. R. Co. *v.* Graves, 2 Texas App. Civ. Cas., § 676; Missouri Pac. R. Co. *v.* Nicholson, 2 Texas App. Civ. Cas., § 168.

A carrier may legally enter into a parol contract of shipment. Missouri, etc., R. Co. *v.* Carter, 9 Tex. Civ. App. 677, 29 S. W. 565; Texas, etc., R. Co. *v.* Nicholson, 61 Tex. 491; San Antonio, etc., R. Co. *v.* Timon, 45 Tex. Civ. App. 47, 99 S. W. 418; Ft. Worth, etc., R. Co. *v.* Wright, 30 Tex. Civ. App. 234, 70 S. W. 335; Gulf, etc., R. Co. *v.* Irvine (Tex. Civ. App.), 73 S. W. 540; San Antonio, etc., R. Co. *v.* Williams (Tex. Civ. App.), 57 S. W. 883; Missouri, etc., R. Co. *v.* Withers, 16 Tex. Civ. App. 506, 40 S. W. 1073, affirmed in 93 Tex. 691, no op.

When a carrier legally enters into a parol contract of shipment, it will be binding upon the parties as the contract

package plainly marked with the name and address of the person to whom the same is to be forwarded, is equivalent to an express written or verbal direction to the carrier to transport the package as the same is directed,[64] although a statute requires a common carrier to give receipts for merchandise delivered to him.[65] A statutory provision that the transportation of goods by a common carrier shall be considered as commenced from the time the bill of lading is signed does not preclude the liability from commencing before, viz. from the time of the delivery of the goods, so as to make the carrier liable for loss when no bill is issued.[66]

§ 643. Authority of Agent.—In General.—Verbal contract by a railroad station agent for the transportation of freight, binds the railroad company unless the shipper knows that the agent has no such authority.[67]

Stipulations Limiting Agent's Authority.—A written contract for the shipment of cattle, limiting the authority of the carrier's agent to make a verbal contract, does not merge a previous verbal contract made by the agent with the

regulating the shipment, unless voluntarily and mutually changed or abandoned. Missouri, etc., R. Co. *v.* Carter, 9 Tex. Civ. App. 677, 29 S. W. 565.

Contract of affreightment.—Roberts *v.* Riley, 15 La. Ann. 103, 77 Am. Dec. 183.

64. **Mere reception of goods.**—No bill of lading is necessary to create the liability of a common carrier; the mere reception of the goods for the purpose of transportation is sufficient. Shelton *v.* Merchants' Dispatch Transp. Co., 36 N. Y. Super. Ct. 527.

Express company failing to give receipt.—It is not essential to the liability of an express company that they should have given a receipt for the property delivered to them. Gulliver *v.* Adams Exp. Co., 38 Ill. 503.

Cars loaded at shipper's warehouse.—Where a railroad has side tracks running to a shipper's warehouse, on which they run cars to such warehouse to be loaded by the shipper, the freight is to be regarded as delivered to and in the possession of the railroad from the time it is loaded on the car, though no bill of lading has been issued. Illinois Cent. R. Co. *v.* Smyser, 38 Ill. 354, 87 Am. Dec. 301.

65. Failure of a common carrier to give receipts for merchandise delivered to him, as required by Code, § 2139, does not affect his liability relative to such goods. Montgomery, etc., R. Co. *v.* Kolb, 73 Ala. 396, 49 Am. Rep. 54.

66. East Line, etc., R. Co. *v.* Hall, 64 Tex. 615. See, also, Texas, etc., R. Co. *v.* Wheat, 2 Texas App. Civ. Cas., § 165; Texas, etc., R. Co. *v.* Hamm, 2 Texas App. Civ. Cas., § 491.

Rev. St., arts. 281-283, making a carrier's liability begin when the bill of lading is signed, do not apply in case of a parol contract by a railroad company to receive cattle for transportation on a certain day, and the company is liable for breach, though no bill of lading is signed. Texas, etc., R. Co. *v.* Nicholson, 61 Tex. 491; Texas, etc., R. Co. *v.* Hamm, 2 Texas App. Civ. Cas., § 491.

67. **Authority of agent.**—Gulf, etc., R. Co. *v.* Hume Bros., 87 Tex. 211, 27 S. W. 110, reversing 6 Tex. Civ. App. 653, 24 S. W. 915; San Antonio, etc., R. Co. *v.* Williams (Tex. Civ. App.), 57 S. W. 883; Missouri, etc., R. Co. *v.* Withers, 16 Tex. Civ. App. 506, 40 S. W. 1073, affirmed in 93 Tex. 691, no op.

Since an oral contract by a railroad station agent for transportation is binding unless the shipper has knowledge that the agent has no authority to make such contract, it is not error in an action against a railroad on such a contract to refuse to charge on defendant's plea setting up the agent's want of authority to enter into an oral contract. San Antonio, etc., R. Co. *v.* Williams (Tex. Civ. App.), 57 S. W. 883.

This can be so only upon the theory that such agents have ostensible authority to make such contracts. The question in such case would be whether or not the shipper knew of the lack of authority, or was chargeable with such knowledge. Courts probably might take notice of the fact that such agents represent the railway company in their locality in receiving and contracting for the shipment of freight. The public can not take notice of the limitations on their powers unless they are conveyed to the public in such a manner as to authorize the inference that shippers are apprised of them. Hence from the very nature of their office there is apparent authority for the making of freight contracts. San Antonio, etc., R. Co. *v.* Williams (Tex. Civ. App.), 57 S. W. 883.

Question for jury.—Whether the agents had authority to make a verbal contract of carriage and whether the shipper knew of lack of authority on his part to make such contract, is a question for the jury. San Antonio, etc., R. Co. *v.* Timon, 45 Tex. Civ. App. 47, 99 S. W. 418.

shipper, in which the agent agreed to furnish cars ready to receive the cattle on a certain day.[68]

Shipper Knowing That Written Contract Required.—The mere fact that a shipper knew, when the verbal contract for a shipment was entered into, that he would be required to execute a written contract, is not sufficient to constitute a waiver of the rights that accrued under the verbal contract.[69] The shipper's knowledge of what was in former contracts is not notice to him of what will be in the next contract he must sign, especially where there had been instances when he had not been required to sign such written contracts.[70]

Ratification of Unauthorized Contract.—An authorized agent of a railroad company who receives freight for shipment without objection under a parol agreement made by an unauthorized agent, binds the company by his authority, notwithstanding the want of authority by the agent who made the contract.[71]

§ 644. Failure or Inability of Shipper to Read Contract.—In the absence of fraud or mutual mistake, a shipper who is sui juris will not be heard to say that he did not read and understand his duly executed contract of shipment,[72] but he is conclusively presumed, in the absence of fraud and imposition, to have assented thereto, and is bound thereby. It is not fraud for a carrier's agent to fail to read to a shipper, who can not read, certain portions of the receipt in fine print, where the clause omitted is expressive only of the carrier's liability under the law.[73]

§ 645. Signing.—See ante, "Agent of Owner or Shipper," § 637. Neither the signature of the agent of the carrier nor of the shipper is essential to the validity of a contract of carriage and an unsigned bill of lading issued to shipper is evidence of the contract.[74]

§ 646. Fraud.—See "Effect of Overcharge," chapter 16.

§ 647-648. Mistake—§ 647. As to Rate.—Where an agent of a railroad company telegraphed the general agent for a shipping rate, as requested by plaintiffs, and there was a mistake in the reply telegram, which was evident on its face or known to the shippers, they could not seize upon such mistake to take an unfair advantage of it,[75] but where the shipper accepted the quoted

68. **Stipulations limiting agent's authority.**—Gulf, etc., R. Co. *v.* Combes (Tex. Civ. App.), 80 S. W. 1045.

69. **Shipper knowing that written contract required.**—Gulf, etc., R. Co. *v.* Batte (Tex. Civ. App.), 107 S. W. 632.

70. San Antonio, etc., R. Co. *v.* Timon, 45 Tex. Civ. App. 47, 99 S. W. 418, distinguishing Texas, etc., R. Co. *v.* Gallagher (Tex. Civ. App.), 70 S. W. 97.

71. **Ratification of unauthorized contract.**—Gulf, etc., R. Co. *v.* Jackson, 99 Tex. 343, 89 S. W. 968, reversing 86 S. W. 47.

72. **Failure or inability to read contract.**—See ante, "Bills of Lading," chapter 6.

U. S. C. C. A.—Missouri Pac. R. Co. *v.* Harper Bros., 201 Fed. 671, 121 C. C. A. 570; Kellerman *v.* Kansas, etc., R. Co., 136 Mo. 177, 34 S. W. 41, 37 S. W. 828; McFadden *v.* Missouri Pac. R. Co., 92 Mo. 343, 4 S. W. 689, 1 Am. St. Rep. 721. See, also, Wyrick *v.* Missouri, etc., R. Co., 74 Mo. App. 406; Texas, etc., R. Co. *v.* Scrivener, 2 Texas App. Civ. Cas., § 328; International, etc., R. Co. *v.* Watt, 2 Texas App. Civ. Cas., § 781.

73. Hadd *v.* United States, etc., Exp. Co., 52 Vt. 335, 36 Am. Rep. 757.

74. Plaintiff, through an agent, delivered certain goods to defendant railroad company for shipment, and asked for a bill of lading, which was given, but the station agent neglected to sign it. The goods having been lost, plaintiff brought suit for their value, setting up the writing as the contract of shipment. Held, that the paper, while not constituting a written contract, was evidence of the contract actually made, and, in the absence of any evidence to the contrary, established the terms of such contract. Judgment, Patrick *v.* Missouri, etc., R. Co., 88 S. W. 330, 5 Ind. T. 742, modified in 144 Fed. 632, 75 C. C. A. 434.

75. **Mistake.**—Central, etc., R. Co. *v.* Gortatowsky, 123 Ga. 366, 51 S. E. 469.

rate in good faith, and the mistake was not evident, it created a binding contract.[76]

§ 648. Misclassification of Goods.—A carrier, classifying goods received for shipment with knowledge of their character, and collecting the freight under such classification, can not avoid the contract, or its liability for failure to ship according to the contract, on the ground that the goods did not belong to the class named.[77]

§ 649. Discrimination and Overcharge.—See ante, "Overcharge and Discrimination," §§ 182-196.

Discriminatory Contracts.—One who promised a railroad company, in consideration of its laying its rails to his manufactory, and furnishing him money to aid in bringing the raw material thereto, to give the company the transportation of the manufactured product to market at reasonable rates, can not avoid the contract on the ground that it deprived him of rights guaranteed by Pennsylvania Const. art. 17, § 3, declaring that all individuals shall have equal rights to transportation, without discrimination.[78]

Effect of Overcharge.—The fact that the railroad company collected an excessive freight rate at the destination of the stock shipped does not show fraud in the execution of the shipping contract, and such contract is not invalid because of such overcharge.[79]

§ 650. Necessity for Actual Receipt of Goods.—See ante, "Bills of Lading," chapter 6.

§ 651. Effect of Partial Invalidity.—Valid conditions in a shipping contract, which can be separated from those which are understood by both parties to be invalid, can be enforced,[80] but where the purpose of the contract is illegal, as where it is to create an illegal monopoly of an industry by the shipper in the territory served by the carrier, the stipulations, innocent on their face, will not be enforced.[81]

Unauthorized Contract to Carry beyond Carrier's Own Line.—The fact that a station agent exceeds his authority in making a through contract for transportation, does not invalidate such contract for such part of it as lies within his authority.[82]

76. Where a shipper applied to a railroad agent for a rate for the transportation of certain men and horses, and the agent was a commercial agent only, without authority to make a special rate, and he telegraphed to the general agent for one, and the reply, as delivered to the agent, stated an amount lower than the general agent had written, and upon receipt of it the agent quoted a rate, as stated in the telegram, and the shippers accepted it in good faith, and the mistake was not evident, it created a binding contract. Central, etc., R. Co. *v.* Gortatowsky, 51 S. E. 469, 123 Ga. 366.

77. **Misclassification of goods.**—St. Louis, etc., R. Co. *v.* Cash Grain Co., 161 Ala. 332, 50 So. 81.

78. **Discriminatory contracts.** — Bald Eagle, etc., R. Co. *v.* Nittany, etc., R. Co., 171 Pa. 284, 33 Atl. 239, 29 L. R. A. 423, 50 Am. St. Rep. 807.

79. **Effect of overcharge.**—Atchison, etc., R. Co. *v.* Crittenden, 4 Kan. App. 512, 44 Pac. 1000. See, also, post, "Discrimination and Overcharge," chap. 16.

80. **Effect of partial invalidity.**—Grieve *v.* Illinois Cent. R. Co., 104 Iowa 659, 74 N. W. 192.

81. Where a railroad company enters into a contract with a coal company for the carriage of the latter's coal, one clause of which is void as making an illegal discrimination against smaller shippers, and the obvious intent of the contract, read as a whole, is to secure to the coal company an illegal monopoly of the coal industry served by the railroad, the contract will not be disintegrated by the court for the purpose of enforcing against the railroad company other stipulations contained in it, which, though innocent on their face, were entered into with the intent of securing an illegal monopoly to the coal company, and would, if enforced, effect that purpose. Burlington, etc., R. Co. *v.* Northwestern Fuel Co., 31 Fed. 652.

82. **Unauthorized contract to carry beyond carrier's own line.**—Gulf, etc., R. Co. *v.* Hodge, 10 Tex. Civ. App. 543, 30 S. W. 829.

§ 652. Conformity to Rates, Rules and Classification of State Corporation Commission.—All contracts or bills of lading made by carriers as to intrastate shipments, which are inconsistent with the rates, charges, classifications, rules, and regulations adopted by the Corporation Commission, are void.[83] Only such contracts relating to intrastate shipments as are made pursuant to rules and regulations adopted by the Corporation Commission are valid.[84]

§§ 653-656. Evidence as to Contract—§ 653. Parol Evidence.—Since it is not necessary that a contract of affreightment should be in writing, parol evidence of any special agreement is, therefore, admissible, where the contract is oral.[85]

Shipping Receipt Not Embodying Contract.—Where a shipping receipt given the shipper does not embody the contract of shipment, such receipt and parol evidence is admissible to prove a contract to transport the goods.[86]

§§ 654-655. Bill of Lading or Receipt—§ 654. In General.—The bill of lading does not create the contract between the shipper and the common carrier. It has been adopted as a convenient mode of establishing the contract, but it is not an exclusive species of evidence.[87]

§ 655. Whole Document in Evidence.—When a receipt is introduced as evidence of the contract of affreightment, the whole document is in proof; and one part can not be separated from the other in its judicial interpretation.[88]

§ 656. Freight Account or Bill.—An account for freight, usually called a freight bill, though receipted, is not admissible to prove the contract of affreightment or shipment, it not being a bill of lading.[89]

§§ 657-689. Construction, Operation and Effect—§ 657. In General.—In the absence of fraud or imposition, the rights of a carrier and shipper are to be controlled by whatever written contract was entered into at the time the property was received for transportation.[90]

§§ 658-663. Rules of Construction—§ 658. In General.—Strictly Construed against Carrier.—If there is a reasonable doubt as to the con-

83. Conformity to rates, rules and classification of state corporation commission.—St. Louis, etc., R. Co. *v.* Bilby, 35 Okla. 589, 130 Pac. 1089.

84. St. Louis, etc., R. Co. *v.* Bilby, 35 Okla. 589, 130 Pac. 1089.

85. Parol evidence.—Roberts *v.* Riley, 15 La. Ann. 103, 77 Am. Dec. 183; Gulliver *v.* Adams Exp. Co., 38 Ill. 503.

86. Shipping receipt not embodying contract.—In an action by a shipper against a railroad company for neglect to transport goods, it appeared that a verbal contract was made with the carrier to transport the goods, and a receipt was given therefor, merely stating the receipt of the goods marked with the consignee's address. Held, that the receipt and parol contract were admissible to prove a contract to transport the goods, such receipt not being a contract embodying the previous oral engagement. McCotter *v.* Hooker, 8 N. Y. 497, Seld. Notes 150.

87. Bill of lading, receipt.—Dunn *v.* Branner, 13 La. Ann. 452.

88. Whole of document in evidence.—Butler *v.* The Arrow, Fed. Cas. No. 2,237, 6 McLean 470, Newb. Adm. 59.

89. In an action by the shipper to recover damages for injuries to certain goods which defendant, as a common carrier, undertook to transport down the Coosa river from Rome to Greenport, and part of which were loaded on a lighter attached to the side of the steamer, and which was sunk by striking a snag, plaintiff offered to read a receipted freight bill, the items appearing under the headline, "Freight per steamer Georgia to Greensport;" the contention being that defendant violated the contract by using the lighter. Held, that the freight bill was not admissible to prove the contract, it not being a bill of lading. Coosa River Steamboat Co. *v.* Barclay, 30 Ala. 120.

90. Construction, operation and effect.—Addoms *v.* Weir, 108 N. Y. S. 146, 56 Misc. Rep. 487.

struction of a contract of carriage, it is to be construed strictly and most strongly against the carrier.[91]

Words Interpreted in Ordinary Sense.—It is the duty of the court to interpret writings free from ambiguity, and to determine what is meant by words used therein, in an ordinary rather than a peculiar technical or trade sense; and where, in a freight contract, the word "lumber" was used, and there was no evidence that it was used in any other than its common meaning, whether it included ties was for the court.[92]

Hidden or Obscure Meaning.—A hidden or obscure meaning will not be sought for a particular clause of a bill of lading, or shipping contract because its obvious meaning provides for contingencies which are also provided for by other clauses of the same bill.[93]

Construed in Favor of Validity.—See post, "Laws Governing," § 664.

§ 659. Practical Construction Given by Parties.—Where the terms "compressed cotton, any quantity, and uncompressed cotton, any quantity" are used in a tariff sheet, without further amplifying words, the construction placed on said terms by the railroad company, through its agent, as to baled cotton delivered to the railroad and thereafter compressed and then shipped through, when there are no other promulgated rates between the designated points concerning cotton shipments, is competent in determining the meaning of the contract.[94]

§ 660. Separable or Entire Contract.—A contract of carriage, made in Iowa, to take stock from Iowa to Indiana, though regarded as to be partly performed in Iowa and partly in Illinois, is entire and indivisible.[95] When a carrier agreed to carry plaintiff's goods from a point in the state to a location in Canada for a certain freightage, and to advance the customs duties, and collect both the freight and duties at the destination, the contract was indivisible, and the agreement to advance the duties was not a separate and foreign contract.[96]

§ 661. Alternative Conditions.—See post, "Agreements for Liquidated Damages," § 687.

§ 662. Contracts Partly Written and Partly Printed.—Where a contract for the carriage of freight is partly written and partly printed, the written portions will control, and only so much of the printed matter in the blank form used as is consistent with the written portions is of any effect.[97]

§ 663. Clerical Errors.—An apparent clerical error in writing a shipping contract or copying it into the record, by which the shipper is made to agree to pay any loss or damage, to his own property, etc., will be disregarded and

91. **Strictly construed against carrier.**—See post, "Limitation of Liability," chapter 14.

Stipulations in shipping contracts, inserted entirely for the benefit of the carrier, will receive strict construction. Yazoo, etc., R. Co. *v.* Bent, 94 Miss. 681, 47 So. 805, 22 L. R. A., N. S., 821; Standard Milling Co. *v.* White Line Cent. Transit Co., 122 Mo. 258, 26 S. W. 704.

92. **Words interpreted in ordinary sense.**—Greason *v.* St. Louis, etc., R. Co., 112 Mo. App. 116, 86 S. W. 722.

93. **Hidden or obscure meaning.**—Judgment 99 Fed. 1006, 39 C. C. A. 679, affirmed. Texas, etc., R. Co. *v.* Reiss, 22 S. Ct. 253, 183 U. S. 621, 46 L. Ed. 358.

94. **Practical construction given by parties.**—Chicago, etc., R. Co. *v.* Dodson (Okla.), 94 Pac. 673.

95. **Separable or entire contract.**—Illinois Cent. R. Co. *v.* Beebe, 174 Ill. 13, 50 N. E. 1019, 43 L. R. A. 210, 66 Am. St. Rep. 253.

96. Waldron *v.* Canadian Pac. R. Co., 22 Wash. 253, 60 Pac. 635.

97. **Contracts partly written and partly printed.**—Babcock *v.* Lake Shore, etc., R. Co., 49 N. Y. 491.

Bill of lading.—The contract of afreightment, evidenced by a bill of lading partly written and partly printed, is to be gathered from the whole instrument. Robinson Bros. *v.* Merchants' Despatch Transp. Co., 45 Iowa 470.

the agreement treated as one on part of the company to pay the loss if any as therein limited.[98]

§ 664. Laws Governing.—A contract for transportation made by a railroad company is subject to the provisions of the Constitution and laws existing when the contract is made.[99]

Conflict of Laws.—A contract for the transportation of goods is governed as to its nature, construction, validity and effect, by the laws of the state or country where it is made,[1] notwithstanding the initial carrier is a corporation of another state.[2] When there are no circumstances attending the transaction, except the mere execution, delivery and acceptance of a bill of lading, the safest rule to arrive at the intention of the parties is that which upholds, rather than that which defeats, the contract, and the laws of the state under which the contract is valid should be applied.[3]

Contract to Be Partly Performed in State Other than Locus Contractus.—The general rule is that a contract for the carriage of freight from one point in one state to a point in another will, in the absence of proof of a contrary intention, be governed by the law of the place where the contract was entered into,[4] but such contract is not necessarily governed in matters of construction and effect by the laws of the locus contractus especially as to require-

98. **Clerical errors.**—St. Louis, etc., R. Co. *v.* Rogers, 49 Tex. Civ. App. 304, 108 S. W. 1027.

99. **Laws governing.**—State *v.* Atlantic, etc., R. Co., 51 Fla. 578, 646, 40 So. 875.

1. **Conflict of laws.**—*United States.*—The Brantford City, 29 Fed. 373.

Connecticut.—Hale *v.* New Jersey Steam Nav. Co., 15 Conn. 539, 39 Am. Dec. 398.

Illinois.—Michigan Cent. R. Co. *v.* Boyd, 91 Ill. 268; Merchants' Dispatch Transp. Co. *v.* Furthmann, 149 Ill. 66, 36 N. E. 624, 41 Am. St. Rep. 265; Ginsburg *v.* Adams Exp. Co., 160 Ill. App. 566; Waxelbaum *v.* Southern R. Co., 168 Ill. App. 66; Gamble-Robinson Commissioner Co. *v.* Delaware, etc., R. Co., 169 Ill. App. 319; Clingan *v.* Cleveland, etc., R. Co., 163 Ill. App. 568.

Where goods are delivered to a carrier in another state, the contract to be performed there, the laws of that state will govern as to the construction of the contract, and will determine the extent of the carrier's undertaking. Milwaukee, etc., R. Co. *v.* Smith, 74 Ill. 197.

Iowa.—McDaniel *v.* Chicago, etc., R. Co., 24 Iowa 412.

Missouri.—Hartman *v.* Louisville, etc., R. Co., 39 Mo. App. 88; Lord, etc., Co. *v.* Texas, etc., R. Co., 155 Mo. App. 175, 134 S. W. 111.

New York.—First Nat. Bank *v.* Shaw, 61 N. Y. 283; Robertson *v.* National Steamship Co., 1 App. Div. 61, 37 N. Y. S. 69, 72 N. Y. St. Rep. 223.

South Dakota.—Meuer *v.* Chicago, etc., R. Co., 5 S. Dak. 568, 59 N. W. 945, 25 L. R. A. 81, 49 Am. St. Rep. 898.

Texas.—Texas, etc., R. Co. *v.* Davis, 2 Tex. App. Civ. Cas., § 191.

2. A bill of lading, made by certain steamship companies to a shipper in Georgia for carriage of cotton from Savannah to Bremen, via Baltimore, must be deemed executed in Georgia, notwithstanding the initial company is a corporation under the laws of Maryland. Lazard *v.* Merchants', etc., Transp. Co., 78 Md. 1, 26 Atl. 897.

3. Ryan & Co. *v.* Missouri, etc., R. Co., 65 Tex. 13, 57 Am. Rep. 589.

4. **Contract to be partly performed in state other than locus contractus.**—*Connecticut.*—A steamboat was in the business of transporting goods from New York to Providence. The plaintiff owned carriages, which he wished to have transported to Boston. The carriers received them in New York, to convey them to Providence or Boston, and they were lost in the Sound, near Huntington, L. I. Held, that the contract of the parties was to be governed by the laws of New York. Hale *v.* New Jersey Steam Nav. Co., 15 Conn. 539, 39 Am. Dec. 398.

Georgia.—If goods are shipped by connecting carriers from New York to Georgia, and suit is brought in Georgia for damages from delay in delivery by the final carrier after arrival, whether the delivery and taking of the shipping receipt constituted a contract by the shipper with the initial carrier will be determined by the laws of New York, if they be shown. Southern Exp. Co. *v.* Hanaw, 134 Ga. 445, 67 S. E. 944.

If goods are shipped in one state on a through contract and delivered in another by a common carrier (omitting any question of public policy), ordinarily, in the absence of anything to show a contrary intent, the validity, form, and effect of the contract will be determined by the laws of the state where it was made and partly to be performed, under Pol. Code, § 8, providing that the validity, form, and

ments which are to be wholly performed in the latter state.[5] Thus, the courts of Alabama[6] and Ohio[7] have held that where a shipper contracted in one state with a carrier to ship goods and deliver them at a point in another state, the contract, so far as delivery was involved, was to be wholly performed in the latter, and the carrier's liability for failure to deliver depended upon the law of that state, and the court of New Hampshire has held: When a contract is made by a common carrier in one state to transport goods from that state into another, and the goods are lost, the rights of the parties are governed by the law of the state in which the loss happens.[8]

Shipment to Be Held at Destination for Instructions.—In a suit for damages to a car load of potatoes shipped under a contract to ship on defendant's road from a point in Wisconsin to a point in Illinois and there hold for instructions, and a subsequent order given defendant at its Chicago station to ship to Mississippi, the suit will be on the Illinois contract, and defendant's liabilities will be determined by the law of Illinois.[9]

Interstate Commerce.—Where a contract for through transportation of flour from Pond Creek, Okl., to New York, was made in Oklahoma, it was subject to the Oklahoma law to the extent that such law was not an invasion of the exclusive rights of the United States to regulate commerce between the states.[10] A state statute declaring that a consignor, by accepting a bill of lading or written contract for carriage, with a knowledge of its terms, assents to

effect of contracts are determined by the laws of the place where executed. Southern Exp. Co. *v.* Hanaw, 134 Ga. 445, 67 S. E. 944.

Illinois.—Where a contract for the transportation of potatoes was made and partly to be performed in Iowa, its validity and interpretation of the obligation must be governed by the laws of that state, though the shipment might be carried into or through Illinois. Coats *v.* Chicago, etc., R. Co., 87 N. E. 929, 239 Ill. 154.

Iowa.—A contract of affreightment made by a consignor for the consignee, residing in another state, is binding upon the latter, if it is valid under the laws of the state where made. Robinson Bros. *v.* Merchants' Despatch Transp. Co., 45 Iowa 470.

Missouri.—Townsend, etc., Dry Goods Co. *v.* United States Exp. Co., 113 S. W. 1161, 133 Mo. App. 683.

North Dakota.—Hanson *v.* Great Northern R. Co., 18 N. Dak. 324, 121 N. W. 78.

New York.—Robertson *v.* National Steamship Co., 37 N. Y. S. 69, 1 App. Div. 61, 72 N. Y. St. Rep. 223.

South Dakota.—A contract, made in Wisconsin, between a railroad company and a shipper, for transporting live stock and emigrant movables from a point in that state to a point in South Dakota, is to be interpreted by the law of the former state. Meuer *v.* Chicago, etc., R. Co., 5 S. Dak. 568, 59 N. W. 945, 25 L. R. A. 81, 49 Am. St. Rep. 898.

Texas.—A contract made with a railroad company in one state to carry property into another, if valid by the laws of the former, would be valid in the latter. Texas, etc., R. Co. *v.* Davis, 2 Texas App. Civ. Cas., § 191.

A condition contained in a contract made in Arkansas, for the shipment of sheep to be transported from that state to Texas, that "the business of the carrier shall not be delayed by the detention of trains to unload and reload the sheep for any cause whatever," is valid, the condition being valid in Arkansas. Texas, etc., R. Co. *v.* Davis, 2 Texas App. Civ. Cas., § 191.

A shipment from a point within to a point beyond the state is not governed by the local laws. Gulf, etc., R. Co. *v.* Nelson (Tex. Civ. App.), 139 S. W. 81.

Contract for carriage from France through London to New York.—A bill of lading, made in France, providing for the transportation of goods from Havre, France, to London, and from London to New York, is not governed by the law of England, as it was made, and to be performed mainly outside of England. Robertson *v.* National Steamship Co., 1 App. Div. 61, 37 N. Y. S. 69, 72 N. Y. St. Rep. 223.

5. Carter & Co. *v.* Southern R. Co., 59 S. E. 209, 3 Ga. App. 34; Atlanta, etc., R. Co. *v.* Broome, 60 S. E. 355, 3 Ga. App. 641.

6. Southern Exp. Co. *v.* Gibbs, 155 Ala. 303, 46 So. 465, 18 L. R. A., N. S., 874.

7. Jacobson & Co. *v.* Adams Exp. Co., 1 O. C. C. 381, 1 O. C. D. 212.

8. Gray *v.* Jackson & Co., 51 N. H. 9, 12 Am. Rep. 1.

9. **Shipment to be held at destination for instructions.**—Mahaffey *v.* Wisconsin Cent. R. Co., 147 Ill. App. 43.

10. **Interstate commerce.**—Erie R. Co. *v.* Pond Creek Mill, etc., Co., 89 C. C. A. 568, 162 Fed. 878.

the rate of hire, the time, place, and manner of delivery therein stated; but that his assent to any other modification of the carrier's obligations contained therein can only be manifested by his signature to the contract, should not be construed as merely affecting the vehicle through which a transportation contract can be proved, but was a valid exercise of legislative power affecting interstate commerce originating in Oklahoma, to which transportation contracts made in that state were subject.[11]

Effect of Hepburn Act.—The Hepburn act (Act June 29, 1906, c. 3591, § 7, 34 Stat. 595 [U. S. Comp. St. Supp. 1907, p. 909]), relating to the liability of common carriers of property in interstate commerce for loss or damage to such property, but which contains the proviso "that nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing law," leaves a shipper free to resort to the laws of a state applicable to his contract.[12]

§ 665. Course of Dealing, Usage and Custom.—Where, at the time of the shipment of goods by an agent to his principal, no particular agreement is made between the agent and the carrier, the fact that they have an habitual course of dealing with respect to contracts of transportation is a material and important element in determining the construction to be put upon their acts.[13] But the shipping of goods under a special contract in any number of instances will not bind the parties sending them to similar terms in the future without agreement.[14]

Effect of Usage.—Where a shipping contract, permitting the shipper to accompany his stock, and return, without extra charge, does not specify the route by which he shall return, a general usage of the carrier to allow a return by either of two routes will, if known to the shipper when the contract is made, be presumed a part thereof.[15]

§ 666. Persons Bound.—Contract by Consignor.—The consignor is the agent of the consignee in the shipment of the goods; and whatever contract he makes with the carrier is binding on the consignee,[16] and he will be conclusively presumed to know its stipulations, in the absence of fraud or mistake.[17]

Estoppel of Consignee to Question Authority of Consignor to Contract.—Where a consignee sues to recover for a neglect of duty under a special contract of affreightment made in his behalf by the consignor, the consignee is not at liberty to challenge the authority of the consignor to make the shipment under such a contract.[18]

Contract with Purchasers—Bill of Lading Given to Seller.—Where a carrier contracts with a purchaser of goods to transport them for him, the delivery of a bill of lading to the seller which modified the carrier's liability under the original contract does not bind the purchaser, in the absence of a course of business, between the parties, or of a custom sanctioning such an inter-

11. Erie R. Co. *v.* Pond Creek Mill, etc., Co., 89 C. C. A. 568, 162 Fed. 878.

12. **Effect of Hepburn act.**—Latta *v.* Chicago, etc., R. Co., 97 C. C. A. 198, 172 Fed. 850.

13. **Course of dealing, usage and custom.**—Shelton *v.* Merchants' Dispatch Transp. Co., 59 N. Y. 258, 48 How. Prac. 257.

14. McMillan *v.* Michigan, etc., R. Co., 16 Mich. 79, 93 Am. Dec. 208; Heffron *v.* Michigan, etc., R. Co., 16 Mich. 131; King *v.* Michigan, etc., R. Co., 16 Mich. 132.

15. **Effect of usage.**—Milroy *v.* Chicago, etc., R. Co., 98 Iowa 188, 67 N. W. 276.

16. **Contract by consignor.**—Frohlich *v.* Pennsylvania Co., 138 Mich. 116, 110 Am. St. Rep. 310, 101 N. W. 223, 4 Am. & Eng. Ann. Cas. 1140.

17. Robinson Bros. *v.* Merchants' Despatch Transp. Co., 45 Iowa 470.

18. **Estoppel of consignee to question authority of consignor to contract.**—Bell Bros. *v.* Western, etc., R. Co., 125 Ga. 510, 54 S. E. 532.

pretation of the original contract.[19]

Clerical Errors.—See ante, "Clerical Errors," § 663.

§ 667. Persons Entitled to Benefit.—Though a person who had contracted with a city to furnish it with coal for use in running a system of waterworks becomes the head of the water commission of such city, he can not, because of his official position as such, avail himself of the terms of a transportation contract between the city and a railway company whereby the former had secured reduced freight charges upon goods or supplies hauled for its benefit.[20]

§ 668. When Liability Accrues.—The liability of a carrier as such commences at the time of delivery and acceptance of property for shipment.[21]

§§ 669-687. Duties and Obligations of Carrier and Shipper—§ 669. Obligation as Fixed by Law.—The obligation of a common carrier is fixed by law, and is as much a part of the contract of shipment as though written therein.[22] A bill of lading which recites the receipt of the goods in good order and binds the carrier to deliver them in good order and condition as received, imposes the liability of a common carrier on the carrier.[23]

§ 670. Special Contract as Superseding Common-Law Liability.—See post, "Limitations of Liability," chapter 14. Where a special contract is proven between a shipper and a carrier, the former can not rely on the common-law liability of the carrier.[24]

§ 671. Effect of Acceptance of Rate Offered.—Where a shipper asked for "the lowest rates on potatoes in car-load lots," and accepted the rates thereupon offered by the carrier, all other terms and conditions are left open for future arrangement.[25]

§§ 672-675. Obligation of Carrier to Receive, Transport and Deliver—§ 672. In General.—Implied Promise to Carry Safely and Deliver.—Where the carrier received merchandise, and undertook its delivery, there is an implied promise safely to carry and deliver the same without delay

19. Contract with purchaser of goods—Effect of bill of lading given to seller.—A carrier contracted with the purchaser to transport certain iron, as evidenced by a letter from the purchaser to the carrier, accompanied by an order to the seller to deliver the iron. The carrier loaded the iron on a canal boat, and delivered to the seller a bill of lading for the purchaser, which modified the carrier's liability under the original contract. On the same day, by the sinking of the boat, the iron was lost. Held, that the carrier could not defend under the bill of lading against a recovery of the value of the iron by the purchaser, in the absence of evidence of a course of business between the parties, or of a custom sanctioning such an interpretation of the original contract. Park *v.* Preston, 108 N. Y. 434, 15 N. E. 705.

20. Persons entitled to benefit.—Dixon *v.* Central, etc., R. Co., 110 Ga. 173, 35 S. E. 369.

21. When liability accrues.—Chicago, etc., R. Co. *v.* Pollock, 16 Wyo. 321, 93 Pac. 847.

22. Obligation as fixed by law.—Evansville, etc., R. Co. *v.* Kevekordes, 35 Ind. App. 706, 69 N. E. 1022, 73 N. E. 1135.

23. Contracts for transportation of goods—Construction and operation.—The defendants, whose general business was that of common carriers, gave to the plaintiffs a bill of lading, setting forth that they had shipped, in good order and condition, certain iron, to be delivered to the plaintiffs or their assigns in like order and condition, the dangers of the seas only excepted. Held, that if not otherwise liable as common carriers, they contracted such liability by the bill of lading, which bound them to deliver the iron in good order and condition as they had received it, the dangers of the sea only excepted. Stephens, etc., Transp. Co. *v.* Tuckerman, etc., Co., 33 N. J. L. 543.

24. Special contracts as superseding common law liability.—Michigan Cent. R. Co. *v.* Hale, 6 Mich. 243.

25. Effect of acceptance of rate offered.—Jennings *v.* Grand Trunk R. Co., 5 N. Y. S. 140, 52 Hun 227, 23 N. Y. St. Rep. 15.

to the consignee.[26]

§ 673. Continuing Offer to Carry.—A contract by a carrier to transport goods between certain points at a certain rate of freight for a certain period of time is a continuing offer to carry such goods as plaintiff shall furnish, at the specified price during the period named, and plaintiff may recover damages for failure of the carrier to transport goods afterwards offered.[27]

§ 674. Goods to Be Carried beyond Terminus of Carrier's Line.—Where a package was delivered to an express company, to be carried to the town of B., and the company was not a common carrier to B., the company was liable only as an involuntary or gratuitous bailee.[28]

§ 675. Transportation "at Owner's Risk."—The term, "at the owner's risk," in a bill of lading, or transportation contract which is declared to be a special contract, taken in connection with other stipulations therein, limits the carrier to such loss or damages only as might result from ordinary neglect, which is defined to mean that want of care and diligence which prudent men usually bestow on their own concerns.[29]

§ 676. Obligation of Shipper to Furnish Freight.—Where a carrier contracted to transport certain merchandise for defendant, the contract providing in detail for the amount of the carrier's compensation, the amount of merchandise to be transported, and the deductions to be made from the compensation for merchandise lost in transit, the agreement of the carrier to transport the merchandise and of defendant to pay therefor imported an implied covenant by defendant to allow the carrier to transport merchandise and to furnish him with the agreed quantity for that purpose.[30]

§ 677. Point Where Goods to Be Received.—Though a railroad company is not bound to receive freight except at stations, it may, as a result of custom or an express contract, become obligated to receive freight at a point where there is no station, platform, cars, or agent.[31]

"Point" Meaning Station.—Under a contract providing that a carrier would return the outfit of a railroad contractor to point of shipment from any point on the carrier's line, the word "point" would be construed to mean a station or point where the carrier was doing its regular business as a common carrier.[32]

§ 678. Destination.—The contract is a single, indivisible contract of transportation to the point of destination and not effected by the place of transfer to the succeeding carrier. Where a railroad company obligated itself to carry to a named point beyond the terminus of its own line, such point is the destination of the shipment[33] and an agreement, on the part of a carrier, to trans-

26. **Implied promise to carry safely and deliver.**—Indiana, etc., R. Co. *v.* Empire Rubber Mfg. Co., 118 Ill. App. 652.

27. **Continuing offer to carry.**—Harvey *v.* Connecticut, etc., R. Co., 124 Mass. 421, 26 Am. Rep. 673.

28. **Goods to be carried beyond terminus of carrier's line.**—Pitlock *v.* Wells Fargo & Co., 109 Mass. 452.

29. **Transportation "at owner's risk."**—Baltimore, etc., R. Co. *v.* Rathbone, 1 W. Va. 87, 88 Am. Dec. 664.

30. **Obligation of shipper to furnish freight.**—White *v.* Toncray, 46 Va. (5 Gratt.) 179.

31. **Point where goods to be received.**—Georgia, etc., R. Co. *v.* Marchman, 121 Ga. 235, 48 S. E. 961.

32. **"Point" meaning station.**—Santa Fe, etc., R. Co. *v.* Grant Bros. Constr. Co., 13 Ariz. 186, 108 Pac. 467.

33. Plaintiff delivered a shipment of oranges to the defendant to be transported to C., a place beyond the terminus of defendant's road. The bill of lading provided that the goods were to be transported over defendant's road to the company's freight station, "as designated below," and the only place mentioned in the bill was C., though this was in connection with a guaranty of the freight rate. The contract also limited the liability of the defendant to its own road. Held, that the defendant contracted to transport the goods to C., and was liable for delivering them to the wrong parties

port a shipment of goods to their destination, if on its road, or otherwise to a place on its road where the same is to be delivered to "any connecting carrier," left no discretion as to the place of delivery, where such place was specified in the shipping receipt, and no other instructions were given; and it was its duty to obey the instructions, and transmit such instructions to the connecting carrier.[34]

§ 679. Property Concerning Which Parties Negotiating.—In determining what property is embraced in a shipping contract the court will not confine the language to a specific quantity, but will construe it to mean the property concerning which the parties were negotiating.[35]

§ 680. Quantity to Be Shipped or Carried.—If the contract of carriage be to take a specified quantity or less, but not more in any event, the taking of more is breach of contract, and forfeits the right to take the specified number or less; but if, in every event, the carrier is to take the specified quantity or less, he may take more without a forfeiture of the right to take the specified quantity.[36]

Right to Elect Quantity to Be Transported.—Where a carrier covenanted with a manufacturer of salt to transport from 1,200 to 5,000 barrels of salt, annually, for three years, from the manufacturer's salt works to certain specified places, for a stipulated reward per barrel, transported, the manufacturer, and not the carrier, had the right to elect what quantity of salt, not less than 1,200, nor more than 5,000, barrels, should be transported by the carrier annually.[37] If the carrier willfully failed to transport the salt received by him in the first or second year, he was bound to transport it in the second or third year, and could not withhold it and at the same time call on defendant to supply what he already had in his own hands. The carrier was entitled to transport within the year all the salt that defendant delivered in that year, and if he did so his right in regard to the quantity to be transported the next year was not thereby affected.[38]

at such station. German Fruit Co. v. California, etc., R. Co., 133 Cal. 426, 65 Pac. 948.

A bill of lading accompanying cars of grain shipped from Chicago fixed the destination of the shipment as Bridgeport, but directed that the cars be held at West Albany for further orders. When the cars reached West Albany the shipper directed them to be sent to Waterbury, instead of Bridgeport. No new bill of lading was issued, but the original was merely indorsed, "Consignment changed," etc.; giving the new destination. Held, that the whole transit of the grain from Chicago to Waterbury was under a single and indivisible contract of transportation, and West Albany was but the place of transfer, and not the place of shipment. Soper v. Tyler, 58 Atl. 699, 77 Conn. 104.

34. Cleveland, etc., R. Co. v. Potts & Co., 71 N. E. 685, 33 Ind. App. 564.

35. "Your timber."—Where a letter written by a carrier in referring to timber to be hauled under a contract between it and a logging company referred to it as "your timber," and at the time the contract was negotiated the logging company not only made known its then holdings and its outstanding contracts of purchase, but also its purpose to acquire other timber properties and continue the logging business at a certain point as long as profitable or until the tributary timber was exhausted, held, that in determining what timber was embraced in the contract the term "your timber" meant the timber concerning which the parties were negotiating, and not the specific quantity then owned by the logging company. Sultan R., etc., Co. v. Great Northern R. Co., 58 Wash. 604, 109 Pac. 320, hearing in banc denied 109 Pac. 1020.

36. Quantity to be shipped or carried.—Cooper v. Berry, 21 Ga. 526, 68 Am. Dec. 468.

37. Right to elect quantity to be transported.—White v. Toncray, 36 Va. (9 Leigh) 347.

38. White v. Toncray, 46 Va. (5 Gratt.) 179.

Plaintiff was bound to transport within the year all the salt he received, and if he failed to do so he was still entitled to transport at least 1,200 barrels of salt the next year, if the contract had not then expired, but having it already in his hands he had no right to call on defendant for the delivery to him of 1,200 barrels more, and the transportation of salt which plaintiff already had in his hands in the next year would be a com-

Amount to Be Delivered Per Month.—Where a contract of carriage is for all the shipper's freight to a named point during the summer and fall, to be delivered in quantities of at least 25 per cent of the whole freight in each and every month from the first of July, the shippers are bound to deliver to the carrier all their freight intended for such point during that "summer and fall" in such proportions as to equal 25 per cent of the whole during each month from July and October, both inclusive.[39]

§ 681. Option as to Mode of Shipment.—Where a carrier has an option as to the mode of shipment, it must exercise it for the best interests of the consignee, and it is a breach of the contract to exercise it to his disadvantage, unless it is done in good faith and under circumstances which seem to require it.[40]

§ 682. Route.—Where, at the time of making a written contract for the shipping of stock from Utah to Chicago, another written contract was made for the transportation of the shipper's servant to care for the stock, under which a passenger ticket issued, which read to Omaha, though the contract for the transportation of the stock did not name any particular route by which it was to be shipped, the contract was to ship through Omaha.[41]

§ 683. Stop-Over Privilege.—Where a complaint avers that a consignee was the owner of property at the time of shipment, a stop-over privilege contained in the bill of lading will be presumed to have been for his benefit.[42]

§ 684. Loading and Unloading.—A contract of a railroad by which it contracted at its own expense to load oil and transport it over its road to a specified point, "and thence by barges to the warehouse" of the company, and to provide suitable covered cars, etc., "and cause the same to be unloaded and returned without delay," the oil company to pay "on the delivery of the oil;" requires the company to unload the oil from the barges at the warehouse.[43]

Agreement to Furnish Facilities and Laborers.—A contract for the transportation of cattle at reduced rates providing that the owner shall load and unload at his own risk, the carrier furnishing laborers to assist under direction of the owner, who was to examine for himself all the means used does not require the carrier to furnish the facilities for unloading at a station en route where they were delayed on account of a storm.[44]

§ 685. Time of Delivery to Carrier.—Where a contract of shipment does

pliance with his contract for that year, and, defendant permitting him to do it, would be equivalent to an annual delivery by him of the same quantity for that year. White *v.* Toncray, 46 Va. (5 Gratt.) 179.

39. The O. corporation agreed with P. to consign to him, at S., all their freight intended to be transported to N. T., "during this summer and fall, amounting, it is now supposed, to about 1,000 tons, and will deliver it to him from time to time, in such quantities that at least 25 per cent of the whole freight shall be delivered to him during each and every month from the first day of July next." P. agreed to receive at S., and transport to N. T., at a price specified, all the freight they should consign to him at S. before October 31st. Held, that they were bound to consign to him at S. all their freight, regardless of its quantity, intended to be transported to N. T. during that "summer and fall," in such proportions as to equal 25 per cent of the whole amount during each month from July to October, both inclusive. Perkins *v.* Ophir Silver Min. Co., 35 Cal. 11.

40. **Option as to mode of shipment.**—Stewart *v.* Comer, 100 Ga. 754, 62 Am. St. Rep. 353, 28 S. E. 461; Blitz *v.* Union Steamboat Co., 51 Mich. 558, 17 N. W. 55.

41. **Route.**—Sharp *v.* Clark, 13 Utah 510, 45 Pac. 566.

42. **Stop-over privilege.**—Tebbs *v.* Cleveland, etc., R. Co., 20 Ind. App. 192, 50 N. E. 486.

43. **Loading and unloading.**—New York, etc., R. Co. *v.* Standard Oil Co., 20 Hun 39, affirmed in 87 N. Y. 486.

44. Penn *v.* Buffalo, etc., R. Co., 49 N. Y. 204, 10 Am. Rep. 355, reversing 3 Lans. 443.

not specify the time the goods are to be delivered to the carrier for shipment, the shipper has a reasonable time.[45]

§ 686. Time to Be Consumed in Transportation.—Where agents for a railroad stated to the owner of perishable goods that the company had a schedule for one of its trains between Savannah and New York of 43 hours, and expected to maintain it, and such owner, acting on the belief induced by such statement, made shipments of such goods from Savannah to New York, a special contract to transport the shipments in 43 hours was not shown.[46]

§ 687. Agreements for Liquidated Damages.—An agreement of a carrier to transport goods from New York to Missouri in a certain number of days, or to deduct for each day's delay a certain amount from the freight money, is not alternative agreements, but the amount to be deducted is in the nature of liquidated damages.[47]

§ 688. Liability as Bailee.—See ante, "Goods to Be Carried beyond Terminus of Carrier's Line," § 674.

§ 689. Liability as Warehouseman.—See post, "Carrier as Warehouseman," chapter 13.

§ 690. Transfer or Assignment.—A contract between a shipper and a carrier for the transportation of certain freight at a specified rate is a personal contract, and can not be transferred so as to make it include freight shipped by any person other than the one with whom the contract was made.[48]

§§ 691-710. Performance or Breach—§§ 691-692. What Constitutes a Breach—§ 691. When Special Effort to Perform Required.—A contract to carry goods made by a canal boatman shortly before the period when the canal might be expected to freeze requires him to make a special effort to perform the contract.[49]

§ 692. Shipment of Bonded Goods on Unbonded Vessel.—Carriers who receive bonded goods, knowing they are to be shipped in bond, and, taking them out of bond, ship them upon an unbonded vessel, are liable as for conversion.[50]

§ 693. Demand of Performance.—There is a breach of defendant railroad company's contract to transport plaintiff's ice from where it was, on another road, where it notified him that it could not furnish cars and take it from such place, so that it is unnecessary to make further demands, which both parties know can not be complied with.[51]

§ 694. Tender of Property.—When a railway company announces through its agent that it will not make a shipment at a time previously contracted for, a tender of the articles to be shipped at the time previously agreed on is thereby waived and rendered unnecessary to fix the liability of the company for resulting damages,[52] and the refusal of prior shipment and information that an or-

45. **Time of delivery to carrier.**—Southern R. Co. *v.* Wilcox, 99 Va. 394, 39 S. E. 144.

46. **Time to be consumed in transportation.**—Atlantic, etc., R. Co. *v.* Wells, 130 Ga. 55, 60 S. E. 170.

47. **Agreements for liquidated damages.**—Harmony *v.* Bingham, 12 N. Y. 99, 62 Am. Dec. 142, affirming 8 N. Y. Super. Ct. (1 Duer) 209.

48. **Transfer or assignment.**—Wabash R. Co. *v.* Wright, 75 Ill. App. 243.

49. **When special effort to perform required.** — Spann *v.* Erie Boatman's Transp. Co., 11 Misc. Rep. 680, 33 N. Y. S. 566, 67 N. Y. St. Rep. 354.

50. **Shipment of bonded goods on unbonded vessel.**—Mellier *v.* St. Louis, etc., Transp. Co., 14 Mo. App. 281.

51. **Demand of performance.**—Bigelow *v.* Chicago, etc., R. Co., 104 Wis. 109, 80 N. W. 95.

52. **Tender of property.**—Texas, etc., R. Co. *v.* Nicholson, 61 Tex. 491.

der to refuse is still operative renders further tender unnecessary,[53] and so also where a carrier receives part of a shipment and declines taking any more it is not necessary to tender the residue.[54]

§§ 695-709. **Excuses for Breach or Nonperformance—§ 695. Act of God.**—If a common carrier makes a contract for the future transportation of goods, and at the time appointed fails to have his boat at the place, he is no more exonerated by the act of God from liability for failure to comply with an express stipulation of his contract than any other person would be for a failure from the same cause to comply with any other kind of contract, the rule in relation to this excuse being that, where the law imposes the duty, the law will acknowledge the act of God as an excuse for its nonperformance; but where one by his own contract expressly and absolutely undertakes to do any act, he can not be discharged from the performance by the act of God, because it was his own folly not to have made the proper exception.[55]

§ 696. **"Perils of River," Navigation and Fire.**—Nonperformance of a contract to transport goods, "the usual dangers of river navigation and fire excepted," will not be excused by unprecedented low water in a river, preventing navigation.[57]

§ 697. **Mobs and Strikes.—Mob Preventing Connecting Carrier from Doing Business.**—See ante, "Contract to Carry beyond Terminus," § 620.

§ 698. **Military Occupation.**—Where a railroad company agreed to ship goods after a certain time, and before that time its line was seized by the Confederate government and held until after such time expired, it was a valid excuse for not shipping the goods.[58] Even where a railroad company is not in the free exercise of its franchises, and receives property for transportation, and gives the ordinary shipping receipt, without limiting its liability or undertaking, it is still liable as a common carrier, notwithstanding military or other control.[59]

§ 699. **Nonpayment of Freight.**—Although goods have been taken into the possession of a common carrier, if the freight is not paid as stipulated, he may refuse to carry them, the contract not being yet consummated.[60] Where a carrier, in an action against it for failure to carry goods delivered to it,

53. A railroad company passed an order that after that date no shipment of salt or other merchandise from B., in competition with S., would be received for local stations on its line, or for passing over another road operated under lease, or for points beyond, unless charges were prepaid and shipments delivered at the company's warehouse by drays as local business, and that local rates from that point would be assessed. A firm, who shipped salt from B. by a road connecting with the first-mentioned road, tendered to it one or more car loads, and it was refused; and, when 47 cars loaded with salt arrived, the agent of the road bringing them inquired of the agent of the other road whether the order above stated was still operative, and was informed that it was. Held, that there was no necessity for further tender before bringing suit for the refusal. Central, R. etc., Co. *v.* Logan, 77 Ga. 804, 2 S. E. 465.

54. Where the defendant contracted to carry fifty tons of the plaintiff's hay to a distant port for sale, the hay to be delivered at the ship's side, and, after receiving twenty-four tons on board, declined taking any more, because the ship was full, it was held that it was not necessary for the plaintiff, after this refusal, to tender the residue of the hay at the ship's side, in order to entitle himself to damages. Nourse *v.* Snow (Me.), 6 Greenl. 208.

55. **Act of God.**—Collier *v.* Swinney, 16 Mo. 484; Myres *v.* Diamond Joe Line, 58 Mo. App. 199.

57. **"Perils of river," navigation and fire.**—Cowley *v.* Davidson, 13 Minn. 92, Gil. 86.

58. **Military occupation.**—Sumner *v.* Charlotte, etc., R. Co., 78 N. C. 289.

59. Illinois Cent. R. Co. *v.* McClellan, 54 Ill. 58, 54 Am. Rep. 83; Illinois Cent. R. Co. *v.* Ashmead, 58 Ill. 487; Illinois Cent. R. Co. *v.* Cobb, etc., Co., 64 Ill. 128.

60. **Nonpayment of freight.**—Stewart *v.* Bremer, 63 Pa. 268.

claims that its refusal was because the freight had not been paid, plaintiff may show the value of the goods, for the purpose of showing that defendant had ample security, and that there was no reason for stopping them in transit.[61]

§ 700. Merchandise Not Branded as Required by Statute.—Under a contract for transportation of hay, a carrier is not liable for refusing to carry hay upon which, as required by Rev. St. 1841, c. 64, the name of the "person pressing it" is not branded.[62]

§ 701. Nondelivery by Shipper.—See post, "Contract to Carry Specific Quantity or Number," § 709.

§ 702. Change of Legal Rate.—A railroad company is not relieved of its contract obligation to give a shipper a certain rate, though the law is changed after the contract is made so as to make it unlawful for the company to charge other shippers a higher rate for shorter distances in the same direction, as it is not the giving of the lower rate, but the charging of the higher rate, which is declared unlawful.[63]

§§ 703-709. Particular Stipulations or Contracts—§ 703. Time Contracts.—If a carrier agrees to forward goods to their destination, and deliver them within a given time, he is held to a strict performance; and no obstruction or even impossibility will be a defense against a nonperformance.[64]

§ 704. Contracts to Carry by Particular Train or Vessel.—If the carrier expressly promised to receive and remove property by its next train, it would be its duty to do so.[65]

Misrepresentation as to Size and Weight of Machine.—Representations made by a shipper as to the size and weight or a machine to be transported, although not correct, are no defense to a suit against the carrier for its failure to carry such machine on a particular vessel, in accordance with the terms of a bill of lading which was issued afterwards, and after the carrier's agents had seen the machine, and had opportunity to obtain full information as to its dimensions and weight.[66]

Goods Afterwards Forwarded by Another Vessel.—It is no defense to a suit for damages for the breach of a contract to transport goods by a particular vessel that the carrier afterwards forwarded the goods by another vessel without additional cost or risk to the shipper.[67]

§ 705. Contract to Carry Perishables.—Failure of Refrigerator Company to Furnish Cars.—A common carrier is not exempt from liability for

61. Leach *v.* New York, etc., R. Co., 89 Hun 377, 35 N. Y. S. 305, 69 N. Y. St. Rep. 749.

62. **Merchandise not branded as required by statutes.**—Pickard *v.* Bayley, 46 Me. 200.

63. **Change of legal rate.**—Newport News, etc., Co. *v.* McDonald Brick Co.'s Assignee, 109 Ky. 408, 22 Ky. L. Rep. 934, 59 S. W. 332.

64. **Time contracts.**—Upon tender of goods to a carrier for shipment, it is bound to make all reasonable efforts to furnish facilities for their transportation; but, where it enlarges its liability by an unconditional express promise to move the goods at a certain time, such contract must be strictly performed, and unavoidable accident or even impossibility preventing compliance will be no defense unless it is so stipulated in the contract. Central, etc., R. Co. *v.* Sigma Lumber Co., 170 Ala. 627, 54 So. 205, Ann. Cas. 1912 D, 965; Shelby *v.* Missouri Pac. R. Co., 77 Mo. App. 205.

65. **Contracts to carry by particular train or vessel.**—Central, etc., R. Co. *v.* Sigma Lumber Co., 170 Ala. 627, 54 So. 205, Ann Cas. 1912 D, 965.

66. **Misrepresentation as to size and weight of machine.**—The Protection, 42 C. C. A. 489, 102 Fed. 516.

67. **Goods afterwards forwarded by another vessel.**—The Protection, 42 C. C. A. 489, 102 Fed. 516.

failure to ship melons by the fact that the refrigerator company whose cars it was intending to use failed to furnish them.[68]

§ 706. Stipulation as to Destination at Which Carrier Has No Agency.—Where a carrier contracts generally to carry goods, but provides that, if it has not an agency at the point of destination, it shall carry to its nearest agency, and there notify the consignee, or deliver the property to some other carrier, it is not sufficient to bring the case within the contract to prove that it had no office at the point of destination.[69] A contract between a railway and a construction company for the hauling of a camp and grading outfit required by the company in grading a railway extension requires the hauling of such outfit to and from points as near as possible to the work without regard to regular stations.[70]

§ 707. Contract to Carry beyond Terminus.—Mobs Preventing Connecting Line from Doing Business.—Nonperformance of a carrier's contract to transport live stock to an extra terminal point is not excused by the fact that the connecting line over which the shipment was to be carried was prevented by a mob from doing business.[71]

Default of Connecting Line.—A common carrier which has contracted to transport merchandise to a certain point is not relieved from liability for injuries thereto by the fact that it has intrusted the performance of part of the contract to a connecting carrier.[72]

§ 708. Contract for Future Transportation.—Nonperformance of a contract by a carrier for the future transportation of goods is not excused by the fact that the shipper knew that the fulfillment of the contract would be extremely difficult.[73]

Act of God as Defense.—See ante, "Act of God," § 695.

§ 709. Contract to Carry Specific Quantity or Number.—Where the contract was for the transportation of a specific number of articles, it is no defense, in a suit for the breach of the contract, which the defendant did not offer to fulfill, that the plaintiff did not have so large a number ready for transportation.[74]

§ 710. Waiver of Breach.—Acceptance after Breach.—Acceptance of goods which a carrier has contracted to deliver at a certain time and which it has failed to deliver until a later date is no waiver of the consignee's right of action for the delay.[75]

§ 711. Modification or Rescission.—Where a definite shipping contract has been made between a consignee and the carrier, it can not be varied by any subsequent agreement between the carrier and consignor, unless by authority from the consignee.[76] A consignee may sue the carrier for breach of duty im-

68. **Failure of refrigerator company to furnish cars.**— Mathis *v.* Southern R. Co., 65 S. C. 271, 43 S. E. 684, 61 L. R. A. 824.

69. **Stipulation as to destination at which carrier has no agency.**—Judgment (Sup. 1908) 69 Atl. 206, reversed. Saunders *v.* Adams Exp. Co., 78 N. J. L. 441, 74 Atl. 670.

70. Santa Fe, etc., R. Co. *v.* Grant Bros. Constr. Co., 33 S. Ct. 474, 228 U. S. 177, reversing judgment 108 Pac. 467, 13 Ariz. 186.

71. **Mobs preventing connecting line from doing business.**—White *v.* Missouri Pac. R. Co., 19 Mo. App. 400.

72. **Default of connecting line.**—Gulf, etc., R. Co. *v.* Insurance Co. (Tex. Civ. App.), 28 S. W. 237.

73. **Contract for future transportation.**— Myers *v.* Diamond Joe Line, 58 Mo. App. 199.

74. **Contract to carry specific quantity or number.**—Taylor *v.* The Robert Campbell, 20 Mo. 254.

75. **Acceptance after breach.**—Norfolk, etc., R. Co. *v.* Shippers' Compress Co., 83 Va. 272, 2 S. E. 139.

76. **Modification or rescission.**—Perkins Co. *v.* American Exp. Co., 199 Mass. 561, 85 N. E. 895.

posed by law, and, if such duty has been varied by contract between the carrier and consignor, the consignee may still sue; his rights being limited by the terms of the special contract.[77]

§§ 712-755. Contracts for Cars or Other Means of Transportation—§§ 712-730. Requisites and Validity—§§ 712-714. Capacity to Contract—§ 712. In General.—No law prohibits a railway company from contracting to furnish cars at an agreed time and place on the line of the road to be used for shipment.[78]

§ 713. Contract to Furnish Cars of Another Road.—A railway's contract to furnish a shipper cars belonging to another line is not ultra vires.[79]

§ 714. Contract to Furnish Cars on Line of Connecting Road.—It is competent for a railroad company to bind itself by contract to furnish cars at a place not on its own line but on that of a connecting carrier.[80]

§§ 715-723. Authority of Agent—§ 715. Necessity.—Where a contract to furnish cars to a shipper was made with an agent having no authority to make it, and he did not report it to the carrier, and the carrier did not learn of it, it was not binding on the carrier.[81]

§§ 716-720. Authority of Station Agent—§ 716. In General.—A railway station master is by virtue of his position ordinarily the agent of the carrier for the making of contracts to furnish cars at his station upon the road,[82] on a named day,[83] notwithstanding such a power may not have been expressly conferred on him.[84]

§ 717. Proof of Authority.—Whether or not an agent of a railroad company had authority to make a contract to furnish cars for the shipment of cattle is a matter of proof.[85] The local agent of a railroad company has authority presumptively, to make contract for cars,[86] and unless the shipper has notice of limitations of the agent's authority to make such contracts he may rely upon such presumptive authority;[87] and in order for the railway to relieve itself from lia-

77. Perkins Co. *v.* American Exp. Co., 199 Mass. 561, 85 N. E. 895.

78. **Capacity to contract.**—Cross *v.* McFaden, 1 Tex. Civ. App. 461, 20 S. W. 846; Easton *v.* Dudley, 78 Tex. 236, 14 S. W. 583.

79. **Contract to furnish cars of another road.**—Nichols *v.* Oregon, etc., R. Co., 24 Utah 83, 91 Am. St. Rep. 778, 66 Pac. 768.

80. **On line of connecting carrier.**—Missouri, etc., R. Co. *v.* Kyser, 87 S. W. 389, 38 Tex. Civ. App. 355.

81. **Necessity.**—Gulf, etc., R. Co. *v.* Dinwiddie, 21 Tex. Civ. App. 344, 51 S. W. 353.

82. **Authority of station agent.**—Easton *v.* Dudley, 78 Tex. 236, 14 S. W. 583; McCarty *v.* Gulf, etc., R. Co., 79 Tex. 33, 15 S. W. 164; Gulf, etc., R. Co. *v.* Hume Bros., 6 Tex. Civ. App. 653, 24 S. W. 915, affirmed, on this point, by the supreme court in 87 Tex. 211; Gulf, etc., R. Co. *v.* Hodge, 10 Tex. Civ. App. 543, 30 S. W. 829.

83. McCarty *v.* Gulf, etc., R. Co., 79 Tex. 33, 15 S. W. 164.

84. **Express authority unnecessary.**—A contract made by a station agent that the company will furnish cars at a named place and day for transportation of freight, binds the company, notwithstanding such a power may not have been expressly conferred on him. McCarty *v.* Gulf, etc., R. Co., 79 Tex. 33, 15 S. W. 164; Easton *v.* Dudley, 78 Tex. 236, 14 S. W. 583.

85. **Proof of authority.**—Texas, etc., R. Co. *v.* Hamm, 2 Texas App. Civ. Cas., § 491.

86. Galveston, etc., R. Co. *v.* Thompson (Tex. Civ. App.), 44 S. W. 8, following Easton *v.* Dudley, 78 Tex. 236, 14 S. W. 583.

87. Where it is understood that the shipper knew of no limitation upon the authority of the station agent, it was proper for the court to instruct the jury that the agent had the power to contract for the railway for supply of cars, etc., for a shipper. Gulf, etc., R. Co. *v.* Hume Bros., 6 Tex. Civ. App. 653, 24 S. W. 915, reversed in 87 Tex. 211.

bility, it devolves upon it to show want of authority in the agent, and that the shipper knew it.[88]

Sufficiency.—Where a shipper called up the station agent by telephone, but was told that the station agent was not there; and the shipper gave his order for cars to the one who answered, who stated that it would be all right; but it appeared that the latter had no authority, and that the shipper had no reason to think that he had, there was no contract to furnish cars.[89]

§ 718. Time When Cars to Be Furnished.—A local agent having the power to contract for a shipment has also power to agree with the shipper upon a time at which the cars necessary for that shipment shall be furnished.[90] The authority to contract for the shipment implies the power to make the agreement to furnish cars at a given time. It is necessary to enable the agent properly to perform his duties.[91]

Contract to Furnish Cars in Unreasonably Short Time—Notice to Shipper of Limitation of Authority.—In the absence of testimony showing a limitation upon his authority, a local station agent of a railway company has authority to bind the railway company by contract to furnish cars at a particular time.[92] The printing of the rule, upon the subject of the agent's authority to contract for cars at a specified time, in the contracts can not be notice to a shipper of his want of authority, for the reason that such contracts in the natural course of things would not be known to the shipper until after the contract for cars had been made. There is no error in excluding the evidence offered to show that the agent had no authority to make the contract.[93] To hold that the denial, in the printed forms of shipping contracts, to the agent of authority to contract for cars at a specified time, deprives him of such authority, is to hold that the powers necessary to carry out his agency have been utterly destroyed by such stipulation.[94] If the local agent of a railway company makes a con-

88. **Burden of proof.**—Gulf, etc., R. Co. *v.* Hume Bros., 6 Tex. Civ. App. 653, 656, 24 S. W. 915, reversed in 87 Tex. 211.

89. **Sufficiency.**—Gulf, etc., R. Co. *v.* Fromme (Tex. Civ. App.), 86 S. W. 651.

90. **Time when and place where cars to be furnished.**—German *v.* Lake Erie, etc., R. Co., 144 Ill. App. 532; Easton *v.* Dudley, 78 Tex. 236, 14 S. W. 583; McCarty *v.* Gulf, etc., R. Co., 79 Tex. 33, 15 S. W. 164; Gulf, etc., R. Co. *v.* Hume Bros., 87 Tex. 211, 27 S. W. 110, reversing 6 Tex. Civ. App. 653, 24 S. W. 915; Gulf, etc., R. Co. *v.* Jackson, 99 Tex. 343, 89 S. W. 968, reversing 86 S. W. 47; Gulf, etc., R. Co. *v.* Irvine (Tex. Civ. App.), 73 S. W. 540; San Antonio, etc., R. Co. *v.* Timon, 45 Tex. Civ. App. 47, 99 S. W. 418; Austin, etc., R. Co. *v.* Slator, 7 Tex. Civ. App. 344, 26 S. W. 233; Galveston, etc., R. Co. *v.* Thompson (Tex. Civ. App.), 44 S. W. 810; Cross *v.* Graves, 4 Texas App. Civ. Cas., § 100, 16 S. W. 102.

91. Gulf, etc., R. Co. *v.* Jackson, 99 Tex. 343, 89 S. W. 968, reversing 86 S. W. 47; San Antonio, etc., R. Co. *v.* Timon, 45 Tex. Civ. App. 47, 99 S. W. 418; McCarty *v.* Gulf, etc., R. Co., 79 Tex. 33, 15 S. W. 164; Gulf, etc., R. Co. *v.* Hume Bros., 87 Tex. 211, 27 S. W. 110, reversing 6 Tex. Civ. App. 653, 24 S. W. 915.

In the case of Gulf, etc., R. Co. *v.* Jackson, 99 Tex. 343, 89 S. W. 968, reversing 86 S. W. 47, the court says in reference to McCarty *v.* Gulf, etc., R. Co., 79 Tex. 33, 15 S. W. 164, and Gulf, etc., R. Co. *v.* Hume Bros., 87 Tex. 211, 27 S. W. 110, reversing 6 Tex. Civ. App. 653, 24 S. W. 915: "These cases rest upon the well-recognized rule of law that, by conferring upon an agent express power to do certain acts, the authority is implied to do whatever may be necessary to execute the express power." San Antonio, etc., R. Co. *v.* Timon, 45 Tex. Civ. App. 47, 99 S. W. 418.

"If the agent can contract to receive the freight, he can contract as to the time when he will receive it and as to every other undertaking necessary to that end." Easton *v.* Dudley, 78 Tex. 236, 14 S. W. 583; San Antonio, etc., R. Co. *v.* Timon, 45 Tex. Civ. App. 47, 99 S. W. 418.

92. **Notice to shipper of limitation of authority.**—Austin, etc., R. Co. *v.* Slator, 7 Tex. Civ. App. 344, 347, 26 S. W. 233; Easton *v.* Dudley, 78 Tex. 236, 14 S. W. 583.

93. Gulf, etc., R. Co. *v.* Hume Bros., 87 Tex. 211, 27 S. W. 110, reversing 6 Tex. Civ. App. 653, 24 S. W. 915.

94. Easton *v.* Dudley, 78 Tex. 236, 14 S. W. 583; San Antonio, etc., R. Co. *v.* Timon, 45 Tex. Civ. App. 47, 99 S. W. 418.

tract for cars, and receives notice as to when the cars were desired, and agrees to furnish them on that date, the railroad company would be liable for a failure to do so, even though reasonable time was not given to have them on hand.[95]

§ 719. Station or Place Where Cars to Be Furnished.—A station agent has apparent, if not implied, authority to bind the carrier to furnish a car at a specified place.[96]

Station Other than Agent's Own.—The station agent of a railroad company may bind it by a contract to furnish cars at his station for the shipment of freight, but not at other stations,[97] such agent has no implied authority to order cars for another station;[98] in an action on such contract the railroad may show the agent's want of authority,[99] and is not liable for damages for breach of such contract unless the agent is shown to have been authorized to so contract or the company had notice of and ratified such contract.[1]

Admissibility of Evidence.—Evidence of contracts of witness with the agent of the railway company, by which cars had been furnished at I., was admissible to show that such agent's contract with plaintiff to furnish cars at I. was within the scope of his authority.[2]

§ 720. Verbal Contract.—A station agent of a railroad company can bind it by verbal contract to furnish cars at a given time for the shipment of freight, unless the shipper knows that the agent has no such authority.[3] Upon issue as to the authority of a station agent to contract verbally to furnish cars at a given time for the shipment of freight, the fact that the rule denying such authority was printed upon the contract of shipment, is properly excluded for the reason that the shipper would not naturally know of such contract until after the

95. Galveston, etc., R. Co. *v.* Thompson (Tex. Civ. App.), 44 S. W. 8, following Easton *v.* Dudley, 78 Tex. 236, 14 S. W. 583.

96. Station or place where cars to be furnished.—Grimes *v.* Lake Erie, etc., R. Co., 142 Ill. App. 532.

97. Station other than agent's own.—Gulf, etc., R. Co. *v.* Hodge, 10 Tex. Civ. App. 543, 30 S. W. 829.

Action for damages from breach of a contract made by station agent for 150 cars, for use in shipping corn from Belton to Laredo. The contract by plaintiffs with the Laredo house, the purchasers of the corn, required plaintiffs to load the corn upon the cars at place of shipment, and did not require the delivery by plaintiffs at Laredo. It was therefore not necessary that the station agent have authority to make freight contracts from Belton to Laredo. Having authority to contract for supply of cars for the shipper, the railway company was bound by his contract to furnish the cars as the contract declared on. Gulf, etc., R. Co. *v.* Hodge, 10 Tex. Civ. App. 543, 30 S. W. 829.

98. Southern Kansas R. Co. *v.* Cox, 47 Tex. Civ. App. 84, 103 S. W. 1122; Missouri, etc., R. Co. *v.* Belcher, 88 Tex. 549, 32 S. W. 518; Gulf, etc., R. Co. *v.* Jackson, 99 Tex. 343, 89 S. W. 968, reversing 86 S. W. 47; Gulf, etc., R. Co. *v.* Hodge, 10 Tex. Civ. App. 543, 30 S. W. 829; Gulf, etc., R. Co. *v.* Dinwiddie, 21 Tex. Civ. App. 344, 51 S. W. 353.

99. In an action against a railroad for breach of a contract made by a station agent in one county to furnish cars in another county, the railroad could show a want of authority in the station agent to contract for the furnishing of cars in other counties. Texas, etc., R. Co. *v.* Ray Bros., 84 S. W. 691, 37 Tex. Civ. App. 622, citing Gulf, etc., R. Co. *v.* Hodge, 10 Tex. Civ. App. 543, 30 S. W. 829; Gulf, etc., R. Co. *v.* Dinwiddie, 21 Tex. Civ. App. 344, 51 S. W. 353.

1. Gulf, etc., R. Co. *v.* Dinwiddie, 21 Tex. Civ. App. 344, 51 S. W. 353; Gulf, etc., R. Co. *v.* Hodge, 10 Tex. Civ. App. 543, 30 S. W. 829; Missouri, etc., R. Co. *v.* Belcher, 88 Tex. 549, 32 S. W. 518; S. C., 89 Tex. 428, 35 S. W. 6.

2. Admissibility of evidence.—Pecos River R. Co. *v.* Latham, 40 Tex. Civ. App. 78, 88 S. W. 392.

3. Writing-parol contracts.—Easton *v.* Dudley, 78 Tex. 236, 14 S. W. 583; McCarty *v.* Gulf, etc., R. Co., 79 Tex. 33, 37, 15 S. W. 164; Gulf, etc., R. Co. *v.* Hume Bros., 87 Tex. 211, 27 S. W. 110, reversing 6 Tex. Civ. App. 653, 24 S. W. 915; International, etc., R. Co. *v.* True, 23 Tex. Civ. App. 523, 57 S. W. 977, affirmed in 94 Tex. 705, no op.; Texas, etc., R. Co. *v.* Gallagher (Tex. Civ. App.), 70 S. W. 97; Gulf, etc., R. Co. *v.* Irvine (Tex. Civ. App.), 73 S. W. 540.

contract for cars was made.[4] The fact that a shipper knew that he would be required to sign a written contract before his property was shipped, would not, as a matter of law, destroy the oral contract for the cars at a certain time, even though he may have known that the written contract would probably contain a negation to the agent of the power or authority to agree to furnish cars at any specified time.[5]

§ 721. Traveling Agent.—Whether a carrier's traveling freight agent has authority to contract to furnish cars, is a question for the jury;[6] as is also the question whether a carrier ratified the contract of its traveling freight agent to furnish cars for a through transportation over its own and a connecting line, if he acted without authority.[7] Where a railroad's traveling agent contracted to furnish cars at a point on another line for a through shipment to a destination on his own line, and the rule of the initial carrier was that responsibility for through transportation must be assumed, if at all, by its connecting carrier, the transaction must be assumed to have been conducted in accordance with that custom, the duty to furnish the cars under the contract resting upon defendant, and hence it could ratify the agent's act.[8] The road not being legally bound to furnish cars on another line, unless it had agreed to do so, and the rule of the other line requiring defendant to do so to insure the passing of the shipment to destination over defendant's line, the fact that it furnished cars to be so used at the instance of its agent would justify an inference that it acted upon the agent's agreement.[9] Evidence that similar agreements of a traveling freight agent, to furnish cars at points on other lines for through shipments to points on his line, were acted upon by the carrier tends to show that the making of such agreements was within the agent's authority.[10]

§ 722. General Freight Agent.—See post, "Offer and Acceptance," § 728.

§ 723. Conductor.—A carrier is bound by the promise of a freight train conductor to furnish cars for a shipment, where he has been intrusted generally with such power and accustomed to exercise it.[11]

§ 724. Certainty and Definiteness.—An agreement by the general manager of a carrier to furnish fruit cars within 24 hours after ordered was definite and binding as to the cars actually ordered.[12]

§ 725. Consideration.—A request by a shipper that a carrier furnish cars for a shipment carries with it an understanding on their part to use the cars, and furnishes a sufficient consideration for the carrier's promise to furnish them.[13]

Agreement to Furnish Cars in the Future.—Where a shipper asks for cars to be furnished on a day mentioned in the future for transportation of live stock, and the carrier agrees to furnish same, such agreement rests upon a valid consideration, and is binding on the carrier as well as the shipper, notwith-

4. Gulf, etc., R. Co. *v.* Hume Bros., 87 Tex. 211, 27 S. W. 110.

5. San Antonio, etc., R. Co. *v.* Timon, 45 Tex. Civ. App. 47, 99 S. W. 418.

6. **Traveling agent.**—St. Louis, etc., R. Co. *v.* Boshear, 102 Tex. 76, 113 S. W. 6.

7. St. Louis, etc., R. Co. *v.* Boshear, 102 Tex. 76, 113 S. W. 6.

8. St. Louis, etc., R. Co. *v.* Boshear, 102 Tex. 76, 113 S. W. 6.

9. St. Louis, etc., R. Co. *v.* Boshear, 102 Tex. 76, 113 S. W. 6.

10. St. Louis, etc., R. Co. *v.* Boshear, 102 Tex. 76, 113 S. W. 6.

11. **Conductor.**—Georgia, etc., R. Co. *v.* Durrence, 6 Ga. App. 615, 65 S. E. 583.

12. **Certainty and definiteness.**—Chattanooga Southern R. Co. *v.* Thompson, 65 S. E. 285, 133 Ga. 127.

13. **Consideration.**—The contract of a carrier to furnish a person with a certain number of cars, at a certain price per car, for shipment of freight, is not without consideration, where it imposes on such person the obligation to load the cars and have weekly inspection and shipments. Baxley *v.* Tallassee, etc., R. Co., 128 Ala. 183, 29 So. 451; Pope *v.* Wisconsin Cent. R. Co., 112 Minn. 112, 127 N. W. 436.

standing the shipper may not have owned or had any stock at the time the agreement was entered into.[14]

§ 726. Date of Contract.—The time of making of a contract for cars is immaterial.[15]

§ 727. Mutuality.—The contract of a carrier to furnish a person with a certain number of cars, at a certain price per car, for shipment of freight, is not unilateral, where it imposes on such person the obligation to load the cars and have weekly inspection and shipments.[16]

§ 728. Offer and Acceptance.—A contract by a carrier's agent to furnish cars must be an unconditional undertaking in order to impose on the carrier an absolute liability to furnish the cars.[17] A promise by the agent to haul a car or cars at a specified time "if possible," on that date[18] or "to do the best he could,"[19] and a statement by the agent "that he thought he could get the car,"[20] are not unconditional contracts to furnish cars and do not render the railroad liable for a failure to do so.

Acceptance of General Freight Agent.—Even if the superintendent of transportation of a railroad had power to decline to furnish cars where the general freight agent had made a special contract for the furnishing of a train to move freight, there is a complete contract where plaintiff sent to the superintendent a request for a train, and the superintendent sent it to the general freight agent, who wrote plaintiff referring to his letter to the superintendent, and saying that they had considered his application to be permitted to load a train and were prepared to permit it.[21]

14. Agreement to furnish cars in the future.—Pittsburgh, etc., R. Co. *v.* Racer, 5 Ind. App. 209, 31 N. E. 853.

15. Date of contract.—Plaintiff, in his petition in an action for breach of contract, alleged the making of a contract with defendant on or about June 10th to furnish him by June 14th cars to be delivered June 17th. Held, that the time of the making of the contract was not material, and it was error to exclude evidence of a contract made on June 14th. Morehouse *v.* Texas Trunk R. Co., 4 Texas App. Civ. Cas., § 267, 17 S. W. 1086.

16. Mutuality.—Baxley *v.* Tallassee, etc., R. Co., 128 Ala. 183, 29 So. 451.

17. Unconditional undertaking.—Texas, etc., R. Co. *v.* Arnett, 40 Tex. Civ. App. 76, 88 S. W. 448.

18. Where plaintiff, a fruit grower, notified a railroad that it required a refrigerator car that day, and one on the following day, and was immediately notified that the car would be furnished that day if possible, and thereafter, during the same day, that defendant would be unable to furnish a car that day, but would furnish all cars needed by noon the following day, there was no contract to furnish a car on day named, but only to furnish one on the following day, for breach of which latter contract only the railway company was liable. Elberta Peach Co. *v.* Georgia, etc., R. Co., 66 S. E. 779, 133 Ga. 685.

Evidence that a railroad's agent, when applied to on October 30th to furnish cars, accepted the order, and said that he would have the cars ready by the 1st of November, if possible, but did not promise definitely to do so, was insufficient to establish a contract to furnish the cars on the 1st of November. Texas, etc., R. Co. *v.* Arnett, 88 S. W. 448, 40 Tex. Civ. App. 76.

19. Offer and acceptance.—This did not tend to show an unconditional undertaking to furnish the car as requested, but was entirely consistent with the agent's promise merely to "do the best he could" to so furnish it, and evidenced an effort on his part to comply with his undertaking. St. Louis, etc., R. Co. *v.* Cannington (Tex. Civ. App.), 110 S. W. 965; Texas, etc., R. Co. *v.* Arnett, 40 Tex. Civ. App. 76, 88 S. W. 448.

20. A railroad depot agent verbally agreed with a shipper, who desired a poultry car on a stated day, "that he thought he could get the car, and would do the best he could towards getting it, but did not make any absolute promise to get the car." The car was not furnished at the date asked for by the shipper. Held, that the contract imposed on the carrier no liability to furnish the car absolutely, and, as the shipper's action was based on contract, there could be no recovery. St. Louis, etc., R. Co. *v.* Cannington (Tex. Civ. App.), 110 S. W. 965.

21. Acceptance of general freight agent.—Outland *v.* Seaboard, etc., R. Co., 134 N. C. 350, 46 S. E. 735.

Plaintiff wrote defendant that he was

§ 729. Writing.—A contract between a carrier and a shipper for cars for a shipment need not be in writing to be valid,[22] even under a Reciprocal Demurrage Law.[23]

§ 730. Effect of Partial Invalidity.—A station agent having apparent authority to bind the railway in contracting for cars at his station, would not invalidate a contract made by him for cars, by exceeding his authority in contracting for shipment by a named route. Testimony to the agent's authority to bind the road as to the route would be immaterial.[24]

§§ 731-736. Construction and Operation—§ 731. In General.—Contracts to furnish cars when entered into are to be governed by the ordinary and general rules of construction that relate to contracts and the breaches thereof.[25]

§ 732. Persons Bound and Persons Entitled to Benefit.—A shipper's order for a specified number of cars for a specified day, when accepted, is a contract binding the carrier to furnish the cars, and the shipper to furnish the goods, but does not render the carrier liable to parties who did not authorize the order.[26]

§ 733. Time When Cars to Be Furnished.—When a request to furnish necessary cars for a shipper on a certain day has been made of a railroad company's station agent in due time, the company is under an implied agreement to furnish the cars on that day.[27]

§ 734. Contract with Owner of Private Railroad.—A shipping contract between a railroad company and a private person owning a road intended and used solely for the latter's private business is not a contract between connecting carriers, but one between the railroad company as a carrier and the private person as a shipper, and the carrier to furnish cars on reasonable notice to the shipper in necessary numbers for the conducting of the latter's business.[28]

cutting and expected to cut fifty car loads of props at a certain point, which he could not load at any siding, and asked for a train to load them on the main line. Defendant wrote that it had considered his application to load a train on the main line and was prepared to permit it, and concluded, "Please let me know when you desire a train, and we will take up with the superintendent the question when it can be furinshed." Held, that there was an unconditional and complete contract to furnish cars for transportation of the props; the day when the superintendent should send them being a mere matter of detail and in law to be done within a reasonable time after plaintiff should make known his readiness therefor. Outland *v.* Seaboard, etc., R. Co., 46 S. E. 735, 134 N. C. 350.

22. **Writing.**—See ante, "Verbal Contract, § 720.

23. **Under Minnesota reciprocal demurrage law.**—Laws 1907, c. 23 (Rev. Laws Supp. 1909, §§ 2023—1 to 2023—13), known as the "Reciprocal Demurrage Law," has no application to voluntary contracts between carriers and shippers, and therefore an agreement of a carrier to furnish cars at a specified time need not be in writing, as required by such act. Pope *v.* Wisconsin Cent. R. Co., 112 Minn. 112, 127 N. W. 436.

24. **Effect of partial invalidity.**—Gulf, etc., R. Co. *v.* Hodge, 10 Tex. Civ. App. 543, 30 S. W. 829.

25. **Construction and operation.**—Cross *v.* McFaden, 1 Tex. Civ. App. 461, 20 S. W. 846; Texas, etc., R. Co. *v.* Nicholson, 61 Tex. 491; Gulf, etc., R. Co. *v.* McCorquodale, 71 Tex. 41, 9 S. W. 80.

26. **Persons bound and persons entitled to benefit.**—Cumbie *v.* St. Louis, etc., R. Co. (Ark.), 151 S. W. 240.

27. **Time when cars to be furnished.**—Newport News, etc., R. Co. *v.* Mercer, 96 Ky. 475, 16 Ky. L. Rep. 555, 29 S. W. 301.

28. **Contract with owner of private railroad.**—By a contract between a railroad company and a lumber company the latter agreed to build a road from a connection with the railroad to its mill, twelve miles distant, the connection and the maintenance of a station there to be at the joint expense of the parties. It also agreed to build a side track "for the placing of cars" under the supervision of the railroad company's engineer, which should be sufficient to enable the railroad company with its engines to transfer cars "to and from its railroad and the switch and upon the railroad" of the lumber company, which also bound itself under penalties to ship all of its products, except such as should be sent by water, over the road of the railroad company. Held,

§ 735. Contract for Track Facilities.—A transportation company, having a railroad which tapped a coal region, and having agreed with the coal company to build a side track to the latter's mines, and to furnish the latter the same transportation facilities and make the same charges as the transportation company charged between two points on its main road, the distance being about the same, and the coal company having agreed to furnish for transportation all the coal it should mine, up to a certain amount, was bound to furnish the coal company with the same facilities on the side track as it furnished on the main track between the points named, and was not limited to the proportion of its facilities that the whole product of the coal company's mines bore to the product of all the other mines in the region.[29]

§ 736. Agreement to Haul Defective Car.—Where a railroad agreed to haul a car, one of the drawbars of which was broken by attaching the good end of it to a locomotive or train, it waived any objection that the car was not in proper condition for transportation.[30]

§§ 737-755. Performance or Breach—§ 737-740. What Constitutes a Breach—§ 737. Refusal to Permit Use of Cars.—The refusal to permit shipper to use cars furnished him at an agreed time and place and resulting in damage is a breach of the contract and gives cause of action.[31]

§ 738. Failure to Tender Cars in Time.—Whether or not the cars contracted for were furnished within a reasonable time is a question of fact for the jury to be determined from all the evidence, and not a fact to be proved by the opinion of any witness.[32] As a matter of law, a railroad company which contracts to furnish cars for transporting timber does not, by tendering them 75 or 80 days after the contract is made, perform its contract in a reasonable time.[33]

Hour of Day at Which Cars Furnished.—Where the railroad company was not required by order for cars for a particular day to furnish them at any particular day, the delivery at any hour of the day is sufficient.[34]

§ 739. Furnishing Defective Cars.—A railroad is liable as for breach of contract for furnishing defective cars where the defects would have been discovered on proper inspection.[35]

that such contract was between the railroad company, as a carrier and the lumber company, as a shipper, and by implication bound the former on reasonable notice to furnish cars on the side track in necessary numbers for the use of the lumber company in conducting its business. Taenzer & Co. *v.* Chicago, etc., R. Co., 170 Fed. 240, 95 C. C. A. 436.

29. **Contract for track facilities.**—Hazelton Coal Co. *v.* Buck Mountain Coal Co., 57 Pa. 301.

30. **Agreement to haul defective car.**—Judgment, 105 Ill. App. 96 affirmed. Illinois Cent. R. Co. *v.* Byrne, 205 Ill. 9, 68 N. E. 720.

31. **The refusal to permit shipper to use.**—Cross *v.* McFaden, 1 Tex. Civ. App. 461, 20 S. W. 846.

32. **Failure to tender cars in time.**—Pecos, etc., R. Co. *v.* Evans-Snider-Buel Co., 42 Tex. Civ. App. 60, 93 S. W. 1024, affirmed in 100 Tex. 190, 97 S. W. 466.

33. Outland *v.* Seaboard, etc., R. Co., 134 N. C. 350, 46 S. E. 735.

34. **Cars not required by order to be furnished at particular hour.**—In an action against a railroad company for failing to furnish coal cars ordered for a particular day, the evidence showed that the cars were delivered at 4 o'clock in the afternoon, and that the miners quit work at that hour, so that the cars could not be loaded that day. Held that, where the railroad company was not required by the order to furnish the cars at any particular hour, the delivery at any hour of the day was sufficient. McGrew *v.* Missouri Pac. R. Co., 109 Mo. 582, 19 S. W. 53.

35. **Liability for furnishing defective cars.**—In an action by a quarry company against a railroad company for breach of contract to furnish strong and inspected cars for the transportation of stone, the complaint alleged that a car was delivered which was defective, and had not been inspected; that the defects were hidden and unknown to the quarry company, but would have been discovered on proper inspection by the railroad com-

§ 740. Requisition Essential Where Contract to Furnish as Ordered.—Under a contract binding a carrier to furnish cars as ordered to ship peaches, the shipper can not recover for failure to furnish cars sufficient to transport ungathered peaches, for which no requisition was made.[36]

§§ 741-753. Liability of Carrier for Breach—§ 741. In General.—Where a railroad company contracted to furnish cars to a shipper at a specified time, but neglected to do so or to give reasonable notice of its inability so to do, it was liable for damages occasioned by failure to furnish the cars at the agreed time,[37] as an individual, and not as a common carrier.[38]

§ 742. Effect of Statute Allowing Recovery of Penalty.—A shipper, if he desires only to recover for breach of contract to furnish cars, although he may be entitled to recover the statutory penalty for carrier's failure to furnish cars, need only show a valid contract, breach and extent of injury.[39] The liability of a railroad company for breach of a parol agreement to furnish cars at a time specified is not abrogated by a statute prescribing a penalty for a failure to supply cars on written application, and an action for breach of such contract is not an action for the penalty and is maintainable.[40]

§ 743. Tender of Property for Transportation.—A carrier is not liable for failure to furnish cars and transport goods, unless they are offered at a regular depot or other usual place for receiving freight; but refusal, on demand, to furnish cars for goods placed at a station on its line, relieves the owner from making any further delivery or offer to deliver.[41]

§ 744. Road Not Owning Cars.—A carrier is not relieved from liability for breach of its contract to furnish cars, though at the date of and during the

pany; and that by reason thereof, and without fault of the quarry company, the car broke lose, ran down a grade, and killed a quarryman. Held, that the facts stated were sufficient to show an inexcusable breach of duty by the railroad company. Hoosier Stone Co. *v.* Louisville, etc., R. Co., 131 Ind. 575, 31 N. E. 365.

36. **Requisition essential where contract to furnish as ordered.**—Cumbie *v.* St. Louis, etc., R. Co. (Ark.), 151 S. W. 240.

37. **Liability of carrier for breach.**—Nichols *v.* Oregon, etc., R. Co., 24 Utah 83, 66 Pac. 768, 91 Am. St. Rep. 778.

A carrier is liable for damages resulting from a breach of a contract to furnish cars at specified time and place. Cross *v.* McFaden, 1 Tex. Civ. App. 461, 20 S. W. 846; Texas, etc., R. Co. *v.* Nicholson, 61 Tex. 491; Gulf, etc., R. Co. *v.* McCorquodale, 71 Tex. 41, 9 S. W. 80; Pecos River R. Co. *v.* Latham, 40 Tex. Civ. App. 78, 88 S. W. 392, affirmed in 101 Tex. 652, no op.

The Texas statute in no way limits the liability for damages for breach of a contract, in which case it is only necessary to show a valid contract and the extent of injury from its breach. McCarty *v.* Gulf, etc., R. Co., 79 Tex. 33, 15 S. W. 164.

38. International, etc., R. Co. *v.* Dimmit County Pasture Co., 5 Tex. Civ. App. 186, 23 S. W. 754.

39. **Effect of statute allowing recovery of penalty.**—McCarty *v.* Gulf, etc., R. Co., 79 Tex. 33, 15 S. W. 164.

Where a carrier agreed to furnish a shipper stable cars, which were not shown to be the only suitable kind and proper for the freight to be shipped, although that did not render it liable to the statutory penalty for a failure to do so, it is liable to damages for breach of the contract. Texas, etc., R. Co. *v.* Barrow, 33 Tex. Civ. App. 611, 77 S. W. 643, affirmed in 101 Tex. 663, no op.; Austin, etc., R. Co. *v.* Slator, 7 Tex. Civ. App. 344, 26 S. W. 233.

40. Receivers, etc., R. Co. *v.* Graves, 4 Texas App. Civ. Cas., § 149, 16 S. W. 102.

Though Act 20th Leg. Sess. imposes a penalty on railroad companies for failure to furnish freight cars after demand therefor in writing, an action will lie for the breach of an oral contract to furnish cars. Missouri Pac. R. Co. *v.* Harmonson, 4 Tex. App. Civ. Cas. 133, 16 S. W. 539.

41. A railroad company is not responsible in an action for an alleged infringment of a contract to carry coal for the plaintiff, unless it is proved that the plaintiff actually tendered the coal to the company for transportation, and the company then refused to carry it. Northwestern Fuel Co. *v.* Burlington, etc., R. Co., 20 Fed. 712; Louisville, etc., R. Co. *v.* Flannagan, 113 Ind. 488, 14 N. E. 370, 3 Am. St. Rep. 674.

time covered by the contract it did not have or own any cars.[42]

§ 745. Road Not Equipped with Cars of Character to Be Furnished.—In General.—Where a carrier agreed to furnish a certain kind of cars it could not avoid the consequences of a breach of the duty to do so by showing that its road was not equipped with cars of that character.[43]

Preference as to Character of Cars.—Where a railroad company contracted to furnish a shipper a certain number of cars at a specified time, but it was understood that such order was merely an expression of preference, and that the shipper would accept any variety of cars he could get, if the kind ordered were not obtainable, the company was not absolved from the duty to furnish cars at the required time by inability to obtain the precise kind ordered.[44]

§ 746. Failure to Furnish Refrigerator Cars.—A railroad company which does not own refrigerator cars, but has an arrangement with the owners of such cars whereby it can furnish the same to its shippers, is liable for injuries to shippers caused by delay in furnishing cars when promised.[45] In an action against a carrier for failure to furnish iced cars as agreed, it can not show as a defense that it held itself out as willing to haul iced cars to be furnished by another company under a contract with the shipper.[46] Where a railway company had contracted to ship freight in iced cars, the liability of the railroad company for failure so to do does not depend upon whether the company who was to furnish the cars was a common carrier.[47] Where a carrier fails to furnish refrigerator cars as agreed, the plaintiff has only to show that defendant is such a carrier, and refused to carry the perishable freight which was the cause of the damage to the shipper; and the carrier is liable, whether the freight was more than enough to fill the cars agreed to be furnished, or not, and it is not necessary for him to show that the carrier agreed to furnish the cars properly iced.[48]

§ 747. Effort to Procure Foreign Cars.—A railroad company is not relieved of liability for breach of its contract to furnish cars to transport freight by the fact that it used reasonable effort to procure foreign cars.[49]

§§ 748-753. Excuses for Breach or Nonperformance—§ 748. In General.—Matters not excusing the performance of a special contract to furnish cars, but only tending to excuse performance of the general duty imposed by law, are no defense to a breach of the special contract.[50]

§ 749. Act of God.—The act of God will not excuse a carrier from liability under an express contract to furnish cars.[51]

§ 750. Unavoidable Accident or Casualties.—A railroad company unconditionally contracting to furnish cars at a certain time can not excuse itself from liability by showing unavoidable accident or delay.[52]

42. Road not owning cars.—Baxley *v.* Tallassee, etc., R. Co., 128 Ala. 183, 29 So. 451.

43. Road not equipped with cars of character to be furnished.—International, etc., R. Co. *v.* True, 23 Tex. Civ. App. 523, 57 S. W. 977.

44. Preference as to character of cars.—Nichols *v.* Oregon, etc., R. Co., 24 Utah 83, 66 Pac. 768, 91 Am. St. Rep. 778.

45. Failure to furnish refrigerator cars.—International, etc., R. Co. *v.* Young (Tex. Civ. App.), 28 S. W. 819; Texas, etc., R. Co. *v.* Nicholson, 61 Tex. 491.

46. Mathis *v.* Southern R. Co., 65 S. C. 271, 43 S. E. 684, 61 L. R. A. 824.

47. Mathis *v.* Southern R. Co., 65 S. C. 271, 43 S. E. 684, 61 L. R. A. 824.

48. Mathis *v.* Southern R. Co., 65 S. C. 271, 43 S. E. 684, 61 L. R. A. 824.

49. Effort to procure foreign cars.—Outland *v.* Seaboard, etc., R. Co., 134 N. C. 350, 46 S. E. 735.

50. Excuse for breach or nonperformance.—Chattanooga Southern R. Co. *v.* Thompson, 133 Ga. 127, 65 S. E. 285.

51. Act of God.—Miller *v.* Chicago, etc., R. Co., 62 Mo. App. 252.

52. Unavoidable accident or casualties.—Cumbie *v.* St. Louis, etc., R. Co. (Ark.), 151 S. W. 240; Harrison *v.* Missouri Pac. R. Co., 74 Mo. 364, 41 Am. Rep. 318.

§ 751. Storms.—Where a carrier agreed to furnish cars at a day certain, it is no defense, on failure so to do, that it was prevented by a severe storm.[53]

§ 752. Wrecks.—The wreck of a railroad train, whereby the free movement of cars is prevented, is a sufficient excuse for the company's failure to furnish cars to a shipper at a certain time and place as agreed.[54]

§ 753. Unprecedented Traffic.—Where a carrier contracted to furnish a specified number of cars at specified times and places, the carrier's inability to furnish the cars contracted for owing to unusually heavy traffic at the time the cars were demanded constitutes no defense to an action for damages for such failure.[55]

§ 754. Liability of Shipper for Breach.—A railroad company can recover damages against a shipper who fails to furnish the goods to be shipped at the time and place agreed on, the company having been ready with their cars to receive them. The responsibilities for breach of contract can not rest upon one of the parties whilst the other is to reap its benefits only.[56]

§ 755. Waiver of Cause of Action against Carrier.—In an action against a carrier for damages caused by its delay in transporting cattle, there is no error in the court's failure to instruct the jury that the plaintiffs, by making the written contract of transportation, waived all damages for breach of the parol contract to furnish the cars at a stated time, where there was no consideration for the waiver.[57]

§§ 756-760. Merger—§ 756. General Rule.—Where a shipper of property takes from the carrier a bill of lading or other voucher, expressing the terms and conditions on which the property is to be transported, the writing, in the absence of proof of fraud or mistake, must be taken as the sole evidence of the final agreement of the parties, and by it their duties and liabilities must be regulated.[58] All prior verbal negotiations between the parties to a shipping

53. Storms.—Miller *v.* Chicago, etc., R. Co., 62 Mo. App. 252.

54. Wrecks.—Newport News, etc., R. Co. *v.* Mercer, 96 Ky. 475, 16 Ky. L. Rep. 555, 29 S. W. 301.

55. Unprecedented traffic.—Oregon R., etc., Co. *v.* Dumas, 104 C. C. A. 641, 181 Fed. 781.

A carrier who contracts to furnish all the cars necessary to transport the peach crop at a certain station, on failure to do so, can not defend because of heavy and unprecedented traffic. Cumbie *v.* St. Louis, etc., R. Co. (Ark.), 151 S. W. 240.

Texas.—Gulf, etc., R. Co. *v.* Hume Bros., 6 Tex. Civ. App. 653, 24 S. W. 915, following Cross *v.* McFaden, 1 Tex. Civ. App. 461, 20 S. W. 846; Gulf, etc., R. Co. *v.* Hume Bros., 87 Tex. 211, 27 S. W. 110.

Unexpected increase of business.—Inability of a railroad to furnish cars contracted for, owing to an unexpected increase in its volume of business, is no defense for breach of such contract. Gulf, etc., R. Co. *v.* Hodge, 10 Tex. Civ. App. 543, 30 S. W. 829; Southern Kansas R. Co. *v.* Morris (Tex. Civ. App.), 99 S. W. 433, affirmed in 100 Tex. 611; Gulf, etc., R. Co. *v.* Hume Bros., 87 Tex. 211, 27 S. W. 110.

56. Liability of shipper for breach.—Texas, etc., R. Co. *v.* Nicholson, 61 Tex. 491.

57. Waiver of cause of action against carrier.—Gulf, etc., R. Co. *v.* McCarty, 82 Tex. 608, 18 S. W. 716.

After the cattle were loaded in the cars, plaintiff signed a written contract of shipment, releasing defendant from all liability for delay in receiving or shipping the cattle, and making it a condition precedent to plaintiff's right to recover for any injury to the cattle at any station where they might be loaded or unloaded that he should give the station master of the last-named station a written notice of his claim. Held, that the court erred in refusing to instruct that plaintiff, by his contract, had waived all claims for damages previously accrued, since, under Rev. St., art. 1265, subd. 10, the want of consideration for such contract could be set up only by a proper plea supported by affidavit, which was not done in this case. Gulf, etc., R. Co. *v.* Wright, 1 Tex. Civ. App. 402, 21 S. W. 80.

58. General rule.—The bill of lading that the shipper receives from the carrier, and uses by attaching thereto a draft on the consignee in payment of the goods shipped, is the final contract as to

contract are merged in the written contract, and the shipper can not admit the execution of the contract and avail himself of the fact that he did not read it or know its contents, where no mistake, fraud, imposition or deceit is charged to have occurred.[59] In such case the written shipping contract governs the shipment as a matter of law.[60] But an action may be maintained against a railway company on a verbal contract of shipment, under certain circumstances, although a written contract may have been subsequently entered into.[61]

§§ 757-758. Contract Executed after Carriage Begun—§ 757. In General.—The mere receipt of a written contract[62] or bill of lading does not alter or affect a prior contract, under which goods have been actually shipped and are in course of transit, without an actual consent to the change.[63] Where

the transportation of the goods. Bedell *v.* Richmond, etc., R. Co., 94 Ga. 22, 20 S. E. 262; Long *v.* New York Cent. R. Co., 50 N. Y. 76.

59. McFadden *v.* Missouri, Pac. R. Co., 92 Mo. 343, 4 S. W. 689, 1 Am. St. Rep. 721; Turner *v.* St. Louis, etc., R. Co., 20 Mo. App. 632.

Instances.—Prior to the reception of goods, and before any bill of lading was issued, a carrier agreed to ship the goods "in cold service." The bill of lading did not mention such agreement. Held, that it could be shown by parol evidence, in an action by the shipper against the carrier to recover the value of the goods. Merchants' Dispatch Transp. Co. *v.* Furthmann, 47 Ill. App. 561, affirmed in 149 Ill. 66, 36 N. E. 624, 41 Am. St. Rep. 265.

A shipper, who had orally agreed with a railroad company to ship his cattle upon certain terms and conditions, delivered the cattle to the railroad company, and then, before the train had started, accepted and signed a written contract of shipment containing provisions materially different from those of the oral contract. Held, that the oral contract was thereby annulled. Leonard *v.* Chicago, etc., R. Co., 54 Mo. App. 293.

Bill of lading at variance with prior agreement.—Where a bill of lading is given by the shipowner and accepted by the shipper without objection, a prior agreement for the carriage is not a final and definite statement of all the terms of the agreement between the parties, and the bill of lading is the real contract by which the mutual obligations of the parties are to be governed. The Caledonai, 43 Fed. 681.

Where a bill of lading is made out by the carrier, and delivered to and accepted by the shipper, all previous parol agreements are merged in it. Bostwick *v.* Baltimore, etc., R. Co. (N. Y.), 55 Barb. 137.

If there is nothing on the face of a bill of lading requiring the master of the vessel to take one route rather than another, such an obligation can not be established by proof of any preliminary conversation. White *v.* Van Kirk (N. Y.), 25 Barb. 16.

60. Gulf, etc., R. Co. *v.* McCord (Tex. Civ. App.), 81 S. W. 1032; Southern Pac. Co. *v.* Anderson, 26 Tex. Civ. App. 518, 63 S. W. 1023, affirmed in 95 Tex. 686, no op.; Missouri, etc., R. Co. *v.* Carter, 9 Tex. Civ. App. 677, 29 S. W. 565; Texas, etc., R. Co. *v.* Avery, 19 Tex. Civ. App. 235, 46 S. W. 897, affirmed in 93 Tex. 673, no op.; Gulf, etc., R. Co. *v.* McCarty, 82 Tex. 608, 18 S. W. 716; Gulf, etc., R. Co. *v.* Stanley, 89 Tex. 42, 33 S. W. 109, affirming 29 S. W. 806; San Antonio, etc., R. Co. *v.* Wright, 20 Tex. Civ. App. 136, 137, 49 S. W. 147; Galveston, etc., R. Co. *v.* Botts, 22 Tex. Civ. App. 609, 55 S. W. 514; Gulf, etc., R. Co. *v.* Funk, 42 Tex. Civ. App. 490, 92 S. W. 1032; San Antonio, etc., R. Co. *v.* Barnett, 27 Tex. Civ. App. 498, 66 S. W. 474; Ft. Worth, etc., R. Co. *v.* Wright, 30 Tex. Civ. App. 234, 70 S. W. 335; Gulf, etc., R. Co. *v.* Hume Bros., 87 Tex. 211, 27 S. W. 110, reversing 6 Tex. Civ. App. 653, 24 S. W. 915; San Antonio, etc., R. Co. *v.* Williams (Tex. Civ. App.), 57 S. W. 883; McNeill *v.* Galveston, etc., R. Co. (Tex. Civ. App.), 86 S. W. 32; Missouri, etc., R. Co. *v.* Carter, 9 Tex. Civ. App. 677, 29 S. W. 565; Missouri, etc., R. Co. *v.* Withers, 16 Tex. Civ. App. 506, 40 S. W. 1073, affirmed in 93 Tex. 691, no op.; Houston, etc., R. Co. *v.* Mayes, 44 Tex. Civ. App. 31, 97 S. W. 318; Atchison, etc., R. Co. *v.* Grant, 6 Tex. Civ. App. 674, 26 S. W. 286, affirmed in 93 Tex. 699, no op.

61. Gulf, etc., R. Co. *v.* McCord (Tex. Civ. App.), 81 S. W. 1032.

62. Where a shipper loads his cattle under a parol contract, it governs a written contract given to him just as the train was starting, and which he fails to read before signing. Missouri, etc., R. Co. *v.* Carter, 9 Tex. Civ. App. 677, 29 S. W. 565.

63. Decree, 112 Fed. 829, reversed. Farmers' Loan, etc., Co. *v.* Northern Pac. R. Co., 57 C. C. A. 533, 120 Fed. 873, affirmed Northern Pac. R. Co. *v.* American Trading Co., 25 S. Ct. 84, 195 U. S. 439, 49 L. Ed. 269. See ante, "Bills of Lading," chapter 6.

Illinois.—Wabash R. Co. *v.* Lannum, 71 Ill. App. 84.

Kansas.—A shipper who neglects to examine a bill of lading handed him after

a verbal contract was made, the goods received, and the journey begun, and then a written contract was presented to the shipper, which he signed with a knowledge of its contents or where he had sufficient time to have read its contents, and which he was not induced to sign by any false representations of the carrier's agent, or which he signed under circumstances such that he should have read the same; the verbal contract is merged into the written contract; but where the written contract was obtained by fraud or misrepresentation, the verbal contract would not be merged into it;[64] this rule could have no application where the bill of lading was not relied on by the carrier.[65]

Allegation and Proof of Want of Consideration, Duress, etc.—The plaintiff in attacking the validity of the written contract must allege and prove the want of consideration for its execution, or circumstances of duress attending the same;[66] this allegation it seems must be under oath.[67]

the shipment had been made on a parol agreement is not bound by such bill's terms as to a material matter which had been otherwise stipulated in the parol agreement. Missouri Pac. R. Co. *v.* Beeson, 30 Kan. 298, 2 Pac. 496.

New York.—Where goods are shipped under a verbal agreement for their transportation, such agreement is not merged in a bill of lading, which is partly written and partly printed, delivered to the shipper after he has parted with the control of his goods, notwithstanding such bill of lading, by its terms, limits the liability of the carrier, and expresses on its face that, by accepting it, the shipper agrees to its conditions. The mere receipt of the bill, after the verbal agreement had been acted upon, is not sufficient to conclude him from showing what the actual agreement was under which the goods had been shipped. Schiff *v.* New York, etc., R. Co. (N. Y.), 52 How. Prac. 91.

A failure to object to limitations contained in a bill of lading issued in New York, and delivered several days after the goods had been shipped, can not, under the decisions of New York, be held to be a waiver of an oral contract, relating to the manner of shipment of such goods, also made in New York between the parties, whereby different terms were agreed upon. Merchants' Dispatch Transp. Co. *v.* Furthmann, 47 Ill. App. 561, affirmed in 149 Ill. 66, 36 N. E. 624, 41 Am. St. Rep. 265.

North Carolina.—Where defendant orally agreed to furnish cars to plaintiffs on a certain day, and failed to do so, the fact that plaintiffs shipped their cattle after the day on which defendant agreed to furnish the cars, and took a bill of lading therefor, does not merge the oral contract to furnish the cars on a certain day in the subsequent written contract of shipment, and relieve defendant from liability for such failure. McAbsher *v.* Richmond, etc., R. Co., 108 N. C. 344, 12 S. E. 892.

68. Bill of lading subsequently handed to shipper's clerk.—A contract of shipment made with a common carrier can not be modified by a bill of lading subsequently handed to the shipper's clerk. Rudell *v.* Ogdensburg Transit Co., 76 N. W. 380, 117 Mich. 568, 44 L. R. A. 415.

When goods are shipped under a parol contract covering future shipments, bills of lading given by the carrier are only evidence of the dates and amounts of shipments made under the pre-existing contract. St. Louis, etc., R. Co. *v.* Elgin Condensed Milk Co., 74 Ill. App. 619, affirmed St. Louis, etc., R. Co. *v.* Elgin Condensed Milk Co., 51 N. E. 911, 175 Ill. 557, 67 Am. St. Rep. 238.

64. Atchison, etc., R. Co. *v.* Grant, 6 Tex. Civ. App. 674, 26 S. W. 286, affirmed in 93 Tex. 699, no op.; Gulf, etc., R. Co. *v.* Wright, 1 Tex. Civ. App. 402, 21 S. W. 80.

65. Bill of lading not relied on by carrier.—In an action against a carrier for loss resulting from defendant's delay in delivering perishable goods which it undertook to carry for plaintiff, where no bill of lading was delivered to plaintiff, and he sued on a verbal contract made by him with defendant's agent to deliver the goods within four days from the date of their shipment, and defendant in its answer does not rely on the bill of lading subsequently delivered to plaintiff, the rule that oral testimony can not, in the absence of any allegation of fraud or mistake, be introduced to change or vary the terms of a written contract, does not apply. The issue is, was there a verbal contract between plaintiff and the agent? Chesapeake, etc., R. Co. *v.* Bradford, 15 Ky. L. Rep. 60.

66. Allegation and proof of want of consideration duress, etc.—See Texas, etc., R. Co. *v.* Avery, 19 Tex. Civ. App. 235, 46 S. W. 897, affirmed in 93 Tex. 673, no op.; Ft. Worth, etc., R. Co. *v.* Underwood, 39 Tex. Civ. App. 404, 87 S. W. 713.

In the absence of a pleading putting in issue its validity, the written contract

67. Allegation under oath.—But see McNeill *v.* Galveston, etc., R. Co. (Tex. Civ. App.), 86 S. W. 32; Gulf, etc., R. Co. *v.* Jackson (Tex. Civ. App.), 86 S. W. 47, reversed in 99 Tex. 343.

Merger a Question for Jury.—Whether the written or verbal contract should control is a question for the jury; and it is for the jury to find whether or not the necessary time was given to inspect the written contract, and whether the contents were misrepresented to the shipper.[68]

§ 758. Ratification or Adoption by Negotiation of Bill of Lading.—The fact that a shipper, after receiving a bill of lading, negotiates the same, is not a ratification or adoption of its terms, as between him and the carrier, which will operate to annul a prior valid contract under which the goods were shipped, and under which rights have vested and obligations have accrued.[69]

§ 759. Written Contract Executed after Breach of Parol Contract.—Where a written contract for the shipment of freight was entered into after the breach of an oral contract in relation to the same matter, the written contract did not merge the oral contract, and would not bar a recovery for breach of it,[70]

imports a consideration. Ft. Worth, etc., R. Co. *v.* Underwood, 39 Tex. Civ. App. 404, 87 S. W. 713.

In the absence of any evidence of want of any additional consideration, fraud, compulsion, duress or want of time to read the written contracts, they must be taken as merging all previous understandings between the parties. San Antonio, etc., R. Co. *v.* Barnett, 27 Tex. Civ. App. 498, 66 S. W. 474; Missouri, etc., R. Co. *v.* Carter, 9 Tex. Civ. App. 677, 29 S. W. 565; Houston, etc., R. Co. *v.* Mayes, 44 Tex. Civ. App. 31, 97 S. W. 318.

Contract to furnish cars.—Ft. Worth, etc., R. Co. *v.* Underwood, 39 Tex. Civ. App. 404, 87 S. W. 713.

Weight of evidence—Instances.—See San Antonio, etc., R. Co. *v.* Barnett, 27 Tex. Civ. App. 498, 66 S. W. 474.

There is ample proof to sustain an allegation in plaintiff's pleading, that he was overreached and caused to sign a contract with whose contents he was not acquainted, and with which he was not permitted to acquaint himself by defendant; where the evidence shows that the written contract was not presented to the plaintiff until he was en route, and that he was then told that it was merely a paper that secured him transportation; and was not given time in which to read it, and that relying upon the statements made to him, and impelled by the fact that he was told that he must sign to get transportation, he signed the contract. Atchison, etc., R. Co. *v.* Grant, 6 Tex. Civ. App. 674, 26 S. W. 286, affirmed in 93 Tex. 699, no op.

68. Merger a question for jury.—Atchison, etc., R. Co. *v.* Grant, 6 Tex. Civ. App. 674, 26 S. W. 286, affirmed in 93 Tex. 699, no op.

Defendant carrier has the right to set up in its answer that, instead of shipments being made under a verbal contract, as alleged by plaintiff, it was under a written contract, but it is error to hold, without submitting any issue thereon, that the verbal contract was merged into the written, and that a provision in the latter requiring certain notices to be given, was binding. Withers *v.* Missouri, etc., R. Co. (Tex. Civ. App.), 32 S. W. 906.

69. Ratification or adoption by negotiation of bill of lading.—Decree (C. C. 1902), 112 Fed. 829, reversed. Farmers' Loan, etc., Co. *v.* Northern Pac. R. Co., 120 Fed. 873, 57 C. C. A. 533, affirmed in Northern Pac. R. Co. *v.* American Trading Co., 25 S. Ct. 84, 195 U. S. 439, 49 L. Ed. 269.

A special agreement in behalf of railway receivers to forward a thorough shipment by the steamer of a connecting carrier sailing on a designated day is not modified by the mere receipt, without objection, and the subsequent hypothecation, of the bill of lading containing, as a part of numerous conditions printed in small type, the statements that the carrier is not to be liable for any loss not occurring on its own road, and that the contract as executed is accomplished, and all liability thereunder terminates, upon the delivery of the property to the vessel, where the bill was not examined or read, and was accepted after the goods had passed from the control of the shipper, by a clerk who had no knowledge of these conditions, and no authority to consent to a modification of the contract already made. Decree, Farmers' Loan, etc., Co. *v.* Northern Pac. R. Co., 120 Fed. 873, 57 C. C. A. 533, affirmed in Northern Pac. R. Co. *v.* American Trading Co., 25 S. Ct. 84, 195 U. S. 439, 49 L. Ed. 269.

70. Written contract executed after breach of parol contract.—Harrison *v.* Missouri Pac. R. Co., 74 Mo. 364, 41 Am. Rep. 318.

Where animals are shipped under a parol contract, and injured by reason of a defective car, the shipper's right to recover damages is not affected by a written contract of carriage, afterwards made, in the absence of an express provision relating thereto. Louisville, etc., R. Co. *v.* Craycraft, 12 Ind. App. 203, 39 N. E. 523.

A contract to furnish a certain number of live-stock cars at a certain date is not

unless there was a consideration inuring to the shipper as compensation for the damages resulting from the breach when the contract was signed.[71]

§ 760. Receipt for Freight Accepted after Shipment Received.—See ante, "Shipping Receipts," chapter 7.

§ 761. Modification and Rescission.—Where a shipper telephoned the carrier for an all-rail rate, and received a 90-cent rate and the next day shipped the goods, and sent with them to the depot an ordinary dray ticket, the sending of this ticket, without any designation that the freight was to go by an all-rail route, was a contract that it should go in the ordinary way, and a revocation of the telephone contract, and a charge to that effect was proper.[72]

Shipping Instructions Superseded by Bill of Lading.—A shipper's written instruction to a station agent as to the selection of a connecting carrier is superseded by subsequent bills of lading containing no provision on the subject.[73]

Contract of Carriage and Insurance by Subsequent Bill of Lading Delivered to Consignor.—Where plaintiff made a contract at Mobile for the transportation and insurance of certain goods from New York to Mobile, a bill of lading afterwards given to his consignor when the goods were shipped, limiting the carrier's liability to the value of the goods at the place of shipment, did not supersede the oral contract, and the measure of damages was the value of the goods at the place of delivery.[74]

Shipping Report.—The shipping report signed by plaintiff and the agent of the connecting line at the connecting point could not change or affect the written contracts between plaintiff and defendant.[75]

Bill of Lading Issued by Connecting Carrier.—Where a railroad company agreed, in consideration of a consignor's routeing freight by its line, to furnish through refrigerator cars for transportation of perishable products, the agreement is not superseded by a bill of lading given by a connecting carrier at the original point of shipment, whereby liability was lessened, the contracts being independent of each other.[76]

Express Modification of Provisions as to Duty to Feed and Water Stock.—The provisions of a bill of lading of live stock that the shipper is to feed and water them is waived by the carrier when he writes across the face of

merged in a bill of lading issued after breach of the contract, when the cattle were actually laden and shipped, so as to deprive the shipper of his right to damages for such breach. Pittsburgh, etc., R. Co. *v.* Racer, 10 Ind. App. 503, 37 N. E. 280.

Where plaintiff contracted with the vice president and agent of two connecting lines to ship oil by such lines, and notified him of the danger of leakage in case of delay on the route, and the latter agreed that there should be no delay, and that the companies had competent coopers to take care of the oil, and would be responsible for the leakage; and subsequently, on receipt of the oil, the common agent of the companies at the shipping point issued through bills of lading, limiting the companies' liability for loss by leakage; and, by reason of delay in shipment, leakage occurred—held, that the jury were justified in finding that the contract was contained in the prior agreement, and not in the bills of lading varying that agreement. Swift *v.* Pacific Mail, etc., Co., 106 N. Y. 206, 12 N. E. 583.

Texas.—Pecos River R. Co. *v.* Latham, 40 Tex. Civ. App. 78, 88 S. W. 392, affirmed in 101 Tex. 652, no op.

71. Gulf, etc., R. Co. *v.* House, 40 Tex. Civ. App. 105, 88 S. W. 1110.

72. Modification and rescission.—Hostetter *v.* Baltimore, etc., R. Co. (Pa.), 11 Atl. 609.

73. Shipping instructions superseded by bill of lading.—Bessling & Co. *v.* Houston, etc., R. Co., 35 Tex. Civ. App. 470, 80 S. W. 639.

74. Contract of carriage and insurance by subsequent bill of lading delivered to consignor.—Judgment (Sup. 1897), 45 N. Y. S. 286, 17 App. Div. 408, reversed. Lowenstein *v.* Lombard, etc., Co., 164 N. Y. 324, 58 N. E. 44.

75. Shipping report.—San Antonio, etc., R. Co. *v.* Barnett, 27 Tex. Civ. App. 498, 66 S. W. 474.

76. Bill of lading issued by connecting carrier.—Judgment, St. Louis, etc., R. Co. *v.* Elgin Condensed Milk Co., 74 Ill. App. 619, affirmed in St. Louis, etc., R. Co. *v.* Elgin Condensed Milk Co., 51 N. E. 911, 175 Ill. 557, 67 Am. St. Rep. 238.

the bill of lading: "To be fed and watered at the expense of the shippers. No one in charge." Besides, when the carrier knows that no one accompanies the stock, it is his duty to look after and care for them as if there were no contract with the shipper.[77]

Contract to Carry to Terminus Only—Markings on Bill of Lading.—A specific agreement by the receiving carrier to transport the freight only to the terminus of its line, and there deliver to a connecting carrier, can not be controlled by markings on the bill of lading, giving the name of the consignee and the ultimate destination of the freight.[78]

Through Contracts by Bill of Lading.—Where a verbal contract of shipment is made by which freight is to be carried to its destination, but the bill of lading then made is merely to carry to the next carrier, which the shipper does not notice, the verbal contract is competent evidence in an action to recover under the common-law liability for failure to deliver.[79]

Subsequent Change of Rates.—A shipper applied to the local freight agent of a railroad company, to get the rates of freight upon a proposed shipment of a certain amount of grain to a given point. The agent, acting by authority, gave him the rate, and he agreed to ship at that rate. He then went to the master of trains of the company, and made an arrangement with him for the requisite number of cars per week, for the purpose of making such shipment. Held, that this amounted to a special contract, on the part of the company, to make the shipment at the rates named by the freight agent, and to furnish the cars in the manner agreed upon by the shipper and master of trains; and it could not be affected by a subsequent change of their rates of freight.[80]

False Representations as to Arrival as Grounds for Rescission.—Where contracts for furnishing freight are entered into in reliance upon untrue representations as to the arrival of the vessel at port of shipment, which representations amount to a warranty on the part of the shipper and her agents, they can not be enforced against the shippers, though the contracts contained no canceling clause.[81]

Evidence of Rescission.—Where a shipper contracted with the agent of a railroad company for the transportation of goods on a particular day and train, but the company failed to perform such agreement, the fact that the shipper was subsequently informed by another person that the goods could not be sent by that train if the car should be full was not evidence of a subsequent rescission of such contract, it appearing that such person was not a freight agent of the company.[82]

§§ 762-786. Actions against Carrier for Breach of Contract—§ 762. Nature and Form of Remedy.—Where a railroad company was induced to break its contract with a shipper by threats and representations of a third person, the shipper's remedy is an action against the railroad company for a breach of contract.[83]

§ 763. Limitation, in Contract, of Time for Bringing Action.—Under a stipulation in a bill of lading that no action for breach thereof shall be sustainable, unless brought within 40 days after the right of action has accrued, a

77. **Express modification of provisions as to duty to feed and water stock.**—Norfolk, etc., R. Co. *v.* Sutherland, 105 Va. 545, 54 S. E. 465.

78. **Contract to carry to terminus only by marking on bill of lading.**—Miller Grain, etc., Co. *v.* Union Pac. R. Co., 138 Mo. 658, 40 S. W. 894.

79. **Through contracts by bill of lading.**—P. C. & St. L. R. Co. *v.* Blakemore, 1 O. C. C. 42, 1 O. C. D. 26.

80. **Subsequent change of rates.**—Toledo, etc., R. Co. *v.* Roberts, 71 Ill. 540.

81. **False representations as to arrival as grounds for rescission.**—Gray *v.* Moore, 37 Fed. 266.

82. **Evidence of rescission.**—Curtis *v.* Chicago, etc., R. Co., 18 Wis. 312.

83. **Nature and form of remedy.**—Glencoe Land, etc., Co. *v.* Hudson Bros. Comm. Co., 138 Mo. 439, 40 S. W. 93, 36 L. R. A. 804, 60 Am. St. Rep. 560.

delay for a longer period will not bar an action for breach of a prior verbal contract to furnish cars for the shipment of stock at a certain place, on a certain day.[84]

§ 764. Demand.—No demand is necessary before commencing an action of contract against a carrier for neglecting to carry and deliver the goods according to his contract, if the property be lost or destroyed.[85]

§§ 765-767. Persons Who May Sue—§ 765. Shipper.—One with whom a railroad company makes a contract for the shipment of goods may, prima facie, recover for its breach, without showing title to the property.[86] A bill of lading given by a common carrier to a shipper is sufficient evidence of such shipper's ownership to entitle him to sue for failure to transport the goods.[87]

Consignee Agent of Shipper.—In an action against a carrier for failure to transport goods according to a contract, if the consignee of the goods be merely the agent of the shippers the latter are the proper parties to institute the suit, and are entitled to recover the damages sustained.[88]

§ 766. Forwarding Agent.—A mere forwarding agent who ships under a contract made by his principal with the carrier has not a sufficient interest to entitle him to maintain an action against the carrier for breach of the contract.[89]

§ 767. Consignee.—A consignee, having title to the property carried, may sue in contract upon the carrier's implied agreement to deliver; but such implied agreement will be also subject to the terms of any express contract made by the carrier with the consignor.[90]

§§ 768-773. Pleading—§§ 768-772. Complaint, Declaration or Petition—§ 768. Where Contract Distributive as to Time.—Where plaintiff, a carrier, contracted to transport for defendant, a manufacturer, from his works from 1,200 to 5,000 barrels of salt, annually, for three years, the contract providing in detail for plaintiff's compensation and the deductions to be made therefrom for salt lost in transit, in asserting a breach of contract by defendant, whether by refusing to pay for transportation or by refusing to permit it, plaintiff must confine himself to a single year, or declare distributively for single years.[91]

§ 769. Necessary Allegations.—Terms of Contract and Breach.—A petition in an action on a shipping contract is defective where it does not set forth the terms of the contract and allege a breach thereof.[92] A petition is

84. **Limitation, in contract, of time for bringing action.**—McCarty *v.* Gulf, etc., R. Co., 79 Tex. 33, 15 S. W. 164. See ante, "Limitation in Contract of Time for Bringing Action," § 763; post, "Limitation of Liability," Chap. 14.

85. **Demand.**—Alden *v.* Pearson (Mass.), 3 Gray 342. See Bowlin *v.* Nye (Mass.), 10 Cush. 416.

86. **Shipper.**—Davis *v.* Jacksonville Southeastern Line, 126 Mo. 69, 28 S. W. 965.

87. Parks *v.* Gulf, etc., R. Co. (Tex. Civ. App.), 30 S. W. 708.

88. **Consignee agent of shipper.**—Harrison *v.* Stewart, Fed. Cas. No. 6,145, Taney 485.

89. **Forwarding agent.**—Plaintiff, at the request of A., promised that after A.'s death plaintiff would transport his body to his home for burial. Plaintiff obtained a coffin from the city, and purchased a box, in which he placed the coffin, and forwarded the body on defendant's vessel under a contract made by the sister of deceased with defendant. Held, that plaintiff did not have a sufficient interest in the contract to entitle him to maintain an action against defendant for failing to transport the body. Driscoll *v.* Nichols (Mass.), 5 Gray 488.

90. **Consignee.**—Perkins Co. *v.* American Exp. Co., 199 Mass. 561, 85 N. E. 895.

91. **Where contract distributive as to time.**—White *v.* Toncray, 46 Va. (5 Gratt.) 179.

92. **Terms of contract and breach.**—Garrison *v.* Babbage Transp. Co., 94 Mo. 130, 6 S. W. 701.

fatally defective which pleads at most a breach of an unpleaded contract.[93]

Allegations That Defendant a Common Carrier.—In an action against a railroad company on a special contract "to ship, transport, and carry" plaintiff's goods to N., a point beyond defendant's line, it is not necessary to allege that defendant is a common carrier.[94]

Name of Carrier's Agent.—In an action against a carrier for breach of contract of shipment, it is sufficient to allege that the shipping contract was made with defendant corporation and it is unnecessary to state the name of the agent making it.[95]

Ability to Transport or Furnish Means of Transportation.—In a complaint against a railroad company for a breach of a contract to furnish at a certain time and place the necessary cars, and to transport a certain number of hogs, it is not necessary to allege that the defendant, at the time complained of, had the ability to transport, or to furnish the means to transport, such hogs.[96]

Delivery of Goods to Carrier.—In an action against a common carrier for breach of contract, in failing to carry goods, the plaintiff must allege a delivery; and it is not sufficient to allege that the carrier executed a bill of lading "acknowledging the receipt" of the goods.[97]

Description of Shipment.—In an action against a carrier for breach of a special contract for the shipment of fruit trees, where the petition did not claim as damages, the market value of the trees, but the amount for which the trees had been sold, of which it was alleged defendant was fully apprised when the contract was made, it was not necessary for plaintiff, in his complaint or by a bill of particulars, to give any description of the contents of the shipment; his measure of damages being the amount for which the trees had been sold.[98]

Special Damages.—In an action against a railroad for failure to furnish cars for the shipment of cattle according to contract, there can be no recovery for horse hire made necessary by the delay, where such item is not pleaded.[99]

Items Constituting Amount of Damages.—In an action against a carrier for breach of a special contract of shipment, where defendant was informed of the accrual of items of expense for renotifying and delivering the goods to the purchasers, in the event it failed to deliver them safely and at the time agreed upon, it was not necessary for plaintiff to itemize in his petition the different matters constituting the amount of such damage.[1]

Rate Fixed by Railroad Commission.—The petition in an action against a carrier for breach of a freight contract, made while the railroad commission was in force, need not allege that the rate fixed by the contract was that established by the commission, as any violation of the commission act is a matter of defense.[2]

93. Currell v. Hannibal, etc., R. Co., 97 Mo. App. 93, 71 S. W. 113.

94. **Allegations that defendant a common carrier.**—Dunbar v. Port Royal, etc., R. Co., 36 S. C. 110, 15 S. E. 357, 31 Am. St. Rep. 860.

95. **Name of carrier's agent.**—Missouri, etc., R. Co. v. Withers, 16 Tex. Civ. App. 506, 40 S. W. 1073.

96. **Ability to transport or furnish means of transportation.**—Pittsburgh, etc., R. Co. v. Hays, 49 Ind. 207.

97. **Delivery of goods to carrier.**—Page & Co. v. Sandusky, etc., R. Co., 2 O. Dec. Reprint 716, 4 W. L. M. 644.

98. **Description of shipment.**—Pacific Exp. Co. v. Needham, 37 Tex. Civ. App. 129, 83 S. W. 22.

99. **Special damages.**—Texas, etc., R. Co. v. Arnett, 40 Tex. Civ. App. 76, 88 S. W. 448.

An item of damages was loss of price on 4,000 bushels of corn from the breach of contract to furnish cars. There was no averment of injury to corn accumulated, through exposure, etc. Held, error to admit testimony to the injury not alleged. Gulf, etc., R. Co. v. Hodge, 10 Tex. Civ. App. 543, 30 S. W. 829.

1. **Items constituting amount of damages.**—Pacific Exp. Co. v. Needham, 83 S. W. 22, 37 Tex. Civ. App. 129. See St. Louis, etc., R. Co. v. Stonecypher, 25 Tex. Civ. App. 569, 63 S. W. 946; Missouri Pac. R. Co. v. Edwards, 78 Tex. 307, 14 S. W. 607.

2. **Rate fixed by railroad commission.**—Thompson v. San Antonio, etc., R. Co., 11 Tex. Civ. App. 145, 32 S. W. 427.

Illegality of Contract Relied on.—Where the petition in an action against a railroad for breach of a freight contract showed no violation of law in the contract made, it was a matter of defense to show wherein it was illegal.[3]

Written Contract Relied on as Defense for Violation of Carrier's Duty.—In an action against a railroad company to recover damages for an alleged violation of duty as a common carrier, plaintiff is not required to plead or prove the written contract under which his shipment was made, which, if relied on by defendant, is a matter of defense.[4]

§ 770. Sufficiency of Allegation.—In an action against a railroad company on a special contract "to ship, transport, and carry" plaintiff's goods to N., a point beyond defendant's line, it is sufficient to set out such contract, and a breach thereof by defendant.[5]

That Defendant Railway a Common Carrier.—That a railway company sued on a contract of carriage is a common carrier is sufficiently averred by an allegation in the declaration that defendant is a corporation created by the law of the state, and engaged in operating a railroad, and conveying corn and grain in cars furnished by the company upon its own and other roads.[6]

Allegation of Acceptance of Offer.—An allegation in the declaration in an action by a shipper against a carrier for breach of a contract of shipment, which alleges an offer on the part of the carrier and an acceptance by the shipper, is an allegation of an acceptance before the offer was withdrawn,[7] and is sufficiently made by use of the word agreed.[8]

Demand That Cars Be Furnished.—An allegation in the complaint in an action against a railway company for failure to furnish cars that plaintiff had demanded of the company, through its agent at a designated station, that cars be furnished there, and that he had demanded of its agent at another designated station, who acted as agent for another station, that cars be furnished at the latter station, sufficiently shows demands of proper authority, and sufficiently apprises the company of the agents on whom the demands were made.[9]

Time When Cars to Be Furnished.—A complaint which alleges an agreement whereby defendant was to equip a sidetrack to be laid to plaintiff's orchard, and to furnish sufficient refrigerator cars to handle plaintiff's apple crop estimated at about 50 cars, at the rate of about six or eight cars per week, as required by plaintiff, in consideration of which plaintiff agreed to ship all his apple crop over defendant's railroad and also alleges that defendant failed and refused on demand to furnish cars in accordance with the contract, and that, by reason thereof, plaintiff was damaged, etc., sets forth a contract mutual in

3. **Illegality of contract relied on.**—Thompson *v.* San Antonio, etc., R. Co., 11 Tex. Civ. App. 145, 148, 32 S. W. 427.

4. **Written contract relied on as defense for violation of carrier's duty.**—Empire State Cattle Co. *v.* Atchison, etc., R. Co., 129 Fed. 480; Southern Pac. Co. *v.* Arnett, 50 C. C. A. 17, 111 Fed. 849.

5. **Sufficiency of allegation.**—Dunbar *v.* Port Royal, etc., R. Co., 36 S. C. 110, 15 S. E. 357, 31 Am. St. Rep. 860.

6. **That defendant railway a common carrier.**—Toledo, etc., R. Co. *v.* Roberts, 71 Ill. 540.

7. **Allegation of acceptance of offer.**—Southern R. Co. *v.* Wilcox, 99 Va. 394, 39 S. E. 144.

8. **"Agreed."**—A complaint, alleging that defendant, a common carrier, promised and agreed with plaintiff for a reward to receive and transport some staves from a designated place, that plaintiff was notified by defendant to have the staves prepared for loading, and that defendant wrongfully refused to accept and transport the staves when tendered, to plaintiff's damage, was not demurrable for failing to allege that plaintiff promised and agreed to ship the staves and pay the freight thereon; the word "agreed" being defined as "brought into harmony, united in opinion, settled by consent," and the allegation that plaintiff was notified by defendant to have the staves prepared for loading showing at least that plaintiff was to accept the contract by acting, and not by written acceptance (citing 1 Words and Phrases, 279). Mott *v.* Jackson, 172 Ala. 448, 55 So. 528.

9. **Demand that cars be furnished.**—Choctaw, etc., R. Co. *v.* Rolfe, 76 Ark. 220, 88 S. W. 870.

its terms, and is not uncertain for failure to specify the time when the cars were to be furnished, it being presumed that the parties made their contract in view of the usual custom relative to the transaction with knowledge of the time when, in the ordinary course, the crop would be moved.[10]

Tender of Shipment.—A complaint in an action against a railway company for failure to furnish cars which alleges that plaintiff placed for shipment at stations named certain quantities of lumber, and that he offered the same for shipment, sufficiently shows that the tender was to the respective station agents.[11]

Fact of Delivery of Goods to Carrier.—See ante, "Necessary Allegations," § 769.

Allegation of Delivery of Goods within Reasonable Time.—An allegation in the declaration that the goods were delivered according to the agreement is to be construed as alleging a delivery within a reasonable time.[12]

Readiness to Pay Freight.—A declaration in an action to recover for damages for defendant's breach of contract to furnish cars to carry plaintiff's live stock, plaintiff declared on the special contract, alleging that "for a certain reasonable hire or reward, to be thereupon paid by the plaintiff to the defendant in that behalf," defendant agreed to furnish the cars, sufficiently alleged plaintiff's readiness to pay the freight at the time the car was demanded.[13]

Breach of Contract to Stop at Any Intermediate Point.—In an action against a railroad company for breach of a condition in a bill of lading to the effect that the car containing bananas might be stopped at any intermediate point, the complaint having alleged that there was a good market for the bananas at both of the places named, that they had a market value which was stated, and that they were shipped to meet the demands of the markets at such place, but that by being carried further, they became unfit for use, was sufficient.[14]

§ 771. Theories of Case.—A complaint for breach of a contract to carry lumber by boat during the boating season, alleging that plaintiff was thereby compelled to pay to others excessive freights to a certain amount, as one theory of the measure of damages, and alleging that by reason of defendant's promises that the lumber would all be conveyed in due time, plaintiff kept a large amount of lumber on its docks, ready for shipment, which it was compelled to carry over the winter, and sell in the spring at a reduced price, and was compelled to pay taxes, interest, and insurance during the winter, as another theory of the measure of damages, does not present inconsistent theories, but the jury may be required to find on both.[15]

§ 772. Aider by Subsequent Pleadings and Verdict.—The subsequent pleadings may supply defects in the petition.[16]

10. **Time when cars to be furnished.**—Oregon R., etc., Co. *v.* Dumas, 104 C. C. A. 641, 181 Fed. 781.

11. **Tender of shipment.**—Choctaw, etc., R. Co. *v.* Rolfe, 76 Ark. 220, 88 S. W. 870.

12. **Allegation of delivery of goods within reasonable time.**—Southern R. Co. *v.* Wilcox, 99 Va. 394, 39 S. E. 144.

13. **Readiness to pay freight.**—Waterman *v.* Vermont Cent. R. Co., 25 Vt. 707.

14. **Breach of contract to stop at any intermediate point.**—Tebbs *v.* Cleveland, etc., R. Co., 20 Ind. App. 192, 50 N. E. 486.

15. **Theories of case.**—Shores Lumber Co. *v.* Starke, 100 Wis. 498, 76 N. W. 366.

16. **Aider by subsequent pleadings.**—The answer, after a general denial, alleged a contract whereby it was to furnish cars on a certain day, in time for plaintiff's cattle to reach the Chicago market of a certain other day, and alleged that the cars were in readiness for plaintiff's use in due time, but that plaintiff refused to take them. The replication admitted the contract as pleaded in the answer. Held, that the subsequent pleadings did not supply the defects of the petition so as to justify a trial on the theory of an unpleaded contract whereby defendant agreed to have the cars ready at 1 a. m., and not for failure to furnish cars in time for the Chicago market. Currell *v.* Hannibal, etc., R. Co., 71 S. W. 113, 97 Mo. App. 93.

Aider by Verdict.—Where in an action for not transporting certain goods, the plaintiff declared that he loaded the goods on board the defendant's vessel, to be transported by the defendant for a specified freight, to be paid by the consignee, and that the defendant, in consideration thereof, promised to transport and deliver the goods to the consignee, the declaration will, after verdict, be held good, though it did not aver that the goods were the plaintiff's, nor that a reasonable time for transporting them had elapsed.[17]

Want of Allegation of Readiness to Pay Freight.—Where the contract sued on was fairly susceptible of the interpretation that plaintiff was to pay a reasonable freight at the end of the carriage, a declaration alleging that, "for a certain reasonable hire or reward to be thereupon paid by the plaintiff to the defendant in that behalf," defendants agreed to let plaintiff have a car, etc., was sufficient, on a motion in arrest, after verdict, for the want of an allegation of readiness to pay the freight to the defendant at the time of demanding the car.[18]

§ 773. Plea or Answer.—Plea Denying Agency of Persons Making Contract.—Where the agency of the person making a shipping contract which included personal transportation is not denied by verified plea, the contract is binding on the carrier.[19]

Answer.—On a complaint for breach of a contract to furnish and set in cars on a warehouseman's siding, an answer that the warehouseman had allowed the cars to be placed so far out that collisions with cars on the main track resulted, and there was danger of others, was properly stricken; it not being sufficient as a defense in bar, and not having been pleaded as a set-off or counterclaim.[20]

Illegality of Contract.—See ante, "Necessary Allegations," § 769.

Demurrer.—Since it is a matter of proof whether or not an agent of a railroad company had authority to make a contract to furnish cars, it is error to sustain a demurrer to an answer, in an action against such company for injury to the shipment, alleging want of such authority.[21]

§ 774. Issues, Proof and Variance.—In an action for breach of contract by a carrier to furnish cars for shipment of timber, the damages sought being the profits which but for such breach plaintiff would have made on his contract to furnish the timber to W., the question whether plaintiff had to turn over his contract with W. to certain persons to pay them what he owed them is not within the issues, there being interposed only the plea of general issue and special pleas that the contract sued on was indefinite and unilateral.[22]

Evidence That Contract in Violation of Interstate Commerce Laws.—When an interstate railroad is sued for the breach of a contract to carry goods at a reduced rate, evidence that the contract is illegal as a violation of the interstate commerce law is admissible under the general issue.[23]

Bill of Lading Evidencing Contract "to Forward," Action on Contract "to Carry."—In an action against a railroad company on a special contract "to ship, transport, and carry" plaintiff's goods to N., a point beyond defendant's line, plaintiff could not offer in evidence the bill of lading, showing defendant's contract to be "to forward" the goods to N., and that defendant "assumes no liability beyond its own rails," and "will not be responsible for delays or

17. Aider by verdict.—Stimpson *v.* Gilchrist (Me.), 1 Greenl. 202.

18. Want of allegation of readiness to pay freight.—Waterman *v.* Vermont Cent. R. Co., 25 Vt. 707.

19. Plea denying agency of persons making contract.—International, etc., R. Co. *v.* Campbell, 1 Tex. Civ. App. 509, 512, 20 S. W. 845.

20. Answer.—Amsden *v.* Dubuque, etc., R. Co., 13 Iowa 132.

21. Demurrer.—Texas, etc., R. Co. *v.* Hamm, 2 Texas App. Civ. Cas., § 491.

22. Issues, proof and variance.—Baxley *v.* Tallassee, etc., R. Co., 128 Ala. 183, 29 So. 451.

23. Evidence that contract in violation of interstate commerce laws.—Southern R. Co. *v.* Wilcox, 99 Va. 394, 39 S. E. 144.

damages from unavoidable causes,"—a contract to forward not being a contract to carry or transport.[24]

Validity of Written Contract Executed after the Oral Contract.—In an action by a shipper against a carrier for failure to furnish cars within the time specified in an oral contract, it is error to ignore the written contract, pleaded by defendant, executed after the oral contract, and releasing defendant from liability for breach of the oral contract—its validity not having been assailed in plaintiff's pleadings—as, in the absence of a pleading putting in issue the validity of the written contract, it, besides reciting a consideration, imports one.[25]

Title of Consignee.—Where in an action by a consignee against the carrier and consignor to recover for damages to perishable freight, the consignee's title being in issue the claim being that the property belonged to the consignor, the consignee having in a supplemental petition, and by way of estoppel, alleged that he had presented a claim to the company, which it had refused to pay, saying that, if the goods were damaged, it was the fault of the carrier, from which the consignee must collect his claim, whereby the consignee was induced to sue the carrier, the facts so alleged were admissible under the consignee's general allegation of ownership.[26]

Instruction to Stop at Intermediate Point.—Where the contract for the shipment of stock from Utah to Chicago required that the shipment be made through Omaha, but the stock was shipped by another route, whereby the shipper, lost an opportunity to dispose of it at Omaha, it was proper, in an action for the breach, for plaintiff to testify that he told the shipping agent he wanted the stock stopped at Omaha, as he expected it would be sold there; such testimony not varying the terms of the contract.[27]

Parol Evidence Where Bill of Lading Delivered after Contract Not Relied on.—In an action against a carrier for loss resulting from defendant's delay in delivering perishable goods which it undertook to carry for plaintiff, where no bill of lading was delivered to plaintiff, and he sued on a verbal contract made by him with defendant's agent to deliver the goods within four days from the date of their shipment, and defendant in its answer does not rely on the bill of lading subsequently delivered to plaintiff, the rule that oral testimony can not, in the absence of any allegation of fraud or mistake, be introduced to change or vary the terms of a written contract, does not apply.[28]

Contract by Receiver or Agent of Receiver.—In an action against a railroad receiver for damages on a shipping contract to which the company was subsequently made a party, there is no variance between the contract sued on which was alleged to have been executed by receiver and the contract in evidence which was signed by the agent of receiver without showing on its face that it was made with the receiver, where the road was in the receiver's hands, when the contract was made.[29]

Contract to Furnish Cars on Specific Day—Evidence Showing Negligent Delay.—Where a petition alleged the breach by a railroad of a contract to furnish cars on a specific date, it was error to submit to the jury the issue,

24. **Bill of lading evidencing contract "to forward," action on contract "to carry."**—Dunbar *v.* Port Royal, etc., R. Co., 36 S. C. 110, 15 S. E. 357, 31 Am. St. Rep. 860.

25. **Validity of written contract executed after the oral contract.**—Ft. Worth, etc., R. Co. *v.* Underwood, 39 Tex. Civ. App. 404, 87 S. W. 713.

26. **Title of consignee.**—Texas Cent. R. Co. *v.* Dorsey, 30 Tex. Civ. App. 377, 70 S. W. 575.

27. **Instruction to stop at intermediate point.**—Sharp *v.* Clark, 13 Utah 510, 45 Pac. 566.

28. **Parol evidence where bill of lading delivered after contract not relied on.**—Chesapeake, etc., R. Co. *v.* Bradford, 15 Ky. L. Rep. 60. See ante, "Merger," §§ 756, 760.

29. **Contract by receiver or agent of receiver.**—Texas, etc., R. Co. *v.* Wilson (Tex. Civ. App.), 21 S. W. 373, affirmed in 85 Tex. 507.

raised only by the evidence, of a negligent delay in furnishing cars.[30]

Variance Immaterial.—The variance is immaterial where, in an action against a carrier on a bill of lading, the complaint alleged the bill of lading in the form prescribed by the Code and the bill introduced in evidence contained special limitations of the carrier's common-law liability;[31] where a petition to recover damages for a violation of a contract of affreightment to carry safely alleged that the shipment was from Kansas City to Indianapolis, when in fact the contract was from Kansas City to St. Louis, the evidence showing that the alleged injuries occurred between Kansas City and St. Louis;[32] where, in an action for breach of a carrier's contract to furnish cars, plaintiff alleged that defendant's agent who acted for them in negotiating the contract, to wit, W. and S., were duly authorized to make such contract, proof that plaintiff negotiated the contract with S. through letters and telegrams, and consummated a verbal contract with M.[33]

Variance Material.—Where an action is brought for an alleged breach of a carrier's implied contract, and the goods are shown to have been shipped, under a special written contract, the plaintiff can not recover.[34]

Variance as to Point of Destination.—In a suit against a carrier for breach of contract of shipment, allegation in the petition that the contract provided for the shipment to a certain point, and the contract introduced showed shipment to a different point, the variance was fatal.[35]

§ 775. Questions for Jury.—The question as to whether certain goods were shipped upon a bill of lading or under a prior parol contract covering future shipments is a question of fact for the jury.[36]

Whether Parties Made Alleged Contract.—In an action against a carrier for failure to deliver cars, whether the parties made an alleged contract to furnish them, as testified to by plaintiff, was a question of fact, so that it was not error to deny defendant's motion for an instructed verdict.[37]

Whether Goods Delivered within Reasonable Time.—Where a contract for the shipment of goods at a reduced rate requires delivery to the shipper within a reasonable time, and there is considerable delay on the part of the shipper, but it is partially caused by the carrier making overcharges, and by an increase in the rate, it is not error, in an action against the carrier for a breach of the contract, to submit the issue whether the goods were delivered to the carrier within a reasonable time.[38]

Authority of Agent to Make Verbal Contract.—See ante, "Authority of Agent," §§ 715-723.

Merger of Oral in Written Contract a Question for the Jury.—See ante, "Contract Executed after Carriage Begun," §§ 757-758.

§§ 776-784. Evidence—§ 776. Presumptions and Burden of Proof. —Burden of Proof of Making of Contract.—In an action against a railroad

30. **Evidence showing negligent delay.**—Texas, etc., R. Co. *v.* Arnett, 40 Tex. Civ. App. 76, 88 S. W. 448.

31. **Variance immaterial.**—Louisville, etc., R. Co. *v.* Landers, 135 Ala. 504, 33 So. 482; Nashville, etc., R. Co. *v.* Cody, 137 Ala. 597, 34 So. 1003.

32. Cash *v.* Wabash R. Co., 81 Mo. App. 109.

33. Pecos River R. Co. *v.* Latham, 40 Tex. Civ. App. 78, 88 S. W. 392, affirmed in 101 Tex. 652, no op.

34. **Variance material.**—Stewart *v.* Cleveland, etc., R. Co., 21 Ind. App. 218, 52 N. E. 89.

35. **Variance as to point of destination.**—Texas, etc., R. Co. *v.* Hamm, 2 Texas App. Civ. Cas., § 491.

36. **Questions for jury.**—St. Louis, etc., R. Co. *v.* Elgin Condensed Milk Co., 74 Ill. App. 619, affirmed St. Louis, etc., R. Co. *v.* Elgin Condensed Milk Co., 51 N. E. 911, 175 Ill. 557, 67 Am. St. Rep. 238.

37. **Whether parties made alleged contract.**—Pope *v.* Wisconsin Cent. R. Co., 112 Minn. 112, 127 N. W. 436.

38. **Whether goods delivered within reasonable time.**—Southern R. Co. *v.* Wilcox, 99 Va. 394, 39 S. E. 144.

for its failure to furnish cars within a reasonable time for the shipment of cattle, the burden is on plaintiff to prove the making of a contract for the cars.[39]

That Rate Established by Railroad Commission.—There is no presumption that the railroad commission of a state has established freight rates over a particular road.[40]

That Rate Filed in Compliance with Interstate Commerce Act.—In a suit against a railroad for breach of a contract to transport freight at a certain rate, the burden is not on plaintiff to show that the contract rate had been filed with the Interstate Commerce Commission and approved by the State Railroad Commission, as required by Interstate Commerce Act Feb. 4, 1887, c. 104, 24 Stat. 380, § 6 [U. S. Comp. St. 1901, p. 3156], and Code 1892, § 4292.[41]

§§ 777-782. Admissibility—§ 777. Relevancy and Competency.—In an action against a carrier for failure to furnish cars, evidence that cars were ordered at a station from the agent there, who stated that cars could be had through the agent at another place, was admissible, as showing that the carrier had contracted to furnish cars.[42]

Contract between Vendor and Vendee as to Purchase and Shipment.—In an action against a carrier for failure to deliver goods committed to him for transportation, evidence as to the plaintiff's purchase of the goods, and his contract with his vendor as to their shipment, is admissible as part of the res gestæ to show plaintiff's interest in the goods, to identify them, and to show that he authorized their delivery to the carrier, but not to show that the goods were actually delivered to the carrier.[43] But in Virginia it has been held: Evidence of contracts by a shipper for the sale of goods to be shipped over a certain railroad, the railroad not being a party thereto, is inadmissible in action by the shipper against the railroad for the breach of a contract to carry the goods at a certain rate, though such contracts of sale are based on the reduced freight rate.[44]

Evidence as to Ability to Furnish Cars.—In an action against a railroad company for damages for failure to ship cattle as agreed, where it was claimed in defense that the company was crowded with business, and could not furnish cars sooner, evidence that empty cars stood at the shipping point during the time of delay, and that the cattle were finally shipped in a part of the same cars, is admissible.[45]

Knowledge of Officers That Carrier Unable to Furnish Cars.—Letters of the officials of the carrier were competent to show that the officers knew that the carrier did not have sufficient cars to meet the ordinary demands of shippers.[46]

Seizure of Railroad by Confederate States.—Where, in an action against

39. **Burden of proof of making of contract.**—Texas, etc., R. Co. *v.* Ray Bros., 37 Tex. Civ. App. 622, 84 S. W. 691.

40. **Presumption that railroad commission established rate.**—So held where in an action against a carrier to recover damages resulting from a failure to carry out a contract for the transportation of produce at an agreed rate, defendant excepted to the petition as showing a contract for transportation at a fixed rate made while the state railway commission was in existence, without alleging that such rate was authorized by the commission. Thompson *v.* San Antonio, etc., R. Co., 11 Tex. Civ. App. 145, 32 S. W. 427.

41. **That rate filed in compliance with interstate commerce act.**—Laurel Cotton Mills *v.* Gulf, etc., R. Co., 84 Miss. 339, 37 So. 134, 66 L. R. A. 453.

42. **Relevancy and competency.**—Gulf, etc., R. Co. *v.* House, 40 Tex. Civ. App. 105, 88 S. W. 1110.

43. **Contract between vendor and vendee as to purchase and shipment.**—New England Mfg. Co. *v.* Starin, 60 Conn. 369, 22 Atl. 953.

44. Southern R. Co. *v.* Wilcox, 99 Va. 394, 39 S. E. 144.

45. **Evidence as to ability to furnish cars.**—Gulf, etc., R. Co. *v.* McCorquodale, 71 Tex. 41, 9 S. W. 80.

46. **Knowledge of officers that carrier unable to furnish cars.**—Midland Valley R. Co. *v.* Hoffman Coal Co., 91 Ark. 180, 120 S. W. 380.

a railroad company to recover damages for failure to ship certain cotton, it was shown that plaintiff had employed the defendant's station agent to purchase cotton for him, and to hold and ship it under his directions, and the agent had been instructed by plaintiff not to ship until he had purchased a certain number of bales, evidence of the seizure of the railroad company by the Confederate government before the required number of bales had been procured should be considered as tending to prove that the defendant never received the cotton at all.[47]

Commission Merchant's Quotation.—In an action for failure to furnish cars to transport stock as agreed, accounts of sales and prices current sent by a commission merchant to his principal are not evidence of the value or weight of stock in the market.[48]

Effect of Date of Contract.—See ante, "Date of Contract," § 726.

§ 778. Parol Evidence.—Parol Evidence as to Records of Interstate Commerce Commission.—In a suit against a carrier on an interstate commerce contract, oral testimony as to the schedule rates of the interstate commerce commission was proper, as the records of such commission could not be reached by process of the court.[49]

Parol Evidence Where Contract in Writing.—See ante, "Merger," §§ 756-760. See, also, ante, "Issues, Proof and Variance," § 774.

§ 779. Best and Secondary Evidence.—Where the defendant carrier was alleged to be in possession of the contracts of shipment, and after notification to produce them, defendant introduced secondary evidence of them, the court did not err in refusing to strike out such evidence upon defendant's subsequently offering the written contracts in evidence.[50]

§ 780. Custom.—In a suit for damages for breach of contract to furnish cars, evidence of custom in the matter of furnishing cars was properly excluded as irrelevant and immaterial.[51]

§ 781. Necessity for Production of Bill of Lading.—As the bill of lading received by the shipper from the carrier is the contract between the parties, the shipper can not recover for an alleged breach of the contract of transportation by the carrier without producing in evidence the bill of lading,[52] or account for its nonproduction and prove its contents in substance as alleged.[53] If an action to recover for injury to live stock is founded on the carrier's common-law liability, and not on the bill of lading, it is not necessary for plaintiff to produce the bill of lading in evidence.[54]

§ 782. Evidence as to Net Profits.—Evidence of the effect of the failure to furnish cars to a mine as to expense of maintenance and as to the cost of mining was admissible in determining the net profits recoverable.[55]

§ 783. Reception of Evidence.—Reference to Memorandum of Contract.—In a suit by a contractor against a railroad company to recover dam-

47. **Seizure of railroad by confederate states.**—Sumner *v.* Charlotte, etc., R. Co., 78 N. C. 289.

48. **Commission merchant's quotation.**—Hoskins *v.* Missouri Pac. R. Co., 19 Mo. App. 315.

49. **Parol evidence as to records of interstate commerce commission.**—Gulf, etc., R. Co. *v.* Dimmitt, 17 Tex. Civ. App. 255, 42 S. W. 583.

50. **Best and secondary evidence.**—Gulf, etc., R. Co. *v.* Leatherwood, 29 Tex. Civ. App. 507, 69 S. W. 119, affirmed in 97 Tex. 634, no op.

51. **Custom.**—Pecos, etc., R. Co. *v.* Evans-Snider-Buel Co., 42 Tex. Civ. App. 60, 93 S. W. 1024, affirmed in 100 Tex. 190, 97 S. W. 466.

52. **Necessity for production of bill of lading.**—Bedell *v.* Richmond, etc., R. Co., 94 Ga. 22, 20 S. E. 262.

53. Texas, etc., R. Co. *v.* Wheat, 2 Texas App. Civ. Cas., § 165; Missouri Pac. R. Co. *v.* Nicholson, 2 Texas App. Civ. Cas., § 168; Bedell *v.* Richmond, etc., R. Co., 94 Ga. 22, 20 S. E. 262.

54. Missouri Pac. R. Co. *v.* Nicholson, 2 Texas App. Civ. Cas., § 168.

55. **Evidence as to net profits.**—Midland Valley R. Co. *v.* Hoffman Coal Co., 91 Ark. 180, 120 S. W. 386.

ages for the failure of defendant to furnish the number of cars agreed to be furnished per day to be loaded with gravel, where plaintiff testified that at the time the contract, which was verbal, was agreed on, he made a memorandum of its contents, and that no reference was made in said memorandum to flat cars and where plaintiff also proved the alleged contract by the uncontradicted testimony of two witnesses, defendant was not injured by the reference to the memorandum.[56]

§ 784. Sufficiency of Evidence.—In General.—The evidence must tend to show such an agreement as is sued upon or it is insufficient to make even a prima facie case.[57]

Date of Contract.—It is sufficient to prove that the damage occurred by reason of the failure of the railroad company to furnish the cars, without reference particularly to the date of the entering into said contract.[58]

Contract to Carry at Reduced Rate.—Testimony of a shipper that he was told by a person who was in the office of a carrier, but not the regular agent, that certain goods to be shipped a few days later would be carried at a certain rate less than the tariff rates, is not proof of a contract to carry at such reduced rate.[59] In an action for breach of a contract of carriage, in which defendant pleaded that the contract was invalid because the freight rate named therein was unreasonable, while it would be some evidence of the justness of the charge, conclusive perhaps in the absence of any other showing, to show that the rate exacted was the published rate and the rate charged every one for a similar service, it is not evidence when the purpose is to set aside a rate created by contract.[60] In such action where the record failed to show that the rate was discriminatory or extortionate, or that it was unduly oppressive on the carrier, other than to show that a published rate considerably higher than the contract rate was established, it was insufficient to justify the court in setting aside the contract rate.[61]

56. **Reference to memorandum of contract.**—Robinson *v.* Lake Shore, etc., R. Co., 103 Mich. 607, 61 N. W. 1014.

57. **Evidence as to contract.**—In an action against a railroad company for failure to furnish cars to plaintiff, the latter testified that he ordered three cars from defendant to ship cattle in, that the order was made at 11 o'clock, and the cars were to be ready on the evening of that day. Defendant's agent testified: That in the morning plaintiff came to him, and said: "I am going for those steers today. When can you have a train for me?" That witness replied that No. 94, a loaded train, was due at 1:12. That plaintiff then said: "That will fix me. I want my cattle to get in that train." That at 11 o'clock plaintiff's cattle came in, and he spoke to witness about the train, and asked him what time he would have a train. Held, that the evidence did not tend to show an agreement to furnish three cars to plaintiff. Gann *v.* Chicago, etc., R. Co., 65 Mo. App. 670.

Evidence in action for failure to promptly ship the corpse held to show that defendant's agent did not contract to pay the undertaker's bill. Gathright *v.* Pacific Exp. Co. (Tex.), 145 S. W. 1185, affirming judgment, Pacific Exp. Co. *v.* Gathright (Tex. Civ. App.), 130 S. W. 1035.

Evidence sufficient in action for breach of a contract to furnish refrigerator cars.—Ferrell & Co. *v.* Great Northern R. Co. (Minn.), 138 N. W. 284.

58. **Date of contract.**—Morehouse *v.* Texas Trunk R. Co., 4 Texas App. Civ. Cas., § 267, 17 S. W. 1086; St. Louis, etc., R. Co. *v.* Evans, 78 Tex. 369, 14 S. W. 798; Brown *v.* Sullivan, 71 Tex. 470, 10 S. W. 288.

59. **Contract to carry at reduced rate.**—Wells, Fargo Exp. Co. *v.* Williams (Tex. Civ. App.), 71 S. W. 314.

Inadequacy of rate.—In an action for breach of a contract of carriage, the carrier must establish its claim of invalidity of the contract on the ground of unreasonableness of the freight rate charged by direct evidence of the fact. Sultan R., etc., Co. *v.* Great Northern R. Co., 58 Wash. 604, 109 Pac. 320, hearing in banc denied 109 Pac. 1020.

60. Sultan R., etc., Co. *v.* Great Northern R. Co., 58 Wash. 604, 109 Pac. 320, hearing in banc denied 109 Pac. 1020.

61. Sultan R., etc., Co. *v.* Great Northern R. Co., 58 Wash. 604, 109 Pac. 320, hearing in bank denied 109 Pac. 1020.

Proof of Ownership.—Where the evidence is sufficient to establish the title of a vendee against the seller it is also sufficient to establish the title of the plaintiff in an action against a railroad company for breach of a transportation contract;[62] but the plaintiff in such action is not entitled to recover where the evidence of ownership is insufficient to preclude the maintenance of a subsequent action by either the consignor or consignee.[63]

Authority of Station Agent.—See ante, "Authority of Agent," §§ 715-723.

§ 785. Instructions.—Instructions in actions for breach of special contracts for transportation of freight must be tendered to the court by the party desiring them,[64] must fairly submit the issue between the parties[65] as based upon the evidence[66] and pleadings,[67] but must not assume facts,[68] be misled-

62. **Proof of ownership.**—In an action against a carrier for negligence causing the loss of certain property in transit, plaintiff's ownership of the property was denied, and it was shown that plaintiff purchased the property under a contract which had been construed by the parties thereto as passing title to plaintiff. Held, that the evidence, being sufficient to establish plaintiff's title as against the seller, was also sufficient to establish title as against defendant. Union Feed Co. *v.* Pacific Clipper Line, 71 Pac. 552, 31 Wash. 28.

63. Lashinsky *v.* Russian Co., 91 N. Y. S. 175.

64. **Necessity for tender—Authority of agent of carrier to contract.**—In an action against a railroad company for failure to furnish cars, if the defendant wishes to raise an issue as to the authority of its agent to make the contract, it should tender an instruction on that point. McCarty *v.* Gulf, etc., R. Co., 79 Tex. 33, 15 S. W. 164.

In an action against a railroad company for failure to furnish cars for the shipment of live stock, the court instructed that if the jury believed that plaintiffs contracted with defendant's agent to furnish the cars at a certain time and place, and that the agent had authority to make such contract, and that defendant failed to receive and ship the cattle as agreed, to plaintiffs' damage, they must find for plaintiffs. Held not error; that, if defendant wished to raise an issue as to the agent's authority to make such a contract, it should have tendered an instruction on that subject. McCarty *v.* Gulf, etc., R. Co., 79 Tex. 33, 15 S. W. 164.

65. Plaintiffs declared upon a verbal contract to furnish cars. Defendant contended that the shipment was under a certain written contract or bill of lading. The court, besides instructing that if the jury believed from the evidence that defendant's agent made such a contract, and had authority to do so, and that defendant failed to furnish the cars to plaintiffs' damage they should find a verdict in their favor, gave correct instructions as to the measure of damages. Held, that the court fairly submitted the issue under the verbal contract. McCarty *v.* Gulf, etc., R. Co., 79 Tex. 33, 15 S. W. 164.

66. **Based upon evidence.**—Where the record fails to disclose any evidence that defendant's agent agreed to furnish cars at a particular day named, it is error to charge that, if the jury believe from the evidence that the agent failed to furnish the cars as agreed, plaintiff is entitled to recover damages suffered by reason of such failure. Texas, etc., R. Co. *v.* Avery (Tex. Civ. App.), 33 S. W. 704.

Acquiescence of carrier in agent's violation of orders.—Evidence that one or more of the agents of a railroad company departed from their orders in shipping fruit for one season by taking no bill of lading, without evidence that the company had notice of such omission, does not authorize a charge, in an action on a contract of affreightment, that, notwithstanding the agent may have violated his instructions, yet, if the railway company had knowledge of such contract, and acquiesced in it, then it would be liable. Central, etc., R. Co. *v.* Felton, 36 S. E. 93, 110 Ga. 597.

Authority of drivers of express wagons.—In an action against an express company for the breach of a special contract of shipment, it was error for the court to assume in its charge that drivers of delivery wagons for the express company had authority to make the contract in question, where there was no evidence

67. A charge presenting an issue or ground of recovery not presented by the pleading should be refused. Texas, etc., R. Co. *v.* Ray Bros., 37 Tex. Civ. App. 622, 84 S. W. 691.

68. In an action for breach of contract by a carrier's agent to furnish cars, where the evidence was conflicting as to what the agent told plaintiff, a requested charge that the agent's statement that he would try to have the cars furnished would not be an agreement to do so, and the verdict should be for defendant, was properly refused, as assuming that the statement was as stated. St. Louis, etc., R. Co. *v.* Boshear, 102 Tex. 76, 113 S. W. 6.

ing,[69] or confusing,[70] conflicting,[71] or on the weight of the evidence,[72] or withdraw from the jury facts material in determining whether the carrier excused its failure to furnish cars.[73]

in the record tending to show that they had such authority. Pacific Exp. Co. *v.* Needham, 83 S. W. 22, 37 Tex. Civ. App. 129.

Liability for injury to live animals.—In an action by an express company to recover compensation for carrying live pigeons, where neither the pleadings nor the evidence indicated in what character plaintiffs transmitted the birds, the refusal of requests based on an assumption that common carriers are not liable for an injury to live animals in the course of transportation was proper. American, etc., Exp. Co. *v.* Phillips, 29 Mich. 515.

Damages for failure to furnish train on main line.—Under the contract (the evidence), consisting of plaintiff's letter, stating that he expected to cut fifty car loads of props and asking defendant "to grant me train to load my props on the main line," and defendant's letter, agreeing to furnish "a train," there is no error in an instruction to allow plaintiff such damages as he sustained by defendant's failure to furnish "trains" of cars sufficient to transport fifty car loads of props; no train having been furnished. Outland *v.* Seaboard, etc., R. Co., 46 S. E. 735, 134 N. C. 350.

69. Misleading instructions—Duty of dispatcher to control cars.—In an action against a railroad company for failure to provide cars to a shipper as agreed, it appeared that on the day before the cars were required the necessary number were standing at the desired place, but that they were removed, and none furnished in their stead. Held, that it was misleading to charge, without explanation, that "it was the duty of the train dispatcher to control defendant's cars, and to assign them in the order in which they were called for by the shipper," the company having a right, under such circumstances, to remove them elsewhere if it make arrangements to furnish cars in their stead at the proper time. Newport News, etc., R. Co. *v.* Mercer, 96 Ky. 475, 29 S. W. 301, 16 Ky. L. Rep. 555.

Agreement to ship by a passenger train.—In an action for delay in transporting a circus, where plaintiff alleged and produced evidence to establish that carrier's agent agreed to place the circus car in a passenger train, and after failing to do so, agreed to put it in the first freight train, which he also failed to do, it was error to submit a charge on plaintiff's constructive or actual notice of agent's want of authority to contract for the passenger train, without also charging as to the freight train agreement. Such charge was misleading and prejudicial, as ignoring the subsequent agreement to send the car by the freight train. Parks *v.* Gulf, etc., R. Co. (Tex. Civ. App.), 30 S. W. 708.

70. In an action against a railroad for failure to furnish cars, the petition alleged the making of a contract with defendant's agent in one county to furnish cars at a point in another county. There was evidence of an application for cars as alleged, but no direct evidence of the agent's authority to make such a contract. The agent testified that no request had been made of him, but that his books showed that the request was made of his clerk, and recited that the message had been sent to the agent in the other county. The court, in its general charge, submitted the issue of contract vel non, as alleged, and in its special charge stated that the local agent had no authority to bind defendant to furnish cars in the other county, but had the right to place an order with the local agent in the other county, for cars to be furnished there, and that, if he did place the order, defendant would be bound thereby. Held, that the general charge, together with the special charge, was confusing. Texas, etc., R. Co. *v.* Ray Bros., 84 S. W. 691, 37 Tex. Civ. App. 622.

71. Conflicting instructions.—An instruction that a railroad company is not required to furnish cars at any particular hour of the day, and that a delivery at any hour of the day is a delivery on such day, does not conflict with an instruction that the railroad has the right to furnish and supply cars the day before the day specified, so as to have them ready for the day for which demanded. McGrew *v.* Missouri Pac. R. Co., 109 Mo. 582, 19 S. W. 53.

72. Instruction on weight of evidence.—Texas, etc., R. Co. *v.* Ray Bros., 37 Tex. Civ. App. 622, 84 S. W. 691.

Where, in an action against the carrier for damages to a shipment of freight, alleged by the shipper to have been made under an oral contract and by the carrier to have been made under a subsequent written contract, plaintiff showed facts as to the written contract which defeated it as a contract, a charge that the oral contract was not in force was properly refused as being on the weight of the evidence. Texas, etc., R. Co. *v.* Miller (Tex. Civ. App.), 88 S. W. 499.

73. Where the evidence showed that there was a market on the carrier's line for only a small percentage of coal mined, and that the greater percentage of coal shipments went off the line, and that during the shipping season there was an unprecedented demand for cars for shipment of coal and other commodities,

Error Cured by Other Instructions.—An instruction that if the jury believed the evidence they should find that defendant agreed to furnish plaintiff with cars "as alleged in the complaint" (which was at such time as plaintiff might need them) is harmless, though the contract merely required them to be furnished within a reasonable time, they also being instructed that they were to allow such damages as plaintiff sustained by reason of cars not being furnished in a reasonable time, and there having, as matter of law, been an unreasonable delay in furnishing them.[74]

§ 786. Verdict.—See post, "Damages," §§ 787-798.

§§ 787-798. Damages—§§ 787-788. Liability—§ 787. In General.—See ante, "Liability of Shipper for Breach," § 754.

§ 788. Breach of Contract Other than That Sued on.—In an action for breach of a contract to furnish on a certain day a car for for the shipment of cattle, damages can not be recovered for negligent shipment under a contract thereafter entered into.[75]

§ 789. Duty of Shipper to Mitigate Damages.—A shipper is ordinarily required to mitigate or lessen the damages arising from a carrier's breach of a contract to furnish means of transportation by exercising ordinary care to preserve or dispose of his freight,[76] but he is not required in any attempt to lessen the damages resulting from a carrier's refusal to supply cars as contracted for, to employ, or attempt to employ, another carrier to do that which the defendant carrier had obligated itself to do, and the failure to do which constitutes the breach sued upon.[77]

which demand could not reasonably have been anticipated by the carrier, an instruction that the fact that the connecting lines failed to return promptly the cars of the carrier was no excuse for its failure to furnish with reasonable promptness sufficient cars for the transportation of the operator's coal was erroneous as withdrawing from the jury the fact that cars were off the line of the carrier, and that the return thereof could not be secured, in determining whether or not the carrier excused its failure to furnish cars. Midland Valley R. Co. *v.* Hoffman Coal Co., 91 Ark. 180, 120 S. W. 380.

74. **Error cured by other instructions.**—Outland *v.* Seaboard, etc., R. Co., 134 N. C. 350, 46 S. E. 735.

75. **Breach of contract other than that sued on.**—Waters *v.* Richmond, etc., R. Co., 110 N. C. 338, 14 S. E. 802, 16 L. R. A. 834.

76. Though plaintiff, induced to buy ice by defendant railroad company's agreement to transport it from where it was, a few miles from its road, on another company's tracks, to S., at $2 per ton, bought it at 75 cents a ton, yet, having made an absolute sale of it for $2 a ton to a third person, which plaintiff would have received but for defendant's breach of its contract, he is entitled to $2 per ton damages, less any expenses of shipping, and less any sum he could have obtained for it on sale to another; but he can not recover this full amount where defendant would transport the ice if delivered on its tracks, and plaintiff could get it there for less than $2 per ton, but made no effort to do so, and, being unable to sell it, let it melt. Bigelow *v.* Chicago, etc., R. Co., 80 N. W. 95, 104 Wis. 109.

77. Gulf, etc., R. Co. *v.* Hodge, 10 Tex. Civ. App. 543, 30 S. W. 829.

Duty to procure transportation over other line.—In an action for the breach of a contract to transport goods, the rule of damages which would obtain if the plaintiff could not procure the goods to be sent at all does not prevail when he can send by another conveyance. In the latter case he must send the goods by such other conveyance, and he will be entitled to recover the difference between the price at which the defendants undertook to convey the goods and the price which he was compelled to pay for their transportation. Grund *v.* Pendergast (N. Y.), 58 Barb. 216.

Where one makes a contract for the transportation of goods, and delivers them, ready for transportation, he has a right to rely on the fulfillment of the contract until it is repudiated, or he is notified that the carrier can not or will not transport the goods within a reasonable time, and he is not obliged to procure their immediate transportation over another line. Louisville, etc., R. Co. *v.* Flannagan, 113 Ind. 488, 14 N. E. 370, 3 Am. St. Rep. 674.

§§ 790-793. Elements of Damage—§ 790. Loss of Profits.—Speculative profits which might have been lost as a result of a carrier's breach of a contract for transportation are not an element of damages;[78] but net profits of operating a coal mine lost by reason of the carrier's failure to furnish cars under a contract binding the mine operator not to ship by another line may be recovered.[79]

Profits on Collateral Contract.—Where plaintiff made an agreement for a shipping rate with defendant carrier, and, on defendant's refusal to give the rate, canceled collateral contracts made on the faith of such agreement, he could not recover loss of prospective profits on such contracts, since he should have performed them, making his shipments at regular rates, and holding defendant for the excess over the rate agreed.[80] Where plaintiff, at the time of making an agreement for shipping rates with defendant company, stated he intended to make certain contracts, but did not state the terms thereof, loss of profits on such collateral contracts, occasioned by defendant's failure to keep its agreement as to rates, could not have been within the probable contemplation of plaintiff and defendant when their agreement was made, and plaintiff could not recover for such loss.[81]

Subsequent Contract of Which Carrier Had No Knowledge.—Where a railroad company contracted with a coal company to furnish cars at a point, and failed to do so, the company, in an action for breach of the contract, can not recover for profits that would have accrued on a subsequent contract made by it to deliver a certain number of tons of coal per day to a buyer, if the railroad company had no knowledge when it agreed to deliver the cars that the coal company contemplated such a contract.[82]

§ 791. Expense of Renotifying and Reshipping.—In an action against a carrier for the breach of a special contract of shipment, plaintiff can recover

78. In an action by the owner of a brick yard against a railroad company for breach of a contract to transport a definite quantity of bricks per week, the future profits, which the plaintiff expected to make, can not be considered in estimating the damages. Harrison *v.* New Orleans, etc., R. Co., 28 La. Ann. 777.

Where a drayman breaches a contract to haul from one part of a city to another all the cotton intended for a certain press at a fixed price per bale, he is not liable for loss of profits which the press might have made by compressing cotton its owners failed to get from his not complying with his contract. Reading *v.* Donovan, 6 La. Ann. 491.

In an action against a carrier for breach of a contract to transport specified goods for a given time to a place designated, the fact that a ground of the contract, known to the carrier, was the owner's contracts with third parties for sales of the goods to them, does not entitle him to recover of the carrier the profits which he would have made but for the breach of the contract of carriage. Harvey *v.* Connecticut, etc., R. Co., 124 Mass. 421, 26 Am. Rep. 673.

Where a railroad company undertook to transport a steam boiler for the plaintiff, which he intended to use in the business of sawing lumber for the market, and the company failed to comply with their agreement, held, that the speculative profits which might be supposed to arise, but which were defeated because of the breach of contract which delayed the business, could not be looked to as an element of damages. Vicksburg, etc., R. Co. *v.* Ragsdale, 46 Miss. 458.

79. **Net profits of operating mine.**—A carrier contracted to furnish cars to the operator of a coal mine opened at the instigation of the carrier and bound the operator not to contract with another line for the shipment of its coal. The carrier knew that fixed charges had to be met at the mine, whether it was run or was idle, and knew that the only practical way to mine was to load the coal into railroad cars, and that it was not practical to store coal. The carrier failed to furnish cars. Held, that the operator might recover as damages the net profits of operating the mine. Midland Valley R. Co. *v.* Hoffman Coal Co., 91 Ark. 180, 120 S. W. 380.

80. **Profits on collateral contract.**—Steffen *v.* Mississippi, etc., R. Co., 156 Mo. 322, 56 S. W. 1125.

81. Steffen *v.* Mississippi, etc., R. Co., 156 Mo. 322, 56 S. W. 1125.

82. **Subsequent contract of which carrier had no knowledge.**—Clyde Coal Co. *v.* Pittsburg, etc., R. Co., 226 Pa. 391, 75 Atl. 596, 26 L. R. A., N. S., 1191.

items of expense incurred in renotifying and delivering to purchasers the goods which they had purchased, where defendant had been fully informed as to the accrual of this element of damage in the event it failed to deliver the goods safely at the time agreed upon.[83]

§ 792. Increased Freight and Extra Charges.—Where a drayman breaches a contract to haul from one part of a city to another all the cotton intended for a certain press at a fixed price per bale, he is liable for the increased price required to have the cotton hauled.[84]

Breach of Charter Party.—In an action for breach of a charter party, whereby defendant was compelled to pay for the transportation of two cargoes by other vessels, the measure of damages is the difference between the freight as fixed in the charter party and the freight actually paid for the transportation of the cargoes which the chartered vessel failed to carry.[85]

Goods Carried Part of Distance.—Where, by a contract, a common carrier undertook to deliver merchandise at a particular point, for a certain price, and it appeared that the goods were only carried part of the distance, and the shipper was obliged to pay, in addition to the full freight paid the carrier, a freight to other carriers for transporting the goods the remainder of the distance covered by the original contract, the extra charge then incurred was apparently a damage incurred by the failure of the first carrier to comply with his contract, and, as such, fell within Louisiana Civ. Code, art. 3204, giving the shipper a privilege on the vessel in which the goods were shipped, and a right to the writ of sequestration.[86]

§ 793. Breach of Particular Contracts.—Contract to Carry Definite Quantity Per Week.—In an action by the owner of a brick yard against a railroad company for breach of a contract to transport a definite quantity of bricks per week, neither the interest on the money invested in buildings, etc., nor the depreciation in the value of his property since the breach of the contract, could be considered in estimating the damages.[87]

Contract to Furnish Cars for Props Cut and to Be Cut.—A railroad company which contracts to furnish, for a certain amount to be paid as freight, cars to transport a certain amount of props cut and to be cut, having broken the contract, is liable for damages as respects the props cut at the time of the contract, as well as those thereafter cut, including those cut after it gave notice that it could not furnish cars.[88]

§§ 794-795. Measure of Damages—§ 794. Breach by Carrier.—A carrier refusing to comply with a contract to transport goods is liable for the difference between the market value at the destination when they would have arrived if he had complied, and their value at the same time at the place from which they were to have been carried.[89]

83. **Expense of renotifying and reshipping.**—Pacific Exp. Co. *v.* Needham, 37 Tex. Civ. App. 129, 83 S. W. 22.

84. **Increased freight and extra charges.**—Reading *v.* Donovan, 6 La. Ann. 491.

85. **Breach of charter party.**—Lumberman's Min. Co. *v.* Gilchrist, 5 C. C. A. 239, 55 Fed. 677, 6 U. S. App. 599, affirming (C. C.) 50 Fed. 118.

86. **Goods carried part of distance.**—White *v.* The Kate Dale, 16 La. Ann. 172.

87. **Contract to carry definite quantity per week.**—Harrison *v.* New Orleans, etc., R. Co., 28 La. Ann. 777.

88. **Contract to furnish cars for props cut and to be cut.**—Outland *v.* Seaboard, etc., R. Co., 134 N. C. 350, 46 S. E. 735.

89. *Georgia.*—Chattanooga Southern R. Co. *v.* Thompson, 133 Ga. 127, 65 S. E. 285.

New York.—The proper measure of damages for the breach of a contract to transport goods from A to B is the difference between the value of the goods at A and their increased value at B. Bracket *v.* McNair (N. Y.), 14 Johns. 170, 7 Am. Dec. 447.

Pennsylvania.—On a breach of a contract to carry wheat from Pittsburg to Philadelphia, the measure of damages is the difference between the value of the wheat at Pittsburg, and the freight added, and the market price in Philadelphia, if the wheat had arrived pursuant to the

Deterioration Caused by Delay to Furnish Cars.—In a suit to recover damages for failure to furnish cars for the shipment of fruit, where the damages claimed are as compensation for the deteriorated condition of the fruit, caused by the delay in furnishing cars, the difference in the market value of the fruit at the point of shipment at the time the cars should have been furnished, and at the time they were actually furnished, may be considered by the jury in estimating damages.[90]

Refusal to Transport at Agreed Rate.—The measure of damages for a breach of a contract for the transportation of goods is the difference between their market price or value at the destination to which they were to have been carried at the time they would have arrived there, if the carrier had performed his contract, and their value at the same time at the place from which they were to have been carried, less the agreed freight and other necessary charges of transportation.[91] Quære, as to the rule, when the place of destination is beyond the terminus of defendant's route.[92]

Contract to Deliver by Certain Time at Specified Rate.—In an action upon a contract for the transportation of certain goods at a specific rate by a certain time, where they were never taken possession of by the carrier, the measure of damages for the breach is the difference in the value of the goods at the time and place where they were to be delivered and the value of the same quantity of goods at the same time at the place from which they were to be transported, with the cost of transportation at the specified rate added, with interest on such difference from the time the goods were to be delivered at the

contract. O'Conner *v.* Forster (Pa.), 10 Watts 418.

Texas.—Galveston, etc., R. Co. *v.* Stovall, 3 Texas App. Civ. Cas., § 251.

In an action against a railroad for failure to provide cars for the shipment of plaintiff's corn, the latter can not recover both the profits he might have made if the corn had been shipped and the expenses incurred in preparing it for transportation. Gulf, etc., R. Co. *v.* Hodge, 10 Tex. Civ. App. 543, 30 S. W. 829.

90. Deterioration caused by delay to furnish cars.—Chattanooga Southern R. Co. *v.* Thompson, 133 Ga. 127, 65 S. E. 285.

91. Refusal to transport at agreed rate.—Harvey *v.* Grand Trunk R. Co., Fed. Cas. No. 6,180, 2 Hask. 124.

Indiana.—Michigan, etc., R. Co. *v.* Caster, 13 Ind. 164.

Iowa.—In an action, upon a breach of contract for the transportation of grain from C. to L. at a stipulated price, the defendant having refused to receive the grain, the measure of damages was held to be the difference between the market price of the grain at C. and its market price at L. (which was greater) at the time it should have been delivered, less the agreed price of carriage; the defendant having failed to show that the grain would not have reached without delay or in safety the port of delivery, if he had received it according to his contract, or that his violation was not willful, or that the plaintiff could, in the exercise of ordinary care, have obtained another conveyance. Bridgman *v.* The Emily, 18 Iowa 509.

Maine.—Where the defendant contracted to carry fifty tons of the plaintiff's hay to a distant port for sale, the hay to be delivered at the ship's side, and, after receiving twenty-four tons on board, declined taking any more, because the ship was full, the rule of damages was the difference between what the plaintiff in fact received, or with due diligence and prudence might have obtained, for the hay left in his hands, and the price at the port of destination, deducting freight and expenses. Nourse *v.* Snow (Me.), 6 Greenl. 208.

Massachusetts.—Harvey *v.* Connecticut, etc., R. Co., 124 Mass. 421, 26 Am. Rep. 673.

Michigan.—The measure of damages for the breach of a contract to transport from one market to another an ordinary article of merchandise, always to be found in the market, is the excess in value at the place of destination at the time when, by the contract, the merchandise should have arrived there, beyond its value at the place of shipment, with the agreed freight added, and such expenses as, under the contract, the shipper would have incurred in loading and unloading, etc., had the contract been performed. Ward's, etc., Pac. Lake Co. *v.* Elkins, 34 Mich. 439, 22 Am. Rep. 544.

Missouri.—Birney *v.* Wabash, etc., R. Co., 20 Mo. App. 470.

92. Michigan, etc., R. Co. *v.* Caster, 13 Ind. 164.

point to which they were to be carried.[93]

Contract of Sale Lost by Reason of Failure of Railroad.—A carrier, for breach of contract to furnish cars to plaintiff, made with knowledge that he had a contract to deliver the property offered for shipment to others on board the cars at a certain price, is liable for the profit which he would have made but for such breach;[94] as, for instance, contracts for the delivery of cattle,[95] grain,[96] lumber,[97] timber[98] or wood.[99]

93. Contract to deliver by certain time at specified rate.—Cowley *v.* Davidson, 13 Minn. 92, Gil. 86.

94. Contract of sale lost by reason of failure of railroad.—Gulf, etc., R. Co. *v.* Hodge (Tex. Civ. App.), 39 S. W. 986.

95. Where defendant had notice of plaintiff's contract to deliver cattle at their destination on a certain day, and failed to furnish cars for the transportation thereof as agreed, and the cattle depreciated in value by reason of the delay, the measure of damages is the difference between the contract price at their destination and their market value in their damaged condition at the point of shipment, less the freight. International, etc., R. Co. *v.* Startz (Tex. Civ. App.), 33 S. W. 575.

But, if defendant was not notified of said contract, the damages would be the difference in their market value at their destination, and their value in their damaged condition at the point of shipment. International, etc., R. Co. *v.* Startz (Tex. Civ. App.), 33 S. W. 575.

Where sale of cattle lost for season.—The measure of damages for breach of a contract for furnishing cars for the shipment of cattle, which compelled plaintiff to cancel a contract for their sale, whereby he lost the opportunity of putting them on the market for that season, is the difference between the reasonable value of the cattle, when under herd at the contemplated time and place of shipment, and the amount stipulated in the contract of sale. Gulf, etc., R. Co. *v.* Martin (Tex. Civ. App.), 28 S. W. 576.

96. The measure of damages on failure of a carrier to transport grain as agreed is the difference between the price at which plaintiff was required to sell the grain and the price agreed to be paid by the consignees, where such price is less than the market value of the grain at its intended destination. Missouri, etc., R. Co. *v.* Witherspoon, 45 S. W. 424, 18 Tex. Civ. App. 615.

Where defendant agreed to transport plaintiff's grain to L. at a fixed rate, in consequence of which plaintiff contracted to sell the grain to dealers in L. at a specified price, the measure of plaintiff's damages, on the refusal of defendant to transport the grain as agreed, is the difference between the market value of the grain at L. at the time it should have been carried and its value at the place of shipment, less the cost of carriage. Missouri, etc., R. Co. *v.* Witherspoon (Tex. Civ. App.), 38 S. W. 833; Inman *v.* St. Louis, etc., R. Co., 14 Tex. Civ. App. 39, 37 S. W. 37, affirmed in 93 Tex. 643, no op.

97. Plaintiff sued for a breach of contract to carry his lumber by boat during the boating season to C. When it became evident to him that defendant would not carry all the lumber during the season, plaintiff was unable to secure other boats. There was no market for the lumber at the place of shipment, and plaintiff was compelled to hold it until spring, when he shipped it to C., and sold it for less than the price at C. the former season. Held, that the proper measure of damages was the difference in the market price in C. during the time the lumber ought to have been carried under the contract, and the price when it could be carried and sold the following season, plus the cost of insurance during the winter, and interest on the proceeds of the lumber which ought to have been carried, from the close of navigation until when it could be sold the following season. Shores Lumber Co. *v.* Starke, 76 N. W. 366, 100 Wis. 498.

98. Sale of timber.—Where defendant carrier, at the time it contracted to furnish plaintiff cars for shipment of timber, had notice of the existence of the contract of W. to purchase the timber from plaintiff, or knew that such contract was in contemplation, and before default in supplying the cars had notice that it had been made and that the timber was to be delivered to W. in performance of plaintiff's contract with W., the measure of damages for failure to furnish the cars is the profit which, but for such failure, plaintiff would have made out of his contract with W. Baxley *v.* Tallassee, etc., R. Co., 29 So. 451, 128 Ala. 183.

99. Where a railroad company, with knowledge that an applicant for cars had contracted to sell and deliver wood, failed, without reasonable excuse, to furnish him cars for its shipment, by reason of which the contract was annulled by the purchaser, it is liable to the applicant for the profits he would have made on the contract as actual damages. Houston, etc., R. Co. *v.* Campbell (Tex. Civ. App.), 40 S. W. 431, reversed 45 S. W. 2, 91 Tex. 551, 43 L. R. A. 225.

Reshipment to Another Point Necessitated.—In an action against a carrier who failed to haul freight, necessitating the reshipment of the goods by another carrier, and to another point, the measure of plaintiff's damages is the difference between what he obtained and what he would have received at the original destination, together with the additional expense of transportation, and interest thereon.[1]

Where Carrier Transports Goods Part of Distance.—Where a carrier, by failure to exercise due diligence, is able to transport the goods only a part of the way, the shipper's measure of damages is the difference between the contract price of transportation and the increased cost necessary to secure the delivery of the property at its destination, without any pro rata allowance to the carrier for the partial carriage.[2]

Rate to Manufacturing Company to Secure Location of Plant.—Where the shipper, a manufacturing company, instead of suing from time to time for the difference between the contract rate and the freight charged on material actually shipped, seeks to recover for the entire injury in one action, the measure of damages is the diminution in value of the manufacturing plant by reason of the carrier's refusal to maintain the contract rate; and this is true though the shipper has become insolvent.[3]

Excessive Damages.—In an action against a railway company for breach of a verbal contract to furnish cars for the shipment of certain cattle within a given time, where, according to the market price at the place of destination, the cattle would have sold for $968 more than they did if they had been shipped as agreed, and plaintiffs incurred further expense, amounting to $95, in caring for the cattle while waiting for shipment, a verdict for $700 is not excessive.[4]

§ 795. Breach by Shipper.—It seems that, where plaintiff, owner of a canal boat, contracts to carry potatoes, to be put on board at a certain time, but which are not put on board till some days after, thereby causing delay and expense to the plaintiff, the measure of the plaintiff's damages is not the difference between the ordinary rate of transportation of similar property and the rate agreed to be paid to plaintiff, if the difference were to be in his favor, together with the value of the use of the boat for the time occupied by the defendants in loading the boat beyond the time fixed by the contract, but plaintiff is entitled to recover all the damages which, by default of defendants, he naturally and necessarily sustains.[5]

Voyage to Enhance Damages.—Where a contract of affreightment has been broken, and the master of the vessel knows that he can obtain no freight at the port of lading, he can not make a voyage thither to enhance damages.[6] In an action to recover for the breach of a contract to furnish a given amount of freight for a particular trip of a steamer, at a stipulated price, the defendant may show, in mitigation of damages, that other freight was, or might have been, procured; but the burden of proof is on him, and, in the absence of such proof, the measure of damages is the contract price of the freight.[7]

§ 796. Special Damages.—A shipper can not recover special damages arising from a railroad company's failure to furnish cars as agreed unless the

1. **Reshipment to another point necessitated.**—Laurent v. Vaughn, 30 Vt. 90.

2. **Where carrier transports goods part of distance.**—Spann v. Erie Boatman's Transp. Co., 11 Misc. Rep. 680, 33 N. Y. S. 566, 67 N. Y. St. Rep. 354.

3. **Rate of manufacturing company to secure location of plant.**—Newport News, etc., Co. v. McDonald Brick Co.'s Assignee, 109 Ky. 408, 59 S. W. 332, 22 Ky. L. Rep. 934.

4. **Excessive damages.**—Gulf, etc., R. Co. v. McCarty, 82 Tex. 608, 18 S. W. 716.

5. **Breach by shipper.**—Starbird v. Barrons, 38 N. Y. 230.

6. **Voyage to enhance damages.**—Bradley v. Denton, 3 Wis. 557.

7. Medbery v. Sweet (Wis.), 3 Pin. 210, 3 Chand. 231.

facts leading to the special damages are made known to the company.[8] Where a shipper desirous of shipping logs showed them to the general manager of a railroad company, and explained the method and expense of loading them, and the manager agreed to furnish cars, the shipper had a right to keep his teams necessary for loading on expense while waiting for the company's performance of the agreement, and on its failure to furnish cars he was entitled to recover the expense as special damages.[9]

Waggoner.—Where a waggoner on being employed to carry a load of cotton made the necessary preparations for the journey, but while loading his wagon was discharged by the other party, he was entitled to recover the price of carrying the cotton.[10]

§ 797. Proof of Damages.—Sufficiency.—Since, for a railway company's failure to carry grain according to contract, plaintiff can recover only compensatory damages, which he must prove, a verdict founded only on his testimony as to what profit he would have made on the grain, if transported according to contract, must be set aside.[11]

§ 798. Release of Damages.—Damages for breach of a contract to furnish cars for a shipment are not released by a provision in a subsequent contract releasing such damages for the expressed consideration of a reduced freight rate, where it appears that no reduction was given.[12]

§ 799. Interference by One Carrier with Contract of Another.—Where C., by fraudulent representations to the person having charge of certain goods, obtained possession of them for transportation, knowing that B., another carrier, had contracted with the owner for their transportation and the owner refused to receive the goods from C., whereupon B. paid to C. the stipulated freight, received the goods, and delivered them to the owner, B. could receive the damages from C. if the goods, when received by B. and delivered to the owner, were so damaged that the owner had the right to recoup for damages against B.'s claim for freight.[13]

§ 800. Contracts to Furnish Freight.—A contract with a proposed railroad, securing to it a percentage of all the tonnage moved by rail, incident to the operation of salt-works, and referring in a clause to tonnage into and out of that point, contemplates both the incoming and outcoming tonnage to the operation of the works.[14]

8. **Special damages.**—Choctaw, etc., R. Co. *v.* Rolfe, 76 Ark. 220, 88 S. W. 870.

9. Choctaw, etc., R. Co. *v.* Rolfe, 76 Ark. 220, 88 S. W. 870.

10. **Waggoner.**—Davis *v.* Crawford (S. C.), 2 Mill Const. 401, 12 Am. Dec. 682.

11. **Sufficiency.**—Toledo, etc., R. Co. *v.* Roberts, 71 Ill. 540.

12. **Release of damages.**—Missouri, etc., R. Co. *v.* Darlington (Tex. Civ. App.), 40 S. W. 550; Gulf, etc., R. Co. *v.* McCarty, 82 Tex. 608, 18 S. W. 716; Ft. Worth, etc., R. Co. *v.* Greathouse, 82 Tex. 104, 17 S. W. 834; Missouri, etc., R. Co. *v.* Carter, 9 Tex. Civ. App. 677, 680, 29 S. W. 565; Gulf, etc., R. Co. *v.* Holliday, 65 Tex. 512.

13. **Interference by one carrier with contract of another.**—Barnett *v.* Central Line of Boats, 51 Ga. 439.

14. **Contracts to furnish freight.**—Lone Star Salt Co. *v.* Texas, etc., R. Co. (Tex. Civ. App.), 86 S. W. 355.

Plaintiff railroad agreed to construct a road to the town wherin defendant's salt works were located, to give defendant the benefit of competition in rates; defendant agreeing to furnish plaintiff for transportation "for the full term of 20 years, 66 per cent of all the tonnage moved by rail incident to the operation of its said works." The contract was silent as to the times when and the quantities in which the tonnage was to be delivered, but provided for the payment of liquidated damages for each year in which defendant should fail to tender to plaintiff 66 per cent of its tonnage. It was shown that plaintiff's road was only nine miles in length, and passed through an unsettled territory, in which the traffic originating, besides that derived from defendant's business, was not sufficient to justify the building of the road, and that without such business it would be operated at a heavy loss. It also appeared that defendant's business required the constant

§ 801. Contracts for Drayage or Hauling.—An agreement between a railway and a drayman that the latter should haul to the depot of the former, for a named price agreed to be paid by it, all freight that local shippers might desire to have transported over its railroad did not bind the railroad to furnish such hauling to the drayman, unless the shippers selected that road. Where they shipped by another to an adjoining town and there transferred to the contracting road, the drayman could not recover for loss of the profits of hauling in the latter's depot.[15] A railway company is liable for breach of such contract, and can not escape liability for depriving the drayman of the right to perform the service at the price agreed upon by having it delivered to another road at the initial point and hauled by that road to another point on its line before receiving it, where the person controlling the routing of the shipment designated defendant's and not the other road as the route.[16] Such contract did not bind the shipper to deliver his goods to the defendant road.[17] The drayman suing for damages from being denied the right to perform his contract for lucrative service, assumes the burden of showing that he was able and willing to perform his part, had the carrier permitted,[18] and a consignor was entitled to testify that the consignee was entitled to route a shipment by rail.[19]

§ 802. Contracts Enlarging Carrier's Liability.—Clear and Precise Language.—To make a contract which enlarges a carrier's liability so as to waive the limited protection which the law affords him when entered into, it "must be done by clear and precise language; for the law will not imply from any doubtful language such an intention, but will rather presume, when the meaning of the contract is doubtful, that it was not his intention to waive a protection so reasonable and so important to him. Express language will be required to impose upon a party the responsibility of an insurer beyond his legal obligation, or to prevent the operation of the customary rule in cases where the act of God or inevitable accident excuses the nonperformance of a contract."[20] Statements by the commercial agent of a common carrier duly authorized to solicit shipments of freight in response to a statement by the shipper that he "wanted a quick run," that "it would take four days" to get the freight to the Wednesday morning market, and that he would give the shipper a quick run and as he had ten cars he could run them as special; does not constitute an express contract on the part of the carrier to ship and deliver within four days.[21]

transportation of its product and its supplies, and that the prompt filling of some of its orders could be better accomplished by shipment over a road other than plaintiff's. Held, that the contract did not obligate defendant to deliver to plaintiff for transportation by regular and continuous delivery 66 per cent of its tonnage as it accrued. Lone Star Salt Co. *v.* Texas, etc., R. Co., 90 S. W. 863, 99 Tex. 434, 3 L. R. A., N. S., 828.

15. Contracts for drayage or hauling.—Gulf, etc., R. Co. *v.* Dennison, 22 Tex. Civ. App. 89, 58 S. W. 834.

16. Gulf, etc., R. Co. *v.* Dennison, 25 Tex. Civ. App. 127, 60 S. W. 281, distinguishing Gulf, etc., R. Co. *v.* Dennison, 22 Tex. Civ. App. 89, 58 S. W. 834.

17. Defendant railroad company contracted with plaintiff to pay the latter for all freight carried to its depot for persons living in a certain city who wished to ship freight on defendant's line. Plaintiff commenced to deliver a large quantity of freight at defendant's depot, but was stopped by the latter, and paid for what he had delivered; the shipper having made arrangements to deliver the freight to another road, at another station, to be delivered to defendant at a connecting point. Held that it was error to instruct that the defendant had agreed by such contract to pay the plaintiff for hauling such freight, since the contract did not bind the shipper to deliver the goods to defendant company. Gulf, etc., R. Co. *v.* Dennison, 58 S. W. 834, 22 Tex. Civ. App. 89.

18. Gulf, etc., R. Co. *v.* Dennison, 22 Tex. Civ. App. 89, 58 S. W. 834.

19. Gulf, etc., R. Co. *v.* Dennison, 25 Tex. Civ. App. 127, 60 S. W. 281.

20. Clear and precise language.—International, etc., R. Co. *v.* Wentworth, 8 Tex. Civ. App. 5, 14, 27 S. W. 680, affirmed in 87 Tex. 311.

21. International, etc., R. Co. *v.* Wentworth, 87 Tex. 311, 28 S. W. 277, affirming 27 S. W. 680, 8 Tex. Civ. App. 5.

CHAPTER IX.

Title, Custody and Control of Goods.

I. Title and Rights of Consignor in General, § 803.
II. Title and Rights of Consignee in General, § 804.
III. Title and Rights of Carrier in General, § 805.
IV. Change of Destination, § 806.
V. Seizure under Legal Process, § 807.
VI. Actions by and against Carriers, §§ 808-811.
A. Right of Carrier to Maintain Action, § 808.
B. Right to Maintain Action against Carrier, §§ 809-811.
a. In General, § 809.
b. Right of Consignor, § 810.
c. Right of Consignee, § 811.

§ 803. Title and Rights of Consignor in General.—Where goods are left with a common carrier to be delivered to the consignee without any qualification or restriction, the consignor parts with the goods and all control over them,[1] and can not, by a subsequent direction to the carrier, prevent their delivery to the consignee,[2] unless such facts are shown as will justify the stoppage of the goods in transitu.[3] A seller of goods for cash on delivery, who delivers without payment, can not recover possession from the carrier after the carrier in the usual course of business, and without notice, has given a negotiable bill of lading therefor to the fraudulent buyer.[4] The possession of one who delivers goods to a carrier for transportation to himself as consignee gives him a prima facie right to recover in conversion where the goods are attached in a suit against another.[5]

When Carrier Consignor's Agent.—If the right to control the goods be reserved by the shipper, the carrier must be regarded as his agent.[6] The question whether the consignor reserved the jus disponendi is one of intention, to be gathered from all the facts and circumstances of the transaction.[7] Where a

1. **Title and right of consignor.**—Philadelphia, etc., R. Co. *v.* Wireman, 88 Pa. 264. See post, "Title and Rights of Consignee in General," § 804; "Change of Destination," § 806.

Where goods are shipped to a consignee over a railroad, the shipper has no right to require a delivery at an intermediate point, although he offers to pay the freight to the point of destination. Pinnix *v.* Charlotte, etc., R. Co., 66 N. C. 34.

Right to demand redelivery.—Plaintiff collected money for persons supposed to be in the service of the United States, and delivered it to defendant express company, directed to such persons, but the company was unable to find the consignees. Held, that since the fact that discharges had been issued in the names of the consignees was evidence that the money was not consigned to fictitious persons, but to persons entitled to it, plaintiff was not, as against defendant, entitled to have the money redelivered to him. Thompson *v.* Fargo (N. Y.), 4 Thomp. & C. 665, 2 Hun 379.

Under a shipment consigned to the seller, "notify" the purchaser, title does not pass to the purchaser, in the absence of anything to the contrary. Asheboro Wheelbarrow, etc., Co. *v.* Southern R. Co., 149 N. C. 261, 62 S. E. 1091.

2. Philadelphia, etc., R. Co. *v.* Wireman, 88 Pa. 264.

3. **Stoppage in transitu.**—As to consignor's right of stoppage in transitu, see post, "Stoppage in Transitu," Chapter 17.

4. **Delivery of bill of lading to buyer.**—Western Transp. Co. *v.* Marshall (N. Y.), 4 Abb. Dec. 575, 6 Abb. Prac., N. S., 280, affirming 37 Barb. 509.

5. **Consignor also consignee.**—Rosencranz *v.* Swofford Bros. Dry Goods Co., 175 Mo. 518, 75 S. W. 445, 97 Am. St. Rep. 609.

6. **Right to control goods reserved by shipper.**—Emery's Sons *v.* Irving Nat. Bank, 25 O. St. 360, 18 Am. Rep. 299.

7. **Evidence as to intention.**—Emery's Sons *v.* Irving Nat. Bank, 25 O. St. 360, 18 Am. Rep. 299, followed in Miller *v.* Sullivan & Co., 26 O. St. 639, reversing

wholesale dealer ships goods to a retailer under an agreement that the title should remain in the former, and that the latter should be responsible for them while they were in his possession, and the retailer ships back the part of goods unsold by the same carrier, the retailer is responsible to the wholesale dealer for the value of the goods lost during transit, as the carrier is his agent.[8]

Rescission of Contract of Carriage.—Where a seller has authority "to ship by boat," he may rescind a contract of carriage with a boat owner, and reship the goods in another boat, after they have been placed in the former boat and a bill of lading has been sent to said buyer; and the rescission releases such owner from all liability to the buyer for injury to the goods after they were taken from his boat.[9]

Delivery Conditional on Payment of Draft.—The shipper of goods, after delivery to the carrier and receipt of bill of lading, may make the delivery to the consignee conditional on the latter's payment of a draft, provided the bill of lading has not been forwarded to the consignee, or some one for his use.[10]

After a consignor has elected to treat property as converted on account of the carrier's wrongful refusal to deliver according to his order, and has notified the carrier of such election, he is under no obligation to defend suits relating to the property or to aid the carrier in disposing of it.[11]

§ 804. Title and Rights of Consignee in General.—Delivery to Carrier as Vesting Title in Consignee.—Where goods are in the possession of the carrier to be delivered to the consignee it is presumed that the title to the goods is in the consignee,[12] subject only to the carrier's lien for freight,[13] and

in part 1 C. S. C. R. 76, 13 O. Dec. Reprint 425.

On such question of intention, the terms of the bill of lading are to be taken as admissions of the consignor, and are entitled to great weight, but are not conclusive. Emery's Sons *v.* Irving Nat. Bank, 25 O. St. 360, 18 Am. Rep. 299.

8. Castelli *v.* Jereissati, 80 N. J. L. 295, 78 Atl. 227.

9. Rescission of contract of carriage.—Tootle *v.* Rusk, 5 O. Dec. Reprint 107, 2 Am. L. Rec. 553.

10. Delivery conditional on payment of draft.—Louisville, etc., R. Co. *v.* Hartwell, 99 Ky. 436, 18 Ky. L. Rep. 745, 36 S. W. 183, 38 S. W. 1041.

11. Where property converted.—Atchison, etc., R. Co. *v.* Schriver, 72 Kan. 550, 84 Pac. 119, 4 L. R. A., N. S., 1056.

12. Title of consignee.—*United States.*—Blum *v.* The Caddo, Fed. Cas. No. 1573, 1 Woods 64; Lawrence *v.* Minturn (U. S.), 17 How. 100, 107, 15 L. Ed. 58.

Alabama.—Jones *v.* Sims (Ala.), 6 Port. 138.

Arkansas.—Memphis, etc., R. Co. *v.* Freed, 38 Ark. 614.

California.—Webb *v.* Winter, 1 Cal. 417.

Georgia.—Rhodes, etc., Co. *v.* Continental Furniture Co., 2 Ga. App. 116, 58 S. E. 293.

Illinois.—Lake Shore, etc., R. Co. *v.* National Live Stock Bank, 178 Ill. 506, 53 N. E. 326; Nonotuck Silk Co. *v.* Adams Exp. Co., 256 Ill. 66, 99 N. E. 893, affirming judgment 166 Ill. 519; S. C., 256 Ill. 76, 99 N. E. 897, affirming judgment 166 Ill. App. 525.

Indiana.—Butler *v.* Pittsburgh, etc., R. Co., 18 Ind. App. 656, 46 N. E. 92; Madison, etc., R. Co. *v.* Whitesel, 11 Ind. 55; Pennsylvania Co. *v.* Poor, 103 Ind. 553, 3 N. E. 253; Cleveland, etc., R. Co. *v.* Moline Plow Co., 13 Ind. App. 225, 41 N. E. 480; Tebbs *v.* Cleveland, etc., R. Co., 20 Ind. App. 192, 50 N. E. 486.

Iowa.—Bank *v.* American Exp. Co., 127 Iowa 1, 102 N. W. 107.

Kentucky.—Hoeing *v.* Adams Exp. Co., 7 Ky. L. Rep. 664; Louisville, etc., R. Co. *v.* Fort Wayne Elect. Co., 108 Ky. 113, 55 S. W. 918, 21 Ky. L. Rep. 1544.

Louisiana.—Schindler *v.* Smith, etc., Co., 18 La. Ann. 476; The Red River, 106 La. 42, 30 So. 303, 87 Am. St. Rep. 293.

Minnesota.—Benjamin *v.* Levy, 39 Minn. 11, 38 N. W. 702; McCauley *v.* Davidson (Gil. 150), 13 Minn. 162; Ammon *v.* Illinois Cent. R. Co., 120 Minn. 438, 139 N. W. 819.

Mississippi.—Butler *v.* Smith, 35 Miss. 457.

New York.—Thompson *v.* Fargo, 2 Hun 397, 4 Thomp. & C. 665 affirmed in 63 N. Y. 479; White *v.* Schweitzer, 132 N. Y. S. 644, 147 App. Div. 544, reargument denied 133 N. Y. S. 1149; Price *v.* Powell, 3 N. Y. 322; Wertheimer *v.* Wells, Fargo & Co., 112 N. Y. S. 1062; Krulder *v.* Ellison, 47 N. Y. 36, 7 Am. Rep. 402;

13. Lien for charges.—Memphis, etc., R. Co. *v.* Freed, 38 Ark. 614; Howe *v.* C. H. & D. R. Co., 18 O. C. C. 333, 10 O. C. D. 182. See post, "Charges and Liens," chapter 15.

the consignor's right of stoppage in transitu.[14] But until the contract of shipment takes effect, the consignee has no title thereto.[15] In the absence of notice to the carrier of the existence of a different relation, the consignee must be treated as the owner of the goods, with authority to control them in transit.[16] But where a party ships goods, consigned to himself, his agent, or the order of either,[17] or where there is no agreement further than that the goods shall be

Dressner *v.* Manhattan Delivery Co., 92 N. Y. S. 800.

North Carolina.—Parker Buggy Corp. *v.* Atlantic, etc., R. Co., 152 N. C. 119, 67 N. E. 251; Gaskins *v.* Southern R. Co., 151 N. C. 18, 65 S. E. 518.

Ohio.—State *v.* Mullin, 78 O. St. 358, 85 N. E. 536, affirming 10 O. C. C., N. S., 417, 20-30 O. C. D. 251; Howe *v.* C. H. & D. R. Co., 18 O. C. C. 333, 10 O. C. D. 182; S. C., 18 O. C. C. 606, 10 O. C. D. 220.

South Dakota.—Hess *v.* South Dakota Cent. R. Co. (S. D.), 139 N. W. 334.

Tennessee.—Ochs *v.* Price, 53 Tenn. (6 Heisk.) 483; Brooks *v.* Friend Paper Co., 94 Tenn. 701, 31 S. W. 169.

Texas.—Nashville, etc., R. Co. *v.* Grayson County Nat. Bank, 100 Tex. 17, 21, 93 S. W. 431, reversing 91 S. W. 1106; Greif & Bro. *v.* Seligman (Tex. Civ. App.), 82 S. W. 533; East Line, etc., R. Co. *v.* Hall, 64 Tex. 615, 620; Cobb *v.* Beall, 1 Tex. 342, 347; Gulf, etc., R. Co. *v.* Rotter Bros. (Tex. Civ. App.), 104 S. W. 402; Orthwein's Sons *v.* Wichita Mill, etc., Co., 32 Tex. Civ. App. 600, 75 S. W. 364, affirmed in 97 Tex. 643, no op.; Fort Produce Co. *v.* Dissen, 45 Tex. Civ. App. 403, 101 S. W. 477.

Virginia.—Vaughan Mach. Co. *v.* Stanton Tanning Co., 106 Va. 445, 56 S. E. 140.

Wisconsin.—Congar *v.* Galena, etc., R. Co., 17 Wis. 477.

Service of garnishment process on the consignee by a creditor of the shipper before the goods arrive is good as against another garnishment made after the goods arrived. Schindler *v.* Smith, etc., Co., 18 La. Ann. 476.

Assignment of goods in transit.—A bona fide assignment of goods at sea, and their proceeds, is sufficient to pass the legal title to the goods and proceeds, without an indorsement of the bill of lading, so that replevin will lie for the proceeds. D'Wolf *v.* Harris, Fed. Cas. No. 4,221, 4 Mason 515.

Instances.—Where a lease for oil provides for delivery to the lessor of a fraction of the oil in the pipe line of a carrier, there need be no actual physical separation of the lessor's share from the whole of the oil to vest title in him. Smith *v.* Linden Oil Co., 69 W. Va. 57, 71 S. E. 167.

Where there was an order by letter, for the purchase of two thousand bushels of "red wheat, new crop, at 65 cents delivered Galveston, f. o. b. — shipment within two days. Delivery at ——" and the seller wrote in reply, "We book sale to you of 2,000 bushels 65 cents Galveston," the reference to Galveston was one of price only, and not as the place of delivery, and upon delivery to the carrier the title passed to the purchaser. Orthwein's Sons *v.* Wichita Mill, etc., Co., 32 Tex. Civ. App. 600, 75 S. W. 364, affirmed in 97 Tex. 643, no op.

A. purchased cattle, and consigned them, without qualification, to his principal in New York, paying for them with "scale tickets," in the nature of checks, which were accepted by a bank, to be subsequently collected by draft on the consignee. After the cattle were en route, the bank procured by the carrier two shipping receipts, one covering the "scale tickets" then accepted, and the other those not yet presented. The receipts recited that the carrier had received of the bank certain cattle to be forwarded to it at New York, but the cattle were delivered as originally consigned. Held, that delivery to the carrier put the title in the consignee, and the bank, which never shipped the cattle, and knew they were shipped to consignee, did not acquire title to them by the receipts. Lake Shore, etc., R. Co. *v.* National Live Stock Bank, 53 N. E. 326, 178 Ill. 506.

14. Stoppage in transitu.—Memphis, etc., R. Co. *v.* Freed, 38 Ark. 614; Krulder *v.* Ellison, 47 N. Y. 36, 7 Am. Rep. 402; Howe *v.* C. H. & D. R. Co., 18 O. C. C. 333, 10 O. C. D. 182; Howe *v.* Chicago, etc., R. Co., 18 O. C. C. 606, 10 O. C. D. 220; Brooks *v.* Friend Paper Co., 94 Tenn. 701, 31 S. W. 160; Gulf, etc., R. Co. *v.* Rotter Bros. (Tex. Civ. App.), 104 S. W. 402; Greif & Bro. *v.* Seligman (Tex. Civ. App.), 82 S. W. 533. See post, "Stoppage in Transitu," chapter 17.

15. Until contract of shipment takes effect.—Finn *v.* Western R. Corp., 112 Mass. 524, 17 Am. Rep. 128.

16. Tebbs *v.* Cleveland, etc., R. Co., 20 Ind. App. 192, 50 N. E. 486. See Southern Exp. Co. *v.* Fant Fish Co., 12 Ga. App. 447, 78 S. E. 197.

17. Goods consigned to shipper or agent.—Missouri Pac. R. Co. *v.* Lau, 57 Neb. 559, 78 N. W. 291. See Whaley *v.* Atlantic, etc., R. Co., 84 S. C. 189, 65 S. E. 1022.

Shipment "notify" the purchaser.—Under a shipment of iron consigned to the seller, "notify" the purchaser, title does not pass to the purchaser, in the absence of anything to the contrary. Asheboro Wheelbarrow, etc., Co. *v.* Southern R. Co., 149 N. C. 261, 62 S. E. 1091.

Possession by a bank of a draft with

shipped to a given point, and the consignor is shown to be the owner before shipment,[18] there is nothing to show a change of ownership. And if it appears from a contract of sale that the title is to remain in the consignor until the destination is reached, delivery to the carrier does not devest the title of the consignor.[19] It is held that where a seller of goods delivers them to a carrier and forwards bill of lading with draft attached for collection, the title vests in the buyer without payment of price or actual delivery.[20] The general rule that a delivery by the seller to the carrier is a delivery to the consignee,[21] and that the goods are thereafter at his risk, may be changed by a contract that the rights of the parties shall be otherwise.[22] The presumption that the consignee is owner of the goods may be explained or rebutted by evidence showing where the real ownership lies,[23] and where the consignee's right in the goods is controverted the question of ownership is for the jury.[24]

By the acceptance of a draft for goods, accompanied by a bill of lading,

bill of lading attached as transferree thereof, the bill of lading containing the recital, "Order Notify F." a buyer from the consignor's vendee of the corn shipped is only prima facie evidence of the consigning seller's intention to retain title until payment of the draft. First Nat. Bank *v.* McSwain, 75 S. E. 1106, 93 S. C. 30.

Question for jury.—The presumption that a person shipping goods, consigned by bill of lading to himself or order, retained the title, if litigated, is one of fact for the jury. Missouri Pac. R. Co. *v.* Lau, 78 N. W. 291, 57 Neb. 559.

18. Agreement to ship goods to given point.—East Line, etc., R. Co. *v.* Hall, 64 Tex. 615.

19. Blakiston *v.* Davies, Turner & Co., 42 Pa. Super. Ct. 390.

Where the consignor and consignee enter into a contract, by which the consignee agrees to pay a specified price for all the wheat that the consignor would deliver to him at a certain point by a specified time, the wheat purchased by the consignor to fill the contract belongs to the consignor until it reaches its destination. East Tennessee, etc., R. Co. *v.* Nelson, 41 Tenn. (1 Coldw.) 272.

20. Bill of lading attached to draft.—Robinson *v.* Houston, etc., R. Co. (Tex.), 146 S. W. 537, reversing judgment Houston, etc., R. Co. *v.* Robinson (Tex. Civ. App.), 131 S. W. 444. But see Cudahy Packing Co. *v.* Dorsey, 26 Tex. Civ. App. 484, 63 S. W. 548, holding that where a carrier has instructions not to deliver property until payment of draft, the title does not pass upon delivery.

21. Straus & Bro. *v.* Wessel & Co., 30 O. St. 211; Emery's Sons *v.* Irving Nat. Bank, 25 O. St. 360, 18 Am. Rep. 299; Fort Produce Co. *v.* Dissen, 45 Tex. Civ. App. 403, 101 S. W. 477.

S., residing in Indiana, received from W., a commission merchant of Cincinnati, $6,000, advanced on account of pork, to be thereafter cut and shipped by S. for sale on commission. In pursuance of the contract, S. shipped by rail a car load of the pork, consigned to W. at Cincinnati, to whom he also sent an invoice of the shipment with a letter of advice stating: "We deliver this load on our own indebtedness." The value of the shipment was less than the amount of such indebtedness. The bill of lading was taken by S. in his own name, and was not forwarded to the consignee. It was held that under these circumstances the delivery of the pork by S. to the carrier was equivalent to a delivery to the consignee. Straus & Bro. *v.* Wessel & Co., 30 O. St. 211, affirming Wessel & Co. *v.* Weber, 13 O. Dec. Reprint 844.

22. Contract changing rule.—Fort Produce Co. *v.* Dissen, 45 Tex. Civ. App. 403, 101 S. W. 477.

23. Rebuttal of presumption. — *United States.*—The Carlos F. Roses, 20 Ct. 803, 177 U. S. 655, 44 L. Ed. 929.

Alabama.—Southern R. Co. *v.* Proctor, 3 Ala. App. 413, 57 So. 513; Jones *v.* Sims (Ala.), 6 Port. 138.

Indiana.—Pennsylvania Co. *v.* Poor, 3 N. E. 253, 103 Ind. 553; Cleveland, etc., R. Co. *v.* Moline Plow Co., 13 Ind. App. 225, 41 N. E. 480.

Minnesota.—Ammon *v.* Illinois Cent. R. Co., 120 Minn. 438, 139 N. W. 819.

New York.—Dressner *v.* Manhattan Delivery Co., 92 N. Y. S. 800; Wertheimer *v.* Wells, Fargo & Co., 112 N. Y. S. 1062; Price *v.* Powell, 3 N. Y. 322.

Texas.—Ft. Worth, etc., R. Co. *v.* Caruthers (Tex. Civ. App.), 157 S. W. 238.

Wisconsin.—Congar *v.* Galena, etc., R. Co., 17 Wis. 477.

Presumption of ownership in the consignee of goods may be rebutted by proof of a completed sale before shipment to the person directed in the bill of lading to be notified, which completed sale may exist without delivery or payment of the price. Ammon *v.* Illinois Cent. R. Co., 139 N. W. 819, 120 Minn. 438.

24. Question for jury.—Cobb *v.* Beall, 1 Tex. 342, 347.

the consignee's title becomes absolute, subject only to the consignor's right of stoppage in transitu.[25]

A direction to notify a third person contained in the bill of lading, does not make him consignee, or give rise to a presumption that he is the owner.[26]

Bill of Lading as Vesting Title in Consignee.—The effect of a bill of lading as vesting title in the consignee is treated elsewhere.[27]

Right to Maintain Action.[28]—The consignee named in a bill of lading, upon payment of freight, may maintain an action against any person who assumes a control over them in violation of his right.[29] Where a carrier has sold goods, transported by him, consignee may follow up the goods, and recover them, or recover the price thereof, from one who has purchased of the carrier and sold them.[30]

Right of Inspection.—Where the right of the shipper and carrier are not regulated by agreement, the right of the consignee to inspect exists.[31]

Right to Repudiate Part of Transaction.—A carrier owes the consignee no duty as a common carrier, except subject to the valid terms of the contract of shipment, and if he repudiates part of the transaction, he must repudiate it all, in which case he can not assert the carrier ever became as to him a common carrier or a bailee for hire.[32]

§ 805. Title and Rights of Carrier in General.—A carrier has a special title to goods received for transportation, which gives it a legal right to the custody thereof, before delivery to the consignee, as against one having no right.[33] But it must yield possession, or recognize the right of a third person having the true title to the goods, or such person may enforce his right by suit.[34]

25. **Acceptance of draft.**—Dows *v.* Cobb (N. Y.), 12 Barb. 310.

26. **Direction "notify" third person.**—Ammon *v.* Illinois Cent. R. Co., 120 Minn. 438, 139 N. W. 819.

27. **Bill of lading as vesting title consignee.**—See ante, "Bills of Lading," chapter 6.

28. **Right to maintain action** against carrier for loss, damage, nondelivery, etc., see post, "Right of Consignee," § 811.

29. Webb *v.* Winter, 1 Cal. 417.

A consignee can maintain replevin against a warehouseman who wrongfully retains them, though the consignee is not the general owner of the goods. Butler *v.* Smith, 35 Miss. 457.

30. Crumbacker *v.* Tucker, 9 Ark. 365; Bailey *v.* Shaw, 24 N. H. 297, 55 Am. Dec. 241.

31. **Right of inspection.**—Earnest *v.* Delaware, etc., R. Co., 134 N. Y. S. 323, 149 App. Div. 330.

32. **Repudiation of part of transaction.**—Bates *v.* Weir, 121 App. Div. 275, 105 N. Y. S. 785.

33. **Title of carrier.**—State *v.* Intoxicating Liquors, 83 Me. 158, 21 Atl. 840.

34. **Right of true owner.**—*Georgia.*—Georgia R., etc., Co. *v.* Haas, 56 S. E. 313, 127 Ga. 187, 9 Am. & Eng. Ann. Cas. 677.

Kansas.—Atchison, etc., R. Co. *v.* Jordon Stock Food Co., 72 Pac. 533, 67 Kan. 86.

New York.—Blossom *v.* Champion (N. Y.), 37 Barb. 554; Bassett *v.* Spofford, 45 N. Y. 387, 6 Am. St. Rep. 101, affirming 2 Daly 432.

Pennsylvania.—Jacoby *v.* Laussatt (Pa.), 6 Serg. & R. 300.

West Virginia.—Smith *v.* Linden Oil Co., 69 W. Va. 57, 71 S. E. 167.

Instances.—Plaintiffs sold turpentine, to be paid for on delivery, and the purchaser sold the same to a third person. Plaintiffs, by order of the original purchaser, caused the property to be shipped on defendant's vessel, taking receipts therefor. The second purchaser, without paying for the property, procured from the agent of the vessel a bill of lading, and indorsed the same to one making advances on the property. In an action against the master of the vessel to recover possession of the property, held, that the vendors did not lose their title by failure to notify the master of the fact that the price had not been paid. Blossom *v.* Champion (N. Y.), 37 Barb. 554.

Where a supercargo, fraudulently consigned goods to a carrier to secure a debt due from the shipper, it was held that the carrier was not entitled to the goods as against the shipper's assignees for creditors. Jacoby *v.* Laussatt (Pa.), 6 Serg. & R. 300.

Where a vendor refused to deliver goods to vendee in pursuance of a contract but delivered them to a carrier consigned to another, it was held, that the vendee could not, as against the carrier, recover possession of the goods. Lester *v.* McDowell, 18 Pa. 91.

Where an oil lease provided that the

A carrier can not pledge,[35] or sell,[36] goods delivered to it for transportation, so as to divert the title of the consignee. Where the title to goods has rightfully passed to the consignee by reason of a good delivery the carrier can not recover against him on the strength of a judgment recovered by the consignor against the carrier in another state as for a misdelivery.[37]

Right to Insure Goods.—A carrier has such an interest in goods intrusted to it for transportation that it may insure not only its liability, but the whole value of the goods. And in such case it may collect the whole value, and, after reimbursing itself for the special loss it has sustained, will hold the surplus in trust for the owners.[38]

Safe Custody and Preservation.—Since a carrier is a bailee for hire, it may resort to any means to protect the property that the owner could use.[39] The duty and liability of the carrier as to safe custody and preservation of property is treated elsewhere.[40]

To enforce the payment of its charges a carrier has the right by the common law to retain possession of the goods transported.[41]

Delay to Determine Ownership.—Where property is in the hands of a common carrier, and possession thereof is demanded by a stranger to the bill of lading prior to actual shipment and under a claim of ownership, the carrier, having reasonable doubt as to which party is entitled to possession and acting in good faith, may have a reasonable time in which to investigate the claims of the respective parties, and for this purpose may delay immediate shipment.[42]

Right to Dispute Consignor's Title.—It is held that the carrier can not dispute the title of the consignor in an action brought by him.[43] This is es-

lessee should pay the landowner a royalty of a fraction of the oil produced under the lease, such royalty oil to be delivered into the pipe line of a common carrier of oil, such common carrier, having notice of the assignment by the landowner to another of a given fraction of such royalty, must account to such assignee for his undivided fraction of such oil. Smith *v.* Linden Oil Co., 69 W. Va. 57, 71 S. E. 167.

35. **Power to pledge goods.**—Kitchell *v.* Vanadar (Ind.), 1 Blackf. 356, 12 Am. Dec. 249.

Carriers by water purchased a boat on their way to ascend a certain river towards the place of destination, and deposited with the seller a part of the property carried, as security for the price of the boat; informing him that they were carriers. Held, that this disposal of the property was unauthorized, and that the right to the possession of it continued in the original owner. Kitchell *v.* Vanadar (Ind.), 1 Blackf. 356, 12 Am. Dec. 249.

36. **Power to sell goods.**—Crumbacker *v.* Tucker, 9 Ark. 365; Bailey *v.* Shaw, 24 N. H. 297, 55 Am. Dec. 241.

37. Philadelphia, etc., R. Co. *v.* Wireman, 88 Pa. 264.

38. **Right to insure goods.**—Lancaster Mills *v.* Merchants' Cotton-Press Co., 89 Tenn. 1, 14 S. W. 317.

A carrier may contract valid insurance, which will protect it from a loss of goods, occasioned by the negligence of its own servants. Phœnix Ins. Co. *v.* Erie, etc., Transp. Co., 117 U. S. 312, 29 L. Ed. 873, 6 S. Ct. 750, 1176.

39. **Power to protect property.**—Pittsburg, etc., R. Co. *v.* Chicago, 242 Ill. 178, 89 N. E. 1022, affirming 144 Ill. App. 293.

40. **Safe custody and preservation.**—See post, "Loss of or Injury to Goods," chapter 12.

41. **Enforcement of charges.**—Ames *v.* Palmer, 42 Me. 197, 66 Am. Dec. 271. See post, "Detention for Debt or Charges," § 841.

This right does not deprive the general owner of the right to immediate possession, as against a wrongdoer. It constitutes no bar to the possession of the property, unless set up by the authority of the party holding such lien. Ames *v.* Palmer, 42 Me. 197, 66 Am. Dec. 271.

42. **Delay to determine ownership.**—Merz *v.* Chicago, etc., R. Co., 86 Minn. 33, 90 N. W. 7.

What is a reasonable time for investigation by a carrier to determine the ownership of goods claimed by two parties is ordinarily a question for the jury. Merz *v.* Chicago, etc., R. Co., 90 N. W. 7, 86 Minn 33.

43. **Right to dispute consignor's title.**—Denver, etc., R. Co. *v.* Frame, 6 Colo. 382; Wallace *v.* Matthews, 39 Ga. 617, 99 Am. Dec. 473; Lockhart *v.* Western, etc., R. Co., 73 Ga. 472, 54 Am. Rep. 883; Carter *v.* Southern R. Co., 111 Ga. 38, 36 S. E. 308, 50 L. R. A. 354.

Georgia Civil Code, § 2286, provides

pecially true where the party delivering the property to the carrier is bound by contracts or otherwise to make the shipment, or has become responsible to the carrier for its charges.[44] But it is held that this rule does not apply to cases where the plaintiff himself shows that he has no interest or title to the property in question.[45] And the carrier may dispute the consignor's title where the title of the real owner is sought to be enforced against it.[46]

Liability as Trespasser.—A carrier who receives goods to carry from one not authorized to deliver them to him is a trespasser and may be sued in trover for the goods, as any other illegal taker may be.[47] But where a shipper loads property on railroad cars, the railroad company, if not a party to the taking, is not a trespasser, though subsequently notified by the owners of the property not to ship it.[48]

§ 806. Change of Destination.—Where under the circumstances a delivery to the carrier is not a delivery to the consignee, the consignor has the right to direct a change in destination, and the carrier is bound to obey such direction,[49] even where the consignee has accepted bills on the strength of the consignment;[50] and the carrier is not liable to the consignee.[51] But it is held that where the bill of lading has been forwarded to the consignee the consignor can not alter the destination.[52] The consignor can not exercise the right to change the destination without paying a reasonable charge therefor.[53]

The true owner of the property in the possession of a common carrier may have the same diverted at a station on the route between the shipping point and the place of destination while it is in transit, but may be required to produce

that "The carrier can not dispute the title of the person delivering the goods to him by setting up adverse title in himself, or a title in third persons, which is not being enforced against him." Shellnut *v.* Central, etc., R. Co., 131 Ga. 404, 62 S. E. 294, 18 L. R. A., N. S., 494.

A carrier sued by the consignor of goods intrusted to it for transportation can not say that the real title was in another, unless it shows that the goods were taken by the latter without injury to the consignor. Great Western R. Co. *v.* McComas, 33 Ill. 185.

44. Illinois Cent. R. Co. *v.* Schwartz, 11 Ill. App. 482.

45. Lockhart *v.* Western, etc., R. Co., 73 Ga. 472, 54 Am. Rep. 883.

46. Carter *v.* Southern R. Co., 111 Ga. 38, 36 S. E. 308, 50 L. R. A. 354; Lockhart *v.* Western, etc., R. Co., 73 Ga. 472, 54 Am. Rep. 883.

47. Liability as trespasser.—Southern Exp. Co. *v.* Palmer, 48 Ga. 85.

48. Nashville, etc., R. Co. *v.* Walley, 147 Ala. 697, 41 So. 134.

49. Right of consignor to change destination.—Lewis *v.* Salena, etc., R. Co., 40 Ill. 281; Straborn *v.* Union Stock Yard, etc., Co., 43 Ill. 424, 92 Am. Dec. 142; Howell *v.* Morlan, 78 Ill. 162; Hartwell *v.* Louisville, etc., R. Co., 15 Ky. L. Rep. 778. See Carr *v.* Pennsylvania R. Co., 92 N. Y. S. 799.

A debtor who ships cotton to his factor and creditor for sale and application to the debt, and sends the bill of lading, may change the shipment to another person without making the carrier liable to the first consignee. Chaffe *v.* Mississippi, etc., R. Co., 59 Miss. 182.

Goods in hands of connecting carrier.—A consignor of goods, after they have passed from the hands of the railroad company with which the contract of affreightment was made, into the hands of another company, has the same right to change their destination while in transitu, by taking a new bill of lading, as if the first company had a continuous line to the destination. Sutherland *v.* Second Nat. Bank, 78 Ky. 250, 6 Am. & Eng. R. Cas. 368.

That a person to be notified of the arrival of goods consigned to shipper's order takes them from the carrier's possession without its knowledge and detains them in its own warehouse is no justification for the carrier's failure to comply with the order from the shipper directing a diversion of the consignment. Atchison, etc., R. Co. *v.* Schriver, 84 Pac. 119, 72 Kan. 550, 4 L. R. A., N. S., 1056.

50. Lewis *v.* Salena, etc., R. Co., 40 Ill. 281.

51. Chaffe *v.* Mississippi, etc., R. Co., 59 Miss. 182. See Pool *v.* Columbia, etc., R. Co., 23 S. C. 286.

52. Hartwell *v.* Louisville, etc., R. Co., 15 Ky. L. Rep. 778.

53. Payment of reasonable charges.—Carr *v.* Pennsylvania R. Co., 92 N. Y. S. 799.

the bill of lading or furnish other evidence of ownership to entitle him to this right.[54]

Buyer Directed to Be Notified.—Where goods are shipped under a bill of lading calling for delivery to the shipper, with directions to notify the buyer, the latter has no authority to change the destination without producing the bill of lading.[55]

Agent.—Where a purchasing agent consigns goods to his principal, he can not afterwards, while they are in transit, change their destination, nor confer a right to make such change on another.[56]

§ 807. Seizure under Legal Process.—The duties and liabilities of the carrier where goods are seized under legal process, what goods are subject to legal process, the rights of persons whose goods are wrongfully seized, and the rights of the officer making the levy, will be found in another part of this work.[57]

§§ 808-811. Actions by and against Carriers—§ 808. Right of Carrier to Maintain Action.—A carrier has a right of action in its own name,[58] and which it may assign,[59] for damage done to property intrusted to it to be carried; and it may sue in admiralty as well as at common law.[60] A carrier may sue to recover property wrongfully taken or withheld from it,[61] and may

54. True owner.—Ryan *v.* Great Northern R. Co., 95 N. W. 758, 90 Minn. 12. See Ft. Worth, etc., R. Co. *v.* Caruthers (Tex. Civ. App.), 157 S. W. 238.

55. Buyer directed to be notified.—Perkett *v.* Manistee, etc., R. Co. (Mich.), 141 N. W. 607.

56. Agent.—Lake Shore, etc., R. Co. *v.* National Live Stock Bank, 53 N. E. 326, 178 Ill. 506.

57. Seizure under legal process.—See post, "Goods Seized under Legal Process," §§ 870-874.

58. Right of carrier to maintain action.—*United States.*—The Beaconsfield, 158 U. S. 303, 15 S. Ct. 860, 39 L. Ed. 993; The Commander-in-Chief (U. S.), 1 Wall. 43, 17 L. Ed. 609; Hovey *v.* The Sarah E. Brown, Fed. Cas. No. 6,744.

Alabama.—The Farmer, 26 Ala. 189, 72 Am. Dec. 718.

Missouri.—Chicago, etc., R. Co. *v.* Kansas City, etc., R. Co., 78 Mo. App. 245.

New York.—Merrick *v.* Brainard (N. Y.), 38 Barb. 574.

Though the owner may have a right of action, a carrier may also recover the full value from one who destroys the property. Pittsburg, etc., R. Co. *v.* Chicago, 242 Ill. 178, 89 N. E. 1022, affirming 144 Ill. App. 293.

59. Right of action assignable.—Merrick *v.* Brainard (N. Y.), 38 Barb. 574.

60. The Beaconsfield, 158 U. S. 303, 15 S. Ct. 860, 39 L. Ed. 993; The Propeller Commerce (U. S.), 1 Black 574, 17 L. Ed. 107; Hovey *v.* The Sarah E. Brown, Fed. Cas. No. 6744.

61. Property wrongfully taken or withheld.—United States *v.* Vermilye, Fed. Cas. No. 16,618, 10 Blatchf. 280, affirmed in 88 U. S. 138, 22 L. Ed. 609.

Proof of delivery of goods to carrier and its agreement to pay therefor, in consequence of nondelivery, is evidence of sufficient property in the carrier to support trover for the goods. Maine Stage Co. *v.* Longley, 14 Me. 444.

Delivery to wrong person.—A carrier, who by mistake delivers a consignment of goods to the wrong person, may, after demand for their return, or payment of their value, and a refusal, bring tort for the conversion of the goods. Hudson River R. Co. *v.* Lounsberry (N. Y.), 25 Barb. 597; Johnson *v.* Gulf, etc., R. Co., 82 Miss. 452, 34 So. 357; Cheshire Railroad *v.* Foster, 51 N. H. 490.

Illustrations.—Treasury notes of the United States stolen from an express company and sold for value after due in the regular course of business may be recovered by the express company which has succeeded to the rights of the original owner. Vermilye *v.* Adams Exp. Co. (U. S.), 21 Wall. 138, 22 L. Ed. 609.

Defendant ordered a car of corn through a broker, who ordered it from H., who shipped the corn consigning it to himself. When the car had been placed on the switch at its destination, the broker opened the car and delivered the corn to defendant, who paid the broker for it. Thereafter the railroad paid H. for the corn, the broker refusing to do so, and the railroad then sued defendant for conversion. Held, that plaintiff was entitled to maintain the action. Fordyce *v.* Dempsey, 82 S. W. 493, 72 Ark. 471.

Refusal of connecting carrier to sign bill of lading.—Where cotton was delivered to a railroad company under a bill of lading stating that it was to be delivered "to the ship T.," and it was placed on board immediately on its arrival, according to the usage of the port, the railroad company, by virtue of its right to possession as bailee, could maintain a libel against the vessel to recover the goods,

maintain an action against another carrier to whom it has entrusted goods in its charge for failure to deliver them according to contract.[62] But where the carrier has devested itself of further responsibility or interest in the goods by delivering them to a warehouseman it can not maintain an action against him for converting them.[63] A carrier, who has delivered goods to the consignee, without requiring the performance of a proper condition precedent to delivery, can not recover possession of the goods without paying to the consignee the amount of the freight paid by him.[64]

Where Goods Attached.—A carrier can not replevy goods taken by a constable on a writ of attachment, regular on its face, against the consignee, where the constable pays the carrier's charges.[65]

Bona Fide Purchaser.—A carrier who has negligently delivered goods to a vendee of the shipper, without collecting the purchase money or requiring the production of the bill of lading, can not recover them of a bona fide purchaser from such vendee.[66] But it has been held that where a carrier delivered a shipment on a forged order, which was sold to one ignorant of the fraud, the rule of caveat emptor applied, and the carrier could recover from such purchaser.[67]

§§ 809-811. Right to Maintain Action against Carrier—§ 809. In General.—To sustain an action against a carrier for loss or damage to goods, plaintiff must be the owner, or have some special interest in them;[68] and the

upon the master's refusal to sign the bill of lading except with certain additional qualifications. Chamberlain *v.* Torgorm, 48 Fed. 584.

62. Deford *v.* Seinour, 1 Ind. 532.

63. **Effect of delivery to warehouseman.**—Hamilton *v.* Nickerson (Mass.), 11 Allen 308, wherein, it appeared that a common carrier by water carried goods to their destination, and, being unable to find the consignee, delivered them to a warehouseman, receiving from him the whole amount of his charges, and left him in possession of them for four years, without further act of the carrier's part, or any evidence of a special contract other than that which would be naturally inferred from these facts. It was held that it was sufficient evidence that the carrier has devested itself of further responsibility for or interest in the goods.

64. Walker *v.* Louisville, etc., R. Co., 111 Ala. 233, 20 So. 358.

65. **Where goods attached.**—Livingston *v.* Miller, 48 Hun 232, 16 N. Y. St. Rep. 71.

66. **Bona fide purchaser.**—Norfolk Southern R. Co. *v.* Barnes, 104 N. C. 25, 10 S. E. 83, 5 L. R. A. 611.

67. Gulf, etc., R. Co. *v.* Taylor, 18 Tex. Civ. App. 571, 45 S. W. 749.

68. **Right to maintain action against carrier.**—*Georgia.*—Southern R. Co. *v.* Johnson, 2 Ga. App. 36, 58 S. E. 333.

Illinois.—Edgerton *v.* Chicago, etc., R. Co., 240 Ill. 311, 88 N. E. 808; Lake Shore, etc., R. Co. *v.* National Live Stock Bank, 178 Ill. 506, 53 N. E. 326.

Massachusetts.—Garvan *v.* New York, etc., R. Co., 210 Mass. 275, 96 N. E. 717; Sanford *v.* Housatonic R. Co. (Mass.), 11 Cush. 155.

Minnesota.—Grinnell-Collins Co. *v.* Illinois Cent. R. Co., 109 Minn. 513, 124 N. W. 377, 26 L. R. A., N. S., 437.

New York.—Thompson *v.* Fargo, 49 N. Y. 188, 44 How. Prac. 176, 10 Am. Rep. 342, reversing 58 Barb. 575; Green *v.* Clark (N. Y.), 5 Denio 497.

Texas.—Gulf, etc., R. Co. *v.* Wolston (Tex. Civ. App.), 23 S. W. 233.

Wisconsin.—Congar *v.* Galena, etc., R. Co., 17 Wis. 477.

Instances of right to sue.—One who has bought property agreeing to pay therefor when sales are made by the consignees, to whom he has it shipped, who are to pay the freight at the point of destination, remitting to him the proceeds less the freight, is the general owner, and entitled to sue the carrier for failure to deliver. Louisville, etc., R. Co. *v.* Allgood, 20 So. 986, 113 Ala. 163.

A complaint alleging that defendant carrier, received certain property of plaintiff, to be delivered to a consignee named, but that, on the latter's refusal to receive the goods, defendant sold them, without first notifying the owner, plaintiff therein, is sufficent on demurrer to show general ownership in plaintiff, so as to entitle him to sue. Martin *v.* McLaughlin, 5 Colo. 387.

The delivery of shipping receipts to the purchaser of goods, with drafts attached, drawn by the sellers, is a delivery of the goods to the purchaser, so as to entitle him to sue the carrier for failure to deliver. Illinois Cent. R. Co. *v.* Miller, 32 Ill. App. 259.

Where goods were delivered to plaintiff by a manufacturer with the right to return them if a proposed customer did not buy, and on the goods being lost while in the hands of the carrier, the manufacturer

ownership must exist at the time of the injury.[69] One having a beneficial interest may maintain the action.[70] The owner of goods, though he be not the shipper, may recover from a carrier for injury negligently done to them,[71] or for their non-delivery.[72] But where an owner ships goods under a bill of lading accepted by him, designating consignees as shippers and owners, he can not predicate a right of action thereon for the railroad's alleged wrongful delivery.[73]

An action on the express contract in a bill of lading should, as a general rule, be instituted by the shipper, with whom the master contracted, or by the owner of the goods, where the shipper acted as his agent.[74]

Where there is common ownership in the goods shipped, each owner may maintain a separate action for the damages sustained by him.[75] And one partner may maintain suit against a carrier for damages for injury caused partnership property.[76]

Undisclosed Principal.—It is held that though an agent contracts in his own name, without disclosing that of his principal, for the transportation of goods, the owner may maintain an action against the carrier for failure to comply with his contract.[77] But it is also held that a carrier dealing with one as

billed the goods to plaintiff, treating the transaction as a sale, such act transferred the title to plaintiff so as to entitle him to recover against the carrier. Easter *v.* New York, etc., Exp. Co., 132 N. Y. S. 402, 74 Misc. Rep. 399.

69. Law *v.* Hatcher (Ind.), 4 Blackf. 364. But see Gulf, etc., R. Co. *v.* Humphries, 4 Tex. Civ. App. 333, 23 S. W. 556.

Defendant contracted to carry certain merchandise for A., to whom the bill of lading was made; but before the goods arrived they were, by a verbal contract, sold by A. to plaintiffs, but the bill of lading was not indorsed. When the goods arrived, A. directed that they be delivered to plaintiffs, who found the goods damaged. Held, that since the sale was not complete until the goods were delivered, and until after the damage occurred, A., and not plaintiffs, should bring the action against the carrier for the damage. Law *v.* Hatcher (Ind.), 4 Blackf. 364.

70. Beneficial interest.—Lloyd *v.* Haugh, etc., Transfer Co., 223 Pa. 148, 72 Atl. 516, 21 L. R. A., N. S., 188; Southern Exp. Co. *v.* Caperton, 44 Ala. 101, 4 Am. Rep. 118.

71. Where owner not shipper.—Harvey *v.* Terre Haute, etc., R. Co., 6 Mo. App. 585. See Boughman *v.* Louisville, etc., R. Co., 14 Ky. L. Rep. 268; Schlosser *v.* Great Northern R. Co., 20 N. Dak. 406, 127 N. W. 502.

The owner of goods may sue the carrier in his own name to recover for an injury thereto by a carrier, although they were billed in the name of the owner's agent, where the contract of shipment was made for the benefit of the owner and that fact was known to the carrier. Norfolk, etc., R. Co. *v.* Crull, 112 Va. 151, 70 S. E. 521.

72. D'Anjou *v.* Deagle (Md.), 3 Har. & J. 206.

73. St. Louis, etc., Railway *v.* Gilbreath (Tex. Civ. App.), 144 S. W. 1051.

74. Action on express contract.—Dows *v.* Cobb (N. Y.), 12 Barb. 310.

75. Common ownership.—Baughman *v.* Louisville, etc., R. Co., 14 Ky. L. Rep. 268; Newport News, etc., R. Co. *v.* Nixon, 16 Ky. L. Rep. 319, holding that plaintiff can recover no more than he is entitled to whether the ownership be put in issue or not.

Undisclosed joint owner.—The joint owners of personal property intrusted to a common carrier may maintain an action against him for its loss, notwithstanding the receipt given for the property by the carrier, at the time he received it, was an acknowledgment that he had received it from two of the plaintiffs, the joint ownership of the other plaintiff being unknown to him. Day, etc., Co. *v.* Ridley, 16 Vt. 48, 42 Am. Dec. 489.

76. Partner.—Missouri Pac. R. Co. *v.* Smith, 84 Tex. 348, 19 S. W. 509; Southern Kansas R. Co. *v.* Morris, 100 Tex. 611, 612, 102 S. W. 396, affirming 99 S. W. 433.

77. Undisclosed principal.—Ames *v.* First Div., etc., R. Co., 12 Minn. 412 (Gil. 295); Atlanta, etc., R. Co. *v.* Texas Grate Co., 81 Ga. 602, 9 S. E. 600; New Jersey Steam Nav. Co. *v.* Merchants' Bank (U. S.), 6 How. 344, 12 L. Ed. 465.

Instances.—Where an express company contracts with a transportation company to carry its freight, one who ships goods with the express company can maintain an action in his own name against the transportation company for the loss of property while it is being carried by such company. New Jersey Steam Nav. Co. *v.* Merchants' Bank (U. S.), 6 How. 344, 12 L. Ed. 465.

A third person rolled up the plaintiff's coat in a bundle with his own coat, and placed his own name and address upon the bundle, and delivered it to the carrier, for transportation. It was held that

shipper, and making its contract with him, assumes no responsibility to answer to the real, but undisclosed, owner in case of loss of the property delivered to it,[78] and may refuse to deliver the goods to him without the production of the bill of lading.[79]

Shipper Both Consignor and Consignee.—Shippers who are in control of merchandise shipped, and are both consignors and consignees, should be assumed, in the absence of evidence to the contrary, to have sufficient title to enable them to maintain an action against the carrier.[80] And though the shipper does not own all the goods he may sue for loss or injury thereto.[81] Where goods are consigned to the seller, with directions to notify the purchaser, the purchaser can not sue the carrier for damage sustained because of delay,[82] or for loss occurring before he received the bill of lading.[83] But it is also held that where one ships goods to himself as consignee, the purchaser not to obtain the bill of lading until payment of the draft attached, delivery to the carrier vests title in the purchaser entitling him to sue the carrier for delay in transportation.[84]

A bailee, who is the consignor of goods, has sufficient interest to maintain an action against the carrier for loss or damage to goods,[85] or for delivery without requiring the performance of a proper condition precedent to delivery.[86]

A factor has such special property in goods that he may sue the carrier for their loss.[87]

Transferee of Bill of Lading.—As a general rule, the indorsee or transferee of a bill of lading, as the real party in interest, may bring an action in his own name against the carrier.[88] But in some jurisdictions it is held that an assign-

the plaintiff might maintain an action against the carrier to recover damages for the loss of his coat. Elkins *v.* Boston, etc., Railroad, 19 N. H. 337, 51 Am. Dec. 184.

78. Hill *v.* Adams Exp. Co., 78 N. J. L. 333, 74 Atl. 674.

79. The owner of certain goods delivered them, through his agents, to a common carrier for transportation, and the agents took a bill of lading therefor in their own names. When the goods arrived at destination, the agents through whom the shipment had been made refused to deliver the bill of lading to the owner of the goods; but he demanded, nevertheless, that the carrier make delivery to him. The carrier refused to deliver to him, unless he would produce the bill of lading. Held, that the carrier's refusal to deliver, under the circumstances stated, did not constitute a conversion, and that the owner of the goods could not maintain bail trover against the carrier for them. Kaufman *v.* Seaboard, etc., Railway, 10 Ga. App. 248, 73 S. E. 592.

80. Shipper both consignor and consignee.—Swift *v.* Pacific Mail Steamship Co., 106 N. Y. 206, 12 N. E. 583. See Houston, etc., R. Co. *v.* Robinson (Tex. Civ. App.), 131 S. W. 444, reversed in 146 S. W. 537.

81. Shipper part owner.—Walter *v.* Alabama, etc., R. Co., 142 Ala. 474, 39 So. 87; Denver, etc., R. Co. *v.* Frame, 6 Colo. 382.

82. Asheboro Wheelbarrow, etc., Co. *v.* Southern R. Co., 149 N. C. 261, 62 S. E. 1091.

83. St. Louis, etc., R. Co. *v.* Allen, 31 Okla. 248, 120 Pac. 1090, 39 L. R. A., N. S., 309.

84. Robinson *v.* Houston, etc., R. Co. (Tex.), 146 S. W. 537, reversing 131 S. W. 444.

85. Bailee.—*Georgia.*—Southern R. Co. *v.* Johnson, 2 Ga. App. 36, 58 S. E. 333.

Illinois.—Great Western R. Co. *v.* McComas, 33 Ill. 185.

Massachusetts.—Garvan *v.* New York, etc., R. Co., 210 Mass. 275, 96 N. E. 717.

Maine.—Moran *v.* Portland Steam Packet Co., 35 Me. 55.

86. Murray *v.* Warner, 55 N. H. 546, 20 Am. Rep. 227.

87. Factor.—Edgerton *v.* Chicago, etc., R. Co., 240 Ill. 311, 88 N. E. 808; H. & T. C. R. Co. *v.* Stewart & Co., 1 Texas App. Civ. Cas., § 1246.

On to whom goods were shipped for sale on commission who sold the goods and consigned them to a buyer had such an interest therein as authorized him to sue the carrier for loss of a part of the goods removed from the car before the sale. Edgerton *v.* Chicago, etc., R. Co., 240 Ill. 311, 88 N. E. 808, affirming 146 Ill. App. 199.

88. Transferee of bill of lading.—*United States.*—The Thames Fed. Cas. No. 13,859, 7 Blatchf. 226, affirmed in (U. S.), 14 Wall. 98, 20 L. Ed. 804; Robinson, etc., Co. *v.* Memphis, etc., R. Co., 9 Fed. 129

California.—Dodge *v.* Meyer, 61 Cal. 405.

Massachusetts.—Newcomb *v.* Boston, etc., R. Corp., 115 Mass. 230.

Missouri.—Gratiot St. Warehouse Co. *v.* Missouri, etc., R. Co., 124 Mo. App. 545,

ment of a bill of lading transfers no more than the property in the goods which it represents, and does not transfer the contract between the original parties to it; and therefore its assignee can not maintain an action founded upon it in his own name.[89]

Shipper Surrendering Bill of Lading in Exchange for Transportation. —Under the Carmack Amendment to the Interstate Commerce Act which provides that any common carrier, receiving property for transportation from a point in one state to a point in another state, shall issue a receipt or bill of lading and shall be liable to the "lawful holder" thereof for any loss or injury to such property caused by it or by any carrier to which such property may be delivered or over whose line such property may pass, the term "lawful holder" comprehends the owner of the property transported or the one beneficially entitled to recover for the loss or injury, and manual possession of the bill of lading is not a prerequisite to the right to sue, so that a shipper accompanying the shipment is not deprived of his right to sue because he surrenders his bills of lading at the destination in exchange for free transportation on the return.[90]

Forwarding Merchant.—A forwarding merchant, who delivers goods to a carrier, under a contract with their owner to forward them, has not such an interest in them that he can maintain trover against the carrier for their non-delivery.[91] But it has been held that forwarding merchants who have paid the freight on goods which they delivered to the carrier for transportation could maintain assumpsit on the contract for damage to the goods, and recover the entire amount of the loss for the benefit of themselves and the owners of the goods, especially where the latter were parties to the record and precluded from further claim.[92]

An insurer who pays a loss caused by a carrier's negligence is subrogated to the assured's rights against such carrier; and suit can be maintained in the name of the assured for the use of the insurer to recover of the carrier the amount paid upon such loss.[93]

Assignee of Claim.—An assignee of a claim for damages for delay in delivery is vested with the right of the shipper,[94] and may recover in his own name from the carrier for injuries in transit.[95] It is held that if plaintiff in an action against a carrier for the conversion of goods was owner of the claim at the time of the suit, it is immaterial that he was not the owner of the goods at conversion.[96]

Borrower.—One who has no property, general or special, in an article shipped, but is a mere borrower from the owner and consignee, can not sue a carrier for its loss, but the action should be brought in the name of the owner.[97]

102 S. W. 11; Kirkpatrick *v.* Kansas City, etc., R. Co., 86 Mo. 341.

New York.—Merchants' Bank *v.* Union R., etc., Co., 69 N. Y. 373.

South Carolina.—Moore *v.* Atlantic, etc., Railroad, 85 S. C. 19, 67 S. E. 11.

89. Haas *v.* Kansas City, etc., R. Co., 81 Ga. 792, 795, 7 S. E. 629; Knight *v.* St. Louis, etc., R. Co., 141 Ill. 110, 30 N. E. 543, affirming 40 Ill. App. 471; Adams *v.* The Pilgrim, 1 O. Dec. 477, 10 West. L. J. 141.

90. **Shipper surrendering bill of lading in exchange for transportation.**—Act June 29, 1906, c. 3591, § 7, pars. 11, 12, 34 Stat. 595 [U. S. Comp. St. Supp. 1911, p. 1307]; Pecos, etc., R. Co. *v.* Meyer (Tex. Civ. App.), 155 S. W. 309.

91. **Forwarding merchant.**—Green *v.* Clark, 12 N. Y. 343.

92. Steamboat Co. *v.* Atkins & Co., 22 Pa. 522.

93. **Insurer.**—Louisville, etc., R. Co. *v.* Manchester Mills, 88 Tenn. 653, 14 S. W. 314.

94. **Assignee of claim for damages.**—Texas Cent. R. Co. *v.* Hannay-Frerichs & Co., 104 Tex. 603, 142 S. W. 1163, modifying judgment (Tex. Civ. App.), 130 S. W. 250.

95. Texas, etc., R. Co. *v.* Davis, 93 Tex. 378, 54 S. W. 381, 55 S. W. 562, reversing 54 S. W. 381. See Gulf, etc., R. Co. *v.* Wolston (Tex. Civ. App.), 23 S. W. 233; East Line, etc., R. Co. *v.* Hall, 64 Tex. 615; Texas, etc., R. Co. *v.* Klepper (Tex. Civ. App.), 24 S. W. 567.

96. Gulf, etc., R. Co. *v.* Humphries, 4 Tex. Civ. App. 333, 23 S. W. 556.

97. **Borrower.**—Lockhart *v.* Western, etc., R. Co., 73 Ga. 472, 54 Am. Rep. 883.

Person Directed to Be Notified.—A mere direction in a bill of lading to notify a person of the arrival of goods does not entitle him to recover for their loss.[98]

Person Paying Freight and Responsible for Goods.—One required by a carrier to pay freight on goods, and who was responsible for the goods, is properly considered as consignee for value or as one who had incurred liability as consignee, authorizing him to sue for any shortage.[99]

§ 810. Right of Consignor.—A consignor's right to sue a carrier for loss of goods depends on whether the title remains in him after delivery for transportation.[1] If the title has passed to the consignee, he can not maintain the action.[2] Where he has no interest in the goods, he can not sue in an action ex delicto for breach of duty by the carrier;[3] and although he is named in the contract of shipment as the person from whom they were received, he is not entitled to maintain such action for their loss.[4] And where a shipper of goods consigned to himself sold the goods in transit, he can not, because of the carrier's failure to deliver, maintain an action for breach of the contract of carriage.[5] When the risk of transportation is upon the consignor, he will be considered the owner for the purpose of suing the carrier for loss or injury.[6] When the consignee is not mentioned, and the goods are shipped to a given point, the consignor may sue for their loss.[7] The right of stoppage in transitu in case of the insolvency of the vendee is not a sufficient interest in the goods to enable the consignor to maintain a suit in tort for loss or damage to the goods.[8]

Where Consignor Owner.—The consignor may maintain an action against the carrier, when he, and not the consignee, is the owner of the goods.[9] So

98. **Person directed to be notified.**—Dalbey & Co. *v.* Mexican Cent. R. Co. (Tex. Civ. App.), 105 S. W. 1154. See Asheboro Wheelbarrow, etc., Co. *v.* Southern R. Co., 149 N. C. 261, 62 S. E. 1091; St. Louis, etc., R. Co. *v.* Allen, 31 Okla. 248, 120 Pac. 1090, 39 L. R. A., N. S., 309.

99. **Person paying freight**—Thomas *v.* Atlantic, etc., R. Co., 85 S. C. 537, 64 S. E. 220, 67 S. E. 908, 21 Am. & Eng. Ann. Cas. 223, 34 L. R. A., N. S., 1177.

1. **Right of consignor.**—Fein *v.* Weir, 114 N. Y. S. 426, 129 App. Div. 299, judgment affirmed 92 N. E. 1084.

The shipper's present ownership of his claim against a carrier for loss of freight is an essential element of the cause of action. Northern Alabama R. Co. *v.* Feldman, 56 So. 16, 1 Ala. App. 334.

2. Krulder *v.* Ellison, 47 N. Y. 36, 7 Am. Rep. 402; Blum *v.* The Caddo, Fed. Cas. No. 1,573, 1 Woods 64.

Where the seller delivers an article to the carrier for transportation by the usual route on an open bill of lading, title passes to the vendee or assignee, so that the seller could not sue for their injury en route unless he specifically retained title by requiring the goods to be delivered to his order, etc. Gaskins *v.* Southern R. Co., 151 N. C. 18, 65 S. E. 518.

3. Central American Steamship Co. *v.* Mobile, etc., R. Co. (Mo. App.), 128 S. W. 822; Bennett *v.* Chicago, etc., R. Co. (Mo. App.), 131 S. W. 770; Carter *v.* Graves, 17 Tenn. (9 Yerg.), 446.

4. Green *v.* Clark (N. Y.), 5 Denio 497.

5. **Sale of goods in transit.**—Sweeney *v.* Frank Waterhouse & Co., 81 Pac. 1005, 39 Wash. 507.

6. **Consignor having risk of transportation.**—Madison, etc., R. Co. *v.* Whitesel, 11 Ind. 55; Houston, etc., R. Co. *v.* Robinson (Tex. Civ. App.), 131 S. W. 444. See Matheson *v.* Southern Railway, 79 S. C. 155, 60 S. E. 437.

7. **Where consignee not mentioned.**—East Line, etc., R. Co. *v.* Hall, 64 Tex. 615.

8. **Right of stoppage in transitu.**—Northern Pac. R. Co. *v.* Lewis, 89 Ill. App. 30.

9. **Where consignor owner.**—*Alabama.*—Southern R. Co. *v.* Proctor, 3 Ala. App. 413, 57 So. 513.

Maryland.—Moore *v.* Sheridine, 2 Har. & McH. 453.

Massachusetts.—Sanford *v.* Housatonic R. Co., 11 Cush. 155.

Minnesota.—Jarrett *v.* Great Northern R. Co., 74 Minn. 477, 77 N. W. 304.

Missouri.—Landes *v.* Pacific R. Co., 50 Mo. 346.

New York.—Price *v.* Powell, 3 N. Y. 322; Levy *v.* Weir, 77 N. Y. S. 917, 38 Misc. Rep. 361.

Tennessee.—W. & A. R. Co. *v.* Kelly, 38 Tenn. (1 Head) 158; Turney *v.* Wilson, 15 Tenn. (7 Yerg.) 340, 27 Am. Dec. 515; East Tennessee, etc., R. Co. *v.* Nelson, 41 Tenn. (1 Coldw.) 272.

Vermont.—Blumenthal *v.* Brainard, 38 Vt. 402, 91 Am. Dec. 350.

Instances.—M. & Son contracted to purchase a vehicle from plaintiffs for $300, payable $35 cash with the order,

an action for failure to deliver promptly apples consigned for sale on commission is properly brought in the name of the consignor, the consignment not operating to devest his title.[10] Where the consignee is a mere agent of the consignor, a right of action against the carrier is in the consignor alone.[11] Where a purchaser reships property to the vendor, and afterwards, it being lost, pays him therefor, the right of action against the carrier for its loss is in such purchaser.[12] A shipper of goods under a "notify" bill of lading with a draft attached, who receives them back from his bank, which had discounted the draft, on payment being refused, reacquires title to the property so as to confer capacity to maintain trover for conversion against the carrier.[13]

Where Consignor Agent.—It has been held that where an agent consigns a package of money to his principal he could sue the carrier for its loss.[14] But where the agent, pursuant to instructions of his principal, consigns moneys of the principal to him, he can not maintain an action against the carrier therefor.[15] Where the consignee employed the consignor to purchase goods for him,

$30 cash on arrival, and the balance in monthly notes, with interest, secured by a deed of trust thereon for the unpaid portion of the price. After payment of the first cash installment plaintiffs shipped to their own order the vehicle and a harness purchased as part of the same contract, and sent the bill of lading to a banker, with instructions to deliver the same to the buyer on his making the other cash payment and executing the notes and mortgage. The vehicle was injured in a wreck, whereupon plaintiff and the buyer rescinded the contract; plaintiff returning the cash paid. After this the carrier repaired the vehicle and shipped it to the buyer, who tendered compliance with the original contract, which plaintiffs refused. Held, that plaintiffs were the owners of the property at the time it was injured, and were therefore entitled to recover against the carrier as for a conversion. Norris *v.* St. Joseph, etc., R. Co., 101 S. W. 159, 124 Mo. App. 16.

Where the consignor and consignee enter into a contract, by which the consignee agrees to give the consignor a specified price for all the wheat that the consignor would deliver to the consignee at a certain point by a specified time, and the wheat is purchased by the consignor to fill said contract, the wheat belongs to the consignor until it reaches its destination, and an action to recover for loss or injury would be properly brought in his name. East Tennessee, etc., R. Co. *v.* Nelson, 41 Tenn. (1 Coldw.) 272.

Owner of part of goods.—An owner of crates of pears intrusted as a commissionman with other crates to ship and sell, such crates together making up a car, may sue a carrier for any damage thereto. Atlantic, etc., R. Co. *v.* Partridge, 50 So. 634, 58 Fla. 153.

Under the Kansas statute giving the consignee of grain the right to recover from a railway company for loss thereof, the owner and consignor of grain can not recover from a railway for loss or shortage. Weber *v.* Chicago, etc., R. Co., 77 Pac. 533, 69 Kan. 611.

Pleadings must show that consignor is owner.—Pennsylvania Co. *v.* Poor, 103 Ind. 553, 3 N. E. 253; Adams Exp. Co. *v.* Bleich, 5 Ky. L. Rep. 122; Hoeing *v.* Adams Exp. Co., 7 Ky. L. Rep. 664; Union Pac. R. Co. *v.* Metcalf, 50 Neb. 452, 69 N. W. 961.

10. **Consignment on commission.**—Southern R. Co. *v.* Deakins, 107 Tenn. 522, 64 S. W. 477.

11. **Consignee mere agent.**—Zimmern's Coal Co. *v.* Louisville, etc., R. Co., 6 Ala. App. 475, 60 So. 598.

A contract of sale calling for delivery to a carrer for delivery to the buyer does not give the buyer such interest in a shipment consigned by the seller to its agent as will authorize an action under Ala. Code 1907, § 2490, by the agent for the buyer's use against the carrier for loss of a part of the shipment. Zimmern's Coal Co. *v.* Louisville, etc., R. Co., 60 So. 598, 6 Ala. App. 475.

12. Ralph *v.* Chicago, etc., R. Co., 32 Wis. 177, 14 Am. Rep. 725.

13. Perkett *v.* Manistee, etc., R. Co. (Mich.), 141 N. W. 607.

14. **Where consignor agent.**—Southern Exp. Co. *v.* Caperton, 44 Ala. 101, 4 Am. Rep. 118.

15. Thompson *v.* Fargo, 63 N. Y. 479, affirming 2 Hun 379, 4 Thomp. & C. 665.

That the moneys were fruits of a fraud perpetrated by the principal through the instrumentality of the agent, although the latter was innocent of the fraud, gives him no title to the moneys which will authorize him to maintain the action. Thompson *v.* Fargo, 63 N. Y. 479, affirming 2 Hun 379, 4 Thomp. & C. 665.

Where consignee not found.—Where plaintiff collected certain money for a third person and delivered it to an express company, to be delivered to such third person, as directed by him, but after a diligent search such person could not be found, and the package was retained by defendant carrier, plaintiff had no

the consignor can not maintain an action against the carrier for loss or damage thereto.[16] And if the consignee takes the risk and expense of transportation of goods consigned to him by his agent, the agent can not maintain an action against the carrier for nondelivery of the goods.[17]

Where Consignor Makes Contract of Shipment.—Whether he is the owner or not, the consignor may sue the carrier for loss or injury to goods where he makes the contract of shipment.[18] If he has in fact no interest, his

such title to the property that an action could be maintained by him to recover it. Thompson *v.* Fargo, 49 N. Y. 188, 44 How. Prac. 176, 10 Am. Rep. 342, reversing 58 Barb. 575.

16. East Tennessee, etc., R. Co. *v.* Nelson, 41 Tenn. (1 Coldw.) 272.

17. Potter *v.* Lansing (N. Y.), 1 Johns. 215, 3 Am. Dec. 310.

18. **Where consignor makes contract of shipment.**—*Georgia.*— Southern R. Co. *v.* Maddox, 7 Ga. App. 650, 67 S. E. 838; Carter *v.* Southern R. Co., 111 Ga. 38, 36 S. E. 308, 50 L. R. A. 354; Southern R. Co. *v.* Johnson, 2 Ga. App. 36, 58 S. E. 333.

Illinois.—Illinois Cent. R. Co. *v.* Schwartz, 13 Ill. App. 490; Ohio, etc., R. Co. *v.* Emrich, 24 Ill. App. 245; Northern Line Packet Co. *v.* Shearer, 61 Ill. 263.

Massachusetts. — Blanchard *v.* Page (Mass.), 8 Gray 281; Finn *v.* Western R. Corp., 112 Mass. 524, 17 Am. Rep. 128.

Mississippi.—Southern Exp. Co. *v.* Craft, 49 Miss. 480, 19 Am. Rep. 4.

Missouri.—Atchison *v.* Chicago, etc., R. Co., 80 Mo. 213; Ross *v.* Chicago, etc., R. Co., 119 Mo. App. 290, 95 S. W. 977; Gratiot St. Warehouse Co. *v.* Missouri, etc., R. Co., 124 Mo. App. 545, 102 S. W. 11, cited in Bromschwig Tailors' Trimming Co. *v.* Missouri, etc., R. Co. (Mo. App.), 147 S. W. 175; Bennett *v.* Chicago, etc., R. Co. (Mo. App.), 131 S. W. 770.

New York.—Dows *v.* Cobb, 12 Barb. 310.

Tennessee.—Carter *v.* Graves, 17 Tenn. (9 Yerg.) 446.

Texas.—Heffron *v.* Pollard, 73 Tex. 96, 11 S. W. 165, 15 Am. St. Rep. 764; Missouri Pac. R. Co. *v.* Smith, 84 Tex. 348, 19 S. W. 509; Gulf, etc., R. Co. *v.* Stanley, 89 Tex. 42, 33 S. W. 109, affirming 29 S. W. 806; Southern Kansas R. Co. *v.* Morris, 100 Tex. 611, 102 S. W. 396; Texas, etc., R. Co. *v.* Klepper (Tex. Civ. App.), 24 S. W. 567; Central American Steamship Co. *v.* Mobile, etc., R. Co. (Mo. App.), 128 S. W. 822; Houston, etc., R. Co. *v.* Robinson (Tex. Civ. App.), 131 S. W. 444; Gulf, etc., R. Co. *v.* Patterson & Co. (Tex. Civ. App.), 144 S. W. 698; H. & T. C. R. Co. *v.* Stewart & Co., 1 Texas App. Civ. Cas., § 1246.

Wisconsin.—Hooper *v.* Chicago, etc., R. Co., 27 Wis. 81, 9 Am. Rep. 439.

When consignor part owner.—Cantwell *v.* Pacific Exp. Co., 58 Ark. 487, 25 S. W. 503; Galveston, etc., R. Co. *v.* Barnett (Tex. Civ. App.), 26 S. W. 782; Southern Kansas R. Co. *v.* Morris, 100 Tex. 611, 102 S. W. 396, affirming 99 S. W. 433. See Denver, etc., R. Co. *v.* Frame, 6 Colo. 382.

One who is agent of the real owner of goods and having charge of them enters into a contract with a carrier for the shipment of the goods without disclosing his agency may sue for a breach of the contract. Carter *v.* Southern R. Co., 111 Ga. 38, 36 S. E. 308, 50 L. R. A. 354, distinguishing Lockhart *v.* Western, etc., R. Co., 73 Ga. 472, 54 Am. Rep. 883.

Consignor shipping at consignee's risk.—A consignor, who has made contracts of shipment, has a right of action against the carrier for the loss of the goods, notwithstanding the fact that by reason of delivery of bills of lading and sending invoices stating that shipments were made at consignees' risk, the title to the property passes to the consignees. American Roofing Co. *v.* Memphis, etc., Packet Co., 5 N. P. 146, 8 O. Dec. 490.

Forwarding merchants paid freight from New York to Philadelphia on goods which were in transit from New York to Cincinnati, and they delivered the goods to the defendants, to be conveyed to Baltimore and there delivered to The Cumberland Railroad Company for carriage to Cumberland, and there to be delivered to the agents of the plaintiffs for carriage in the line of their destination. Held, that they could maintain assumpsit on the contract against the defendants for damages to the goods whilst under their charge, and recover the entire amount of the loss for the benefit of themselves and the owners of the goods, especially as the latter were parties to the record and precluded from further claim. Steamboat Co. *v.* Atkins & Co., 22 Pa. 522.

A statute requiring suit by the real party in interest does not preclude the consignor from suing on the contract of shipment for injuries to the goods, though the title has vested in the consignee. Hooper *v.* Chicago, etc., R. Co., 27 Wis. 81, 9 Am. Rep. 439.

Instances.—Under the rule a seller of goods consigned to the buyer and lost in transit by a carrier, who had receipted the seller for them and recited in the receipt that the goods were to be delivered without unnecessary delay to the buyer, could sue the carrier for their value, though the buyer had paid for the goods and had paid the freight. Atlantic, etc.,

recovery is for the benefit of the consignee or actual party in interest.[19] The contract need not be in writing, but may be implied from delivery and acceptance of the goods for shipment.[20]

Contract to Deliver at Certain Place.—When goods are shipped under a contract by which the consignor is to deliver them to the consignee at a certain place, the consignor may maintain suit against the carrier for their loss or injury,[21] or for delay in transportation.[22]

Refusal of Consignee to Receive Goods.—Where the consignor delivers the goods to the carrier in pursuance of a contract of sale to the consignee but the consignee refuses to receive them, the consignor may sue the carrier for a

R. Co. *v.* Meinhard, etc., Co., 66 S. E. 897, 133 Ga. 684.

Where one who had agreed to furnish third persons coal on board cars, payment on receipt at destination, contracted with the carrier to transport the coal, and the carrier converted the same to its own use, he could sue the carrier therefor, though it be conceded that he had no property in the coal. Rehearing, 97 Pac. 471, 78 Kan. 505, denied. St. Louis, etc., R. Co. *v.* Stone, 78 Kan. 510, 104 Pac. 1067

In an action of contract for neglecting to carry and deliver goods of the plaintiff according to the terms of a bill of lading made part of the declaration, if the answer does not deny the plaintiff's ownership of the goods, but expressly admits the shipment of the goods by the plaintiff, and the defendant's promise to him to carry and deliver them, the defendant can not dispute the right of the plaintiff to maintain the action, on the ground that the bill of lading stipulates for their delivery to another person, nor on the ground that the defendant had received no notice of the right of the plaintiff to control the bill of lading. Alden *v.* Pearson (Mass.), 3 Gray 342.

19. *Georgia.*— Southern R. Co. *v.* Maddox, 67 S. E. 838, 7 Ga. App. 650.

Illinois.—Illinois Cent. R. Co. *v.* Schwartz, 13 Ill. App. 490; Ohio, etc., R. Co. *v.* Emrich, 24 Ill. App. 245.

Massachusetts.—Finn *v.* Western R. Corp., 112 Mass. 524, 17 Am. Rep. 128.

Ohio.—American Roofing Co. *v.* Memphis, etc., Packet Co., 5 N. P. 146, 8 O. Dec. 490.

Texas.—Houston, etc., R. Co. *v.* Robinson (Tex. Civ. App.), 131 S. W. 444.

20. Southern R. Co. *v.* Johnson, 2 Ga. App. 36, 58 S. E. 333.

21. **Contract to deliver at certain place.**—*Alabama.*—Gulf Compress Co. *v.* Jones Cotton Co., 172 Ala. 645, 55 So. 206; Southern R. Co. *v.* Jones Cotton Co., 167 Ala. 575, 52 So. 899.

Indiana. — Madison, etc., R. Co. *v.* Whitesel, 11 Ind. 55.

South Carolina.—Matheson *v.* Southern Railway, 79 S. C. 155, 60 S. E. 437, holding that consignor alone may sue.

Texas.—Missouri Pac. R. Co. *v.* Scott, 4 Tex. Civ. App. 76, 26 S. W. 239; Texas Steamship Co. *v.* Dupree Comm. Co. (Tex. Civ. App.), 131 S. W. 621.

Instances.—Plaintiff, cotton company, delivered cotton to a compress company and subsequently delivered the warehouse receipts of that company to a railway company and received in exchange bills of lading. The cotton company shipped the cotton over the railway line to a purchaser under a contract requiring that the cotton should be delivered in good condition to the purchaser's mills "landed," and drafts for the purchase price with bills of lading attached were drawn on the purchaser and honored before the cotton was delivered at its destination. Held, that "landed" meant that the cotton company was responsible for the entire shipment of cotton and for damages to it until delivered at the point of destination, and therefore the right of recovery for damages to the cotton resulting from exposure to the weather while in the possession of the compress company was in the cotton company, although it had not been called on to repay any of the purchase price. Southern R. Co. *v.* Jones Cotton Co., 167 Ala. 575, 52 So. 899.

Where a seller in Texas, who contracted with a buyer in New York to deliver to him there a specified quantity of goods, delivered the goods to a carrier and received a bill of lading making the shipment subject to the seller's order, and the seller indorsed the bill of lading and drew a draft on the buyer, and attached the bill of lading thereto, and sent it to New York for collection, with directions to deliver the bill of lading on payment of the draft, the title to the goods vested in the buyer when he paid the draft, and the seller, who had not guaranteed the weights of the shipment, could not, after payment of the draft, sue the carrier for a shortage thereafter occurring; but, where the title had not passed to the buyer at the time the shortage occurred, the seller could sue therefor. Texas Steamship Co. *v.* Dupree Comm. Co. (Tex. Civ. App.), 131 S. W. 621.

22. Atchison, etc., R. Co. *v.* Consolidated Cattle Co., 52 Pac. 71, 59 Kan. 111.

breach of duty.[23] But when title has passed to the consignee, the consignor can not sue.[24] Where a third person wrongfully orders goods in the name of the consignee, who refuses to receive them, they remain the property of the consignor, and he may sue for a misdelivery.[25]

Conditional Sale.—Where goods are shipped for sale subject to the approval of the consignee, the consignor has a right of action against the carrier for failure to deliver them.[26] One who receives goods, to be returned if not suitable, and returns them, can not recover from the carrier for their loss en route, since he did not own the goods.[27]

One who ships goods c. o. d. is the proper person to recover against the carrier for their loss, for the title has not passed to the buyer.[28]

§ 811. Right of Consignee.—The presumption that on delivery of goods to a carrier the title thereto passes to the consignee[29] is sufficient to sustain an action either in tort[30] or for breach of contract.[31] So the consignee is entitled

23. Refusal of consignee to receive goods.—*Georgia.*—Savannah, etc., R. Co. *v.* Commercial Guano Co., 30 S. E. 555, 103 Ga. 590.

Illinois.—Chicago, etc., R. Co. *v.* Boggs, 134 Ill. App. 348.

Missouri.—Hance *v.* Wabash, etc., R. Co., 62 Mo. App. 60; Bergner *v.* Chicago, etc., R. Co., 13 Mo. App. 499.

New York.—Withers *v.* New Jersey Steamboat Co., 48 Barb. 455, affirmed in 51 N. Y. 626.

Virginia.—Spence *v.* Norfolk, etc., R. Co., 92 Va. 102, 22 S. E. 815, 29 L. R. A. 578.

Illustrations.—Plaintiff consigned goods to fulfill a contract to sell sound goods to the consignee; through the carrier's negligence they were damaged, and the consignee refused to accept them. It was held, that the consignor was entitled to recover of the carrier. Withers *v.* New Jersey Steamboat Co. (N. Y.), 48 Barb. 455, affirmed in 51 N. Y. 626.

Plaintiffs shipped goods by a railroad, guarantying freight. The bill of lading was accompanied by a draft, to be accepted by consignees before delivery of the goods. The goods having been damaged by delay, the consignees refused to receive the same, and the railroad company notified plaintiffs, requesting them to direct the disposition of the goods, which plaintiffs refused to do, on the ground that the goods belonged to the consignees, and were shipped at their risk. Held, that plaintiffs could maintain a suit against the railroad company for damages caused by the delay. Spence *v.* Norfolk, etc., R. Co., 92 Va. 102, 22 S. E. 815, 29 L. R. A. 578.

24. McLaughlin *v.* Martin, 55 Pac. 195, 12 Colo. App. 268.

L. shipped goods to S., who refused to receive them because damaged. Pending a suit by L. against S. to recover the price of the goods, L. brought suit "for the benefit of whom it may concern" against the carrier, for damages to the goods in transit. Held, that L. showed no interest in the goods entitling him to maintain the action for damages. Leberman *v.* New Orleans, etc., Co., 28 La. Ann. 412.

25. Louisville, etc., R. Co. *v.* Fort Wayne Elect. Co., 108 Ky. 113, 21 L. Rep. 1544, 55 S. W. 918.

26. Conditional Sale.—Louisville, etc., R. Co. *v.* Kauffman & Co., 37 So. 659, 141 Ala. 671; Levy *v.* Weir, 77 N. Y. S. 917, 38 Misc. Rep. 361.

27. Gurwitz *v.* Weir, 111 N. Y. S. 557, 127 App. Div. 352. See Nathan *v.* Missouri Pac. R. Co., 135 Mo. App. 46, 115 S. W. 496.

28. Shipment c. o. d.—Adams Exp. Co. *v.* McDonough, 6 O. C. C. 539, 3 O. C. D. 574.

Where the goods are shipped, marked "C. O. D.," the contract of the common carrier is not only to safely carry and deliver the goods to the consignee, but also to "collect on delivery," and return to the consignor the charges on the goods; and the consignor may sue on such contract, where neither the goods nor the charges thereon are returned to him. United States Exp. Co. *v.* Keefer, 59 Ind. 263.

29. Consignee presumed owner.—See ante, "Title and Rights of Consignee in General," § 804.

30. Right of consignee to maintain action.—Bank *v.* American Exp. Co., 127 Iowa 1, 102 N. W. 107.

Recovery of goods.—The consignee as the presumptive owner of the goods can sustain an action and sequestration against the master of the carrier for the recovery of the goods. The Red River, 106 La. 42, 30 So. 303, 87 Am. St. Rep. 293.

Same—After sale to another.—Merchandise taken from cars of a carrier may be recovered in a tort action by the consignee, though taken after sale to another. Edgerton *v.* Chicago, etc., R. Co., 146 Ill. App. 199, judgment affirmed, 88 N. E. 808.

31. Pennsylvania Co. *v.* Poor, 103 Ind. 553, 3 N. E. 253; Bank *v.* American Exp. Co., 127 Iowa 1, 102 N. W. 107.

to bring an action against the carrier for breach of its duty,[32] as for loss or damage to the goods,[33] misdelivery,[34] delay in delivery,[35] or failure to deliver.[36] And it is held that he may maintain an action against the carrier, although another person was the owner.[37]

When the consignee is the owner of the goods, or when, by the delivery of the goods to the carrier, the property vests in the consignee, he has the legal right of action,[38] notwithstanding the freight is to be paid by the consignor.

32. White *v.* Schweitzer, 132 N. Y. S. 644, 147 App. Div. 541, reargument denied 133 N. Y. S. 1149; East Tennessee, etc., R. Co. *v.* Nelson, 41 Tenn. (1 Coldw.) 272.

33. Loss or damage to goods.—*United States.*—Hall *v.* Nashville, etc., R. Co., Fed. Cas. No. 5,940.

Alabama.—Southern Exp. Co. *v.* Armstead, 50 Ala. 350.

Indiana.—United States Exp. Co. *v.* Keefer, 59 Ind. 263.

Kentucky.—Adams Exp. Co. *v.* Tingle, 10 Ky. L. Rep. 358; Smith *v.* Lewis (Ky.), 3 B. Mon. 229.

Missouri.—Bromschwig Tailors' Trimming Co. *v.* Missouri, etc., R. Co. (Mo. App.), 147 S. W. 175.

New York.—Price *v.* Powell, 3 N. Y. 322.

Texas.—Texas, etc., R. Co. *v.* Turner, 43 Tex. Civ. App. 608, 97 S. W. 509. See Gulf, etc., R. Co. *v.* Humphries, 4 Tex. Civ. App. 333, 23 S. W. 556.

Virginia.—Vaughan Mach. Co. *v.* Stanton Tanning Co., 106 Va. 445, 56 S. E. 140.

West Virginia. — Williamsport, etc., Lumber Co. *v.* Baltimore, etc., R. Co., 71 W. Va. 741, 77 S. E. 333.

That the seller of goods has agreed to indemnify the buyer for the expenses of a suit against the carrier for their loss is not sufficient to overcome positive evidence of title in the buyer, so as to show that he was not entitled to sue. Deaver-Jeter Co. *v.* Southern Railway, 74 S. E. 1071, 91 S. C. 503.

34. Louisville, etc., R. Co. *v.* Fort Wayne Elect Co., 108 Ky. 113, 55 S. W. 918, 21 Ky. L. Rep. 1544.

35. Harper Furniture Co. *v.* Southern Exp. Co., 144 N. C. 639, 57 S. E. 458, 12 Am. & Eng. Ann. Cas. 924; Williamsport, etc., Lumber Co. *v.* Baltimore, etc., R. Co., 71 W. Va. 741, 77 S. E. 333; Parker Buggy Corp. *v.* Atlantic, etc., R. Co., 152 N. C. 119, 67 S. E. 251.

36. Madison, etc., R. Co. *v.* Whitesel, 11 Ind. 55; Arbuckle *v.* Thompson, 37 Pa. 170.

Action for benefit of another.—An action against a common carrier, for failure to deliver goods intrusted to it, is properly brought in the name of the consignees alone, notwithstanding they are prosecuting the suit for the benefit of another whom they hold liable for the value of the goods. Mobile, etc., R. Co. *v.* Williams, 54 Ala. 168.

37. Southern Exp. Co. *v.* Armstead, 50 Ala. 350.

One designated in a bill of lading as the consignee of goods may maintain an action therefor against the carrier, though the consignor continues to be the real owner. Griffith *v.* Ingledew (Pa.), 6 Serg. & R. 429, 9 Am. Dec. 444.

38. Where consignee is owner.—Burriss *v.* Missouri Pac. R. Co., 105 Mo. App. 659, 78 S. W. 1042; Green *v.* Clark (N. Y.), 13 Barb. 57; Robinson *v.* Houston, etc., R. Co. (Tex.), 146 S. W. 537, reversing 131 S. W. 444; Tradewell *v.* Chicago, etc., R. Co., 150 Wis. 259, 136 N. W. 794; Hawkins *v.* Alfalfa Products Co., 153 S. W. 201, 152 Ky. 152, 44 L. R. A., N. S., 600.

Consignee part owner.—Action against a common carrier for the loss of goods is properly brought in the name of the sole consignee, though he does not own the entire interest in the goods. Adams Exp. Co. *v.* Tingle, 10 Ky. L. Rep. 358. See Southern Exp. Co. *v.* Armstead, 50 Ala. 350.

Instances.—If merchandise has been actually bought and the purchaser become liable to pay therefor, such purchaser, when the seller consigns such merchandise to him, may recover of the carrier for the loss thereof, notwithstanding the seller has not pressed the purchaser for payment. Plaff *v.* Pacific Exp. Co., 159 Ill. App. 493, judgment affirmed 95 N. E. 1089.

Under a contract that a purchaser could return an article if defective, his delivery to a carrier will be presumed to be delivery to the vendor, entitling the latter to recover from the carrier for its loss. Hess *v.* South Dakota Cent. R. Co. (S. Dak.), 139 N. W. 334.

Where goods are sold f. o. b. cars of a carrier at a designated point, and are delivered to the carrier at such point and are accepted by it without any limitation on his common-law liability and are injured in transit, the right of action therefor is in the consignee. Vaughan Mach. Co. *v.* Stanton Tanning Co., 106 Va. 445, 56 S. E. 140.

A company ordered goods from plaintiff on five days' sight draft attached to bill of lading. Plaintiff, by mistake, shipped the goods two months before the time specified in the order, and the company refused to receive them except on twenty days' draft. Plaintiff sent the bill of lading and twenty days' draft to a bank, and the company refused to accept the draft, unless immediate delivery was made of the bill of lading to prevent de-

and not by the consignee,[39] or that the carrier has made settlement with the consignor.[40] Where the transaction between a consignor and consignee amounts to a sale of goods in existence by which the title is transferred, action against the carrier for loss of the goods,[41] or injury thereto or delay in shipment,[42] must be brought by the consignee. The vendor, in such case, in making the contract of shipment acts as the agent of the vendee,[43] although the vendee may be a stranger to the carrier;[44] and the carrier is agent of the vendee, and liable to him for its safe delivery.[45]

Where Consignee Has Made Advances.—A consignee, who has made advances on goods, may maintain an action in his own name against the carrier for injury to the goods.[46] And it has been held that the fact that he had been paid his advances did not destroy his right of action.[47] Where goods are shipped for a purchaser, a bill of lading forwarded to him, and a draft drawn on him for the price, which is paid, the title to the goods will be vested in him, entitling him to sue the carrier for delay in transportation, though it was provided that the goods must first pass inspection.[48] But the acceptance and payment of drafts drawn on general account, without reference to any particular lot forwarded, will not pass the title.[49]

Where Consignee to Sell on Commission.—It is held that a consignment of goods to a commission merchant to be sold on commission does not operate to devest the title of the consignor and that the consignee can not bring action against the carrier for delay in delivery.[50] And where property is so consigned without any previous contract or advances to a shipper, the consignee can not

murrage charges, and plaintiff telegraphed the bank to deliver the bill. The object in delivering the bill was to enable the company to unload the goods to prevent demurrage charges. Held, that this act manifested an intention of extending credit to the company and to pass the title to the goods to them. Hoffman *v.* Lake Shore, etc., R. Co., 84 N. W. 55, 125 Mich. 201.

39. Green *v.* Clark (N. Y.), 13 Barb. 57.

40. Sleepy Eye Milling Co. *v.* Chicago, etc., R. Co., 119 Minn. 199, 137 N. W. 813.

41. *United States.*—Blum *v.* The Caddo, Fed. Cas. No. 1,573, 1 Woods 64.

Alabama.—South, etc., R. Co. *v.* Wood, 72 Ala. 451.

Kentucky.—Smith *v.* Lewis (Ky.), 3 B. Mon. 229.

Indiana.—Madison, etc., R. Co. *v.* Whitesel, 11 Ind. 55.

New York.—Frankfurt *v.* Weir, 83 N. Y. S. 112, 40 Misc. Rep. 683.

42. Parker Buggy Corp. *v.* Atlantic, etc., R. Co., 152 N. C. 119, 67 S. E. 251.

43. Smith *v.* Lewis (Ky.), 3 B. Mon. 229; Blum *v.* The Caddo, Fed. Cas. No. 1,573, 1 Woods 64, followed in Meigs *v.* Hagan, 86 Fed. 926.

It is an inference of law and not a presumption of fact that the contract for the safe carriage is between the carrier and consignee. Green *v.* Clark (N. Y.), 13 Barb. 57.

44. Blum *v.* The Caddo, Fed. Cas. No. 1,573, 1 Woods 64.

45. Louisville, etc., R. Co. *v.* Spalding, 7 Ky. L. Rep. 211, holding that carrier liable only to vendee.

Defendants wrote for quotation of its lowest "delivered prices" on lumber, and plaintiff quoted prices at points of delivery. Defendants afterwards wrote that, as the lumber would be shipped direct to a coal company, "the freight would be paid by that company." Thereafter defendants placed the order with plaintiff at the delivered prices quoted. Held, that the contract did not make the carrier the agent of the seller, and, if the lumber was damaged in transit, the carrier was answerable to the purchaser. Werner Sawmill Co. *v.* Ferree, 50 Atl. 924, 201 Pa. 405.

46. Where consignee has made advances.—Burritt *v.* Rench, Fed. Cas. No. 2,201, 4 McLean 325; Adams *v.* Bissell (N. Y.), 28 Barb. 382.

The consignee of goods which were destroyed while in transit may maintain an action against the carrier for the recovery of damages for such destruction, it appearing that such consignee paid the draft drawn against the shipment, and received the bill of lading therefor, and subsequently purchased the goods from the owner. Kirkpatrick *v.* Kansas City, etc., R. Co., 86 Mo. 341.

47. The Geiser, 19 Fed. 877.

48. Cobb *v.* Illinois Cent. R. Co., 88 Ill. 394, affirming Illinois Cent. R. Co. *v.* Cobb, etc., Co., 64 Ill. 128.

49. Cobb *v.* Illinois Cent. R. Co., 88 Ill. 394.

50. Where consignee to sell on commission.—Southern R. Co. *v.* Deakins, 107 Tenn. 522, 64 S. W. 477.

recover for damages to the property in transit.[51] But where the consignee agrees to pay the freight and sell on a specified commission, he has such a special property as to entitle him to sue the carrier for a detention; and may recover his own damages and those of the owner.[52] Where property has been consigned by the owner to an agent who has a special interest therein, and the goods are negligently delayed in transit, and converted by the carrier so that sales thereof previously made by the consignee are canceled, such consignee may maintain an action in his own name against the carrier for the recovery of damages on account of lost commissions and for the value of the property converted.[53]

Where the consignor makes the contract of shipment, the consignee, being the real party in interest, may maintain an action against the carrier for injury to the goods,[54] or delay in shipment.[55]

Where Money Sent in Payment of Debt.—Where a creditor does not direct how money in payment of a debt shall be sent, and the debtor sends it by express, and it is lost in transitu, the debtor, rather than the creditor, has an action against the express company.[56] But where, in pursuance of an agreement between a debtor and creditor, the debtor delivers the money to an express company, addressed to the creditor, and gives no other instructions as to the ownership or right of possession, and imposes no condition as to delivery, upon refusal of the company to deliver the money to the creditor he is entitled to sue for and recover the same.[57]

Consignee Having No Title or Interest.—A consignee, having no special or general property in goods consigned to him, and incurring no risk from their transportation, can not maintain against the carrier an action ex delicto for loss or damage to the goods in transit.[58] And it has also been held that he can not maintain an action for a breach of the carrier's contract, such right of action belonging to the owner of the goods.[59] And where the consignee disclaims an interest in the goods and does not accept the consignment, it will be presumed that the legal title revested in the consignor, so that an action for loss of the goods can not be maintained in the name of the consignee for the benefit of a third person who claims that the goods were shipped to the consignee as factor

51. Grinnell-Collins Co. *v.* Illinois Cent. R. Co., 109 Minn. 513, 124 N. W. 377, 26 L. R. A., N. S., 437.

52. Boston, etc., R. Co. *v.* Warrior Mower Co., 76 Me. 251.

53. Missouri Pac. R. Co. *v.* Peru-Van Zandt Imp. Co., 85 Pac. 408, 87 Pac. 80, 73 Kan. 295, 6 L. R. A., N. S., 1058, 117 Am. St. Rep. 468, 9 Am. & Eng. Ann. Cas. 790.

54. Where consignor makes contract of shipment.—Burriss *v.* Missouri Pac. R. Co., 105 Mo. App. 659, 78 S. W. 1042.

55. Illinois Cent. R. Co. *v.* Hopkinsville Canning Co. (Ky. App.), 116 S. W. 758.

In Georgia it is held that a consignee of freight can not maintain an action on a bill of lading for loss caused by delay, where the consignor made the contract of carriage, unless the bill of lading has been assigned or indorsed to him by the consignor. Haas *v.* Kansas City, etc., R. Co., 81 Ga. 792, 7 S. E. 629.

56. Where money sent in payment of debt.—Bernstine *v.* Express Co., 40 O. St. 451.

57. Pratt *v.* Northern Pac. Exp. Co., 13 Idaho 373, 90 Pac. 341, 10 L. R. A., N. S., 499.

58. Consignee having no interest.—*Georgia.*—Southern R. Co. *v.* Miko, 136 Ga. 272, 71 S. E. 241, 36 L. R. A., N. S., 68.

Minnesota.—Grinnell-Collins Co. *v.* Illinois Cent. R. Co., 109 Minn. 513, 124 N. W. 377, 26 L. R. A., N. S., 437.

New York.—Ogden *v.* Coddington (N. Y.), 2 E. D. Smith 317.

North Carolina.—See Asheboro Wheelbarrow, etc., Co. *v.* Southern R. Co., 149 N. C. 261, 62 S. E. 1091.

Texas.—Cudahy Packing Co. *v.* Dorsey, 26 Tex. Civ. App. 484, 63 S. W. 548.

A shipper delivered goods to a carrier, for delivery to a person named as consignee in a nonnegotiable shipping receipt. The shipper drew on the consignee for the price, and attached the draft to the receipt. Subsequently the carrier, at the shipper's request, delivered the goods to a third person. Thereafter the consignee accepted the draft and paid it. Held, that the consignee had not acquired any title to the goods, and could not sue the carrier for conversion. Green *v.* Baltimore, etc., R. Co., 92 N. E. 622, 206 Mass. 331.

59. Ogden *v.* Coddington (N. Y.), 2 E. D. Smith 317.

for such third person.[60] But it has been held that, notwithstanding the consignor retains title, the consignee may sue the carrier for losses caused by delay in their transmission, though he refuses to accept them because not sooner delivered.[61]

Rescission of Contract of Sale.—Where, after failure to deliver freight, consignee demanded back and received from vendor the price, there was a rescission of the sale precluding a recovery by consignee from the carrier for the failure to deliver.[62]

Consignee Agent of Consignor.—A consignee has no cause of action against a carrier for failure to deliver goods consigned for sale by him as agent of the consignor; the title being in the consignor.[63]

60. Ezell *v.* English (Ala.), 6 Port. 311.

61. Clute *v.* Chicago, etc., R. Co., 83 Kan. 333, 111 Pac. 431, 30 L. R. A., N. S., 1071.

62. **Rescission of contract of sale.**—Matheson *v.* Southern Railway, 79 S. C. 155, 60 S. E. 437.

63. Whaley *v.* Atlantic, etc., R. Co., 84 S. C. 189, 65 S. E. 1022.

CHAPTER X.

Transportation and Delivery by Carrier.

I. Duties as to Transportation in General, § 812.
II. Route and Deviation Therefrom, §§ 813-834.
A. Selection by Shipper, §§ 813-826.
a. Right to Select, § 813.
b. Requisites, Construction and Proof of Agreement, §§ 814-815.
(1) Requisites and Construction, § 814.
(2) Evidence, § 815.
c. Deviation by Carrier, §§ 816-821.
(1) In General, § 816.
(2) Losses for Which Carrier Is Liable, §§ 817-819.
(a) In General, § 817.
(b) Loss Caused by Inevitable Casualties, § 818.
(c) Transportation by Connecting Carriers, § 819.
(3) Necessity for and Justification of Deviation or Forwarding by Another Carrier, § 820.
(4) Damages, § 821.
d. Refusal to Route Cars as Directed by Shipper, § 822.
e. Shipment over Route Contrary to Express Direction of Shipper, § 823.
f. Forwarding by Different Boat or Conveyance than That Stipulated, § 824.
g. Carrier Fraudulently Inducing Shipment over Longer Route, § 825.
h. Diversion by Order of Shipper or Consignee, § 826.
B. Selection by Carrier, §§ 827-834.
a. Right to Select in General, § 827.
b. Regard for Rights of Shipper, § 828.
c. Degree of Care Required, § 829.
d. Duty to Select Safe and Direct Route, § 830.
e. Duty to Pursue Usual and Customary Route and Deviation Therefrom, §§ 831-834.
(1) In General, § 831.
(2) Deviation, §§ 832-834.
(a) What Constitutes, § 832.
(b) Necessity and Justification, § 833.
(c) Losses for Which Carrier Is Liable and Nature of Liability, § 834.
III. Duty and Necessity of Delivery, §§ 835-841.
A. Duty to Deliver, § 835.
B. Liability for Failure or Refusal to Deliver, § 836-841.
a. In General, § 836.
b. Excuse for Nondelivery in General, § 837.
c. Right to Require Receipt before Delivery, § 838.
d. Requiring Proof of Right to Goods, § 839.
e. Requiring Production and Surrender of Bill of Lading, § 840.
f. Detention for Debt or Charges, § 841.
IV. Mode and Sufficiency of Delivery in General, §§ 842-846.
A. In General, § 842.
B. What Constitutes Delivery, § 843.
C. Carrier by Water, § 844.
D. Duties in Making Delivery, § 845.
E. Effect of Custom or Usage, § 846.
V. Time of Delivery, § 847.
VI. Necessity for Personal Delivery, § 848.
VII. Place of Delivery, §§ 849-853.

A. In General, § 849.
B. Usual Place at Destination, § 850.
C. Specified Place, § 851.
D. Intermediate Point, § 852.
E. Shipments in Carload Lots, § 853.
VIII. To Whom Delivery May Be Made, §§ 854-857.
A. Consignee or Agent, § 854.
B. Consignor or Agent, § 855.
C. Actual Owner, § 856.
D. Holder of Bill of Lading, § 857.
IX. Misdelivery, § 858-866.
A. Liability in General, § 858.
B. Fraudulent Consignee, § 859.
C. Delivery without Production of Bill of Lading, §§ 860-865.
a. In General, § 860.
b. Liability to Bona Fide Holder, § 861.
c. Laches of Holder of Bill, § 862.
d. Bill Attached to Draft, § 863.
e. Duplicate Bills, § 864.
f. Direction in Bill to Notify Third Person, § 865.
D. Defenses, § 866.
X. Duty of Consignee to Remove Goods, § 867.
XI. Failure or Refusal of Consignee to Receive Goods, § 868.
XII. Goods Shipped C. O. D., § 869.
XIII. Goods Seized under Legal Process, § 870-874.
A. Liability of Carrier, § 870.
B. Duties of Carrier, § 871.
C. Seizure under Police Regulations, § 872.
D. Garnishment of Carrier, § 873.
E. Rights of Attaching Officer, § 874.
XIV. Actions for Failure to Deliver or Misdelivery, §§ 875-903.
A. Conditions Precedent, § 875.
B. Form of Action, § 876.
C. Joinder of Actions, § 877.
D. Jurisdiction and Venue, § 878.
E. Parties, § 879.
F. Pleading, §§ 880-882.
a. Declaration, Complaint or Petition, §§ 880-881.
(1) In General, § 880.
(2) Necessary Allegations, § 881.
b. Plea or Answer, § 882.
G. Issue, Proof, and Variance, § 883.
H. Evidence, §§ 884-887.
a. Presumptions and Burden of Proof, § 884.
b. Necessity of Producing Bill of Lading, § 885.
c. Admissibility of Evidence, § 886.
d. Weight and Sufficiency of Evidence, § 887.
I. Damages, §§ 888-900.
a. Nominal Damages, § 888.
b. Exemplary Damages, § 889.
c. Compensatory Damages, §§ 890-900.
(1) Failure or Refusal to Deliver, § 890-893.
(a) Actual Loss Proximately Resulting, § 890.
(b) Measure and Elements in General, § 891.
(c) Goods Having no Market Value, § 892.
(d) Computation of Damages, § 893.

(2) Misdelivery, § 894.
(3) Delaying Notice of Arrival of Goods, § 895.
(4) Delaying Notice of Refusal of Goods, § 896.
(5) Mitigation of Damages, § 897.
(6) Evidence, § 898-899.
(a) In General, § 898.
(b) Evidence as to Value, § 899.
(7) Inadequacy of Damages, § 900.
J. Trial and Judgment, §§ 901-903.
a. Questions for Jury, § 901.
b. Instructions, § 902.
c. Verdict and Judgment, § 903.

§ 812. Duties as to Transportation in General.—Duties in General.—A contract by a carrier to transport freight imposes on it the obligation to transport the freight safely [1] and within a reasonable time to the point of destination,[2] and in the order in which it is offered.[3] The carrier, being an insurer, may not escape liability for nonperformance of the contract, except by showing that a failure to transport arose from an act of God or the public enemy, or public authority, or of the shipper, or from the intrinsic nature of the property itself,[4] or from a sudden press of business which could not have been reasonably anticipated.[5] And, while accidents and obstructions will excuse delay, they do not put an end to the contract, which must be completed as soon as the impediment to the transportation of the property is removed, or can reasonably

1. Duty to transport goods safely.—See post, "Loss of or Injury to Goods," chapter 12.

2. Duty to transport freight promptly.—*United States.*—Bank *v.* Adams Exp. Co., 93 U. S. 174, 23 L. Ed. 872; The Delaware, 14 Wall. 579, 596, 20 L. Ed. 779; The Commander-in-Chief (U. S.), 1 Wall. 43, 17 L. Ed. 609; Chicago, etc., R. Co. *v.* Kirby, 225 U. S. 155, 56 L. Ed. 1033, 32 S. Ct. 648, Ann. Cas. 1914a, 501.

Arkansas.—Chicago, etc., R. Co. *v.* King (Ark.), 148 S. W. 1035.

North Carolina.—See Watson *v.* Atlantic, etc., R. Co., 59 S. E. 55, 145 N. C. 236.

Ohio.—Wyler, etc., Co. *v.* Louisville, etc., Railway (Ohio), 6 N. P., N. S., 589, 18 O. D. N. P. 722.

Texas.—Bergin *v.* Missouri, etc., R. Co. (Tex. Civ. App.), 150 S. W. 1184.

Virginia.—Murphy, etc., Co. *v.* Station, 17 Va. (3 Munf.), 239.

West Virginia.—McGraw *v.* Baltimore, etc., R. Co., 18 W. Va. 361, 41 Am. Rep. 696; Baltimore, etc., R. Co. *v.* Morehead, 5 W. Va. 293.

A year is an unreasonable time for a carrier to take to convey a package from Boston to Milwaukee, and upon the expiration of that time the owner may well maintain an action for nondelivery. Nudd *v.* Wells, 11 Wis. 407.

3. Order of forwarding.—Houston, etc., R. Co. *v.* Smith, 63 Tex. 322.

4. Excuses for failure to perform contract.—Wells *v.* Great Northern R. Co., 59 Ore. 165, 114 Pac. 92, 116 Pac. 1070, 34 L. R. A., N. S., 818.

Prevented by human agency.—For failure to carry and deliver, a common carrier can not excuse itself by showing that through human agency, other than of a public enemy, not under its control, this was prevented, without fault on its part. Gulf, etc., R. Co. *v.* Levi, 76 Tex. 337, 13 S. W. 191, 8 L. R. A., N. S., 323.

Direction on freight becoming illegible.—Where several pieces of machinery were shipped to the defendant's agent to be forwarded to plaintiff, and they were described in the bill of lading as "three pipes in one bundle, and two single pipes," and they were delivered by the shipper's agent to the defendant's agent, who had a copy of the bill, and, by some means, the direction on one of the single pipes become illegible, and it was not forwarded, it was held that these facts were sufficient to subject the defendant for negligence as a bailee. Foard *v.* Atlantic & N. Car. R. Co. (N. Car.), 8 Jones 235.

Wrongful refusal to forward without prepayment.—A forwarding company, contracting without prepayment to forward goods to a distant place, breaches its contract where its agent at an intermediate point refuses to forward the goods without the charges being fully paid, regardless of whether the company is a mere forwarder and not a common carrier. Lee *v.* Fidelity Storage & Transfer Co., 98 P. 658, 51 Wash. 208.

5. Mauldin *v.* Seaboard Air Line Railway, 73 S. C. 9, 52 S. E. 677; compare Louisville, etc., R. Co. *v.* Touart, 97 Ala. 514, 11 So. 756.

be overcome.[6] If the place of destination can not be reached so as to make delivery, the carrier should not only take care of the goods, but also notify the consignor or owner within a reasonable time, of its inability to make the delivery.[7] And the carrier should also notify the consignor where goods, not shipped by him in accordance with the direction of the buyer, are deposited at the end of the carrier's road, and it refuses to deliver them to the connecting line on the ground that the liabilities of the latter are greater than the exemption contained in the original contract.[8]

Duty to Follow Instructions.—Carriers of goods are required to follow the instructions given by the owner of property concerning its transportation whenever practicable.[9]

Goods Defectively Marked.—Where goods delivered to a carrier for transportation are without proper directions as to destination, the carrier is not liable for neglecting to transport them.[10] In such case the carrier should hold the goods until the true destination can be determined by inquiry.[11] And an agreement by its agent to have goods forwarded to their proper destination from a point on a connecting line to which they were carried through the mistake of the shipper, in addressing them, makes such carrier merely a gratuitous bailee of the goods.[12] But a carrier is liable for failure to duly forward goods marked with only an initial though the bill of lading provides that the carrier should not be liable for wrong carriage or wrong delivery of goods marked with initials.[13]

Duty to Carry in Identical Conveyance Specified in Contract.—If the carrier is ready and willing, and offers to transport the freight, it will not, it would seem, be liable in damages for not offering to do it in the identical boat specified in the contract. The object of the shipper is to procure the transportation of his property, and it can not be essential to him whether it be done in one boat or another.[14] But it has been held that where an express company has agreed to forward goods by a particular vessel, and that vessel does not go, it has no right to forward the goods by any other usual and proper mode of con-

6. Baltimore, etc., R. Co. *v.* O'Donnell, 49 O. St. 489, 32 N. E. 476, 21 L. R. A., N. S., 117, 34 Am. St. Rep. 579.

7. **Where destination can not be reached—Notice to consignor.**—Green, etc., Nav. Co. *v.* Marshall, 48 Ind. 596; Baltimore, etc., R. Co. *v.* Morehead, 5 W. Va. 293.

8. Rawson *v.* Holland (N. Y.), 47 How. Prac. 292, 5 Daly 155, affirmed in 59 N. Y. 611.

9. **Duty to follow instructions.**—Express Co. *v.* Kountze Bros. (U. S.), 8 Wall. 342, 19 L. Ed. 457; Gulf, etc., R. Co. *v.* Irvine (Tex. Civ. App.), 73 S. W. 540; Gillett *v.* Missouri, etc., R. Co. (Tex. Civ. App.), 68 S. W. 61; Texas Cent. R. Co. *v.* Dorsey, 30 Tex. Civ. App. 377, 70 S. W. 575.

Where a carrier was instructed to carry goods in bond, and they were taken out of bond without authority, in consequence of which they were of less value at the point of destination than they would have been had they been brought there in bond, the taking them out of bond was an interference with the shipper's rights, rendering the carrier liable for actual damages. Smith *v.* New Orleans, etc., R. Co., 30 So. 265, 106 La. 11, 54 L. R. A., N. S., 923, 87 Am. St. Rep. 285.

10. **Goods defectively marked.**—Finn *v.* Western R. Corp., 102 Mass. 283.

No directions as to destination.—On the trial of an action against a carrier for neglecting to forward a lot of shingles delivered with no directions whither to forward, except a stencil mark, "J. S. C.," on each bunch, and, on one bunch in seven, "J. S. Clark," in pencil, where the defendant's station agent denied actual notice, mere proof that within three years six or eight lots had been received at the same station, while he was in charge, similarly stencil marked, accompanied with the bills of lading, was insufficient to justify a finding that he "ought clearly to have known" that they were sent to J. S. Clark. Finn *v.* Western R. Corp., 102 Mass. 283.

11. Gerhard Mennen Chemical Co. *v.* Merchants' Exp. Co., 76 N. J. L. 207, 68 Atl. 906.

12. Treleven *v.* Northern Pac. R. Co., 89 Wis. 598, 62 N. W. 536.

13. **Goods marked only with initials.**—McGowan *v.* Wilmington, etc., R. Co., 95 N. C. 417.

14. **Duty to carry in identical conveyance specified in contract.**—Canal Boat Montgomery *v.* Kent, 20 O. 54.

veyance; and, when it does so forward goods, it is liable to the owner in case of their loss.[15]

Duty to Trace Goods.—It is the duty of the carrier to trace goods when the owner so demands.[16]

Duty as to Perishable Goods.—Where it becomes impossible to deliver goods according to directions, or to return them before they would inevitably perish, the carrier should sell them.[17] But, a carrier can not justify the sale of perishable freight which is obstructed in the course of its shipment by a strike, without notice to the shipper and instructions from him, when it appears that such notice could have been given and instructions obtained without inconvenience to the carrier or causing any delay that would have endangered the safety of the goods.[18]

Duty to Verify Counting of Goods.—A shipper of goods, loading the car, may compel the agent of the carrier to verify the loading and counting by the shipper.[19]

Entry in Custom House.—Where the governmental power prevents the carriage of goods to their destination until duties are paid, it is the duty of the carrier to take all practicable means to notify the consignees, and, failing in that, to notify the shippers, of the situation. Meanwhile the carrier is at liberty to turn the goods over to the customs officers, or to store them in a suitable and reasonably safe place.[20] Where the goods are entered for "immediate consumption," the carrier is required to pay the custom charges.[21]

Effect of Usage.—The duties of a carrier may arise out of usage as well as from statutory enactments, and when once established the obligation of the carrier to perform them is as binding in the one case as in the other.[22]

Special Contract.—A carrier in accepting shipments accepts them subject to the liabilities imposed by law, and the only way in which it can vary or limit the liability is by special contract.[23] Where the carrier contracts to carry within a particular time, or to make a particular connection, or to carry by a particular

15. Goodrich *v.* Thompson, 44 N. Y. 324, affirming 27 N. Y. Super. Ct. 75.

16. **Duty to trace goods.**—Cleveland, etc., R. Co. *v.* Freiberg, 11 O. C. C., N. S., 241, 20-30 O. C. D. 669, affirmed in 83 O. St. 482. See Herf, etc., Chemical Co. *v.* Lackawana Line, 70 Mo. App. 274.

In Georgia it is so provided by statute. Civil Code, §§ 2317, 2318; Code 1910, §§ 2771, 2772; Central, etc., R. Co. *v.* Murphey, 116 Ga. 863, 43 S. E. 265, 60 L. R. A. 817; Savannah, etc., R. Co. *v.* Elder, 116 Ga. 942, 43 S. E. 379; Davis *v.* Seaboard, etc., Railway, 136 Ga. 278, 71 S. E. 428. See post, "Connecting Carriers," Part V.

17. **Duty as to perishable goods.**—Dudley *v.* Chicago, etc., R. Co., 58 W. Va. 604, 52 S. E. 718, 3 L. R. A., N. S., 1135, 112 Am. St. Rep. 1027.

18. Railroad *v.* Odil, 96 Tenn. 61, 33 S. W. 611.

19. **Duty to verify counting of goods.**—Peele *v.* Atlantic, etc., R. Co., 149 N. C. 390, 63 S. E. 66.

20. **Entry in custom house.**—Pennsylvania Co. *v.* Canadian Pac. R. Co., 107 Ill. App. 386.

21. Mitchelson *v.* Minneapolis, etc., R. Co., 67 Minn. 406, 69 N. W. 1106.

Plaintiff instructed his agents in Quebec to ship certain merchandise to St. Paul. Under their direction, their clerk made out triplicate invoices, a declaration to be presented to the United States consul, and a consular certificate; the two latter stating that the goods were to be entered at the port of Sault St. Marie. The invoice, also in triplicate, stated that they were to be consigned for entry at that port to F., defendant's agent. The bill of lading specified that goods going to or coming from the United States were subject to customs charges. The invoice, declaration, consular certificate, and bill came into the agent's hands when the goods reached Sault St. Marie. Held, that defendant's agent was warranted in entering the goods for "immediate consumption," and in paying the duty fixed by the custom house officials, and that it was not his duty to enter them for "transportation" to St. Paul. Mitchelson *v.* Minneapolis, etc., R. Co., 69 N. W. 1106, 67 Minn. 406.

22. **Effect of usage.**—Railroad Comm'rs *v.* Atlantic, etc., R. Co., 59 Fla. 612, 52 So. 4.

23. **Special contract.**—Russell *v.* Chicago, etc., R. Co., 37 Mont. 1, 94 Pac. 488.

train, it is liable for the consequence of a failure to transport according to its terms.[24]

§§ 813-834. Route and Deviation Therefrom—§§ 813-826. Selection by Shipper—§ 813. Right to Select.—The shipper usually has the right to select the route over which his goods are to be shipped.[25]

§§ 814-815. Requisites, Construction and Proof of Agreement—§ 814. Requisites and Construction.—The provisions of a contract of shipment, whether verbal or written, determine the route and connections to be observed.[26]

Authority of Agent to Bind Carrier.—The agent of a railway has authority to bind the company as to the routing of a through shipment in the absence of knowledge by the shipper of limitation on his powers; but where he notified a shipper demanding an all-rail shipment that the company would not regard such billing by him but would send it partly by water, this was notice to the shipper of his lack of authority to contract for an all-rail shipment.[27]

Written Instructions by Shipper—Assent of Agent.—A written instruction by a shipper to a station agent as to his selection of a connecting carrier, to which the agent assented, at the same time telling the shipper, that "the office at the terminal generally took their own route, and would not pay any attention to him," did not amount to a written contract beween the shipper and the company, the assent thereto being insufficient; but amounted only to an instruction or direction of the shipper.[28] A shipper's written instruction to a station agent as to the selection of a connecting carrier is superseded by subsequent bills of lading containing no provision on the subject.[29]

Receipt for Goods Designating Route.—A receipt given for goods "for Baltimore, via Chesapeake and Delaware canal," is a contract to carry the goods through that canal to Baltimore.[30]

§ 815. Evidence.—Evidence as to the customary running time of cattle trains between two points over defendant's line is admissible on the issue of deviation from the route selected by the shippers, but evidence as to the rate of speed of one freight train at a certain time, is inadmissible.[31]

Parol Evidence.—Where shipping contract is silent as to the route, parol evidence as to the route agreed upon is inadmissible.[32]

Experience of Shipper as to Best Route.—On the question whether the shipper made the contract with the carrier to ship the goods by a certain route, his testimony wherein he stated what experience he had in shipping such goods, and that the route indicated was a better way of shipping them, was admissible.[33]

Right of Consignee to Designate Route.—On the issue as to who had the

24. Chicago, etc., R. Co. *v.* Kirby, 225 U. S. 155, 164, 56 L. Ed. 1033, 32 S. Ct. 648, Ann. Cas. 1914A, 501. See post. "Limitation of Liability," Chapter 14.

25. **Right to select.**—Gulf, etc., R. Co. *v.* Irvine (Tex. Civ. App.), 73 S. W. 540; Wells, Fargo & Co's Exp. *v.* Fuller, 4 Tex. Civ. App. 213, 23 S. W. 412 (see 93 Tex. 242, no op.); Texas, etc., R. Co. *v.* Eastin, 100 Tex. 556, 102 S. W. 105; International, etc., R. Co. *v.* Wentworth, 8 Tex. Civ. App. 5, 12, 27 S. W. 680, affirmed in 87 Tex. 311.

26. Missouri, etc., R. Co. *v.* Thompson, 55 Tex. Civ. App. 12, 118 S. W. 618.

27. **Authority of agent to bind carrier.**—Bessling & Co. *v.* Houston, etc., R. Co., 35 Tex. Civ. App. 470, 80 S. W. 639, affirmed in 98 Tex. 610, no op.

28. **Written instructions by shipper, assent of agent.**—Bessling & Co. *v.* Houston, etc., R. Co., 35 Tex. Civ. App. 470, 80 S. W. 639, affirmed in 98 Tex. 610, no op.

29. Bessling & Co. *v.* Houston, etc., R. Co., 80 S. W. 639, 35 Tex. Civ. App. 470.

30. **Receipt for goods designating route.**—Hand *v.* Baynes (Pa.), 4 Whart. 204, 33 Am. Dec. 54.

31. Gulf, etc., R. Co. *v.* Irvine (Tex. Civ. App.), 73 S. W. 540.

32. **Parol evidence.**—Wells, Fargo & Co.'s Exp. *v.* Fuller, 4 Tex. Civ. App. 213, 222, 23 S. W. 412 (see 93 Tex. 742, no op.).

33. **Experience of shipper as to best route.**—Central R., etc., Co. *v.* Skellie, 86 Ga. 686, 12 S. E. 1017.

right to designate the route of a shipment by rail, the consignor may testify that the consignee had such right.[34]

§§ 816-821. Deviation by Carrier—§ 816. In General.—When the shipper, by the assent of the carrier, designates the route, that route must be pursued, and a deviation therefrom is at the risk of the carrier,[35] except as to perishable goods, where conformity would cause injury to the shipment.[36]

§§ 817-819. Losses for Which Carrier Is Liable—§ 817. In General.—If a carrier deviates from the route fixed by his contract, he becomes responsible for all loss[37] which may occur in transit[38] either on his own or connecting lines[39] and can not avail himself of any exceptions in his behalf in the contract.[40]

§ 818. Loss Caused by Inevitable Casualties.—Unless justified by urgent circumstances, a deviation by the carrier will render it responsible for losses resulting, even from inevitable casualties.[41]

§ 819. Transportation by Connecting Carriers.—Substitution of Other Connecting Carrier.—A common carrier who unjustifiably substitutes another connecting carrier for the one named in the bill of lading, becomes an insurer for the substituted carrier, and liable for loss of the goods while in the latter's possession, even by inevitable casualties.[42] When goods are delivered to the first of a connecting line of railroads, to be shipped by a specified route, a delivery to another railroad, which forms a part of a different route, is a conversion, which renders the first road liable for the value of the goods. If they be delayed by such delivery, or damage result, the first road may be held responsible therefor.[43]

34. Right of consignee to designate route.—Gulf, etc., R. Co. *v.* Dennison, 25 Tex. Civ. App. 127, 60 S. W. 281.

35. Express Co. *v.* Kountze Bros. (U. S.), 8 Wall. 342, 19 L. Ed. 457.

Deviation by carrier.—Lord, etc., Co. *v.* Texas, etc., R. Co. (Mo. App.), 134 S. W. 111; Railroad *v.* Odil, 96 Tenn. 61, 64, 33 S. W. 611; Post *v.* Southern R. Co., 103 Tenn. 184, 214, 52 S. W. 301, 55 L. R. A. 481.

36. Lord, etc., Co. *v.* Texas, etc., R. Co. (Mo. App.), 134 S. W. 111.

37. Losses and injuries for which carrier is liable.—Texas, etc., R. Co. *v.* Eastin, 100 Tex. 556, 102 S. W. 105; G. H. & H. R. Co. *v.* Allison, 59 Tex. 193.

Where by assent of the carrier a shipper selects the route over which his goods are to be shipped, the carrier is liable for all damages resulting from deviation therefrom. Gulf, etc., R. Co. *v.* Irvine (Tex. Civ. App.), 73 S. W. 540; Wells, Fargo & Co.'s Exp. *v.* Fuller, 4 Tex. Civ. App. 213, 222, 23 S. W. 412 (see 93 Tex. 742, no op.).

A common carrier contracting to forward goods "by sail on the lake," all lake dangers being in that case taken by the owners, is liable as insurer for their loss if sent by steam. Merrick *v.* Webster, 3 Mich. 268.

38. Railroad *v.* Odil, 96 Tenn. 61, 64, 33 S. W. 611.

The master of a vessel laden with lime, deviated, unnecessarily, from the usual course, and during the deviation was overtaken by a tempest which wetted the lime, and the vessel taking fire, all was lost. The court held the carrier liable, because the loss had actually happened while his wrongful "act" (the deviation in the course of the voyage), was in operation and force, and the loss was attributed to the wrongful act. Lamont & Co. *v.* Nashville, etc., R. Co., 56 Tenn. (9 Heisk.) 58, 64.

39. Texas, etc., R. Co. *v.* Eastin, 100 Tex. 556, 102 S. W. 105. See post, "Transportation by Connecting Carriers," § 819.

40. Deviation as depriving of exemptions of contract.—Pecos, etc., R. Co. *v.* Hughes, 44 Tex. Civ. App. 135, 139, 98 S. W. 410; G. H. & H. R. Co. *v.* Allison, 59 Tex. 193; Texas, etc., R. Co. *v.* Eastin, 100 Tex. 556, 102 S. W. 105; St. Louis, etc., R. Co. *v.* Louisiana, etc., Lumber Co., 50 Tex. Civ. App. 179, 109 S. W. 1143.

41. Loss caused by inevitable casualties.—Fatman & Co. *v.* Cincinnati, etc., R. Co., 2 Disn. 248, 13 O. Dec. 152; Railroad *v.* Odil, 96 Tenn. 61, 64, 33 S. W. 611.

42. Fatman & Co. *v.* Cincinnati, etc., R. Co., 2 Disn. 248, 13 O. Dec. 152; Railroad *v.* Odil, 96 Tenn. 61, 33 S. W. 611.

43. Georgia R. Co. *v.* Cole, 68 Ga. 623.

Instances.—A carrier received goods to be carried to a point beyond its own line, with directions to deliver them to certain connecting carriers, with the last

Loss by Negligence of Connecting Carrier.—A contracting carrier is liable for injuries to a shipment diverted from the route contemplated by the carrier's contract, arising from the negligence of the carrier to which it entrusted it. The initial carrier could not shift its responsibility by placing the shipment in the hands of another carrier not contemplated by the contract, even if it was compelled to do so by necessity.[44]

Diversion from All Rail to Water Route.—A railroad company may stipulate to carry freight by rail from one point to another over its own line and those of connecting roads and such stipulation imposes upon it the duty to so transport the shipment. When it or any subsequent road acting as its partner or agent divested the shipment from the stipulated all-rail route and shipped by water, this was a breach of the contract and subjected the initial carrier to dangers for any injury to the shipment resisting therefrom.[45] A printed condition that each connecting company shall alone be held answerable for loss or damage to the property sustained "during such transportation" does not affect this liability. The damage was not sustained "during such transportation as was contracted for," but during transportation of an entirely different character, and as a consequence of a breach of the contract.[46]

Clause "if Receipted for in Good Order" at Intermediate Point.—A statement that the initial carrier shall not be liable for any damages or deficiency in packages, if receipted for "in good order" by a connecting carrier at some intermediate point, does not release the initial carrier where the shipment is diverted from the route stipulated in the bill of lading and damaged while in transit.[47] The clause "if receipted for in good order," etc., is not to be taken as

of which the shipper had made an agreement for stopping the car at intermediate points on its line for delivery of portions of the goods. It, however, wrongfully sent the goods by different connecting carriers, whose lines reached but one of the intermediate points. On arrival of the goods there, the shipper disclosed his contract to have them distributed at the three points, and demanded compliance therewith. The carrier refused compliance until payment of freight for the whole route, when it delivered the goods destined to that point, and undertook, at its own cost, to carry to each of the other points the portion of the goods to be delivered there, and in doing so the goods were injured. Held, that the initial carrier, though it did not know of the shipper's agreement with the last connecting carrier, to which it was directed to deliver the goods, was liable for the damage. Brown, etc., Co. *v.* Pennsylvania Co., 63 Minn. 546, 65 N. W. 961.

Where a carrier gives a through bill of lading to a point beyond its own line, it can not deliver the goods at an intermediate point to another line which comes no nearer to the destination, but it must carry them to the terminus of its own line and there deliver them to a connecting carrier. St. Louis, etc., R. Co. *v.* Caldwell, 89 Ark. 218, 116 S. W. 210.

44. **Loss by negligence of connecting carrier.**—Missouri, etc., R. Co. *v.* Leibold (Tex. Civ. App.), 55 S. W. 368; G. H. & H. R. Co. *v.* Allison, 59 Tex. 193.

45. In Harshman *v.* Little Miami, etc., Railways (O.), Dayton 173, 175, the defendants stipulated in the bill of lading to transport tobacco to New York by way of the B. & O. R. Co., and all the way by railroads. It was diverted from an all-rail route at Baltimore and shipped by sea. It was held that the defendant was liable for damages for any injury to the tobacco resulting from such shipment.

46. Harshman *v.* Little Miami, etc., Railways (O.), Dayton 173, 175.

47. Where a contract is made with a railroad company to carry freight by railroad from one point to another (as from Cincinnati to Philadelphia), at a specified price for the whole distance, with a stipulation that the company shall not be liable for any damage or deficiency in packages, if receipted for "in good order" by another company, at some intermediate point on the route; and afterwards the goods are receipted for "in good order," and carried a part of the distance by water, on vessels, and the goods are proved to have been damaged while in transit, the first-named company is liable for such damages. The contract is an entirety; the company are carriers for the whole distance, and are liable according to the legal obligations imposed on them as carriers: they are to carry the goods without loss or damage, save those arising from inevitable accident or public enemies; and by changing the route they assume the risk of safe transportation. Fatman & Co. *v.* Cincinnati, etc., R. Co., 2 Disn. 248, 13 O. Dec. 152.

absolutely releasing the carrier, in any event, from responsibility in case of loss of goods, but only from responsibility for losses occurring without any fault of the carrier, or agents employed by him.[48]

Failure to Communicate Shipping Directions to Connecting Lines.—Failure of a railroad company to communicate to its connecting line the direction that the goods are shipped in care of a certain railroad, resulting in their diversion to another route than that directed, while making it liable for injury resulting, does not, in connection with such consequent diversion, amount to a conversion, and ipso facto make it liable for the value of the goods.[49]

Effort of Shipper to Hold Substituted Carrier.—The shipper does not waive his right to recover from the original carrier which substituted another connecting carrier for that named in the bill by making an effort, at its instance, to hold the substituted carrier.[50]

Right of Initial to Recover from Connecting Carrier.—Where an initial carrier shipped over certain connecting lines contrary to the express directions of the shipper, thereby becoming an insurer, it was entitled to recover against a connecting carrier for negligence of the latter for which it was adjudged liable, and to be subrogated to the rights of the shipper.[51]

§ 820. Necessity for and Justification of Deviation or Forwarding by Another Carrier.—When, in case of an unforeseen necessity, the safety of the shipment demands it, a deviation from the route agreed upon with the shipper may be made, and will be justifiable. But, where the goods can be properly cared for and held until the shipper can be communicated with, the carrier will not be justified in selecting another route, without notice to him and instructions from him.[52] Whether or not a carrier should ship over other lines depends on the character of the freight, probable duration of interruption, expense of such diversion and use of such care as an ordinarily prudent person would use under like circumstances.[53]

Ordinary or Temporary Obstructions.—Any ordinary or temporary obstruction of the prescribed route will not justify a deviation therefrom. The carrier upon discovery of such obstruction should not take a route different from the one agreed upon, but should await its removal or notify the shipper of the impracticability of proceeding; a temporary obstruction only suspends but does not dissolve the contract.[54]

Floods.—The deviation by a carrier from the stipulated route, to save delay, because it was impassable by floods, does not render such carrier an insurer, and liable for delay caused by such deviation;[55] but where horses were shipped with defendant under a special contract for speedy and safe shipment in a particular manner, and defendant, owing to its line being obstructed by a flood,

48. Fatman & Co. *v.* Cincinnati, etc., R. Co., 2 Disn. 248, 13 O. Dec. 152.

49. **Failure to communicate shipping directions to connecting lines.**—Booth *v.* Missouri, etc., R. Co. (Tex. Civ. App.), 37 S. W. 168.

50. **Effort of shipper to hold substituted carrier.**—Railroad *v.* Odil, 96 Tenn. 61, 33 S. W. 611.

51. **Right of initial to recover from connecting carrier.**—Texas, etc., R. Co. *v.* Eastin, 100 Tex. 556, 102 S. W. 105.

52. **Necessity for and justification of deviation.**—Railroad *v.* Odil, 96 Tenn. 61, 64, 33 S. W. 611.

53. St. Louis, etc., R. Co. *v.* Jones (Tex. Civ. App.), 29 S. W. 695.

54. Hand *v.* Baynes (Pa.), 4 Whart. 204, 33 Am. Dec. 54.

An alteration of the voyage requiring a vessel to proceed by sea instead of through a canal, is a deviation rendering the carrier liable for the loss of property, although the canal was temporarily obstructed. Hand *v.* Baynes (Pa.), 4 Whart. 204, 33 Am. Dec. 54.

Floods.—International, etc., R. Co. *v.* Wentworth, 8 Tex. Civ. App. 5, 27 S. W. 680.

Because a carrier had notice that part of the stipulated route was dangerous, it did not assume all risks from unforeseen floods thereon. International, etc., R. Co. *v.* Wentworth, 8 Tex. Civ. App. 5, 27 S. W. 680.

delivered the horses to another express company, who hauled the cars on a slow freight train, whereby the horses were injured, defendant is not exonerated from liability on the ground that the second carrier was the agent of plaintiff and not of defendant.[56]

Storms.—Forwarding perishable freight by rail is justifiable when a storm prevents a boat from proceeding upon its voyage.[57]

Strikes.—A common carrier can not justify a deviation in route, upon refusal of a connecting carrier to receive freight on account of a strike, without notice to the shipper and instructions from him, where it appears that the goods could have been held and properly cared for, without endangering their safety, until such notice had been given and instructions received.[58]

§ 821. **Damages.—Measure of Damages.**—The rule that a carrier is required to follow the shipper's instructions in routing, and that, on failure to do so, it becomes an insurer, in no way conflicts with the general rule for the measure of damages for breach of contract of carriage, which limits recovery to such damages as might reasonably be supposed to have been within the contemplation of the parties at the time the contract was made as the probable result of its breach.[59]

Consignee Failing to Receive Prompt Notice of Arrival of Goods.—Where a carrier transports goods by a different route than that over which they were shipped, and, in consequence, the consignee fails to receive prompt notice of their arrival, he can recover from the company the difference between the market value of the goods at the time of their arrival and at the time he received the notice.[60]

Liability as for a Conversion.—A carrier is not liable in conversion for goods because it transports them to their destination by a route other than that over which they were shipped.[61]

Consignee Refusing to Receive Goods.—Where the consignee of goods transported by a route different from that over which they were shipped refuses to take them, because he did not receive prompt notice of their arrival, and they are sold by the terminal carrier, he can not recover their value from the forwarding carrier.[62]

Carrier without Notice of Consignee's Right to Refuse Shipment.—Where a carrier was without notice of the provision of the contract of sale between consignor and consignee which authorized consignee to refuse to accept the shipment unless routed over a certain railroad, it was not liable, on failure by it to follow the routing instructions of consignor, resulting in refusal by consignee to accept shipment, for damages so sustained by consignor.[63]

§ 822. **Refusal to Route Cars as Directed by Shipper.**—After a carrier has refused to route cars as desired, if the shipper permits the carrier to take the cars for shipment, he acquiesces in the routing actually given by the carrier.[64]

56. Adams Exp. Co. *v.* Jackson, 92 Tenn. 326, 21 S. W. 666.

57. **Storm.**—Railroad *v.* Odil, 96 Tenn. 61, 64, 33 S. W. 611.

58. **Strike.**—Railroad *v.* Odil, 96 Tenn. 61, 33 S. W. 611.

59. **Measure of damages.**—St. Louis, etc., R. Co. *v.* Louisiana, etc., Lumber Co., 50 Tex. Civ. App. 179, 109 S. W. 1143.

60. **Consignee failing to receive prompt notice of arrival of goods.**—Southern Pac. Co. *v.* Booth (Tex. Civ. App.), 39 S. W. 585.

61. **Liability as for a conversion.**—Southern Pac. Co. *v.* Booth (Tex. Civ. App.), 39 S. W. 585.

62. **Consignee refusing to receive goods.**—Southern Pac. Co. *v.* Booth (Tex. Civ. App.), 39 S. W. 585.

63. **Carrier without notice of consignee's right to refuse shipment.**—St. Louis, etc., R. Co. *v.* Louisiana, etc., Lumber Co., 50 Tex. Civ. App. 179, 109 S. W. 1143.

64. **Acquiescence in routing.**—Missouri, etc., R. Co. *v.* Thompson, 55 Tex. Civ. App. 12, 118 S. W. 618.

Refusal to Route Shipment over Connecting Carrier Designated by Shipper.—A carrier refusing to route a shipment over connecting carriers designated by the shipper, and requiring him to ship over other connecting carriers, is an insurer of the goods during transportation by the connecting carriers selected by it.[65]

Refusing Short or through Route.—Where a shipper requested a railroad to ship cattle over a certain route, and such road, without any excuse, refused so to do, it became liable for all loses accruing to shipper by reason of the shipment of the cattle over a longer route,[66] unless protected by a written contract signed by the shipper.[67]

Carrier Having No Traffic Arrangement with Requested Connecting Line.—Where a carrier had no authority from connecting carriers to contract for through shipments except by a certain route, a shipper contracting for through shipment could not recover damages to the shipment occasioned by their having gone that way instead of another, as requested; he knowing the limitation of the carrier's authority.[68] Where a shipper of live stock was informed before the stock was loaded that there could be no through billing to the point of destination other than by a particular route, he could not select a different route and exact a through billing, when the carrier was not prepared to give it, and the shipper had been informed of that fact.[69]

§ 823. Shipment over Route Contrary to Express Direction of Shipper.—If a carrier becomes liable for all losses by a mere deviation from the route contracted for, for a stronger reason he should be held liable for all losses when shipped over a route contrary to the express instructions of the shipper.[70]

§ 824. Forwarding by Different Boat or Conveyance than That Stipulated.—If a common carrier forwards goods by different boats or conveyances than those contemplated by his agreement, he becomes an insurer of the goods, and can not avail himself of any exemption in his behalf in the contract.[71]

65. **Refusal to route shipment as designated by shipper.**—Pecos River R. Co. *v.* Harrington, 99 S. W. 1050, 48 Tex. Civ. App. 346.

66. **Refusing short or through route.**—Texas, etc., R. Co. *v.* Eastin, 102 S. W. 105, 100 Tex. 556.

67. **Carrier wrongfully refusing through short routing.**—Where a shipper of live stock requested a through transportation over the lines of the initial and connecting carrier by a shorter route, and it was wrongfully denied him by the initial carrier, when it, under its traffic arrangements with the other road, had the power or authority to grant it, the initial carrier will be liable for damages resulting from the longer haul, unless protected by a written contract signed by the shipper. Houston, etc., R. Co. *v.* Buchanan, 42 Tex. Civ. App. 620, 625, 94 S. W. 199.

A carrier which makes a through shipment under a special contract for a reduced rate of freight is not liable for an injury to the shipment on a certain connecting line, though it did not choose the through route which the shipper preferred. Galveston, etc., R. Co. *v.* Short (Tex. Civ. App.), 25 S. W. 142.

68. **Carrier having no arrangement with requested connecting line.**—Houston, etc., R. Co. *v.* Everett, 99 Tex. 269, 89 S. W. 761, reversing 86 S. W. 17, cited in Houston, etc., R. Co. *v.* Scott, 99 Tex. 326, 331, 89 S. W. 763, 765, reversing 86 S. W. 18.

69. Houston, etc., R. Co. *v.* Buchanan, 94 S. W. 199, 42 Tex. Civ. App. 620.

Where a carrier routes cattle shipments over certain connecting lines after it had refused the shipper's request for routing over another and shorter route, it is not liable for damages for the adoption of such longer route, where it had no traffic arrangements with the connecting lines forming the shorter route, and where it had offered to ship by the local rates by such route. Houston, etc., R. Co. *v.* Buchanan, 42 Tex. Civ. App. 620, 625, 94 S. W. 199.

70. **Shipment over route contrary to express direction of shipper.**—Texas, etc., R. Co. *v.* Eastin, 100 Tex. 556, 102 S. W. 105.

Where a railroad agent shipped over a certain route contrary to the express directions of the shippers, he was guilty of misfeasance, and liable for loss occurring by reason of the shipment over the route selected by him. Texas, etc., R. Co. *v.* Eastin, 100 Tex. 556, 102 S. W. 105.

71. **Forwarding by different boat or**

§ 825. Carrier Fraudulently Inducing Shipment over Longer Route.—Where a shipper of live stock was led into the execution of a contract for shipment which fixed the route, by means of false information by the agent of the carrier, the shipper was entitled to recover for damages resulting by reason of that route being longer than another route which he had demanded.[72]

§ 826. Diversion by Order of Shipper or Consignee.—See ante, "Change of Destination," § 806.

§§ 827-834. Selection by Carrier—§ 827. Right to Select in General.—In contracts of shipment which are silent in their express terms as to the matter of route, the carrier has the right, subject to certain restrictions, to choose the route.[73] In such case, the right of the carrier to choose the route is, by force of law, impressed upon and becomes a part of the contract as effectually as if expressed therein.[74]

Right of Initial Carrier.—In the absence of a selection of a route by a shipper, the initial carrier may choose the same.[75] Thus where a bill of lading issued by the initial carrier for goods to be transported over several connecting lines, and which may be forwarded over different lines to the place of destination, contains no directions on the subject, the right to designate the route rests with the initial carrier.[76]

§ 828. Regard for Rights of Shipper.—The selection of the route by the carriers must be made with regard for the rights of the shipper.[77]

§ 829. Degree of Care Required.—The carrier is liable for all damages resulting from its negligence in selecting the route.[78] The rule seems to be, that the carrier, in the exercise of this right, must use such care in relation to the

conveyances than that stipulated.—G. H. & H. R. Co. *v.* Allison, 59 Tex. 193.

Shipment by boat other than that directed by shipper.—Where a consignment of tow by way of rail line and steamboat connections was refused by the steamboat because the carriage of such goods was prohibited, it was a breach of the railroad company's duty to forward the goods by a towboat, in violation of the shipper's instructions to the freight agent that, unless it could be forwarded by the steamboat line, he did not wish to send it. Johnson *v.* New York Cent. R. Co., 33 N. Y. 610, 88 Am. Dec. 416.

72. **Carrier fraudulently inducing shipment over longer route.**—Houston, etc., R. Co. *v.* Buchanan, 94 S. W. 199, 42 Tex. Civ. App. 620.

73. **Right to select.**—Alabama, etc., R. Co. *v.* McKenzie, 139 Ga. 410, 77 S. E. 647, 45 L. R. A., N. S., 18; Edwards *v.* American Exp. Co., 109 Me. 444, 84 Atl. 987, 42 L. R. A., N. S., 705; Hoffman *v.* Delaware, etc., R. Co., 39 Pa. Super. Ct. 47; Chartrand *v.* Southern Railway, 85 S. C. 479, 67 S. E. 741; Wells, Fargo & Co.'s Exp. *v.* Fuller, 4 Tex. Civ. App. 213, 222, 23 S. W. 412 (see 93 Tex. 742, no op.); Gulf, etc., R. Co. *v.* Irvine (Tex. Civ. App.), 73 S. W. 540.

Bills of lading specifying no particular route for a certain shipment of cotton, give the carrier the right to choose the route. Bessling & Co. *v.* Houston, etc., R. Co., 35 Tex. Civ. App. 470, 80 S. W. 639, affirmed in 98 Tex. 610, no op.

A bill of lading given by an express company, undertaking to forward to point nearest destination reached by the company, which was the point of destination, subject to condition that the company should not be liable except as forwarders only within their own line of communication, does not fix the route of shipment over the company's line, but leaves the company free to choose the route. Wells, Fargo & Co.'s Exp. *v.* Fuller, 4 Tex. Civ. App. 213, 23 S. W. 412.

74. Wells, Fargo & Co.'s Exp. *v.* Fuller, 4 Tex. Civ. App. 213, 222, 23 S. W. 412 (see 93 Tex. 742, no op.).

75. **Right of initial carrier.**—Gulf, etc., R. Co. *v.* Irvine (Tex. Civ. App.), 73 S. W. 540.

76. Bessling & Co. *v.* Houston, etc., R. Co., 80 S. W. 639, 35 Tex. Civ. App. 470.

77. **Regard for rights of shipper.**—Alabama, etc., R. Co. *v.* McKenzie, 77 S. E. 647, 139 Ga. 410, 45 L. R. A., N. S., 18; Edwards *v.* American Exp. Co., 109 Me. 444, 84 Atl. 987, 42 L. R. A., N. S., 705; Wells, Fargo & Co.'s Exp. *v.* Fuller, 4 Tex. Civ. App. 213, 23 S. W. 412 (see 93 Tex. 742, no op.); Gulf, etc., R. Co. *v.* Irvine (Tex. Civ. App.), 73 S. W. 540.

78. **Liability for negligence in selecting route.**—Wells, Fargo & Co.'s Exp. *v.* Fuller, 4 Tex. Civ. App. 213, 223, 23 S. W. 412, affirmed in 93 Tex. 742, no op.

shipment as an ordinarily prudent person would use under similar circumstances.[79] The character of the goods shipped, whether perishable or not, the apparent object to be subserved by the shipment, and all the surrounding circumstances throwing light upon the shipment, must be considered by the carrier in the exercise of the right of routing, and if it fails to use that degree of care which an ordinarily prudent person would use under like conditions, it is held responsible for damages proximately resulting from its negligence in the selection of the route.[80]

§ 830. Duty to Select Safe and Direct Route.—The carrier must, at its peril, select a reasonably safe and direct route.[81] As a general rule when goods are delivered to a carrier for transportation to a designated point, it is his duty to transport them by the safest and most direct route.[82] It can not arbitrarily select a known unsafe route, except at the risk of incurring liability for negligence.[83] Neither can it arbitrarily choose a long, inexpeditious route, without assuming the risk of delay incident to the choice.[84] The action of the carrier in not selecting the most expeditious route is a question of negligence vel non, and should be submitted to the jury as such.[85]

Choice between Route Partly by Water and All-Rail Route.—Where there was no contract by the carrier for all-rail transportation and the bill of lading was silent as to the route, the selection of a route partly by water, whereon the goods were lost by act of God, did not make the carrier liable.[86]

Selection of Obstructed Route.—The carrier can not select a route so obstructed that delivery can not be made over it, where another practicable route is open, though by the bill of lading it is entitled to select the route.[87]

§§ 831-834. Duty to Pursue Usual and Customary Route and Deviation Therefrom—§ 831. In General.—A carrier which undertakes to carry goods between two given places is bound to pursue the usual and customary route.[88] The principle is equally applicable to carriers by water and to carriers by land, whether they act in a public capacity or under special undertakings.[89]

79. Wells, Fargo & Co.'s Exp. *v.* Fuller, 4 Tex. Civ. App. 213, 23 S. W. 412.

80. Wells, Fargo & Co.'s Exp. *v.* Fuller, 4 Tex. Civ. App. 213, 223, 23 S. W. 412 (see 93 Tex. 742, no op.).

81. **Duty to select a safe and direct route.**—Wells, Fargo & Co.'s Exp. *v.* Fuller, 4 Tex. Civ. App. 213, 23 S. W. 412.

82. **Safest and most direct route.**—Texas, etc., R. Co. *v.* Eastin, 100 Tex. 556, 102 S. W. 105.

83. Wells, Fargo & Co.'s Exp. *v.* Fuller, 4 Tex. Civ. App. 213, 23 S. W. 412.

84. Wells, Fargo & Co.'s Exp. *v.* Fuller, 4 Tex. Civ. App. 213, 23 S. W. 412. If the carrier selects a longer and less expeditious route than the one desired by the shipper, it will be held responsible for all damages resulting from its action. Wells, Fargo & Co.'s Exp. *v.* Fuller, 4 Tex. Civ. App. 213, 23 S. W. 412; Gulf, etc., R. Co. *v.* Irvine (Tex. Civ. App.), 73 S. W. 540.

Express companies.—If an express company with the facilities furnished such companies for transportation under the laws of the state of Texas, in exercising its right of routing when the shipper has failed to do so, chooses a long or inexpeditious railway route, when there is a direct and speedy line which it may use, and when the circumstances surrounding the shipment indicate that delay will be damaging, it should be held liable for any damage proximately resulting from the additional time consumed in the journey. Wells, Fargo & Co.'s Exp. *v.* Fuller, 4 Tex. Civ. App. 213, 223, 23 S. W. 412.

85. Wells, Fargo & Co.'s Exp. *v.* Fuller, 4 Tex. Civ. App. 213, 23 S. W. 412.

86. **Choice between route partly by water—And all rail route.**—Bessling & Co. *v.* Houston, etc., R. Co., 35 Tex. Civ. App. 470, 80 S. W. 639, affirmed in 98 Tex. 610, no op.

87. **Selection of obstructed route.**—Houston, etc., R. Co. *v.* Houx, 40 S. W. 327, 15 Tex. Civ. App. 502.

88. Powers *v.* Davenport (Ind.), 7 Blackf. 497, 43 Am. Dec. 100. See post, "Losses for Which Carrier Is Liable," §§ 817-819.

Addition of words "water permitting" does not change the character of the contract, as there implied under the general exception, "the account of God." Bennett *v.* Byram & Co., 38 Miss. 17, 75 Am. Dec. 90.

89. Powers *v.* Davenport (Ind.), 7 Blackf. 497, 43 Am. Dec. 100.

If a carrier would secure the right to deviate from the usual course of the trade, he should stipulate for it in the bill of lading.[90]

§§ 832-834. Deviation—§ 832. What Constitutes.—A deviation is a voluntary departure, without necessity or reasonable cause, from the regular and usual course of transportation.[91] Whether there has been a deviation or not is, upon conceded facts, a question of law for the court.[92]

§ 833. Necessity and Justification.—Deviation Usual or Customary.—A deviation which is a customary incident of the voyage, and according to the known usage of trade, does not defeat the exceptions in a bill of lading so as to subject the carrier to the responsibility of an insurer.[93] Where the usual route of a vessel was through Long Island Sound, but the master, because of the obstruction of the sound by ice, went to the south of the island, this was held to be a deviation, and not justified by a usage of vessels to make a similar deviation under a like circumstance.[94]

Personal Motive of Carrier.—The personal motive of a private person undertaking, as a common carrier, to carry goods between two points—desire to go to his own house—is not a legal excuse for unnecessary deviation from the usual and customary route, and he is liable for all loss sustained in consequence thereof.[95]

Deviation Caused by Unprecedented Floods.—Where a carrier's deviation from regular and usual course is caused by unprecedented floods, which render it absolutely necessary to change the route to prevent or reduce loss, the carrier is not held liable as an insurer.[96] But that the roadbed of a railroad company was damaged by an unprecedented flood, necessitating the forwarding of a shipment received as a connecting carrier by a more circuitous route, does not relieve the carrier from liability for the damages caused thereby, where, by the exer-

90. Lawrence *v.* McGregor (O.), Wright 193.

91. **Deviation defined.**—Hostetter *v.* Park, 137 U. S. 30, 34 L. Ed. 568, 11 S. Ct. 1.

92. Crosby *v.* Fitch, 12 Conn. 410, 31 Am. Dec. 745.

93. **Usual or customary deviation.**—Constable *v.* National, etc., Co., 154 U. S. 51, 38 L. Ed. 903, 14 S. Ct. 1062; Hostetter *v.* Park, 137 U. S. 30, 34 L. Ed. 568, 11 S. Ct. 1; Marande *v.* Texas, etc., R. Co., 184 U. S. 173, 46 L. Ed. 487, 22 S. Ct. 340 (holding evidence insufficient to show deviation).

In marine insurance, it is no deviation for a vessel to touch and stay at a port out of its course, if such departure is within the usage of the trade. The same doctrine is applicable in the case of a bill of lading, even though the usage be not known to the particular shipper, if it be established as a general usage. Hostetter *v.* Park, 137 U. S. 30, 34 L. Ed. 568, 11 S. Ct. 1.

In Hostetter *v.* Park, 137 U. S. 30, 34 L. Ed. 568, 11 S. Ct. 1, it was held to be no deviation, in the Pittsburg and New Orleans barge trade, to land and tie up a tow of barges, and detach from the tow such barge or barges as were designated to take on cargo en route, and to tow the same to the several points where the cargo might be stored, it having been shown that such delays were within the general and established usage of the trade. Constable *v.* National, etc., Co., 154 U. S. 51, 38 L. Ed. 903, 14 S. Ct. 1062.

Usage as to place of discharging cargo.—It is no deviation to land goods at a place where the usage of the trade permits them to be landed. Gracie *v.* Marine Ins. Co. (U. S.), 8 Cranch 75, 3 L. Ed. 492; Constable *v.* National, etc., Co., 154 U. S. 51, 38 L. Ed. 903, 14 S. Ct. 1062.

Where the regular pier of a steamship company is so blockaded that its ships can not obtain access to it to discharge its cargo, it is a matter of ordinary prudence to select a neighboring pier for that purpose, and the berthing of the ship at such a pier is not a deviation so as to render the company an insurer of the cargo discharged there, without notice to the consignee, until its actual delivery. Constable *v.* National, etc., Co., 154 U. S. 51, 38 L. Ed. 903, 14 S. Ct. 1062.

94. Crosby *v.* Fitch, 12 Conn. 410, 31 Am. Dec. 745.

95. **Personal motive of carrier.**—Powers *v.* Davenport (Ind.), 7 Blackf. 497, 43 Am. Dec. 100.

96. **Deviation caused by unprecedented floods.**—International, etc., R. Co. *v.* Wentworth, 8 Tex. Civ. App. 5, 27 S. W. 680, affirmed in 87 Tex. 311.

cise of reasonable care, it could have guarded against the effect of the floods.[97]

§ 834. Losses for Which Carrier Is Liable and Nature of Liability.—If a carrier deviates, without necessity, from the usual and common course of trade or the regular and usual route[98] and the goods are lost or injured during such deviation or as a consequence thereof, he is responsible therefor, and is not excused even if the loss or injury result from act of God,[99] inevitable accident, or act of the public enemies.[1] Such excuse is only available to him while in the pursuit of his voyage in the usual way.[2]

If the loss occurred from the carelessness or wantonness of the navigators of another vessel brought into collision with the vessel, that does not excuse the carrier; he is answerable to the shipper, and the owners of the vessel occasioning the accident refund over to him.[3]

Liable as for a Conversion.—If a common carrier deviates from the regular route and the goods are lost, it is liable as for a conversion.[4]

§§ 835-841. Duty and Necessity of Delivery—§ 835. Duty to Deliver.—The duty of a carrier is not merely to carry safely the goods intrusted to it, but also to deliver them,[5] or do what is equivalent thereto.[6] The conditions

97. St. Louis, etc., R. Co. *v.* Bland (Tex. Civ. App.), 34 S. W. 675.

98. *Indiana.*—Powers *v.* Davenport (Ind.), 7 Blackf. 497, 43 Am. Dec. 100.

Mississippi.—Bennett *v.* Byram & Co., 38 Miss. 17, 75 Am. Dec. 90.

Ohio.—Lawrence *v.* McGregor (O.), Wright 193.

Pennsylvania.—Hoffman *v.* Delaware, etc., R. Co., 39 Pa. Super. Ct. 47.

South Carolina.—Chartrand *v.* Southern Railway, 85 S. C. 479, 67 S. E. 741.

Texas.—Wells, Fargo & Co.'s Exp. *v.* Fuller, 4 Tex. Civ. App. 213, 23 S. W. 412; International, etc., R. Co. *v.* Wentworth, 8 Tex. Civ. App. 5, 27 S. W. 680, affirmed in 87 Tex. 311.

Instances.—A carrier, who, owing to an interruption on his own line, forwards matter via another line, consigned to himself, receives it at its destination, delivers it to the original consignee, and collects the freight, is responsible to the original consignor for damages thereto en route. Levy *v.* Louisville, etc., R. Co., 35 La. Ann. 615.

Carrier stopping short of point of reshipment.—A common carrier, which undertakes to deliver goods at a certain place, with the privilege of reshipping at an intermediate point, but stops short of that point, and goods there lost in a storm, is liable therefore, although he would not have been liable had he discharged his duty by taking them to the point agreed upon. Cassilay *v.* Young & Co. (Ky.), 4 B. Mon. 265, 39 Am. Dec. 505.

99. International, etc., R. Co. *v.* Wentworth, 8 Tex. Civ. App. 5, 27 S. W. 680, affirmed in 87 Tex. 311.

1. Lawrence *v.* McGregor (O.), Wright 193.

2. Lawrence *v.* McGregor (O.), Wright 193.

3. Lawrence *v.* McGregor (O.), Wright 193.

4. **Liable as for a conversion.**—Phillips *v.* Brigham, etc., Co., 26 Ga. 617, 71 Am. Dec. 237.

5. **Duty to deliver.**—*United States.*—North Pennsylvania R. Co. *v.* Commercial Nat. Bank, 123 U. S. 727, 31 L. Ed. 287, 8 S. Ct. 266; Brittan *v.* Barnaby, 21 How. 527, 16 L. Ed. 177; The Commander-in-Chief (U. S.), 1 Wall. 43, 17 L. Ed. 609; Chicago, etc., R. Co. *v.* Kirby, 225 U. S. 155, 56 L. Ed. 1033, 32 S. Ct. 648, Ann. Cas. 1914A, 501.

Arkansas.—Chicago, etc., R. Co *v.* King (Ark.), 148 S. W. 1035.

Illinois.—American Exp. Co. *v.* Baldwin, 26 Ill. 504, 79 Am. Dec. 389.

Maine.—Backer *v.* Flagg, 26 Me. 181.

New Hampshire.—Smith *v.* Mashen, etc., R. Co., 27 N. H. 86.

New York.—De Mott *v.* Laraway (N. Y.), 14 Wend. 225.

Ohio.—Waring & Co. *v.* Baltimore, etc., R. Co., 3 Wkly. L. Bull. 893, 7 O. Dec. Reprint 553; Oskamp *v.* Southern Exp. Co., 61 O. St. 341, 56 N. E. 13; Steamboat John Owen *v.* Johnson, 2 O. St. 143; Gittings *v.* Baker, 2 O. St. 21.

Pennsylvania.—Graff *v.* Bloomer, 9 Pa. 114. See Union Exp. Co. *v.* Ohleman, 92 Pa. 323.

Texas.—Morgan *v.* Dibble, 29 Tex. 107,

6. *Connecticut.*—Graves *v.* Hartford, etc., Steamboat Co., 38 Conn. 143, 9 Am. Rep. 369.

Illinois.—Chicago, etc., R. Co. *v.* Warren, 16 Ill. 502, 63 Am. Dec. 317.

Louisiana.—Sleade *v.* Payne, 14 La. Ann. 453.

New Hampshire.—Moses *v.* Boston, etc., R. Co., 32 N. H. 523, 64 Am. Dec. 381.

New York.—Price *v.* Powell, 3 N. Y. 322; Zinn *v.* New Jersey Steamboat Co., 49 N. Y. 442, 10 Am. Rep. 402; Sherman *v.* Hudson, etc., R. Co., 64 N. Y. 254.

Wisconsin.—Sultana *v.* Chapman, 5 Wis. 454.

which would release a carrier from this duty must be the same as would release it from the safe carriage of the goods;[7] and it is not relieved from the duty by usage.[8]

§§ 836-841. Liability for Failure or Refusal to Deliver—§ 836. In General.—Liability in General.—Where a carrier fails to account for or deliver property intrusted to it for shipment without a valid excuse, it is liable in an action to recover the damages sustained.[9] The acceptance of a part of goods by the consignee, at a place different from that specified in the contract, though admissible in the mitigation of damages, does not discharge the carrier from liability for the residue.[10]

Liability for Breach of Contract.—Failure of a carrier to deliver goods

117, 94 Am. Dec. 264; Houston, etc., R. Co. *v.* Adams, 49 Tex. 748, 30 Am. Rep. 116; Missouri Pac. R. Co. *v.* Haynes, 72 Tex. 175, 10 S. W. 398. See Fielder *v.* Missouri, etc., R. Co., 92 Tex. 176, 179, 46 S. W. 633, affirming 42 S. W. 362.

Vermont.—Pickett *v.* Downer, 4 Vt. 21.

Virginia.—Murphy, etc., Co. *v.* Staton, 17 Va. (3 Munf.) 239.

West Virginia.—McGraw *v.* Baltimore, etc., R. Co., 18 W. Va. 361, 41 Am. Rep. 696; Baltimore, etc., R. Co. *v.* Morehead, 5 W. Va. 293.

Duty to make personal delivery.—See post, "Necessity for Personal Delivery," § 848.

In the absence of a special contract or custom, the duty of a common carrier of goods is not completed on the mere arrival of the goods at destination, but includes the duty of delivery to the consignee. Burr *v.* Adams Exp. Co., 58 Atl. 609, 71 N. J. L. 263.

Delivery subject to conditions.—The contract of the carrier as to delivery is none the less binding because the delivery is subject to a condition. Steamboat John Owen *v.* Johnson, 2 O. St. 143.

7. North Pennsylvania R. Co. *v.* Commercial Nat. Bank, 123 U. S. 727, 733, 31 L. Ed. 287, 8 S. Ct. 266.

8. **Effect of usage.**—Houston, etc., R. Co. *v.* Adams, 49 Tex. 748, 30 Am. Rep. 116.

9. **Liability for failure or refusal to deliver.**—*Georgia.*—Atlanta Baggage, etc., Co. *v.* Mizo, 61 S. E. 844, 4 Ga. App. 407.

Iowa.—Dant & Co. *v.* Northwestern Union Packet Co., 34 Iowa 588.

Kentucky.—Adams Exp. Co. *v.* McDonald (Ky.), 1 Bush 32.

South Carolina.—Catlett *v.* Charleston, etc., Railway, 62 S. E. 315, 81 S. C. 327.

Texas.—Houston, etc., R. Co. *v.* Harry & Bros., 63 Tex. 256.

West Virginia.—Dresser *v.* West Virginia Transp. Co., 8 W. Va. 553.

Failure to deliver draft.—The liability of a common carrier who has undertaken to carry and deliver a draft, and has failed to do so, arises immediately upon such failure, and is not secondary to the liability of the drawer of the draft. Jones *v.* Wells, Fargo & Co., 28 Cal. 259.

Under the Arkansas statute a carrier, failing to deliver goods to the legal holder of the bill of lading on his surrender thereof, is liable to him for the damages sustained. Kirby's Dig., §§ 530, 531. Arkansas Southern R. Co. *v.* German Nat. Bank, 92 S. W. 522, 77 Ark. 482, 113 Am. St. Rep. 160.

Part of goods deliverable.—Where plaintiff's goods, while in the possession of defendant, a carrier, for transportation, were stolen, but part of them were found by the police and deposited with the property clerk, defendant was not thereby relieved of his obligation to deliver such part; he having an adequate right to recover them. Heyman *v.* Stryker, 121 N. Y. S. 592, 67 Misc. Rep. 88.

Illustrations.—In an action against an express company for refusal to deliver a coop of chickens on a certain date, a verdict for defendant was unwarranted; it appearing that its driver, on being requested by plaintiff's wife to carry the coop through a side gate, only 10 feet away, instead of through the front gate, indignantly threw the coop back into the wagon, without looking to see where the side gate was, saying that he would not carry it anywhere, and that defendant's agent, on being informed of the driver's conduct, ratified the same. Gary *v.* Wells, Fargo & Co.'s Exp. (Tex. Civ. App.), 40 S. W. 845.

A common carrier who undertook to transport freight by steamer to a designated point, but terminated his voyage at an intermediate port, and reshipped such freight on the steamer of another carrier, was liable to the owner for its loss, where the second carrier could not find the consignee at the place where the freight was to be delivered, and, because there was no safe place of storage there, returned it to the port where the reshipment was made, and there stored it in a proper warehouse, which, with the freight, was soon after accidentally destroyed by fire. Green, etc., Nav. Co. *v.* Marshall, 48 Ind. 596.

10. Cox, etc., Co. *v.* Peterson, 30 Ala. 608, 68 Am. Dec. 145.

on demand without lawful excuse, is a breach of the carrier's original contract, for which suit may be brought on that contract.[11]

Liability as for Conversion.—The wrongful failure or refusal of the carrier to deliver goods after they have arrived at their destination, on demand, constitutes a conversion for which the carrier is liable.[12] And the rightful owner may recover for such conversion, if entitled to possession at the time of his demand, though he was a stranger to the contract of bailment.[13] But if the refusal to deliver is qualified, and the qualification is reasonable and made in good faith, there is no conversion.[14] A carrier is liable for conversion when it fails or refuses to deliver goods, without lawful excuse, in accordance with the

11. Breach of contract.—Wilson *v.* California Cent. R. Co., 94 Cal. 166, 29 Pac. 861, 17 L. R. A. 685.

12. Liability as for conversion.—*Georgia.*—Bird *v.* Georgia Railroad, 72 Ga. 655; Richmond, etc., R. Co. *v.* Benson, 86 Ga. 203, 12 S. E. 357, 22 Am. St. Rep. 446; Southern Exp. Co. *v.* Fant Fish Co., 12 Ga. App. 447, 78 S. E. 197.

Kentucky.—Louisville, etc., R. Co. *v.* Lawson, 88 Ky. 496, 11 S. W. 511; Jeffersonville R. Co. *v.* White (Ky.), 6 Bush 251.

Missouri.—Loeffler *v.* Keokuk, etc., Packet Co., 7 Mo. App. 185.

Nebraska.—Shellenberg *v.* Fremont, etc., R. Co., 45 Neb. 487, 63 N. W. 859, 50 Am. St. Rep. 561.

New York.—Clement *v.* New York, etc., R. Co., 56 Hun 643, 9 N. Y. S. 601, 30 N. Y. St. Rep. 713; Judah *v.* Kemp, 2 Johns. Cas. 411; McEntee *v.* New Jersey Steamboat Co., 45 N. Y. 34, 6 Am. Rep. 28.

Oklahoma.—St. Louis, etc., R. Co. *v.* Dunham, 36 Okla. 724, 129 Pac. 862.

Texas.—Missouri Pac. R. Co. *v.* Heidenheimer, 82 Tex. 195, 17 S. W. 608; Gulf, etc., R. Co. *v.* Humphries, 4 Tex. Civ. App. 333, 336, 23 S. W. 556.

Refusal to deliver to consignee holding original bill on tender of charges entered thereon constitutes a conversion. Southern Exp. Co. *v.* Fant Fish Co., 12 Ga. App. 447, 78 S. E. 197.

Imposition of unreasonable condition.—The refusal to deliver the goods except upon an unreasonable condition is equivalent to an absolute refusal to deliver. Loeffler *v.* Keokuk, etc., Packet Co., 7 Mo. App. 185.

Refusal to trace goods.—If no notice is given of the arrival of goods as required by custom, and by reason of such failure the owner and consignee, acting on the belief that the goods are lost, asks the carrier to trace them, which he refuses to do, such request and refusal are equivalent to demand for the goods and refusal to deliver, and the carrier is liable. Herf, etc., Chemical Co. *v.* Lackawana Line, 70 Mo. App. 274.

Effect of act of God.—Where goods shipped do not reach the point of destination, the carrier is guilty of conversion and liable for their value, except where an act of God intervenes. Williamson & Co. *v.* Texas, etc., R. Co. (Tex. Civ. App.), 138 S. W. 807.

Conversion by receivers under order of court.—The receipt of the goods for transportation and the subsequent alleged conversion being shown to have been committed by receivers who operated a steamship line under orders of the court which appointed them, and the evidence in no way connecting defendant company with either the receipt, the transportation, or the conversion, a verdict finding damages against the latter for such conversion should have been set aside. Ocean Steamship Co. *v.* Wilder, 33 S. E. 179, 107 Ga. 220.

The captain's unwillingness to carry the goods to the place designated by the consignee at the landing, even if sustained by the contract between him and the consignee, did not afford good ground for not landing the goods and tendering them to the consignee, to be delivered on payment of the freight. The Red River, 30 So. 303, 106 La. 42, 87 Am. St. Rep. 293.

Though there was error in the contract of shipment, by which the master bound himself to place the goods on the levee, he had no right to retain the goods on board and leave the place of the goods' destination. The Red River, 30 So. 303, 106 La. 42, 87 Am. St. Rep. 293.

Agent individually liable.—A railroad agent, under orders from the superintendent to deliver no goods consigned to persons who had abandoned the country and gone into the federal lines, refused to deliver goods to the order of such a consignee. It was held, a conversion for which the agent was individually liable. Elmore *v.* Brooks, 53 Tenn. (6 Heisk.) 45.

13. Shellenberg *v.* Fremont, etc., R. Co., 45 Neb. 487, 63 N. W. 859, 50 Am. St. Rep. 561.

14. Qualified refusal to deliver.—Loeffler *v.* Keokuk, etc., Packet Co., 7 Mo. App. 185; McEntee *v.* New Jersey Steamboat Co., 45 N. Y. 34, 6 Am. Rep. 28.

shipper's orders,[15] or sells them,[16] or stores them at destination as its own,[17] or transports them to another place to prevent their coming to the possession of the consignee.[18] Refusal to deliver goods to one not entitled to receive them,[19] or placing them in a private warehouse, at the expense of the owner, without giving him notice of arrival,[20] or retaining them on board where there is no safe place for storage,[21] or transferring them from a sealed car into another for the carrier's convenience,[22] does not amount to a conversion. The mere showing of a breach of contract of transportation, as a bare omission to deliver goods, may not prove conversion.[23] And a failure to deliver goods, if they have been lost when demand is made, will not constitute a conversion, though the loss was caused by negligence,[24] or it was negligence to fail to deliver before such loss.[25] Where a carrier omits for an unreasonable time to deliver property, and then offers to deliver it, the owner can not refuse to receive it, and proceed against the carrier for its conversion, though the latter is liable for damages for the delay.[26]

15. Refusal to deliver in accordance with instructions.—Atchison, etc., R. Co. *v.* Schriver, 84 Pac. 119, 72 Kan. 550, 4 L. R. A., N. S., 1056.

Effect of claim of third person.—Where a carrier has received a car load of goods for transportation according to shipper's order, the claim of a third person to them will not justify the carrier in withholding the delivery according to such order. Atchison, etc., R. Co. *v.* Schriver, 84 Pac. 119, 72 Kan. 550, 4 L. R. A., N. S., 1056.

16. Sale of goods.—Norfolk, etc., R. Co. *v.* Langdon, 84 Atl. 473, 118 Md. 268.

A vessel having on board a cargo of flour for transportation capsized at her wharf before sailing, and the cargo was much damaged. The carriers might easily have communicated with the owners of the cargo, and sought instructions as to the disposal of it; but they neglected to do so, and sold the cargo upon their own authority, at auction, after which the vessel sailed, and in due time arrived at the port of delivery. Held, that the sale of the flour, under these circumstances, was an unlawful conversion by the carrier. The Joshua Barker, Fed. Cas. No. 7,547, Abb. Adm. 215.

17. Storing goods as it's own.—If a carrier, employed to convey cotton to market, and instructed to sell at a certain price, or store it, without any stipulation as to payment of freight, stores the cotton as his own without demanding charges from the consignee or warehouseman, it is a conversion. Blair *v.* Jeffries (S. C.), Dud. 59.

18. Diversion of goods.—Baltimore, etc., R. Co. *v.* O'Donnell, 49 O. St. 489, 32 N. E. 476, 21 L. R. A., N. S., 117, 34 Am. St. Rep. 579.

19. Refusal to deliver to one not entitled.—Where one owning 6,000 tons of iron ore which was stored on a railroad dock gave an order to the railroad company to deliver 3,500 tons to a furnace company, and the furnace company did not take possession nor separate the 3,500 tons from the other ore, and the owner, having learned that the furnace company was financially embarrassed, gave orders to the railroad company to deliver to other persons, which orders were honored, the furnace company never acquired title to the ore, and could not maintain an action of trover and conversion against the railroad company. Staake *v.* Pennsylvania R. Co., 80 Atl. 1102, 231 Pa. 466.

20. Placing goods in warehouse.—Rome R. Co. *v.* Sullivan, etc., Co., 14 Ga. 277.

21. Retaining goods on boat.—The Hattie Palmer, 68 Fed. 380, 15 C. C. A. 479.

22. Goods were sent by a sealed car to be delivered unbroken at the place of destination. The railroad company on the way opened the car and transferred the goods to another. The owner refused to receive them and brought trover. Held, that if the goods are removed for the convenience of the carrier, and are afterwards delivered without loss of quantity and without injury, the carrier would not be liable in trover. Tucker *v.* Housatonic R. Co., 39 Conn. 447.

23. Bare Omission to Deliver.—Taugher *v.* Northern Pac. R. Co., 21 N. Dak. 111, 129 N. W. 747. See Chicago, etc., R. Co. *v.* Barnett, 190 Fed. 118, 111 C. C. A. 158.

A failure by a carrier to tender goods at the place of destination is not per se a conversion. Way *v.* Dennie, 174 Mass. 43, 54 N. E. 347.

24. Goods lost before demand.—Magnin *v.* Dinsmore, 70 N. Y. 410, 26 Am. Rep. 608; Taugher *v.* Northern Pac. R. Co., 21 N. Dak. 111, 129 N. W. 747. See Goldbowitz *v.* Metropolitan Exp. Co., 91 N. Y. S. 318.

25. Southern Exp. Co. *v.* Sinclair, 130 Ga. 372, 60 S. E. 849.

26. Unreasonable delay.—*United States.*—See Chicago, etc., R. Co. *v.* Barnett, 190 Fed. 118, 111 C. C. A. 158.

Iowa.—Clark *v.* American Exp. Co.,

Goods Lost after Failure to Deliver on Demand.—Where the carrier, on demand of the consignee, refuses to deliver the goods without a sufficient excuse, it is liable for their subsequent loss.[27] And where a consignee is erroneously informed by an agent of the carrier that the goods have not arrived, whereby he fails to get them, and they are lost or destroyed, the failure to deliver is such negligence as will render the carrier liable.[28] But where the consignee is subse-

106 N. W. 642, 130 Iowa 254.

New Jersey.—Higgins *v.* United States Exp. Co., 83 N. J. L. 398, 85 Atl. 450.

New York.—Scovill *v.* Griffith, 12 N. Y. 509.

Tennessee.—Illinois Cent. R. Co. *v.* Johnson, 94 S. W. 600, 116 Tenn. 624.

Texas.—Gulf, etc., R. Co. *v.* Everett, 37 Tex. Civ. App. 167, 83 S. W. 257; Baumback *v.* Gulf, etc., R. Co., 4 Tex. Civ. App. 650, 23 S. W. 693; St. Louis, etc., R. Co. *v.* Tyler Coffin Co. (Tex. Civ. App.), 81 S. W. 826; Wells, Fargo & Co. *v.* Hanson, 41 Tex. Civ. App. 174, 91 S. W. 321.

West Virginia.—Ryland *v.* Chesapeake, etc., R. Co., 46 S. E. 923, 55 W. Va. 181.

In an action against a carrier for the conversion of certain goods, in which no demand on the carrier for the goods and refusal on its part were shown, and in which it appeared that defendant still had the goods in its possession, a tender of them was a defense to the action. St. Louis, etc., R. Co. *v.* Tyler Coffin Co. (Tex. Civ. App.), 81 S. W. 826.

Where the agent of the carrier, through inadvertence, erroneously states that goods have not arrived, but later the owner refuses to receive them, the failure to deliver is not a conversion. Louisville, etc., R. Co. *v.* Campbell, 54 Tenn. (7 Heisk.) 253.

September 11th the carrier's agent notified the consignee that a box of goods had arrived for him. The consignee on the next day gave a drayman an order to get the goods. The drayman called on the agent, and paid the freight, and, with a receipt therefor, demanded the goods of an employee of the carrier, who, the drayman testified, told him the goods were short, and that he would take steps to find them. The evidence tended to show that thereafter the consignee demanded the goods, and that the carrier having the consignee's receipt for the goods exhibited it to him; that about three months thereafter the goods were found in the carrier's depot, where they had been all the time, and were tendered to the consignee, who refused to receive them. In an action by the consignee against the carrier for failure to deliver the goods, the court instructed the jury that, if they found for plaintiff at all, they must find the value of the goods. Held error, as the court could not, as a matter of law, say there had been a conversion. Louisville, etc., R. Co. *v.* Lawson, 9 Ky. L. Rep. 681.

27. Goods lost after failure to deliver on demand.—Louisville, etc., R. Co. *v.* McGuire, 79 Ala. 395.

Act of God.—A carrier is liable for goods lost by the act of God after its refusal to deliver to the consignee on presentation of the bill of lading, though the goods were marked by number only, and the delivery was refused because the waybill giving the name of the consignee had not been received when the demand was made, and the contract exempted the carrier from liability for wrong carriage or delivery of goods marked by initials or numbers. Richmond, etc., R. Co. *v.* Benson, 86 Ga. 203, 12 S. E. 357, 22 Am. St. Rep. 446.

28. *United States.*—Central Trust Co. *v.* East Tennessee, etc., R. Co., 70 Fed. 764.

Indiana.—Jeffersonville R. Co. *v.* Cotton, 29 Ind. 498, 95 Am. Dec. 656.

Kansas.—Union Pac. R. Co. *v.* Moyer, 40 Kan. 184, 19 Pac. 639, 10 Am. St. Rep. 183.

Massachusetts.—Stevens *v.* Boston, etc., Railroad (Mass.), 1 Gray 277.

Nebraska.—Burlington, etc., R. Co. *v.* Arms, 15 Neb. 69, 17 N. W. 351.

Tennessee.—East Tennessee, etc., R. Co. *v.* Kelly, 91 Tenn. 699, 20 S. W. 312, 17 L. R. A. 691; S. C., 91 Tenn. 708, 20 S. W. 314.

Wisconsin.—Meyer *v.* Chicago, etc., R. Co., 24 Wis. 566, 1 Am. Rep. 207.

Illustrations.—A bill of lading for hams provided that the railroad company carrying them should not be liable for the hams while at a station awaiting delivery, and that they should be delivered during business hours. The hams reached the station of their destination on Thursday. The consignee inquired for them Thursday and Friday, and was told that they had not arrived. He was notified of their arrival at 5.30 Saturday p. m., and removed them Monday a. m. They were found to have been damaged by heat. Held, that the company was liable. McKinney *v.* Jewett, 90 N. Y. 267, affirming 24 Hun 19.

Where goods were plainly marked, "J. Weil & Bros." but the station agent entered them on the waybill as for "T. Weil & Co.," and when the messengers of J. Weil & Bros. called for the goods, they were told that there was nothing for them, and the mistake was not discovered until the goods were destroyed by fire, it was held that the carrier was liable. Meyer *v.* Chicago, etc., R. Co., 24 Wis. 566, 1 Am. Rep. 207.

quently notified that the goods have arrived, in ample time to remove them before the loss, he can not recover their value on the ground of conversion.[29]

Right of Consignee Who Has Refused Goods.—Though the consignee has refused, under a mistake, to receive goods from a carrier, he may maintain an action for a refusal to deliver them upon his subsequent demand, when they are still in the hands of the carrier, and no other rights have intervened.[30]

Effect of Settlement with Consignee.—In case of unqualified consignment of property, the carrier has the right to assume that the consignee is the owner, and to settle a claim, for damages for the nondelivery of property with him.[31]

§ 837. Excuse for Nondelivery in General.—What Excuses.—A carrier may show as an excuse for nondelivery that the goods were seized under valid legal process,[32] or were delivered to the true owner,[33] or that the shipper wrongfully obtained the goods from the true owner,[34] or that the goods were the carrier's own property,[35] or that consignor had properly exercised his right of stoppage in transitu,[36] or that the delivery was prohibited by law,[37] or the proper authorities,[38] or that the contract of carriage was illegal,[39] or that delivery was prevented by the act of God[40] or the public enemy.[41]

What Does Not Excuse.—Nondelivery by a carrier of goods shipped is not excused by obstructions and difficulties that should have been foreseen,[42] or by the fact that the goods were stolen,[43] or were partially injured by the act of

29. Williams *v.* Delaware, etc., Canal Co., 53 Hun 635, 6 N. Y. S. 36, 25 N. Y. St. Rep. 518, 3 Silvernail 19.

30. **Right of consignee who has refused goods.**—Bacharach *v.* Chester Freight Line, 133 Pa. 414, 19 Atl. 409.

31. **Effect of settlement with consignee.**—Scammon *v.* Wells, Fargo & Co., 84 Cal. 311, 24 Pac. 284.

32. **Seizure under legal process.**—As to seizure under legal process as excusing delivery, see post, "Goods Seized under Legal Process," §§ 870-874.

33. **Delivery to true owner.**—The Idaho, 93 U. S. 575, 23 L. Ed. 978. See post, "Actual Owner," § 856.

Whether the shipper obtained possession by fraud, or whether he honestly supposed he had a right to the property is immaterial. The Idaho, 93 U. S. 575, 23 L. Ed. 978.

Liability to holder of bill of lading.—That goods were taken from the carrier by one from whom the consignor obtained them without paying the price is a good defense to an action by an indorsee of a bill of lading to recover of the carrier for nondelivery, as the seller's title was paramount to that of the consignor. National Bank *v.* Chicago, etc., R. Co., 44 Minn. 224, 46 N. W. 342, 20 Am. St. Rep. 566, 9 L. R. A., N. S., 263.

34. Bates *v.* Stanton, 8 N. Y. Super. Ct. 79.

35. Valentine *v.* Long Island R. Co., 79 N. E. 849, 187 N. Y. 121, reversing 92 N. Y. S. 645, 102 App. Div. 419.

36. **Stoppage in transitu.** — Missouri Pac. R. Co. *v.* Heidenheimer, 82 Tex. 195, 17 S. W. 608. See post, "Stoppage in Transitu," chapter 17.

37. **Delivery prohibited by law.**—Patron *v.* Silva, 1 La. 275.

Where other goods illegal.—If shipper's goods may legally enter the port, the fact that they are on board other goods which, if landed, would expose the ship to seizure, does not excuse the carrier's failure to deliver. Fernandez *v.* Silva, 1 La. 269.

38. A carrier was excused for refusing to deliver a shipment of bananas to the consignee, where, upon its arrival, the carrier was notified by the chief of police not to deliver, and that the consignee would not be allowed to unload and distribute it, if delivered; the chief of police acting under instructions from a sanitary commission created by an ordinance establishing a quarantine against all bananas from New Orleans, though the particular shipment was made from Mobile. Alabama, etc., R. Co. *v.* Tirelli, 93 Miss. 797, 48 So. 962, 17 Am. & Eng. Cas. 879, 21 L. R. A., N. S., 731.

39. **Contract of carriage illegal.**—A shipper of coin and bullion from Mexico to Texas, during the Civil War, in violation of the proclamation of the president of the United States, can not recover of the carrier for failure to deliver it. Cantu *v.* Bennett, 39 Tex. 303.

40. **Act of God.**—Williamson & Co. *v.* Texas, etc., R. Co. (Tex. Civ. App.), 138 S. W. 807; Illinois Cent. R. Co. *v.* McClellan, 54 Ill. 58, 5 Am. Rep. 83. See post, "Loss of or Injury to Goods," chapter 12.

41. **Act of pubic enemy.**—Illinois Cent. R. Co. *v.* McClellan, 54 Ill. 58, 5 Am. Rep. 83. See post, "Loss of or Injury to Goods," chapter 12.

42. **What does not excuse.**—Berje *v.* Texas, etc., R. Co., 37 La. Ann. 468.

43. **Where goods stolen.**—Perkins *v.* Chautauqua Tract. Co., 137 N. Y. S. 80,

God,[44] or because they were piled beneath other goods,[45] or because the carrier failed to have a waybill for them.[46] It does not avail a carrier which has converted goods of a consignee that the consignee had not paid for them,[47] or that the conversion was through an honest mistake,[48] or that the shipper may have been negligent in marking the goods,[49] or that the consignee knew that the bill of lading fraudulently stated the weight of the goods at less than it was, and did not notify the carrier thereof.[50] And it is no defense to an action for conversion against the carrier that by mistake it delivered the goods to a third person, and that it offered to deliver to the consignee other goods of equal value,[51] or that the consignee refused to accept a tender of the goods made after the expiration of the time during which he agreed to extend the period of delivery.[52] A carrier can not set up title in another as a reason for refusing to deliver the goods to the shipper or consignee.[53] A carrier is not excused for nondelivery of money consigned to a bank because the bank was closed when he arrived, and, on failing to find the cashier after going to his house twice, he brought the money back to the consignor, who refused to receive it.[54] The master of a vessel, who delivers most of the goods mentioned in the bill of lading to plaintiff, who claims as the transferee of the bill, can not object, when sued for the rest, that the bill has not been assigned to him.[55] A carrier can not refuse to deliver to consignees, who have purchased and shipped goods for their principal, though he has failed and assigned the goods for the benefit of his creditors.[56]

76 Misc. Rep. 307. See Baltimore, etc., R. Co. *v.* O'Donnell, 49 O. St. 489, 32 N. E. 476, 34 Am. St. Rep. 579, 21 L. R. A., N. S., 117.

44. Houston, etc., R. Co. *v.* Harn, 44 Tex. 623.

45. Louisville, etc., R. Co. *v.* McGuire, 79 Ala. 395.

46. Bowdon *v.* Atlantic, etc., R. Co., 41 So. 294, 148 Ala. 29.

47. Gulf, etc., R. Co. *v.* Rotter Bros. (Tex. Civ. App.), 104 S. W. 402.

48. Frazier *v.* Atchison, etc., R. Co., 104 Mo. App. 355, 78 S. W. 679. See Clement *v.* New York, etc., R. Co., 56 Hun 643, 9 N. Y. S. 601, 30 N. Y. St. Rep. 713.

49. Downing *v.* Outerbridge, 79 Fed. 931, 25 C. C. A. 244.

50. Wiggin *v.* Boston, etc., R. Co., 120 Mass. 201.

51. Clement *v.* New York, etc., R. Co., 56 Hun 643, 9 N. Y. S. 601, 30 N. Y. St. Rep. 713.

52. Hamilton *v.* Chicago, etc., R. Co., 103 Iowa 325, 72 N. W. 536.

53. Estoppel to set up title in another.—Rosenfield *v.* Express Co., Fed. Cas. No. 12,060, 1 Woods 131. Perkins *v.* Chautauqua Tract. Co., 137 N. Y. S. 80, 76 Misc. Rep. 307.

Illustrations.—Where one, without title to goods, delivers them to a carrier, on whom he afterwards gives plaintiff an order for them, and the carrier accepts the order, and receives the charges for freight, in an action of detinue against the carrier for refusal to deliver the goods the carrier is estopped to show that the goods belonged to a third person. Young *v.* East Alabama R. Co., 80 Ala. 100.

The fact that a third person claims goods shipped to the shipper's order, and represents to the carrier that he expects to be able to arrive at an understanding with the shipper within a few days, will not justify the carrier in withholding delivery according to the shipper's order. Atchison, etc., R. Co. *v.* Schriver, 84 Pac. 119, 72 Kan. 550, 4 L. R. A., N. S., 1056.

A vendee of goods delivered them to a carrier for shipment. The vendor claimed that the wrong goods had been delivered, and induced the carrier to change the shipment for his account, so that the goods were never delivered to the vendee. In an action by the vendee against the carrier, the latter offered to prove that the vendor had been indebted to the vendee, and had sold the goods on account, and that subsequently to the shipment the account had been settled, the goods in question deducted, and the balance paid. Held inadmissible, as the carrier could not thus dispute the title of the vendee to the goods. Patterson *v.* Moore, 34 Pa. 69.

54. Merwin *v.* Butler, 17 Conn. 138.

55. Tracy *v.* Storer, 5 La. 366.

56. Jordan, etc., Co. *v.* James, 5 O. 88, wherein the facts were: Commission merchants agreed in Boston with P. to purchase and ship for him and on his notes goods to themselves in Cincinnati, to be sold on commission. They made the purchase, shipped the goods to New Orleans charged with the freight, and paid the insurance. At New Orleans the goods were reshipped to them at Cincinnati, and they were charged with the freight from Boston. On the way the freighters received the goods from them to a new destination and issued a new bill of lading.

§ 838. Right to Require Receipt before Delivery.—The carrier may demand a receipt for the goods from the consignee before delivering them to him.[57] And the carrier is not bound to take receipts for them, part by part, as they are taken away, but may require a receipt for the whole before delivering any.[58] The reasonableness of a regulation of a carrier as to receipts for goods is a question of law, whenever, upon the particular facts found, the court can pronounce upon its legal effect by the application of any rules of law.[59]

§ 839. Requiring Proof of Right to Goods.—As carriers are bound to deliver property to the persons entitled, at their peril,[60] they will be protected in refusing to deliver until they have had an opportunity to determine whether the person demanding the property is entitled to receive it.[61] But the rule of a carrier that consignees must be identified, has no application to a consignee of goods not delivered at their destination, and ordered back to their place of shipment, so as to relieve the carrier from liability for its refusal to deliver to him without

57. Right to require receipt before delivery.—Dwyer *v.* Gulf, etc., R. Co., 69 Tex. 707, 709, 7 S. W. 504; Skinner *v.* Chicago, etc., R. Co., 12 Tex. 707, 709, 7 S. W. 504; Skinner *v.* Chicago, etc., R. Co., 12 Iowa 191, holding that a consignee can not maintain replevin against the carrier on its refusal to surrender the goods without a receipt, reciting that the goods were in good order, where it did not refuse to give him a chance to examine them before executing such receipt.

58. Unreasonable regulation as to receipt.—Defendant, a railroad company, in the regular course of its business of carrying wheat for plaintiff, weighed the same into a delivery bin at its elevator, where it was consigned, from which it could be spouted into wagons or sacks at the consignee's pleasure; but by a regulation the consignee was required, before taking the same from the bin, or before he could ascertain, except from the statements of the defendant, whether the same was correct, to receipt for the wheat as weighed into such delivery bin. Held, that such regulation was, as matter of law, unreasonable and void. Christian *v.* First Division, etc., R. Co., 20 Minn. 21, Gil. 12.

59. Question of law.—Christian *v.* First Division, etc., R. Co., 20 Minn. 21, Gil. 12.

60. Baltimore, etc., R. Co. *v.* Pumphrey, 59 Md. 390. See post, "Misdelivery," §§ 858-866.

61. Requiring proof of right to goods.—*Georgia.*—Bass *v.* Glover, 63 Ga. 745.

Maryland.—Baltimore, etc., R. Co. *v.* Pumphrey, 59 Md. 390.

New York.—McEntee *v.* New Jersey Steamboat Co., 45 N. Y. 34, 6 Am. Rep. 28.

Texas.—Gulf, etc., R. Co. *v.* Fowler, 12 Tex. Civ. App. 683, 34 S. W. 661.

A carrier is not bound to accept the statement of a consignee that he is the owner, as true. But it is the consignee's duty to furnish the evidence of his right to receive the shipment. Gulf, etc., R. Co. *v.* Fowler, 12 Tex. Civ. App. 683, 34 S. W. 661, affirmed in 93 Tex. 661, 684, no op.

The carrier has a right to require the most unquestionable proof of the identity of the person seeking to have a delivery made to him. Moore *v.* Baltimore, etc., R. Co., 48 S. E. 887, 103 Va. 189; Sellers *v.* Savannah, etc., R. Co., 123 Ga. 386, 51 S. E. 398.

A carrier is not bound to forward goods to a person who claims to be the consignee, if they are not accompanied with any instructions or bill of lading, and the claimant produces no authority from the consignor for their delivery, although they are marked with the initials of the claimant's name. Finn *v.* Western R. Corp., 102 Mass. 283.

Where parcels are defectively addressed, a refusal to deliver them to a person not identifying himself as the consignee or producing any evidence of title to the property, coupled with an offer to deliver if such title or authority to receive them is shown, is justified by the duty of carriers to secure delivery to the proper person. McEntee *v.* New Jersey Steamboat Co., 45 N. Y. 34, 6 Am. Rep. 28.

In conversion it appeared that defendant carrier received a horse consigned to "T. & W.," and transported it to the point of destination; that plaintiff claimed the shipment was to himself, and demanded possession of the horse; that defendant refused to deliver it till it had some evidence of plaintiff's right to receive the horse, and used all reasonable efforts to ascertain who was the proper consignee; that plaintiff never furnished any evidence; and that, when it was finally determined to whom the horse should be delivered, he refused to accept the horse, and pay the charges, whereupon defendant sold it at public auction. Held, that there was no conversion by defendant. Gulf, etc., R. Co. *v.* Fowler, 12 Tex. Civ. App. 683, 34 S. W. 661.

his being identified.[62] The question whether the carrier acted in good faith, in delaying delivery to ascertain the identity of the consignee is for the jury.[63]

§ 840. Requiring Production and Surrender of Bill of Lading.—As, in general, a bill of lading is assignable by the consignee and sometimes by the consignor, so as to render the carrier liable to make delivery to the assignee,[64] where a bill of lading covering a shipment has been issued, the carrier may demand its production as a condition precedent to making delivery.[65] And a shipper of goods, who informs a connecting carrier that he holds bills of lading for the goods, is estopped from disputing the fact.[66] Where a shipment is consigned to a certain city, to be delivered at some port of that city in order to be loaded on vessels, the carrier has no right, in the absence of any contract on the subject, to require the surrender of the bills of lading at the city mentioned before the shipment is carried to a port.[67] In Texas it is held that a railroad company has no right to demand surrender of bills of lading as a condition of delivery of the goods which they represent to a consignee who tenders charges and produces the bill of lading for inspection, but refuses to surrender the same;[68] and it is immaterial that there is a general custom among railroads of requiring the surrender of the bill of lading.[69]

62. Thomas *v.* Pacific Exp. Co., 30 Mo. App. 86.

63. Question for jury.—Baltimore, etc., R. Co. *v.* Pumphrey, 59 Md. 390.

64. Bass *v.* Glover, 63 Ga. 745; Dwyer *v.* Gulf, etc., R. Co., 69 Tex. 707, 709, 7 S. W. 504.

65. Right to require production of bill.—Bass *v.* Glover, 63 Ga. 745; Sellers *v.* Savannah, etc., R. Co., 123 Ga. 386, 51 S. E. 398; Kaufman *v.* Seaboard, etc., Railway, 10 Ga. App. 248, 249, 73 S. E. 592; Dwyer *v.* Gulf, etc., R. Co., 69 Tex. 707, 7 S. W. 504; Nashville, etc., R. Co. *v.* Grayson County Nat. Bank (Tex. Civ. App.), 91 S. W. 1106, judgment reversed, in 100 Tex. 17, 93 S. W. 431, where it is held that the carrier would clearly have this right provided it had any good reason to doubt the consignee's right to receive the goods. See Arkansas, etc., R. Co. *v.* German Nat. Bank, 77 Ark. 482, 92 S. W. 522, 113 Am. St. Rep. 160; Finn *v.* Western R. Corp., 102 Mass. 283; Shepard *v.* Heinken, 32 N. Y. Super. Ct. 525.

A carrier is not liable for failure to deliver to an unidentified consignee, where he fails to produce the bill of lading, though he may offer security. Gulf, etc., R. Co. *v.* Freeman, 4 Texas App. Civ. Cas., § 246, 16 S. W. 109.

A shipper of goods telegraphed to the connecting carrier that he held the bills of lading, and that no delivery should be made until bills of lading were surrendered. The carrier thereupon refused to deliver the goods. Subsequently the shipper wrote a letter, addressed to the connecting carrier, recalling the order in the telegram, and directing a delivery without the bills of lading. The consignee presented the letter to the carrier at its office at the place of destination, but the carrier refused to deliver because the bills of lading were not produced, but delivered them on production of the freight receipts. Held, that the carrier was justified in refusing to deliver, and therefore not liable to the shipper for the damage to the goods caused by the delay in the delivery. Schlichting *v.* Chicago, etc., R. Co., 96 N. W. 959, 121 Iowa 502.

A consignee of goods can not obtain possession of them from a carrier, who received them from another carrier, by means of a possessory warrant, without producing the bill of lading, or accounting for it. Bass *v.* Glover, 63 Ga. 745.

66. Schlichting *v.* Chicago, etc., R. Co., 96 N. W. 959, 121 Iowa 502.

67. George & Co. *v.* Louisville, etc., R. Co., 40 So. 486, 88 Miss. 306.

68. Dwyer *v.* Gulf, etc., R. Co., 69 Tex. 707, 7 S. W. 504, followed in Gulf, etc., R. Co. *v.* McCown (Tex. Civ. App.), 25 S. W. 435; First Nat. Bank *v.* San Antonio, etc., R. Co., 97 Tex. 201, 214, 77 S. W. 410.

Where bills of lading were pledged to secure advances made to the purchaser of the goods, and on the bankruptcy of the purchaser a part of the property covered by the bills of lading was in possession of a carrier, its refusal to deliver the property to the pledgee of the bills of lading, except on surrender thereof, was a conversion of the property. Judgment (Tex. Civ. App.), 72 S. W. 1033, modified. First Nat. Bank *v.* San Antonio, etc., R. Co., 77 S. W. 410, 97 Tex. 201.

Reason of rule.—The bill of lading may be of use to the consignor or owner of the goods after a delivery has been made. It must be conceded that the bill of lading was at one time the property of the owner of the goods, and it is not perceived how the delivery of them could destroy his right in this property without his consent. Dwyer *v.* Gulf, etc., R. Co., 69 Tex. 707, 709, 7 S. W. 504.

69. Gulf, etc., R. Co *v.* McCown (Tex. Civ. App.), 25 S. W. 435.

§ 841. Detention for Debt or Charges.—Detention for Debt.—A carrier, having received goods for transportation, can not detain them for a debt due to itself, not connected with the carriage.[70] And where the goods are withheld under a claim for a sum other than that due for freight, the consignee may maintain trover against the carrier.[71] In such an action the carrier can not plead in defense a subsequent tender of delivery on payment of freight charges after the price of the articles comprising the freight had materially declined.[72]

Detention for Charges.—A carrier is not liable for the detention of goods until the charges for freight are paid.[73] And the carrier is not liable for retaining the goods in order to ascertain the amount of charges,[74] or whether there are

70. **Detention for debt.**—Pharr *v.* Collins, 35 La. Ann. 939, 48 Am. Rep. 251.

71. Adams *v.* Clark (Mass.), 9 Cush. 215, 57 Am. Dec. 41; Blair *v.* Jeffries (S. C.), Dud. 59.

When goods are sent, not according to the contract with the owner, but by some other route, there is no lien for freight money; and, if the goods are withheld under a claim of lien, an action of trover will lie for their value. Marsh *v.* Union Pac. R. Co., 9 Fed. 873, 3 McCrary 236.

It can not be assumed, where on the day after the arrival of live stock, the carrier refused to deliver it on the tender of a certain amount, that the refusal was merely because the amount tendered was not equal to the amount claimed for freight, and not because it did not include the day's charges for feed, which the carrier, with the consignee's consent, had caused to be given to the animals. Scott Bros. *v.* Chicago, etc., R. Co., 57 Mo. App. 345.

72. Blair *v.* Jeffries (S. C.), Dud. 59.

73. **Detention for charges.**—*United States.*—The Eddy (U. S.), 5 Wall. 481, 18 L. Ed. 486.

Georgia.—Dixon *v.* Central, etc., R. Co., 110 Ga. 173, 35 S. E. 369.

Maine.—Ames *v.* Palmer, 42 Me. 197, 66 Am. Dec. 271.

South Carolina.—Blair *v.* Jeffries (S. C.), Dud. 59.

Texas.—Missouri, etc., R. Co. *v.* Rines & Co., 37 Tex. Civ. App. 618, 84 S. W. 1092; Texas, etc., R. Co. *v.* Klepper, 29 Tex. Civ. App. 590, 69 S. W. 426; Gulf, etc., R. Co. *v.* Browne, 27 Tex. Civ. App. 437, 66 S. W. 341; Gulf, etc., R. Co. *v.* North Texas Grain Co., 32 Tex. Civ. App. 93, 74 S. W. 567; Missouri Pac. R. Co. *v.* Weissman, 2 Tex. Civ. App. 86, 21 S. W. 426.

Connecting carrier.—A reshipper in good faith at a reasonable rate, under a contract with one holding a possession apparently fair under a bill of lading authorizing a reshipment, must be paid his freight before the owner can claim his property, notwithstanding the first carrier's bad faith. Walker *v.* Cassaway, 4 La. Ann. 19, 50 Am. Dec. 551.

Charges accruing from misdirection.—Where lumber intended for plaintiff at Baird, Texas, was shipped to "Beard," Texas, through mistake of plaintiff's agent at the initial point in signing a shipping bill ordering it consigned to plaintiff at such latter point, and from there it was sent to plaintiff at Baird, which was on defendant company's line, defendant was entitled to hold the lumber for payment of the increased freight charges covering the entire route over which the lumber was so transported, and was not liable in damages for refusal to deliver to plaintiff upon his tender of what would have been the proper amount of freight charges but for such mistake. Texas, etc., R. Co. *v.* Klepper, 29 Tex. Civ. App. 590, 69 S. W. 426.

An offer by consignees "to give security to pay freight, if legally liable," is not such a tender of security as comes within the rule that the consignee is entitled to delivery upon the payment of, or security for, the freight. Fox *v.* Holt, Fed. Cas. No. 5,012, 36 Conn. 558, 4 Ben. 278.

Where property is shipped by a factor, who, under Cal. Code, § 2369, has ostensible authority to deal therewith as his own, "in transactions with third persons not having notice of the actual ownership," the actual owner's recovery, in an action of claim and delivery against the master of a vessel, will be subject to the terms of the shipment. And the master of the vessel has a lien upon the property in his possession for proper charges and freights. Green *v.* Campbell, 52 Cal. 586.

Under Louisiana Civ. Code, art. 3213, the captain of a vessel may keep the goods, unless the shipper or consignee shall give him security for the payment of the freight. But he can not demand payment before giving the consignee an opportunity to inspect the condition of the shipment, and he is bound, upon the consignee's tendering the freight money, to place the whole lot of goods comprising the shipment on the levee, separate from other goods, subject to the inspection of the consignee. Lanata *v.* The Henry Grinnell, 13 La. Ann. 24.

74. Plaintiff shipped certain goods, which, on being refused by the consignee, plaintiff directed to be returned to him. The goods were returned under an "astray waybill," not accompanied by any bill indicat-

in fact any charges due.[75] But the right to detain goods for charges does not exist where the parties have, by their agreement, regulated the time and manner of paying the freight.[76] The person entitled to the goods may maintain an action for conversion against a carrier detaining goods for freight, where, by agreement, the goods are to be delivered before payment,[77] or where the carrier demands a greater amount than the price agreed upon,[78] or an excessive rate,[79] or where the goods have been received from a wrongful holder,[80] or where the damage sustained to the goods is greater than the freight due,[81] or

ing back charges, whereupon defendant's agent refused to deliver the goods until he obtained information as to the amount of such back charges, and, on obtaining such information, the agent notified plaintiff thereof, and tendered the goods to plaintiff on payment of the charges, which plaintiff refused. Held, that the agent's refusal to deliver in the first instance did not constitute a conversion, and hence the carrier was only responsible for loss accruing because of the delay in delivery after the goods were returned. Norfolk, etc., R. Co. *v.* Potter, 66 S. E. 34, 110 Va. 427.

75. A carrier receiving goods at the end of another's line is not responsible for the latter's omission to inform him whether the freight has been paid, and may retain the goods a reasonable time to ascertain the facts. Union Exp. Co. *v.* Shoop, 85 Pa. 325.

Where a station agent had reasonable doubts as to whether a charge for the detention of a car containing plaintiff's goods was lawful, and as to whether the railroad company would insist on payment, his refusal to deliver the goods to the owner before obtaining instructions did not constitute a conversion. Hett *v.* Boston, etc., Railroad, 44 Atl. 910, 69 N. H. 139.

76. Chandler *v.* Belden (N. Y.), 18 Johns. 157, 9 Am. Dec. 193.

77. Goods to be delivered before payment.—Chandler *v.* Belden (N. Y.), 18 Johns. 157, 9 Am. Dec. 193. See Lee *v.* Fidelity Storage, etc., Co., 98 Pac. 658, 51 Wash. 208.

78. Northern Transp. Co. *v.* Sellick, 52 Ill. 249; Isham *v.* Greenham, 12 O. Dec. 183, 1 Handy 357.

When carrier unauthorized to make special rate.—Plaintiff, under a contract with a railroad company for special rates on stock, on their arrival at their destination on another railroad tendered the amount fixed by contract, and demanded delivery, which was refused, unless a larger sum called for by the waybill was paid. In an action against the latter railroad, there was no evidence that the contracting company was authorized to make the special rate for defendant. Held, that a nonsuit was properly granted. Lewis *v.* Richmond, etc., R. Co., 25 S. C. 249.

Connecting carrier.—Plaintiff shipped a horse, to be carried under a through contract over connecting railroads; but the freight charges, as fixed by the carrier, were not sufficient to pay the charges of both carriers, but were sufficient to pay the charges of the last carrier. Held that, on the tender of the agreed freight at the point of destination, the last carrier was bound to deliver the horse. Evansville, etc., R. Co. *v.* Marsh, 57 Ind. 505.

Where goods shipped by a railroad company under a special contract as to charges are received by a connecting line without notice of the contract, with a waybill showing charges in excess of the contract price, and the connecting line, without paying such charges, carries the goods to their destination, and refuses to deliver them to the consignee on tender of the contract price (which is in excess of the amount due the connecting line), the latter is liable for damages sustained by the consignee for failure to deliver the goods after it has had a reasonable opportunity to ascertain the existence of the special contract. Illinois Cent. R. Co. *v.* Brookhaven Mach. Co., 71 Miss. 663, 16 So. 252.

The Arkansas Act of Feb. 27, 1885, providing that all carriers shall surrender freight on payment of the charges specified in the bill of lading, does not apply to a connecting carrier which has neither made, authorized, nor adopted the bill of lading. Loewenberg *v.* Arkansas, etc., R. Co., 56 Ark. 439, 19 S. W. 1051.

79. Excessive rate.—Where a terminal carrier of an interstate shipment, through a mistake as to the rate, refused to deliver the goods until an excessive rate was paid, the refusal amounted to a conversion. Pecos, etc., R. Co. *v.* Porter (Tex. Civ. App.), 156 S. W. 267.

Improper classification of goods.—A railroad company can not refuse to deliver japanned iron rings, designed for a neck yoke for horses, because the consignee refuses to pay freight on them as saddlery hardware, they being properly classified as common hardware. Chicago, etc., R. Co. *v.* Gustin, 35 Neb. 86, 52 N. W. 844.

80. Goods shipped by wrongful holder.—Liefert *v.* Galveston, etc., R. Co. (Tex. Civ. App.), 57 S. W. 899; Savannah, etc., R. Co. *v.* Talbot, 123 Ga. 378, 51 S. E. 401.

81. Damage exceeding charges.—*Kansas.*—Missouri Pac. R. Co. *v.* Peru-Van Zandt Imp. Co., 73 Kan. 295, 85 Pac. 408, 87 Pac. 80, 6 L. R. A., N. S., 1058, 117

where goods of several owners are shipped by one bill of lading, and one of the owners offers the freight due for his goods, though the freight on the other goods is not paid.[82] A void injunction annulling an established interstate railroad rate and directing a lower rate will not authorize a consignee, on refusal of tender of the lower rate fixed by the injunction, to recover the goods shipped in replevin.[83]

§§ 842-846. Mode and Sufficiency of Delivery in General—§ 842. In General.—A carrier must deliver the goods entrusted to it in a proper manner,[84] and in such condition that they may be identified by the consignee.[85] Any manner of delivery, good as against the consignee, is, in the absence of notice that he is not the owner of the goods, good as against the consignor,[86] as where, by direction of the consignee, the delivery of money was at an unusual place, in consequence of which the property was stolen after delivery.[87]

Waiver of Objections.—Where a carrier tenders freight at an unreasonable time or improper place or in an improper manner, the consignee, by accepting the goods, waives all objections which he might have urged against the acceptance under ordinary circumstances.[88] And the consignee discharges the carrier from responsibility for an erroneous delivery by subsequently acquiescing therein.[89]

§ 843. What Constitutes Delivery.—In General.—There is no delivery of the goods so as to discharge the carrier from liability, as such, where it still has control of the goods and no one else may move them without its consent,[90] or where they are inaccessible to the consignee,[91] or where something re-

Am. St. Rep. 468, 9 Am. & Eng. Ann. Cas. 790.

South Carolina.—Ewart *v.* Kerr (S. C.), Rice 203; Miami Powder Co. *v.* Port Royal, etc., R. Co., 38 S. C. 78, 16 S. E. 339, 21 L. R. A. 123.

Vermont.—Dyer *v.* Grand Trunk R. Co., 42 Vt. 441, 1 Am. Rep. 350.

In Georgia it is held that a consignee, can not maintain an action ex contractu against a carrier for the value of goods not delivered, and which the carrier tendered at destination in a damaged condition, but refused to deliver without payment of the usual freight charges, notwithstanding the damage to the goods amount to more than the freight charges, and the shipper demanded that the damages to the shipment be offset against the freight bill. Wilensky *v.* Central, etc., R. Co., 10 Ga. App. 8, 72 S. W. 516; S. C., 72 S. E. 418, 136 Ga. 889, Ann. Cas. 1912 D, 271.

82. Hale *v.* Barrett, 26 Ill. 195, 79 Am. Dec. 367.

83. Void injunction.—Atchison, etc., R. Co. *v.* Foster Lumber Co., 31 Okla. 661, 122 Pac. 139.

84. Mode of delivery.—Trice *v.* Miller, 3 Texas App. Civ. Cas., § 440; Gulf, etc., R. Co. *v.* Clark, 2 Texas App. Civ. Cas., § 512.

85. Galveston, etc., R. Co. *v.* Crow (Tex. Civ. App.), 117 S. W. 170.

86. Sweet *v.* Barney, 23 N. Y. 335, affirming 24 Barb. 533; O'Dougherty *v.* Boston, etc., R. Co. (N. Y.), 1 Thomp. & C. 447.

87. Sweet *v.* Barney, 23 N. Y. 335, affirming 24 Barb. 533.

88. Waiver of objections.—Gulf, etc., R. Co. *v.* Clark, 2 Texas App. Civ. Cas., § 512.

89. O'Dougherty *v.* Boston, etc., R. Co. (N. Y.), 1 Thomp. & C. 447.

90. No delivery where carrier in control of goods.—Huntting Elevator Co. *v.* Bosworth, 179 U. S. 415, 45 L. Ed. 256, 21 S. Ct. 183; Chicago, etc., R. Co. *v.* Bosworth, 179 U. S. 442, 45 L. Ed. 267, 21 S. Ct. 941; Rau *v.* Bosworth, 179 U. S. 443, 45 L. Ed. 268, 21 S. Ct. 194; Bosworth *v.* Carr, etc., Co., 179 U. S. 444, 45 L. Ed. 268, 21 S. Ct. 194.

The line of a railroad company terminated at East St. Louis and it had no track extending into the city of St. Louis, Missouri. It did not own any terminal or facilities for handling of freight business at either point, its business being handled by a terminal company under an agreement by which that company leased to the railroad company terminal facilities and storage room for cars, the contract providing that cars damaged in making and breaking up of trains should be at the risk of the railroad company, and that cars rendered in bad order when the terminal company should use them in making a further conveyance, were to be repaired by the terminal company. The evidence showed that cars in the yards of the terminal company were not

91. Where goods inaccessible.—Hungerford *v.* Winnebago, etc., Transp. Co., 33 Wis. 303.

mains to be done to complete delivery and acceptance;[92] an actual acceptance being necessary to relieve the carrier from liability.[93] But the carrier's liability

to be moved except under orders of the railroad company and that orders from the consignee were not recognized by the terminal company. Cars containing freight for St. Louis were delivered by the railroad company at the yards of the terminal company, and while there awaiting further directions as to the shipment, were destroyed by fire. It was held that the railroad company was liable, as there had been no delivery. Huntting Elevator Co. *v.* Bosworth, 179 U. S. 415, 45 L. Ed. 256, 21 S. Ct. 183; Chicago, etc., R. Co. *v.* Bosworth, 179 U. S. 442, 45 L. Ed. 267, 21 S. Ct. 941; Rau *v.* Bosworth, 179 U. S. 443, 45 L. Ed. 268, 21 S. Ct. 194; Bosworth *v.* Carr, etc., Co., 179 U. S. 444, 45 L. Ed. 268, 21 S. Ct. 194.

92. Where something remains to be done.—The deposit of goods upon a float preparatory to their actual delivery to the consignee does not constitute a delivery thereof, so as to terminate the carrier's liability. Miller *v.* Steam Nav. Co., 10 N. Y. 431, Seld. Notes 64, affirming 13 Barb. 361; Goold *v.* Chapin, 20 N. Y. 259, 75 Am. Dec. 398.

Freight was left on Saturday, at dusk, at the request of the consignee, upon a side track of the railroad; the consignee promising to remove it on Monday morning. The consignee, on opening the car on Monday morning with his own key, found one case opened and the contents removed. Held, that the common carrier was liable for the contents. Eagle *v.* White (Pa.), 6 Whart. 505, 37 Am. Dec. 434.

Plaintiff shipped an engine, together with certain tools and a cable used in connection therewith, consigned to himself at a flag station on defendant's road where defendant maintained a warehouse and a side track, but no station or agent. The consignment was shipped on an open flat car, and on its arrival plaintiff, in passing through the town, discovered the car set out on the side track, and notified his bookkeeper to confer with defendant's agent at an adjoining station and ascertain if the tools belonged to plaintiff, and, if so to unload the same. Plaintiff's bookkeeper was unable to obtain this information until it was too late to unload the material the next day, and during the night the tools and cable were lost or stolen from the car. Held, that the mere setting out of the flat car on the siding, without more, did not constitute a delivery. Normile *v.* Northern Pac. R. Co., 77 Pac. 1087, 36 Wash. 21, 167 L. R. A. 271.

93. Acts not constituting acceptance.—In an action against an express company for the value of a trunk which had been misdelivered, plaintiff testified that when the trunk reached its destination the company's agent agreed that plaintiff might take some things out of the trunk, and leave it in the office for a day or so, upon paying the charges and signing a receipt, and that, upon calling for the trunk, he was informed that it had been delivered to other parties upon the supposition that he had sent for it. The agent testified that he had no authority to make such an arrangement, but did not say that he so notified plaintiff. Held, that there had not been a complete delivery of the trunk to plaintiff. Oderkirk *v.* Fargo, 58 Hun 347, 11 N. Y. S. 871, 34 N. Y. St. Rep. 166.

Merchandise was consigned to plaintiff at a station where he had previously been agent. When the train arrived, the conductor opened the car, and told plaintiff that he had some freight for him. The plaintiff replied that he could not take it—that he was no longer agent—whereupon it was taken to the next station, where it perished. Held, that the company was liable for its value, as there was not a delivery to the consignee, he only refusing to receive as agent for the company. Edwards *v.* Cheraw, etc., R. Co., 32 S. C. 117, 10 S. E. 822.

An express company's agent left word at the store of F., the person entitled to receive a package, that the package was at the office, and F.'s clerk said that F. was absent, and that he would come over and see about it. He afterwards went over, and said that "F. was away, and had the key of the safe, and that the defendants would have to keep it." But the package was not offered to him, nor was it entered on the delivery book according to the custom of the company. Held, that the packages had not been delivered, and that the company was liable. Baldwin *v.* American Exp. Co., 23 Ill. 197, 74 Am. Dec. 190.

A. purchased a quantity of flour to be manufactured by a certain mill and a parol agreement was made by A. and B. for the sale of the flour by the former to the latter for cash on delivery. Afterwards a freight company gave B. an instrument styled a bill of lading, dated before the flour had been manufactured, by which said company acknowledged the receipt by it for the flour from B. and agreed to transport it to C. at Boston, Mass. Afterwards the servants of the transfer company took the flour from said mill, and put it in the custody of a railroad company for which freight company acted as agent, said transfer company giving the superintendent of said mill dray tickets for the flour, and receiving from said railroad company a bill of lading for the flour to be delivered to C. at Boston. Hearing of the embar-

is terminated where the consignee has actually accepted the goods,[94] as where they are pointed out to him and he removes a portion,[95] or has paid the freight,[96] or the carrier retains the goods at his request.[97] And it is held that an actual delivery is not necessary to devest the liability of the carrier, but such liability ceases when the goods are ready for delivery, and a reasonable opportunity to remove them has been afforded.[98] Where an initial carrier wrongfully sent goods by a connecting carrier, whose lines reached but one of the three places of destination, and on arrival of the goods at that point, the shipper disclosed his contract to have them distributed at three points, but compliance therewith was refused until the freight for the entire route was paid the shipper did not accept a delivery of the entire shipment, by paying the freight and accepting

rassment of B., who a few days afterwards became insolvent, A. inquired of the superintendent of the mill about the flour, received from him said dray tickets, and the day after the delivery of the flour to the railroad company went with said tickets and a bill for the flour to B. and requested payment, which not being made A. told B. that he would keep the tickets and make other disposition of the flour. Held, that A's acceptance of the dray tickets did not operate as a delivery, and he was still the owner of the flour and entitled to its possession. Union R., etc., Co. *v.* Yeager, 34 Ind. 1.

94. Acceptance by agent.—In an action against a carrier to recover the value of a car load of lumber consigned to plaintiff at a station where defendant had no agent, it appeared that the car was placed on a side track at such station in the presence of plaintiff's agent, and that he, or some of his employees, jumped on the car, pulled out a piece of the lumber, and said, "This is the lumber we have been waiting for." Held, that a judgment for defendant should not be disturbed. Armistead Lumber Co. *v.* Louisville, etc., R. Co. (Miss.), 11 So. 472.

Agents of both carrier and owner.—The plaintiff shipped tubs of butter by the defendant's boat, and directed the captain to sell them on arrival. On arrival, the captain hauled the boat to the pier, and gave her in charge to another agent of the carrier. The next day the butter was placed on deck. The captain sold part, and the rest was stolen. Held that, from the time the butter was placed on deck, it was to be deemed delivered to the captain as the shipper's consignee. Labar *v.* Taber (N. Y.), 35 Barb. 305.

Plaintiff shipped hay on board a vessel of which defendant was master, and consigned the hay to defendant for sale. It did not appear that defendant had a warehouse or other building at the point of destination for the storage of goods, and there was no custom as to storing hay in such cases. By special agreement the hay was carried on deck, and, the next morning after arriving, defendant began his efforts to sell, leaving the hay on the boat. Held, that plaintiff waived his right to have the hay landed and stored, and that defendant's liability as carrier terminated on arrival at the destination, and his character as consignee to sell began. Stone *v.* Waitt, 31 Me. 409, 52 Am. Dec. 621.

95. Goods pointed out and portion removed.—Where the agent of a railroad company, on the arrival of perishable goods upon their warehouse platform at 10 o'clock a. m. on Saturday, immediately pointed them out to the agent of the consignees, who, on being informed that there was no room for them in the warehouse, took a portion of them away, and not until the next Monday returned for the remainder, when they could not be found, held to be an actual delivery, and within a reasonable time. Culbreth *v.* Philadelphia, etc., R. Co. (Del.), 3 Houst. 392.

In an action against a railroad company for the value of cotton which was burned in a car, it appeared that the cotton had been transported to the place of delivery in safety; that the car was placed on a side track, at the request of plaintiff, and for its convenience; that the waybill had been delivered to defendant, as a receipt and that plaintiff had removed a portion of the cotton. The origin of the fire was unknown. Held, that the evidence showed a delivery of the cotton. Whitney Mfg. Co. *v.* Richmond, etc., R. Co., 38 S. C. 365, 17 S. E. 147, 37 Am. St. Rep. 767.

96. Paying freight.—New Albany, etc., R. Co. *v.* Campbell, 12 Ind. 55.

97. Goods held by request.—Young *v.* Smith (Ky.), 3 Dana 91, 28 Am. Dec. 57.

98. Constructive delivery.—Wood *v.* Milwaukee, etc., R. Co., 27 Wis. 541; Melbourne *v.* Louisville, etc., R. Co., 88 Ala. 443, 6 So. 762. See post, "Carrier as Warehouseman," Chapter 13.

Where a drayage company which was a common carrier was the agent of the consignee to receive a shipment of one car load of goods, which the evidence showed to have been removed in about a day or a day and a half, and the railroad company notified the drayage company more than that time before the goods were destroyed by fire, the car having been

the portion of the goods destined for that point.[99] Where the carrier has made delivery, its liability is terminated, though the consignee or his agent return the goods.[1]

Receipt for Goods.—The delivery of goods is complete when the consignee or his agent gives a receipt for them,[2] though a part is left on the premises of the carrier.[3] But if the agent of the carrier abstracts a parcel while in the act of delivering it, it is no delivery, even though a receipt is signed, and the form of delivery gone through, by the agent's laying the property for a moment out of his hands.[4]

Transfer to Warehouse.—The transfer of goods, consigned in the usual general terms, by a vendor on credit, by a carrier by railway, to a warehouse at the station designated for their discharge, in the vicinity of the vendee's place of business, there to await the payment by him of the charges thereon, does not ipso facto constitute a delivery thereof.[5]

Delivery by One Carrier to Another.—An expressman agreeing to carry baggage to a railroad station is relieved from liability by depositing the bag-

placed on a house track for unloading, there was a completed delivery by the railroad company to the drayage company. Arkadelphia Milling Co. *v.* Smoker Merchandise Co., 100 Ark. 37, 139 S. W. 680.

99. Brown, etc., Co. *v.* Pennsylvania Co., 63 Minn. 546, 65 N. W. 961.

1. **Redelivery by consignee's agent to consignor.**—Where a railroad company receives and issues bills of lading for uncomp essed cotton, and, under due authority, sends it to a compress leased and operated by the assignee of the bills, and his servants, not being informed that he had become the owner by assignment, redeliver it to the original consignor, believing him the owner, the company is not liable to the assignee for failure to deliver the cotton. Missouri, etc., R. Co. *v.* McFadden, 89 Tex. 138, 33 S. W. 853.

Return to warehouse when carrier properly delivered goods.—Where property consigned to a point beyond the terminus of defendant's route was safely transported to the termination of his line, and there delivered to a warehouseman, who acted as agent of the carriers and others in receiving and delivering freight, and who, in accordance with the custom, turned it over, to a teamster, who delivered it to the consignee, it was a delivery which terminated defendant's liability as carrier, though the goods were afterwards returned to the warehouse by the consignee. Salinger *v.* Simmons (N. Y.), 57 Barb. 513, 8 Abb. Pac., N. S. 409, 2 Lans. 325,

2. **Giving receipt.**—Kenny Co. *v.* Atlanta, etc., R. Co., 122 Ga. 365, 50 S. E. 132; State *v.* Intoxicating Liquors, 106 Me. 138, 76 Atl. 265, 29 L. R. A., N. S., 745, 20 Am. & Eng. Ann. Cas. 668.

The word "receipt," as in common use, means no more than a bare acknowledgment of having received something, and, in the absence of evidence to show the contents of a receipt given by a consignee to a railroad company, it was error to permit the jury to assume that the writing contained any special clause enlarging such acknowledgment. Erie R. Co. *v.* Wanaque Lumber Co., 75 N. J. L. 878, 69 Atl. 168.

Receipt before delivery.—In an action to recover money given to an express company to deliver to H. at L., it appeared that the rules of such company required a receipt for money packages before the same were delivered; that on the morning the money in question was to reach L. the train was late, and H. knew he would not have time after the train arrived to receipt for the money and take passage on the train, as he desired; that, therefore, by promising to "relieve" the express agent from liability, he persuaded him to let him (H.) receipt for the money in advance; that after the train arrived the agent carried the package to the platform of the car on which H. stood, and pitched it towards him, saying, "Here is your money;" that the package lodged on the platform step, and it was claimed that H. never actually received it. Held, that the arrangement between the agent and H. terminated the liability of the carrier. Carroll *v.* Southern Exp. Co., 37 S. C. 452, 16 S. E. 128.

3. State *v.* Intoxicating Liquors, 106 Me. 138, 76 Atl. 265, 20 Am. & Eng. Ann. Cas. 668.

4. American Exp. Co. *v.* Haggard, 37 Ill. 465, 87 Am. Dec. 257.

5. **Transfer to warehouse.**—Calahan *v.* Babcock, 21 O. St. 281, 8 Am. Rep. 63.

When goods have arrived at their destination, and notice has been given to the consignee, who does not indicate an intention to receive them, and the goods remain in the custody of the carrier without any agreement to hold them as agent or warehouseman for the consignee, there is no delivery to the consignee. Wheeling, etc., R. Co. *v.* Koontz, 61 O. St. 551, 56 N. E. 471, 76 Am. St. Rep. 435.

gage there at the place provided for it,[6] unless he was ordered to deliver it otherwise.[7]

Delivery to Independent Warehouseman.—Where a carrier is accustomed to deliver goods transported by it to a warehouseman, who is independent of the carrier, and by whom the consignees are notified of the arrival of such goods, and the consignees are aware of the custom, and have long acquiesced in it, the liability of the carrier ends with the delivery of the goods to the warehouseman, and no recovery can be had against the carrier for their subsequent destruction by fire.[8]

Partial Delivery.—Where a carrier fails to deliver a part of a shipment of freight, and the part not delivered is necessary to make the whole shipment effective, it is a failure to deliver the whole.[9] But a shipper is not justified in refusing to receive goods carried for him by rail because one of a number of boxes is missing.[10]

6. Delivery by one carrier to another.—Henshaw *v.* Rowland, 54 N. Y. 242.

Where an expressman who agrees to carry a trunk to a depot, to be taken there at once, delivers it at the place set apart for such baggage, and calls the attention of the baggage agent thereto, and tells him to whom it belongs and on what train it was going, he is not liable for the loss of the trunk. Anniston Transfer Co. *v.* Gurley, 107 Ala. 600, 18 So. 209, 34 L. R. A. 137.

Where a hackman ordered to take a box "to the early train" took it to such train, and, finding no one there authorized to receive it, carried it into the depot—a safe building, locked at night—and, with the baggage master's knowledge, placed it on the platform where trunks for the train were usually put, and the box was lost, he was not, in law, negligent, such delivery being a sufficient compliance with the order. Manheim *v.* Carr, 62 Me. 473.

7. Manheim *v.* Carr, 62 Me. 473.

Defendants, who engaged to carry and deliver a trunk to a certain depot, under a contract to deliver it in a safe place, or keep it until a delivery could be made to the boat, deposited it, with other baggage, on the pier, from which several boats started. Held, that the defendants were liable for the loss of the trunk after it was deposited at the pier. Sunderland *v.* Westcott, 32 N. Y. Super. Ct. 260, 40 How. Prac. 468.

8. Delivery to independent warehousemen.—Black *v.* Ashley, 80 Mich. 90, 44 N. W. 1120.

Grain arrived over defendant's road, consigned to plaintiffs, November 25th and 26th, and was inspected on those days, and weighed by the state weighmaster, and stored by defendant on November 26th in a public warehouse fit for such purposes, for and on behalf of plaintiffs, subject to a general instruction given by the railway companies to all the elevator companies not to issue any warehouse receipts until the paid freight bills were presented. On the afternoon of November 27th (Saturday), between 4 and 5 o'clock, the elevator company gave plaintiffs written notice that the wheat had been placed to their credit, accompanied with a report of the weight and grade. The defendant did not present its freight bill to plaintiffs until November 29th (Monday). The wheat was accidentally destroyed by fire in the elevator on the night of November 27th without any fault of either party. Both parties knew of and acquiesced in the general custom of railroads at that point, which was, in the absence of special instructions to deliver the grain to one of the public elevators for the consignee, immediately upon inspection. Held, that defendant's liability as carrier had terminated before the destruction of the property; and that the instruction contained in the notice that warehouse receipts would not be issued to consignees until the paid freight bills were presented, in no way affected the situation of the property with reference to the duty of the carrier. Arthur *v.* St. Paul, etc., R. Co., 38 Minn. 95, 35 N. W. 718.

9. Partial delivery.—McKerall *v.* Atlantic, etc., R. Co., 76 S. C. 338, 56 S. E. 965.

The shipper is not bound to take any and every remnant of goods, in whatever condition they may be identified and offered to him, short of total destruction. Chicago, etc., R. Co. *v.* Warren, 16 Ill. 502, 63 Am. Dec. 317.

A party delivered 1,716 pounds of rags, put up securely in bags, to a common carrier, to be transported to Chicago; on demand the carrier offered some 500 pounds of rags lying loosely about. Held, that an offer to deliver the rags in such a condition, it not appearing that they were the same rags, was not a delivery pro tato, and that the carrier was liable for the value of the whole. Chicago, etc., R. Co. *v.* Warren, 16 Ill. 502, 63 Am. Dec. 317.

10. Duty of consignee to accept partial delivery.—Gulf, etc., R. Co. *v.* Booton, 4 Tex. Civ. App. 103, 15 S. W. 502.

§ 844. Carrier by Water.—In the absence of a special contract, goods will be regarded as delivered when deposited upon the proper wharf at their place of destination, at a proper time, and notice given to the consignee, after which he has had a reasonable time and opportunity to remove them.[11] But in order to relieve the carrier from responsibility, there must be a delivery on the wharf to some person authorized to receive the goods, or some act must be done which is equivalent to a delivery.[12] A mere deposit of the goods at the ship's own wharf is not sufficient, without an acceptance by the consignee, where the goods are not separated and set apart from the residue of the cargo, and reasonable time and opportunity given for their removal.[13] And the discharge of a cargo

11. Carrier by water.—*United States.*—Salmon Falls Mfg. Co. *v.* The Tangier, Fed. Cas. No. 12,266, 1 Cliff. 396; The Grafton, Fed. Cas. No. 5,656, Olc. 43; Salmon Falls Mfg. Co. *v.* The Tangier, Fed. Cas. No. 12,267, 3 Ware 110; The Middlesex, Fed. Cas. No. 9,533; Kennedy *v.* Dodge, Fed. Cas. No. 7,701, 1 Ben. 311; The Santee, Fed. Cas. No. 12,328, 2 Ben. 519; The Tybee, Fed. Cas. No. 14,304, 1 Woods 358; Warner *v.* The Illinois, Fed. Cas. No. 17,184a.

Louisiana.—Segura *v.* Reed, 3 La. Ann. 695. See Northern *v.* Williams, etc., Co., 6 La. Ann. 578.

New York.—McAndrew *v.* Whitlock, 52 N. Y. 40, 11 Am. Rep. 657, affirming 32 N. Y. Super. Ct. 623; Goodwin *v.* Baltimore, etc., R. Co., 50 N. Y. 154, 10 Am. Rep. 457, reversing 58 Barb. 195.

"As the steamboat or ship can not leave the water, a usage has ripened into law, that a delivery upon the wharf at a public port, with notice to the consignee, will excuse the carrier by water. When there is a contract for any particular mode of delivery, that will, of course, govern." Dean *v.* Vaccaro, 39 Tenn. (2 Head) 488, 75 Am. Dec. 744.

Where the master of a vessel delivered the goods at the place chosen by the consignees, at which they agree to receive them, and did receive a large portion of them after full and fair notice, and the master deposited them for the consignees in proper order and condition at midday, on a week day, in good weather, it was a good delivery according to the general usages of the commercial and maritime law. Richardson *v.* Goddard (U. S.), 23 How. 28, 16 L. Ed. 412.

Bulky articles landed on a wharf are, after notice to consignee, payment of freight, and a reasonable time for their removal, absolutely at his risk; and the carrier is not liable, even as warehouseman, for resulting damage. Goodwin *v.* Baltimore, etc., R. Co., 50 N. Y. 154, 10 Am. Rep. 457, reversing 58 Barb. 195.

The ship is not liable for damage by rain to cargo delivered on wharf, at request of consignee, whose clerk assumed charge thereof, but failed to employ sufficient drays to remove them before night. Ellsworth *v.* Wild Hunter, Fed. Cas. No. 4,411, 2 Woods 315.

Reasonable time is such as gives the consignee time enough, under all proper and ordinary circumstances, and by proceeding in the ordinary mode of those engaged in the same business, to provide for the care and removal of the goods. McAndrew *v.* Whitlock, 52 N. Y. 40, 11 Am. Rep. 657, affirming 32 N. Y. Super. Ct. 623.

12. Sleade *v.* Payne, 14 La. Ann. 453. Goods were shipper to a certain landing, but no consignee was named, and no bill of lading issued. When the boat arrived, the goods were put on the bank by the clerk of the boat, who requested a warehouseman to place them in a shed, which he refused to do. Held, that there was not such a delivery as released the carrier from liability to consignees who did not receive the goods. Bartlett *v.* The Philadelphia, 32 Mo. 256.

13. Delivery on wharf alone.—Redmond *v.* Liverpool, etc., Steamboat Co., 46 N. Y. 578, 7 Am. Rep. 390, reversing 56 Barb. 320. Warner *v.* The Illinois (Pa.), 17 Phila. 549. See Howland *v.* The Henry Hood, Fed. Cas. No. 6,795.

Illustrations.—The carrier is liable where the consignee made repeated calls during the day, and the goods were not placed on the wharf until an advanced hour in the day, and lost through inattention of the carrier's servants. Segura *v.* Reed, 3 La. Ann. 695.

Where goods, on arriving at destination, were, by the defendant's direction, put on the wharf, it was held that this was not a delivery to the consignee, although the goods were taken away (without the direction of the consignee) by a carter usually employed to transport his goods, and the greater part actually received by the consignee; and the defendant was liable for the goods not actually delivered. Ostrander *v.* Brown (N. Y.), 15 Johns. 39, 8 Am. Dec. 211.

Where a vessel discharged goods in a rainstorm which made it impossible for the consignee to take them away, though he knew of their arrival, and the carrier did not check the goods off to the consignee in accordance with its custom, there was not such a delivery to the consignee as relieved the carrier from liability for the loss of the goods while they were on the wharf. Morgan *v.* Dibble, 29 Tex. 107, 94 Am. Dec. 264.

at a remote, unusual, or inaccessible spot, or upon an uncovered pier, so that it is exposed to the weather or to any unusual hazard, may render the carrier liable for resulting injury, notwithstanding a stipulation against the consequences of negligence in its bill of lading.[14] On failure of the shipper to make provision for receiving the cargo, the carrier is at liberty to treat the contract as broken, and land the cargo at the usual place, if there is one, or procure a suitable place at the shipper's expense, or he may wait for the shipper to appear, and rely on obtaining compensation for the delay in an action for breach of the implied contract to receive in a reasonable time.[15]

§ 845. Duties in Making Delivery.—Notice to Consignee—Necessity for.—As to necessity for notice to consignee of the arrival of goods, see elsewhere.[16]

Sufficiency of Notice.—The laws of the state where the delivery of an interstate shipment is made govern as to the sufficiency of notice.[17] The notice must be reasonable;[18] it must inform the consignee with reasonable certainty that the carrier is ready to deliver, and of the place of delivery; and must be given in business hours.[19] Notice by mail is held sufficient,[20] but it must be addressed properly.[21] Newspaper notice is not good unless knowledge of it be brought home to the consignee.[22] And it is held insufficient as to goods from abroad.[23] Notice may be given by posting on a bulletin board at the cus-

14. Discharge at remote or inaccessible place.—Constable *v.* National, etc., Co., 154 U. S. 51, 38 L. Ed. 903, 14 S. Ct. 1062.

15. Wordin *v.* Bemis, 32 Conn. 268, 85 Am. Dec. 255.

16. Necessity for notice to consignee.—See post, "Carrier as Warehouseman," Chapter 13.

17. Sufficiency of notice—What law governs.—Greek-American Produce Co. *v.* Illinois Cent. R. Co., 4 Ala. App. 377, 58 So. 994.

18. Notice must be reasonable.—Crawford *v.* Clark, 15 Ill. 561; Atlantic Nav. Co. *v.* Johnson, 27 N. Y. Super. Ct. 475.

19. T. & P. R. Co. *v.* Schneider, 1 Texas App. Civ. Cas., § 118.

20. Notice by mail.—*Alabama.*—Southern R. Co. *v.* Adams Mach. Co., 165 Ala. 436, 51 So. 779.

Compliance with Code 1896, § 4224, which provides that a carrier, if the destination of freight is a city or town having 2,000 or more inhabitants and a daily mail, is not relieved from responsibility as a carrier unless within twenty-four hours after its arrival notice is given the consignee personally or through the mail, is not shown where one alleged notice was mailed "within a day or two" after arrival of the goods, and another notice was mailed eighteen days after and only two days before the goods were burned. Southern R. Co. *v.* Adams Mach. Co., 165 Ala. 436, 51 So. 779.

New York.—Friedman *v.* Metropolitan, etc., Co., 90 N. Y. S. 401, 45 Misc. Rep. 383.

North Carolina.—Rule 1, Corp. Com. Poythress *v.* Durham, etc., R. Co., 62 S. E. 515, 148 N. C. 391, 18 L. R. A., N. S., 427.

Washington.—Normile *v.* Northern Pac. R. Co., 77 Pac. 1087, 36 Wash. 21, 67 L. R. A. 271.

21. Where goods were directed to the consignee, whose name, and the number of his place of business, were placed upon the box, notice of their arrival, mailed to him, without giving his number, which in consequence thereof was returned, is insufficient. Union Steamboat Co. *v.* Knapp, 73 Ill. 506.

Mailing the notice to the place of delivery where the consignee was known not to be doing business, and where the notice would not be received, is insufficient. National Bank *v.* Southern R. Co., 135 Mo. App. 74, 115 S. W. 517.

An address upon a box intrusted to a carrier read "Wm. Wood & Co., New York," while the shipping ticket read "W. Wood." There were forty persons in the New York directory, who bore the name of "W. Wood." Held, that the carrier did not fulfill its duty by mailing a notice of the arrival of the box at destination to a "W. Wood" selected by chance from the names in the directory. Wood *v.* Baltimore, etc., R. Co., 96 N. Y. S. 184, 48 Misc. Rep. 643.

22. Newspaper notice.—Snow *v.* The Inca, Fed. Cas. No. 13,145a; Kohn *v.* Packard, 3 La. 224, 23 Am. Dec. 453.

The publication of the cargo list of a steamer was not such a notice to the consignee as to discharge the shipowner from liability under a bill of lading, the goods having been unloaded and sold for storage. Caruana *v.* British, etc., Steam Packet Co., Fed. Cas. No. 2484, 6 Ben. 517.

23. Goods from abroad.—Atlantic Nav. Co. *v.* Johnson, 27 N. Y. Super. Ct. 475.

tom house at a port where it is usual so to post such notices.[24] Where a package is jointly addressed to two persons, notice to one of them is notice to both.[25] Actual notice to the consignee's agent is sufficient;[26] but notice to a drayman merely authorized to haul a consignee's goods from the depot,[27] or to a person at the consignee's place of business who represents that he is the consignee,[28] is held insufficient. Where a consignee has actual notice of the arrival of freight, and does not demand it in a reasonable time thereafter, the manner of notice is immaterial.[29] It is held a question for the jury whether notice is sufficient.[30]

Safe-Keeping of Goods.—Until the goods are called for it is the duty of the carrier to take proper care of them, as by depositing them in a safe place.[31] And where circumstances prevent the removal of freight in such time as is usually required by the consignee, it is the carrier's duty to keep it under the responsibility of a warehouseman.[32] But if the owner of goods is present at their arrival, and is then notified that the carrier will not store such goods, and still leaves them, the railroad company may put them off its premises; though if the carrier afterwards place the goods in its shed it waives the refusal and becomes liable as a depository.[33] Where a consignee can not be located, the carrier, if informed that the ownership of the property is in the consignor, is bound to hold it a reasonable length of time, subject to the consignor's order.[34]

Unloading Goods.—It is ordinarily the duty of the carrier to unload the freight and deposit it in a suitable place at which the consignee may receive it;[35]

24. Posting notice.—Constable *v.* National, etc., Co., 154 U. S. 51, 14 S. Ct. 1062, 38 L. Ed. 903.

25. Notice to joint consignee.—Wells *v.* American Exp. Co., 44 Wis. 342.

26. Notice to agent.—Backhaus *v.* Chicago, etc., R. Co., 92 Wis. 393, 66 N. W. 400.

27. Notice to drayman.—Berry *v.* West Virginia, etc., R. Co., 30 S. E. 143, 44 W. Va. 538, 67 Am. St. Rep. 781.

28. Cavallaro *v.* Texas, etc., R. Co., 110 Cal. 348, 42 Pac. 918, 52 Am. Rep. 94.

29. Southern R. Co. *v.* Adams Mach. Co., 165 Ala. 436, 51 So. 779.

30. It is a question for the jury whether notice given to a consignee by a drayman, at 5 o'clock p. m. of a Saturday, of the arrival of goods, which burned the following day in the carrier's warehouse, was not sufficient, where the consignee kept his place of business open that night till 9 o'clock, or later, and there was evidence that the drayman offered to haul the goods then. Frank *v.* Grand Tower, etc., R. Co., 57 Mo. App. 181

31 Safe keeping of goods.—Baltimore, etc., R. Co. *v.* Morehead, 5 W. Va. 293; American Exp. Co. *v.* Hockett, 30 Ind. 250, 95 Am. Dec. 691. See post, II, XI.

The carrier of goods deposited them outside its depot, where they were injured by the weather before they could be taken by the consignee. Held, that the carrier was liable, as it was its duty to warehouse the goods until called for by the consignee. McHenry *v.* Philadelphia, etc., R. Co. (Del.), 4 Har. 448.

A carrier without compensation held liable on the ground of gross negligence, because he deposited the goods in a place which was peculiarly unsafe at the time, by reason of an anticipated raid of hostile troops Adams Exp. Co. *v.* Cressap (Ky.), 6 Bush 572.

A usuage for the shipper to notify the consignee, and for the consignee to call at a railroad station and take the goods without notice from the carriers, will not excuse the railroad company for want of proper care of the goods until they are called for. Browning *v.* Long Island R. Co. (N. Y.), 2 Daly 117.

32. Harris *v.* Louisville, etc., R. Co., 9 Ky. L. Rep. 392.

33. Smith *v.* Nashua, etc., R. Co., 27 N. H. 86, 59 Am. Dec. 364.

34. Southern R. Co. *v.* Born Steel Range Co., 126 Ga. 527, 55 S. E. 173.

35. Duty to unload.—Beaumont *v.* Philadelphia, etc., R. Co., 38 Pa. Super. Ct. 224. See Chicago, etc., R. Co. *v.* Bensley, 69 Ill. 630.

Portion of goods unloaded.—Where, after notice to the consignee of the arrival of goods and the removal of a portion of those unloaded, the remainder of the goods which have been unloaded are destroyed by fire on the wharf, the fact that the carrier has not unloaded a portion of the consignment does not make it liable for the destroyed goods. Wynantskill Knitting Co. *v.* Murray, 90 Hun 554, 36 N. Y. S. 26, 71 N. Y. St. Rep. 33.

Where not duty to unload.—When a car loaded with fruit in baskets is, at the consignee's request, taken for unloading to a platform so placed and constructed that the fruit will be liable to damage from the weather, and also liable to be stolen

but it is held that in the case of bulky freight shipped by cars the carrier is not required to remove it from the car, but discharges its obligation by delivering the car in a safe and convenient position for unloading at the place designated, by the contract, or, in the absence of such designation, on its side track in the usual and customary place for unloading by consignees.[36] And when the consignee knows that the railroad company has no depot or agent at the place of destination, leaving the car containing the goods on a side track at such place is a good delivery, and relieves the carrier of further responsibility, and no liability as warehouseman will be assumed.[37] Where the consignee undertakes to unload the goods, using the carrier's machinery for that purpose, the carrier is not answerable for any loss or injury that may happen in the course of unloading.[38]

Opportunity to Inspect and Remove Goods.—After goods have arrived the carrier must give the consignee a reasonable opportunity to inspect[39] and

if taken from the car, it is not the duty of the defendant to unload the car. Davies *v.* Michigan Cent. R. Co., 131 Ill. App. 649.

Under Arkansas Act March 24, 1887, which provides that a common carrier of freight shall load, transport, and unload freight for the one charge for transportation, defendant could be excused from unloading brick on the ground only that plaintiff voluntarily bound himself by agreement, express or implied, to unload it. Little Rock, etc., R. Co. *v.* Bruce, 55 Ark. 65, 17 S. W. 363.

Illustrations.—A car load of bricks was consigned to plaintiff at "Cloverfield Sta." There was no station agent or side track there, and no one was upon the ground to receive the bricks. After waiting a few minutes, during which the locomotive whistle was repeatedly sounded, the car was carried to a station a mile beyond, and left upon a side track. Held that, since the loaded car could not be left upon the track, it was the duty of the company to unload and leave the bricks upon the ground, and, the freight having been prepaid, plaintiff was entitled to recover their value. Louisville, etc., R. Co. *v.* Gilmer, 89 Ala. 534, 7 So. 654.

A railroad contracted at its own expense to load oil and transport it over its road to a specified point, "and thence by barges to the warehouse" of the company, and "cause the same to be unloaded and returned without delay;" the oil company to pay "on the delivery of the oil." Held, that the contract required the railroad company to unload the oil from the barges at the warehouse, and no freight could be recovered for oil not unloaded. New York Cent., etc., R. Co. *v.* Standard Oil Co., 87 N. Y. 486, affirming 20 Hun 39.

36. Car load freight.—Beaumont *v.* Philadelphia, etc., R. Co., 38 Pa. Super. Ct. 224. McCabe *v.* Atchison, etc., R. Co., 154 Ill. App. 380. See Yount *v.* Wabash R. Co., 119 S. W. 1, 136 Mo. App. 697.

Alabama Code 1907, § 5604, requires cars shipped for "track delivery" to be placed on tracks maintained by railroad companies at accessible places for unloading cars, for the purpose of delivering freight in car load lots. Greek-American Produce Co. *v.* Illinois Cent. R. Co., 4 Ala. App. 377, 58 So. 994.

37. South, etc., R. Co. *v.* Wood, 66 Ala. 167, 41 Am. Rep. 749; Reid *v.* Southern R. Co., 63 S. E. 112, 149 N. C. 423. See Bachant *v.* Boston, etc., Railroad, 187 Mass. 392, 73 N. E. 642, 105 Am. St. Rep. 408.

38. Where consignee unloads.—If A., for whom goods are transported by a railroad company, authorizes B. to receive the delivery and transportation thereof to A. and B. instead of receiving the goods at the usual place of delivery, requests the agent of the company to permit the car which contains the goods to be hauled to a near depot of another railroad company, and such agent assents thereto, and assists B. in hauling the car to such depot, and B. there requests and obtains leave of that company to use its machinery to remove the goods from the car, then the company that transported the goods is not answerable for the want of care or skill in the persons employed in so removing the goods from the car, nor for the want of strength in the machinery used in the removal of them, and can not be charged with any loss that may happen in the course of such delivery to A. Lewis *v.* Western R. Corp. (Mass.), 11 Metc. 509.

39. Opportunity to inspect goods.—*United States.*—The Mary Washington, Fed. Cas. No. 9,229, 1 Abb. U. S. 1, Chase 125; Dibble *v.* Morgan, Fed. Cas. No. 3,881, 1 Woods 406; Bradstreet *v.* Heran, Fed. Cas. No. 1,792, 1 Abb. Adm. 209, affirmed in Fed. Cas. No. 1792a, 2 Blatchf. 116.

Kansas.—Leavenworth, etc., R. Co. *v.* Maris, 16 Kan. 333; Missouri Pac. R. Co. *v.* Wichita Wholesale Grocery Co., 55 Kan. 525, 40 Pac. 899.

New York.—Clark *v.* Masters, 14 N. Y. Super. Ct. 177.

If the consignee can not examine the goods without unlading, the carrier is

remove them,[40] in the usual hours of business.[41] But an actual inspection of the goods and their removal by the consignee is not necessary to a delivery by a carrier.[42]

Duty to Inform Consignee of Charges.—A statute providing that carriers shall inform any consignee of the correct amount due for freight according to classification and rates established and filed is not limited to a shipment where rates have been established and filed; but the carrier must inform the consignee of the charges in any case.[43]

§ 846. Effect of Custom or Usage.—The prima facie obligation of a carrier with respect to delivery may be affected by a well-established and generally well-known custom and usage.[44] Delivery according to the well-known custom and usage of the port will discharge the carrier of its responsibility.[45]

bound to unlade the cargo at his own expense, and place it in such a position that the consignee may exercise these rights, before he can claim his whole freight. Clark *v.* Masters, 14 N. Y. Super. Ct. 177.

40. Opportunity to remove goods.—*United States.*—Dibble *v.* Morgan, Fed. Cas. No. 3,881, 1 Woods 406.

Kansas.—Leavenworth, etc., R. Co. *v.* Maris, 16 Kan. 333; Missouri Pac. R. Co. *v.* Wichita Wholesale Grocery Co., 55 Kan. 525, 40 Pac. 899.

Kentucky.—Louisville, etc., R. Co. *v.* Jones, 10 Ky. L. Rep. 494.

Louisiana.—Maignan *v.* New Orleans, etc., R. Co., 24 La. Ann. 333; Sleade *v.* Payne, 14 La. Ann. 453; Segura *v.* Reed, 3 La. Ann. 695.

New York.—Price *v.* Powell, 3 N. Y. 322; Goodwin *v.* Baltimore, etc., R. Co., 50 N. Y. 154, 10 Am. Rep. 457, reversing 58 Barb. 195; McAndrew *v.* Whitlock, 52 N. Y. 40, 11 Am. Rep. 657, affirming 32 N. Y. Super. Ct. 623.

New Jersey.—Burr *v.* Adams Exp. Co., 71 N. J. L. 263, 58 Atl. 609.

Wisconsin.—Backhaus *v.* Chicago, etc., R. Co., 92 Wis. 393, 66 N. W. 400; Parker *v.* Milwaukee, etc., R. Co., 30 Wis. 689.

Where a consignee requires several days to remove a large quantity of bulky merchandise, the carrier is liable as such for quantities as are lost or stolen from its warehouse before such time expires, though he pointed out to the consignee all the merchandise before he began to remove it. Maignan *v.* New Orleans, etc., R. Co., 24 La. Ann. 333.

If goods are received on a holiday, and it has been the usage of the consignee not to receive goods on those days, he is entitled to a reasonable time after that day to remove them, before the carrier's liability will cease. Russell Mfg. Co. *v.* New Haven Steamboat Co., 50 N. Y. 121.

41. Missouri Pac. R. Co. *v.* Wichita Wholesale Grocery Co., 55 Kan. 525, 40 Pac. 899; Leavenworth, etc., R. Co. *v.* Maris, 16 Kan. 333.

42. Dibble *v.* Morgan, Fed. Cas. No. 3,881, 1 Woods 406.

43. Duty to inform consignee of charges.—Harrill Bros. *v.* Southern R. Co., 144 N. C. 532, 57 S. E. 383. Revisal 1905, § 2633.

44. Effect of custom or usage.—*United States.*—Richardson *v.* Goddard (U. S.), 23 How. 28, 38, 16 L. Ed. 412.

Alabama.—Alabama, etc., R. Co. *v.* Kidd, 29 Ala. 221; Melbourne *v.* Louisville, etc., R. Co., 88 Ala. 433, 6 So. 762, Mobile, etc., R. Co. *v.* Williams, 54 Ala. 168.

Georgia.—Southern Exp. Co. *v.* Everett, 37 Ga. 688; Mosher & Co. *v.* Southern Exp. Co., 38 Ga. 37.

Illinois.—Cahn *v.* Michigan Cent. R. Co., 71 Ill. 96.

Iowa.—Angle & Co. *v.* Mississippi, etc., R. Co., 9 Iowa 487.

Kentucky.—Briant *v.* Louisville, etc., R. Co., 9 Ky. L. Rep. 47.

New Hampshire.—Stimson *v.* Jackson, 58 N. H. 138.

Pennsylvania.—McMasters *v.* Pennsylvania R. Co., 69 Pa. 374, 8 Am. Rep. 264.

Utah.—Sharp *v.* Clark, 13 Utah 510, 45 Pac. 566.

Considered part of contract.—Long-established, uniform, and well-known usage as to the mode of delivery will be considered as a part of the contract of the carrier. The Richmond, Fed. Cas. No. 11,796, 1 Biss. 49.

When no consignee is named, but merely the place of destination, what constitutes a delivery depends on the usages of the trade. Galloway *v.* Hughes (S. C.), 1 Bailey 553.

Must be established by proof.—Where a carrier relies on local usage as controlling the question of sufficiency of delivery, such local usage must be affirmatively established by proof, and evidence of a single case in which such a usage has been acted upon is insufficient. Rowland *v.* Miln (N. Y.), 2 Hilt. 150.

45. Delivery according to usage of port.—Constable *v.* National, etc., Co., 154 U. S. 51, 38 L. Ed. 903, 14 S. Ct. 1062; Richardson *v.* Gooddard (U. S.), 23 How. 28, 16 L. Ed. 412; Field *v.* The Lovett Peacock, Fed. Cas. No. 4,768; Irzo *v.*

But such custom or usage should be known to the shipper,[46] or of such character that he is chargeable with notice of it.[47] Also, it must not be unreasonable,[48] or contrary to the contract of shipment.[49]

Perkins, 10 Fed. 779. The Mill Bay (D. C.), 13 Fed. 181; Atlantic Nav. Co. *v.* Johnson, 27 N. Y. Super. Ct. 475. See Richmond *v.* Union Steamboat Co., 87 N. Y. 240.

46. Custom must be known.—Central R., etc., Co. *v.* Anderson, 58 Ga. 393; Packard *v.* Earle, 113 Mass. 280; Steamboat Albatross *v.* Wayne, 16 O. 513, affirming 4 West. L. J. 527, 1 O. Dec. 219.

But see Turner *v.* Huff, 46 Ark. 222, 55 Am. Dec. 580, holding that a carrier by water can not be held for loss of goods delivered at the proper landing place, although there is no warehouse there, and he gives no notice to the consignee, if such is the uniform usage, although neither shipper nor consignee knows the usage.

Where there are no directions for transportation, save such as may be inferred from marks on the goods, the carrier is only bound to transport and deliver them at their destination according to the established usage of the business in which he is engaged, whether the consignor knew of the usage or not. Hemstead *v.* New York Cent. R. Co. (N. Y.), 28 Barb. 485.

47. To effect the prima facie obligation of a carrier with respect to delivery, the custom and usage must be so uniformly acquiesced in, by length of time, that the jury will feel themselves constrained to say that it entered into the minds of the parties, and made a part of the contract. Cahn *v.* Michigan Cent. R. Co., 71 Ill. 96.

A shipper who has been in the habit of shipping over a certain railroad is chargeable with notice of a general and long-established custom of the road to deliver freight to connecting lines as consignors. Indianapolis, etc., R. Co. *v.* Murray, 72 Ill. 128.

48. Custom must be reasonable.—Reed *v.* Richardson, 98 Mass. 216, 93 Am. Dec. 155. See The Mill Boy, 13 Fed. 181, 4 McCrary 383.

Instances of reasonable customs.—The custom of a port to stop discharging cargoes of brimstone when there is a high wind is not unreasonable. Bertellote *v.* Part of Cargo of Brimstone, 5 Hughes 201, 3 Fed. 661.

A custom of a railroad company to deposit freight on the platform of small way stations without storing it, and without notice to the consignee, is a reasonable one, and will operate to discharge the company from its common-law liability for loss occasioned by its failure to store it. McMasters *v.* Pennsylvania R. Co., 69 Pa. 374, 8 Am. Rep. 264.

Plaintiff sold to B. certain goods, to be paid for in cash on delivery, and B. sold them to W. Plaintiffs, by order of B., caused the property to be shipped on board a vessel of which defendant C. was master, taking a receipt therefor, which they continued to hold. W., without having paid for the property, and without any actual possession or indicia of ownership, procured from the owner of the vessel a bill of lading as owner and shipper of the goods, and indorsed it to persons advancing money on it. Held, in an action of claim and delivery for the goods, that proof of a custom to deliver the bill of lading only to holders of the shipping receipt was admissible; such custom being reasonable, and tending to protect the shipper and shipowner. Blossom *v.* Champion (N. Y.), 37 Barb. 554.

A usage of expressmen, whenever packages arrive at their places of business specially addressed to consignee at establishments where many persons sojourn or are employed, to deliver them in the offices or counting-rooms of such establishments, to the clerks there in charge, for the consignees, and take the receipts of the clerks therefor, without giving notice to the consignees personally, held to be a reasonable usage, in respect to ordinary packages—as a box of clothing of the value of $50. Sullivan *v.* Thompson, 99 Mass. 259.

49. Custom must not violate contracts.—Pennsylvania R. Co. *v.* Stern, 119 Pa. 24, 12 Atl. 756, 4 Am. St. Rep. 626; Collender *v.* Dinsmore, 55 N. Y. 200, 14 Am. Rep. 224, reversing 64 Barb. 457.

Illustration.—In an action against an express company for goods which it contracted to deliver to a certain consignee, "C. O. D. $375, from T.'s Express," evidence of a custom showing that the contract means that T.'s Express was required to collect of the consignee, is inadmissible, as the contract clearly makes it incumbent on defendant to collect from T.'s Express. Collender *v.* Dinsmore, 55 N. Y. 200, 14 Am. Rep. 224, reversing 64 Barb. 457.

Proof of a custom between the carrier and a third person to make and receive delivery of goods formerly shipped without production of the bill of lading, which was not brought home to the shipper, or acquiesced in by him, will not exonerate the carrier from liability when instructed to deliver only on production of bill of lading. Pennsylvania R. Co. *v.* Stern, 119 Pa. 24, 12 Atl. 756, 4 Am. St. Rep. 626. See Midland Nat. Bank *v.* Missouri Pac. R. Co., 132 Mo. 492, 33 S. W. 521, 53 Am. St. Rep. 505, affirming 62 Mo. App. 531.

§ 847. Time of Delivery.—Reasonable Time.—Where the contract of shipment does not specify any particular time for delivery, it must be made within a reasonable time.[50] If a common carrier by water be prevented from delivering goods on account of the freezing up of the river, his obligation to deliver them in a reasonable time after the resumption of navigation will still continue.[51] What is such reasonable time can not be defined by any general rule, but must depend upon the circumstances of each particular case. Thus the mode of conveyance, the distance, the nature of the goods, the season of the year, the character of the weather, and the ordinary facilities of transportation are matters properly to be considered.[52] And whether goods are delivered within a reasonable time is a question for the jury.[53]

Within Reasonable Hours.—The carrier must tender the goods at a reasonable time,[54] and within reasonable hours,[55] which is generally held to be within business hours.[56] And if the goods are tendered after the hours of busi-

50. Reasonable time.—*United States.*—Chicago, etc., R. Co. *v.* Kirby, 225 U. S. 155, 56 L. Ed. 1033, 32 S. Ct. 648, Ann. Cas. 1914A, 510.

Georgia.—Central R., etc., Co. *v.* Georgia Fruit, etc., Exch., 91 Ga. 389, 17 S. E. 904; Central R., etc., Co. *v.* Skellie, 86 Ga. 686, 12 S. E. 1017; Rome R. Co. *v.* Sullivan, etc., Co., 25 Ga. 228; Central R., etc., Co. *v.* Hasselkus, 91 Ga. 382, 17 S. E. 838, 44 Am. St. Rep. 37.

Missouri.—See Bartlett *v.* The Philadelphia, 32 Mo. 256.

Ohio.—Baltimore, etc., R. Co. *v.* O'Donnell, 49 O. St. 489, 32 N. E. 476, 21 L. R. A., N. S., 117, 34 Am. St. Rep. 579; Wyler, etc., Co. *v.* Louisville, etc., Railway, 6 N. P., N. S., 589, 18 O. D. N. P. 722.

Tennessee.—East Tennessee, etc., R. Co. *v.* Nelson, 41 Tenn. (1 Coldw.), 272.

Texas.—Houston, etc., R. Co. *v.* Trammell, 28 Tex. Civ. App. 312, 68 S. W. 716; Morgan *v.* Dibble, 29 Tex. 107, 94 Am. Dec. 264; Gulf, etc., R. Co. *v.* Clark, 2 Texas App. Civ. Cas., § 512; Trice *v.* Miller, 3 Texas App. Civ. Cas., § 440; Missouri Pac. R. Co. *v.* Haynes, 72 Tex. 175, 10 S. W. 398; Gulf, etc., R. Co. *v.* Baugh (Tex. Civ. App.), 42 S. W. 245.

Virginia.—Murphy, etc., Co. *v.* Staton, 17 Va. (3 Munf.) 239.

West Virginia.—McGraw *v.* Baltimore, etc., R. Co., 18 W. Va. 361, 41 Am. Rep. 696; Baltimore, etc., R. Co. *v.* Morehead, 5 W. Va. 293.

"When goods are delivered to a carrier for transportation, the contract which the law implies is, whether there be any writing or not, that the carrier, for a reasonable compensation, will within reasonable time deliver the goods at the place of destination to the consignees." Waring & Co. *v.* Baltimore, etc., R. Co., 3 Wkly. L. Bull. 893, 7 O. Dec. Reprint 553.

Where an owner of goods delivers them to a railroad company to be shipped to a designated point, and a bill of lading is issued to the owner, in which he is named as both shipper and consignee, and which contains the words, "notify" a third person, the company will not be relieved of liability to the owner for loss occasioned by a failure to comply with its obligation, to deliver the goods at the point of destination within a reasonable time, by showing that such failure was due to the instructions not to deliver given by the person whom it was directed in the bill of lading to notify of the arrival of the goods at their destination who at the time of such instructions was not in possession of the bill of lading nor entitled to its possession. Florida Cent., etc., R. Co. *v.* Berry, 116 Ga. 19, 42 S. E. 371.

That a shipper insisted upon the payment of drafts drawn on a third person, who was to be notified of the arrival of the goods, after notice that, in accordance with the directions of such third person, the goods had been transported to a point other than the original place of destination, does not relieve the company from liability to the shipper for failure to transport the property within a reasonable time. Florida Cent., etc., R. Co. *v.* Berry, 116 Ga. 19, 42 S. E. 371.

51. Lowe *v.* Moss, 12 Ill. 477.

52. What is reasonable time.—McGraw *v.* Baltimore, etc., R. Co., 18 W. Va. 361, 41 Am. Rep. 696. See Columbus, etc., R. Co. *v.* Flournoy, 75 Ga. 745.

53. Question for jury.—Columbus, etc., R. Co. *v.* Flournoy, 75 Ga. 745.

54. Tender at reasonable time.—Marshall *v.* American Exp. Co., 7 Wis. 1. See Bartlett *v.* The Philadelphia, 32 Mo. 256.

55. Within reasonable hours.—Houston, etc., R. Co. *v.* Trammell, 28 Tex. Civ. App. 312, 315, 68 S. W. 716, affirmed in 95 Tex. 680, no op.; Missouri Pac. R. Co. *v.* Haynes, 72 Tex. 175, 10 S. W. 398.

56. Within business hours.—Morgan *v.* Dibble, 29 Tex. 107, 119, 94 Am. Dec. 264; T. & P. R. Co. *v.* Schneider, 1 Tex. App. Civ. Cas., § 118.

It is the duty of an express company to deliver packages as soon as practicable after arrival, within the usual hours of

ness, or when the consignee is unable to receive them, such tender will not discharge the carrier.[57] But an offer to deliver a package to a bank need not be made during banking hours,[58] unless such is the special engagement, or the established usage of the place of destination.[59]

Delivery on Holiday.—Where it is a general and uniform custom at a place to which freight is consigned not to make delivery on a certain holiday, negligence can not be predicated on the failure of a carrier to make delivery on that day. And one who ships goods to an agent at such place is bound by the custom, though he had no actual knowledge thereof.[60] But the carrier may discharge a cargo on a holiday, where there is no law or custom forbidding a delivery on such holiday.[61]

Delivery during Rain.—It has been held that for a carrier which has contracted to deliver the goods on the platform at a station where it has no building or agent, without further responsibility therefor, to deliver them during a rain, is not negligence.[62]

§ 848. Necessity for Personal Delivery.—Carriers undertaking to deliver in person must make actual delivery to the proper person at his residence or place of business.[63]

Carriers by wagons are required to deliver the goods to the consignee at his house or place of business, and their liability as carrier continues until such delivery.[64]

Express Companies.—An express company is bound to make personal de-

transacting general business in such place. Marshall *v.* American Exp. Co., 7 Wis. 1.

57. Hill *v.* Humphreys (Pa.), 5 Watts & S. 123, 39 Am. Dec. 117.

58. **Banking hours.**—Young *v.* Smith (Ky.), 3 Dana 91, 28 Am. Dec. 57; Marshall *v.* American Exp. Co., 7 Wis. 1.

In an action by a bank against an express company to recover for a package alleged to have been lost through the negligence of the company, it appeared that it had been the custom of the company to deliver packages to the bank after banking hours. Held, that a tender of a package to the bank 1½ hours after banking hours is equivalent to a delivery. Marshall *v.* American Exp. Co., 7 Wis. 1.

59. Young *v.* Smith (Ky.), 3 Dana 91, 28 Am. Dec. 57.

60. **Delivery on holiday.**—Pennsylvania R. Co. *v.* Naive, 112 Tenn. 239, 79 S. W. 124, 64 L. R. A. 443.

61. Richardson *v.* Goddard (U. S.), 23 How. 28, 16 L. Ed. 412.

A ship was ready to discharge, and, the consignees being notified, she began to discharge on Monday. The consignees took the freight away up to Wednesday night, leaving then a few bales on the wharf. Thursday was the annual "Fast Day" appointed by the governor. During the forenoon of that day more cargo was unloaded, and on the afternoon all that was on the wharf was burnt. Held, that there was a good delivery to discharge the carrier from all liability. Richardson *v.* Goddard (U. S.), 23 How. 28, 16 L. Ed. 412.

62. **Delivery during rain.**—Allam *v.* Pennsylvania R. Co., 183 Pa. 174, 38 Atl. 709, 39 L. R. A., N. S., 535.

63. **Necessity for personal delivery.**—Baldwin *v.* American Exp. Co., 23 Ill. 197, 74 Am. Dec. 190.

In early cases it was held that, as a general rule, a common carrier must deliver the goods, to the owner or consignee personally at the place where the transportation ends, and from this duty he can only be discharged by a special contract, or proof of an opposite usage. Schroeder *v.* Hudson River R. Co., 12 N. Y. Super. Ct. 55. See Fisk *v.* Newton (N. Y.), 1 Denio 45, 43 Am. Dec. 649; Bartlett *v.* The Philadelphia, 32 Mo. 256.

A stipulation in a bill of lading that the goods should be forwarded to "Louisville depot only" is sufficient to relieve the common carrier from making a personal delivery to the consignee at his residence or place of business. Merchants' Despatch, etc., Co. *v.* Merriam, 111 Ind. 5, 11 N. E. 954.

That a consignee had guaranteed the rent of a building, and was thus compelled to pay it, does not justify the carrier in delivering the goods there. Mahon *v.* Blake, 125 Mass. 477.

64. **Carriers by wagons.**—Morris, etc., R. Co. *v.* Ayres, 29 N. J. L. 393, 80 Am. Dec. 215; Bansemer *v.* Toledo, etc., R. Co., 25 Ind. 434, 87 Am. Dec. 367. See Gibson *v.* Culver (N. Y.), 17 Wend. 305, 31 Am. Dec. 297; Richardson *v.* Goddard (U. S.), 23 How. 28, 39, 16 L. Ed. 412.

livery either to the residence or place of business of the consignee.[65] And it must use reasonable diligence and make reasonable inquiry to find the consignee.[66] The rule as to the place and mode of delivery of express packages may be modified by special agreement under which delivery may be made at the express office, and the duty of the carrier is then measured by the usage or the terms of the special agreement.[67] Where it is the custom for consignees to call for packages at the company's office, on being notified of their arrival, it is not bound to make personal delivery.[68] An express company may fix reasonable delivery

65. Express companies. — *Illinois.* — American Merchants' Union Exp. Co. *v.* Wolf, 79 Ill. 430.

Indiana.—Railroad Comm. *v.* Adams Exp. Co., 171 Ind. 138, 85 N. E. 337, 19 L. R. A., N. S., 93, rehearing denied 85 N. E. 966.

Pennsylvania.—American Union Exp. Co. *v.* Robinson, 72 Pa. 274. See Union Exp. Co. *v.* Ohleman, 92 Pa. 323.

New Jersey.—See Burr *v.* Adams Exp. Co., 71 N. J. L. 263, 58 Atl. 609.

West Virginia.—Hutchinson *v.* United States Exp. Co., 63 W. Va. 128, 59 S. E. 949, 14 L. R. A., N. S., 393.

Reciprocal duties.—An express carrier's duty to deliver to the consignee in person, and the consignee's duty to receive, are reciprocal. The consignee cannot, by design, or to promote his convenience, deprive the carrier of the right to terminate by delivery the liability as insurer within a reasonable time. Where the consignee has notice of the arrival, and the carrier is ready to deliver but is prevented by the consignee's absence, the liability as carrier ends, and thenceforward the liability is for reasonable care. Adams Exp. Co. *v.* Darnell, 31 Ind. 20, 99 Am. Dec. 582.

A usage of expressmen, whenever packages arrive at their places of business specially addressed to consignees at establishments where many persons sojourn or are employed, to deliver them in the offices or counting rooms of such establishments, to the clerks there in charge, for the consignees, and take the receipts of the clerks therefor, without giving notice to the consignees personally, held to be a reasonable usage, in respect to ordinary packages, as a box of clothing of the value of $50. Sullivan *v.* Thompson, 99 Mass. 259.

A stipulation, in the receipt for an express package addressed to a consignee at a particular place in a certain city, that it "is to be forwarded to our agency nearest or most convenient to destination only," held not to discharge the expressman from all liability other than for the safe delivery of the package at his own place of business in that city, and its safekeeping there upon arrival. If he has agents there who habitually deliver such packages according to the special address of each, he is bound to deliver the package as it is specially addressed, according to the reasonable usages of his business. Sullivan *v.* Thompson, 99 Mass. 259.

Where an express company deposited goods on the station platform at the place of destination, without delivering them to the consignee, or placing them in the custody of any person, held, that this was gross negligence, and rendered the company liable as a common carrier for their loss, although the company's agent, to whom they were tendered by the consignor's messenger for shipment, at first declined to receive them because the company had no agent at the place of destination, and was not allowed to use the depot of the railroad company, and although the shipping agent, in signing the receipt, added the words "owner's risk," but without the knowledge or consent of consignor, and although the consignee, when he ordered the goods to be forwarded by the express company, knew that the company had no agent at the place of destination, and he had lately received goods forwarded by it under receipts containing the same added words. Southern Exp. Co. *v.* Armstead, 50 Ala. 350.

66. Witbeck *v.* Holland, 55 Barb. 443, 38 How. Prac. 273, affirmed in 45 N. Y. 13, 6 Am. Rep. 23.

An express company is liable for failure to deliver a package to the consignee, where its inquiries as to him were confined to a few persons in the vicinity of its place of business, and it obtained information as to a person so named, who was the father of the consignee, but made no inquiry of him. Witbeck *v.* Holland, 45 N. Y. 13, 6 Am. Rep. 23.

An express company is liable for a package that was stolen after having been held by the company for some time because it did not know of the consignee's residence, where it knew of two families in the city by the same surname as the consignee, and by inquiring of either could have learned of the residence. Witbeck *v.* Holland, 55 Barb. 443, 38 How. Prac. 273.

67. Special agreement.—Hutchinson *v.* United States Exp. Co., 63 W. Va. 128, 59 S. E. 949, 14 L. R. A., N. S., 393.

68. Custom for consignees to call for packages.—Southern Exp. Co. *v.* Holland, 109 Ala. 362, 19 So. 66.

limits in towns and cities;[69] and where it has established such limits, it is not liable for refusing to deliver packages at the store of one who, knowing of the limits, moved his store outside thereof, though the limits established in another direction were further from the company's office than such store.[70]

Railroad Companies.—The general rule that the undertaking of a carrier to transport goods to a particular destination includes the obligation of safe delivery to the consignee or his agent does not apply to railroad companies. A universal custom relieves them from the duty of personal delivery to the consignee.[71] And the same principal is applicable to a corporation of freighters owning a line of freight cars.[72] If a railway company, receiving goods for transportation over its road, exacts the payment of cartage in advance of shipping, this will constitute an express contract to deliver at the consignee's place of business, and its liability for damages will not cease until this is done.[73]

Carriers by Water.—Where the contract is to carry by water the carrier is not required to make personal delivery to the consignee; it is enough that the master discharge the goods upon the wharf, giving due and reasonable notice to the consignee of the fact.[74] The rule that the carrier is not bound to de-

69. **Reasonable limits for delivery.**—Railroad Comm. *v.* Adams Exp. Co., 171 Ind. 138, 85 N. E. 966, 19 L. R. A., N. S., 93, denying rehearing 85 N. E. 337.

70. Bullard *v.* American Exp. Co., 107 Mich. 695, 65 N. W. 551.

71. **Railroad companies.**—*United States.*—Atchison, etc., R. Co. *v.* Interstate Commerce Comm., 188 Fed. 229; Southern Pac. Co. *v.* Interstate Commerce Comm., 188 Fed. 241.

Alabama.—South, etc., R. Co. *v.* Wood, 66 Ala. 167, 41 Am. Rep. 749.

Illinois.—Vincent *v.* Chicago, etc., R. Co., 49 Ill. 33; Merchants' Dispatch Transp. Co. *v.* Hallock, 64 Ill. 284; Illinois Cent. R. Co. *v.* Friend, 64 Ill. 303.

Indiana.—Bansemer *v.* Toledo, etc., R. Co., 25 Ind. 434, 87 Am. Dec. 367.

Michigan.—Michigan Cent. R. Co. *v.* Ward, 2 Mich. 538.

Missouri.—Buddy *v.* Wabash, etc., R. Co., 20 Mo. App. 206.

Where a part of goods were destroyed, and the remainder arrived uninjured, the carrier, in order to avoid liability for the entire amount of the goods shipped, is not bound to make, nor offer to make, a personal delivery of the property to the consignee. Michigan, etc., R. Co. *v.* Bivens, 13 Ind. 263.

72. **Freighters.**—Merchant's Dispatch Transp. Co. *v.* Hallock, 64 Ill. 284.

Where it is the usage of a merchants' dispatch transportation company, upon the consignee's request, to deliver goods shipped upon their arrival to teamsters not in the company's employ, who deliver them to the consignee at the latter's expense, collecting their charges from him, in the absence of such a request the company's liability as a carrier is terminated by storing the goods in its warehouse provided for that purpose, if such warehouse is safe and suitable. Merchants' Dispatch Transp. Co. *v.* Hallock, 64 Ill. 284.

73. **Charge for cartage.**—Cahn *v.* Michigan Cent. R. Co., 71 Ill. 96.

If a railroad company accepts goods for transportation from B. to W., and charges in addition to the usual freight for transportation between these points a further compensation for streetage to the foot of Sixth street, and fails to deliver the goods to the consignee or his agent, or at the foot of Sixth street, the consignor is entitled to recover, although the jury may find that the terminus of the road is within the depot in W., and that the goods were safely delivered at that point. Baltimore, etc., R. Co. *v.* Green, 25 Md. 72.

74. **Carrier by water.**—*United States.*—The Eddy (U. S.), 5 Wall. 481, 18 L. Ed. 486; Richardson *v.* Goddard (U. S.), 23 How. 28, 16 L. Ed. 412; The Grafton, Fed. Cas. No. 5,656, Olc. 43.

Indiana.—Bansemer *v.* Toledo, etc., R. Co., 25 Ind. 434, 87 Am. Dec. 367.

Louisiana.—Kohn *v.* Packard, 3 La. 224, 23 Am. Dec. 453.

Massachusetts.—Chickering *v.* Fowler (Mass.), 4 Pick. 371.

New York.—McAndrew *v.* Whitlock, 52 N. Y. 40, 11 Am. Rep. 657, affirming 32 N. Y. Super. Ct. 623; Redmond *v.* Liverpool, etc., Steamship Co. (N. Y.), 56 Barb. 320.

Pennsylvania.—Cope *v.* Cordova (Pa.), 1 Rawle 203.

Contra.—The responsibility of a carrier upon the Ohio river does not cease upon the delivery of goods on the wharf, and notice given to the consignee, but it is his duty to attend to the actual delivery. Hemphill *v.* Chenie (Pa.), 6 Watts & S. 62.

A promise by a shipmaster to deliver goods to a consignee does not bind him to deliver them personally, or at any particular wharf. Chickering *v.* Fowler (Mass.), 4 Pick. 371.

Unless a carrier by water has undertaken to do something more, when it de-

liver to the consignee at his place of business may be controlled by well-established custom.[75]

§§ 849-853. Place of Delivery—§ 849. In General.—A carrier must deliver goods at a safe place;[76] accessible to the consignee.[77] And where delivery is to be made from the car it must be placed where it can be conveniently unloaded.[78] A carrier by water is not obliged to deliver freight at a pier nearest to the address of the consignee as given in the bill of lading.[79] As a general rule placing cars on side tracks does not complete the carrier's contract of carriage,[80] unless such is the agreement of the parties.[81]

Destination Not on Carrier's Route.—When a common carrier undertakes to transport goods, consigned to a person residing beyond his route, at a point to which there is no connecting carrier, his liability is terminated by delivery of the goods to a warehouseman at the point upon his route nearest to the residence of the consignee, and notifying the latter.[82] In such case, where the evidence is conflicting, what is the proper place of delivery is a question for the jury.[83]

Regulations Respecting Delivery.—A carrier may require the consignee to receive freight on the platform of its depot.[84] And it may have yards for its convenience in handling, storing, and distributing freight, and will not be obliged as a common carrier to transport freight from one point in the yards to another for the convenience of shippers.[85]

livers the goods into the custody of the wharfinger, upon the wharf, the transit is ended, and its responsibility as carriers ceases. Farmers', etc., Bank *v.* Champlain Transp. Co., 23 Vt. 186, 56 Am. Dec. 68.

Deposit on bank of river.—In the absence of any special contract, it is negligence in a common carrier of goods to deliver them by merely placing them upon the bank of a river, in the absence of the consignee, and not under the care of the agents of the carrier, he having agents at the point for the purpose of receiving and delivering goods. Dresbach *v.* California Pac. R. Co., 57 Cal. 462.

75. Effect of custom.—Briant *v.* Louisville, etc., R. Co., 9 Ky. L. Rep. 47.

76. Safe place.—A railroad company is responsible for the loss of a heavy article, incurred in the act of delivery to the consignee at an unusual and unfit place. So held where the road employees had rolled from a car a hogshead of molasses upon a "new platform," and in their attempt to help the consignee's driver to raise it thence, into his wagon, it burst. Benbow *v.* North Carolina R. Co., 61 N. C. 421, 98 Am. Dec. 76.

77. Position of accessibility.—Russell Grain Co. *v.* Wabash R. Co., 89 S. W. 908, 114 Mo. App. 488; Brooks Mfg. Co. *v.* Southern R. Co., 68 S. E. 243, 152 N. C. 665.

A sale of goods after arrival at destination, but before delivery, did not relieve the carrier from the duty to the buyer, derived from the consignee, to place the goods in a position of accessibility for delivery. Russell Grain Co. *v.* Wabash R. Co., 89 S. W. 908, 114 Mo. App. 488.

78. Bachant *v.* Boston, etc., Railroad, 187 Mass. 392, 73 N. E. 642, 105 Am. St. Rep. 408.

79. Western Transp. Co. *v.* Hawley (N. Y.), 1 Daly 327.

80. Placing cars on side track.—Klass Comm. Co. *v.* Wabash R. Co., 84 Mo. App. 164; Loeb *v.* Wabash R. Co. (Mo. App.), 85 S. W. 118. See Missouri Pac. R. Co. *v.* Haynes, 72 Tex. 175, 10 S. W. 398.

81. Southern R. Co. *v.* Barclay, 56 So. 26, 1 Ala. App. 348.

When a consignee of goods is fully advised at the time of shipment that the railroad company has no depot or agent at the place of destination, the exigencies of its business not requiring such, the liability of the company as common carrier terminates with the safe delivery of the car containing the goods on a side track at such place, and no liability as warehouseman will be assumed. South, etc., R. Co. *v.* Wood, 66 Ala. 167, 41 Am. Rep. 749.

82. Destination not on carrier's route.—Salinger *v.* Simmons (N. Y.), 8 Abb. Prac., N. S., 409, 57 Barb. 513, 2 Lans. 325.

83. Question for jury.—Louisville, etc., R. Co. *v.* Bernheim, 113 Ala. 489, 21 So. 405.

84. Delivery on platform.—Donovan *v.* Texas, etc., R. Co., 64 Tex. 519.

85. Louisville, etc., R. Co. *v.* Higdon, 148 S. W. 26, 149 Ky. 321.

But a carrier by railroad can not arbitrarily and without any relation to the use to which it is put designate a part of its track or system as yards or switching limits, and assert that it owes no duty as a carrier in that district except such as it chooses to assume, nor can it classify

Contradiction between Bill of Lading and Marks on Goods.—In case of a shipment of goods, the point of delivery called for by the bill of lading must control, though differing from the marks on the box of goods shipped, and must be taken to be the contract between the parties.[86] A stipulation in a bill of lading to deliver goods at a particular point is not changed by the carrier's agent marking the goods with a different address, so as to make the carrier liable for failing to deliver at the latter place.[87]

Usage or custom may control as to the place of delivery.[88] But such usage or custom must not be unreasonable or illegal,[89] and must have been known by the consignee.[90]

or divide its trackage into parts, and say that on one part it is a carrier and on another it is not. Louisville, etc., R. Co. *v.* Higdon, 148 S. W. 26, 149 Ky. 321.

86. Contradiction between bill of lading and marks on goods.—Moore & Son *v.* Henry, 18 Mo. App. 35.

A bill of lading acknowledged the receipt of the goods from the consignors, in New York, addressed to M., at B., Ill., but contained a cause that they were to be forwarded "to Chicago depot only." The consignors had been in the habit of so shipping. The goods arrived at Chicago, were stored in a warehouse, and were destroyed by the great fire of October 9, 1871. Held, that the presumption of an agreement to deliver the goods at B., raised by the acceptance of the goods so marked, was overcome by the express contract in the bill of lading, and M. could not recover from the carrier for the loss. Merchants' Dispatch, etc., Co. *v.* Moore, 88 Ill. 136, 30 Am. Rep. 541.

Expression in bill of lading not controlling.—The expression in the bill of lading, "to be forwarded to East St. Louis station, on its line," is not such an express contract to forward to East St. Louis as overcomes the implied agreement, from the "marks and destination," to carry to St. Louis, a point beyond. Wabash, etc., R. Co. *v.* Jaggerman, 115 Ill. 407, 4 N. E. 641.

87. King *v.* De Land, etc., R. Co., 10 O. Dec. 8, 18 Wkly. L. Bull. 39.

88. Usage or custom.—*United States.*—The Grafton, Fed. Cas. No. 5,656, Olc. 43, affirmed in Fed. Cas. No. 5,655, 1 Blatchf. 173.

Alabama.—Stone *v.* Rice, 58 Ala. 95.

Illinois.—Cahn *v.* Michigan Cent. R. Co., 71 Ill. 96.

Indiana.—Pittsburg, etc., R. Co. *v.* Nash, 43 Ind. 423.

Michigan.—Gates *v.* Detroit, etc., R. Co., 122 N. W. 1078, 158 Mich. 477.

New Hampshire.—Stimson *v.* Jackson, 58 N. H. 138.

New York.—Atlantic Nav. Co. *v.* Johnson, 27 N. Y. Super. Ct. 475.

North Carolina.—Homesly *v.* Elias, 66 N. C. 330.

South Carolina.—See Galloway *v.* Hughes, 1 Bailey 553.

A custom of a railway company to deliver goods at the consignee's place of business is not established by the fact that the company delivered goods arriving at its depot to a carter, to be by him delivered, only when the consignee did not furnish his own teams or give directions to the contrary; the company not being interested in the cartage of the goods. Cahn *v.* Michigan Cent. R. Co., 71 Ill. 96.

Where it has been the custom of a railroad company to deliver cars loaded with lumber for the plaintiff, at or near his place of business, it will be presumed that a contract of shipment was made with reference to such custom, and the company is bound to deliver the cars at the usual place. Pittsburg, etc., R. Co. *v.* Nash, 43 Ind. 423. See Gates *v.* Detroit, etc., R. Co., 122 N. W. 1078, 158 Mich. 477.

A usage to deliver goods consigned to a particular person, though in different parcels, at one place, will relieve the carrier from his responsibility as insurer, where he offers to make such delivery, but the consignee claims the right to require a delivery at different places. The Richmond, Fed. Cas. No. 11,796, 1 Biss. 49.

89. Usage must be reasonable and legal.—Reed *v.* Richardson, 98 Mass. 216, 93 Am. Dec. 155.

Illustrations.—A custom can not be upheld as reasonable which would justify a steamboat carrier in putting off goods consigned to such a landing at the usual place on the river bank, without any protection, when the landing had been broken up by an inundation and the washing away of the building, and the persons in charge had removed. Stone *v.* Rice, 58 Ala. 95.

A usage of a port, that, in order to constitute a delivery of water-borne goods by the carrier, a receipt therefor must be given by the consignee or his agent, and that until then the liability of the carrier continues, is unreasonable and illegal. Reed *v.* Richardson, 98 Mass. 216, 93 Am. Dec. 155.

90. *Colorado.*—Denver, etc., R. Co. *v.* De Witt, 1 Colo. App. 419, 29 Pac. 524.

Massachusetts.—Packard *v.* Earle, 113 Mass. 280.

Ohio.—Albatross *v.* Wayne, 16 O. 513.

Contra.—See Turner *v.* Huff, 46 Ark. 222, 55 Am. Dec. 580.

§ 850. Usual Place at Destination.—The place of destination is the proper place for a carrier to deliver a shipment of goods;[91] and the consignee is under no obligation to receive them elsewhere.[92] Unless the specific place is named in the contract of shipment, property is to be delivered at the usual place for making such delivery at the point of destination.[93] In the absence of a custom authorizing the agent of a railroad company, at the request of the consignee, after the car has reached its destination, to undertake to deliver it at another place, such an undertaking is nothing more than a personal accommodation on the part of the agent, and can not render his principal liable.[94] The unqualified refusal of a consignee to receive goods tendered him by the carrier is a waiver of

91. **Destination named in bill of lading.**—*Arkansas.*—St. Louis, etc., R. Co. *v.* Kilberry, 83 Ark. 87, 102 S. W. 894.

Georgia.—Rome R. Co. *v.* Sullivan, etc., Co., 14 Ga. 277.

Illinois.—St. Louis, etc., R. Co. *v.* Rose, 20 Ill. App. 670; Coats *v.* Chicago, etc., R. Co., 134 Ill. App. 217.

Ohio.—Waring & Co. *v.* Baltimore, etc., R. Co., 3 Wkly. L. Bull. 893, 7 O. Dec. Reprint 553; Oskamp *v.* Southern Exp. Co., 61 O. St. 341, 56 N. E. 13; Southern Exp. Co. *v.* Oskamp, etc., Co., 14 O. C. C. 176, 7 O. C. D. 417.

Texas.—Gulf, C. & S. F. Ry. Co. *v.* Clark, 2 Texas App. Civ. Cas., § 512; Gulf, etc., R. Co. *v.* Baugh (Tex. Civ. App.), 42 S. W. 245.

Where "privilege of reshipping" is reserved in the bill of lading, the carrier continues liable until the goods are safely delivered at the port of destination. The privilege of reshipment is to allow him to carry the goods in another's vessel, if he will, but does not discharge or affect his liability for the safe delivery of the goods. Little *v.* Semple, 8 Mo. 99, 40 Am. Dec. 123.

Where a package was misaddressed, a delivery to the consignee at a place other than that to which the package was directed would have been at the carrier's peril. Mott *v.* Long Island R. Co., 123 N. Y. S. 49.

Change of destination by consignee.—Where a consignee, having his place of business at East St. Louis, was in the habit of receiving goods in car-load lots billed to St. Louis, and had directed a carrier, whose line terminated at East St. Louis, to hold at East St. Louis all such goods carried by it, and consigned to him at St. Louis, held, that the carrier was justified in still delivering such goods to a connecting carrier, and forwarding them to St. Louis, in spite of such notification. Wabash, etc., R. Co. *v.* Jagger-man, 115 Ill. 407, 4 N. E. 641

92. Gulf, etc., R. Co. *v.* Clark, 2 Texas App. Civ. Cas., § 512; Houston, etc., R. Co. *v.* Adams, 49 Tex. 748, 759, 30 Am. Rep. 116. See Gulf, etc., R. Co. *v.* Frank Co. (Tex.), 48 S. W. 210.

93. **Usual place.**—*Arkansas.*—Missouri, etc., R. Co. *v.* Pullen, 90 Ark. 182, 118 S. W. 702.

Illinois.—Crawford *v.* Clark, 15 Ill. 561.

Missouri.—Russell Grain Co. *v.* Wabash R. Co., 89 S. W. 908, 114 Mo. App. 488.

New Jersey.—Erie R. Co. *v.* Wanaque Lumber Co., 75 N. J. L. 878, 69 Atl. 168.

New York.—Atlantic Nav. Co. *v.* Johnson, 27 N. Y. Super. Ct. 475.

Where a local custom bound a railroad company to deliver cars loaded with lumber for plaintiff at or near his place of business, and the local agent agreed to run such cars to the usual place, and the lumber was thereafter destroyed, the company is liable. Pittsburgh, etc., R. Co. *v.* Nash, 43 Ind. 423.

Depot or warehouse.—Carriers by railroad and canal usually deliver at warehouses belonging to themselves or others. Richardson *v.* Goddard (U. S.), 23 How. 28, 39, 16 L. Ed. 412.

A carrier's contract of carriage continues until delivery at its depot or warehouse where goods are customarily unloaded and delivered. Klass Comm. Co. *v.* Wabash R. Co., 84 Mo. App. 164; Loeb *v.* Wabash R. Co. (Mo. App.), 85 S. W. 118.

Where usual place unsafe.—A steamboat carrier, having goods consigned to a consignee at a landing where there had been a warehouse keeper who usually received and took care of goods landed there, can not avoid liability by proving a delivery of goods at the usual place on the river bank, without any protection or guard, when the landing had in the meantime been broken up by an inundation, and the washing away of the buildings and the removal of the person which constituted it a landing. Stone *v.* Rice, 58 Ala. 95.

Where the usual wharf for discharging is blocked so that a vessel can not obtain access to it, the discharge of her cargo, for the mutual advantage of ship and consignees, at a neighboring wharf, which is a fit and proper place therefor, is not a deviation such as to render the company an insurer of cargo there discharged without notice to the consignee, until its actual delivery to him. Constable *v.* National, etc., Co., 154 U. S. 51, 14 S. Ct. 1062, 38 L. Ed. 903.

94. Melbourne *v.* Louisville, etc., R. Co., 88 Ala. 443, 6 So. 762.

the right to insist on a delivery at the usual place of delivery.[95]

§ 851. Specified Place.—A carrier must deliver a shipment at a specified place where it so agrees;[96] and delivery at such place will, in any case, be sufficient.[97] Under a carrier's demurrage rule, so providing, where delivery of carload freight can not be made on a particular track selected, the carrier is entitled to make delivery at the nearest available point.[98]

§ 852. Intermediate Point.—The one who has the right to receive the goods shipped to a certain destination may withdraw them at any point on the route, on payment of the freight to the destination in case it has not been prepaid,[99] where he can do so without unreasonable interference with the business of the carrier;[1] and if he receives the goods before they have arrived at the place of delivery, the carrier is relieved from further responsibility.[2] But an

95. Effect of refusal to receive goods.—Central, etc., R. Co. *v.* Montmollen, 145 Ala. 468, 39 So. 820, 117 Am. St. Rep. 58.

96. Delivery at specified place.—*Massachusetts.*—Chickering *v.* Fowler (Mass.), 4 Pick. 371.

Michigan.—Moore *v.* Michigan Cent. R. Co., 3 Mich. 23.

Texas.—Texas, etc., R. Co. *v.* Martin, 2 Texas App. Civ. Cas., § 342.

Wisconsin.—Sultana *v.* Chapman, 5 Wis. 454.

Because of the low stage of water, the boat could ascend the river, does not excuse the defendant's failure to deliver the goods at the specified place. Cox, etc., Co. *v.* Peterson, 30 Ala. 608, 68 Am. Dec. 145.

Where goods are marked with the name and place of residence of the owner, and are described in the bill of lading as so marked, and nothing further appears to indicate their destination, the residence of the owner will be held to be their ultimate place of destination. Brown & Co. *v.* Mott & Co., 22 O. St. 149.

Effect of custom.—Evidence of a custom among the steamboat men to ascend the river as high as the stage of the water in it permitted, and then to land their cargo and deposit the goods in warehouses, is not admissible for the defendants, in an action against the owners of a steamboat carrier for failing to deliver goods at the place specified in their bill of lading. Cox, etc., Co. *v.* Peterson, 30 Ala. 608, 68 Am. Dec. 145.

But the delivery of the cotton by defendant at its wharf at West Wego, which is on the opposite side of the river from New Orleans, was a compliance with the bill of lading requiring its delivery at the port of New Orleans, although West Wego was not at that time within the boundaries of the port of New Orleans, as defined in the statute, it being, in a well-understood commercial and business sense, the part of that port where steamship companies rightfully expected to receive cotton from Texas for transportation to European ports. Reiss *v.* Texas, etc., R. Co., 98 Fed. 533, 39 C. C. A. 149; Texas, etc., R. Co. *v.* Reiss, 99 Fed. 1006, 39 C. C. A. 680. Affirmed Texas, etc., R. Co. *v.* Reiss, 22 S. Ct. 253, 183 U. S. 621, 46 L. Ed. 358.

Illustrations.—Where a railroad company contracts to deliver a car of lumber to the consignee in a specified part of the city, a tender of the lumber to the consignee at its station in the city is not a compliance with its undertaking. Texas, etc., R. Co. *v.* Driskell (Tex. Civ. App.), 128 S. W. 466.

The liability of a carrier who contracted to deliver goods in Pittsburg was not changed to that of a warehouseman by his depositing the goods at his warehouse in Allegheny City, just across the river, and but a few hundred yards from his warehouse in Pittsburg. Graff *v.* Bloomer, 9 Pa. 114.

Under a bill of lading reciting the shipping of goods on a particular ship, to be landed at a certain place, the goods must be landed there from the ship, if it can be done with safety to her. Shaw *v.* Gardner (Mass.), 12 Gray 488.

The consignee of a part of a cargo of grain, coming from the lakes to Buffalo, has the right to select the elevator into which it shall be discharged. Richmond *v.* Union Steamboat Co., 8 Abb. N. C. 66, affirmed in 87 N. Y. 240.

A bill of lading whereby the ship contracts to deliver a cargo of coal at a designated port to the consignee, "or his assigns," is not an express undertaking to deliver at the particular coal wharf owned by the consignee. Smith *v.* Lee, 66 Fed. 344, 13 C. C. A. 506.

97. Richardson *v.* Goddard (U. S.), 23 How. 28, 16 L. Ed. 412.

98. Wooley *v.* Chicago, etc., R. Co. (Wis.), 136 N. W. 616.

99. Delivery at immediate point.—Sharp *v.* Clark, 13 Utah 510 15 Pac. 566.

1. Cleveland, etc., R. Co. *v.* Sargent, 19 O. St. 438.

2. *Georgia.*—Bruhl *v.* Southern Exp. Co., 103 Ga. 583, 30 S. E. 269.

Maine.—Stone *v.* Waitt, 31 Me. 409, 52 Am. Dec. 621.

Mississippi.—Bennett *v.* Byram & Co., 38 Miss. 17, 75 Am. Dec. 90.

New York.—Parsons *v.* Hardy (N. Y.),

offer to receive the goods on certain conditions, which is refused, will not operate to relieve the carrier from his contract to deliver them at the point to which they are consigned.[3]

§ 853. Shipments in Carload Lots.—A carrier is bound, in the absence of a contrary custom or contract, to deliver shipments received in carload lots at the consignee's place of business, when located on its industrial tracks;[4] but it is not bound, at its own charge, to make delivery beyond its own or leased tracks.[5]

Delivery of Grain—Statutory Provisions.—Under the Illinois statutes relating to warehousemen, railroad companies can not deliver grain received for transportation to any other warehouse than that to which it was consigned, without the consent of the owner or the consignee.[6] In order for the statutes to apply, the grain must be in bulk and consigned to a particular warehouse at the time of shipment;[7] and such warehouse must be connected by some track with the line of the railroad company and be, in fact, a portion thereof.[8] Where a

14 Wend. 215, 28 Am. Dec. 521; Sweet *v.* Barney, 23 N. Y. 335.

Ohio.—Cleveland, etc., R. Co. *v.* Sargent, 19 O. St. 438.

Pennsylvania.—Arbuckle *v.* Thompson, 37 Pa. 170.

The expense of transportation, after the goods have been unconditionally received by the consignee at an intermediate port, is to be borne by the consignee. Reed *v.* Dick (Pa.), 8 Watts 479.

3. Arbuckle *v.* Thompson, 37 Pa. 170.

4. **Shipments in car load lots.**—Banner Grain Co. *v.* Great Northern R. Co., 137 N. W. 161, 119 Minn. 68, 41 L. R. A., N. S., 678; Vincent *v.* Chicago, etc., R. Co., 49 Ill. 33.

5. Banner Grain Co. *v.* Great Northern R. Co., 137 N. W. 161, 119 Minn. 68, 41 L. R. A., N. S., 678; Brooks Mfg. Co. *v.* Southern R. Co., 68 S. E. 243, 152 N. C. 665.

6. **Grain—Illinois statute.**—Act Feb. 16, 1867, § 22; Rev. St., c. 114, § 82; Vincent *v.* Chicago, etc., R. Co., 49 Ill. 33.

It is no sufficient excuse for the company to refuse to deliver it that it can not do so without large additional expense, caused by the loss of the use of motive power, labor, and service, and loss of use of cars while the same are being delivered and unloaded at such elevators and brought back, for it is precisely that for which the company is paid its freight. Chicago, etc., R. Co. *v.* People, 56 Ill. 365, 8 Am. Rep. 690.

A contract by a railroad company with certain elevators that it will deliver grain to them exclusively is not a valid excuse to the company for refusing to deliver grain to other elevators upon the line of its way, the owners of which are not parties to the contract, and to which grain has been consigned. Chicago, etc., R. Co. *v.* People, 56 Ill. 365, 8 Am. Rep. 690.

A railroad company can not evade the duty of receiving and delivering grain in bulk to a particular elevator on its line of road, to which it was consigned, on the ground that it had the right to establish its own usage in that regard, and, never having held itself out as a carrier of grain in bulk, except on condition that it might choose the consignee, this had become the usage, beyond which it could not be compelled to go. Chicago, etc., R. Co. *v.* People, 56 Ill. 365, 8 Am. Rep. 690.

7. Chicago, etc., R. Co. *v.* Stanbro, 87 Ill. 195.

8. People *v.* Chicago, etc., R. Co., 55 Ill. 95, 8 Am. Rep. 631.

The provisions of Const., art. 13, § 5, that all railroad companies shall deliver grain to any elevator that can be reached by any track which "can be used" by such companies, does not refer to mere physical possibility. A company can not be compelled to run cars over a track for the use of which it has no license or contract. Hoyt *v.* Chicago, etc., R. Co., 93 Ill. 601, affirming 1 Ill. App. 374.

Where a carrier contracted to use another's side track for the purpose of delivering grain to plaintiff's elevator, situated on such side track, it was held, that plaintiff's elevator was to be considered on the line of defendant's road, for the purpose of delivering grain as a common carrier. Chicago, etc., R. Co. *v.* National Elevator, etc., Co., 153 Ill. 70, 38 N. E. 915, affirming 50 Ill. App. 339, and distinguishing Chicago, etc., R. Co. *v.* Stanbro, 87 Ill. 195.

Illustrations.—A railroad company entered the city from different points upon separate tracks, these separate tracks or lines of road being called "divisions." The elevator was situated upon a track used by the company in connection with the business of one of those divisions exclusively, but could be reached from the other division, though by a very indirect route, and subjected the company to great loss of time and pecuniary damage, in the delay that would be caused to their regular trains and business in their other division. Held, that the roads constituting these different divisions,

railroad has provided a warehouse on its own track which is ample in capacity and apparatus to receive, contain, and unload all grain ordinarily transported in bulk over its road, a delivery of grain in bulk to such warehouse is sufficient,[9] if not consigned to any other warehouse on the line of its road.[10] A contract by which a railroad company agrees to deliver to an elevator all cars of grain consigned to said elevator brought to a certain point over its road, binds the company to deliver the grain to the elevator, though it was not consigned thereto until after it reached such place.[11]

§§ 854-857. To Whom Delivery May Be Made—§ 854. Consignee or Agent.—The duty of a carrier is discharged by delivery to the consignee,[12]

though belonging to the same corporation, and having a common name, were, for the purposes of transportation, substantially different roads, constructed under different charters, and the track upon which the elevator in question was situated, having been laid for the convenience especially of one of those divisions, and only approachable from the other under the difficulties mentioned, could not be regarded as upon the line of the latter division, so as to make it obligatory upon the company to deliver thereat freight coming over that division. Chicago & N. W. Ry. Co. *v.* People, 56 Ill. 365, 8 Am. Rep. 690.

9. It appeared that the track upon which the elevator was situated was owned and used by defendant carrier and another company in common, and was a direct continuation of the line of one of the defendant's divisions, and of convenient and easy access from that division, and was used by the defendant not only to deliver grain to other elevators thereon, some of which were more difficult of access than that of the relator, but also to deliver lumber and other freight coming over such division; thus making it not only legally, but actually, by positive occupation, a part of the road. Held that, in reference to grain coming over that division, the track upon which the plaintiff's elevator was situated was to be regarded as a part of the defendant's line of road, and it was its duty to deliver such grain to that elevator, if consigned thereto. Chicago, etc., R. Co. *v.* People, 56 Ill. 365, 8 Am. Rep. 690.

10. People *v.* Chicago, etc., R. Co., 55 Ill. 95, 8 Am. Rep. 631.

11. National Elevator, etc., Co. *v.* Chicago, etc., R. Co., 50 Ill. App. 339, affirmed 153 Ill. 70, 38 N. E. 915.

12. **Delivery to consignee.** — *United States.*—North Pennsylvania R. Co. *v.* Commercial Nat. Bank, 123 U. S. 727, 31 L. Ed. 287, 8 S. Ct. 266; Southern Exp. Co. *v.* Dickson, 94 U. S. 549, 24 L. Ed. 285; Brittan *v.* Barnaby (U. S.), 21 How. 527, 16 L. Ed. 177; Conard *v.* Atlantic Ins. Co. (U. S.), 1 Pet. 386, 7 L. Ed. 189.

Arkansas.—Equitable Powder Mfg. Co. *v.* St. Louis, etc., R. Co. (Ark.), 150 S. W. 1028.

Georgia.—McCaffrey *v.* Georgia Southern Railroad, 69 Ga. 622; Bass *v.* Glover, 63 Ga. 745; Bruhl *v.* Southern Exp. Co., 103 Ga. 583, 30 S. E. 269; Southern Exp. Co. *v.* Fant Fish Co., 12 Ga. App. 447, 78 S. E. 197.

New York.—Gass *v.* Astoria Veneer Mills, 134 App. Div. 184, 118 N. Y. S. 982; Marshall *v.* New York Cent. R. Co. (N. Y.), 45 Barb. 502, affirmed in 48 N. Y. 660.

Ohio.—Oskamp *v.* Southern Exp. Co., 61 O. St. 341, 56 N. E. 13, reversing on other grounds, 14 O. C. C. 76, 7 O. C. D. 417; Steamboat John Owen *v.* Johnson, 2 O. St. 143.

Tennessee.—Dean *v.* Vaccaro, 39 Tenn. (2 Head) 488, 75 Am. Dec. 744; Butler *v.* East Tennessee, etc., R. Co., 76 Tenn. (8 Lea) 32.

Texas.—Nashville, etc., R. Co. *v.* Grayson County Nat. Bank, 100 Tex. 17, 93 S. W. 431, reversing 91 S. W. 1106.

Washington. — Bonds-Foster Lumber Co. *v.* Northern Pac. R. Co., 53 Wash. 302, 101 Pac. 877.

Consignee prima facie owner.—A carrier may presume, in the absence of some notice to the contrary, that the consignee is the owner of the goods. Sweet *v.* Barney, 23 N. Y. 335, affirming 24 Barb. 533; Sturges *v.* Detroit, etc., R. Co., 166 Mich. 231, 131 N. W. 706.

Minnesota Gen. St., c. 39, § 15, provides that a conditional sale shall be absolutely void as against the creditors of the vendee and subsequent purchasers and mortgagees in good faith, unless the note or contract, or copies thereof, shall be filed as provided. Held, where plaintiff delivered a piano to a common carrier for shipment, and transferred the bill of lading to the consignee, who recovered from the carrier the full value of the piano, which was destroyed by fire before delivery, the fact that a copy of the sale, which was conditional, was filed as required by statute, was not notice to the carrier, and the latter had a right to rely on the presumption that the title was in the consignee. Dyer *v.* Great Northern R. Co., 51 Minn. 345, 53 N. W. 714, 38 Am. St. Rep. 506.

Delivery to joint consignee.—Where a purchaser of wagons from one who borrows money from another to enable him

or by his direction,[13] or to his agent authorized by him to receive the

to fill the order, although requested by both the seller and lender to send the money to the latter, sends it by express, in a package addressed jointly to the seller and lender, as though they were a firm, the express company, delivering the package to the seller, is not liable to the lender for his interest therein, merely for the fact that the agent to whom the purchaser delivered the package knew that the lender had shipped the wagons to the purchaser by railway, and had sent a bill thereof for collection, which had been returned to the lender unpaid. Wells *v.* American Exp. Co., 44 Wis. 342.

Warehouseman as consignee.—Where a bill of lading contains a stipulation that the goods shall be delivered "into a warehouse or to assigns" at a certain landing, the warehouseman at the landing is the consignee; and, if he consents that the goods be landed at a point less than ten feet above the surface of the water, the consignor can not recover for damages to the goods by a flood on the ground that defendant violated Code, §§ 896, 897, making carriers liable in double the value of the goods damaged by flood, if they are landed at a point less than ten feet perpendicular above the surface of the water. Winston *v.* Cox, etc., Co., 38 Ala. 268.

Illustrations.—Where bills of lading for beans shipped by plaintiff referred to commission merchants who had bought the beans from plaintiff as the shippers, and there was no evidence of notice to the carriers that plaintiff had any interest in the beans, a delivery by the ultimate carrier to the proper persons named in the bills was not a conversion, though made on forged bills of lading. Nelson Grain Co. *v.* Ann Arbor R. Co. (Mich.), 140 N. W. 486.

Plaintiff's assignors shipped by a common carrier certain goods addressed to another person, but took a bill of lading which showed that the goods were consigned to the order of the consignors. On the arrival of the goods, another common carrier, in the usual course of business, and at the addressee's request, obtained and delivered them to him without notice that he was not the real owner. Held, that there had been no conversion by the second carrier. Nanson *v.* Jacob, 93 Mo. 331, 6 S. W. 246, 3 Am. St. Rep. 531.

13. Delivery by direction of consignee.—*United States.*—North Pennsylvania R. Co. *v.* Commercial Nat. Bank, 123 U. S. 727, 31 L. Ed. 287, 8 S. Ct. 266; Southern Exp. Co. *v.* Dickson, 94 U. S. 549, 24 L. Ed. 285.

Georgia.—McCaffrey *v.* Georgia Southern Railroad, 69 Ga. 622.

New York.—Gass *v.* Astoria Veneer Mills, 134 App. Div. 184, 118 N. Y. S. 982.

Ohio.—Southern Exp. Co. *v.* Oskamp, etc., Co., 14 O. C. C. 176, 7 O. C. D. 417.

Tennessee.—Butler *v.* East Tennessee, etc., R. Co., 76 Tenn. (8 Lea) 32.

Illustrations.—An express company received a package of money addressed to a certain bank at its street and number, but, at the direction of the bank, delivered the package, in another part of the city, to the bank's agent, from whom the money was afterwards stolen. Held, that the owner could not recover of the express company for nondelivery. Sweet *v.* Barney, 23 N. Y. 335, affirming 24 Barb. 533.

The consignee paid the express charges on goods sent C. O. D., but refused to receive the goods, and directed the company to return them to the consignor. The consignor brought suit against the consignee, and recovered a judgment for the value of the goods; but in the meantime, after a verdict was rendered in favor of the consignor, and before judgment was rendered thereon, the express company, by direction of the consignor's attorney, returned the goods to the consignor. The consignee never countermanded his directions to the company to reship to the consignor. When final judgment was rendered, the consignee brought an action of trover against the company to recover the value of the goods, without offering to pay the money due on the goods. Held, that the consignee had no right of action against the company. American Exp. Co. *v.* Greenhalgh, 80 Ill. 68.

Written authority from consignee.—A delivery on written authority from the consignee releases the carrier from liability, even though the consignee states that he has no claim on the goods. Dobbin *v.* Michigan Cent. R. Co., 56 Mich. 522, 23 N. W. 204.

But such authority should not be so uncertain as to give just grounds for doubting the scope of the authorization. Wells Fargo & Co. *v.* Windham, 1 Tex. Civ. App. 267, 268, 21 S. W. 402.

An order for consignee to railroad agent who was also the express company agent as follows: "Railroad Agent: Dear Sir—Please deliver to the bearer any freight I may have in your possession and oblige;" is not a sufficient demand on the express company to make it the agent's duty to deliver express. Wells Fargo & Co. *v.* Windham, 1 Tex. Civ. App. 267, 21 S. W. 402.

Plaintiff shipped by defendant's steamship company a quantity of butter consigned to plaintiff's order, the packages being unmarked. A third person presented to defendant's delivery clerk, at the place of receipt, a letter written by plaintiff to him containing this clause, "The rolls sent you today you will find

shipment.[14] When delivery has been made to an agent, the carrier, if sued for misdelivery, must prove that the recipient had authority from the

a very good quality," and upon this the clerk delivered butter to such person. Held, that the letter was not a sufficient authority to justify a delivery of the butter. Viner *v.* New York, etc., Steamship Co., 50 N. Y. 23.

A written order, dated at a place where an express company had no office, addressed to an agent of the company at its office, where consignments to the writer were to be transferred to a railroad company, and directing that agent to "deliver any and all express matter (moneys included) addressed to [the writer] to the conductor of" that railroad, "until further notice," and concluding with the words, "This my standing order," until revoked authorized deliveries of such matter to be made not only to the person who happened to be conductor at the time the order was signed, but to any other person occupying that position and acting in that capacity. Southern Exp. Co. *v.* Williams, 27 S. E. 743, 99 Ga. 482.

14. Delivery to agent of consignee.—*Arkansas.*—Equitable Powder Mfg. Co. *v.* St. Louis, etc., R. Co. (Ark.), 150 S. W. 1028.

Georgia.—Bruhl *v.* Southern Exp. Co., 103 Ga. 583, 30 S. E. 269; Southern Exp. Co. *v.* Williams, 99 Ga. 482, 27 S. E. 743; Savannah, etc., R. Co. *v.* Coleman, 103 Ga. 583, 30 S. E. 269; Southern Exp. Co. *v.* Everett, 37 Ga. 688; Brunswick, etc., R. Co. *v.* Rothchild & Co., 46 S. E. 830, 119 Ga. 604; Kenny Co. *v.* Atlanta, etc., R. Co., 122 Ga. 365, 50 S. E. 132.

Illinois.—Illinois Cent. R. Co. *v.* Simpson, 17 Ill. App. 325.

New York.—Sweet *v.* Barney, 23 N. Y. 335, affirming 24 Barb. 533.

Tennessee.—Dean *v.* Vaccaro, 39 Tenn. (2 Head) 488, 75 Am. Dec. 744; Butler *v.* East Tennessee, etc., R. Co., 76 Tenn. (8 Lea) 32.

Texas.—St. Louis, etc., R. Co. *v.* Crawford (Tex. Civ. App.), 35 S. W. 748; Gulf, etc., R. Co. *v.* Lewine (Tex. Civ. App.), 29 S. W. 835.

Although the goods were not ordered by the consignee to whom the shipper really intended to send them, but by another person, bearing, or pretending to bear, the same name, to whom the goods were finally delivered after passing through the hands of the real consignee's agent a delivery to the authorized agent of the consignee completes the contract of carriage. Southern Exp. Co. *v.* Williams, 27 S. E. 743, 99 Ga. 482.

Delivery to stranger accompanied by consignee's drayman.—Plaintiffs consigned certain hogs to P., paying charges, and shipping them by defendant's road. Reaching their destination, they were taken from defendant's cars by a stranger, assisted by consignees' drayman. An expense bill was given the stranger at his request, on his representation that he was acting for the consignees. The hogs were delivered by the stranger to the consignees as his property, and they paid him for them. Held, that the railroad company was not guilty of negligence, and that plaintiff's remedy was against the consignees. Ryder *v.* Burlington, etc., R. Co., 51 Iowa 460, 1 N. W. 747.

Delivery by direction of agent.—Where a railway company receives freight consigned to the agent of the owner, a delivery to a third person on the direction of the agent is a delivery to the consignee, and the railway company is not liable to the owner, though the person to whom delivery is made fails to pay for the goods. Gates *v.* Chicago, etc., R. Co., 42 Neb. 379, 60 N. W. 583.

Goods delivered to the defendant by plaintiff, for shipment, were, before their delivery to the consignee, directed to be delivered to S., the agent of the plaintiff. Afterwards, on an order from S., directing that the goods be delivered to the consignee, and an order from the latter, directing that they be delivered to certain named persons, the goods were surrendered to such persons. On learning of such delivery, plaintiff made no objection, but began suit against the consignee for the value of the goods. Held, that defendant was not liable for such delivery. Brasher *v.* Denver, etc., R. Co., 12 Colo. 384, 21 Pac. 44.

A package sent to a bank directed to the cashier thereof, is properly delivered to the assistant receiving teller while he was at the receiving teller's desk. Hotchkiss *v.* Artisans' Bank, 42 Barb. 517, affirmed in 41 N. Y. 564, 2 Abb. Dec. 403.

Money sent by express to a bank was delivered to a person in its employ, who called for it, and gave a receipt. Such person had been in the habit of receiving packages for the banks in the same way, and this mode of delivery was adopted at the request of the bank officers, and for their accommodation. Held, that this was a good delivery. Sweet *v.* Barney, 24 Barb. 533, affirmed in 23 N. Y. 335.

Delivery to president of college as delivery to student.—In an action against an express company for the loss of a diamond pin consigned to a student at a college, it was held that if it was the custom of the president of the college to receive from the defendant parcels directed to the students therein under his charge, and receipt therefor, or if it was in accordance with the rules of the college that he should do so, then he might properly be considered as the authorized agent of the

consignee to receive the goods, or had been held out by him as authorized.[15] Where the carrier knows that the consignee is not entitled to receive the goods, delivery to him,[16] or on his order,[17] will render the carrier liable.

students for that purpose, and the jury might presume a good delivery to the student to whom it was addressed, when delivered to the president thereof. Southern Exp. Co. *v.* Everett, 37 Ga. 688.

A package addressed to "Hon. J. G. Carlisle, Secretary United States Treas. Dept., Washington, D. C.," but with no direction to deliver it personally to the secretary of the treasury, or to any particular department, was properly delivered at the treasury department, at the usual place for such packages, within the time agreed upon. Aldrich, etc., Mfg. Co. *v.* American Exp. Co., 75 N. W. 94, 117 Mich. 32.

Acquiescence in former deliveries.—Where former deliveries to a certain person had been acquiesced in, the carrier had the right to regard such person as an agent, and the delivery to him may constitute a good defense to an action against the carrier for conversion. Ontario Bank *v.* New Jersey Steamboat Co., 59 N. Y. 510, affirming 5 Daly 117.

Effect of custom.—If it is the custom for the carrier to forward goods by boat from their destination on its line, and the consignee knew this when he ordered goods shipped, and the owner of a boat has previously received goods for him from the carrier and delivered them, the carrier is authorized to deliver the goods to such owner for transportation by boat to the consignee. Chesapeake & O. Ry. Co. *v.* Lavin (Ky.), 124 S. W. 274.

Delivery to drayman.—A carrier, who delivers the goods to a drayman not authorized by the consignee to receive them, is liable for their loss. Dean *v.* Vaccaro, 39 Tenn. (2 Head) 488, 75 Am. Dec. 744; Shenk *v.* Philadelphia Steam Propeller Co., 60 Pa. 109, 100 Am. Dec. 541.

An officer of the customhouse on board a ship in the discharge of his official duty to care for the lawful unloading of the cargo, is not, as such, authorized to receive the goods; and a discharge, with his knowledge and assent, is not such a delivery as relieves the carrier from liability. McAndrew *v.* Whitlock, 52 N. Y. 40, 11 Am. Rep. 657.

But when the duties on dutiable goods are not paid upon their arriving at the port of New York, under the laws of congress and the treasury regulations of that port, the custom-house officers are the only persons authorized to receive such goods on the wharf; and when they do so receive them, day or night, the liability of the carrier terminates. Redmond *v.* Liverpool, etc., Steamship Co., (N. Y.), 56 Barb. 320.

Illustrations of persons not authorized.—Where a carrier delivered certain merchandise directed to M. at a certain casino to a barkeeper at the casino, who was not M.'s agent, or authorized by her to receive the package, there was no delivery to the consignee, and the carrier was therefore liable. Charles Schlesinger & Sons *v.* New York, etc., R. Co., 85 N. Y. S. 372.

If goods are sent by a common carrier to be delivered to A, the carrier is not justified in delivering them at the store of B, although A. has guaranteed the rent of the store, and has been compelled to pay it. Mahon *v.* Blake, 125 Mass. 477.

An express company tendered a package to the consignee at her place of business, and she refused to accept it or pay the charges, on the ground that she never authorized its purchase. Afterwards the consignee's daughter called at the express office, and ordered the package sent to her mother's place of business, but her authority was not shown. The package was taken back to the consignee's place of business, and delivered to one W., who was in the place of business, but no questions were asked as to his authority, and he receipted for the same in his own name. No authority in W. to accept the package for the consignee, or circumstances from which it might be inferred, was shown. Held, that the express company was liable to the consignor for its loss. Nebenzahl *v.* Fargo, 3 N. Y. S. 929, 15 Daly 130, 22 N. Y. St. Rep. 231.

15. American Merchants' Union Exp. Co. *v.* Milk, 73 Ill. 224.

In an action against a railroad company for delivering a lot of sewing machines to the wrong person, it appeared that plaintiff was general agent for sale of the machines at St. Paul, and had been in the habit of shipping machines to a subagent at Minneapolis. The latter having requested plaintiff to ship him a certain number of machines, plaintiff caused that number of machines to be shipped, consigned to himself at Minneapolis. Defendant delivered them to the subagent. Held, that the fact that the machines were consigned to plaintiff was not conclusive that they were not sent pursuant to the request of the subagent, and that the jury might, from such circumstances, find authority in the subagent to receive the machines. Wilcox *v.* Chicago, etc., R. Co., 24 Minn. 269.

16. **Notices that consignee not entitled.**—Nanson *v.* Jacob, 93 Mo. 331, 6 S. W. 246, 3 Am. St. Rep. 531; Lester *v.* Dela-

17. Southern Exp. Co. *v.* Dickson, 94 U. S. 549, 24 L. Ed. 285.

The addressing of a package to a consignee in the care of a third person, as between the consignor, the consignee, and the carrier, and as to the liability of the latter, and in the absence of known limitations upon the scope of the authority given, confers upon such third person the right to receive the goods, and ordinarily constitutes him the proper person to whom to make delivery.[18] Where such third person declines the package, the consignee is entitled to receive it.[19]

Where the bill of lading fails to show who the consignee is, delivery without ascertaining from the shipper to whom the same is to be made makes the carrier liable in conversion.[20]

Conflict between Bill of Lading and Marks on Goods.—Where there is a conflict between the bill of lading and the marks on goods, in determining to whom it is the duty of the carrier to deliver, the marks on the goods do not control the bill of lading.[21]

§ 855. Consignor or Agent.—When the carrier delivers the goods to the agent selected by the consignor to receive them, the carrier's responsibility ceases.[22] And the fact that the agent is also the agent of the carrier does not affect the question.[23] But a carrier who, without authority from the consignor

ware, etc., R. Co., 92 Hun 342, 36 N. Y. S. 907, 72 N. Y. St. Rep. 334; Nashville, etc., R. Co. *v.* Grayson County Nat. Bank, 100 Tex. 17, 93 S. W. 431, reversing 91 S. W. 1106. See Southern Exp. Co. *v.* Fant Fish Co., 12 Ga. App. 447, 78 S. E. 197.

Where the consignor is known to the carrier to be the owner, the carrier must be understood to contract with him only for his interest, upon such terms as he dictates in regard to the delivery, and the consignees are to be regarded simply as agents selected by him to receive the goods at a place indicated. Where he is an agent merely, the rule is different. Southern Exp. Co. *v.* Dickson, 94 U. S. 549, 24 L. Ed. 285.

18. **Care of third person.**—Commonwealth *v.* People's Express Co., 201 Mass. 564, 88 N. E. 420. See Russell *v.* Livingston, 16 N. Y. 515, reversing 19 Barb. 346.

19. United States Exp. Co. *v.* Hammer, 51 N. E. 953, 21 Ind. App. 186.

20. **Where consignee unknown.**—Gass *v.* Astoria Veneer Mills, 118 N. Y. S. 982, 134 App. Div. 184.

21. **Conflict between bill and marks.**—Rome R. Co. *v.* Sullivan, etc., Co., 25 Ga. 228.

22. **Agent of consignor.**—Roberts *v.* Union Line Exp. Co., 2 O. Dec. 577; Houston, etc., R. Co. *v.* Hogg (Tex.), 2 Posey 544, 549.

Knowledge of agency.—In a suit by a consignor against a carrier for the value of goods delivered by the carrier to a third party, it was held that evidence to show such third party an agent of the consignor was admissible, though the facts were unknown to defendant when the goods were delivered. Angle & Co. *v.* Mississinpi, etc., R. Co., 9 Iowa 487.

The husband of the consignor, who had separated from her, and who did not have the bill of lading or other express authority, was not an authorized agent to receive the goods of such consignor. Missouri Pac. R. Co. *v.* Weil, 57 Pac. 853, 8 Kan. App. 839.

Delivery by direction of broker.—Where a carrier delivers the goods as directed by the consignor's broker, who was not his duly authorized agent to direct such delivery, the carrier is liable. The broker, under his general powers as such, has no authority either to receive the goods or to direct to whom they should be delivered, nor could such authority be conferred upon him, so as to bind the consignor, by any local custom or usage, the latter having no knowledge thereof. American Sugar Refin. Co. *v.* McGhee, 96 Ga. 27, 21 S. E. 383.

23. *Georgia.*—Fitzsimmons *v.* Southern Exp. Co., 40 Ga. 330, 2 Am. Rep. 577.

Maine.—See Stone *v.* Waitt, 31 Me. 409, 52 Am. Dec. 621.

Ohio.—Roberts *v.* Union Line Exp. Co., 2 O. Dec. 577 (after such agent receives the goods, the carrier is not even a naked bailee.)

Texas.—Houston, etc., R. Co. *v.* Hogg (Tex.) 2 Posey 544, 549.

Contra.—Where a package delivered to common carriers for transportation is addressed to the care of the agent and principal representative of the carrier at the point where the carriage is to terminate, it may be regarded as a direction to have the package stopped at the place on the route where the agent is in charge of the business, and does not import that upon receiving it the carrier's responsibility ceases, and the agent becomes a consignee. Russell *v.* Livingston, 16 N. Y. 515, reversing 19 Barb. 346; compare Bristoe *v.* Rensselaer, etc., R. Co. (N. Y.), 9 Barb. 158, and Labar *v.* Taber (N. Y.), 35 Barb. 305.

or consignee, delivers goods to the consignor's general agent at the place of delivery, is liable to the consignee,[24] even though the consignee did not reside there, and did not expect to be there to receive them.[25] And where a consignee has made advances for the goods, the carrier is liable for a conversion thereof, where he delivers them to another at the consignor's request, though the consignor sent no bill of lading to the consignee.[26] A carrier is guilty of no conversion, though it receives property from one not rightfully entitled to possession, and, acting as a mere conduit, delivers it in pursuance of his directions, if this is done before notice of the rights of the real owner.[27]

§ 856. Actual Owner.—As the actual owner may recover the property from the carrier,[28] it is excused for failure to deliver to the consignee by delivering the property to the actual owner,[29] or his duly authorized agent.[30]

§ 857. Holder of Bill of Lading.—Where by the indorsement of a bill of lading, the indorsee obtains the right to the delivery of the goods named therein, a delivery to the holder of a bill of lading properly indorsed relieves the carrier from further liability,[31] even though such holder obtained possession of the bill wrongfully.[32] But it is held that if the carrier delivers the goods on

24. General agent.—Ela *v.* American, etc., Exp. Co., 29 Wis. 611, 9 Am. Rep. 619.

25. Wilson Sewing Mach. Co. *v.* Louisville, etc., R. Co., 71 Mo. 203.

26. Where consignee made advances.—Bailey *v.* Hudson River R. Co., 49 N. Y. 70.

27. Shellnut *v.* Central, etc., R. Co., 131 Ga. 404, 406, 62 S. E. 294, 18 L. R. A., N. S., 494; Nanson *v.* Jacob, 93 Mo. 331, 6 S. W. 246, 3 Am. St. Rep. 531.

28. Savannah, etc., R. Co. *v.* Talbot, 123 Ga. 378, 51 S. E. 401.

A package of money, really belonging to A alone, was sent by express, directed to the firm of A & B; and on its arrival A demanded it of the express company, stating that it was his. There was no assignment by B to A of his apparent interest, nor any written order by him to deliver to A, nor any offer of a receipt or acquittance from both. The company refused to deliver to A, claiming that the money had been garnisheed. Held that, apart from the question of garnishment, A was entitled to recover the money. Wells *v.* American Exp. Co., 55 Wis. 23, 11 N. W. 537, 12 N. W. 441, 42 Am. Rep. 695.

29. Delivery to actual owner.—*United States.*—The Idaho, 93 U. S. 575, 23 L. Ed. 978; Rosenfield *v.* Express Co., Fed. Cas. No. 12,060, 1 Woods 131.

Iowa.—Brunswick & Co. *v.* United States Exp. Co., 46 Iowa 677.

Minnesota.—National Bank *v.* Chicago, etc., R. Co., 44 Minn. 224, 46 N. W. 342, 560, 9 L. R. A., N. S., 263, 20 Am. St. Rep. 566.

New York.—Bliven *v.* Hudson River R. Co., 36 N. Y. 403, affirming 35 Barb. 188.

Pennsylvania.—King *v.* Richards, 6 Whart. 418, 37 Am. Dec. 420.

West Virginia.—Smith *v.* Linden Oil Co., 69 W. Va. 57, 62, 71 S. E. 167.

Where lumber was loaded by the seller, passing title thereto to the buyer to whom it was billed, but the seller unloaded it and reloaded the car, billing it to his own order, the carrier properly delivered it to the buyer, and was not liable to the seller in damages for nondelivery. McCollom *v.* Minneapolis, etc., R. Co., 139 N. W. 1129, 152 Wis. 435.

30. Agent of owner.—Adams *v.* Blankenstein, 2 Cal. 413, 56 Am. Dec. 350; Southern Exp. Co. *v.* Everett, 37 Ga. 688.

31. Holder of bill of lading.—*United States.*—North Pennsylvania R. Co. *v.* Commercial Nat. Bank, 123 U. S. 727, 31 L. Ed. 287, 8 S. Ct. 266; The Thames (U. S.), 14 Wall. 98, 20 L. Ed. 804.

Nebraska.—Union Pac. R. Co. *v.* Johnston, 45 Neb. 57, 63 N. W. 144, 50 Am. St. Rep. 540; Gates *v.* Chicago, etc., R. Co., 42 Neb. 379, 60 N. W. 583.

Pennsylvania.—Pennsylvania R. Co. *v.* Stern, 119 Pa. 24, 12 Atl. 756, 4 Am. St. Rep. 626.

South Carolina.—National Bank *v.* Atlanta R. Co., 25 S. C. 216.

32. Wrongful possession of bill.—A railroad company issued bills of lading for grain shipped to the order of the shipper, per advice of M., B. & Co. The bills were duly indorsed, and by M., B. & Co. delivered to a bank as collateral. The bank was in the habit of allowing M., B. & Co. to withdraw such bills from time to time, and they got possession of these bills, and obtained the grain from the railroad on presentation thereof. Failing to pay their note when due, the bank sued them, and sought to recover from the railroad company the value of the grain, on the ground that the property passed to it by delivery of the bills of lading. Held, that the bank, by allowing M., B. & Co. to get possession of the bills and present them, properly indorsed, to the railroad company, was estopped to deny the legality of the delivery. Douglas *v.* People's Bank, 86 Ky. 176, 5 S. W. 420.

a stolen bill of lading, it will not be protected from liability, though the bill be indorsed in blank and the delivery be made in perfect good faith,[33] unless the bill was stolen by reason of the negligence or carelessness of the owner or his agent.[34] Where a bill of lading deliverable to order is attached to, and forwarded with, a time draft sent to an agent for collection, without special instructions, an acceptance of the draft by the drawee entitles him to the bill of lading, and a delivery of the goods to him discharges the carrier from liability.[35]

Holder of Unindorsed Bill of Lading.—Possession of a bill of lading by one other than the consignee, without indorsement, does not justify the delivery of the consignment to such person.[36] And where the bill directs delivery to the vendor's order, or his assigns, the carrier is notified that he must not deliver to the consignee without the bill properly indorsed by the consignor, and if he delivers otherwise he will be liable.[37]

33. Delivery on stolen bill.—Raleigh, etc., R. Co. *v.* Lowe, 28 S. E. 867, 101 Ga. 320.

A carrier, without the production of the bill of lading, delivered goods to a person for whom it had reason to believe that they were ultimately intended, taking his check to indemnify itself against loss because of such unauthorized delivery. The bill of lading was subsequently stolen from a bank, which, as the owner's agent, was its lawful custodian, but which had no knowledge of the above facts. Held, that the bank was under no duty to the carrier of so guarding the possession of the bill as to protect said carrier from loss occasioned by surrendering the indemnifying check, in consequence of the production of the bill of lading by an unauthorized person, and it made no difference that said unauthorized person was the party who was to be notified of the consignment, and whose name appeared upon the bill of lading in this connection. Raleigh, etc., R. Co. *v.* Lowe, 28 S. E. 867, 101 Ga. 320.

34. Raleigh, etc., R. Co. *v.* Lowe, 101 Ga. 320, 28 S. E. 867.

In such case the familiar principle would be applicable that where one of two innocent parties must suffer by the fraud of another, the loss should fall upon him who enabled such third person to commit the fraud. Raleigh, etc., R. Co. *v.* Lowe, 101 Ga. 320, 28 S. E. 867.

35. Commercial Bank *v.* Chicago, etc., R. Co., 160 Ill. 401, 43 N. E. 756, affirming 58 Ill. App. 438.

36. Holder of unindorsed bill.—Louisville, etc., R. Co. *v.* Barkhouse, 100 Ala. 543, 13 So. 534.

Where a consignee named in a bill of lading was arrested and thrown into jail, and the bill of lading was taken from his person by the jailer, and the bill of lading was never assigned or indorsed by the consignee, a delivery of the goods by the carrier to a person who by some means obtained possession of the bill of lading from the jailer did not discharge it from liability, though it acted in good faith in surrendering the property. Florence, etc., R. Co. *v.* Jensen, 48 Colo. 28, 108 Pac. 974.

A carrier is liable for goods consigned to the shipper, and delivered, without orders, to a person who ordered the goods, and to whom the shipper had sent an unindorsed bill of lading, drawing on him through a bank for the price, and accompanying the draft with another bill of lading, and an order for the goods to be delivered on payment of the draft, though the company was ignorant of the sending of the other bill of lading and draft, as well as of the fact that the goods were not paid for. Weyand *v.* Atchison, etc., R. Co., 75 Iowa 573, 39 N. W. 899, 1 L. R. A. 650, 9 Am. St. Rep. 504, reversing 33 N. W. 133.

Where a director of a corporation to which goods have been consigned got possession of the unindorsed bill of lading and induced the carrier to deliver the goods to him without authority, which he converted to his own use, the carrier was liable for misdelivery. Cane Belt R. Co. *v.* Peden Iron & Steel Co., 45 Tex. Civ. App. 630, 101 S. W. 528.

A custom on the part of a carrier or of carriers generally at a particular place to deliver goods to one other than the consignee, who merely holds the bill of lading without any indorsement, does not justify such delivery. Louisville, etc., R. Co. *v.* Barkhouse, 100 Ala. 543, 13 So. 534; Weyand *v.* Atchison, etc., R. Co., 75 Iowa 573, 39 N. W. 899, 9 Am. St. Rep. 504, 1 L. R. A. 650 (shipper having no knowledge of custom).

A carrier which makes delivery to a person other than the shipper or consignee of goods shipped on his presenting an unindorsed receipt therefor, providing for delivery to a certain person, which he has surreptitiously obtained, is liable therefor, notwithstanding its custom, unknown to the shipper, to deliver goods to persons presenting such a receipt without inquiry as to who they are or what is their authority. Adrian Knitting Co. *v.* Wabash R. Co., 108 N. W. 706, 145 Mich. 323.

37. Arkansas, etc., R. Co. *v.* German Nat. Bank, 92 S. W. 522, 77 Ark. 482, 113

§§ 858-866. Misdelivery—§ 858. Liability in General.—A carrier must, in all events, deliver the goods which it carries to the person entitled to receive them, and it is liable if it delivers to the wrong person,[38] or in violation

Am. St. Rep. 160; Grayson County Nat. Bank *v.* Nashville, etc., Railway (Tex. Civ. App.), 79 S. W. 1094.

A bill of lading, promising to deliver goods to "A or his assigns," was sent by A to B unindorsed, and in a letter containing no words of transfer. Held, that B could maintain no action against C, the owner of the vessel, either as surviving owner or as assignee of the goods, and that C, having delivered part of the goods to B was not thereby estopped to deny his claim to the residue. Stone *v.* Swift (Mass.), 4 Pick. 389, 16 Am. Dec. 349.

38. Delivery to wrong person.—*United States.*—The Huntress (U. S.), Fed. Cas. No. 6,914, 2 Ware (Dav. 82), 89. See Southern R. Co. *v.* Atlanta Nat. Bank, 112 Fed. 861, 50 C. C. A. 558, 56 L. R. A. 546.

Arkansas.—Chicago, etc., R. Co. *v.* Pfeifer, 90 Ark. 524, 119 S. W. 642, 22 L. R. A., N. S., 1107; Equitable Powder Mfg. Co. *v.* St. Louis, etc., R. Co., 99 Ark. 497, 138 S. W. 964.

Illinois.—Brown *v.* Cleveland, etc., R. Co., 155 Ill. App. 187.

Indiana.—American Exp. Co. *v.* Stack, 29 Ind. 27.

Massachusetts.—Hall *v.* Boston, etc., R. Corp. (Mass.), 14 Allen 439, 92 Am. Dec. 783; Murray *v.* Postal Telegraph Cable Co., 96 N. E. 316, 210 Mass. 188, Ann. Cas. 1912, C, 1299.

Missouri.—Wilson *v.* Adams Exp. Co., 43 Mo. App. 659; American Storage, etc., Co. *v.* Wabash R. Co. (Mo. App.), 123 S. W. 964.

New York.—Security Trust Co. *v.* Wells, Fargo & Co.'s Exp., 178 N. Y. 620, 70 N. E. 1109, affirming 80 N. Y. S. 830, 81 App. Div. 426.

Ohio.—Oskamp *v.* Southern Exp. Co., 61 O. St. 341, 56 N. E. 13.

Texas.—Gulf, etc., R. Co. *v.* Clark, 2 Texas App. Civ. Cas., § 512; Trice *v.* Miller, 3 Texas App. Civ. Cas., § 440; Missouri Pac. R. Co. *v.* Heidenheimer, 82 Tex. 195, 17 S. W. 608; Gulf, etc., R. Co. *v.* Fowler, 12 Tex. Civ. App. 683, 34 S. W. 661, affirmed in 93 Tex. 661, 684, no op.; Houston, etc., R. Co. *v.* Adams, 49 Tex. 748, 30 Am. Rep. 116; Roberts *v.* Yarboro, 41 Tex. 449; Gulf, etc., R. Co. *v.* Humphries, 4 Tex. Civ. App. 333, 23 S. W. 556; Texas, etc., R. Co. *v.* First Nat. Bank, 47 Tex. Civ. App. 283, 112 S. W. 589; Wells Fargo & Co. *v.* Windham, 1 Tex. Civ. App. 267, 269, 21 S. W. 402.

All classes of common carriers are responsible, and equally responsible, for a loss of the goods by delivery to the wrong person. Houston, etc., R. Co. *v.* Adams, 49 Tex. 748, 30 Am. Rep. 116.

Misdelivery by connecting carrier.—See post, "Connecting Carriers," part V.

Care required in identification of consignee.—Defendant, an express company, refused to deliver a package to one claiming that he was consignee until he was identified, whereupon he brought L., at whose hotel he was stopping, and who was also unknown to the defendant. L. then procured a person known to the company, who identified L., but stated that he did not know the consignee. L. then represented that the person claiming to be the consignee was the person to whom the package was addressed, whereupon it was delivered to him, without inquiry as to the length or nature of L.'s acquaintance with him. Held, that the company was liable to the real consignee for the value of the package. American Exp. Co. *v.* Stack, 29 Ind. 27.

Intention of consignor.—Where goods were consigned to L. S., Springfield, Ill., whether the consignor meant L. S., of Boston, Mass., or L. S., of Springfield Ill., was not material. Singer *v.* Merchants', etc., Transp. Co., 77 N. E. 882, 191 Mass. 449, 114 Am. St. Rep. 635.

Delivery to one of similar name.—Plaintiff shipped by defendant's road goods consigned to A. B., in Washington. Defendant could find no one of that initial, but found one L. B., and learning from plaintiff's agent that he had sold some goods to L. B., delivered the goods to him. Held, that defendant was liable for the goods. Wernwag *v.* Philadelphia, etc., R. Co., 117 Pa. 46, 11 Atl. 868.

Agreements to hold goods.—Where the agent of an express company agrees with the consignee of goods, before he has paid the charges thereon, that he may take part of the goods, and leave the balance to be called for at a future day, the agent acts within the apparent scope of his authority, and, in the absence of notice to the consignee of want of actual authority, binds the company so as to make it liable in case the goods are afterwards negligently delivered to the wrong person. Oderkirk *v.* Fargo, 61 Hun 418, 16 N. Y. S. 220, 41 N. Y. St. Rep. 9, following 58 Hun 347, 11 N. Y. S. 871.

A special agreement that goods might remain in the depot without storage charges until called for, if not taken away promptly within twenty-four hours on reaching their destination, is not valid unless supported by a consideration, but it may bind the carrier so far as to prohibit the delivery of the goods for storage to a third person, who was a warehouseman, without direct authority so to do

of the shipper's instructions.[39] A common carrier is bound to deliver the goods

from the shipper. Angle *v.* Mississippi, etc., R. Co., 18 Iowa 555.

Illustrations.—Where a carrier, on arrival of goods at destination, placed them in the warehouse of a third person, who by mistake delivered them to a person not authorized to receive them, the carrier is liable to the owner. Alabama, etc., R. Co. *v.* Kidd, 35 Ala. 209.

A railroad company delivered certain articles of freight within twenty-four hours after their arrival at their place of destination to warehousemen, who were supposed by the company to be agents of the consignee, but who were not so in fact. The goods were destroyed by fire five or six days afterwards, while in the hands of the warehousemen. A published rule of the company provided that "all articles of freight, on arriving at the place of destination, must be taken away within twenty-four hours after being unloaded from the cars; goods remaining uncalled for at the end of that time will be placed in store, and storage charged." Held, that the company was liable for the loss of the goods, as it was bound at its peril to know that the persons to whom it delivered them had authority to receive them. Angle *v.* Mississippi, etc., R. Co., 18 Iowa 555.

A shipper billed certain goods to his local agent, and not to the purchaser, and the agent, without transferring the bill of lading, made a further contract with defendant for the carriage of the goods to the place where they were to be delivered to the purchaser; the agent directing that such goods should be delivered only to his order. Held that, the evidence being sufficient to support a finding that the shipper had not parted with the right to the possession of the goods, a delivery of them to the purchaser was at the risk of the defendant. Wolfe *v.* Missouri Pac. Ry. Co., 97 Mo. 473, 11 S. W. 49, 10 Am. St. Rep. 331, 3 L. R. A. 539.

In an action for damages against a steamboat company, it appeared that plaintiff put on board one of defendants' boats certain iron, to be conveyed to one A at B; that there was an understanding between defendants' agent and A (of which plaintiff was ignorant) that all freight transported for him should be landed at a place on the river bank near his house, and that the iron was landed there; that, shortly after, A refused to pay the freight bill, and notified defendants' agent that he should not take the iron away; that afterwards one C without authority from A, was permitted to pay the freight bill, and took the iron away, and that plaintiff never received any information as to the disposition of it. Held, that plaintiff was entitled to recover. Howard *v.* Old Dominion Steamship Co., 83 N. C. 158, 35 Am. Rep. 571.

A., in France, having arranged, by correspondence with the agent of the defendant carrier in Havre, for the carriage of a bag of gold to the United States, sent the bag addressed to a certain name, street, and number, "New York, Utica, America." The bill of lading provided for the delivery of the bag to that name, at that street and number, "New York [City]," and was sent by mail to A. too late for a reply to be received at Havre from him before the vessel sailed. A. took no steps to advise defendant of the error. The gold was delivered in New York City to a person who falsely represented himself to be the person for whom it was intended, a bill of lading having been sent by defendant to a person other than the consignee. Held, in an action by the consignee, that there was no negligence on A.'s part, and that a finding that defendant was negligent was justified by the evidence. Guillaume *v.* General Transp. Co., 100 N. Y. 491, 3 N. E. 489.

Bills of lading for cotton recited that it was received for delivery to the order of plaintiff. The shipper was a buyer of cotton, who paid therefor by drafts on plaintiff, secured by the bills of lading. The cotton was delivered to another, who guaranteed to hold the carrier harmless, and, without paying plaintiff, applied the cotton to a claim against the third person. The delivery was not made in accordance with custom, but in reliance on the guaranty. Held, that the carrier was liable to plaintiff for the loss of the cotton. Texas, etc., R. Co. *v.* First Nat. Bank, 112 S. W. 589, 47 Tex. Civ. App. 283.

Through the mistake of a forwarding agent, goods belonging to Russel Adams, and marked "R. Adams, Brenham, Tex." were shipped to Bremond, Tex., and on request of a letter signed "R. Adams," were forwarded to Burton, Tex., and delivered to Robert Adams, who showed no receipt or bill of lading, and who receipted for them as "R. Adams." It was held that the carrier was liable for the goods. Houston, etc., R. Co. *v.* Adams, 49 Tex. 748, 30 Am. Rep. 116.

A statement by a teamster, known by a railroad company to be employed by a mill owner to deliver flour for transportation, that "this flour is for Mr. T.," does not authorize the company to deliver the flour received from the teamster under such remark, without further instructions from the owner, whatever may be the local custom of receipting. Sawyer *v.* Chicago, etc., R. Co., 22 Wis. 403, 99 Am. Dec. 49.

39. Delivery in violation of instructions.—Southern Exp. Co. *v.* Everett, 37 Ga. 688; Mosher & Co. *v.* Southern Exp. Co.,

at their destination, and it is liable if it delivers them at the wrong station.[40]

Liability as for Conversion.—Where a carrier delivers goods to the wrong person, it is liable for conversion.[41] It has been held that where a carrier

38 Ga. 37; Illinois Cent. R. Co. *v.* Carter, 62 Ill. App. 618. See Ginnochio—Jones Fruit Co. *v.* Missouri, etc., R. Co. (Mo. App.), 134 S. W. 1028. See post, "Delivery without Production of Bill of Lading," §§ 860-865.

A consignor of freight directed the carrier to forward a portion of it to places designated by a third party. Instead of doing this, the carrier delivered it to such third person, who wrongfully converted it, and disappeared. Held, that the carrier was liable. Illinois Cent. R. Co. *v.* Carter, 62 Ill. App. 618.

Delivery after order to stop in transitu.—A wrongful delivery of goods after an order given by the consignor, founded on the inability of the consignee to pay, to stop in transitu, renders the carrier liable; and the subsequent receipt by the consignor of the consignee's note packed in blank with the goods, and an attempt on his part to collect it, does not relieve the carrier's liability unless the note be paid. Adams Exp. Co. *v.* Wentworth, 1 Cin. S. C. R. 142, 13 O. Dec. Reprint 464. See post, "Stoppage in Transitu," chapter 17.

An inspection of property shipped in sealed cars, permitted by the carrier without authority at the point of destination, in consequence of which the consignor, who was also the consignee, was prevented from completing a contemplated sale thereof, is not a wrongful delivery by the carrier so as to make it liable for the value of the property. Dudley *v.* Chicago, etc., R. Co., 52 S. E. 718, 58 W. Va. 604, 112 Am. St. Rep. 1027, 3 L. R. A., N. S., 1135.

40. Delivery at wrong place.—Rome R. Co. *v.* Sullivan, etc., Co., 14 Ga. 277; Frisby *v.* Sheridan (La.), 3 Mart., N. S., 243.

The act of an agent of carrier in billing a shipment to a place other than that stated in the contract of shipment, held the proximate cause of the shipper's losing the benefit of the market. Gulf, etc., R. Co. *v.* Harris (Tex. Civ. App.), 72 S. W. 71.

41. Liability as for conversion.—*United States.*—Blowers & Co. *v.* Canadian Pac. R. Co., 155 Fed. 935; Southern Exp. Co. *v.* Dickson, 94 U. S. 549, 24 L. Ed. 285.

California.—Newhall *v.* Central Pac. R. Co., 51 Cal. 345, 21 Am. Rep. 713.

Georgia.—Savannah, etc., R. Co. *v.* Sloat, 93 Ga. 803, 20 S. E. 219; Southern Exp. Co. *v.* Sinclair, 130 Ga. 372, 60 S. E. 849; Rome R. Co. *v.* Sullivan, etc., Co., 14 Ga. 277; Hobbs *v.* Chicago Packing, etc., Co., 98 Ga. 576, 25 S. E. 584, 58 Am. St. Rep. 320; Bruhl *v.* Coleman, 113 Ga. 1102, 39 S. E. 481; Merchants', etc., Transp. Co. *v.* Moore & Co., 124 Ga. 482, 52 S. E. 802; Atlantic, etc., R. Co. *v.* Goodwin, 1 Ga. App. 351, 57 S. E. 1070.

Illinois.—St. Louis, etc., R. Co. *v.* Rose, 20 Ill. App. 670.

Massachusetts.—Claflin *v.* Boston, etc., R. Co. (Mass.), 7 Allen 341; Forbes *v.* Boston, etc., R. Co., 133 Mass. 154, 9 Am. & Eng. R. Cas. 76; Wright, etc., Wire-Cloth Co. *v.* Warren, 177 Mass. 283, 58 N. E. 1082.

Maryland.—Seaboard, etc., Railway *v.* Phillips, 108 Md. 285, 70 Atl. 232.

Michigan.—Gibbons *v.* Farwell, 63 Mich. 344, 29 N. W. 855, 6 Am. St. Rep. 301.

New York.—Security Trust Co. *v.* Wells, Fargo & Co.'s Exp., 178 N. Y. 620, 70 N. E. 1109, affirming 80 N. Y. S. 830, 81 App. Div. 426; Packard *v.* Getman (N. Y.), 4 Wend. 613, 21 Am. Dec. 166.

Ohio.—Oskamp *v.* Southern Exp. Co., 61 O. St. 341, 56 N. E. 13.

South Carolina.—Trowell *v.* Youmans (S. C.), 5 Strob. 67.

Texas.—Missouri, etc., R. Co. *v.* Seley, 31 Tex. Civ. App. 158, 72 S. W. 89; Houston, etc., R. Co. *v.* Adams, 49 Tex. 748, 759, 30 Am. Rep. 116; Missouri Pac. R. Co. *v.* Heidenheimer, 82 Tex 195, 202, 17 S. W. 608.

Vermont.—Winslow, etc., Co. *v.* Vermont, etc., R. Co., 42 Vt. 700, 1 Am. Rep. 365.

West Virginia.—Clarke-Lawrence Co. *v.* Chesapeake, etc., R. Co., 63 W. Va. 423, 61 S. E. 364.

Illustrations.—If dutiable goods which are sent into the United States from Canada, are marked to the care of another person than the consignee, in order that such person may pay the duties, under an arrangement by which such goods come in bond, this gives to the agent no authority to change their destination; and a carrier who, knowing the limited authority thus conferred upon the agent, upon his order delivers them to persons not entitled to receive them, is liable for a conversion. Claflin *v.* Boston, etc., R. Co. (Mass.), 7 Allen 341.

Plaintiff shipped a car of zinc dross to its own order, care of defendants, who operated a line of steamships, and sent the bill of lading to C., with draft attached. The draft was not paid, and it and the bill of lading were returned to plaintiff. The car was placed on defendants' wharf, and the freight bill delivered to them showed plaintiff to be the consignee, and was indorsed, "Notify C." F. had accepted freight rates on a shipment of zinc dross obtained from defendants, and requested defendants to deliver the permit for loading to C. Several barrels of dross were hauled to the wharf by

by mistake delivered goods consigned to plaintiff to another, but recovered them within a day, and tendered them to plaintiff within three days, there was no conversion.[42]

Effect of Fraud, Imposition or Mistake.—Neither fraud,[43] imposi-

C.'s teamster and loaded on defendants' steamer under the permit. The barrels bore the same mark as those in the car, and defendants also permitted the contents of the car to be loaded, and all the dross was carried abroad. Held, that there was nothing in the transaction with F. which could relieve defendants from liability for conversion of the dross. Wright, etc., Wire-Cloth Co. *v.* Warren, 58 N. E. 1082, 177 Mass. 283.

Plaintiff agreed to sell and deliver to W. a car load of corn, to be paid for in cash before delivery. W. having paid part of the price only, plaintiff shipped the corn on one of the cars of defendant, a common carrier, for account of himself, not stating the name of any consignee. Defendant delivered the corn to W. at his request, but without the consent of plaintiff, and without payment of the balance of the price. Held, that this was a conversion of the corn by defendant. Jellett *v.* St. Paul, etc., R. Co., 30 Minn. 265, 15 N. W. 237.

A carrier delivered goods to the consignee four days after notice by the real owner, to the carrier's agent where the goods were, not to do so except on his written order. In reply to such notice, and three days afterwards, the agent advised the owner that he could not hold the goods if demanded on bill of lading, and to send his orders through the shipping office. On the next day the owner wrote such agent that he wanted the goods reshipped to him, and he would advance freight. Held, that the owner was guilty of no laches that would prevent him recovering from the carrier for the conversion of the goods, there appearing to be no delay by such owner affecting the ground on which the carrier acted. Lester *v.* Delaware, etc., R. Co., 92 Hun 342, 36 N. Y. S. 907, 72 N. Y. St. Rep. 334.

Where a carrier negligently delivers goods to one other than the consignee, and afterwards contracts with the person to whom they are delivered to sell the goods, and hold the proceeds for its account, it is guilty of conversion. Erie Dispatch *v.* Johnson, 87 Tenn. 490, 11 S. W. 441.

A carrier is guilty of a conversion of the goods when he forwards them from their point of destination elsewhere on the order of any one but the party to whom they should have been delivered. Houston, etc., R. Co. *v.* Adams, 49 Tex. 748, 759, 30 Am. Rep. 116.

42. Gulf, etc., R. Co. *v.* Wortham (Tex. Civ. App.), 154 S. W. 1071.

43. Delivery through fraud.—*United States.*—The Santee, Fed. Cas. No. 12,328, 2 Ben. 519, affirmed in Fed. Cas. No. 12,330, 7 Blatchf. 186.

Arkansas.—Equitable Powder Mfg. Co. *v.* St. Louis, etc., R. Co., 99 Ark. 497, 138 S. W. 964.

Georgia.—Atlantic, etc., R. Co. *v.* Speirs, 1 Ga. App. 22, 57 S. E. 973.

Texas.—Houston, etc., R. Co. *v.* Adams, 49 Tex. 748, 30 Am. Rep. 116; Trice *v.* Miller, 3 Texas App. Civ. Cas., § 440.

Virginia.—Moore *v.* Baltimore, etc., R. Co., 103 Va. 189, 48 S. E. 887.

West Virginia.—Dudley *v.* Chicago, etc., R. Co., 58 W. Va. 604, 52 S. E. 871, 3 L. R. A., N. S., 1135, 112 Am. St. Rep. 1027.

Illustrations.—Where one had given a general order to an express company that all matter addressed to him should be delivered by it to the conductor of a named railroad, and a package of goods which had been received by the conductor from the express company under such order was tendered by an agent of the railroad company to the person who had given the order, and he declined to receive it because it was not intended for him and was not his property, and the agent of the railroad company thereupon delivered the goods to an impostor, who pretended to be the rightful consignee, and loss to the consignor was thus occasioned, both the person giving the order and the railroad company became liable to the consignor for the value of the goods, though the impostor exhibited to the agent of the railroad company, before the goods were delivered, some evidence tending to show that the goods were really intended for him. Bruhl *v.* Coleman, 39 S. E. 481, 113 Ga. 1102.

Delivery to person presenting notice sent to consignee.—Defendant, a carrier, sent to plaintiffs, the consignees of certain goods, a notice that the goods had arrived at destination, such notice bearing a request to return it when calling to pay charges, and a statement that all orders for the delivery of goods must give the number of the car and date of freight bill. Plaintiffs handed this notice to their truckman, who lost it, and some third person presented it to defendant, and received the goods. Held, that such notice furnished no such evidence of title as to justify defendant in delivering the goods, upon its production, without ascertaining that the delivery was being made to the consignee, and it was immaterial that plaintiff's truckman had been accustomed to take them from the carrier on the production of similar no-

tion,[44] nor mistake[45] will excuse the carrier for delivering goods to the wrong person. The carrier is liable, without regard to the question of due care or negligence.[46]

§ 859. Fraudulent Consignee.—When the carrier delivers goods to the person to whom the goods were sent, although by false and fraudulent devices that person impersonates another, to whom the consignor believed he was sending the goods, the carrier is not liable.[47]

tices. Sinsheimer *v.* New York Cent., etc., R. Co., 46 N. Y. S. 887, 21 Misc. Rep. 45.

Forged order.—A carrier is liable for misdelivery on a forged order. Trowell *v.* Youmans (S. C.), 5 Strob. 67; American Merchants' Union Exp. Co. *v.* Milk, 73 Ill. 224; Houston, etc., R. Co. *v.* Adams, 49 Tex. 748, 30 Am. Rep. 116.

Forged bills of lading.—A carrier, delivering freight to the holder of forged bills of lading, is liable to the holder of the genuine bills. New York Cent., etc., R. Co. *v.* Bank, 195 Fed. 456.

44. Imposition.—*California.*—Adams *v.* Blankenstein, 2 Cal. 413, 56 Am. Dec. 350.

Georgia.—Atlantic, etc., R. Co. *v.* Spires, 1 Ga. App. 22, 57 S. E. 973.

Virginia.—Moore *v.* Baltimore, etc., R. Co., 103 Va. 189, 48 S. E. 887.

West Virginia.—Dudley *v.* Chicago, etc., R. Co., 58 W. Va. 604, 52 S. E. 718, 3 L. R. A., N. S., 1135, 112 Am. St. Rep. 1027.

Impersonation of consignee.—A common carrier, who negligently delivers goods to one impersonating the true consignee, is liable therefor. Pacific Exp. Co. *v.* Critzer (Tex. Civ. App.), 42 S. W. 1017.

45. Delivery by mistake.—*United States.*—The Santee, Fed. Cas. No. 12,328, 2 Ben. 519, affirmed in Fed. Cas. No. 12,330, 7 Blatchf. 186.

Arkansas.—Little Rock, etc., R. Co. *v.* Glidewell, 39 Ark. 487; Equitable Powder Mfg. Co. *v.* St. Louis, etc., R. Co., 99 Ark. 497, 138 S. W. 964.

California.—Adams *v.* Blankenstein, 2 Cal. 413, 56 Am. Dec. 350.

Georgia.—Rome R. Co. *v.* Sullivan, etc., Co., 14 Ga. 277; Atlantic, etc., R. Co. *v.* Spires, 57 S. E. 973, 1 Ga. App. 22; Sellers *v.* Savannah, etc., R. Co., 123 Ga. 386, 51 S. E. 398.

Illinois.—Chicago, etc., R. Co. *v.* Ames, 40 Ill. 249.

New York.—Packard *v.* Getman (N. Y.), 4 Wend. 613, 21 Am. Dec. 166; Scheu *v.* Erie R. Co. (N. Y.), 10 Hun 498; Bush *v.* Romer (N. Y.), 2 Thomp. & C. 597.

South Carolina.—Trowell *v.* Youmans (S. C.), 5 Strob. 67.

Texas.—Gulf, etc., R. Co. *v.* Fowler, 12 Tex. Civ. App. 683, 34 S. W. 661, affirmed in 93 Tex. 661, 684, no op.; Missouri Pac. R. Co. *v.* Heidenheimer, 82 Tex. 195, 17 S. W. 608; Roberts *v.* Yarboro, 41 Tex. 449; Gulf, etc., R. Co. *v.* Humphries, 4 Tex. Civ. App. 333, 23 S. W. 556; Houston, etc., R. Co. *v.* Adams, 49 Tex. 748, 30 Am. Rep. 116.

Virginia.—Moore *v.* Baltimore, etc., R. Co., 103 Va. 189, 48 S. E. 887.

West Virginia.—Dudley *v.* Chicago, etc., R. Co., 58 W. Va. 604, 52 S. E. 718, 3 L. R. A., N. S., 1135, 112 Am. St. Rep. 1027.

A carrier is chargeable with a conversion at the instance of the consignee or his assigns, if he delivers the goods to any other person, though the carrier acts in entire good faith, and the wrong delivery is the result of an innocent mistake on the part of another carrier from whom he received the goods. Merchants', etc., Transp. Co. *v.* Moore & Co., 52 S. E. 802, 124 Ga. 482.

Where a carrier by mistake issues a receipt for freight to the wrong person, it can excuse delivery to him only by showing he was in fact the true owner of the freight and asserted his claim thereto before delivery could be made to the consignee for whom the shipment was intended. Atlantic, etc., R. Co. *v.* Howard Supply Co., 54 S. E. 530, 125 Ga. 478.

46. *Indiana.*—Cleveland, etc., R. Co. *v.* Wright, 58 N. E. 559, 25 Ind. App. 525.

Massachusetts.—Forbes *v.* Boston, etc., R. Co., 133 Mass. 154, 9 Am. & Eng. R. Cas. 76.

Ohio.—Oskamp *v.* Southern Exp. Co. 61 O. St. 341, 56 N. E. 13.

Texas.—Houston, etc., R. Co. *v.* Adams, 49 Tex. 748, 30 Am. Rep. 116.

47. Fraudulent consignee.—*United States.*—Fulton, etc., Cotton Mills *v.* Hudson Nav. Co., 164 Fed. 1022, affirming 157 Fed. 987.

Massachusetts.—Samuel *v.* Cheney, 135 Mass. 278, 46 Am. Rep. 467.

New York.—Price *v.* Oswego, etc., R. Co. (N. Y.), 58 Barb. 599.

Ohio.—Oskamp *v.* Southern Exp. Co., 11 O. C. C. 543, 5 O. C. D. 145; Oskamp *v.* Southern Exp. Co., 61 O. St. 341, 56 N. E. 13.

Pennsylvania.—Seibert *v.* Philadelphia, etc., R. Co., 15 Pa. Super. Ct. 435.

Texas.—Pacific Exp. Co. *v.* Hertzberg, 17 Tex. Civ. App. 100, 42 S. W. 795.

Illustrations.—Where a person, fraudulently assuming the name of a reputable merchant, orders goods by letter, the carrier, to whom the seller intrusts the goods for delivery to such person, is not liable to the seller for delivering the goods

Goods Consigned to Fictitious Firm.—Where a carrier, without requiring evidence of identity, delivers to a stranger goods which have been fraudulently ordered by the latter in the name of a fictitious firm, and which have been shipped in compliance with the order, directed to the fictitious firm, it is liable to the consignor for their value.[48]

Goods Shipped on Fictitious Order.—Where, by means of a fictitious order, a consignor is induced to send property to a person whom he knows to be responsible, the carrier is liable for loss from a delivery of the goods to another person, claiming to be the proper consignee, though the delivery is induced by false representations to the carrier's agent.[49] A delivery to one who by falsely

to him. Samuel *v.* Cheney, 135 Mass. 278, 46 Am. Rep. 467; Edmunds *v.* Merchants' Despatch Transp. Co., 135 Mass. 283; Lake Shore, etc., R. Co. *v.* Luce, 11 O. C. C. 543, 5 O. C. D. 145.

G., representing himself as Y., of Providence, bought goods of plaintiff. The goods were marked to Y., and delivered to defendant railway company, who carried them to Providence. G., who was known to defendants by his real name, applied for them as the property of Y.; and defendants delivered to him on his receipt, but without his producing a bill of lading, which the defendants had given to plaintiff, promising to deliver the goods to Y. or order. There was no Y. in Providence. Held, that the defendants were not liable to plaintiff for delivering the goods to G. Dunbar *v.* Boston, etc., R. Corp., 110 Mass. 26, 14 Am. Rep. 576.

48. **Goods consigned to fictitious firm.**—Price *v.* Oswego, etc., R. Co., 50 N. Y. 213, 10 Am. Rep. 475.

49. **Goods shipped on fictitious order.**—*Florida.*—Southern Exp. Co. *v.* Van Meter, 17 Fla. 783, 35 Am. Rep. 107.

Illinois.—Shearer *v.* Pacific Exp. Co., 43 Ill. App. 641, affirmed in 160 Ill. 215, 43 N. E. 816, 37 L. R. A. 177, 52 Am. St. Rep. 324.

Indiana. — American Exp. Co. *v.* Fletcher, 25 Ind. 492.

Ohio.—Oskamp *v.* Southern Exp. Co., 61 O. St. 341, 56 N. E. 13, reversing 14 O. C. C. 176.

Tennessee.—Sword *v.* Young, 89 Tenn. (5 Pickle) 126, 14 S. W. 481, 604.

Vermont.—Winslow, etc., Co. *v.* Vermont, etc., R. Co., 42 Vt. 700, 1 Am. Rep. 365.

Where, after notice from the consignee that he had not ordered the goods, the carrier delivers them to one who had wrongfully ordered them in the name of the consignee, it is liable to the consignor for their value. Louisville, etc., R. Co. *v.* Fort Wayne Elect. Co., 108 Ky. 113, 55 S. W. 918, 21 Ky. L. Rep. 1544; Pacific Exp. Co. *v.* Hertzberg, 17 Tex. Civ. App. 100, 42 S. W. 795.

It is no defense in an action against an express company for delivering a package of money to a person other than the consignee that the consignor might have discovered by the exercise of due care that the order and check for the money were forgeries. Judgment, 80 N. Y. S. 830, 81 App. Div. 426, affirmed. Security Trust Co. *v.* Wells, Fargo & Co.'s Exp., 70 N. E. 1109, 178 N. Y. 620.

Illustrations.—In an action against a railroad company to recover damages from them, as carriers, for nondelivery of goods, it appeared that the goods were ordered from the plaintiffs, by C., writing under the false name of R., and intending to swindle the plaintiffs. The plaintiffs addressed the goods to R., and forwarded them by defendants' road. C. awaited their arrival, and claimed them under the name of R., which name he assumed for the purpose of getting them; and the defendants delivered them without requiring identification, or taking any other precaution to make sure that the person receiving them was R. Held, that they were liable for a misdelivery. Winslow, etc., Co. *v.* Vermont, etc., R. Co., 42 Vt. 700, 1 Am. Rep. 365.

Goods ordered over a fictitious name, with the intent not to pay for them, were delivered by the carrier to the person giving the order, upon his presenting an unindorsed bill of lading made out in the assumed name, and without requiring him to identify himself as the consignee or the consignee's agent. Held, that the carrier was liable to the consignor for the price of the goods. Sword *v.* Young, 89 Tenn. (5 Pickle) 126, 14 S. W. 481; S. C., 14 S. W. 604.

Same—Consignments of money.—A. forged a telegram in the name of B., requesting a national bank at Charleston, Ill., to forward $500 to B., at Gainesville, Fla. Upon the receipt of this telegram, B.'s agent gave his note for the money, which B. subsequently paid, and the bank forwarded the money by express; the package being addressed to B., at the Arlington House, Gainesville. The agent of the express company at Gainesville delivered the package to a stranger without any further identification than that an hotel keeper, known to said agent as a reliable person, accompanied the stranger, and treated him as B. Held, that the company was liable to B. for the loss of the money. Southern Exp. Co. *v.* Van Meter, 17 Fla. 783, 35 Am. Rep. 107.

An imposter, under the name of J. C. S. (one with whom plaintiff had had

representing himself to be an agent of another, obtained the assent of the consignor to a sale of goods which were consigned to his assumed principal, is not excused, even though he may have been recognized by the consignor in making the sale.[50]

Two Persons with Same Name.—It has been held that where there were two men of the same name, and one refused a tender of the goods, saying he had not ordered them, a delivery to the other who produced the bill of lading, did not charge the carrier with negligence, though the person receiving the goods was a comparative stranger.[51]

§§ 860-865. Delivery without Production of Bill of Lading—§ 860. In General.—A carrier delivers goods at its peril to one without the bill of lading;[52] and it is liable if it makes wrongful delivery without requiring the production and surrender of the bill,[53] even if delivery be made to the con-

dealings), telegraphed to plaintiff to express to him $4,000, in response to which plaintiff expressed the money, at the same time telegraphing for particulars as to the use the money was to be put to, which telegram the impostor answered. The impostor had been staying in the town to which the money was expressed, and from which the telegram was sent, for several days, under the name of J. C. S.; and the express company, on receipt of the money, delivered it to the impostor, after using reasonable diligence to ascertain his identity. There was no evidence as to his true name. Held, that the express company was liable to plaintiff as for a misdelivery of the money. Pacific Exp. Co. *v.* Shearer, 160 Ill. 215, 43 N. E. 816, 37 L. R. A. 177, 52 Am. St. Rep. 324, affirming 43 Ill. App. 641.

Suit against an express company for failure to deliver a package of money consigned by the plaintiff to one A. The receipt given for the package stipulated that it was to be delivered to A. in person. Answer, that the agent of the company at the place to which said package was addressed was also the telegraph operator at that place; that a person pretending to be A. came to said agent, and sent a telegram through him to the plaintiffs, requesting that the money sued for should be sent; that in answer to said telegram the money was sent by the plaintiffs, addressed to A.; and that the same person who had sent said telegram called for and demanded said package, representing himself to be the person to whom the same was addressed, and the money was thereupon delivered to him by the defendant's agent. Held, that the answer did not show such a degree of care and caution as would relieve the defendant from liability, even if charged as a forwarder only. American Exp. Co. *v.* Fletcher, 25 Ind. 492.

50. Brunswick & Co. *v.* United States Exp. Co., 46 Iowa 677; Edmunds *v.* Merchants' Despatch Transp. Co., 135 Mass. 283.

51. Two persons of same name.—Bush *v.* St. Louis, etc., R. Co., 3 Mo. App. 62. See Pacific Exp. Co. *v.* Hertzberg, 17 Tex. Civ. App. 100, 42 S. W. 795.

A carrier's agent, who delivered goods to one whose name was the same as that of the consignee, was not chargeable with knowledge that the consignor had been sending goods through the same company for five years, six or seven times a year, addressed in the same way. Singer *v.* Merchants', etc., Transp. Co., 77 N. E. 882, 191 Mass. 449, 114 Am. St. Rep. 635.

52. Delivery without bill of lading.—*Alabama.*—Mobile, etc., R. Co. *v.* Bay Shore Lumber Co., 165 Ala. 610, 51 So. 956; Atlantic, etc., R. Co. *v.* Dahlberg Brokerage Co., 170 Ala. 617, 54 So. 168.

Georgia.—Boatmen's Sav. Bank *v.* Western, etc., R. Co., 81 Ga. 221, 7 S. E. 125.

Illinois.—Lake Shore, etc., R. Co. *v.* National Live Stock Bank, 59 Ill. App. 451.

Ohio.—Bank *v.* Baltimore, etc., Railway, 15 O. D. N. P. 32, 2 N. P., N. S., 403.

53. Farris *v.* Baltimore, etc., R. Co., 143 Ill. App. 208; Merchants' Despatch, etc., Co. *v.* Merriam, 111 Ind. 5, 11 N. E. 954.

Under commercial usage a carrier should deliver articles shipped only on production of bill of lading, though it names the consignee. First Nat. Bank *v.* Northern Pac. R. Co., 68 Pac. 965, 28 Wash. 439.

Where goods have been transferred from one carrier to another, the last carrier is bound to deliver the goods to the holder of the bill of lading issued by the first carrier. Grayson County Nat. Bank *v.* Nashville, etc., R. Co. (Tex. Civ. App.), 79 S. W. 1094.

But in Nanson *v.* Jacob, 93 Mo. 331, 6 S. W. 246, 3 Am. St. Rep. 531, it was held that there had been no conversion by the second carrier where plaintiff's assignors shipped by a common carrier certain goods addressed to another person, but took a bill of lading, which showed that the goods were consigned to the order of the consignors, and on the arrival of the goods, the second carrier, in the usual

signee.[54] As a general rule where it is stipulated that the goods shall be delivered only on the production of the bill of lading, a delivery, even to the consignee, renders the carrier liable if the bill be not presented.[55] In some states by statute carriers are required not to deliver goods except upon the sur-

course of business, and at the addressee's request, obtained and delivered them to him, without notice that he was not the real owner.

Custom.—If a usage exists for railroad corporations in a certain city to deliver to a consignee goods consigned to him by a bill of lading not containing the words "or order," without requiring the production of the bill of lading, such a delivery is good as against a person to whom the consignee has previously delivered the bill of lading as security for an advance made by him to the consignee. Forbes *v.* Boston, etc., R. Co., 133 Mass. 154, 9 Am. & Eng. R. Cas. 76.

Receipt held not bill of lading.—A shipping receipt, whereby the carrier agreed to transport goods, and in which a third person was named as consignee, and the number of the car containing the goods was stated, was not a bill of lading to bearer, and was not an instrument symbolical of the goods, without production of which a delivery could not be made to any one. Green *v.* Baltimore, etc., R. Co., 92 N. E. 622, 206 Mass. 331.

54. Union Pac. R. Co. *v.* Johnston, 45 Neb. 57, 63 N. W. 144, 50 Am. St. Rep. 540; Gates *v.* Chicago, etc., R. Co., 42 Neb. 379, 60 N. W. 583.

55. Stipulation requiring production of bill.—*Maryland.*—Seaboard, etc., Railway *v.* Phillips, 108 Md. 285, 70 Atl. 232; Chesapeake Steamship Co. *v.* Merchants' Nat. Bank, 102 Md. 589, 63 Atl. 113; Merchants' Nat. Bank *v.* Baltimore, etc., Steamboat Co., 63 Atl. 108, 102 Md. 573.

New York.—Foggan *v.* Lake Shore, etc., R. Co., 61 Hun 623, 16 N. Y. S. 25.

Texas.—Nashville, etc., R. Co. *v.* Grayson County Nat. Bank, 93 S. W. 431, 100 Tex. 17, reversing 91 S. W. 1106; Louisville, etc., R. Co. *v.* United States Fidelity, etc., Co., 125 Tenn. 658, 148 S. W. 671.

Holder of invoice.—When goods are consigned to the order of the shipper, and the manifest and invoice show that they were to be delivered only on production of the bill of lading, the carrier is liable, to the extent of their value, for delivering them to the holder of the invoice without compliance with these terms. Pennsylvania R. Co. *v.* Stern, 119 Pa. 24, 12 Atl. 756, 4 Am. St. Rep. 626.

In Texas it is held that in the absence of such a stipulation in the bill the carrier may deliver to the consignee without requiring its production. Nashville, etc., R. Co. *v.* Grayson *v.* County Nat. Bank, 100 Tex. 17, 93 S. W. 431, reversing 91 S. W. 1106.

Illustrations.—Where a railway company, after issuing a bill of lading on which is stamped, "Not negotiable unless delivery is to be made to the consignee or order," delivers the goods to the consignee named therein without requiring the bill of lading to be produced, it does so at its peril. Barnum Grain Co. *v.* Great Northern R. Co., 102 Minn. 147, 112 N. W. 1030.

A bill of lading containing a provision that the goods are to be delivered on "presentation of duplicate thereof" establishes the fact that the consignor is the owner of the goods, and, if the carrier delivers the goods to the consignee without the presentation of any bill of lading, the carrier becomes liable to the consignor. Jeffersonville, etc., R. Co. *v.* Irvin, 46 Ind. 180.

On the face of the bill of lading, under the word "Consignee," was written "Order of C. E. Drake." On the back was printed the word "Conditions," and under it "Not negotiable," and under this a number of conditions, one of which provided that "if the word 'Order' is written hereon, immediately before or after the name of the party to whose order the property is consigned," the surrender of the bill of lading shall be required before the delivery of the property, and that in any other case the property may be delivered without requiring such surrender. Held, that the bill of lading on its fact was transferable, and the carrier, having delivered the goods without requiring its production, was liable to third persons who had acquired rights in the property. First Nat. Bank *v.* New York, etc., R. Co., 85 Hun 160, 32 N. Y. S. 604, 66 N. Y. St. Rep. 112.

Where a carrier permitted goods consigned to shipper's orders to be taken away by a purchaser after arrival at destination without complying with carrier's instructions in producing a bill of lading, it is liable for their value regardless of whether its possession was that of a carrier or warehouseman. St. Louis, etc., R. Co. *v.* Hall, etc., Mach. Co., 23 Tex. Civ. App. 211, 56 S. W. 140, affirmed in 93 Tex. 694, no op.

Production of bill not required.—Where a bill of lading provided that, if the shipper did not elect to sign and accept the conditions printed thereon, the property would be transported at the carrier's liability, limited only as provided by common law and the laws of the United States and the several states, and the shipper signed no acceptance of the conditions, a further provision of the bill of lading that its surrender, properly indorsed, should be required before the delivery of the property at destination,

render of the bills of lading.[56] Where a shipment is delivered to the proper person the carrier is not liable to the consignor though delivery was made without the production of the bill of lading;[57] as, for instance, where the bill is wrongfully withheld.[58] Where goods are consigned by a person to his own order and are delivered to such consignor or upon his order, this delivery frees the carrier from further liability to the consignor, even though the bill of lading was not surrendered in accordance with a stipulation therein contained.[59] A carrier, which issues a bill of lading naming an intended buyer as the shipper and consignee, in the absence of any outstanding order of the apparent shipper, may, as between itself and him, waive a stipulation that the bill of lading was to be surrendered before delivery, without subjecting itself to liability to the owner.[60] And a bill of lading, providing that, unless the word "order" was written thereon immediately before or after the name of the party to whose order the freight was consigned, the carrier might deliver without the produc-

had no application to the shipment. George & Co. *v.* Louisville, etc., R. Co., 40 So. 486, 88 Miss. 306.

Goods were shipped under a bill of lading which stipulated for their delivery to the order of the consignor, and that its surrender should be required before the delivery of the goods at destination. The bill was indorsed to a partnership for collection, and delivery was directed to the firm's order. Held, that the carrier was authorized to deliver upon a written order signed by one of the partners, without requiring the bill to be presented, though the partner may have privately intended the signing of the order to be his individual act only, provided the carrier's agent had no information of such partner's intention. Chicago Packing, etc., Co. *v.* Savannah, etc., R. Co., 29 S. E. 698, 103 Ga. 140, 40 L. R. A. 367.

56. Statutes requiring surrender of bills of lading.—Nebraska Meal Mills *v.* St. Louis, etc., R. Co., 64 Ark. 169, 41 S. W. 810, 38 L. R. A. 358, 62 Am. St. Rep. 183. See Laws 1858 C. 326 & 1859 C. 353; Colgate *v.* Pennsylvania Co., 102 N. Y. 120, 6 N. E. 114, affirming 31 Hun 297.

Under Pen. Code, § 633, making it an offense for a carrier to deliver merchandise for which a bill of lading has been issued unless it bears on its face the words "Not negotiable," or unless it is surrendered at the time of the delivery, delivery of goods without surrender of the bill of lading is unlawful where the words "Not negotiable" do not appear on its face, though such words are printed on the back. First Nat. Bank *v.* New York, etc., R. Co. (N. Y.), 85 Hun 160, 32 N. Y. S. 604, 66 N. Y. St. Rep. 112.

Delivery to consignee after transfer by him of bill of lading.—Under Laws 1858, c. 326, and 1859, c. 353, forbidding a delivery by a common carrier except on the production and cancellation of the bill of lading, the common carrier is liable for conversion upon delivery of the goods to consignee after he has transferred the bill of lading to third parties, unless the bill of lading is stamped "Not negotiable." Colgate *v.* Pennsylvania Co., 102 N. Y. 120, 6 N. E. 114, affirming 31 Hun 297.

57. Effect of delivery to proper person.—A provision in a bill of lading requiring a surrender as a condition of delivery is for the benefit of the carrier, and hence, where delivery is made to the proper person, it is immaterial that surrender of the bill was not required. Nelson Grain Co. *v.* Ann Arbor R. Co. (Mich.), 140 N. W. 486.

Where one ships goods consigned to the order of himself, with direction to notify B., who was the purchaser and ultimate consignee, and sends the bill of lading, requiring delivery of the goods on production of the bill of lading properly indorsed, together with a draft on B., to a bank, the bill of lading to be delivered to B. on payment of the draft, the carrier is not liable for delivering the goods to B., who paid the draft to the bank, though the bill of lading was not produced, and though part of the draft was not paid till after delivery of part of the goods; and it is immaterial that the bank subsequently became insolvent, and failed to remit proceeds of the draft. Witt *v.* East Tennessee, etc., R. Co., 41 S. W. 1064, 99 Tenn. 442.

58. "If the bill of lading is wrongfully withheld, and the goods go to the person who is legally or equitably entitled to them, as between him and the shipper, though without the use of the bill of lading, the shipper sustains no actual damage, where there is no other outstanding interest in the goods; and his claim for a merely technical irregularity in delivering them without the bill of lading, is damnum absque injuria." Herbst *v.* The Asiatic Prince, 97 Fed. 343, 345.

59. Goods shipped to consignor's order.—Chicago Packing, etc., Co. *v.* Savannah, etc., R. Co., 103 Ga. 140, 29 S. E. 698, 40 L. R. A. 367.

60. Waiver of stipulation requiring surrender of bill.—St. Louis, etc., R. Co. *v.* Gilbreath (Tex. Civ. App.), 144 S. W. 1051.

tion or surrender of the bill, protects the carrier in delivering to a third person, where the bill does not contain the word "order." [61] Where no bills of lading are issued, the carrier is justified in delivering the goods to the consignee without the production of receipts or other evidence of ownership issued to the consignor.[62]

§ 861. Liability to Bona Fide Holder.—Where the carrier delivers goods without the surrender of the bill of lading it assumes the risk of its previous transfer to an innocent party.[63] And it is liable to a bona fide holder of the bill where, without production of such bill, it delivers the goods to one not entitled thereto.[64] But the carrier is not liable where the transfer of the bill is subsequent to delivery, as the transfer of a bill of lading only carries with it whatever title the transferror had at the time of the transfer.[65]

61. St. Louis, etc., R. Co. *v.* Mayer Bros. Co., 79 Kan. 697, 100 Pac. 623; Weisman *v.* Philadelphia, etc., R. Co., 22 R. I. 128, 47 Atl. 318.

62. **Where no bills issued.**—Schlichting *v.* Chicago, etc., R. Co., 121 Iowa 502, 96 N. W. 959.

63. **Liability to bona fide holder.**—Midland Nat. Bank *v.* Missouri, etc., R. Co., 1 Mo. App. 417, 62 Mo. App. 531.

64. *United States.*—The Thames, Fed. Cas. No. 13,858, 7 Blatchf. 226, affirmed in 14 Wall. 98, 20 L. Ed. 804.

Georgia. — Boatmen's Sav. Bank *v.* Western, etc., R. Co., 81 Ga. 221, 7 S. E. 125.

New Hampshire.—First Nat. Bank *v.* Northern Railroad, 58 N. H. 203.

New York.—Colgate *v.* Pennsylvania Co. (N. Y.), 31 Hun 297, affirmed in 102 N. Y. 120, 6 N. E. 114.

Texas.—Nashville, etc., R. Co. *v.* Grayson County Nat. Bank (Tex. Civ. App.), 91 S. W. 1106, judgment reversed in part, 100 Tex. 17, 93 S. W. 431.

Where, by the terms of the bill of lading, the goods are consigned to the order of the consignor, and the bill is indorsed in blank, and negotiated for value as security for a draft drawn by the consignor on a third person, the carrier has no right to deliver the goods to such third person without production of the bill of lading, or authority from the holder thereof. Boatmen's Sav. Bank *v.* Western, etc., R. Co., 81 Ga. 221, 7 S. E. 125. See Chicago Packing, etc., Co. *v.* Savannah, etc., R. Co., 103 Ga. 140, 29 S. E. 698, 40 L. R. A. 367.

Where a carrier allows live stock shipped over its road to go into the possession of a person, other than the consignee, without the order of the consignee, it becomes responsible for their value to a bank, which holds the orders of the consignee indorsed on the receipts for the shipments. North Pennsylvania R. Co. *v.* Commercial Nat. Bank, 123 U. S. 727, 737, 31 L. Ed. 287, 8 S. Ct. 266.

Memorandum on bill "for A."—Where a vessel issues a bill of lading for goods, making them deliverable to order, the fact that upon the vessel's bill of lading there is a memorandum "for A," does not justify a delivery to A., where the shipper's bill of lading is not produced, as against an indorsee of the shipper's bill of lading, who cashed a draft on the consignee upon the faith thereof. The Thames, Fed. Cas. No. 13,859, 7 Blatchf. 226, affirmed in (U. S.), 14 Wall. 98, 20 L. Ed. 804.

Indorsement "notify" third person.—Where a person ships goods which he intends to deliver under a previous contract, but takes a bill of lading to his own order, the delivery to the carrier will not be held to be a delivery to the person to whom the goods are contracted, for in such case the shipper reserves to himself power to dispose of the property; and a bank taking the bill of lading to secure advances made without knowledge of such contract is a bona fide purchaser, notwithstanding an indorsement on the bill to notify certain third persons. Illinois Cent. R. Co. *v.* Southern Bank, 41 Ill. App. 287.

Effect of custom.—The rights of a bona fide holder for value and without notice of a bill of lading stipulating for the delivery of the goods to the shipper's order at a designated point with direction to notify a third person are not affected by a prior agreement or custom of the consignor, the third person and the carrier giving such third person the right to change the destination of the goods without the production of the bill of lading. Western, etc., R. Co. *v.* Ohio, etc., Trust Co., 107 Ga. 512, 33 S. E. 821.

65. **Subsequent transfer of bill.**—Alabama Nat. Bank *v.* Mobile, etc., R. Co., 42 Mo. App. 284. See St. Louis, etc., R. Co. *v.* Gilbreath (Tex. Civ. App.), 144 S. W. 1051.

A delivered property to a common carrier, to be delivered to B. Bills of lading were issued, and transferred to C. for money advanced to B. Before the carrier had notice of the transfer, it delivered the property, under B's direction, to third parties, in part before and in part after the transfer of the bills. Held, that for that part delivered before the transfer the carrier was not liable. Colgate *v.* Pennsylvania Co. (N. Y.), 31 Hun 297, affirmed in 102 N. Y. 120, 6 N. E. 114.

§ 862. Laches of Holder of Bill.—Laches on the part of the owner of a bill of lading can not be assumed merely from delay in presenting it to the carrier.[66] And where a carrier issues a bill of lading for goods as deliverable to order, the laches of the holder in not presenting the order does not excuse the carrier for the delivery of the goods to a person not authorized to receive them, and without production of the bill.[67]

§ 863. Bill Attached to Draft.—If the seller takes a bill of lading to his own order and attaches thereto a draft for the purchase money, he retains the title till the draft is paid, accepted, or secured; and in such case the carrier becomes the agent of the seller and is authorized to deliver the goods only on surrender of the bill of lading;[68] and a delivery to the buyer without payment of the draft or production of the bill of lading is, unless the seller consents, a conversion.[69] But where a bill of lading unconditionally directs delivery to the consignee, the carrier is not liable to the consignor by making such delivery without requiring the production of the bill of lading though he attached thereto a sight draft on the consignee, and sent it to a bank for collection, in the absence of notice to the carrier of such draft.[70] Where a third party has cashed drafts attached to a bill of lading, the carrier is liable to him for a misdelivery.[71]

66. Laches of holder of bill.—First Nat. Bank *v.* New York, etc., R. Co. (N. Y.), 85 Hun 160, 32 N. Y. S. 604, 66 N. Y. St. Rep. 112.

Where holder of bill negligent.—A bank holding a draft, with bill of lading attached, for collection, permitted the drawee to take it up by a new draft, retaining the bill of lading as security, and to reship the goods. This was in accordance with a long course of dealing between them. The goods were delivered, by the drawee's orders, to a third party. The railway company had no notice at any time of the bill of lading, it having been issued by a transportation company. Held, that the railroad company was not liable to the bank on such bill of lading. National Bank *v.* Philadelphia, etc., R. Co., 163 Pa. 467, 30 Atl. 228.

67. The Thames, Fed. Cas. No. 13,859, 7 Blatchf. 226, affirming Fed. Cas. No. 13,858, 3 Ben. 279, affirmed in 14 Wall. 98, 20 L. Ed. 804.

68. Bill of lading attached to draft.—*Arkansas.*—Midland Valley R. Co. *v.* Fay, etc., Co., 89 Ark. 342, 116 S. W. 1171.

Georgia.—Southern R. Co. *v.* Strozier, 10 Ga. App. 157, 73 S. E. 42.

Mississippi.—Alabama, etc., R. Co. *v.* Organ Power Co., 92 Miss. 781, 46 So. 254.

Tennessee.—Louisville, etc., R. Co. *v.* United States Fidelity, etc., Co., 125 Tenn. 658, 148 S. W. 671.

Under a shipment addressed to the consignor with direction to notify his vendee, a bill of lading marked, "B. L. attached to draft," sufficiently notified the carrier not to deliver the shipment without surrender of the bill, though the blank form used was what is known as the "straight," and not the "order," form. Sturges *v.* Detroit, etc., R. Co., 166 Mich. 231, 131 N. W. 706.

A consignee forwarded goods by a carrier, consigned to himself, "to be forwarded to Louisville depot only," and sent the bill of lading, with a draft attached, to a banker for collection. The drawee of the draft never paid it, but wrote out an order in favor of his brother upon the carrier, signed by himself as "agent," and obtained the goods. Held, that as there was evidence that the bill of lading was not produced, and the goods were delivered to the drawee's brother upon the letter alone, and without inquiry as to his identity or right to the goods, the carrier was liable for the loss. Merchants' Despatch, etc., Co. *v.* Merriam, 111 Ind. 5, 11 N. E. 954.

69. Midland Valley R. Co. *v.* Fay, etc., Co., 89 Ark. 342, 116 S. W. 1171.

70. Nebraska Meal Mills *v.* St. Louis, etc., R. Co., 64 Ark. 169, 41 S. W. 810, 38 L. R. A. 358, 62 Am. St. Rep. 183.

71. Where third party has cashed drafts.—*United States.*—See North Pennsylvania R. Co. *v.* Commercial Nat. Bank, 123 U. S. 727, 31 L. Ed. 287, 8 S. Ct. 266.

Illinois.—St. Louis, etc., R. Co. *v.* Larned, 103 Ill. 293.

South Carolina.—National Bank *v.* Atlantic, etc., R. Co., 25 S. C. 216.

One of the common uses of bills of lading is to enable sellers of goods to obtain advances upon their shipments by drawing on the purchasers for the price of the goods, attaching the bill of lading to the draft, and having the draft discounted by some bank, which holds the bill of lading and relies upon its terms as security for the payment of the draft. The carrier must have knowledge that the bill of lading may be so used and thus get into the hands of a bona fide holder, and is bound to see that the goods are not delivered until the draft

§ 864. Duplicate Bills.—Where a railroad company issues original shipper's order bills of lading, declaring that the consignment is in its possession, to be delivered only on their presentation, not conditioned to be void in case of delivery on duplicate bills issued for protection, the company will be liable on its original bills to one holding them as assignee for a valuable consideration, though it has already delivered the freight to the shipper on his presenting one of the duplicate bills.[72] Where the owner of goods received a bill of lading containing a provision that they should be delivered to the consignee upon a presentation of a duplicate of such bill of lading, the carrier is liable for the loss occasioned by the delivery of the goods to the consignee who did not produce such duplicate.[73]

§ 865. Direction in Bill to Notify Third Person.—A direction contained in a bill of lading, to notify a certain person of the arrival of the shipment at the place of destination, is no authority to the carrier to make delivery of such shipment to the person to be so notified, without the production of the bill of

is paid and the bill of lading produced. Western, etc., R. Co. *v.* Ohio, etc., Trust Co., 107 Ga. 512, 33 S. E. 821.

Illustrations.—Defendant railroad company received, in Arkansas, cotton from plaintiff's agent, to be shipped to Rhode Island. By mistake the cotton was sent to Maine. The company then gave the agent a through bill of lading, and agreed to have the cotton sent from Maine to P., in Connecticut. The agent drew against the bill of lading, and the draft was paid by plaintiff. In the meantime the cotton had been delivered by the railroad company in Maine, into whose hands it had come, to one A., who refused to give it up. Held, that defendant was liable. St. Louis, etc., R. Co. *v.* Larned, 103 Ill. 293.

Where a second carrier receives goods from the first carrier, to transport to their destination, knowing upon whose account they are carried, although without knowledge that the consignor has drawn upon the purchaser and attached the draft to the bill of lading, it is liable to the holder of the bill of lading if it delivers the goods to one who, before the arrival of the goods, has purchased them from the consignee. Alderman *v.* Eastern R. Co., 115 Mass. 233.

A consigned a car of corn to his own order, with directions to the railroad company to notify B. A then drew on B for the price, and sent on the draft, with the bill of lading indorsed in blank attached, for collection. B was absent from home when the draft was presented, and at the request of B's clerk, C, who had business dealings with B, paid the draft, and kept the bill of lading as security. The corn was then delivered to B, and put into his storehouse; and some days afterwards C learned of the fact, but said nothing to the company about the misdelivery, and B, with C's knowledge, used up the corn in his business. C then sued the company. Held, that as he had done nothing to induce the misdelivery, and being under no legal duty to notify the company of the same, he was not estopped from maintaining the action. Joslyn *v.* Grand Trunk R. Co., 51 Vt. 92.

Effect of agreement unknown to plaintiff.—By an agreement between the drawers of drafts attached to a bill of lading and the shipper, that the goods should be delivered to the drawee without the production of the bill of lading, the carrier delivered the cotton to the drawee. Held, that this arrangement, being unknown to plaintiff, was a fraud on him, and did not excuse the carrier for the improper delivery. National Bank *v.* Atlanta, etc., R. Co., 25 S. C. 216.

72. Delivery to holder of duplicates.—Midland Nat. Bank *v.* Missouri Pac. R. Co., 132 Mo. 492, 33 S. W. 521, 53 Am. St. Rep. 505, affirmnig 62 Mo. App. 531.

Custom and usage at the place of delivery of never delivering a consignment without surrender of the original bills, and of loaning money on such original bills, is not a factor in determining the liability of a railroad on such bills to a bona fide holder thereof, by written assignment, as security for a loan, where the road has delivered the consignment to the shipper on presentation of the duplicate bill alone. Midland Nat. Bank *v.* Missouri Pac. R. Co., 132 Mo. 492, 33 S. W. 521, 53 Am. St. Rep. 505.

The custom in the place of delivery, that the consignee should take possession of the consignment within six days after notice of its arrival, does not excuse the carrier from liability on the original bill of lading, conditioned for delivery of the consignment, on its presentation, where it delivers the consignment to one presenting the duplicate bill. Midland Nat. Bank *v.* Missouri Pac. R. Co., 132 Mo. 492, 33 S. W. 521, 53 Am. St. Rep. 505, affirming judgment 62 Mo. App. 531.

73. Directing delivery upon presentation of duplicate.—McEwen *v.* Jeffersonville, etc., R. Co., 33 Ind. 368, 5 Am. Rep. 216.

lading properly indorsed.[74] And the holder of the bill of lading is not required to notify the carrier not to deliver to the person who was to be notified, nor to inquire whether the goods would be so delivered.[75]

§ 866. Defenses.—It is no defense in an action against a carrier for delivery of goods to the wrong person that such person acknowledges his liability therefor,[76] or that such a person had a lien on the goods for freight paid, where it appears that he at the time owed plaintiff a large sum,[77] or that the consignee negligently failed to call for the goods within a reasonable time,[78] or

74. Direction to notify third person.—*United States.*—North Pennsylvania R. Co. *v.* Commercial Nat. Bank, 123 U. S. 727, 31 L. Ed. 287, 8 S. Ct. 266.

Georgia.—See Florida Cent., etc., R. Co. *v.* Berry, 116 Ga. 19, 42 S. E. 371.

Illinois.—See Illinois Cent. R. Co. *v.* Southern Bank, 41 Ill. App. 287.

Massachusetts.—See Wright, etc., Wire-Cloth Co. *v.* Warren, 177 Mass. 283, 58 N. E. 1082.

Mississippi.—Alabama, etc., R. Co. *v.* Organ Powder Co., 92 Miss. 781, 46 So. 254.

Nebraska.—Union Stock Yard Co. *v.* Westcott, 47 Neb. 300, 66 N. W. 419.

New York.—Lyons *v.* New York, etc., R. Co. (App. Term.), 119 N. Y. S. 703, affirmed in 120 N. Y. S. 1132, 136 App. Div. 903; Furman *v.* Union Pac. R. Co., 106 N. Y. 579, 13 N. E. 587.

South Carolina.—General Elect. Co. *v.* Southern Railway, 72 S. C. 251, 51 S. E. 695, 110 Am. St. Rep. 600.

Illustrations.—Plaintiff's assignors delivered freight to a carrier in Norfolk, Va., for shipment to Denver, Colo., receiving a receipt therefore describing the goods as "marked 'Y,' order notify Zucca Bros.," Denver, Colo. The goods were delivered by an intermediate carrier to defendant company with a "transfer sheet," "Consignee, 'Y,' order Hup. Zucca Bros., Denver, Colo.," and were delivered by defendant to Zucca Bros. without demanding the production of the bill of lading. The bill of lading had been attached to a draft drawn on Zucca Bros. for the price of the goods, which was dishonored and the bill of lading returned, and indorsed to plaintiff, who demanded the goods of defendant. Held, that defendant had sufficient notice to put him on inquiries, and a delivery of the goods to Zucca Bros. without demanding the bill of lading was negligence, and rendered defendant liable for their value. Furman *v.* Union Pac. R. Co., 106 N. Y. 579, 13 N. E. 587.

A bill of lading declared that, if the word "Order," was written thereon immediately before or after the name of the party to whose order the property was consigned, the surrender of the bill of lading, properly indorsed, should be required before delivery of the property. An organ blower was shipped by plaintiff under a bill of lading, reciting: "Consigned to Organ Power Company, P. R. M. Co. Notify Paton-Rubush Music Company. Via Merchants Dispatch." The freight bill contained the following: "Consignee Organ Power Company, O N Patton-Rubush M. House." Held that, as the court would take judicial notice that the letters "O N" signified "order notify," the carrier was chargeable as for a misdelivery in delivering the blower to the person to be notified without surrender of the bill of lading and payment of the draft thereto attached. Alabama, etc., R. Co. *v.* Organ Power Co., 92 Miss. 781, 46 So. 254.

Effect of custom.—Where cattle are shipped to the order of the consignor, the fact that the railroad company had been in the habit of delivering cattle, transported by it, to a person to whom the receipts required notice to be given without requiring the production of any bill of lading or receipt of the carrier given to the shipper, or any authority of the shipper, in no respect relieves the company from liability, where it is not shown that the shipper or the bank which took the draft against the shipment, had any knowledge of the practice. North Pennsylvania R. Co. *v.* Commercial Nat. Bank, 123 U. S. 727, 31 L. Ed. 287, 8 S. Ct. 266.

75. National Bank *v.* Atlanta, etc., R. Co., 25 S. C. 216.

76. Defenses.—Atlantic Nav. Co. *v.* Johnson, 27 N. Y. Super. Ct. 475.

77. Lester *v.* Delaware, etc., R. Co. (N. Y.), 92 Hun 342, 36 N. Y. S. 907, 72 N. Y. St. Rep. 334.

78. Negligent failure to call for goods.—Indianapolis, etc., R. Co. *v.* Herndon, 81 Ill. 143.

The failure of a consignee to observe a custom, requiring him to take possession of a consignment of goods within a certain time after its arrival at its destination does not justify or excuse the misdelivery of the goods by the carrier, nor relieve against the express language of the bill of lading to deliver only to the shipper's order. Midland Nat. Bank *v.* Missouri, Pac. R. Co., 132 Mo. 492, 33 S. W. 521, 53 Am. St. Rep. 505.

Consignee unknown.—The liability of a carrier, for wrongful delivery to a stranger, is not discharged because the consignee, whose initials only were marked

that the delivery was made according to custom and usage,[79] or was occasioned by fraud, mistake or imposition,[80] or that the goods were subsequently destroyed by an unprecedented storm,[81] or that the consignee refused to accept a tender thereof made more than three weeks after the expiration of the time extended for delivery, and suit had been brought,[82] or that one shipping goods to his order failed to endeavor to recover possession thereof from the one wrongfully obtaining them.[83] And a carrier is not relieved from liability for misdelivery by stipulations in the bill of lading that the consignee shall remove the goods immediately,[84] or requiring claims for loss or damage to be made in a certain time and manner.[85] The fact that a carrier, wrongfully delivering goods, reclaimed and tendered them to the shipper might be shown in mitigation of damages, does not relieve the carrier, on the shipper's damages exceeding the value of the goods.[86]

Mistake in Directions.—A carrier is not liable for a misdelivery made through a mistake, in the direction of a parcel, such mistake not being known to the carrier, which delivers according to the direction and the known course of business at destination.[87] But it has been held that if a carrier delivers goods to the wrong person, he is responsible, although the address of the consignee was erroneously given.[88]

Ratification of Unauthorized Delivery.—A carrier's unauthorized delivery of goods may be ratified;[89] and the right of action for wrongful delivery may

on the goods, was unknown, and did not claim the goods at the end of the transit. Little Rock, etc., R. Co. *v.* Glidewell, 39 Ark. 487.

79. **Effect of custom of usage.**—Mobile, etc., R. Co. *v.* Bay Shore Lumber Co., 165 Ala. 610, 51 So. 956.

80. **Fraud, mistake or imposition.**—See ante, "Liability in General," § 858.

81. **Subsequent loss by unprecedented storm.**—Missouri, etc., R. Co. *v.* Seley, 31 Tex. Civ. App. 158, 72 S. W. 89.

82. Hamilton *v.* Chicago, etc., R. Co., 13 Iowa 325, 72 N. W. 536.

83. Midland Valley R. Co. *v.* Fay, etc., Co., 89 Ark. 342, 116 S. W. 1171.

84. **Stipulation as to removal.**—An ocean carrier which deposited a shipment of goods in a closed wharf after unloading them, and notified the consignee of their arrival, after which the delivery clerk at the gate of the wharf delivered the goods to the wrong person, is not exempted from liability by a stipulation in the bill of lading that the consignee shall remove the goods immediately, otherwise they will be deposited at his expense and risk of fire, loss, or injury in the warehouse provided for that purpose on the steamship wharf. Collins *v.* Burns, 63 N. Y. 1.

85. **Stipulation as to claims for damages.**—Where a carrier is guilty of a conversion by reason of a wrong delivery, he can not take advantage of a stipulation in the bill of lading that claims for loss or damage must be made in writing at the point of delivery after the arrival of the property, and, if delayed more than 30 days after delivery or after due time for delivery, the carrier shall not be liable. Merchants, etc., Transp. Co. *v.* Moore & Co., 52 S. E. 802, 124 Ga. 482.

86. Midland Valley R. Co. *v.* Fay, etc., Co., 89 Ark. 342, 116 S. W. 1171.

87. **Mistake in directions.**—Stimson *v.* Jackson, 58 N. H. 138. See Lake Shore, etc., R. Co. *v.* Hodapp, 83 Pa. 22; Congar *v.* Chicago, etc., R. Co., 24 Wis. 157, 1 Am. Rep. 164.

Where a box marked "Leopold Hotelfa" had come through on defendant's line from New York, and had lain in defendant's warehouse two months, during which time no inquiry was made for it, and defendant's officers had inquired for the consignee without finding him, and the box was then delivered to Leopold's Hotel, the proprietor of which was accustomed to receive consignments for emigrants, it was error, in an action for the loss, to instruct that delivery to the wrong person was a want of ordinary care. Lake Shore, etc., R. Co. *v.* Hodapp, 83 Pa. 22.

88. McCulloch *v.* McDonald, 91 Ind. 240. See Gulf, etc., R. Co. *v.* Maetze, 2 Texas App. Civ. Cas., § 631.

89. **Ratification of unauthorized delivery.**—Converse *v.* Boston, etc., Railroad, 58 N. H. 521.

Illustrations.—A consignee ratifies an unauthorized delivery by paying freight charges and filing a mechanic's lien and making claim in bankruptcy against the persons to whom delivery had been made. Burritt Co. *v.* New York, etc., R. Co., 135 N. Y. S. 557, 76 Misc. Rep. 520.

Plaintiff sold merchandise to A. on condition that it was to be forwarded by carrier to C., who should deliver it to A. on his executing a note indorsed by C. and others. C., without notice of the arrangement, and on representation made by A., verbally authorized A. to receive the package from the carrier, after which A.

be waived by any action which ratifies the delivery, and thereby deprives the carrier of the right to recover over against the person to whom the delivery was made.[90] But a suit by consignor at instance and for benefit of carrier and judgment for value of the goods wrongfully converted by consignee after arrival at destination, does not affect consignor's right of recovery against carrier for its misdelivery.[91]

The acceptance of goods by the consignee, at a place short of their destination, after the time appointed for their delivery, will not free the carrier from the responsibility for damages incurred by a breach of his contract of affreightment.[92] But it is held that, where a consignee directs the forwarding of goods from a wrong destination, to another place where he receives them, such acceptance operates as a waiver of the carrier's liability for the erroneous delivery.[93] And after such acceptance the carrier is not liable for the loss of the

sent to plaintiff a note with forged indorsements, on which plaintiff afterwards sued A., alleging the consideration to be goods sold and delivered. Held, that plaintiff could not afterwards recover of the carrier for failure to deliver the goods to C. Platt *v.* Wells (N. Y.), 26 How. Prac. 442.

Delivery without production of bill of lading.—Though goods may have been shipped upon a bill of lading the production of which was, by its terms, essential to a lawful delivery of the goods to the person for whom they were intended, the purpose being that this person should pay for the goods before obtaining possession of them, yet where the consignor, after receiving information that the goods had in fact been delivered without the production of the bill of lading, and knowing that payment had not been made, drew a draft payable thirty days after its date, upon the other party, took an acceptance thereof, and undertook its collection through a bank, this, though the collection was not in fact made, was such an abandonment of the original purpose of requiring payment on delivery, and such a ratification of the delivery, if actually made, as would relieve the carrier from liability for having made delivery without requiring the surrender of the bill of lading. Southern R. Co. *v.* Kinchen, 103 Ga. 186, 29 S. E. 816.

Where consignors deliver goods to a common carrier with directions to notify a third person and deliver to him on his presentation of the bill of lading and payment of the draft, and the carrier delivers the goods before payment of the draft and without presentation of the bill of lading, but afterwards the consignors treat directly with such party, accepting a part of the purchase money in cash, and taking a check for the balance, which was not paid, the consignors by treating directly with the party receiving the goods waived any right they might have against the carrier. Callaway *v.* Southern R. Co., 55 S. E. 22, 126 Ga. 192.

Where delivery not ratified.—Plaintiffs consigned to themselves, and retained, the bill of lading for goods of which they had made an executory contract of sale; the goods to be delivered to the buyer only on compliance with certain conditions precedent. When the goods reached the destination, defendant carrier improperly delivered them to the buyer. Held, that plaintiffs did not ratify such delivery by corresponding with the buyer in reference to the subject of payment, where they never assented to the delivery, and shortly afterwards called defendant's attention to the matter, and insisted all the time on the liability of defendant. McSwegan *v.* Pennsylvania R. Co., 7 App. Div. 301, 40 N. Y. S. 51, reversing 16 Misc. Rep. 157, 37 N. Y. S. 943.

A shipper can not be held bound by, or be supposed to have consented to, the improper shipment or delivery of his goods by the carrier, merely by following them to the point to which they have been improperly forwarded, or by demanding them from the party to whom they were wrongfully delivered. Houston, etc., R. Co. *v.* Adams, 49 Tex. 748, 30 Am. Rep. 116.

90. Blowers & Co. *v.* Canadian Pac. R. Co., 155 Fed. 935.

91. St. Louis, etc., R. Co. *v.* Hall, etc., Mach. Co., 23 Tex. Civ. App. 211, 56 S. W. 140, affirmed in 93 Tex. 694, no op.

92. Acceptance of goods.—Atkisson *v.* Steamboat Castle Garden, 28 Mo. 124.

In an action to recover the value of bricks, as upon failure of the carrier to deliver them according to the contract of shipment, it appeared that the bricks were left by the company at a station beyond the place of destination designated in the contract of shipment. Held, that the fact that certain tenants of the consignee and owner asked at the station if plaintiff's bricks had come, and unloaded them and placed them on the ground, is not sufficient, in the absence of other proof of authority, to show that they received them as plaintiff's agents. Louisville, etc., R. Co. *v.* Gilmer, 89 Ala. 534, 7 So. 654.

93. Hayman *v.* Canadian, etc., R. Co., 86 N. Y. S. 728, 43 Misc. Rep. 74.

goods,[94] or for the acts or omissions of persons employed to remove them.[95]

If the owner receives payment from the person to whom the carrier has erroneously delivered goods, he becomes estopped to make any claim therefor as against the carrier;[96] but a receipt of payment for a portion of the goods dos not constitute a waiver of his claim against the carrier for the balance, if he does not intend such waiver.[97] And it is held that the receipt by the owner of the proceeds of the sale of goods wrongfully delivered, is no bar to the recovery of damages of the carrier for the wrongful delivery.[98]

Subsequent Payment of Draft.—A carrier who delivers goods to the purchaser without requiring surrender of bill of lading, and payment of draft thereto attached, as directed by the consignee, does not render himself liable to the consignor as for conversion of the goods, where the purchaser subsequently, but promptly, paid the draft to the bank that held it for collection, although the bank failed to remit proceeds, and subsequently became insolvent.[99]

§ 867. Duty of Consignee to Remove Goods.—Where the goods have arrived at destination and the carrier has properly performed its duty, as by giving notice of arrival when it is required, it is the duty of the person entitled to receive the goods to remove them within a reasonable time,[1] or at the end

94. Cleveland, etc., R. Co. *v.* Sargent, 19 O. St. 438.

95. Jewell *v.* Grand Trunk Railway, 55 N. H. 84.

96. **Receipt of payment for goods.**—Brown *v.* Vandalia R. Co., 163 Ill. App. 473.

97. Lester *v.* Delaware, etc., R. Co., 92 Hun 342, 36 N. Y. S. 907, 72 N. Y. St. Rep. 334.

98. Arrington *v.* Wilmington, etc., R. Co., 51 N. C. 68, 72 Am. Dec. 559; Clarke-Lawrence Co. *v.* Chesapeake, etc., R. Co., 63 W. Va. 423, 61 S. E. 364.

99. **Subsequent payment of draft.**—Witt *v.* East Tennessee, etc., R. Co., 99 Tenn. 442, 41 S. E. 1064.

1. **Duty of consignee to remove goods.**—*Illinois.*—Jackson & Son *v.* New York Cent., etc., R. Co., 167 Ill. App. 461.

Kentucky.—Adams Exp. Co. *v.* Tingle, 7 Ky. L. Rep. 441; Harris *v.* Louisville, etc., R. Co., 9 Ky. L. Rep. 392.

Massachusetts.—Bickford *v.* Metropolitan Steamship Co., 109 Mass. 151.

New York.—Goodwin *v.* Baltimore, etc., R. Co., 50 N. Y. 154, 10 Am. Rep. 457; Clendaniel *v.* Tuckerman (N. Y.), 17 Barb. 184.

South Carolina.—Layton & Sons *v.* Charleston, etc., R. Co., 90 S. C. 323, 72 S. E. 988.

West Virginia.—Hurley & Son *v.* Norfolk, etc., R. Co., 68 W. Va. 471, 69 S. E. 994; Hutchinson *v.* United States Exp. Co., 63 W. Va. 128, 59 S. E. 949, 14 L. R. A., N. S., 393; Berry *v.* West Virginia, etc., R. Co., 44 W. Va. 538, 30 S. E. 143, 67 Am. St. Rep. 781, holding that distance from depot and means of removal immaterial.

A consignee can not, after he has notice of the arrival for him of property, defer taking it away, while he attends to his other affairs, thus prolonging the duration of the carrier's liability as insurer. It is his duty at once, and with diligence, to act upon the notice, and to seek delivery, and to continue until delivery is complete. The time he gives to his other business after receiving the notice cannot be allowed to him in estimating what is a reasonable time in which to take delivery. Hedges *v.* Hudson River R. Co., 29 N. Y. Super. Ct. 119.

A rule requiring removal within forty-eight hours after notice of arrival of freight is not unreasonable. Gulf City Constr. Co. *v.* Louisville, etc., R. Co., 121 Ala. 621, 25 So. 579.

Reasonable time to produce bill of lading.—Where title and control of the goods does not pass to the consignee until he acquires a bill of lading, he is entitled to a reasonable time after arrival to obtain and produce such bill of lading. Layton & Sons *v.* Charleston, etc., R. Co., 72 S. E. 988, 90 S. C. 323.

Reasonable diligence used.—Where the consignees of a cargo of malt unloaded part of it the day after receiving notice of its arrival, but did not continue the work until the seventh day after breaking bulk, a finding that they used reasonable diligence is supported by evidence that one Sunday and one holiday had intervened, and that on one or two of the other days it had been raining. Scheu *v.* Benedict, 116 N. Y. 510, 22 N. E. 1073, 15 Am. St. Rep. 426.

Where the custody has been transferred to the consignee, as where bulky articles are landed from a vessel upon a public wharf, with notice to the owner and consignee, who pays the freight and takes steps to remove them, if he unnecessarily delays the removal, he does so at his own risk. Goodwin *v.* Baltimore, etc., R. Co., 50 N. Y. 154, 10 Am. Rep. 457, reversing 58 Barb. 195.

In the absence of notice of arrival consignees of perishable freight are not

of an agreed delay;[2] and if he fails to do so the carrier relieves itself from all liability by depositing them with a responsible warehouseman.[3] As to what constitutes such reasonable time, see elsewhere.[4]

§ 868. Failure or Refusal of Consignee to Receive Goods.—The carrier's responsibility, as such, ceases where the consignee fails or refuses to receive the goods, and afterwards its liability is that of a warehouseman.[5] Where

bound to make inquiry at the office of the carrier therefor, though they have reason to believe that the shipment is overdue. Pennsylvania R. Co. *v.* Naive, 79 S. W. 124, 112 Tenn. 239, 64 L. R. A. 413.

Illustrations.—A consignment of freight reached its destination in due time. The consignee had notice of its arrival November 8th, about 9 o'clock a. m., and that day removed about two-thirds of it, and, under ordinary conditions, could have removed all of it, but was hindered in the use of his dray by an unusual crowd of people obstructing the streets; and the portion left in the depot was burned that night. No negligence was charged on the carrier as to fire, and the action against it by the consignee assumed its liability as a common carrier, and not as the warehouseman. Held, that a peremptory instruction to find for defendant was proper. Harris *v.* Louisville, etc., R. Co., 9 Ky. L. Rep. 392.

The plaintiff, having arrived with a cargo of coal at the place of destination, offered to deliver it, but the owner was not ready to receive it; and it was left on board the plaintiff's vessel, which, after waiting several days for an opportunity to discharge her cargo, was carried away by a freshet, and her cargo lost overboard, so that it could not be delivered to the owner. Held, that the plaintiff's contract as a carrier had been performed, and that he was entitled to recover the stipulated freight, he being liable only for the want of ordinary care after the offer to deliver. Clendaniel *v.* Tuckerman (N. Y.), 17 Barb. 184.

2. Bickford *v.* Metropolitan Steamship Co., 109 Mass. 151.

Contract by employee without authority.—A railway company delivered to the owner goods which were in its warehouse, taking his receipt therefor. By an arrangement between the owner and the baggageman, a part of the goods were left in the warehouse, and subsequently lost. Held, that the company is not liable for the goods lost, where the baggageman had no authority to make any contract for the company; his permitting part of the goods to remain in the warehouse being his private arrangement, to which the company was not a party. Mulligan *v.* Northern Pac. R. Co., 4 Dak. 315, 29 N. W. 659.

3. Bickford *v.* Metropolitan Steamship Co., 109 Mass. 151.

4. **What constitutes reasonable time.**—See post, "Carriers as Warehouseman," chapter 13.

5. **Failure or refusal to receive goods.**—*Georgia.*—American Sugar Refin. Co. *v.* McGhee, 96 Ga. 27, 21 S. E. 383.

Illinois.—American Merchants' Union Exp. Co. *v.* Wolf, 79 Ill. 430 (after notice to consignor).

New York.—Adler *v.* Weir, 96 N. Y. S. 736, 49 Misc. Rep. 134; Lendsberg *v.* Dinsmark (N. Y.), 4 Daly 490; Williams *v.* Holland (N. Y.), 22 How. Prac. 137; Manhattan Rubber Shoe Co. *v.* Chicago, etc., R. Co., 41 N. Y. S. 83, 9 App. Div. 172, 75 N. Y. St. Rep. 544.

Tennessee.—Kremer *v.* Southern Exp. Co., 46 Tenn. (6 Coldw.) 356, (carrier liable only for gross negligence).

Texas.—Missouri, etc., R. Co. *v.* Jenkins, 35 Tex. Civ. App. 429, 80 S. W. 428; House *v.* Soder, 36 Tex. 629, reaffirmed in Gerhard *v.* Neese, 36 Tex. 635.

Wisconsin.—Marshall *v.* American Exp. Co., 7 Wis. 1.

A shipper of goods consigned to himself can not, by failure to receive them on their arrival, continue to hold the carrier liable as such; and it is immaterial that he forwards the bill of lading to an agent of the initial carrier at the point of destination, the goods being in the warehouse of a connecting line, and directs him to deliver them from time to time as subsequently ordered. Illinois Cent. R. Co. *v.* Carter, 46 N. E. 374, 165 Ill. 570, 36 L. R. A. 527.

The refusal of the owner of goods consigned to himself to receive same at destination constitutes an abandonment, and the owner is estopped from afterwards asserting that the carrier had converted them. Beedy *v.* Pacey, 60 Pac. 56, 22 Wash. 94.

Insufficient excuse for refusing to receive goods.—In an action brought by a bank against an express company to recover for the value of a package alleged to have been lost through the negligence of the company, it appeared that the company tendered a delivery of the package at the bank an hour and a half after the usual banking hours, that it was the custom of the company to deliver packages after banking hours, that the teller and clerk were present at the time, and that ordinarily delivery of packages was made to such teller. Held, that it was not a sufficient excuse on the part of the bank for refusing to receive the package that

the consignee is absent from the place of destination,[6] or where the carrier is unable to find an unknown consignee after reasonable inquiries,[7] the carrier may discharge itself from further liability by placing the goods in store with some responsible third person at the place of delivery, for and on account of the owner. If the carrier converts the goods to its own use or wrongfully disposes of them, it is liable for their value.[8]

Duties of Carrier in General.—If a consignee fails or refuses to receive the goods consigned to him, it is the duty of the carrier to take such steps in relation to the goods as will advance the owner's interest and purposes consistently with a reasonable security to itself for its freight and charges. What it ought to do in a given case will depend upon circumstances. If, acting as agent for the owner, it pursues such course as men of ordinary prudence would follow, it will be protected by the law, whatever may be the result.[9] The carrier should take proper care of the goods,[10] and should store them in a safe place.[11] It is held that it is the duty of the carrier to notify the consignor of the consignee's

it was tendered after banking hours, and that the vaults had been locked by the cashier, who had taken the keys away with him. Marshall *v.* American Exp. Co., 7 Wis. 1.

6. **Where consignee absent.**—Salinger *v.* Simmons (N. Y.), 8 Abb. Prac., N. S., 409, 57 Barb. 513, 2 Lans. 325.

7. **Inability to find unknown consignee.**—Where the consignee of certain kegs of butter, sent from Albany to New York by a freight barge, was a clerk, having no place of business of his own, whose name was not in the city directory and who was not known to the carrier, and after reasonable inquiries by the carrier's agent could not be found, it was held that the carrier discharged himself from further responsibility by depositing the property with a storehouse keeper, then in good credit, for the owner, and taking his receipt for the same, according to the usual course of business in that trade, though the butter was subsequently sold by the storehouse keeper, and the proceeds lost to the owner by his failure. Fisk *v.* Newton (N. Y.), 1 Denio 45, 43 Am. Dec. 649.

8. **Where carrier converts goods.**—Chicago, etc., R. Co. *v.* Pfeifer, 90 Ark. 524, 119 S. W. 642, 22 L. R. A., N. S., 1107; Chesapeake, etc., R. Co. *v.* Saulsberry, 103 S. W. 254, 31 Ky. L. Rep. 624.

In an action for damages against a steamboat company, it appeared that plaintiff put on board one of defendant's boats certain iron, to be conveyed to one A. at B.; that there was an understanding between defendant's agent and A. (of which plaintiff was ignorant) that all freight transported for him should be landed at a place on the river bank near his house, and that the iron was landed there; that, shortly after, A. refused to pay the freight bill, and notified defendant's agent that he should not take the iron away; that afterwards one C., without authority from A., was permitted to pay the freight bill, and took the iron away; and that plaintiff never received any information as to the disposition of it. Held, that plaintiff was entitled to recover. Howard *v.* Old Dominion Steamship Co., 83 N. C. 158, 35 Am. Rep. 571.

9. **Duties of carrier in general.**—The Keystone, 28 Mo. 243, 75 Am. Dec. 123.

10. Porter *v.* Chicago, etc., R. Co., 20 Ill. 407, 71 Am. Dec. 286; Chickering *v.* Fowler (Mass.), 4 Pick. 371; Redmond *v.* Liverpool, etc., Steamboat Co., 46 N. Y. 578, 7 Am. Rep. 390, reversing 56 Barb. 320.

The failure of the legal holder of the bill of lading to appear for the purpose of receiving the goods when they reached their destination did not relieve the carrier of liability, but it was required to store the same with the company designated, with directions to deliver to the person entitled thereto on the production of the bill of lading, properly indorsed. Arkansas, etc., R. Co. *v.* German Nat. Bank, 92 S. W. 522, 77 Ark. 482, 113 Am. St. Rep. 160.

11. **Storage in safe place.**—The Eddy (U. S.), 5 Wall. 481, 18 L. Ed. 486; Richardson *v.* Goddard (U. S.), 23 How. 28, 16 L. Ed. 412; Brittan *v.* Barnaby (U. S.), 21 How. 527, 16 L. Ed. 177; The Thames (U. S.), 14 Wall. 98, 20 L. Ed. 804; North Pennsylvania R. Co. *v.* Commercial Nat. Bank, 123 U. S. 727, 31 L. Ed. 287, 8 S. Ct. 266.

On refusal of the consignee to accept goods, it devolves on the master of the carrier to have them placed, at the expense of the consignee, in a place where they will not be exposed to loss. The Red River, 30 So. 303, 106 La. 42, 87 Am. St. Rep. 293.

That the goods are foreign merchandise, subject to duty, and are entered in bond by the consignee, he obtaining a permit to remove them to a designated warehouse, and that their removal is under the supervision of the customs officer, does not affect the carrier's liability. Redmond *v.* Liverpool, etc., Steamboat Co., 46 N. Y. 578, 7 Am. Rep. 390, reversing 56 Barb. 320.

refusal to receive the goods;[12] even if the goods are perishable where it is practicable to give notice.[13] But the carrier need not give such notice where it was given by the consignee.[14] The carrier must hold the goods subject to the order of the consignor,[15] and return them to him upon his demand, subject to reasonable regulations as to the payment of charges, etc.;[16] but it need not return the goods unless the consignor so demands.[17]

12. **Notice to consignor.**—*United States.*—See The Eddy (U. S.), 5 Wall. 481, 18 L. Ed. 486.

Georgia.—American Sugar Refin. Co. *v.* McGhee, 96 Ga. 27, 21 S. E. 383; Alabama, etc., R. Co. *v.* McKenzie, 139 Ga. 410, 77 S. E. 647, 45 L. R. A., N. S., 18.

Illinois.—American Merchants' Union Exp. Co. *v.* Wolf, 79 Ill. 430; Michigan Cent. R. Co. *v.* Harville, 136 Ill. App. 243.

Kentucky.—Nashville, etc., R. Co. *v.* Dreyfuss-Weil Co., 150 S. W. 321, 150 Ky. 333.

New York.—Carrizzo *v.* New York, etc., R. Co., 123 N. Y. S. 173, 66 Misc. Rep. 243, 9 L. R. A., N. S., 579. See Manhattan Rubber Shoe Co., *v.* Chicago, etc., R. Co., 41 N. Y. S. 83, 9 App. Div. 172, 75 N. Y. St. Rep. 544.

In Williams *v.* Holland (N. Y.), 22 How. Prac. 137, it was held that the failure to notify the owner of the consignee's refusal does not render the carrier liable, unless it is at least shown that the carrier knew who was the owner.

Texas.—The carrier is not required to notify the shipper until it is notified, or by the exercise of ordinary diligence could have known of the consignee's refusal. Missouri, etc., R. Co. *v.* Jenkins, 80 S. W. 428, 35 Tex. Civ. App. 429.

Contra.—If the consignee refuses to receive goods shipped, the carrier is not liable to the consignor for failure to notify him. Kremer *v.* Southern Exp. Co., 46 Tenn. (6 Coldw.) 356.

Plaintiff shipped goods consigned to himself, with directions to notify a third person at the point of destination, on which party plaintiff had drawn for them, attaching the bill of lading to the draft. The drawee wrote plaintiff that he was not able to pay the draft on presentation, whereupon plaintiff made a second draft, on ten days' time. The railroad company, in the meantime, had stored the goods with a warehouseman, taking a warehouse receipt therefor in its own name. Held, that the company's liability as common carrier ceased upon its delivery at the warehouse, although it had failed to notify plaintiff of the drawee's failure to receive. Gregg *v.* Illinois Cent. R. Co., 147 Ill. 550, 35 N. E. 343, 37 Am. St. Rep. 238, affirming 47 Ill. App. 590.

Delay in giving notice.—Where the consignee of cotton refused to accept the same on the ground that it was of inferior grade, the carrier was liable for delay, in notifying the shipper of such refusal in case the cotton was of inferior grade, only for the decline in the market price for the time intervening between the date on which by the exercise of ordinary care it could have learned of the consignee's refusal and notified the shipper and the date on which the cotton was actually sold after notice was given. Missouri, etc., R. Co. *v.* Jenkins, 80 S. W. 428, 35 Tex. Civ. App. 429.

13. **Perishable goods.**—Alabama, etc., R. Co. *v.* McKenzie, 77 S. E. 647, 139 Ga. 410, 45 L. R. A., N. S., 18.

14. **Where notice given by consignee.**—Manhattan Rubber Shoe Co. *v.* Chicago, etc., R. Co., 41 N. Y. S. 83, 9 App. Div. 172, 75 N. Y. St. Rep. 544.

15. American Sugar Refin. Co. *v.* McGhee, 96 Ga. 27, 21 S. E. 383.

16. **Return of goods to consignor.**—Freiberg *v.* Cleveland, etc., R. Co., 11 O. C. C., N. S., 241, 20-30 O. C. D. 669, affirmed in 83 O. St. 482.

Liability to consignee.—Where a buyer, to whom goods are consigned, wrongfully refuses to receive them on their arrival within a reasonable time, the carrier is not guilty of conversion in complying with the seller's orders to ship the goods back to him; and the consignee is estopped to sue the carrier. Stafsky *v.* Southern R. Co., 39 So. 132, 143 Ala. 272.

17. Louisville, etc., R. Co. *v.* Heilprin & Co., 95 Ill. App. 402; Adams Exp. Co. *v.* McConnell, 27 Kan. 238.

Plaintiff delivered defendant goods for carriage, but the consignee refused to accept them, and plaintiff was notified by defendant of such refusal. Plaintiff claimed that he instructed defendant by postal to return the goods. Defendant denied receipt of the postal, but on receiving a subsequent communication from plaintiff, which it did not understand, sent a representative for an explanation, and, receiving instructions for a return of the goods, at once communicated with its agent, and the goods were immediately shipped and tendered to plaintiff the first business day after their arrival. Plaintiff, a week before, had demanded their return by a letter claiming that they would be useless if not returned within three days. Held, that the facts did not justify a finding of a conversion by defendant. Rubin *v.* Wells Fargo Exp. Co., 85 N. Y. S. 1108.

Refusal of consignor to order return.—Where a suit of clothes is manufactured to order, to be inspected by the purchaser before acceptance, and the car-

Return of Goods by Consignee after Delivery.—Where, after delivery to the consignee, he refuses to receive the goods and returns them, the carrier is not liable for their loss.[18]

Excuses for Failure to Receive.—The consignee is not justified because of mere delay in the transportation of goods, to refuse to receive them;[19] but if they have become useless to the consignee, by reason of delay, he is not bound to receive them, and may recover their value.[20] The consignee may not, as a general rule, reject the goods because they have been damaged in the course of shipment;[21] but, when the entire value of the goods has been destroyed and the injury amounts practically to a total loss, the consignee is justified in refusing them and may sue for the entire amount.[22] And he may refuse the goods where upon their arrival the packages or casks are, by the fault of the carrier, in a damaged condition, so that they can not be handled without loss and further damage, and the carrier refuses to repair them.[23]

Sale of Rejected or Unclaimed Freight.—Where a statute regulating the sale of rejected freight by a carrier supersedes the common law in respect to the manner of selling such freight, a sale in violation of the statute is illegal.[24]

rier tenders the goods, and the consignee refuses to accept them, but states that he will shortly call for them, and the carrier stores them for several weeks, when the consignee absolutely rejects them, and the consignor refuses to order their return, on being informed of the rejection, on the ground that they are no longer of any use to him, the consignor can not recover of the carriage. Levy *v.* Weir, 77 N. Y. S. 917, 38 Misc. Rep. 361.

18. Return of goods by consignee after delivery.—A carrier, who received merchandise addressed to the consignee at W., carried the goods to C., the terminus of its line, and delivered to a warehouseman, from whom the goods were taken by a teamster and hauled to C., and, in the absence of the consignee, left on his premises. The consignee afterwards refused to receive the goods, whereupon the teamster returned them to the warehouse at C., where they were afterwards lost. In an action to recover the value, held, that the carrier was not liable. Salinger *v.* Simmons (N. Y.), 57 Barb. 513, 2 Lans. 325, 8 Abb. Prac., N. S., 409.

19. Delay in delivery.—*Kentucky.*—Chesapeake, etc., R. Co. *v.* Saulsberry, 103 S. W. 254, 31 Ky. L. Rep. 624.

New Jersey.—Higgins *v.* United States Exp. Co., 83 N. J. L. 398, 85 Atl. 450.

Oklahoma.—St. Louis, etc., R. Co. *v.* Dreyfus, 37 Okla. 492, 132 Pac. 491.

Texas.—Gulf, etc., R. Co. *v.* Everett, 37 Tex. Civ. App. 167, 83 S. W. 257; Gulf, etc., R. Co. *v.* Somerville Mercantile Agency (Tex. Civ. App.), 104 S. W. 1072.

Delay in the delivery of goods by a common carrier will not authorize the consignee to reject them upon their arrival, and recover their full value from the carrier. His remedy is to sue for the damage he has sustained by reason of the delay. Southern Exp. Co. *v.* Hanaw, 134 Ga. 445, 67 S. E. 944.

20. Gulf, etc., R. Co. *v.* Maetze, 2 Texas App. Civ. Cas., § 631. See St. Louis, etc., R. Co. *v.* Dreyfus, 37 Okla. 492, 132 Pac. 491.

21. Damage to goods in shipment.—Wilkins *v.* Atlantic, etc., R. Co., 160 N. C. 54, 75 S. E. 1090. See post "Loss of or Damage to Goods," Chapter 12.

22. Wilkins *v.* Atlantic, etc., R. Co., 160 N. C. 54, 75 S. E. 1090.

23. Breed *v.* Mitchell, 48 Ga. 533.

24. Statute regulating sale of rejected freight.—St. Louis, etc., R. Co. *v.* Arkansas, etc., Grain Co., 42 Tex. Civ. App. 125, 95 S. W. 656; Gulf, etc., R. Co. *v.* North Texas Grain Co., 32 Tex. Civ. App. 93, 74 S. W. 567.

Kentucky Statute 1903, § 785, authorizes sale of nonperishable freight unclaimed for one year on giving specified notice. Chesapeake, etc., R. Co. *v.* Saulsberry, 31 Ky. L. Rep. 624, 103 S. W. 254.

Under the Texas statute, such sale must be made only after the expiration of six months, on notice to the consignor and such notice of sale as will reasonably assure a sale at the reasonable market value. Missouri, etc., R. Co. *v.* Groce (Tex. Civ. App.), 106 S. W. 720.

A sale is unauthorized, where the sale is for much less than the market value and is made without notice of sale, and immediate sale is unnecessary to protect the carrier in its freight charges, and it is liable for the fair market value at the time of sale. Missouri, etc., R. Co. *v.* Groce (Tex. Civ. App.), 106 S. W. 720.

Such statute is applicable to a shipment from a point without to a point within the state. St. Louis, etc., R. Co. *v.* Arkansas, etc., Grain Co., 42 Tex. Civ. App. 125, 95 S. W. 656.

Where, after rejection of certain corn by the consignee, the carrier sold it without complying with a state statute regulating such sales, and there was no evidence that the corn was perishable other than that it was moldy and in a damaged

Perishable Goods.—Where goods are of a perishable nature, and, in the absence of the consignee, or his refusal to receive them, it becomes a matter of necessity to sell, the carrier may rightfully sell them;[25] and it should make an ordinarily diligent effort to sell at the best price obtainable.[26] In some states there are statutory provisions regulating the sale of such goods.[27] And when a carrier sells goods not in accordance with the statute, it is liable for conversion.[28]

§ 869. Goods Shipped C. O. D.—Necessity for Undertaking to Collect.—In order to charge a carrier with the duty of collecting from the consignee the price or other charge against goods transported, there must be some undertaking by the carrier to collect, either directly proved, or inferable from usage.[29]

condition, it was no defense to the carrier's liability that the statute was inapplicable to perishable freight. St. Louis, etc., R. Co. *v.* Arkansas, etc., Grain Co., 42 Tex. Civ. App. 125, 93 S. W. 656.

25. **Sale of perishable goods.**—*Illinois.*—Hasler Co. *v.* Griffing Florida Orchard Co., 133 Ill. App. 635.

Tennessee.—Rankin *v.* Memphis, etc., Packet Co., 56 Tenn. (9 Heisk.) 564, 24 Am. Rep. 339.

Texas.—Missouri, etc., R. Co. *v.* Cox & Co. (Tex. Civ. App.), 144 S. W. 1196.

West Virginia.—Dudley *v.* Chicago, etc., R. Co., 58 W. Va. 604, 52 S. E. 718, 3 L. R. A., N. S., 1135, 112 Am. St. Rep. 1027.

Where a carrier without authority opens a sealed car and the property therein is perishable, and the owner, on being notified of the danger of loss, relying on the unauthorized inspection by the carrier as constituting a conversion, gives notice of his abandonment of the property, the carrier may sell the same on account of the owner, deduct his charges from the proceeds, and will be liable for the balance only. Dudley *v.* Chicago, etc., R. Co., 52 S. E. 718, 58 W. Va. 604, 112 Am. St. Rep. 1027, 3 L. R. A., N. S., 1135.

26. **Best price obtainable.**—Hull & Co. *v.* Missouri Pac. R. Co., 60 Mo. App. 593.

27. **Under Kentucky St.** 1903, § 785, authorizing a carrier to sell perishable freight as soon as it deems a sale necessary, on giving specified notice, a carrier having in its possession as unclaimed freight corn delivered to it for transportation must, as soon as it is deemed necessary to sell the same, sell it as perishable freight, and give notice thereof, and may, if necessary to sell it at some other place for want of market, transport the same to such place, but the sale must be made in the state, and the carrier taking the freight to another state and there selling it converts it. Chesapeake, etc., R. Co. *v.* Saulsberry, 103 S. W. 254, 31 Ky. L. Rep. 624.

New York.—Laws 1899, p. 1294, c. 582, amending § 46 of the railroad law (Laws 1890, p. 1097, c. 565), provides that unclaimed live stock and perishable freight or baggage may be sold by any railroad without notice, as soon as it can be, upon the best terms that can be obtained, etc., Ten boxes of fish packed in ice were consigned to plaintiff April 7th, reaching their destination April 8th. He failed to call for them for fifty-four hours, though two notices were sent him, and he had ample opportunity to do so. Held, that defendant was warranted in selling the fish. Leech *v.* New York, etc., R. Co., 83 N. Y. S. 166, 40 Misc. Rep. 654.

Oklahoma.—Comp. Laws 1909, § 455, authorizes public or private sale without advertising. Ginnochio-Jones Fruit Co. *v.* Missouri, etc., R. Co. (Mo. App.), 134 S. W. 1028.

A car load of potatoes on the tracks at Tulsa in the latter part of November was "perishable property" within the meaning of the statute. St. Louis, etc., R. Co. *v.* Dreyfus, 37 Okla. 492, 132 Pac. 491.

Texas.—Rev. St. 1805 acts 328, 331, authorizes sale at public auction after five day's notice. Carter *v.* International, etc., R. Co. (Tex. Civ. App.), 93 S. W. 681.

28. **Sale in violation of statute.**—Carter *v.* International, etc., R. Co. (Tex. Civ. App.), 93 S. W. 681.

Demand by consignee before sale.—The consignee of a car load of onions having refused to accept the same because of its damaged condition, the carrier, after a delay of eight days, shipped the property to another place to be sold for freight charges. After such shipment, but before sale, the consignee demanded the property, offering to pay the charges, which the carrier refused. Held a conversion of the property, the sale not being such as is provided for by Rev. St. 1895, arts. 328, 329. Missouri, etc., R. Co. *v.* Rines & Co., 37 Tex. Civ. App. 618, 84 S. W. 1092.

29. **Necessity for undertaking to collect.**—Chicago, etc., R. Co. *v.* Merrill, 48 Ill. 425. See Adams Exp. Co. *v.* Ten Winkel, 44 Colo. 59, 96 Pac. 818.

The agent of an express company who instructed a sender of a package to address the package as he wanted it addressed, and who showed him where he would find envelopes for C. O. D. packages, had the right to presume that the

Liability for Collection of Price.—Where the carrier undertakes to deliver goods to the consignee subject to the payment of a certain sum of money, the carrier is not authorized to deliver the goods without collecting such money;[30] and if it delivers the goods without collecting the sum due, it becomes liable therefor,[31] unless the consignor ratifies such delivery.[32] A con-

sender would exercise care to properly mark the envelope selected. Adams Exp. Co. *v.* Ten. Winkel, 44 Colo. 59, 96 Pac. 818.

What amounts to contract to collect.—Where a shipper sent a package, by her servant, to an express company, with instructions to be carried C. O. D., but the company gave a receipt which was not in the form of a receipt for package sent C. O. D., and the shipper knew it was not, the receipt operates as a refusal to send the package C. O. D.; and, if the shipper accepts and retains the receipt, it is conclusive, and she can not recover of the company for a delivery without collection. Smith *v.* Southern Exp. Co., 104 Ala. 387, 16 So. 62.

A bill of lading recited that the goods were "to be delivered without delay, etc., at the port of, etc., to, etc., or assigns, he or they paying freight for said goods at the rate of, etc., charges payable when collected by boat; charges to be collected" a certain sum, being the value of the goods. Held, that the plain and reasonable intent of the language was that the charges were to be collected by the carrier. Meyer *v.* Lemcke, 31 Ind. 208.

A stipulation in a bill of lading that goods are to be delivered "subject to the payment of $1,665 to the clerk of John Owen (the steamboat) for E. S. J."—the goods shipped having been sold by the shipper to the consignee, and the $1,665 being part of the purchase money—is a binding condition, for the breach of which the vessel may be seized under the statute relating to watercrafts as common carriers. Steamboat John Owen *v.* Johnson, 2 O. St. 143.

Giving receipt c. o. d.—Where the carrier gives a receipt for a package received by it for transportation, the use of the letters "C. O. D." which are the initials of the words "collect on delivery," implies an undertaking on its part to collect of the consignee on delivery the amount due from him, and marked on the package, and to return such amount to the consignor. American Exp. Co. *v.* Lesem, 39 Ill. 312. See United States Exp. Co. *v.* Keefer, 59 Ind. 263.

Marking package c. o. d.—A consignor can not charge a common carrier with any duty of collecting from the consignee the price or other charge against goods transmitted by the carrier by simply marking the package "C. O. D." Chicago, etc., R. Co. *v.* Merrill, 48 Ill. 425.

"Please collect," written on a bill accompanying parcels, is a request only; and where a request to collect is made on delivering a parcel to a carrier, he is under no obligation or agreement to do so. Tooker *v.* Gormer (N. Y.), 2 Hilt. 71.

30. Liable for collection.—Steamboat John Owen *v.* Johnson, 2 O. St. 143.

31. *Alabama.*—See Smith *v.* Southern Exp. Co., 104 Ala. 387, 16 So. 62.

Illinois.—American Merchants' Union Exp. Co. *v.* Wolf, 79 Ill. 430.

Indiana.—Meyer *v.* Lemcke, 31 Ind. 208.

Minnesota.—See Jellett *v.* St. Paul, etc., R. Co., 30 Minn. 265, 15 N. W. 237.

New Hampshire.—Murray *v.* Warner, 55 N. H. 546, 20 Am. Rep. 227.

New York.—Tooker *v.* Gormer (N. Y.), 2 Hilt. 71.

That the sum to be collected was larger than that due, makes no difference in the liability of the carrier, for delivering the goods without collection. Steamboat John Owen *v.* Johnson, 2 O. St. 143.

Liability of connecting carrier.—An initial carrier, forwarding goods shipped C. O. D. by a connecting carrier, may recover of the connecting carrier for their delivery to the consignee without payment, which was imposed as a condition of delivery. Murray *v.* Warner, 55 N. H. 546, 20 Am. Rep. 227.

A carrier undertaking to deliver a corpse in a casket for an undertaker giving the carrier his bill C. O. D. for his services and the price of the casket, is not liable for permitting the consignee to take the corpse from the casket without

32. Ratification of delivery without collection.—Though goods were not to be delivered until the price be paid, yet where the consignor, after notice that the goods had been delivered without such payment, drew a draft upon the consignee, took an acceptance thereof, and undertook its collection through a bank, he thereby abandoned the original purpose of requiring payment on delivery, and ratified the delivery, and whether the draft was collected is immaterial. Southern R. Co. *v.* Kinchen, 29 S. E. 816, 103 Ga. 186.

Where a proposed buyer of goods rejected the consignor-consignee's draft with bill of lading attached, that after the carrier delivered the goods to the buyer the draft was again presented is not conclusive evidence of the consignor's ratification of the delivery. Atlantic, etc., R. Co. *v.* Dahlberg Brokerage Co., 170 Ala. 617, 54 So. 168.

signee's check for goods sent C. O. D. is not payment, and the carrier is liable if the check is not paid.[33] But the carrier is not liable if the consignor receives the check without objection.[34]

Examination of Goods by Consignee.—It is held that the carrier may refuse to permit the consignee to examine goods sent C. O. D. until he has paid the charges and accepted delivery.[35] But it is also held that the consignee has the right to a reasonable opportunity to examine the goods.[36] Where the carrier permits the consignee to examine the goods, such examination is not a delivery, so as to render it liable to the consignor for the money directed to be collected.[37]

paying the bill, as it would be against public policy to require a return of the corpse for nonpayment. American Exp. Co. *v.* Epply, 1 Wkly. L. Bull. 79, 5 O. Dec. 337.

Acceptance of portion of goods.—Where a carrier is employed to carry a parcel of clothes, with instructions to bring back the goods if they are not paid for, and the person to whom they are sent retains a portion of the goods, and returns the others, sending a check for those retained, the sender can not refuse to receive the goods returned, and the check, and sue the carrier for the value of the whole parcel, or for damages, where it does not appear that the check was not for the full value of the goods retained. Feiber *v.* Manhattan Dist. Tel. Co., 3 N. Y. S. 116, 22 Abb. N. C. 121, 15 Daly 62, 20 N. Y. St. Rep. 986.

Goods received before draft for collection.—A marked goods with B's name, and sent them by railroad to B, taking therefor a railroad receipt, in which, under the heading "Marks and Consignees," were written "B order A." A indorsed the receipt in blank, drew a draft on B for the price, attached the draft to the receipt, and forwarded both by an express company for collection. The railroad company delivered the goods to C, another common carrier, to transport to their destination, with a freight bill containing the words, "Order A: Notify B," and the express company gave the receipt, with the draft attached, to C for collection. Held, that C, by delivering the goods to B without the authority of A, and before the payment of the draft by B, was liable to A for the conversion of the goods, and that the fact that the receipt and the draft were not received by C until after he received the goods was immaterial. Libby *v.* Ingalls, 124 Mass. 503.

Contract for delivery of similar goods.—A carrier can not justify delivery of freight to a buyer who had rejected the consignor-consignee's draft with bill of lading attached, on the ground that the buyer had a contract with the consignor's principal for delivery of similar goods. Atlantic, etc., R. Co. *v.* Dahlberg Brokerage Co., 170 Ala. 617, 54 So. 168.

33. **Receiving consignee's check.**—Rathbun *v.* Citizens' Steamboat Co. (N. Y.), 1 City Ct. R. 107.

34. Rathbun *v.* Citizens' Steamboat Co., 76 N. Y. 376, 32 Am. Rep. 321.

35. **Examination of goods by consignee.**—Wiltse *v.* Barnes, 46 Iowa 210.

36. Lyons *v.* Hill, 46 N. H. 49; American Exp. Co. *v.* Epply, 1 Wkly. L. Bull. 79, 5 O. Dec. 337.

37. Aaron *v.* Adams Exp. Co., 27 Wkly. L. Bull. 183, 11 O. Dec. 500; American Exp. Co. *v.* Epply, 1 Wkly. L. Bull. 79, 5 O. Dec. 337.

A carrier received goods, with directions to collect the price on delivery to the consignee. The latter paid the price to the carrier on condition that it should be returned to him if the goods on examination proved unsatisfactory. They did prove so, and the money was repaid; the carrier taking back the goods to the consignor, who refused to receive them, and demanded the price. Held, that the consignor could not recover the price. Lyons *v.* Hill, 46 N. H. 49.

A consignee of a suit of clothes C. O. D. paid the price to the carrier under an agreement that he might have it returned to him if the fit of the clothes was unsatisfactory. He thereafter brought the clothes to the consignor, telling him how he had left the money with the carrier, and stating that the clothes did not fit. The consignor altered the clothes, with the agreement that he should have the money from the carrier if he made them fit satisfactorily, and then sent them a second time to the consignee. The fit was not satisfactory, and he returned the clothes to the carrier, who returned to him the money. Held, that the carrier was not liable to the consignor, as he had ratified the act of the carrier in receiving the money conditionally. Brooks *v.* American Exp. Co. (N. Y.), 14 Hun 364.

Fraud on consignee.—Where the consignee, upon examination of the goods, discovers that they are worthless, and the whole affair a fraud on the part of the consignor, he may return them and receive back the money paid from the carrier at any time before it is actually paid over to the consignor; the fraud of the consignor relieving the carrier from liability as to him. Herrick *v.* Gallagher (N. Y.), 60 Barb. 566.

Liability to Consignee.—A carrier need not deliver goods sent C. O. D. to the consignee until he has paid the charges.[38] Where the consignee refuses to receive the goods, the carrier is relieved from liability by delivering to the true owner.[39] If the consignee paying a draft accompanying a bill of lading which by mistake called for more goods than the carrier delivered, would have known of the mistake before paying the draft, had he exercised ordinary care, his failure to do so amounts to actual knowledge.[40] Where goods are sent C. O. D. at consignor's risk, and the carrier's agent knows that they show signs of wet damage, it is his duty to disclose such fact to the consignee before demanding and receiving payment therefor.[41] The fact that the carrier remits the purchase price to the consignor before receiving notice from the consignee that the goods were worthless does not receive it from liability, if the notice was within a reasonable time.[42] Before the consignee sues the carrier to recover the price paid he must offer to return the goods to it.[43]

Liability as Warehouseman—Notice to Consignor.—A carrier is liable only as warehouseman for goods to be delivered C. O. D., where the consignee requests a few days time in which to pay the charges after receiving notice of their arrival; and it need not notify the consignor of the delay.[44] It is also held that notice of nonacceptance of the goods is unnecessary.[45] But it has been held that when the carrier fails to give such notice it remains liable as carrier.[46]

38. **Liability to consignee.**—Lane *v.* Chadwick, 146 Mass. 68, 15 N. E. 121; Pacific Aviation Co. *v.* Wells Fargo & Co., 64 Ore. 530, 128 Pac. 438.

39. **Delivery to true owner.**—The consignee paid the express charges on goods sent C. O. D., but refused to receive the goods, and directed the company to return them to the consignor. The consignor brought suit against the consignee, and recovered a judgment for the value of the goods; but, in the meantime, after a verdict was rendered in favor of the consignor, and before judgment was rendered thereon, the express company, by direction of the consignor's attorney, returned the goods to the consignor. The consignee never countermanded his directions to the company to reship to the consignor. When final judgment was rendered, the consignee brought an action of trover against the company to recover the value of the goods, without offering to pay the money due on the goods. Held, that the consignee could not recover. American Exp. Co. *v.* Greenhalgh, 80 Ill. 68.

On consignee's refusal to pay the charges and accept delivery, the carrier may return the goods to the consignor, if the consignor has specially instructed them so to do, or if the company took charge of the goods subject to a general regulation, known to the consignor, prescribing this course. Wiltse *v.* Barnes, 46 Iowa 210.

40. Missouri, etc., R. Co. *v.* Levine (Tex. Civ. App.), 93 S. W. 1095, holding that whether he exercised such care is a question for the jury.

41. **Where goods damaged.**—Hardy *v.* American Exp. Co., 182 Mass. 328, 65 N. E. 375, 59 L. R. A. 731.

42. Hardy *v.* American Exp. Co., 182 Mass. 328, 65 N. E. 375, 59 L. R. A. 731.

Reasonableness of time question for jury.—Where the books were delivered on December 1st, opened by the consignor December 12th or 13th, and on December 19th, after the express company had remitted the purchase price to the consignor, notice was sent the express company by the consignee that the books were so damaged as to be worthless, the reasonableness of the time within which notice was sent was for the jury and the jury would be warranted in finding that notice to the express company within a reasonable time was reasonably to the expected. Hardy *v.* American Exp. Co., 182 Mass. 328, 65 N. E. 375, 59 L. R. A. 731.

43. Hardy *v.* American Exp. Co., 65 N. E. 375, 182 Mass. 328, 59 L. R. A. 731.

A consignment of fifty sets of Balzac's works, damaged so as to be worth only $5 or $6, is not so worthless as to excuse its return to the express company which delivered them, when demand is made on it for the price paid. Hardy *v.* American Exp. Co., 65 N. E. 375, 182 Mass. 328, 59 L. R. A. 731.

44. **Liability as warehouseman—Notice to consignor.**—Hasse *v.* American Exp. Co., 94 Mich. 133, 53 N. W. 918, 34 Am. St. Rep. 328; Grossman *v.* Fargo (N. Y.), 6 Hun 310; Weed *v.* Barney, 45 N. Y. 344, 6 Am. Rep. 96.

45. Kremer *v.* Southern Exp. Co., 46 Tenn. (6 Coldw.), 356.

46. American Exp. Co. *v.* Wettstein, 28 Ill. App. 96 (failure to notify for a week). And see Tooker *v.* Gormer (N. Y.), 2 Hilt. 71; American Merchants' Union Exp. Co. *v.* Wolf, 79 Ill. 430.

Where the consignee can not be found and the express company immediately notifies the consignor thereof, it is only liable as a warehouseman though the goods are destroyed before the consignor receives the notice.[47]

§§ 870-874. Goods Seized under Legal Process—§ 870. Liability of Carrier.—Excuses Nondelivery.—A carrier is excused from liability for failure to deliver goods, when, without any act, fault, or connivance on the part of the carrier, they are seized by virtue of a valid legal process, and taken out of its possession.[48] But if goods attached are not taken from the carrier's custody, and the attachment is afterwards dissolved, the levy furnishes no defense

47. Hasse *v.* American Exp. Co., 94 Mich. 133, 53 N. W. 918, 34 Am. St. Rep. 328.

48. **Excuses nondelivery.**—*United States.*—The M. M. Chase, 37 Fed. 708; The Idaho, 93 U. S. 575, 23 L. Ed. 978; Wells *v.* Maine Steamship Co., Fed. Cas. No. 17,401, 4 Cliff. 228; Lemont *v.* New York, etc., R. Co., 28 Fed. 920; Rosenfield *v.* Express Co., Fed. Cas. No. 12,060; 1 Woods 131; Stiles *v.* Davis (U. S.), 1 Black 101, 17 L. Ed. 33; Robinson *v.* Memphis, etc., R. Co., 16 Fed. 57.

California.—Hayden *v.* Davis, 9 Cal. 573.

Georgia.—Savannah, etc., R. Co. *v.* Wilcox, etc., Co., 48 Ga. 432, 11 Am. R. Rep. 375; Wallace *v.* Matthews, 39 Ga. 617, 99 Am. Dec. 473; Western, etc., R. Co. *v.* Ohio, etc., Trust Co., 107 Ga. 512, 33 S. E. 821. See Southern R. Co. *v.* Heymann, 118 Ga. 616, 45 S. E. 491, reversed in Heyman *v.* Southern R. Co., 203 U. S. 270, 51 L. Ed. 178, 27 S. Ct. 104, 7 Am. & Eng. Ann. Cas. 1130.

Indiana.—Ohio, etc., R. Co. *v.* Yohe, 51 Ind. 181, 19 Am. Rep. 727; Indiana, etc., R. Co. *v.* Doremeyer, 20 Ind. App. 605, 50 N. E. 497, 67 Am. St. Rep. 264.

Maine.—Bennett *v.* American Exp. Co., 83 Me. 236, 22 Atl. 159, 23 Am. St. Rep. 774, 13 L. R. A. 33, 49 Am. & Eng. R. Cas. 56.

Massachusetts.—Adams *v.* Scott, 104 Mass. 164; French *v.* Star Union Transp. Co., 134 Mass. 288; Clifford *v.* Brocton Transp. Co., 214 Mass. 466, 101 N. E. 1092.

Michigan.—Pingree *v.* Detroit, etc., R. Co., 66 Mich. 143, 33 N. W. 298, 11 Am. St. Rep. 479; Gibbons *v.* Farwell, 63 Mich. 344, 29 N. W. 855, 6 Am. St. Rep. 301.

Minnesota.—Cooley *v.* Minnesota Transfer R. Co., 53 Minn. 327, 55 N. W. 141, 55 Am. & Eng. R. Cas. 616, 39 Am. St. Rep. 609.

Missouri.—Landa *v.* Holck, 129 Mo. 663, 31 S. W. 900, 50 Am. St. Rep. 459; Letts-Spencer Grocery Co. *v.* Missouri Pac. R. Co., 138 Mo. App. 352, 122 S. W. 10.

New Hampshire.—Hett *v.* Boston, etc., Railroad, 69 N. H. 139, 44 Atl. 910.

New Mexico.—MacVeagh *v.* Atchison, etc., R. Co., 3 N. Mex. 327, 5 Pac. 457, 18 Am. & Eng. R. Cas. 651.

New York.—Barnard *v.* Kobbe, 54 N. Y. 516; Bates *v.* Stanton, 8 N. Y. Super. Ct. 79; Edson *v.* Weston (N. Y.), 7 Cow. 278; Rogers *v.* Weir, 34 N. Y. 463; Mierson *v.* Hope, 32 N. Y. Super. Ct. 561; Livingston *v.* Miller (N. Y.), 48 Hun 232, 16 N. Y. St. Rep. 71; Bliven *v.* Hudson River R. Co. (N. Y.), 35 Barb. 188, affirmed in 36 N. Y. 403; Van Winkle *v.* United States Mail, etc., Co. (N. Y.), 37 Barb. 122.

Ohio.—Baltimore, etc., R. Co. *v.* O'Donnell, 49 O. St. 489, 32 N. E. 476, 21 L. R. A., N. S., 117, 34 Am. St. Rep. 579.

Oregon.—Jewett *v.* Olsen, 18 Ore. 419, 23 Pac. 262, 17 Am. St. Rep. 745, 42 Am. & Eng. R. Cas. 435.

Pennsylvania.—Holmes *v.* Pennsylvania R. Co., 2 Pa. Ct. Rep. 345.

South Carolina.—Faust *v.* South Carolina R. Co., 8 S. C. 118.

Texas.—Gulf, etc., R. Co. *v.* Belton Oil Co., 45 Tex. Civ. App. 44, 99 S. W. 430.

Vermont.—Burton *v.* Wilkinson, 18 Vt. 186, 46 Am. Dec. 145.

England.—Tyler *v.* London & S. W. R. Co., 1 C. & E. 285; Wilson *v.* Anderson, 1 B. & Ad. 450, 20 E. C. L. 426; Sheridan *v.* New Quay Co., 4 C. B., N. S., 618, 93 E. C. L. 618; Verrall *v.* Robinson, 5 Tyr. 1069, 4 D. P. C. 242.

Contra—In West Virginia, it is held that it is no defense to the claim of a consignee that the goods have been attached or seized by virtue of any juridical process. The contract of the carrier is that he will deliver the goods in good order and condition to the shipper or to his assigns. He thus guarantees to protect the possession of the shipper and his assigns. Neill *v.* Rogers Bros. Produce Co., 41 W. Va. 37, 23 S. E. 702.

Under Act Pennsylvania June 13, 1874 (Purd. Dig. [Ed. 1885] 146, pl. 8), carriers are not responsible to the owner of goods, nor to the holder of the bill of lading or other receipt for the same, when the goods, are taken from them by legal process. Lemont *v.* New York, etc., R. Co., 28 Fed. 920; Automatic Merchandising Co. *v.* Delaware, etc., Co., 233 Pa. 581, 82 Atl. 939.

Where goods are taken under a search warrant, and by the court delivered to a third person, who claims that the goods were stolen from him, the carrier is not

to the carrier for failing to transport and deliver them.[49]

Validity of Process.—A seizure under legal process of goods in the custody of the carrier will not protect it from liability for their nondelivery unless the process was valid and regular.[50] And it is held that the carrier must exercise due diligence to ascertain whether the process is in fact legal.[51] But it is held that the consignor is not entitled to maintain replevin for goods though they were

liable to the consignee. Bliven *v.* Hudson River R. Co. (N. Y.), 35 Barb. 188, affirmed in 36 N. Y. 403.

That the process was obtained by fraud, is immaterial if the carrier is in no way privy thereto. Bliven *v.* Hudson River R. Co. (N. Y.), 35 Barb. 188.

Right to yield possession to one having paramount title.—In Van Winkle *v.* United States Mail, etc., Co. (N. Y.), 37 Barb. 122, an action against a carrier for non-delivery of goods, it was held that defendant could introduce evidence to show that the goods did not belong to the shipper, but to a firm, and were taken from defendant at their destination under an attachment against the firm.

49. Faust *v.* South Carolina R. Co., 8 S. C. 118.

50. **Seizure must be under valid process.**—*United States.*—The M. M. Chase, 37 Fed. 708; Wells *v.* Maine Steamship Co., Fed. Cas. No. 17,401, 4 Cliff. 228.

Georgia.—Savannah, etc., R. Co. *v.* Wilcox, etc., Co., 48 Ga. 432.

Illinois.—Great Western R. Co. *v.* McComas, 33 Ill. 185.

Indiana.—Ohio, etc., R. Co. *v.* Yohe, 51 Ind. 181, 19 Am. Rep. 727.

Maine.—Bennett *v.* American Exp. Co., 83 Me. 236, 22 Atl. 159, 23 Am. St. Rep. 774, 49 Am. & Eng. R. Cas. 56, 13 L. R. A. 33.

Massachusetts.—Edwards *v.* White Line Transit Co., 104 Mass. 159, 6 Am. Rep. 213; Kiff *v.* Old Colony, etc., R. Co., 117 Mass. 591, 19 Am. Rep. 429.

Michigan.—Gibbons *v.* Farwell, 63 Mich. 344, 29 N. W. 855, 6 Am. St. Rep. 301.

Missouri.—McAlister *v.* Chicago, etc., R. Co., 74 Mo. 351, 7 Am. & Eng. R. Cas. 373, holding that the carrier is not liable for surrendering property on a writ issued under an unconstitutional statute, the writ being valid on its face.

New York.—Bliven *v.* Hudson River R. Co., 36 N. Y. 403; Livingston *v.* Miller, 48 Hun 232, 16 N. Y. St. Rep. 71; Van Winkle *v.* United States Mail, etc., Co. (N. Y.), 37 Barb. 122.

Ohio.—Baltimore, etc., R. Co. *v.* O'Donnell, 49 O. St. 489, 32 N. E. 476, 21 L. R. A., N. S., 117, 34 Am. St. Rep. 579.

South Carolina.—Faust *v.* South Carolina R. Co., 8 S. C. 118; Kohn *v.* Richmond, etc., R. Co., 37 S. C. 1, 16 S. E. 376, 55 Am. & Eng. R. Cas. 675, 24 L. R. A. 100.

Tennessee.—Nashville, etc., R. Co. *v.* Estes, 78 Tenn. (10 Lea) 749, 3 Am. & Eng. R. Cas. 210.

Process must be valid on its face.—Merz *v.* Chicago, etc., R. Co., 86 Minn. 33, 90 N. W. 7. See Livingston *v.* Miller, 48 Hun 232, 16 N. Y. St. Rep. 71.

The Pennsylvania statute, Act June 13, 1874 (P. L. 285), exempting a carrier from liability for goods taken on legal process, does not protect a carrier from liability for goods taken by writ of attachment void on its face. Automatic Merchandising Co. *v.* Delaware, etc., Co., 82 Atl. 939, 233 Pa. 581; S. C., 46 Pa. Super. Ct. 648.

Negligence in complying with mere telegram from sheriff.—Where a common carrier surrenders mules in transportation to a person who exhibits only a telegram from a sheriff directing him to seize the mules under a writ of attachment, alleged to be in the sheriff's hands, the carrier will be liable to the shipper in damages, for negligence, whether there be a contract in limitation of such a liability or not. And the liability will not be released by the subsequent appearance of the sheriff and his actual levy of the attachment on the mules. Nickey *v.* St. Louis, etc., R. Co., 35 Mo. App. 79.

The bare statement that the goods were seized by legal process and that fact communicated to the shipper, without more, is not sufficient to relieve the carrier from its legal liability. It should be shown what was the nature or character of the process and at whose instance or against whom the process was sued out, and the burden is also on the carrier to show that the process was legal and that it was issued against the proper parties. Mosher & Co. *v.* Southern Exp. Co., 38 Ga. 37.

Illegal seizure.—Under Mass. Gen. St. ch. 8, § 28, as re-enacted in 1889, ch. 415, §§ 30, 65, prohibiting the sale of intoxicating liquors directly or indirectly, except as authorized in that chapter, an attachment of liquors while in the hands of a common carrier is illegal. Kiff *v.* Old Colony, etc., R. Co., 117 Mass. 591, 19 Am. Rep. 429.

51. Georgia, etc., R. Co. *v.* Knight, 11 Ga. App. 489, 75 S. E. 823.

Delivery by a carrier on demand of an officer levying an attachment, where the attachment was on a printed form upon which appeared a form for bond not filled out, without inquiry as to whether a bond had been given, does not protect the carrier from liability to the owner of the goods. Georgia, etc., R. Co. *v.* Knight, 75 S. E. 823, 11 Ga. App. 489.

taken under a void writ if he had knowledge of the proceedings.[52]

Attachment against Person Other than Owner.—It is held a defense to an action against a common carrier for breach of its contract to deliver goods, that they were taken from him by an officer under an attachment against a person who was not their owner;[53] but there is a contrary holding.[54]

Goods Wrongfully Detained.—Where the seizure of goods under process of law is brought about in consequence of the unauthorized and wrongful act of the carrier in detaining them while in transit, the carrier is liable for a failure to deliver.[55]

Where goods are exempt from attachment it is no defense that the goods were taken from the carrier by an officer and attached against its will, and without fraud or collusion on its part, or knowledge of the nature of the goods.[56]

Where Property Diverted.—Where a carrier accepts property for a certain point and diverts it to a different point, where it is attached, and the shipper loses his property, the carrier is liable as for conversion.[56a]

When Goods Are Attachable.—Goods in the custody of the carrier within

52. Florence, etc., R. Co. *v.* Radetsky, 52 Colo. 479, 122 Pac. 791.

53. **Attachment against person other than owner.**—Indiana, etc., R. Co. *v.* Doremeyer, 20 Ind. App. 605, 50 N. E. 497, 67 Am. St. Rep. 264. See Furman *v.* Chicago, etc., R. Co., 62 Iowa 395, 17 N. W. 598, 6 Am. & Eng. R. Cas. 280; Hett *v.* Boston, etc., Railroad, 69 N. H. 139, 44 Atl. 910.

Merchants failed and made an assignment for the benefit of creditors. The assignee sold goods assigned to plaintiffs, who delivered them to a dispatch company to be sent by rail to a distant place, and while en route they were attached by the creditors of the insolvent merchants, and the agent of the dispatch company was summoned as garnishee. Some days later plaintiffs demanded the goods of the garnishee, and, being refused, brought suit for a conversion. Held, that the action could not be maintained. At the time of the demand the goods were in legal effect in the possession of the sheriff. If the goods were wrongfully attached, the remedy was against the parties attaching. Stiles *v.* Davis (U. S.), 1 Black 101, 17 L. Ed. 33.

54. Edwards *v.* White Line Transit Co., 104 Mass. 159, 6 Am. Rep. 213. And see Bingham *v.* Lamping, 26 Pa. 340, 67 Am. Dec. 418.

In Dickson *v.* Chaffee, 34 La. Ann. 1133, it was held that where plaintiff consigns goods receiving the bill of lading therefor, and the sheriff seizes them under a writ commanding the seizure of the property of another, and consigns them to defendant, who, pursuant to directions, sells them, and pays over to the sheriff the proceeds, he is not liable to plaintiff, where he had no other notice of his adverse claim than that the goods had been originally shipped in plaintiff's name and that he held the bill of lading therefor.

55. **Goods wrongfully detained.**—Western, etc., R. Co. *v.* Ohio, etc., Trust Co., 107 Ga. 512, 33 S. E. 821.

Holding goods to allow creditors to attach.—Where a carrier receives goods consigned to one who has made advances thereon, it is liable to the consignee where, through connivance with the shipper, it holds the goods until they can be attached by the shipper's creditors. Robinson *v.* Memphis, etc., R. Co., 16 Fed. 57.

A carrier who receives goods under an engagement to forward them to the consignee can not hold them to answer an attachment at the suit of a creditor of the shipper, previously served upon him; nor is he liable in respect to them upon the attachment. Bingham *v.* Lamping, 26 Pa. 340, 67 Am. Dec. 418.

56. **Goods exempt from attachment.**—Kiff *v.* Old Colony, etc., R. Co., 117 Mass. 591, 19 Am. Rep. 429.

56a. **Where property diverted.**—Lincoln Grain Co. *v.* Chicago, etc., R. Co., 91 Neb. 203, 135 N. W. 443.

Where a carrier, in pursuance of an agreement or custom whereby a certain third person was to have the right to change the destination of the goods shipped without producing the bill of lading, under the instructions of such third person to whom notice was to be given of the delivery of the goods, and without authority from the holder of the bill of lading who had no notice of the agreement or custom, stops the goods at an intermediate point, and there stores them in its warehouse, where they are levied on as the property of the consignor, under an attachment sued out against him by such third person, such seizure will not relieve the carrier from liability for its failure to deliver the goods on demand of the holder of the bill of lading. Western, etc., R. Co. *v.* Ohio, etc., Trust Co., 33 S. E. 821, 107 Ga. 512.

the state and county where the writ is issued at the time of the issuing of the writ are subject to attachment.[57] But freight in the custody of the carrier is not attachable unless it is susceptible of manual seizure.[58] As a general rule property can not be attached unless it belongs to the person against whom the attachment is issued.[59]

Goods Subject to Execution.—The piling of property on the carrier's wharf does not give it such possession as to prevent its being seized on execution against the owner.[60]

Liability for Removing Attached Property.—Where a creditor has attached property of his debtor, and filed a copy of the writ, as required by statute, a railroad company, which, with notice of attachment, removes and ships the property on the order of the debtor, is liable to the attaching creditor in trover.[61]

Liability to Mortgagee of Goods.—Where goods have been delivered to a carrier for transportation, a demand thereof under a mortgage with condition broken, given by the consignor, is not such legal process as will render the carrier liable for conversion on its refusal to deliver the goods to the mortgagee.[62]

Liability for Refusal to Permit Levy.—To a suit against a carrier for refusing to permit the levy of an attachment on property in his hands, it is a good defense that the property did not belong to the defendant in attachment, and was not subject to levy.[63] And it has been held that the fact that the agent of the carrier obstructed an officer in levying an attachment, and removed the

57. When goods are attachable.—*United States.*—The M. M. Chase, 37 Fed. 708.

Georgia.—Western R. Co. *v.* Thornton, 60 Ga. 300; Savannah, etc., R. Co. *v.* Wilcox, etc., Co., 48 Ga. 432.

Iowa.—Furman *v.* Chicago, etc., R. Co., 62 Iowa 395, 6 Am. & Eng. R. Cas. 280, 17 N. W. 598.

Kansas.—Wheat *v.* Platte, etc., R. Co., 4 Kan. 370.

New York.—Bliven *v.* Hudson River R. Co., 36 N. Y. 403; Van Winkle *v.* United States Mail, etc., Co. (N. Y.), 37 Barb. 122.

Vermont.—Burton *v.* Wilkinson, 18 Vt. 186, 46 Am. Dec. 145.

58. Illinois Cent. R. Co. *v.* Cobb, 48 Ill. 402; Sutherland *v.* Second Nat. Bank, 78 Ky. 250, 6 Am. & Eng. R. Cas. 368; Bates *v.* Chicago, etc., R. Co., 60 Wis. 296, 19 N. W. 72, 50 Am. Rep. 369, 14 Am. & Eng. R. Cas. 700.

Goods, which are not in the county, are not susceptible of manual seizure, and therefore not attachable. Pennsylvania R. Co. *v.* Pennock, 51 Pa. 244.

59. Goods can not be attached for vendor's debts.—Where a carrier receives freight from a vendor consigned to the vendee, the vendor has no further authority over it except the right of stoppage in transitu, and it can not be attached for his debt. Louisville, etc., R. Co. *v.* Spaulding (Ky.), 22 Am. & Eng. R. Cas. 418.

Property belonging to the carrier, is not subject to attachment in its hands as the property of the consignee. Hamilton *v.* Chicago, etc., R. Co., 103 Iowa 325, 72 N. W. 536.

Goods not attachable in suit against consignee.—Persons in New Orleans ordered goods manufactured in New York and shipped to them, to be paid for on delivery. The goods were accordingly manufactured and placed in the hands of a carrier, directed to the parties ordering them at New Orleans. Held, that the title did not pass to the consignees until the delivery of the goods at place of consignment, and that therefore they were not attachable in a suit against the consignees while they were still in New York. Bates *v.* New Orleans, etc., R. Co. (N. Y.), 4 Abb. Prac. 72, 13 How. Prac. 516.

60. Goods subject to execution.—Coos Bay, etc., Nav. Co. *v.* Siglin, 34 Ore. 80, 53 Pac. 504.

61. Removing attached property.—Johnson *v.* Grand Trunk R. Co., 44 N. H. 626.

62. Demand by mortgagee.—Kohn *v.* Richmond, etc., R. Co., 37 S. C. 1, 16 S. E. 376, 24 L. R. A. 100, 55 Am. & Eng. R. Cas. 675.

63. Refusal to permit levy.—Simpson *v.* Dufour, 126 Ind. 322, 26 N. E. 69, 22 Am. St. Rep. 590.

Since goods in transit are presumed to belong to the consignee, a carrier who, after service of notice of garnishment in an action against the shipper, forwards the goods, is not liable to the attaching creditor in an action to recover their value. Bingham *v.* Lamping, 26 Pa. 340, 67 Am. Dec. 418.

goods out of the state by running out the train, does not furnish a cause of action against the carrier, at the instance of the plaintiff in attachment.[64]

§ 871. Duties of Carrier.—Notice of Seizure to Owner of Goods.—Where goods, while in the hands of a carrier, are seized by virtue of legal process, and taken out of its possession, it should give immediate notice of the seizure to the persons interested.[65] It is held that if the owner has timely knowledge of the seizure the carrier need not give him formal notice.[66] And where he has been notified by the carrier of an attempt to levy an attachment on the goods, knowledge of the danger makes further notice unnecessary.[67]

Duty to Resist Judicial Process.—The carrier is not required to resist forcibly judicial proceedings in the courts of the state into or through which the goods are carried.[68] And the carrier is not bound to resist officers of the

64. **Liability to attaching creditor.**—Western R. Co. *v.* Thomas, 60 Ga. 313, 27 Am. Rep. 411.

65. **Notice of seizure.**—*United States.*—Robinson *v.* Memphis, etc., R. Co., 16 Fed. 57; American Exp. Co. *v.* Mullins, 212 U. S. 311, 53 L. Ed. 525, 29 S. Ct. 381, 15 Am. & Eng. Ann. Cas. 536; The M. M. Chase, 37 Fed. 708; Lemont *v.* New York, etc., R. Co., 28 Fed. 920; Wells *v.* Maine Steamship Co., Fed. Cas. No. 17,401, 4 Cliff. 228.

Indiana.—Ohio, etc., R. Co. *v.* Yohe, 51 Ind. 181, 19 Am. Rep. 727.

Iowa.—Furman *v.* Chicago, etc., R. Co., 57 Iowa 42, 10 N. W. 272.

Minnesota.—Merz *v.* Chicago, etc., R. Co., 86 Minn. 33, 90 N. W. 7.

New York.—Bliven *v.* Hudson River R. Co., 36 N. Y. 403.

North Dakota.—Taugher *v.* Northern Pac. R. Co., 21 N. Dak. 111, 129 N. W. 747.

Ohio.—Baltimore, etc., R. Co. *v.* O'Donnell, 49 O. St. 489, 32 N. E. 476, 21 L. R. A., N. S., 117, 34 Am. St. Rep. 579.

Oregon.—Jewett *v.* Olsen, 18 Ore. 419, 23 Pac. 262, 17 Am. St. Rep. 745, 42 Am. & Eng. R. Cas. 435.

That a shipper of goods replevied them while in the carrier's hands does not exonerate the carrier from liability to the consignee, who was not notified of the replevin action. Spiegel *v.* Pacific Mail Steamship Co., 56 N. Y. S. 171, 26 Misc. Rep. 414.

Where no reply is made to the notice given to the consignor and consignee of goods seized under legal process, the carrier has a right to presume that they have abandoned the property, as subject to the legal process under which it was seized. Savannah, etc., R. Co. *v.* Wilcox, etc., Co., 48 Ga. 432.

Where goods are levied on at destination by attachment against the consignee, it is not the duty of the carrier to defend, or to give notice to the consignor, on the failure of the consignee to claim the property or to defend the action, he being presumably the owner, and not the consignor. Frank Bros. & Co. *v.* Central R. Co., 9 Pa. Super. Ct. 129.

Notice to consignor's husband.—A common carrier is not liable for household goods seized while in its hands under an attachment against the consignor's husband, where it has notified the latter of the attachment on his presenting the bill of lading to its agent in time for him to assert the consignor's title to the goods before they are sold under the attachment, as it was entitled to rely on the presumption that he was the consignor's duly-authorized agent in regard to the control of the goods, and it is immaterial by what means he obtained the bill of lading. Furman *v.* Chicago, etc., R. Co., 57 Iowa 42, 10 N. W. 272; S. C., 81 Iowa 540, 46 N. W. 1049.

If the carrier fails to give notice it assumes the burden of establishing the legality of the proceedings on which the attachment was made, and it is not protected because the writ is regular on its face if it is void in law. Taugher *v.* Northern Pac. R. Co., 21 N. Dak. 111, 129 N. W. 747.

66. Robinson *v.* Memphis, etc., R. Co., 16 Fed. 57; MacVeagh *v.* Atchison, etc., R. Co., 3 N. Mex. 327, 5 Pac. 457, 18 Am. & Eng. R. Cas. 651.

67. MacVeagh *v.* Atchinson, etc., R. Co., 3 N. Mex. 327, 5 Pac. 457, 18 Am. & Eng. R. Cas. 651.

68. **Duty to resist judicial process.**—American Exp. Co. *v.* Mullins, 212 U. S. 311, 53 L. Ed. 525, 29 S. Ct. 381, 15 Am. & Eng. Ann. Cas. 536.

If the carrier, through connivance or fraud, permits a judgment to be rendered against it, such judgment can not be invoked by it as a bar to an action brought by the owner of the goods. American Exp. Co. *v.* Mullins, 212 U. S. 311, 314, 53 L. Ed. 525, 29 S. Ct. 381, 15 Am. & Eng. Ann. Cas. 536; Harris *v.* Balk, 198 U. S. 215, 49 L. Ed. 1023, 25 S. Ct. 625.

law,[69] or remove the goods,[70] in order to prevent their seizure under legal process.

§ 872. Seizure under Police Regulations.—As a general rule, a carrier is not liable for the loss of goods, if, without its fault, they are seized under the authority of the police regulations of the state,[71] but an illegal seizure is no defense in an action against the carrier for the value of the goods.[72]

Notice of Seizure.—As a general rule the carrier must give proper notice

69. **Not bound to resist officer.**—Savannah, etc., R. Co. *v.* Wilcox, etc., Co., 48 Ga. 432, 11 Am. R. Rep. 375; Pingree *v.* Detroit, etc., R. Co., 66 Mich. 143, 33 N. W. 298, 11 Am. St. Rep. 479.

70. **Not bound to remove goods.**—MacVeagh *v.* Atchison, etc., R. Co., 3 N. Mex. 327, 5 Pac. 457, 18 Am. & Eng. R. Cas. 651.

71. **Seizure under police regulations.**—*United States.*—Wells *v.* Maine Steamship Co., Fed. Cas. No. 17,401, 4 Cliff. 228.

Arkansas.—St. Louis, etc., R. Co. *v.* Gans, 69 Ark. 252, 62 S. W. 738.

Georgia.—Southern Exp. Co. *v.* Sottile Bros., 134 Ga. 40, 67 S. E. 414, 28 L. R. A., N. S., 139.

Ohio.—Baltimore, etc., R. Co. *v.* O'Donnell, 49 O. St. 489, 32 N. E. 476, 21 L. R. A., N. S., 117, 34 Am. St. Rep. 579.

Seizure of liquors.—Where liquors marked for shipment through a state, while in the custody of the carrier in that state, were seized and destroyed, in conformity with the state statute, as being kept, deposited, and intended for sale in violation thereof, and the carrier gave regular notice to their owner, it is relieved from all obligation to deliver such liquors. Wells *v.* Maine Steamship Co., Fed. Cas. No. 17,401, 4 Cliff. 228.

The carrier is not liable to the consignor for nondelivery to the consignee, even though the statute be unconstitutional; it never having been judicially declared so. Southern Exp. Co. *v.* Sottile Bros., 134 Ga. 40, 67 S. E. 414, 28 L. R. A., N. S., 139.

But where goods were shipped to be safely transported and delivered, "unavoidable accidents excepted," a loss occurring through a lieutenant in the United States army with a detachment of soldiers stopping the train and taking the goods (intoxicating liquors), under the claim that the carrier had been unlawfully selling such goods to the Indians, is not within the exception, neither could such destruction be said to be by the public enemy. It was held that no technical vis major was proved, and that the carrier was liable. Seligman *v.* Armijo, 1 N. Mex. 459.

Under Arkansas Statute, Act Feb. 13, 1899, §§ 1, 3, seizure and destruction of liquor shipped from a point within the state to a prohibited district is a defense to an action against the carrier for the conversion thereof. St. Louis, etc., R. Co. *v.* Gans, 62 S. W. 738, 69 Ark. 252.

Seizure of game.—Where game birds, though lawfully taken and shipped in Arkansas, were not packed in the manner prescribed by Lacey Act, § 5 (Act Cong. May 25, 1900, c. 553, 31 Stat. 188 [U. S. Comp. St. 1901, p. 3182]), and were seized and confiscated by the game warden in Missouri before arriving at their destination in Illinois, the shipment not being interstate commerce in the full sense, the carrier was not liable to the shipper for the value of the game so seized. Eager *v.* Jonesboro, etc., Exp. Co. (Ark.), 147 S. W. 60.

Failure to deliver firearms believed to be intended for mob.—Baltimore, etc., R. Co. *v.* O'Donnell, 49 O. St. 489, 32 N. E. 476, 21 L. R. A., N. S., 117, 34 Am. St. Rep. 579.

Forfeiture for nonpayment of custom duties.—To a declaration against a carrier for nondelivery of goods, defendants pleaded that the goods had, prior to the delivery to the carrier, been forfeited to the crown for nonpayment of customs due. Held, not a valid defense. White *v.* Canadian Pac. R. Co., 6 Man. 169.

Carrier not chargeable with knowledge of unconstitutionality of statute.—A carrier will not be held liable in damages for permitting the goods of his bailor to be taken out of his custody upon a writ issued under a penal statute which is subsequently decided to be unconstitutional. He is not bound to know that it is unconstitutional. McAlister *v.* Chicago, etc., R. Co., 7 Am. & Eng. R. Cas. 373, 74 Mo. 351.

72. **Illegal seizure of game.**—Bennett *v.* American Exp. Co., 83 Me. 236, 22 Atl. 159, 13 L. R. A. 33, 23 Am. St. Rep. 774, 49 Am. & Eng. R. Cas. 56; Merriman *v.* Great Northern Exp. Co., 63 Minn. 543, 65 N. W. 1080.

Deception of shipper.—The mere fact that at the time the shipper delivered game to a carrier, he knew that its agent had been directed not to receive game, does not render the shipper guilty of such deception as will exonerate the carrier from liability for its loss by illegal seizure by a game warden, if there was no special contract limiting the carrier's liability. Bennett *v.* American Exp. Co., 83 Me. 236, 22 Atl. 159, 23 Am. St. Rep. 774, 13 L. R. A. 33, 49 Am. & Eng. R. Cas. 56.

of the seizure to the owner of the goods.[73]

§ 873. Garnishment of Carrier.—Goods Awaiting Transportation.—Goods held by a carrier for transportation are liable to garnishment before they are in transit.[74]

Goods in Transit.—A carrier can not be held as garnishee for property in actual transit at the time of service of process.[75]

Termination of Transportation.—A carrier, after the termination of the transportation of the property, and while holding it only as warehouseman, is liable to garnishment in respect to such property.[76]

§ 874. Rights of Attaching Officer.—If an officer attaching goods subject to the lien of a common carrier for freight pays the freight, that he may get the goods into his possession, the officer, in respect to the lien, stands in the place, and has the rights, of the common carrier.[77]

§§ 875-903. Actions for Failure to Deliver or Misdelivery—§ 875. Conditions Precedent.—Necessity for Demand.—Before an action can be maintained against the carrier for failing to deliver the goods to the consignee, a demand must be made for them, unless it is not in the power of the carrier to deliver them.[78] And an action will not lie for omitting seasonably to deliver the

73. **Notice of seizure.**—*United States.*—See Wells *v.* Maine Steamship Co., Fed. Cas. No. 17,401, 4 Cliff. 228.

Georgia.—See Southern Exp. Co. *v.* Sottile Bros., 134 Ga. 40, 67 S. E. 414, 28 L. R. A., N. S., 139.

Massachusetts.—Kiff *v.* Old Colony, etc., R. Co., 117 Mass. 591, 19 Am. Rep. 429.

Michigan.—Gibbons *v.* Farwell, 63 Mich. 344, 29 N. W. 855, 6 Am. St. Rep. 301.

New York.—Bliven *v.* Hudson River R. Co., 36 N. Y. 403.

Ohio.—Baltimore, etc., R. Co. *v.* O'Donnell, 49 O. St. 489, 32 N. E. 476, 21 L. R. A., N. S., 117, 34 Am. St. Rep. 579.

When notice unnecessary.—Where game unlawfully killed, is delivered to a carrier for shipment by one not entitled to its possession, the carrier, on delivering the game to the state on demand, is not bound to give notice to the consignor. Thomas *v.* Northern Pac. Exp. Co., 75 N. W. 1120, 73 Minn. 185.

74. **Goods awaiting transportation.**—*Illinois.*—See Illinois Cent. R. Co. *v.* Cobb, 48 Ill. 402.

Massachusetts.—Adams *v.* Scott, 104 Mass. 164.

Missouri.—Landa *v.* Holck, 129 Mo. 663, 31 S. W. 900, 50 Am. St. Rep. 459.

Wisconsin.—See Bates *v.* Chicago, etc., R. Co., 60 Wis. 296, 19 N. W. 72, 50 Am. Rep. 369, 14 Am. & Eng. R. Cas. 700.

Goods stored on board of a steamer for shipment to a foreign port are not subject to garnishment where unreasonable expense and delay would be incurred in unloading them. Van Camp Hardware, etc., Co. *v.* Plimpton, 174 Mass. 208, 54 N. E. 538, 75 Am. St. Rep. 296.

Lack of knowledge as to ownership.—A common carrier can not be charged as a garnishee for goods consigned to defendant, when he does not know whether they belong to the defendant or not. Walker *v.* Detroit, etc., R. Co., 49 Mich. 446, 13 N. W. 812, 9 Am. & Eng. R. Cas. 251.

75. **Goods in transit.**—Bates *v.* Chicago, etc., R. Co., 60 Wis. 296, 19 N. W. 72, 50 Am. Rep. 369, 14 Am. & Eng. R. Cas. 700.

A railroad company is not liable to be garnished in respect of property which is already in transit and beyond the limits of the county. Illinois Cent. R. Co. *v.* Cobb, 48 Ill. 402, Michigan Cent. R. Co. *v.* Chicago, etc., R. Co., 1 Ill. App. 399.

Property in the hands of a common carrier in transit to a place outside of the state is not subject to garnishment, though it is within the state at the time of the service of the garnishee summons. Stevenot *v.* Eastern R. Co., 61 Minn. 104, 63 N. W. 256, 28 L. R. A. 600.

Public policy, and the proper discharge of the duties of common carriers, require that they can not be held liable upon a garnishee summons for personal chattels in their possession in actual transit at the time the summons is served. Bates *v.* Chicago, etc., R. Co., 14 Am. & Eng. R. Cas. 700, 60 Wis. 296, 19 N. W. 72, 50 Am. Rep. 369.

76. **Termination of transportation.**—Cooley *v.* Minnesota Transfer R. Co., 53 Minn. 327, 55 N. W. 141, 39 Am. St. Rep. 609, 55 Am. & Eng. R. Cas. 616.

77. **Rights of attaching officer.**—Thompson *v.* Rose, 16 Conn. 71, 41 Am. Dec. 121; Rucker *v.* Donovan, 13 Kan. 251, 19 Am. Rep. 84.

78. **Necessity for demand.**—Jarrett *v.* Great Northern R. Co., 74 Minn. 477, 77 N. W. 304.

Plaintiff shipped goods by express, and the company carried the goods to the consignee, who refused to receive them, whereupon the company placed them in

goods, without a previous demand.[79] A demand is unnecessary where it would be useless,[80] or where the carrier has converted the goods,[81] or wrongfully refused to deliver them,[82] or made delivery to the wrong party,[83] or failed to deliver according to the consignment.[84]

Tender of Charges.—The rule that, to entitle the consignee to the possession of the goods, he must pay or tender the legal charges for their carriage, has no application in an action against the carrier for the conversion of the goods.[85] And a tender is unnecessary where it would be useless,[86] or where the carrier makes a peremptory refusal to deliver the goods,[87] or refuses to de-

their "on hand department," and notified the consignee that they were at the owner's risk, but failed to notify the consignor. Six months thereafter the consignor, on inquiry, was informed that the goods were so held. Without making any demand he sued for failure to deliver the goods. At the trial the express company tended the goods. Held, that a verdict for the full value of the goods must be set aside. Block *v.* United States Exp. Co., 75 N. J. L. 455, 68 Atl. 173.

Even though the carrier has made a wrong delivery of the goods, a demand is necessary to render it liable for conversion. Rome R. Co. *v.* Sullivan, etc., Co., 14 Ga. 277.

Unless there is proof of a contrary dealing with the property by the carrier, there must be a demand for the property and a refusal by the carrier in order to show conversion. Louisville, etc., R. Co. *v.* Britton, 39 So. 585, 145 Ala. 654.

Order equivalent to demand.—An order from the shipper of goods consigned to shipper's order, duly accepted by the carrier and noted on the bill of lading by its agent, directing a diversion of the goods from one destination to another, is equivalent to a demand for delivery. Atchison, etc., R. Co. *v.* Schriver, 84 Pac. 119, 72 Kan. 550, 4 L. R. A., N. S., 1056.

Insufficient demand.—Where goods were delivered to a carrier for transportation under a contract to deliver them within a specified time, a demand made for the goods on the day agreed on for delivery before the goods had arrived was insufficient to charge the carrier with conversion thereof. Clark *v.* American Exp. Co., 106 N. W. 642, 130 Iowa 254.

Where a consignor, having heard nothing from the goods shipped, asked the carrier what had became of the goods, and was told that he did not know, there was no demand, so as to render the carrier guilty of conversion. St. Louis, etc., R. Co. *v.* Tyler Coffin Co. (Tex. Civ. App.), 81 S. W. 826.

Young trees were consigned by express to a person at a certain station in care of the railroad agent, who was agent also of the express company. The freight and express received at the station were kept in the same room. After the trees had been there several weeks, the consignee sent an order, addressed to the "R. R. Agent," directing the latter to deliver to bearer "any freight" there might be for the consignee. The agent reported that there was nothing for him. Held, that the demand was not sufficient to charge the express company with liability for the agent's failure to deliver. Wells, Fargo & Co. *v.* Windham, 1 Tex. Civ. App. 267, 21 S. W. 402.

79. Robinson *v.* Austin (Mass.), 2 Gray 564; Ryland *v.* Chesapeake, etc., R. Co., 46 S. E. 923, 55 W. Va. 181.

80. **When demand unnecessary.**—Where a railroad company contracted to carry goods to a point beyond the terminus of their line, it is no objection to a recovery by the owner for their nondelivery that no demand was made by him at said point, if it appears that the goods never reached the point in question, and that the defendants had no office there, nor any agent upon whom the demand could be made. Schroeder *v.* Hudson River R. Co., 12 N. Y. Super. Ct. 55.

81. Missouri Pac. R. Co. *v.* Heidenheimer, 82 Tex. 195, 17 S. W. 608.

82. Peebles *v.* Boston, etc., R. Co., 112 Mass. 498; Wiggin *v.* Boston, etc., R. Co., 120 Mass. 201.

83. Clarke-Lawrence Co. *v.* Chesapeake, etc., R. Co., 63 W. Va. 423, 61 S. E. 364; compare, Cole *v.* Wabash, etc., R. Co., 21 Mo. App. 443.

Where a carrier delivers goods to the person to whom they are consigned, after notice by the real owner not to do so except on his written order, no further demand is necessary to entitle such owner to maintain an action against the carrier for their conversion. Lester *v.* Delaware, etc., R. Co., 92 Hun 342, 36 N. Y. S. 907, 72 N. Y. St. Rep. 334.

84. Erskine *v.* Steamboat Thames, 6 Mo. 371; Ludwig *v.* Meyre (Pa.), 5 Watts & S. 435.

85. **Tender of charges.**—Baltimore, etc., R. Co. *v.* O'Donnell, 49 O. St. 489, 32 N. E. 476, 21 L. R. A., N. S., 117, 34 Am. St. Rep. 579.

If a carrier by railroad refuses to deliver goods carried, for other reasons than the nonpayment of freight, an action will lie against him for conversion of the goods, without payment of freight. Peebles *v.* Boston, etc., R. Co., 112 Mass. 498; Wiggin *v.* Boston, etc., R. Co., 120 Mass. 201.

86. Fernandez *v.* Silva, 1 La. 269.

87. Chandler *v.* Fulton, 10 Tex. 2, 60 Am. Dec. 188. See Peebles *v.* Boston, etc., R. Co., 112 Mass. 498.

liver unless the consignee pay illegal charges,[88] or a sum other than the charges for freight,[89] or where the goods are damaged to a greater extent than the bill for freight,[90] or where the carrier has only partially performed its undertaking.[91] The owner of property shipped to his agent may sue for nondelivery, though he had not paid or offered to pay the freight, and the carrier had not looked to him for payment thereof.[92]

§ 876. Form of Action.—Assumpsit,[93] **or case,**[94] may be brought against the carrier for not delivering goods.

Detinue may be maintained for wrongful refusal to deliver.[95]

Replevin.—Upon the refusal of a carrier to deliver freight to the consignee upon a valid tender by him of its regular charges, he may maintain an action of replevin therefor.[96] But it has been held that where goods came into the hands of the carrier lawfully, replevin could not be maintained for the mere detention of the goods.[97]

Trover will lie against a carrier for a misdelivery,[98] or an appropriation of the property to its own use, or for any act antagonistic to and inconsistent with plaintiff's claim or right;[99] but not for goods lost by accident or stolen, or for nondelivery, unless there be a refusal to deliver while the carrier is in posses-

88. Long *v.* Mobile, etc., R. Co., 51 Ala. 512; Johnston *v.* Davis, 60 Mich. 56, 26 N. W. 830. See Loomis *v.* Wabash, etc., R. Co., 17 Mo. App. 340.

Where, on a dispute as to the amount due for the carriage of goods; the carrier withheld them until the amount claimed by him to be due should be paid, a tender was not necessary before bringing suit for their conversion, where there was no refusal by the owner to pay what he deemed a proper amount. Gates *v.* Bekins, 87 Pac. 505, 44 Wash. 422.

89. Blair *v.* Jeffries (S. C.), Dud. 59; Adams *v.* Clark (Mass.), 9 Cush. 215, 57 Am. Dec. 41.

90. Ewart *v.* Kerr (S. C.), Rice 203; Miami Powder Co. *v.* Port Royal, etc., R. Co., 38 S. C. 78, 16 S. E. 339, 21 L. R. A. 123; Dyer *v.* Grand Trunk R. Co., 42 Vt. 441, 1 Am. Rep. 350.

91. Breed *v.* Mitchell, 48 Ga. 533; Johnston *v.* Davis, 60 Mich. 56, 26 N. W. 830.

Where goods arrive at their point of destination, and the packages or casks are, by the fault of the carrier, in a damaged condition, so that they can not be handled without loss and further damage, it is the duty of the carrier to repair the casks, if possible, before the owner can be compelled to receive them; and, if he refuses to do this, the owner may refuse to receive the goods, and may recover the value; and this, without offering to pay the freights. Breed *v.* Mitchell, 48 Ga. 533.

92. Louisville, etc., R. Co. *v.* Allgood, 113 Ala. 163, 20 So. 986.

93. **Assumpsit.** — Bullard *v.* Young (Ala.), 3 Stew. 46; Bates *v.* Bigby, 123 Ga. 727, 51 S. E. 717.

See Dresser *v.* West Virginia Transp. Co., 8 W. Va. 553, where oil belonging to plaintiff was delivered to defendant carrier, by a petroleum company, to be transported from the tanks at their wells to the point of destination. After it was so transported plaintiff demanded the oil, and defendant refused to deliver it because it was claimed by the petroleum company. It did not appear that defendant sold or disposed of the oil or any part of it. Held, that plaintiff could not recover on the common counts for goods sold and delivered to defendant by plaintiff or for money received by defendant for plaintiff's use.

94. **Case.**—Bullard *v.* Young (Ala.), 3 Stew. 46; Johnson *v.* Strader, 3 Mo. 355; Packard *v.* Getman (N. Y.), 6 Cow. 757, 16 Am. Dec. 475; S. C., 4 Wend. 613, 21 Am. Dec. 166.

95. **Detinue.**—Long *v.* Mobile, etc., R. Co., 51 Ala. 512.

96. **Replevin.**—*Indiana.*—Evansvillle, etc., R. Co. *v.* Marsh, 57 Ind. 505.

Michigan.—Johnston *v.* Davis, 60 Mich. 56, 26 N. W. 830.

Vermont.—Dyer *v.* Grand Trunk R. Co., 42 Vt. 441, 1 Am. Rep. 350.

97. Woodward *v.* Grand Trunk R. Co., 46 N. H. 524.

98. **Trover.**—*United States.*—Blowers & Co. *v.* Canadian Pac. R. Co., 155 Fed. 935.

Alabama.—Central R., etc., Co. *v.* Lampley, 76 Ala. 357, 52 Am. Rep. 334.

Illinois.—Illinois Cent. R. Co. *v.* Parks, 54 Ill. 294.

New York.—Packard *v.* Getman (N. Y.), 4 Wend. 613, 21 Am. Dec. 166.

South Carolina.—Trowell *v.* Youmans (S. C.), 5 Strob. 67.

99. Central R., etc., Co. *v.* Lampley, 76 Ala. 357, 52 Am. Rep. 334. See St. Louis, etc., R. Co. *v.* Dunham, 36 Okla. 724, 129 Pac. 862.

sion,[1] nor for an act or omission which amounts to negligence merely and not to an actual wrong,[2] as trover can not be sustained without proof of conversion.[3] And a carrier who receives goods to carry from one not authorized to deliver them to him may be sued in trover.[4]

Delivery after Notice to Stop in Transitu.—An action against a common carrier for its negligence in delivering goods after notice from the shipper to stop them in transitu, which it agreed to do, is founded upon the tort of defendant, not upon the shipping contract, which ended upon the receipt of such notice by the carrier.[5]

§ 877. Joinder of Actions.—One entitled to maintain an action against a carrier for failure to deliver goods may join therewith a claim for a statutory penalty for unreasonable delay in delivery.[6]

§ 878. Jurisdiction and Venue.—In some states, by statute, a carrier may be sued for failure to deliver goods either in the county where the contract for transportation was executed or in the county where the delivery was to be made.[7]

§ 879. Parties.—As to who may maintain an action against a carrier for failure to deliver or misdelivery, see elsewhere.[8]

§§ 880-882. Pleading—§§ 880-881. Declaration, Complaint or Petition—§ 880. In General.—Statutory Form.—In an action against a carrier to recover for its failure to deliver goods, a complaint in the form prescribed by the statute is sufficient.[9]

Repugnancy.—Where a declaration in an action against a carrier is defective for repugnancy, a demurrer thereto will be sustained.[10]

1. *Alabama.*—Central R., etc., Co. *v.* Lampley, 76 Ala. 357, 52 Am. Rep. 334. See Long *v.* Mobile, etc., R. Co., 51 Ala. 512.

Georgia.—Bird *v.* Georgia Railroad, 72 Ga. 655.

Massachusetts.—See Adams *v.* Clark (Mass.), 9 Cush. 215, 57 Am. Dec. 41.

Missouri.—Johnson *v.* Strader, 3 Mo. 355.

New Hampshire.—Moses *v.* Norris, 4 N. H. 304.

New York.—Packard *v.* Getman, 4 Wend. 613, 21 Am. Dec. 166; Magnin *v.* Dinsmore, 70 N. Y. 410, 26 Am. Rep. 608.

A undertook to carry certain flour for B to a certain place, and, having deposited it by the way, a part of the flour was taken by mistake by C. B refusing to receive the residue, C received it, and paid for the whole. This was a conversion by A sufficient to support trover by B. Bullard *v.* Young (Ala.), 3 Stew. 46.

2. Central R., etc., Co. *v.* Lampley, 76 Ala. 357, 52 Am. Rep. 334.

3. Bullard *v.* Young (Ala.), 3 Stew. 46; Johnson *v.* Strader, 3 Mo. 355; Packard *v.* Getman (N. Y.), 6 Cow. 757, 16 Am. Dec. 475; S. C., 4 Wend. 613, 21 Am. Dec. 166.

4. Southern Exp. Co. *v.* Palmer, 48 Ga. 85.

5. **Delivery after notice to stop in transitu.**—Rosenthal *v.* Weir, 170 N. Y. 148, 63 N. E. 65, 57 L. R. A. 527.

6. **Joinder of action.**—Robertson *v.* Atlantic, etc., R. Co, 148 N. C. 323, 62 S. E. 413; Revisal 1905, § 2632.

7. **Jurisdiction and venue.**—See post, "Loss of an Injury to Goods," Chapter 12.

Georgia statute.—Burns *v.* Louisville, etc., R. Co., 65 S. E. 582, 6 Ga. App. 614; Albany, etc., R. Co. *v.* Merchants', etc., Bank, 73 S. E. 637, 137 Ga. 391; Ga. Civ. Code 1910, § 2798; Ga. Civ. Code 1895, § 2334.

If one delivers a commodity to a carrier for shipment from one county to another, and the commodity is never shipped, and the evidence authorizes the inference that the carrier or its agents made way with the commodity at the point where it was delivered to the carrier, trover and conversion may be maintained against the carrier in the county where the delivery to the carrier and the conversion took place. Southern R. Co. *v.* Morrison, 8 Ga. App. 647, 70 S. E. 91.

Express companies.—Southern Exp. Co. *v.* B. R. Elect. Co., 55 S. E. 254, 126 Ga. 472. Civ. Code, 1895, § 2004.

8. **Parties.**—See ante, "Right to Maintain Action against Carrier," §§ 809-811.

9. **Statutory form.**—Southern Exp. Co. *v.* Crook, 44 Ala. 468, 4 Am. Rep. 140.

10. **Repugnancy.**—A declaration in assumpsit against a common carrier, averring a verbal agreement that goods and chattels were to be delivered according to the direction of the plaintiff, and not to the consignee, but further expressly

A prayer, in action against a carrier for conversion of goods, is defective where it ignores evidence that may be considered in mitigation of damages.[11]

Construction of Petition.—Where a petition can be construed either as a suit in contract or as an action for breach of duty arising out of the contract, the latter construction will be adopted.[12]

§ 881. Necessary Allegations.—Plaintiff's Interest.—A complaint in an action against a carrier for failure to deliver goods should show plaintiff's ownership in the goods or interest in the contract of transportation.[13]

That Defendant Common Carrier.—The complaint must allege that defendant is a common carrier, or it will not be held responsible in that character.[14]

Reasonable Time for Delivery.—The complaint must show either that after the carrier received the goods to be transported a reasonable time has elapsed for transportation, or that the goods have been transported before the demand was made.[15]

As to Charges.—If charges were to be paid for transportation, it must be alleged, or the agreement will be presumed to be without consideration.[16] The complaint must show either that the defendant's reasonable freights and charges have been paid or tendered, or that a reason exists for not having done so.[17]

Failure to Perform Duty.—In order to make a good complaint, the averments should be such as to show a duty or obligation resting upon the carrier, and a violation of that duty, or a failure to perform the obligation.[18] Where

stating that such verbal agreement was subject to the terms and conditions of a written receipt which provided that the goods and chattels were to be delivered to such consignee, is demurrable for repugnancy. Thomas *v.* Pennsylvania R. Co. (Del.), 50 Atl. 285, 3 Pen. 81.

11. Seaboard, etc., Railway *v.* Phillips, 108 Md. 285, 70 Atl. 232, holding that a prayer, that if the jury found for plaintiff to allow the value of the goods shipped at the time of conversion with interest in the jury's discretion, was defective in that it ignored evidence tending to show that the carrier, in response to plaintiff's demand for a return of the goods, had them retransported and tendered them to plaintiff in substantially the same condition in which it had received them, and had thereafter held them subject to plaintiff's order.

12. **Construction of petition.**—Atlantic, etc., R. Co. *v.* Goodwin, 1 Ga. App. 351, 57 S. E. 1070; Central, etc., R. Co. *v.* Chicago Portrait Co., 122 Ga. 11, 49 S. E. 727, 106 Am. St. Rep. 87.

13. **Plaintiffs interest.**—Galveston, etc., R. Co. *v.* Borden (Tex. Civ. App.), 29 S. W. 1100.

In an action by A against a railroad company for damages for the nondelivery to B of goods consigned to him by A, the complaint must allege either that A was, and continued to be, or that the consignee, B, was not, the owner of the goods, and that the company had notice or knowledge of A's continued ownership, and of B's want of title, notwithstanding the consignment thereof. Pennsylvania Co. *v.* Holderman, 69 Ind. 18.

Insufficient complaint.—In an action against a common carrier for a failure to deliver freight, a count in the declaration employing no other averment of ownership in the plaintiff than the word "claims" is not sufficient on demurrer. Montgomery, etc., R. Co. *v.* Edmonds, 41 Ala. 667.

Sufficient complaint.—If a complaint against a common carrier, for failure to carry and deliver property, shows that the property was bought of the consignor by the plaintiff, that the consignor delivered it to the carrier, and that the carrier executed a bill of lading to the plaintiff, but failed to deliver the goods, it is sufficient. Ohio, etc., R. Co. *v.* Yone, 51 Ind. 181, 19 Am. Rep. 727.

14. **That defendant common carrier.**—Bristoe *v.* Rensselaer, etc., R. Co. (N. Y.), 9 Barb. 158.

15. **Reasonable time for delivery.**—Jeffersonville, etc., R. Co. *v.* Gent, 35 Ind. 39.

16. **Allegation as to charges.**—Bristoe *v.* Rensselaer, etc., R. Co. (N. Y.), 9 Barb. 158.

17. **Payment or tender of charges.**—Jeffersonville, etc., R. Co. *v.* Gent, 35 Ind. 39.

18. Lake Erie, etc., R. Co. *v.* Condon, 10 Ind. App. 536, 38 N. E. 71.

The complaint, in an action against a common carrier for failure to deliver freight at its destination, is demurrable where, by the contract of shipment set out, the defendant only agreed to deliver the freight to a connecting carrier. Lake Erie, etc., R. Co. *v.* Condon, 10 Ind. App. 536, 38 N. E. 71.

A complaint with alleges that plaintiff's decedent entered into a written contract with defendant to ship his household goods, cattle, etc., over it lines, that

the petition in an action against a carrier for failure to deliver property does not mention a contract to notify the consignee of the receipt of the property at its destination, or allege a breach of such condition, plaintiff can not recover on the ground of such breach.[19] In an action by the consignor a complaint which alleges merely that defendant failed to deliver the goods within a reasonable time to the consignee at the destination is demurrable; it should allege that the goods were not elsewhere delivered to and accepted by the consignee.[20]

Demand and Refusal in Action for Conversion.—A petition, in an action against a carrier for conversion, which, with proper allegations of the plaintiff's ownership of the property and of its value, avers that the defendant converted it to his own use, states a cause of action. It is not necessary to allege a demand of the property by the plaintiff and a refusal to deliver it to him by the defendant.[21]

Immaterial Averments.—In a complaint upon a bill of lading given to the consignor, which contains a clause providing that the goods shall be delivered on "presentation of duplicate hereof," it is unnecessary to aver the reasons that influenced, and purposes that controlled, the shippers or the carrier in inserting the clause, and such averments do not add anything to the legal effect of the bill of lading.[22]

§ 882. Plea or Answer.—A plea seeking to avoid liability for failure to deliver goods because of a special contract must clearly bring the defendant within the provision of the contract.[23] As in other civil actions a plea[24] or

defendant furnished decedent a car on a side track and directed him to load his goods therein, and that, after they were loaded, defendant, without notice to decedent, pulled the car onto its main track, where it was negligently struck by a freight train and the property therein damaged, and setting out a contract in the usual form of a bill of lading, sufficiently shows a contract for carriage, a compliance with the contract by decedent, that the goods were received for transportation, and the carrier's failure to carry and deliver. Pittsburgh, etc., R. Co. *v.* Brown (Ind.), 97 N. E. 145.

Under the Georgia Code, which abolishes forms of action, and simply requires a plaintiff to set forth the facts which constitute his cause of action, a petition in an action by the owner of bills of lading to recover the value of the goods represented thereby is sufficient to sustain a recovery where it alleges facts which raised a duty on the part of defendant, into whose possession the goods came by virtue of such bills of lading, to properly deliver them, and shows a breach of such duty by their delivery to another, by which they were lost to plaintiff; and it is not material whether defendant's liability arises upon the contracts or ex delicto. Southern R. Co. *v.* Atlanta Nat. Bank, 112 Fed. 861, 50 C. C. A. 558, 56 L. R. A. 546.

19. Gulf, etc., R. Co. *v.* Darby, 28 Tex. Civ. App. 229, 67 S. W. 129.

20. Pennsylvania Co. *v.* Holderman, 69 Ind. 18.

21. **Demand and refusal.**—Baltimore, etc., R. Co. *v.* O'Donnell, 49 O. St. 489, 32 N. E. 476, 21 L. R. A., N. S., 117, 34 Am. St. Rep. 579.

22. **Immaterial averments.**—Jeffersonville, etc., R. Co. *v.* Irvin, 46 Ind. 180.

23. **Plea or answer.**—Louisville, etc., R. Co. *v.* Price, 159 Ala. 213, 48 So. 814.

A carrier defended an action for failure to deliver one case of goods included in a shipment by setting up in a special plea the terms of a special contract under which the shipment was made, avoiding liability unless claim for the loss or damages was made promptly after arrival, and if delayed more than thirty days after the delivery of the property, or after a due time for delivery, no liability would be imposed on the carrier. The shipment, minus the case, was delivered February 27th, and claim was made May 16th. Held, that the plea was defective, since, the action being for a failure to deliver, the plea should have alleged that no claim was made within thirty days after due time for delivery. Louisville, etc., R. Co. *v.* Price, 159 Ala. 213, 48 So. 814.

24. In an action against a railroad company for misdelivery of goods, where the complaint alleges that they were deliverable to the order of plaintiffs, who delivered the bills of lading to defendant with the agreement that the goods were to be delivered to another on his payment for the same, but does not allege that such agreement was part of the original contract with defendant, or that the goods were marked to indicate that the price was to be collected, a plea that the agreement was with defendant's agent, who was acting beyond his authority, and as plaintiffs', and not defendant's, agent, is good, since in such case his failure to

answer[25] which states facts which would defeat the plaintiff's action is sufficient. But an answer to a complaint for failure to deliver goods by boat according to a contract which excepted the dangers of canal navigation, averring an inability to deliver on account of the dangers of the canal, but without stating what such dangers were, is not sufficient on special demurrer.[26]

Admission of Nondelivery.—Where a common carrier sued for nondelivery pleads only that it never received the goods, this is an admission of the nondelivery.[27]

Answer Curing Petition.—If a petition in an action of trover against a carrier is defective in not positively averring a conversion, such defect is cured by the answer, which denies that the defendant had "converted said goods."[28]

§ 883. Issue, Proof and Variance.—Issues.—Where plaintiff alleges that defendant received goods for carriage, but neither delivered them to the consignee nor returned them to plaintiff, a general denial puts in issue both the delivery of the goods to defendant and their nondelivery by it.[29]

Proof.—Under the general issue in an action against a carrier for failure to deliver goods any fact or circumstance is admissible which legitimately tends to rebut plaintiff's proof upon a point which he must sustain in order to recover.[30] Under the general issue the defendant may show an attempted delivery,[31] or that the identical goods claimed by plaintiff were shipped by another person, who took a bill of lading therefor,[32] or that when the consignee demanded the goods he had no bill of lading and refused to pay the invoice price of the goods or show his ownership.[33] Where, defendant pleads specially an offer to deliver the

collect before delivery could not bind defendant. Cox *v.* Columbus, etc., R. Co., 91 Ala. 392, 8 So. 824.

Demurrable plea.—A plea by a carrier, sued for the nondelivery of goods, which alleges that before it ascertained that the same was intended for plaintiff, the plaintiff had left the United States, preventing the carrier from delivering the goods to him, and the carrier did not receive instructions from him to deliver the goods to any other person, was demurrable because it contained no matter of avoidance of the fulfillment of the carrier's contract, and failed to show an attempt by notice through the mails or otherwise to effect a delivery. Broadwood *v.* Southern Exp. Co., 41 So. 769, 148 Ala. 17.

Special plea setting up fraud of shipper and mistake of agent.—In an action against a carrier by a shipper for its failure to deliver more than 49 cases of shoes, when 55 cases were mentioned in the bill of lading, defendant answered by a special plea admitting the issuance of a bill for 55 cases, and that the car contained only 49 cases on its arrival at destination, but it was alleged that not more than 49 cases were delivered to the carrier, and that the reason the bill was issued for 55 cases was that plaintiff attempted to defraud defendant by falsely and fraudulently representing to its agent at the point of shipment that he had hauled 55 cases to the station and placed that many in the car, and induced the agent to sign the bill of lading in question. Held, that the special plea fairly set up a defense of mistake on the part of defendant's agent. Cohen Bros. *v.* Missouri, K. & T. Ry. Co. of Texas, 44 Tex. Civ. App. 381, 98 S. W. 437.

25. Skinner *v.* Chicago, etc., R. Co., 12 Iowa 191.

In replevin by a consignee to recover goods withheld by a carrier, the petition stated that plaintiff believed the goods had been damaged, and would not sign a receipt acknowledging that they were received in good order till he had an opportunity to examine them, and, because of his refusal to sign a receipt in good order, the carrier had refused to deliver them. Held, that an answer denying that plaintiff claimed that the goods were damaged at the time he applied for them, and alleging that the goods were tendered on condition that consignee sign a receipt usually given on delivery of goods, was sufficient. Skinner *v.* Chicago, etc., R. Co., 12 Iowa 191.

26. Woodworth *v.* McBride (N. Y.), 3 Wend. 227.

27. **Admission of nondelivery.**—Hot Springs R. Co. *v.* Hudgins, 42 Ark. 485.

28. **Answer curing petition.**—Louisville, etc., R. Co. *v.* Lawson, 88 Ky. 496, 11 S. W. 511.

29. **Issues.**—Brooks *v.* Delaware, etc., R. Co., 88 N. Y. S. 961.

30. **Proof under general issue.**—Wells, Fargo & Co. *v.* Hanson, 41 Tex. Civ. App. 174, 91 S. W. 321.

31. Central, etc., R. Co. *v.* Montmollen, 39 So. 820, 145 Ala. 468, 117 Am. St. Rep. 58.

32. Evart *v.* The Lowndes, 5 La. Ann. 426.

33. Louisville, etc., R. Co. *v.* McCool, 167 Ala. 644, 52 So. 656.

goods, on payment of freight, plaintiff, under a general denial, may prove that the offer was accompanied by a demand for the bill of lading.[34] Evidence of damages sustained by plaintiff, by reason of the existence of special circumstances, is inadmissible, unless the complaint alleges that the carrier had konwledge of such circumstances, or that the refusal to deliver was wanton and willful.[35]

Failure of Proof.—In an action against a carrier for wrongful delivery, where there is no proof that the carrier delivered the goods without the presentation of the bill of lading, as was alleged, a verdict for the plaintiff will not be sustained.[36] Where in an action against a carrier for conversion, it appeared that plaintiff was entitled to recover for a portion of the goods, the fact that the goods were of different weights and classification, and that it was not shown what the weight and classification of the recoverable portion was, did not constitute a failure of proof as to value, since the value might be regarded as a fractional part of the entire value, the burden being on the carrier to show that goods recoverable were less than the average value, if such was the case.[37]

Variance.—The plaintiff in an action against a carrier for misdelivery or nondelivery can not recover where there is a fatal variance between the allegations and the proofs, as where there is a variance between the nature and elements of the cause of action, or substantial departure from the issues as to some material matter. So, there can be no recovery where the complaint alleges facts constituting a common-law liability, and the evidence shows a special contract,[38] or in an action for nondelivery, upon proof that the article was delivered, so damaged as to be worthless.[39] Where plaintiff sues merely for negligent failure to deliver under a contract of carriage, he can not recover as for an unlawful taking.[40] And if a shipper sues for conversion and fails to establish the offense, his action must fail unless his complaint states facts necessary to a recovery on the contract or some other proper form of recovery.[41] But there is no material variance between allegation that plaintiff drew a draft on a proposed purchaser of the goods with bill of lading attached and proof that the draft was drawn in the name of plaintiff's principal.[42] And proof that the carrier received and was paid for transporting property, and that it was not delivered on a proper demand, supports an allegation that the carrier received the property, agreed to deliver it, and neglected to do so.[43]

§§ 884-887. Evidence—§ 884. Presumptions and Burden of Proof.—In an action against a carrier for failure to deliver goods, proof of the delivery of the goods to the carrier for transportation, and of their nondelivery, shows a prima facie right in plaintiff to recover.[44]

34. Gulf, etc., R. Co. *v.* Booton, 4 Texas App. Civ. Cas., § 230, 15 S. W. 909.

35. **Special damages.**—Silver *v.* Kent, 60 Miss. 124.

36. **Failure of proof.**—Southern R. Co. *v.* Kinchen, 103 Ga. 186, 29 S. E. 816.

37. First Nat. Bank *v.* San Antonio, etc., R. Co., 97 Tex. 201, 77 S. W. 410, modifying judgment 72 S. W. 1033.

38. **Material variance.**—Hall *v.* Pennsylvania Co., 90 Ind. 459; Bartlett *v.* Pittsburgh, etc., R. Co., 94 Ind. 281.

39. Midd *v.* Wells, 11 Wis. 407.

40. Southern Exp. Co. *v.* Palmer, 48 Ga. 85.

41. Taugher *v.* Northern Pac. R. Co., 21 N. Dak. 111, 129 N. W. 747.

42. **Immaterial variance.**—Atlantic, etc., R. Co. *v.* Dahlberg Brokerage Co., 170 Ala. 617, 54 So. 168.

43. Lane *v.* Boston, etc., R. Co., 112 Mass. 455.

44. **Presumptions and burden of proof.**—Cohen *v.* Southern Exp. Co., 53 Ga. 128. See post, "Loss of or Injury to Goods," Chapter 12.

"A carrier of parcels for hire who agrees to deliver a telescope bag at a railroad passenger station in time for the owner to take a particular train and gives a claim check therefor is required to affix a duplicate check to the baggage and to deliver the same at the baggage room or other usual place of deposit of baggage at the depot; and in an action to recover for nondelivery, proof by plaintiff

Delivery to Carrier.—In an action against a carrier for failure to deliver goods, the plaintiff must show that the goods were in the carrier's possession for transportation;[45] but the burden is on the carrier to show that goods receipted for were not in fact received.[46] Where it rebuts the prima facie liability arising from the issuance of a bill of lading,[47] the plaintiff has the burden of proving that the goods were actually delivered to the carrier.[48]

Nondelivery by Carrier.—In an action against a carrier for failure to deliver goods intrusted to it for transportation the plaintiff has the burden of proving the nondelivery,[49] although slight proof thereof is sufficient to cast on the carrier the burden of showing delivery.[50] A carrier admitting the receipt of goods has the burden of proving delivery thereof by a preponderance of the evidence.[51]

Excuse for Nondelivery.—The burden of proof is upon the carrier to show an excuse for nondelivery of property which it is proved to have received for transportation.[52] And where no explanation is given for its failure to deliver,

that he inquired at the baggage room of the persons in charge thereof, and at a proper time for his baggage, and was unable to get it, makes a prima facie case which entitles him to recover, unless met with evidence of equal weight; but the burden of proof does not shift from the plaintiff to the defendant." Ziegler *v.* Freeman, 12 O. C. C., N. S., 122, 21-31 O. C. D. 342.

45. Delivery to carrier.—Southern R. Co. *v.* Allison, 115 Ga. 635, 42 S. E. 15; Wells, Fargo & Co. *v.* Hanson, 41 Tex. Civ. App. 174, 91 S. W. 321. See Cohen *v.* Rome R. Co., 45 Ga. 293.

The plaintiff need not show that a bill of lading was issued, if the delivery of the goods for shipment is shown. Alabama Mid. R. Co. *v.* Darby, 24 So. 713, 119 Ala. 531.

Necessity for showing contract of transportation.—In an action against an express company for the conversion of plaintiff's property, where the fact of defendant's possession and conversion were properly alleged and proved, it was not necessary for plaintiff to show the contract under which the property had been received by defendant for transportation. Girardeau *v.* Southern Exp. Co., 26 S. E. 711, 48 S. C. 421.

Where the owner carries away a portion of the goods left at a freight depot, without orders where they should be carried, he must show what was retained by the carrier. Spade *v.* Hudson River R. Co. (N. Y.), 16 Barb. 383.

46. The Willie D. Sandhoval, 92 Fed. 286. See Smith *v.* Austro-American Steamship Co., 125 La. 763, 51 So. 841.

47. Rebuttal of presumption arising from bill of lading.—Where a shipper of goods loaded the car and made out the bill of lading, and sent it to the carrier's agent, who signed it, relying on the shipper loading the car and counting the articles without verifying the same, the prima facie liability of the carrier arising from the issuance of the bill of lading is rebutted. Peele *v.* Atlantic, etc., R. Co., 149 N. C. 390, 63 S. E. 66.

48. Peele *v.* Atlantic, etc., R. Co., 149 N. C. 390, 63 S. E. 66.

49. Burden of proving nondelivery.—*United States.*—The Falcon, Fed. Cas. No. 4,617, 3 Blatchf. 64.

Arkansas.—Kansas City, etc., R. Co. *v.* Morrison (Ark.), 146 S. W. 853.

Illinois.—Woodbury *v.* Frink, 14 Ill. 279.

Louisiana.—Schneideau & Co. *v.* Pennington, 21 La. Ann. 299.

Mississippi.—Chicago, etc., R. Co. *v.* Provine, 61 Miss. 288.

New York.—Roberts *v.* Chittenden, 88 N. Y. 33; compare Schroeder *v.* Hudson River R. Co., 12 N. Y. Super. Ct. 55.

Nondelivery to only one consignee shown.—Where the bill of lading specifies that the goods were to be delivered to L. or Z., in an action against the carrier for nondelivery, it is not enough for the shipper to show nondelivery to L., but he must also give some evidence of nondelivery to Z. So held in The Falcon, Fed. Cas. No. 4,617, 3 Blatchf. 64.

Plea as admission of nondelivery to consignee.—When in an action against a railroad, as a common carrier, for nondelivery of goods to a consignee, it pleads, only, that it never received the goods, this is an admission of the nondelivery to the consignee, and proof of nondelivery to the consignee is not necessary to entitle the plaintiff to a judgment. Hot Springs R. Co. *v.* Hudgins, 42 Ark. 485, 18 Am. & Eng. R. Cas. 643.

50. The Falcon, Fed. Cas. No. 4,617, 3 Blatchf. 64; Woodbury *v.* Frink, 14 Ill. 279; Chicago, etc., R. Co. *v.* Provine, 61 Miss. 288. See Smith *v.* Austro-American Steamship Co., 51 So. 841, 125 La. 763.

51. Dunie *v.* Atlantic, etc., R. Co., 161 N. C. 520, 77 S. E. 756.

52. Excuse for nondelivery.—*Georgia.*—Purcell *v.* Southern Exp. Co., 34 Ga. 315.

Louisiana.—Chapman *v.* New Orleans,

it will be presumed that the goods are still in the hands of the carrier and withheld from the owner.[53]

Misdelivery.—Where the carrier delivers the goods to a person not named in the bill of lading as the consignee,[54] or delivers without the production of the bill of lading,[55] or without the consignor's order,[56] it has the burden of proving that they were delivered to the proper person. Where the carrier proves facts sufficient to raise a presumption of delivery to the true consignee,[57] the plaintiff must meet this presumption by a preponderance of testimony.[58] Where the carrier delivers the goods at a place other than that agreed upon, it has the burden of showing that the delivery was made for the account of the shipper.[59] Where a wrongful delivery amounting to a conversion by the carrier is shown, it is incumbent on the carrier, if it desires to show a return in mitigation of damages, to prove both the identity and unimpaired condition of the goods.[60]

Notice.—A vessel has the burden of showing that notice was given to the consignee of the place where the vessel was to discharge.[61] Where a consignee refuses to accept perishable goods, the burden is on the carrier to show its inability to notify the shipper before selling the goods to prevent loss.[62]

Authority of Agent.—Where a contract for carraige is to deliver the goods at a place other than a regular station, the burden is on the shipper to show that the contract was made with an agent having authority to make it.[63]

Fraud is not to be presumed in the case of common carriers, where there is no evidence to show an illegal or fraudulent conversion of property intrusted to them for transportation, but not delivered.[64]

It is presumed that proper instructions were given, in the absence of evidence to the contrary, where by delivery to a connecting carrier, defendant

etc., R. Co., 21 La. Ann. 224, 99 Am. Dec. 722.

Missouri.—Hammett *v.* Wabash R. Co., 128 Mo. App. 1, 106 S. W. 1106, 1107.

New Hampshire.—Shelden *v.* Robinson, 7 N. H. 157, 26 Am. Dec. 726.

Where a carrier converts property, claiming it as its own, plaintiff proves his cause of action by showing delivery for transportation, the burden being then cast on the carrier to show that it received the goods in good faith under mistake of fact as to plaintiff's ownership, and that it is the true owner. Valentine *v.* Long Island R. Co., 79 N. E. 849, 187 N. Y. 121, reversing 92 N. Y. S. 645, 102 App. Div. 419.

53. Adams Exp. Co. *v.* Holmes (Pa.), 9 Atl. 166, 6 Sad. 167.

54. Misdelivery.—Florence, etc., R. Co. *v.* Jensen, 48 Colo. 28, 108 Pac. 974; Atlantic, etc., R. Co. *v.* Spires, 57 S. E. 973, 1 Ga. App. 22.

In an action against a carrier on a contract to carry and deliver goods, where plaintiff proved that both the consignor and consignee were its agents, and showed that defendant delivered the goods to a stranger, and defendant's answer alleged that it delivered the goods to the rightful owner thereof, the burden is on defendant to show such ownership. Cleveland, etc., R. Co. *v.* Moline Plow Co., 13 Ind. App. 225, 41 N. E. 480.

Where it is claimed that the bill of lading was procured by fraud, the carrier must show that fact before it can disregard its directions. Atlantic, etc., R. Co. *v.* Spires, 57 S. E. 973, 1 Ga. App. 22.

55. National Bank *v.* Atlanta, etc., R. Co., 25 S. C. 216.

56. Atlantic, etc., R. Co. *v.* Dahlberg Brokerage Co., 170 Ala. 617, 54 So. 168.

57. Proof that a person professing to be the consignee of a money package was identified by a trustworthy person as the proper consignee to the satisfaction of the person charged with the delivery, about the time such consignee was expected to call for such a package, and told the person delivering to write his name in the receipt book, is sufficient to raise a presumption of a proper delivery to the true consignee. Ten Eyck *v.* Harris, 47 Ill. 268.

58. Ten Eyck *v.* Harris, 47 Ill. 268.

59. Gilkinson *v.* The Scotland, 14 La. Ann. 417. See Cleveland, etc., R. Co. *v.* Potts & Co., 71 N. E. 685, 33 Ind. App. 654.

60. Seaboard, etc., Railway *v.* Phillips, 108 Md. 285, 70 Atl. 232.

61. Notice.—The Prince Albert, Fed. Cas. No. 11,426, 5 Ben. 386.

62. Alabama, etc., R. Co. *v.* McKenzie, 139 Ga. 410, 77 S. E. 647, 45 L. R. A., N. S., 18.

63. Authority of agent.—Illinois Cent. R. Co. *v.* Swanson, 92 Miss. 485, 46 So. 83.

64. Fraud.—Brehme *v.* Dinsmore, 25 Md. 328.

carrier's liability terminated provided it gave proper instructions to the connecting carrier.[65]

§ 885. Necessity of Producing Bill of Lading.—In an action against ship owners for a sum acknowledged to be due for nondelivery of goods, the production of the bill of lading is not essential.[66]

§ 886. Admissibility of Evidence.—As a general rule, in an action against the carrier any fact or circumstance which is relevant to the issues as made by the pleadings is admissible.[67] So evidence of the carrier's mode of dealing[68] and of the plaintiff's acquiescence therein,[69] that the plaintiff had

65. Hempstead *v.* New York Cent. R. Co. (N. Y.), 28 Barb. 485.

66. **Necessity of producing bill of lading.**—Newell *v.* Nixon (U. S.), 4 Wall. 572, 18 L. Ed. 305.

67. **Admissibility of evidence—Illustrations.**—Where an issue was whether a railroad company had delivered to a consignee all the goods it had received from the consignor, evidence that the car was sealed at the loading point and remained sealed until delivery of the goods to the consignee is admissible. Missouri, etc., R. Co. *v.* Simonson, 68 Pac. 653, 64 Kan. 802, 57 L. R. A. 765, 91 Am. St. Rep. 248.

In an action against a common carrier to recover the value of goods not delivered, the evidence of a witness, who gives the particular facts of his knowledge, and states that the goods were carefully packed, and that he saw them taken away by the drayman, and saw the bills of lading after they were signed, is proper for the consideration of the jury. Scholes *v.* Ackerland, 15 Ill. 474.

In an action by a consignor to recover from a railroad company the amount of a sight draft attached to a bill of lading, drawn on the consignee of certain lumber to be delivered on payment of the draft, and which plaintiff alleged defendant had delivered without such payment, defendant could show that the lumber was so inferior to the lumber contracted for that the payments already made covered the value of the entire amount shipped, and that there was therefore no balance due plaintiff. Stearns *v.* Grand Trunk R. Co., 111 N. W. 769, 148 Mich. 271.

Where, in an action against an express company for failing to deliver plaintiff's trunk, it was shown that a trunk answering the description of plaintiff's and containing the same list of articles and a book with plaintiff's name was found in a railway baggage room at another station, the burden being on plaintiff to prove a delivery of the trunk to the express company, it was error to refuse to permit the latter to ask plaintiff on cross-examination whether he had not brought a ticket to the station where the trunk was found and checked the trunk on such ticket, instead of delivering it to defendant. Wells Fargo & Co. *v.* Hanson, 41 Tex. Civ. App. 174, 91 S. W. 321.

Where, in an action against a carrier for conversion of corn by a sale after rejection by the consignee, the issue was sharply drawn as to whether the corn was No. 2 mixed corn when loaded at the point of shipment, evidence that the corn was part of another carload, the balance of which witness sold as No. 2 corn to dealers at the point of shipment, and that no complaint had ever been made by any of the purchasers of the same was not irrelevant. St. Louis, etc., R. Co. *v.* Arkansas, etc., Grain Co., 93 S. W. 656, 42 Tex. Civ. App. 125.

In an action against a carrier for conversion of freight, based on a refusal to deliver without payment of excessive charges, evidence that the carrier claimed a specified sum to be the true rate per hundred pounds on the shipment was admissible to show what rate had been demanded. Pecos, etc., R. Co. *v.* Porter (Tex. Civ. App.), 156 S. W. 267.

Evidence of custom.—Where a railroad company gives a receipt for freight to be delivered to its agent at the terminus of the road, and the agent there deposits it in a warehouse not belonging to the company, evidence of its custom to deposit freight in that warehouse is admissible in behalf of the company in an action against it for the loss of the shipment. Alabama & T. R. R. Co. *v.* Kidd, 29 Ala. 221.

68. **Mode of dealing.**—Ridgway Grain Co. *v.* Pennsylvania R. Co., 228 Pa. 641, 77 Atl. 1007, 31 L. R. A., N. S., 1178; Mobile, etc., R. Co. *v.* Williams, 54 Ala. 168, holding that where the carrier produces in evidence the receipt of the consignee for the goods, it may be shown that its course of dealing was to demand and receive payment of freight and a receipt for the goods before their delivery.

In an action against an express company to recover the value of a package which it failed to deliver, it was not error to admit testimony as to the refusal of the company to deliver a like package to one other than the consignee at a different time and a different office, where the court limited it to the proof of the course of dealing between the parties. Adams Exp. Co. *v.* Gordon, 27 O. C. C. 243.

69. **Acquiescence of plaintiff.**—Ridgway Grain Co. *v.* Pennsylvania R. Co., 77 Atl. 1007, 228 Pa. 641, 31 L. R. A., N. S., 1178.

never received the goods,[70] that he had never been paid for them,[71] or what freight charges he had paid,[72] is admissible when relevant to any fact to be ascertained by the jury. An objection is properly sustained to a question to a witness calling for a comparison that could be made as well by the jury.[73]

In an action for conversion of goods evidence tending to show that defendant carrier is in possession of the property sued for and exercising ownership over it is admissible.[74] In such an action the plaintiff may prove that he has paid for the goods.[75] Evidence of what the carrier did after it had converted the goods is immaterial.[76] And an offer of an attorney for defendant carrier to settle, made after suit brought, is inadmissible where no tender of payment of any damages was made.[77] In an action against an express company for conversion by the sale of property in its possession belonging to plaintiff, testimony as to the rules of the company regarding sales of unclaimed property was properly excluded where the sale in question was not made under the statute regulating the sale of unclaimed property by express companies.[78]

Res Inter Alios.—Evidence which relates to the transaction forming the basis of the action and tends to throw light upon its true character may be

70. In an action against a carrier for failure to deliver freight, evidence that the consignees had never received the freight was admissible, as tending to show that it had never been delivered at the station, as the contract of shipment provided. Alabama Mid. R. Co. *v.* Thompson, 32 So. 672, 134 Ala. 232.

71. Southern R. Co. *v.* Allison, 42 S. E. 15, 115 Ga. 635.

72. In an action for failure to deliver a case of goods included in a shipment which was delivered, evidence of what freight charges consignor had paid on the case is admissible. Louisville, etc., R. Co. *v.* Price, 159 Ala. 213, 48 So. 814.

73. A bank delivered money to an express company for shipment. When the package arrived at its destination, the consignee, on opening it, found nothing therein but waste paper. In an action by the consignee against the carrier for nondelivery, the carrier's contention was that the money was never delivered to it. To support this contention it was shown that pieces of paper found in the package when it was delivered to plaintiff disclosed certain stains. The color of the panels of the counter in the bank was then shown. The stains on the paper were tobacco stains. Held, that an objection to a question as to whether the color of the bank panels was similar to the color of the stains on the paper was properly sustained. Bank *v.* American Exp. Co., 102 N. W. 107, 127 Iowa 1.

74. **Action for conversion.**—Louisville, etc., R. Co. *v.* Britton, 149 Ala. 552, 43 So. 108.

Illustrations.—Evidence is admissible to show that the carrier's claim agent showed witness that plaintiff's goods were in the box addressed to plaintiff, which the agent said belonged to plaintiff and offered to sell to witness. Louisville, etc., R. Co. *v.* Britton, 149 Ala. 552, 43 So. 108.

A consignor sent by an association of railroad companies, of which the defendant was one, a car load of oats, weighing 23,667 pounds, to be forwarded to a station beyond the line of the defendant's road, and received from the transit company a bill of lading, which he sent to the consignee, in which the oats were stated to weigh 20,000 pounds. The consignee paid the consignor for the full contents of the car. In an action by the consignee against the defendant for the conversion of that portion of the grain removed, the freight agent of the defendant testified that he removed on behalf of the defendant the excess of oats above 20,000 pounds at the end of the defendant's road. Held, that the testimony was competent on the question of conversion. Wiggin *v.* Boston, etc., R. Co., 120 Mass. 201.

75. In an action against a carrier for the conversion of a part of a car load of grain in bulk, the consignee, on the question of title, may prove that he has paid for the entire car load. Peebles *v.* Boston, etc., R. Co., 112 Mass. 498.

76. Where grain shipped is converted by a carrier in delivering it to the consignee without presentation of the bill of lading, and thereafter is redelivered to the carrier and by it stored in a warehouse, evidence, in an action for conversion, that it was customary for the carrier to store grain in a warehouse while awaiting demand of the bill of lading is immaterial; and evidence that after the conversion plaintiff was notified from time to time, and knew that the grain was in a certain place at his final disposal, is also immaterial. Marshall, etc., Grain Co. *v.* Kansas City, etc., R. Co., 75 S. W. 638, 176 Mo. 480, 98 Am. St. Rep. 508.

77. **Offer to settle.**—Gulf, etc., R. Co. *v.* Cleburne Ice, etc., Co. (Tex. Civ. App.), 79 S. W. 836.

78. Girardeau *v.* Southern Exp. Co., 26 S. E. 711, 48 S. C. 421.

regarded as res gestæ and is admissible, though in a certain sense it is res inter alios.[79]

Waybills as Self-Serving Declarations.—Waybills relating to goods are not admissible in behalf of the defendant carrier as they merely amount to declarations of the defendant in its own favor.[80]

Documentary Evidence.—A sales bill reciting a purchase by plaintiff of the goods from a vendor is admissible in evidence, though it is not shown by whom it was made out, where the evidence tends to show that it was received by plaintiff, and that he had paid it.[81] But a bill of lading is not admissible on behalf of the endorsee where there is no proof of the endorsement.[82]

Parol Evidence.—Words or forms of expression, in a carrier's receipt for goods, which are not of universal use, but are purely local or technical, may be explained by parol evidence.[83] In an action against a carrier for the non-delivery of goods consigned beyond the terminus of its route unaccompanied by any directions as to their transportation and delivery, parol evidence in its behalf is admissible to show the route and termini, and the usage of the carrier, and the knowledge of the consignor of these matters, as entering into the contract, though the defendant is prima facie liable for the carriage and delivery of the goods according to the marks.[84] Where in such an action the plaintiff's employee had proved the receipt for the goods, and stated, without objection, the circumstances under which it was given to him, the carrier may introduce evidence as to the circumstances under which it gave the receipt.[85] But where a bill of lading expressly stipulates for delivery to the consignor or his assigns, evidence that, according to the rules and customs of all railroads, a bill of lading, written as it was, would be considered to authorize delivery by the carrier to the consignee without production or surrender of the bill of lading, is inadmissible.[86]

Character of Employees.—In an action against an express company for a failure to deliver money consigned to it, evidence of the good moral character of its employees is inadmissible.[87]

Evidence of Prior Losses.—In an action by the consignee against an express company for its failure to deliver money, evidence that several months before the transaction in question the consignor had been losing money through the theft of some of its employees is incompetent.[88]

Evidence that an employee must ultimately make good the loss under

79. **Res inter alios.**—Seaboard, etc., Railway *v.* Phillips, 108 Md. 285, 70 Alt. 232, which was an action for conversion of goods shipped, holding that a series of letters and telegrams which passed between defendant carrier and another, who jointly issued the bill of lading; touching the handling and movement of the goods while in the possession of one or the other of the carriers, was admissible.

80. **Self-serving declarations.**—Southern R. Co. *v.* Allison, 115 Ga. 635, 42 S. E. 15.

81. **Documentary evidence.**—Louisville, etc., R. Co. *v.* Britton, 39 So. 585, 145 Ala. 654.

82. **Proof of indorsement.**—Capehart *v.* Granite Mills, 97 Ala. 353, 12 So. 44, holding that where it appeared that on the back of the bill of lading was written the name of the firm to whom it was issued, "per P. C., Atty.," who was a member of the firm, and there was no evidence that P. C., or any other member of the firm, made the indorsement, there was no proof of indorsement.

83. **Parol evidence.**—Collender *v.* Dinsmore, 55 N. Y. 200, 14 Am. Rep. 224, reversing 64 Barb. 457, wherein plaintiff shipped with defendant merchandise marked with the name and address of the consignee, and the additional direction, "C. O. D. $375, from Turner's Express, Boston, Mass." In an action against defendant for neglecting to collect of Turner's Express, held, that evidence was admissible to show the common meaning of the letters "C. O. D." but not of the remaining words.

84. Angle & Co. *v.* Mississippi, etc., R. Co., 9 Iowa 487.

85. Scovill *v.* Griffith, 12 N. Y. 509.

86. Grayson County Nat. Bank *v.* Nashville, etc., Railway (Tex. Civ. App.), 79 S. W. 1094.

87. **Character of employees.**—Bank *v.* American Exp. Co., 102 N. W. 107, 127 Iowa 1.

88. **Evidence of prior losses.**—Bank *v.* American Exp. Co., 102 N. W. 107, 127 Iowa 1.

a bond given by him on entering his employment is inadmissible, in an action against a carrier for misdelivery of goods, as affecting the carrier's liability, though such evidence is admissible to show the interest of the employee as a witness.[89]

Evidence as to what transportation lines carried the goods and the efforts plaintiff made to find them, is not prejudicial to defendant, in an action against a transportation company for failure to deliver cotton at the place designated in the bill of lading, where there is no claim that the cotton was delivered to any one at that place.[90]

§ 887. Weight and Sufficiency of Evidence.—Degree of Proof.—Where a carrier is sought to be charged with liability for delivering goods to a wrong person, no greater degree of proof is required of the authority of such person to receive them than in the case of any other issue in a civil action.[91]

Proof of Conversion.—Proof of nondelivery of goods by a carrier without proof of wrongful disposition or withholding, is not sufficient to establish a conversion.[92] Evidence that goods were delivered to defendant, and that he refused to deliver them to plaintiff, and failed to account for them, is sufficient to show conversion.[93] And the general and unqualified refusal of a carrier to deliver goods is evidence of a conversion.[94]

Evidence of Notice.—The making and depositing in a post office of a notice by a carrier to the consignee of goods is not sufficiently shown by evidence that it was the regular course of business to make and deposit such notices, where it appears that the persons whose duty it was to make and deposit them had no recollection thereof, and there was no memorandum in any book or paper in the office of the carrier from which the making of such notice could be verified.[95]

Evidence of Title and Right to Goods.—In an action against a railroad for the conversion of plaintiff's goods, a sales bill reciting purchase by plaintiff of the goods from a shoe company, in connection with evidence that it was paid, showed title in plaintiff and his right to immediate possession of the goods, in the absence of contrary evidence.[96]

Evidence That Goods Shipped in Good Order.—In an action against a carrier to recover the value of goods not delivered, the evidence of a witness, who gives the particular facts of his knowledge, and states that the goods were carefully packed, and that he saw them taken away by the drayman, and saw the bills of lading after they were signed, may be held as sufficient evidence of the fact that they were shipped and in good order.[97]

Particular instances of evidence held sufficient or insufficient are set out in the notes.[98]

89. Hamilton *v.* Chicago, etc., R. Co., 72 N. W. 536, 103 Iowa 325.

90. Capehart *v.* Granite Mills, 97 Ala. 353, 12 So. 44.

91. **Degree of proof.**—Wilcox *v.* Chicago, etc., R. Co., 24 Minn. 269.

92. **Proof of conversion.**—Rosenfeld *v.* Central Vermont R. Co., 97 N. Y. S. 905, 111 App. Div. 371.

93. Suesskind-Schatz Co. *v.* Loria, 99 N. Y. S. 427.

94. Louisville, etc., R. Co. *v.* Britton, 149 Ala. 552, 43 So. 108.

95. **Evidence of notice.**—Stephenson *v.* United States Exp. Co., 21 Wis. 405.

96. **Evidence of title and right to goods.**—Louisville, etc., R. Co. *v.* Britton, 39 So. 585, 145 Ala. 654.

97. **Evidence that goods shipped in good order.**—Scholes *v.* Ackerland, 15 Ill. 474.

98. **Evidence held sufficient.**—In an action against a carrier for nondelivery of money, evidence of the delivery of the money to the carrier, and that when the package supposed to contain it was delivered to the consignee it contained nothing but waste paper, was sufficient to support a verdict for plaintiff. Bank *v.* American Exp. Co., 102 N. W. 107, 127 Iowa 1.

In an action by consignor against a railroad company for delivery of goods to the consignee without requiring surrender of bill of lading, evidence that there was no course of dealing between the parties waiving a provision of the bill of lading requiring its surrender before the delivery of the goods, and that plaintiff did not with knowledge of such delivery in many instances ratify such course of dealing between the consignee

§§ 888-900. Damages—§ 888. Nominal Damages.—When goods have been delivered by a carrier to a person not entitled to them, and the latter delivers the goods to the shipper or consignee, or pays him their value, in a suit

of the goods and the agent of the railroad company, held to sustain a verdict for the plaintiff. Salberg *v.* Pennsylvania R. Co., 237 Penn. 495, 85 Atl. 767.

Evidence that a witness, on learning that goods shipped to him over defendant's railway had reached their destination, went with his wagons to haul the same, and found them in a car on a switch about two miles distant, and that he had been informed that the car remained at the point of destination a day and a night, is sufficient to support a finding that the goods remained at the point of destination only twenty-four hours, and were thereafter removed by the railroad company to the place where they were delivered to a third party. St. Louis, etc., R. Co. *v.* Hall, etc., Mach. Co., 56 S. W. 140, 23 Tex. Civ. App. 211.

Where, in an action against a carrier for nondelivery of plaintiff's trunk, plaintiff testified without objection that B. delivered the trunk to the carrier for transportation, such evidence justified a finding of the delivery of the trunk to the carrier. Wells, Fargo & Co. *v.* Hanson, 41 Tex. Civ. App. 174, 91 S. W. 321.

Where a bill of lading required the carrier to notify a person named, and the carrier's counsel admitted that it was the carrier's duty to give notice of the arrival of the goods, a finding that it was the carrier's duty to give notice to the person named of the arrival of the goods was justified. Uber *v.* Chicago, etc., R. Co., 151 Wis. 431, 138 N. W. 57.

Evidence held insufficient.—In an action for the value of certain furniture delivered to defendant for carriage, it appeared that plaintiff's husband delivered the goods and took the receipt, which he gave to plaintiff. When the goods reached their destination they were delivered to a carman, who produced the receipt, it having been given him by plaintiff's husband. The goods were taken to a salesroom, and exposed for sale, where plaintiff saw them, and made no objection. The goods were sold, and plaintiff's husband got the money. He had sold other goods through the same salesman by plaintiff's authority, and on one occasion, in his presence, she asked for the proceeds of the sale. Plaintiff testified that she did not give the receipt to her husband, and that she thought the salesroom was a railway storehouse. Held not sufficient evidence to sustain a verdict for plaintiff. Reynolds *v.* New York, etc., R. Co., 50 Hun 606, 3 N. Y. S. 331, 21 N. Y. St. Rep. 319.

Plaintiff, a consignee, in his action against a common carrier for refusing to deliver goods, alleged and proved his cause of action, but, on his examination, admitted that the carrier had been ordered by the consignor not to deliver the goods. Held, that a nonsuit was properly ordered. Pool *v.* Columbia, etc., R. Co., 23 S. C. 286.

Insufficient evidence of delivery.—To prove delivery of a lost trunk, the defendants adduced the deposition of the clerk of a steamer, running from Montgomery to New Orleans, where the trunk was directed, who stated that it was delivered, and a receipt taken, which was subsequently lost. The address of the trunk received was different from that alleged to have been delivered, and, in reply to numerous inquiries, the defendants said, "We have written all along the line, and will get it to you as soon as possible." Held, that delivery was not proved. Stadhecker *v.* Combs & Co. (S. C.), 9 Rich. Law 193.

Evidence not sustaining defence.—In an action by a shipper against a carrier for the conversion of a car load of lumber by delivering it to a wrong person, the defense that defendant was justified in making the delivery, because the invoice delivered by plaintiff to the person receiving the lumber described the car containing it in connection with another car rightfully delivered to such person, is not sustained, where the evidence shows that the invoice described the lumber in the car actually sold to such person, and did not describe the lumber in suit. Mobile, etc., R. Co. *v.* Bay Shoe Lumber Co., 165 Ala. 610, 51 So. 956.

In an action by the shipper against a railroad company for the loss of freight, it appeared that the goods were delivered to defendant at Parkersburg, W. Va., April 18, 1861, consigned to a person at Culpepper Court House, Va.; that the goods were carried as far as Baltimore, and there sold at auction by the carrier in 1864, for a grossly inadequate price. The carrier sought to justify by showing that the war between the confederate and federal governments had begun prior to the date of the alleged shipment; that troops were marching through Baltimore to Washington previous to that time; that Ft. Sumter had been fired upon on April 12 or 13, 1861; and that the president of the United States had issued his call for 75,000 men on April 15, 1861. Held, that the evidence only showed that the war was existing, but did not show that defendant was prevented thereby from delivering the freight. Baltimore, etc., R. Co. *v.* Morehead, 5 W. Va. 293.

against the carrier for the nondelivery of the goods the shipper or consignee can only recover nominal damages.[99]

§ 889. Exemplary Damages.—In a proper case exemplary damages are recoverable in an action against a carrier for refusal to deliver.[1]

§§ 890-900. Compensatory Damages—§§ 890-893. Failure or Refusal to Deliver—§ 890. Actual Loss Proximately Resulting.—In an action against a carrier for breach of its duty to deliver goods, the plaintiff may recover compensation for the actual loss sustained as the direct and proximate result of the carrier's wrong.[2] Damages which are not the natural and prox-

99. **Nominal damages.**—Rosenfield *v.* Express Co., Fed. Cas. No. 12,060, 1 Woods 131.

1. **Exemplary damages.**—Defendants received goods on their steamboat at St. Louis to deliver at plaintiffs' landing. On going down the river, defendants made no attempt to stop at the landing, but left the goods at a point a few miles below, and on the return stopped at the landing with the goods, which they refused to deliver unless plaintiffs would pay the freight charges and also the cost of storage at the place where the goods were left. Held to be such a willful refusal to deliver as to entitle plaintiffs to exemplary damages. Silver *v.* Kent, 60 Miss. 124.

A steamboat company received goods for shipment as a common carrier for hire, to be delivered at a private landing. The company afterwards refused to deliver the goods at the private landing, but delivered the same at another place. Held, that the consignor was entitled to recover punitive damages for willful failure to deliver. Stricker *v.* Leathers, 68 Miss. 803, 9 So. 821, 13 L. R. A. 600.

Where the driver of an express company's wagon refused to deliver an express package, with malicious disregard of the rights of the consignee, and the express company ratified his act, the consignee was entitled to exemplary damages. Gary *v.* Wells, Fargo & Co.'s Exp. (Tex. Civ. App.), 40 S. W. 845.

A petition alleging that defendant's agent wrongfully, willfully, and wantonly took possession of and withheld a bill of lading on which lumber was shipped to plaintiff, and that the agent's acts were authorized and ratified by defendant, states a tort for which actual and exemplary damages may be recovered. Alderson *v.* Gulf, etc., R. Co. (Tex. Civ. App.), 23 S. W. 617, affirmed in 93 Tex. 678, no op.

Mere brusqueness on the part of the agent, not amounting to insult, is not a ground for punitive damages in an action against a carrier for damages for refusing to deliver goods. Illinois Cent. R. Co. *v.* Brookhaven Mach. Co., 71 Miss. 663, 16 So. 252.

2. **Actual loss proximately resulting—** *Kentucky.*—Louisville, etc., R. Co. *v.* Lawson, 9 Ky. L. Rep. 681.

Maryland.—Baltimore, etc., R. Co. *v.* Pumphrey, 59 Md. 390.

Mississippi.—Stricker *v.* Leathers, 68 Miss. 803, 9 So. 821, 13 L. R. A. 600.

South Carolina.—Teague *v.* Southern R. Co., 45 S. C. 27, 22 S. E. 779.

Texas.—See Gulf, etc., R. Co. *v.* McCorquodale, 71 Tex. 41, 46, 9 S. W. 80.

Illustrations.—A. purchased goods of B. in New York, of which he received a bill of sale and in payment for which he gave his note at six months. The goods were shipped by B., to be delivered to the order of the shipper at San Francisco. On arrival at San Francisco, the defendant, who was master of the vessel, delivered the goods to A., who paid the freight. The agent of B., to whose order the goods were ordered to be delivered, subsequently tendered the freight to the master and demanded the goods. In an action for the value of the goods, it was held that B. held a lien on the goods for the purchase price, for which the defendant was liable, but not for their value in San Francisco. Persse *v.* Cole, 1 Cal. 369.

In an action against a common carrier for failing to deliver to the plaintiff a canvas bag containing ninety double eagles of the coinage of the United States, which the carrier received from the plaintiff's agent in Mexico, in 1862, it was held that the plaintiff was entitled to recover in treasury notes the value of the coin, together with the premium on gold at the time when it should have been delivered, with interest on the amount from the date of the demand. Cushing *v.* Wells, etc., Co., 98 Mass. 550.

Plaintiff's intestate delivered to defendants' agent a certain sum of money for the purpose of paying a semiannual premium on his policy of life insurance which by the terms would lapse if the premiums were not paid within eight days. The agent knew of this, but failed to deliver the money. Held, that defendants would be liable for the net value of the policy on the day it lapsed. Grindle *v.* Eastern Exp. Co., 67 Me. 317, 24 Am. Rep. 31.

The defendant contracted with the plaintiff to carry a quantity of pease from Canada to New York by water, but, by his own negligence and unnecessary delay, was unable to carry them further than Burlington during the same season, on account of the freezing of the lake.

imate result of the carrier's breach of duty are not recoverable.[3] Damages which are too remote are not recoverable.[4]

Action ex Delicto or ex Contractu.—The same rule applies to an action against a carrier for failure to deliver goods, whether it is ex delicto or ex contractu in form, and the measure of damages is as much a question of law, under the control of the court, as if the right rested on contract only.[5]

§ 891. Measure and Elements in General.—In General.—If a carrier fails to deliver goods or converts them it is liable for the value of the goods at their destination and at the time when they should have been delivered,[6] with

The plaintiff then, upon the defendant refusing either to forward the pease by railroad to New York, or to deliver them to the plaintiff, except upon the payment of the freight, obtained possession of them by writ of replevin, and sent them to Boston for a market, which was a judicious disposition of them. Held, that the plaintiff was entitled to recover the difference between the net amount realized from the sale of the pease in Boston and the net amount they would have sold for in New York, at the time when they should have arrived there, had the defendant properly discharged his contract. Laurent *v.* Vaughn, 30 Vt. 90.

3. Gulf, etc., R. Co. *v.* Pickens (Tex. Civ. App.), 58 S. W. 156.

Illustrations.—The suffering of plaintiffs' families, from cold and inconvenience, by the failure of defendant to deliver them a bill of lading of clothing and household goods shipped, is not the natural and proximate result of a breach of the shipping contract, where defendant was not informed by plaintiffs of their necessitous condition, and the consequent sufferings from cold that might ensue from their inability to buy other clothing and goods if those shipped were not promptly delivered. St. Louis, etc., R. Co. *v.* May (Tex. Civ. App.), 44 S. W. 408.

Where, in an action against a carrier for failure to deliver cotton at the destination named in the bill of lading, the consignor claimed damages suffered by reason of the consignee's refusal to accept after having procured samples, which he would not have done if the cotton had been delivered at the proper place, plaintiff could not recover, in the absence of proof that the carrier was instrumental in permitting the consignee to procure the samples, or that it had any knowledge of the contract between plaintiff and the consignee, since such damages were special, and not the proximate result of the carrier's breach of contract. Gulf, etc., R. Co. *v.* Pickens (Tex. Civ. App.), 58 S. W. 15

4. **Remote damages.**—Alderson *v.* Gulf, etc., R. Co. (Tex. Civ. App.), 23 S. W. 617, affirmed in 93 Tex. 678, no op.; Central, etc., R. Co. *v.* Chicago Portrait Co., 49 S. E. 727, 122 Ga. 11, 106 Am. St. Rep. 87.

Illustrations.—There can be no recovery of damages under an allegation that, by reason of defendant's failure to deliver lumber, plaintiff was unable to build a house for which she would have received certain rent, this being too remote. Alderson *v.* Gulf, etc., R. Co. (Tex. Civ. App.), 23 S. W. 617, affirmed in 93 Tex. 678, no op.

5. **Action ex delicto or ex contractu.**—Baltimore, etc., R. Co. *v.* Pumphrey, 59 Md. 390.

6. **Value at destination.**—*United States.*—The Gold Hunter, Fed. Cas. No. 5,513, 1 Blatchf. & H. 300.

Alabama.—Capehart *v.* Granite Mills, 97 Ala. 353, 12 So. 44; Echols *v.* Louisville, etc., R. Co., 90 Ala. 366, 7 So. 655.

Georgia.—Atlantic, etc., R. Co. *v.* Howard Supply Co., 125 Ga. 478, 54 S. E. 530; Rome R. Co. *v.* Sloan, 39 Ga. 636; Cooper *v.* Young, 22 Ga. 269, 68 Am. Dec. 502; Taylor & Co. *v.* Collier, 26 Ga. 122; Atlantic, etc., R. Co. *v.* Goodwin, 1 Ga. App. 351, 356, 57 S. E. 1070; Albany, etc., R. Co. *v.* Merchants, etc., Bank, 137 Ga. 391, 73 S. E. 637.

Illinois.—Northern Transp. Co. *v.* McClary, 66 Ill. 233.

Kentucky.—Chesapeake, etc., R. Co. *v.* Webb, 8 Ky. L. Rep. 44; see Louisville, etc., R. Co. *v.* Lawson, 9 Ky. L. Rep. 681.

Louisiana.—St. Marc *v.* La Chapella (La.), 1 Mart., O. S., 36; Ames *v.* Reed (La.), 2 Mart., N. S., 236; Burke *v.* Clarke, 11 La. 206.

Maryland.—Baltimore, etc., R. Co. *v.* Pumphrey, 59 Md. 390.

Massachusetts. — Massachusetts Loan, etc., Co. *v.* Fitchburg R. Co., 143 Mass. 318, 9 N. E. 669; Spring *v.* Haskell (Mass.), 4 Allen 112; Forbes *v.* Boston, etc., R. Co., 133 Mass. 154, 9 Am. & Eng. R. Cas. 76; Peebles *v.* Boston, etc., R. Co., 112 Mass. 498; Cushing *v.* Wells, etc., Co., 98 Mass. 550.

Minnesota.—Jellett *v.* St. Paul, etc., R. Co., 30 Minn. 265, 15 N. W. 237.

Missouri.—Loeffler *v.* Keokuk, etc., Packet Co., 7 Mo. App. 185; Atkisson *v.* Steamboat Castle Garden, 28 Mo. 124.

New York.—Sherman *v.* Wells (N. Y.), 28 Barb. 403.

Ohio.—Baltimore, etc., R. Co. *v.* O'Don-

interest thereon from that time,[7] at the same time deducting the unpaid cost of transportation.[8] It has been held that in case of conversion there is no de-

nell, 49 O. St. 489, 32 N. E. 476, 21 L. R. A., N. S., 117, 34 Am. St. Rep. 579.

Pennsylvania.—Ludwig *v.* Meyre (Pa.), 5 Watts & S. 435.

Tennessee.—Dean *v.* Vaccaro, 39 Tenn. (2 Head) 488, 75 Am. Dec. 744; Erie Dispatch *v.* Johnson, 87 Tenn. 490, 11 S. W. 441.

Texas.—Carter *v.* International, etc., R. Co. (Tex. Civ. App.), 93 S. W. 681; H. & T. C. R. Co. *v.* Stewart & Co., 1 Texas App. Civ. Cas., § 1246; Missouri, etc., R. Co. *v.* Rines & Co., 37 Tex. Civ. App. 618, 84 S. W. 1092. See Missouri, etc., R. Co. *v.* Cox & Co. (Tex. Civ. App.), 144 S. W. 1196. See Gulf, etc., R. Co. *v.* Cleburne Ice, etc., Co. (Tex. Civ. App.), 79 S. W. 836. See Texas, etc., R. Co. *v.* Curry, 3 Texas App. Civ. Cas., § 453.

West Virginia.—Clarke-Lawrence Co. *v.* Chesapeake, etc., R. Co., 63 W. Va. 423, 61 S. E. 364.

Wisconsin.—Nudd *v.* Wells, 11 Wis. 407.

The measure of damages for failure of defendant express company, with knowledge of the facts, to deliver a bicycle which plaintiff had purchased and shipped for use during her vacation, she being unable to use it at other times, is the value of the bicycle, and not the cost of hiring another during her vacation, though at the close of her vacation defendant offered to deliver it, and she refused to receive it, no bicycle being obtainable at the place where her vacation was spent. Judgment, 43 N. Y. S. 1123, 19 Misc. Rep. 530, 3 N. Y. Ann. Cas. 400, affirmed. Mitchell *v.* Weir, 45 N. Y. S. 1085, 19 App. Div. 183.

7. Interest as element of damage.—*United States.*—The Gold Hunter, Fed. Cas. No. 5513, 1 Blatchf. & H. 300.

Alabama.—Capehart *v.* Granite Mills, 97 Ala. 353, 12 So. 44; Echols *v.* Louisville, etc., R. Co., 90 Ala. 366, 7 So. 655.

Illinois.—Northern Transp. Co. *v.* McClary, 66 Ill. 233.

Iowa.—Dant & Co. *v.* Northwestern Union Packet Co., 34 Iowa 588.

Kentucky.—Chesapeake, etc., R. Co. *v.* Webb, 8 Ky. L. Rep. 44.

Massachusetts. — Spring *v.* Haskell (Mass.) 4 Allen 112; Cushing *v.* Wells, etc., Co., 98 Mass. 550; Forbes *v.* Boston, etc., R. Co., 133 Mass. 154, 9 Am. & Eng. R. Cas. 76.

Minnesota.—Jellett *v.* St. Paul, etc., R. Co., 30 Minn. 265, 15 N. W. 237.

New York.—Sherman *v.* Wells (N. Y.), 28 Barb. 403; McCormick *v.* Pennsylvania Cent. R. Co., 49 N. Y. 303.

Texas.—Missouri, etc., R. Co. *v.* Rines & Co., 37 Tex. Civ. App. 618, 84 S. W. 1092; Carter *v.* International, etc., R. Co. (Tex. Civ. App.), 93 S. W. 681.

Wisconsin.—Nudd *v.* Wells, 11 Wis. 407.

Illustrations.—In an action against a carrier for failure to deliver tobacco delivered to it for transportation, it appeared that at the time the tobacco was landed at the point of destination the shipper was entitled to receive it in good condition, and that it came in a damaged condition. The carrier retained it for the estimation of damages, and, instead of paying the damages assessed and delivering the tobacco to the shipper, it shipped it to another point. Held, that the shipper was entitled to recover interest on the value of the tobacco from the date of its arrival at the point of destination. Dant & Co. *v.* Northwestern Union Packet Co., 34 Iowa 588.

Interest in discretion of jury.—In assumpsit against a carrier for not delivering goods intrusted to him to carry, interest on the value of the property is not allowable as matter of law, but the jury, in their discretion, may allow or withhold interest. Richmond *v.* Bronson (N. Y.), 5 Denio 55.

Rate.—Where, after the conversion of property, the legal rate of interest is reduced, the owner is entitled to the legal rate from the conversion to the time the rate is changed, and to the reduced rate from them to the date of the trial. Gulf, etc., R. Co. *v.* Humphries, 4 Tex. Civ. App. 333, 23 S. W. 556.

8. Deduction of unpaid charges.—*Alabama.*—Capehart *v.* Granite Mills, 97 Ala. 353, 12 So. 44; Echols *v.* Louisville, etc., R. Co., 90 Ala. 366, 7 So. 655.

Georgia.—Atlantic, etc., R. Co. *v.* Howard Supply Co., 125 Ga. 478, 54 S. E. 530; Cooper *v.* Young, 22 Ga. 269, 68 Am. Dec. 502; Taylor & Co. *v.* Collier, 26 Ga. 122; Albany, etc., R. Co. *v.* Merchants, etc., Bank, 137 Ga. 391, 73 S. E. 637.

Illinois.—Northern Transp. Co. *v.* McClary, 66 Ill. 233.

Massachusetts.—Peebles *v.* Boston, etc., R. Co., 112 Mass. 498.

Missouri.—Atkisson *v.* Steamboat Castle Garden, 28 Mo. 124.

Tennessee.—Dean *v.* Vaccaro, 39 Tenn. (2 Head) 488, 75 Am. Dec. 744; Erie Dispatch *v.* Johnson, 87 Tenn. 490, 11 S. W. 441.

Texas.—Missouri, etc., R. Co. *v.* Rines & Co., 37 Tex. Civ. App. 618, 84 S. W. 1092; Carter *v.* International, etc., R. Co. (Tex. Civ. App.), 93 S. W. 681.

Where freight paid or to be paid by another.—In an action against a common carrier for the conversion of goods delivered to a person unauthorized to receive them, who pays the freight upon them, the measure of damages is the market value of the goods, less the freight, with interest from the date of the

duction for freight.[9] Unless a carrier has contracted to carry the goods to their destination to fulfill a contract at a greater price, or knew of such contract, he can not be charged with more than the market value of the goods, less freight charges at their destination, by reason of his failure to deliver to the person authorized to receive them under the bill of lading.[10]

Goods Shipped under Contract of Sale.—Where the carrier negligently delays the delivery of goods, whereby a sale is cancelled, and converts them, in an action by the consignee for the loss of commissions and the value of the property, the measure of damages is the price for which the sale was made.[11]

Where goods are taken by legal process, as being the goods of a party not the shipper, it is held that the damages in an action against the carrier are properly measured by the value of the goods at the place where they were taken.[12] It is also held that where a shipment is diverted to another state by the carrier and there attached for a debt not due, and sold, the measure of damages is the value of the property at the point of shipment to the shipper.[13]

Expenses.—As an element of damages for improperly withholding freight, plaintiff should be allowed expenses incurred in sending for it.[14] But it has been held that the expense of plaintiff's agent while waiting the delivery of the freight, on a statement of the agent of the carrier that the same had not arrived, when it was in fact in his possession, is too remote to be allowed in an action for conversion.[15]

Profits.—A carrier is not liable for the loss of profits by the necessary suspension of plaintiff's manufactory in consequence of its failure to deliver coal shipped according to contract.[16] If goods intrusted to a common carrier for shipment have been sold in advance of delivery, and in view of unusual conditions at prices yielding a profit and such expected profit is lost, it is not recoverable as part of the damages, unless the carrier, had notice of the contracts or the special purpose for which the goods had been purchased and shipped.[17]

Retail Price.—The retail price, where a quantity of merchandise is sued for, can not properly measure the value. The retail price would be unjust, for the merchant in fixing that price takes into consideration not only the first cost of the goods, but store rent, clerk hire, insurance, and a probable amount of bad debts, and adds to all these a percentage of profit.[18]

§ 892. Goods Having No Market Value.—Where a carrier fails to deliver, according to contract goods which are worn and have no market value, such as personal apparel, the measure of damages is what they are worth in their worn

conversion. Forbes *v.* Boston, etc., R. Co., 133 Mass. 154.

In an action against a common carrier, brought by the assignee of an insolvent debtor to recover for a wrongful delivery of goods to the consignee, after insolvency, and without calling for the proper vouchers from him, the measure of damages is the market value of the goods, less the freight charges, although by the contract between the consignee and his assignee the freight was to be paid by the former, and the carrier had notice of the assignment, and its terms. Massachusetts Loan, etc., Co. *v.* Fitchburg R. Co., 143 Mass. 318, 9 N. E. 669.

9. Atlantic, etc., R. Co. *v.* Goodwin, 1 Ga. App. 351, 57 S. E. 1070.

10. Grayson County Nat. Bank *v.* Nashville, etc., Railway (Tex. Civ. App.), 79 S. W. 1094.

11. **Goods shipped under contract of sale.**—Missouri Pac. Ry. Co. *v.* Peru-Van Zandt Imp. Co., 73 Kan. 295, 6 L. R. A., N. S., 1058, 117 Am. St. Rep. 468, 85 Pac. 408, 87 Pac. 80.

12. **Goods taken under legal process.**—Van Winkle *v.* United States Mail, etc., Co. (N. Y.), 37 Barb. 122.

13. Lincoln Grain Co. *v.* Chicago, etc., R. Co., 91 Neb. 203, 135 N. W. 443.

14. **Expenses.**—Gulf, etc., R. Co. *v.* Loonie, 84 Tex. 259, 263, 19 S. W. 385.

15. Central, etc., R. Co. *v.* Chicago Portrait Co., 122 Ga. 11, 49 S. E. 727, 106 Am. St. Rep. 87.

16. **Profits.**—Cooper *v.* Young, 22 Ga. 269, 68 Am. Dec. 502.

17. Clarke-Lawrence Co. *v.* Chesapeake, etc., R. Co., 63 W. Va. 423, 61 S. E. 364.

18. **Retail price.**—Texas, etc., R. Co. *v.* Payne, 15 Tex. Civ. App. 58, 38 S. W. 366; Heidenheimer & Co. *v.* Schlett, 63 Tex. 394.

condition as compared with their value if they were new, excluding circumstances of inconvenience resulting from being deprived of their use.[19] The measure of damages for the conversion by a carrier of household and kitchen furniture is actual value, and it is not necessary, to prove value, to first prove market value.[20]

§ 893. Computation of Damages.—Damages for nondelivery of goods intrusted to a carrier should be computed in the currency of the country where the goods were to be delivered, without taking into account any depreciation or appreciation there may be in the currency of that country.[21]

§ 894. Misdelivery.—The rule as to the measure of damages for loss of goods applies to losses occasioned by misdelivery.[22] The measure of damages, where the plaintiff receives the goods for sale and disposal at the place where they were misdelivered, is their value at that point when so received, less the price they actually brought, with due care in the sale, plus the cost and carriage, if the same had not been paid.[23] Where an article is shipped to a factor, at a certain market, who had been instructed not to sell until ordered, and the carrier delivered it to a factor at a different market, who had no instructions concerning it, and it was by him immediately sold, upon its appearing that the article in question rose in price, from that day until the suit was brought, the plaintiff is entitled to recover the highest price attained by the article within that period, where the suit is brought within a reasonable time.[24]

Delivery without Payment of Draft.—The measure of damages for wrongful delivery of the goods by the carrier to the consignee without requiring payment of a draft, according to the directions of the consignor, can not exceed the value of the goods.[25]

Delivery at Wrong Place.—In an action against a carrier for failure to deliver goods at the proper place,[26] or grain shipped in bulk at a particular elevator,[27] the plaintiff may recover the expenses of removing the property to the proper place or elevator.

§ 895. Delaying Notice of Arrival of Goods.—In an action for damages for delay in giving notice to the consignee of the arrival of goods, whereby they had depreciated, the measure of damages is the difference between the value of the goods, at the time of notice to the consignee, and the value at the time the goods arrived.[28]

19. **Goods having no market value.**—Chesapeake, etc., R. Co. *v.* Webb, 8 Ky. L. Rep. 44.

20. Pecos, etc., R. Co. *v.* Porter (Tex. Civ. App.), 156 S. W. 267.

21. **Computation of damages.**—Rice *v.* Ontario Steamboat Co. (N. Y.), 56 Barb. 384. See The Patrick Henry, Fed. Cas. No. 10,805, 1 Ben. 292.

22. **Misdelivery.**—See post, "Loss of or Injury to Goods," Chapter 12.

23. Little Rock, etc., R. Co. *v.* Miller Coal Co., 66 Ark. 645, 51 S. W. 1054. See Clarke-Lawrence Co. *v.* Chesapeake, etc., R. Co., 63 W. Va. 423, 61 S. E. 364.

24. Arrington *v.* Wilmington, etc., R. Co., 51 N. C. 68, 72 Am. Dec. 559.

25. **Delivery without payment of draft.**—Louisville, etc., R. Co. *v.* Hartwell, 99 Ky. 436, 36 S. W. 183, 38 S. W. 1041, 18 Ky. L. Rep. 745.

26. **Delivery at wrong place.**—Where, after plaintiff had delivered goods consigned to himself to defendant to be carried by it to M., and there delivered to another carrier, and by it taken to A., defendant agreed with plaintiff that it would endeavor to stop the goods at M., and from there take them to D., and by reason of its negligent failure to use reasonable effort to do so they were not stopped, but taken to A., defendant is liable for the cost of taking them back to D. Cincinnati, etc., R. Co. *v.* Steele, 140 Ky. 383, 131 S. W. 22.

27. **Delivery at wrong elevator.**—Richmond *v.* Union Steamboat Co., 87 N. Y. 240; Chicago, etc., R. Co. *v.* Stanbro, 87 Ill. 195, holding that if the action is under the Illinois statute (Rev. St., c. 114, § 82) requiring delivery at a particular warehouse, the depreciation in the price of the grain may be considered.

28. **Delaying notice of arrival of goods.**—New Orleans, etc., R. Co. *v.* Tyson, 46 Miss. 729.

§ 896. Delaying Notice of Refusal of Goods.—Where the consignee of property refused to accept it on the ground that it was of inferior grade, the carrier was liable for delay, in notifying the shipper of such refusal in case the property was of inferior grade, only for the decline in the market price for the time intervening between the date on which, by the exercise of ordinary care, it could have learned of the consignee's refusal and notified the shipper, and the date on which the property was actually sold after notice was given.[29]

§ 897. Mitigation of Damages.—Where goods which have been wrongfully delivered are reclaimed by the carrier and tendered or delivered to the consignee, or the proceeds thereof paid to him, such tender, delivery or payment will mitigate the damages.[30] But a rejected compromise proposition made to the consignee of goods by a person to whom they have been wrongfully delivered by the carrier for the purchase thereof and payment of a profit on the same does not work a mitigation of the damages.[31] Where two of three cars were wrongfully delivered to one, who subsequently became bankrupt, and plaintiff was allowed a part of the total value of all the cars in his claim against the bankrupt's estate, in a subsequent action against the carrier for the value of the two cars wrongfully delivered, the full amount recovered from the bankrupt's estate will not be allowed as a credit against plaintiff's claim, but only the pro rata payment on the two cars wrongfully delivered.[32]

§§ 898-899. Evidence—§ 898. In General.—In an action against a carrier to recover for the carrying of goods beyond their destination, plaintiff should be allowed, where the breach of the contract is admitted, to give evidence of any general or direct damages which he may have suffered.[33] In trover for conversion of a car of coal, the plaintiff is entitled to show, on the issue of exemplary damages, that defendant had seized and appropriated other cars of coal than the one involved in the suit.[34]

§ 899. Evidence as to Value.—Value at Place of Shipment.—Evidence of the value of goods at the point of shipment is relevant to the inquiry as to value at the point of delivery;[35] and the carrier can not complain that the proof of value is confined to the place of shipment, as the presumption is that the value there is less than at the point of destination.[36]

29. Delaying notice of refusal of goods.—Missouri, etc., R. Co. *v.* Jenkins, 80 S. W. 428, 35 Tex. Civ. App. 429.

30. Mitigation of damages.—Clarke-Lawrence Co. *v.* Chesapeake, etc., R. Co., 63 W. Va. 423, 61 S. E. 364.

Plaintiff agreed to sell and deliver to W. a car load of corn, to be paid for in cash before delivery. W. having paid part of the price only, plaintiff shipped the corn on one of the cars of defendant, a common carrier, for account of self, not stating the name of any consignee. Defendant delivered the corn to W. at his request, but without the consent of the plaintiff, and without payment of the balance of the price. Held, that defendant was entitled to allege and prove, in mitigation of damages, that, subsequent to such conversion, plaintiff had received from W. the full amount of the purchase price of the corn. Jellett *v.* St. Paul, etc., R. Co., 30 Minn. 265, 15 N. W. 237.

31. Clarke-Lawrence Co. *v.* Chesapeake, etc., R. Co., 63 W. Va. 423, 61 S. E. 364.

32. Louisville, etc., R. Co. *v.* Hiram Blow & Co. (Ky. App.), 124 S. W. 391.

33. Admissibility of evidence as to damages.—Teague *v.* Southern R. Co., 45 S. C. 27, 22 S. E. 779.

34. Gulf, etc., R. Co. *v.* Cleburne Ice, etc., Co. (Tex. Civ. App.), 79 S. W. 836.

35. Evidence of value at point of shipment.—Echols *v.* Louisville, etc., R. Co., 90 Ala. 366, 7 So. 655.

Where corn was to be carried between two stations about eighty miles apart, the value of the corn at the place and time of delivery to the carrier is competent evidence of its value at the place of destination. South, etc., R. Co. *v.* Wood, 72 Ala. 451.

Where the plaintiffs fail to give precise evidence of the market value of the goods at the place of delivery, the defendant may give evidence of their value at the place where they were shipped, and of the expenses of transportation to the place of delivery, as a proximate method of ascertaining the damages. Richmond *v.* Bronson (N. Y.), 5 Denio 55.

36. Rome R. Co. *v.* Sloan, 39 Ga. 636; Echols *v.* Louisville, etc., R. Co., 90 Ala. 366, 7 So. 655.

No Market Value at Destination.—Where there is evidence that the goods have no market value at the place of delivery, it is proper to admit evidence of the amount paid for them in other cities, where it is also shown that the prices paid are those charged by dealers in such goods, and that the goods are reasonably worth the same amount at the place of delivery.[37]

Amount Received at Sale.—Where carriers sold a car load of potatoes without giving the buyers an opportunity to inspect them, the amount received at the sale does not show the market value of the potatoes.[38]

Contract Price.—In an action against a common carrier for the value of a lot of fruit trees delivered to it for transportation, but which it failed to deliver at the point of destination, the price at which plaintiff had contracted to sell the trees at such point affords some evidence of their value at that point.[39]

Value at Time of Seizure under Legal Process.—Where delivery by a carrier to an officer under a valid writ of attachment constitutes conversion, proof of the value of the property delivered, as of the date delivered to the officer, is competent proof of value to support a recovery.[40]

Testimony that the goods were worth "about" a stated amount is not the equivalent or positive proof that the amount named was their exact value or that they were worth not less than that sum.[41]

Opinion of Expert.—The jury are not absolutely bound by the opinion of an expert witness touching the market value of the goods at the point of destination.[42]

§ 900. Inadequacy of Damages.—The rule applicable to all cases is that where the amount of damages allowed by the jury is not plainly inadequate, their verdict in this particular will not be disturbed.[43]

§§ 901-903. Trial and Judgment—§ 901. Questions for Jury.—In an action against a carrier for a wrongful delivery or failure to deliver, questions of law should not be submitted to the jury.[44] Where the evidence is conflict-

37. **No market at destination.**—New York, etc., Co. *v.* Weiss (Tex. Civ. App.), 47 S. W. 674.

38. **Amount received at sale.**—Carter *v.* International, etc., R. Co. (Tex. Civ. App.), 93 S. W. 681.

39. **Contract price.**—Clements *v.* Burlington, etc., R. Co., 74 Iowa 442, 38 N. W. 144.

40. **Value at time of seizure under legal process.**—Taugher *v.* Northern Pac. R. Co., 21 N. Dak. 111, 129 N. W. 747.

41. Atlantic, etc., R. Co. *v.* Howard Supply Co., 54 S. E. 530, 125 Ga. 478.

42. **Opinion of expert.**—Atlantic, etc., R. Co. *v.* Howard Supply Co., 125 Ga. 478, 54 S. E. 530.

43. **Inadequacy of damages.**—In an action by the consignor against a carrier for conversion of goods, after refusal of the consignee to take them, by selling them to a third person, where there was evidence that the goods were worth from $10 to $12, a verdict for $6 will not be disturbed. Baker *v.* Chicago, etc., R. Co., 98 Iowa 438, 67 N. W. 376.

44. **Question of law for court.**—National Bank *v.* Atlanta, etc., R. Co., 25 S. C. 216; Richer *v.* Fargo, 78 N. Y. S. 1007, 77 App. Div. 550.

Illustrations.—Where goods ordered reshipped by a seller to himself did not arrive until nearly three months after the date of the waybill, though the seller had been informed that the goods would arrive in three or four days, it was not proper to leave it to the jury to find that the goods had arrived in due course. Seaboard, etc., Railway *v.* Phillips, 108 Md. 285, 70 Atl. 232.

The consignor of a car of eggs notified a railroad station agent that it desired to ship them in one of defendant's cars. The railroad station agent thereupon procured a car of the defendant, in which the eggs were shipped to Chicago over the agent's road, to be there forwarded to the state of New York; the agent notifying defendant's general agent at Chicago of the shipment. Defendant's Chicago agent issued a receipt to the consignor showing the proper destination of the eggs, but through a mistake of an employee of the railroad in instructing a connecting railroad the eggs were sent to a wrong destination. Held, that the question of a defendant's liability for the railroad company's error was one of law, and was improperly submitted to the jury. Richer *v.* Fargo, 78 N. Y. S. 1007, 77 App. Div. 550.

In an action by a bank, who had cashed time drafts attached to a bill of lading

ing, or there is doubt as to the inference to be drawn therefrom, the question is for the jury.[45] The following are held questions for the jury: What is a due and reasonable effort and diligence on the part of the carrier to find an un-

of cotton, against a railroad company for wrongful delivery of the cotton to the drawee, L. M. Co., it was proper for the court to refuse to charge "that if the jury find that L. M. Co. was entitled by its contract to the cotton, upon its acceptance of the drafts, then the plaintiff can not recover, even though it still holds the bill of lading," as such charge would submit to the jury a question of law. National Bank *v.* Atlanta, etc., R. Co., 25 S. C. 216.

45. Conflicting evidence—Illustrations.—There was evidence that goods shipped to New York over defendant railroad arrived there within two weeks, and were properly stored there for three years, ready for delivery, and that the consignee did not appear to receive them; that the connecting carrier unsuccessfully tried to find the consignee; and that finally the property was sold for charges. There was, on the other hand, evidence that the goods did not reach New York within six weeks, that defendant's agent was unable to trace them five months after their shipment, and that repeated inquiries were made for the goods at the connecting carrier's depots in New York within two months after the shipment. Defendant had agreed to deliver the goods in New York. Held, that the question of nondelivery was for the jury. Alabama, etc., R. Co. *v.* Eichofer, 100 Ala. 224, 14 So. 56.

In an action against a carrier for conversion of goods shipped, the defendant having denied that the goods were worth the amount claimed by the plaintiff, and the evidence on this point being in conflict, the court erred in instructing the jury that, in the event they found for plaintiff, they should find for the full amount claimed. Georgia Railroad *v.* Richards, 9 Ga. App. 639, 72 S. E. 48.

Where the demand read, "We feel justified in putting in a claim for the entire shipment, and hold the goods subject to your inspection," and where a later letter contained complaints that the consignees had lost the use of their money for the intervening period, it was a question for the jury whether a flat denial of liability by the express company did not excuse a more definite tender of the almost worthless books. Hardy *v.* American Exp. Co., 182 Mass. 328, 65 N. E. 375, 59 L. R. A. 731.

In an action against an express company for the value of a trunk which had been misdelivered, plaintiff testified that, when the trunk reached its destination, the company's agent agreed that plaintiff might take some things out of the trunk, and leave it in the office for a day or so, upon paying the charges and signing a receipt, and that, upon calling for the trunk, he was informed that it had been delivered to other parties upon the supposition that he had sent for it. The agent testified that he had no authority to make such an arrangement, but did not say that he so notified plaintiff. Held, that there had not been a complete delivery of the trunk to plaintiff, and that the question of defendant's liability as a warehouseman should have been submitted to the jury, for, if the arrangement was made before payment of the charges and signing of the receipt, with a view to giving plaintiff reasonable opportunity of sending for his goods, it was a matter within the apparent scope of the agent's authority, and would bind the company in the absence of any notice to plaintiff of any restriction on the agent's authority. Oderkirk *v.* Fargo, 58 Hun 347, 11 N. Y. S. 871, 34 N. Y. St. Rep. 166.

Where plaintiff delivered to an initial carrier nineteen cases of rugs, one consigned to a point on the line of the initial carrier and eighteen to a point on the line of the terminal carrier, and only seventeen were delivered at such point, and two employees of the initial carrier testified that seventeen cases only were delivered at the point on the terminal line, and that the word "eighteen" in the bill of lading was a mistake, the question is for the jury. Siyufy *v.* Pennsylvania Co., 83 Atl. 279, 234 Pa. 466.

Whether reasonable care exercised.—Where defendant carrier agreed to carry plaintiff's trunk to a station, and, in his absence left it on the platform, in the usual place for such deliveries, and it was stolen therefrom, but the evidence whether plaintiff was to be there to receive it was conflicting, the question whether defendant exercised reasonable care in protecting it was for the jury. Ft. Worth Transfer Co. *v.* Isaacs (Tex Civ. App.), 40 S. W. 39.

Whether plaintiff paid freight.—Louisville, etc., R. Co. *v.* Britton, 149 Ala. 552, 43 So. 108.

Whether delivery made to authorized person.—Equitable Powder Mfg. Co. *v.* St. Louis, etc., R. Co., 99 Ark. 497, 138 S. W. 964.

Existence of special contract.—In an action for conversion of goods by failure to forward, where evidence is conflicting the question of the existence of a contract imposing a liability on defendant to forward the goods directly to plaintiff without respect to the acts of the forwarding agent, is for the jury. Lee *v.* Fidelity Storage, etc., Co., 98 Pac. 658, 51 Wash. 208.

known consignee;[46] whether a tender to the consignee was reasonable in respect to time, place, and manner;[47] whether a carrier exercised reasonable care in giving notice of the arrival of perishable freight;[48] whether a particular contract was one of affreightment, as with a common carrier, or a hiring by the job;[49] whether, in the absence of an agreement, a reasonable time for delivery had elapsed;[50] the reasonableness of a condition of the contract of carriage exempting the carrier from liability, unless claim was made in writing within 30 days;[51] the reasonableness of a qualified refusal to deliver goods without the bill of lading therefor;[52] and the question, as to the time and place when the duty of the carrier ends.[53]

Proper Place of Delivery.—Where a shipment is billed to a point which is not on a railroad, but near it, what is the proper place of delivery by the carrier is a question for the jury, where the evidence is conflicting.[54]

Reasonable Time for Removal of Goods.—Where the facts are undisputed it is a question for the court to determine what is a reasonable time for the removal of goods after arrival;[55] but where the facts are in dispute, or the inference to be drawn therefrom is in doubt, it is a question for the jury.[56]

Whether Partial Delivery Intended as Delivery of the Whole.—In an action against common carriers for the value of goods delivered to them for transportation, where there has been a partial delivery, and subsequently the remainder of the goods are lost, it is for the jury to determine whether the taking of a part of the goods by the consignee was intended and understood by the parties as a delivery of the whole or only of the part taken.[57]

§ 902. Instructions.—In an action against the carrier for breach of its duty, such as failure to deliver, it is error to give instructions on issues not raised by the pleadings[58] and the evidence.[59] And it is error to give a charge

46. Question for jury.—Zinn *v.* New Jersey Steamboat Co., 49 N. Y. 442, 10 Am. Rep. 402. See Walsh *v.* Adams Exp. Co., 15 Pa. Super. Ct. 292.

47. Reasonableness of tender of goods.—Hill *v.* Humphreys (Pa.), 5 Watts & S. 123, 39 Am. Dec. 117.

48. Uber *v.* Chicago, etc., R. Co., 151 Wis. 431, 138 N. W. 57.

49. Fuller *v.* Bradley, 25 Pa. 120.

50. In the absence of any agreement, the court can not say as a matter of law that from February 27th to May 16th a due time for delivery had elapsed, or that because part of the freight had been delivered on February 27th, a reasonable time had elapsed for the part not delivered. Louisville, etc., R. Co. *v.* Price, 159 Ala. 213, 48 So. 814.

51. Adams Exp. Co. *v.* Gordon, 27 O. C. C. 243.

52. Louisville, etc., R. Co. *v.* Britton, 39 So. 585, 145 Ala. 654.

53. Farmers', etc., Bank *v.* Champlain Transp. Co., 23 Vt. 186, 56 Am. Dec. 68.

54. Proper place of delivery.—Louisville, etc., R. Co. *v.* Bernheim, 21 So. 405, 113 Ala. 489.

55. Reasonable time for removal of goods. — Arkadelphia Milling Co. *v.* Smoker Merchandise Co., 100 Ark. 37, 139 S. W. 680.

56. Arkadelphia Milling Co. *v.* Smoker Merchandise Co., 100 Ark. 37, 139 S. W. 680; Burr *v.* Adams Exp. Co., 71 N. J. L. 263, 58 Atl. 609.

57. Sessions *v.* Western R. Corp. (Mass.), 16 Gray 132.

58. Instructions.—In an action against an express company to recover the value of a package which it failed to deliver, an instruction that the failure to demand the original receipt would be a waiver by the company of a certain condition of the contract was erroneous, where no such waiver was pleaded. Adams Exp. Co. *v.* Gordon, 27 O. C. C. 243.

Where, in an action against a carrier for damages for negligence in failing to promptly notify the shipper of the consignee's refusal to accept the goods, there was neither allegation nor proof that the carrier failed to transport the goods within a reasonable time or give the consignee notice of arrival, an instruction that it was the duty of the carrier to carry out the contract and ship the goods to the destination in a reasonable time, and to give notice to the consignee as agreed on, was error. Missouri, etc., R. Co. *v.* Jenkins, 80 S. W. 428, 35 Tex. Civ. App. 429.

59. Where the only evidence of a demand and refusal for goods alleged to have been converted by a carrier was evidence of plaintiff's attorney that he demanded pay for the goods, the court erred in charging on the issue of willful conversion. Gulf, etc., R. Co. *v.* Humphries, 4 Tex. Civ. App. 333, 23 S. W. 556.

Where goods were refused by the consignee, and were afterwards received by

which changes the issue made by the plaintiff in his declaration.[60] If a charge partly abstract is not prejudicial to the party complaining, it is not ground for reversal.[61] It is error to refuse a special charge upon an issue raised by the evidence.[62] A charge which is in accord with the law and fully and fairly presents to the jury the issues they were called on to determine is not erroneous, notwithstanding some slight verbal inaccuracy of expression.[63] Where an instruction on the measure of damages is more favorable to the plaintiff than the one prescribed by law, he has no cause to be dissatisfied therewith.[64]

§ 903. Verdict and Judgment.—Where it is immaterial whether the defendant carrier's liability depends upon its duties as a carrier or a warehouseman, the objection that the trial court based its judgment on its liability as a carrier is unimportant.[65] Where an action is brought for damages resulting from a carrier's failure to deliver goods, judgment should not be rendered for the possession of the goods and for damages, as in an action of replevin.[66]

Special Verdict.—In an action against a railroad company for the value of goods sold by it after the consignee's refusal to receive them, a special verdict that the goods were not of the quality ordered by the consignee is insufficient to support a judgment for plaintiff for the proceeds of the sale.[67]

Statutory Interest Penalty.—Where a verdict against defendant railroad company for damages resulting from failure to deliver a shipment contained no mention of a statutory interest penalty, and plaintiff's petition was insuffi-

the consignors and sold, an instruction that, if the carrier delivered the goods to the consignee without his surrender of the bill of lading or other order from the consignors to deliver the consignors were entitled to recover, held error. Missouri, etc., R. Co. *v.* Jenkins, 80 S. W. 428, 35 Tex. Civ. App. 429.

Instruction not prejudicial.—The agent of a forwarding company, which was under contract to forward goods without prepayment of the charges, refused to deliver them without the charges being paid. Held, in an action against the forwarding company for conversion, that an instruction that if there was a conversion defendant would be liable for the reasonable value of the goods at the time of conversion was not prejudicial error, in that there was no evidence of the value at that time, where plaintiff testified as to the value, since that was the best evidence obtainable by plaintiff. Lee *v.* Fidelity Storage & Transfer Co., 98 P. 658, 51 Wash. 208.

60. In Central R., etc., Co. *v.* Avant, 80 Ga. 195, 5 S. E. 78, suit was brought against a railroad company for failing to deliver to the consignee two car loads of watermelons, according to the contract of affreightment, and the evidence showed that they were in fact delivered at the point of destination within a reasonable time, but the consignee refused to receive them on the ground that they were damaged by not being properly loaded, and that they had become bruised and a part of them were rotten, it was error to charge that if the defendant did not put the melons in good safe cars, and they had to be transferred from the cars in which they were loaded, whereby damage accrued, the jury would find for the plaintiff the amount of such damage.

61. Instruction partly abstract.—In an action for nondelivery of goods, an instruction that defendant, in the absence of a contract to the contrary, is bound to carry and deliver the goods in a reasonable time, regardless of any unexpected or extraordinary pressure of business, is abstractly correct, and is not ground for reversal, though the record on appeal fails to show any evidence as to a pressure of business. Louisville, etc., R. Co. *v.* Touart, 97 Ala. 514, 11 So. 756.

62. Gulf, etc., R. Co. *v.* Cleburne Ice, etc., Co. (Tex. Civ. App.), 79 S. W. 836.

63. Slight verbal inaccuracy.—That in an action against a carrier for refusal to deliver freight without identification of the person claiming it, the judge, in referring to the paper which the agent called on plaintiff to produce as evidence of his right to demand delivery, alluded to it as "the waybill or bill of lading," was not erroneous, as conveying to the jury the idea that it was incumbent on plaintiff to produce the waybill, which should have been in the hands of the carrier. Sellers *v.* Savannah, etc., R. Co., 51 S. E. 398, 123 Ga. 386.

64. Instruction favorable to party complaining.—Wilson *v.* Atlanta, etc., R. Co., 82 Ga. 386, 9 S. E. 1076.

65. Judgment.—St. Louis, etc., R. Co. *v.* Hall, etc., Mach. Co., 56 S. W. 140, 23 Tex. Civ. App. 211.

66. Brookstone *v.* Wescott Exp. Co., 61 N. Y. S. 72, 29 Misc. Rep. 634.

67. Special verdict.—Finley *v.* Lewis (Tex.), 39 S. W. 974.

cient to support a judgment therefor, it was error for the court to allow such penalty in entering judgment on the verdict.[68]

Unwarranted Verdicts.—Where, in an action against a carrier for conversion, the evidence showed only a probable delivery to one not authorized to receive the property and the question of delivery and authority was not submitted to the jury, a verdict against the defendant is unwarranted.[69] In an action against a carrier for nondelivery of nursery trees, a verdict for plaintiff for a certain sum will not be sustained where there was an utter failure of proof of any certain value.[70]

68. **Statutory interest penalty.**—Gulf, etc., R. Co. *v.* Gregory (Tex. Civ. App.), 59 S. W. 310.

69. **Unwarranted verdicts.**—Gulf, etc., R. Co. *v.* Humphries, 4 Tex. Civ. App. 333, 337, 23 S. W. 556.

70. Adams Exp. Co. *v.* Jones, 53 Ill. 463.

CHAPTER XI.

Delay in Transportation or Delivery.

I. In General, § 904.
II. Diligence Required of Carrier, § 905.
III. What Constitutes Reasonable Diligence, § 906.
IV. Perishable Goods, § 907.
V. Excuses for Delay, §§ 908-922.
A. In General, § 908.
B. Delay Caused by Act of God, Public Enemy, etc., § 909.
C. Delay Caused by Seizure under Judicial Process, § 910.
D. Delay Caused by Unusual Rush of Business, §§ 911-914.
a. In General, § 911.
b. Duty to Provide Proper Facilities, § 912.
c. Where Carrier Could Have Avoided Delay, § 913.
d. Notice to Shipper, § 914.
E. Delay Caused by Act of Consignor or Consignee, § 915.
F. Delay Caused by Rule of Carrier, § 916.
G. Delay Caused by Misdirection of Goods, § 917.
H. Delay Caused by Strikes and Riots, § 918.
I. Where Goods Are Perishable, § 919.
J. Delay under Time Contract, §§ 920-921.
a. In General, § 920.
b. Power of Agent to Make Contract, § 921.
K. Duty of Carrier after Excusing Cause Removed, § 922.
VI. Duty of Consignor and Consignee to Avert or Mitigate Injury, § 923.
VII. Duty of Consignee to Accept Goods, § 924.
VIII. Delay Caused by Connecting Carrier, § 925.
IX. Damages, §§ 926-954.
A. In General, § 926.
B. Arising Proximately from Delay, § 927.
C. Arising at Time of Delivery, § 928.
D. Nominal Damages, § 929.
E. Stipulated Damages, § 930.
F. Special Damages, §§ 931-939.
a. In General, § 931.
b. Within Contemplation of Parties, § 932.
c. Notice of Special Circumstances, § 933-938.
(1) Necessity of Notice, § 933.
(2) Sufficiency of Notice, § 934.
(3) Time Notice Given, § 935.
(4) Notice to Agent, § 936.
(5) Implied Notice, § 937.
(6) Evidence to Prove Notice, § 938.
d. Where Cause of Delay Known to Shipper, § 939.
G. Exemplary Damages, § 940.
H. Measure and Elements of Damages, §§ 941-947.
a. In General, § 941.
b. Decrease in Market Value, § 942.
c. Loss of Profits, § 943.
d. Expenses Occasioned by Delay, § 944.
e. Interest on Value of Goods, § 945.
f. Mental and Physical Suffering, § 946.
g. Liability as for Conversion, § 947.

I. Mitigation of Damages, § 948.
J. Goods Intended for Use of Consignee, §§ 949-951.
a. In General, § 949.
b. Measure and Elements of Damages, § 950.
c. Particular Goods, § 951.
K. Goods Intended for Sale, § 952.
L. Goods Intended to Be Repaired, § 953.
M. Time of Reporting Claim for Damages, § 954.
X. Actions for Delay, §§ 955-974.
A. Nature of Action, § 955.
B. Jurisdiction and Venue, § 956.
C. Joinder of Causes of Action, § 957.
D. Parties, § 958.
E. Limitation of Actions, § 959.
F. Prerequisites to Bringing Action, § 960.
G. Pleading, §§ 961-964.
a. Plaintiff's Pleadings, §§ 961-963.
(1) In General, § 961.
(2) Particular Allegations, § 962.
(3) Amendments, § 963.
b. Defendant's Pleading, § 964.
H. Issues, Proof and Variance, § 965.
I. Dismissal and Nonsuit, § 966.
J. Burden of Proof and Presumptions, § 967.
K. Evidence, § 968-969.
a. Admissibility of Evidence, § 968.
b. Weight and Sufficiency of Evidence, § 969.
L. Instructions, §§ 970-972.
a. Province of Court and Jury, § 970.
b. Necessity and Propriety of Instructions, § 971.
c. Form, Requisites and Sufficiency, § 972.
M. Verdict, § 973.
N. Judgment, § 974.
XI. Demurrage, and Liability of Consignee or Owner for Delay, §§ 975-985.
A. In General, § 975.
B. Right of Carrier to Charge, § 976.
C. Rules and Regulations of Carrier, §§ 977-979.
a. In General, § 977.
b. By Whom Promulgated, § 978.
c. Notice, § 979.
D. Time and Amount of Charge, § 980.
E. Arrival and Continuance at Destination and Nature Thereof, § 981.
F. Persons Liable for Demurrage, § 982.
G. Lien for Demurrage, § 983.
H. Remedies and Defenses, §§ 984-985.
a. Of Carrier, § 984.
b. Of Consignee, § 985.

§ 904. In General.—It is the duty of a common carrier to whom goods are delivered for transportation to forward them promptly, and without unreasonable delay, to their destination.[1] In the absence of an express contract stipulating the time within which the carrier is to transport and deliver goods,

1. **Delay in transportation in general.** —Bibb Broom Corn Co. *v.* Atchison, etc., R. Co., 94 Minn. 269, 102 N. W. 709, 3 Am. & Eng. Ann. Cas. 450, 69 L. R. A. N. S., 509 110 Am. St. Rep. 361.

the law implies a promise to do so within a reasonable time.[2]

Implied Contract.—If a bill of lading is given at the time the goods are delivered to the carrier, the bill of lading comprises not only a receipt for the goods, but a contract to fulfill the obligation which the law imposes on the carrier, and although the words be not put in the bill of lading that the carrier will deliver within a reasonable time, that is the legal interpretation of the contract which the carrier enters into when the bill of lading is given, where there is nothing put in the bill to exclude that interpretation.[3] This implied agreement is as much a part of the bill of lading as if expressed in it in so many words.[4] If no time is expressed, the contract is not on that account to be regarded as incomplete, so as to admit proof of a distinct and separate agreement as to time. In such a case the parties are presumed to have intended that the carrier's obligation as to the time of performance, shall not extend beyond that imposed upon it by law in all undertakings for the transportation and delivery of goods which requires that there shall not be an unreasonable delay.[5] Though

2. *United States.*—Northern Pac. R. Co. *v.* American Trading Co., 195 U. S. 439, 49 L. Ed. 269, 25 S. Ct. 84.

Arkansas.—St. Louis, etc., R. Co. *v.* State, 84 Ark. 150, 104 S. W. 1106; St. Louis, etc., R. Co. *v.* Pearce, 82 Ark. 353, 101 S. W. 760, 12 Am. & Eng. Ann. Cas. 135.

Georgia.—Central R., etc., Co. *v.* Georgia Fruit, etc., Exch., 91 Ga. 389, 17 S. E. 904; Central R., etc., Co. *v.* Skellie, 86 Ga. 686, 12 S. E. 1017; Rome R. Co. *v.* Sullivan, etc., Co., 25 Ga. 228; Central R., etc., Co. *v.* Hasselkus, 91 Ga. 382, 17 S. E. 838, 44 Am. St. Rep. 37; Johnson *v.* East Tennessee, etc., R. Co., 90 Ga. 810, 17 S. E. 121.

Illinois.—Galena, etc., R. Co. *v.* Rae, 18 Ill. 488, 68 Am. Dec. 574; Ohio, etc., R. Co. *v.* Dunbar, 20 Ill. 623, 71 Am. Dec. 291.

Indiana.—Pittsburgh, etc., R. Co. *v.* Knox, 177 Ind. 344, 98 N. E. 295.

Kentucky.—Chesapeake, etc., R. Co. *v.* Saulsbury, 126 Ky. 179, 103 S. W. 254, 12 L. R. A., N. S., 431.

Louisiana.—Rathbone *v.* Neal, 4 La. Ann. 563, 50 Am. Dec. 579.

Missouri.—Dawson *v.* Chicago, etc., R. Co., 79 Mo. 296.

Nebraska.—Jefferies *v.* Chicago, etc., R. Co., 88 Neb. 268, 129 N. W. 273.

New York.—Parsons *v.* Hardy (N. Y.), 14 Wend. 215, 28 Am. Dec. 521, and note.

Ohio.—Waring & Co. *v.* Baltimore, etc., R. Co., 3 Wkly. L. Bull. 893, 7 O. Dec. Reprint 553.

Oklahoma.—St. Louis, etc., R. Co. *v.* Farmers' Union Gin Co., 34 Okla. 270, 125 Pac. 894.

Pennsylvania.—Joynes *v.* Pennsylvania R. Co., 235 Pa. 232, 83 Atl. 1016, Ann. Cas. 1913D, 964; Hoffman *v.* Delaware, etc., R. Co., 39 Pa. Super. Ct. 47.

South Carolina.—Nettles *v.* South Carolina R. Co. (S. C.), 7 Rich. L. 190, 62 Am. Dec. 409.

Texas.—International, etc., R. Co. *v.* Tisdale, 74 Tex. 8, 17, 11 S. W. 900, 4 L. R. A., N. S., 545; Galveston, etc., R. Co. *v.* Silegman (Tex. Civ. App.), 23 S. W. 298; International, etc., R. Co. *v.* Server, 3 Texas App. Civ. Cas., § 441; San Antonio, etc., R. Co. *v.* Josey (Tex. Civ. App.), 71 S. W. 606; Texas, etc., R. Co. *v.* Langbehn (Tex. Civ. App.), 150 S. W. 1188.

Wisconsin.—Peet *v.* Chicago, etc., R. Co., 20 Wis. 594, 91 Am. Dec. 446.

If no time is agreed upon in the contract of shipment, the carrier is bound to complete the contract within a reasonable time, and if it fail to do so within that time, without legal excuse, it is liable therefor. Place *v.* Union Exp. Co. (N. Y.), 2 Hilt. 19.

In the absence of a special contract on the part of the carrier to deliver within a specified time, mere delay in transportation does not create a liability, the delay must be unreasonable. Shoot *v.* Cleveland, etc., R. Co., 145 Ill. App. 532; Bacon *v.* Cleveland R. Co., 155 Ill. App. 40.

Absolute duty.—"In the absence of special contract, there is no absolute duty resting upon a railroad carrier to deliver the goods intrusted to it within what, under ordinary circumstances, would be a reasonable time." Greismer *v.* Lake Shore, etc., R. Co., 102 N. Y. 563, 7 N. E. 828, 55 Am. Rep. 837.

3. **Implied contract.**—Waring & Co. *v.* Baltimore, etc., R. Co., 3 Wkly. L. Bull. 893, 7 O. Dec. Reprint 553.

4. Central R., etc., Co. *v.* Hasselkus, 91 Ga. 382, 17 S. E. 838, 44 Am. St. Rep. 37.

5. **Parol evidence not admissible.**—Central R., etc., Co. *v.* Hasselkus, 91 Ga. 382, 17 S. E. 838, 44 Am. St. Rep. 37.

Parol evidence is not admissible to negative this presumption by showing that a definite and specific time was agreed upon either expressly or by implication. Central R., etc., Co. *v.* Hasselkus, 91 Ga. 382, 17 S. E. 838, 44 Am. St. Rep. 37.

a bill of lading is silent as to the goods being delivered within a reasonable time, yet that obligation is part of the written contract, and an action for failure to deliver in a reasonable time is not barred in six years, but in fifteen years.[6]

§ 905. Diligence Required of Carrier.—It is the duty of the carrier to exercise reasonable and ordinary diligence to transport and deliver the goods to their destination,[7] exercising the care necessary to comply with its contract of shipment; keeping in view the character of the goods, their likelihood of deterioration and loss in value by reason of delay.[8] The carrier is not bound to use extraordinary diligence.[9] Mere delay does not create a liability on the part of the carrier to respond in damages; the delay must be unreasonable.[10]

Carrier Not Insurer.—For delay in receiving and carrying the goods, the carrier is not an insurer, and is bound only by the general rule of liability for a breach of his contract, or of his public duty as a carrier.[11] The principle upon which the extraordinary responsibility of common carriers is founded does not require that that responsibility should be extended to the time occupied in the

6. Waring & Co. *v.* Baltimore, etc., R. Co., 3 Wkly. L. Bull. 893, 7 O. Dec. Reprint 553.

7. **Diligence required of carrier.**—*Florida.*—Seaboard Air Line Railway *v.* Rentz, 60 Fla. 429, 54 So. 13.

Georgia.—Johnson *v.* East Tennessee, etc., R. Co., 90 Ga. 810, 17 S. E. 121.

Illinois.—Ohio, etc., R. Co. *v.* Dunbar, 20 Ill. 623, 71 Am. Dec. 291; Bacon *v.* Cleveland, etc., R. Co., 185 Ill. App. 40.

New York.—Greismer *v.* Lake Shore, etc., R. Co., 102 N. Y. 563, 7 N. E. 828, 55 Am. Rep. 837, citing Wilbert *v.* New York, etc., R. Co., 12 N. Y. 245; Blackstock *v.* New York, etc., R. Co., 20 N. Y. 48, 75 Am. Dec. 372.

North Carolina.—Bonar *v.* Merchants' Co., 46 N. C. 211.

South Carolina.—Harby *v.* Southern R. Co., 75 S. C. 321, 55 S. E. 760.

Texas.—Houston, etc., R. Co. *v.* Foster (Tex. Civ. App.), 86 S. W. 44; Chicago, etc., R. Co. *v.* Kapp, 37 Tex. Civ. App. 203, 83 S. W. 233; Gerhard *v.* Neese, 36 Tex. 635; International, etc., R. Co. *v.* Tisdale, 74 Tex. 8, 11 S. W. 900, 4 L. R. A., N. S., 545; International, etc., R. Co. *v.* Server, 3 Texas App. Civ. Cas., § 441; Chicago, etc., R. Co. *v.* Gillett (Tex. Civ. App.), 99 S. W. 712; St. Louis, etc., R. Co. *v.* Thompson (Tex. Civ. App.), 103 S. W. 684; San Antonio, etc., R. Co. *v.* Turner, 42 Tex. Civ. App. 532, 94 S. W. 214; Missouri, etc., R. Co. *v.* Kyser, 43 Tex. Civ. App. 322, 95 S. W. 747.

West Virginia.—Delaney *v.* United States Exp. Co., 70 W. Va. 502, 74 S. E. 512.

Wisconsin.—Peet *v.* Chicago, etc., R. Co., 20 Wis. 594, 91 Am. Dec. 446.

While, as a rule, only an act of God or of the public enemy will relieve a carrier of goods from liability for their safe delivery, it need only exercise due diligence as to the time of delivery. Judgment (Sup. 1908) 110 N. Y. S. 1125, reversed Cormack *v.* New York, etc., R. Co., 90 N. E. 56, 196 N. Y. 442, 17 Am. & Eng. Ann. Cas. 949, 24 L. R. A., N. S., 1209.

Where a common carrier receives goods for transportation and is sued for delay in delivering them, it is error to charge that the carrier is bound to extraordinary diligence as to the time of transportation. Ordinary and reasonable diligence is the rule. Johnson *v.* East Tennessee, etc., R. Co., 90 Ga. 810, 17 S. E. 121.

The words "promptly and without delay," used to define a carrier's duty with reference to the transportation of goods, mean "with reasonable promptness, and without unreasonable delay." Burlingame *v.* Adams Exp. Co., 171 Fed. 902.

8. International, etc., R. Co. *v.* Young (Tex. Civ. App.), 72 S. W. 68.

9. **Extraordinary diligence.**—Johnson *v.* East Tennessee, etc., R. Co., 90 Ga. 810, 17 S. E. 121.

10. **Delay must be unreasonable.**—Bacon *v.* Cleveland, etc., R. Co., 155 Ill. App. 40; Shoot *v.* Cleveland, etc., R. Co., 145 Ill. App. 532.

11. **Carrier not insurer.** — Pittsburgh, etc., R. Co. *v.* Hollowell, 65 Ind. 188, 32 Am. Rep. 63; Gulf, etc., R. Co. *v.* Levi, 76 Tex. 337, 13 S. W. 191, 8 L. R. A., N. S., 323, 18 Am. St. Rep. 45.

The rule that a carrier is an insurer of safe delivery does not apply to liability for delay of transportation; reasonable care only being required to avoid delay. Delaney *v.* United States Exp. Co., 70 W. Va. 502, 74 S. E. 512.

A common carrier is not an insurer as to time, but is bound to transfer freight to its destination within a reasonable time. American Exp. Co. *v.* Smith, 33 O. St. 511, 31 Am. Rep. 561.

The rule that a carrier is an insurer is inapplicable to an action for damages to a shipment of corn by delay; the corn having been transported and delivered to the consignee. St. Louis, etc., R. Co. *v.* Thompson (Tex. Civ. App.), 103 S. W. 684.

transportation. The danger of robbery or embezzlement by collusion or fraud, on the part of the carrier, has no application here.[12] The reasons upon which the extraordinary responsibility of the carrier for the safety of the goods is founded do not require that the same responsibility should be extended to the time occupied in their transportation. The danger of loss by robbery or embezzlement or theft by collusion and fraud on the carrier's part, has no application where the mere time of the carriage is concerned. The carrier's first duty is to carry the goods safely, and the second to deliver them; and it would be very hard to oblige the carrier, in case of any obstruction, to risk the safety of the goods in order to prevent delay. The carrier's duty is to deliver the goods within a reasonable time, which is a term implied by the law in the contract to deliver, the duty to deliver within a reasonable time being merely a term engrafted by legal implication upon the promise or duty to deliver generally.[13]

Where Carrier Exercises Reasonable Diligence.—A carrier is not liable for delay in the transportation of goods, if ordinary care and diligence is used in the transportation and delivery thereof to the consignee.[14] It is not bound to use any extraordinary exertions nor to incur heavy expense, in order to hasten the delivery of goods.[15] Where a carrier fails or refuses to accept freight tendered it for transportation because of its inability to transport it, occasioned by extraordinary circumstances or an emergency that could not have been reasonably forseen and for which the carrier is not responsible, such failure or refusal gives the shipper no right to recover for delay in transportation of the freight tendered, where the carrier does all that could have been reasonably required of it to meet the demands made upon it for transportation.[16]

Where Goods Shipped with as Much Dispatch as Possible.—Where, in an action against a carrier of goods for damages caused by delay, it appears from the evidence produced by the plaintiffs, the witness being a person who had actual knowledge of the fact, that the car alleged to have been unreasonably delayed in its passage was sent forward and delivered with as much dispatch as possible under the actual circumstances which existed at the time, there is no error in granting a nonsuit.[17]

With All Possible Dispatch.—A carrier is not bound to great haste or expedition.[18] In expediting the shipment the law does not require that it should be transported in as speedy a way as possible.[19] No rule of law makes it the imperative duty of a carrier to furnish immediate transportation after receiving freight for shipment.[20]

Where Shipment for Illegal Purpose.—If an owner of cotton, during the civil war, forwarded it by a common carrier to the Rio Grande, for the illegal

12. Parsons *v.* Hardy (N. Y.), 14 Wend. 215, 28 Am. Dec. 521.

13. Hutchinson on Carriers, §§ 330-335; Gulf, etc., R. Co. *v.* Levi, 76 Tex. 337, 13 S. W. 191, 8 L. R. A., N. S., 323, 18 Am. St. Rep. 45.

14. **Where carrier exercises reasonable diligence.**—St. Louis, etc., R. Co. *v.* Thompson (Tex. Civ. App.), 103 S. W. 684.

It is sufficient, if the carrier exert due care and diligence to guard against delay, if the goods are finally delivered in safety. Parsons *v.* Hardy (N. Y.), 14 Wend. 215, 28 Am. Dec. 521.

15. International, etc., R. Co. *v.* Server, 3 Texas App. Civ. Cas., § 441.

Where a common carrier receives goods for transportation and is sued for delay in delivering them, it is error to charge that the carrier is bound to extraordinary diligence as to the time of transportation. Ordinary and reasonable diligence is the rule. Johnson *v.* East Tennessee, etc., R. Co., 90 Ga. 810, 17 S. E. 121.

6. Seaboard Air Line Railway *v.* Rentz, 60 Fla. 429, 54 So. 13.

17. **Where goods shipped with as much dispatch as possible.**—Smith *v.* Cleveland, etc., R. Co., 92 Ga. 539, 18 S. E. 977.

18. **With all possible dispatch.**—Gerhard *v.* Neese, 36 Tex. 635; Chicago, etc., R. Co. *v.* Gillett (Tex. Civ. App.), 99 S. W. 712.

19. International, etc., R. Co. *v.* Young (Tex. Civ. App.), 72 S. W. 68.

20. **Immediate transportation.**—Chicago, etc., R. Co. *v.* Kapp, 37 Tex. Civ. App. 203, 83 S. W. 233.

purpose of evading the blockade and revenue laws of the United States, and of exporting the cotton to Mexico, and attempted to hurry the carrier along so as to escape the United States authorities and effect his purpose, the carrier was under no obligation to make dispatch in aid of the owner's reports.[21]

Where Carrier Has Notice of Necessity for Haste.—Notice to a carrier of special circumstances which would result in special damages to a shipper from delay in transportation of machinery imposes on the carrier the duty to use diligence commensurate with the requirements of the case, which duty the carrier performs when he uses reasonable diligence to forward the goods promptly.[22]

Where Goods Not Shipped in Turn.—A shipper has no right of action against a carrier for delay in shipment if the freight is shipped in a reasonable time whether in its turn or not.[23]

Where Proper Means and Facilities Furnished.—It is the duty of a carrier to provide sufficient and suitable means for the carriage of goods and to make delivery of them with all convenient dispatch.[24] A carrier is bound to do all that is reasonable and use all reasonable means by increasing the number of its tracks and warehouses to accommodate its increased business.[25]

Where Shipper Designates Time.—Although a permit issued by a steamship company designated a certain day as the date on which certain goods were to be delivered on the wharf for shipment, a railroad company transporting the goods to the wharf had no right to disregard the express directions of the shipper that the goods should be delivered on the wharf in the forenoon of such day, and to rely on the statement of such permit; and where the railroad company delivered the goods in the afternoon, and they were refused by the steamship company on account of lack of room on the vessel, the railroad company was liable to the shipper for resulting damages.[26] Under a statute requiring carriers to transport freight promptly on receiving notice that prompt shipment is required, requires notice to be given within such time before shipment that the carrier's agent, notwithstanding his other duties, with reasonable diligence, may remember the notice; it not being necessary to give notice of the exact time of shipment.[27] Under a statute requiring carriers to transport freight promptly on receiving notice that prompt shipment is required, the notice must be given the shipping agent.[28]

Where No Previous Information as to Causes of Delay Given.—If the shipper has not all the information he desires as to the circumstances or causes which will expedite or delay the delivery of goods, it would be more reasonable that he should make inquiry than to impose on the company or its agents the duty of giving unasked a statement of such circumstances.[29]

Where Goods Held for Freight.—Even if a railroad company may withhold from the owner goods shipped over its road, for the purpose of ascertaining whether the bill of lading correctly states the amount due, or whether a

21. **Where shipment for illegal purpose.**—Gerhard *v.* Neese, 36 Tex. 635.

22. **Where carrier has notice of necessity for haste.**—Chicago, etc., R. Co. *v.* Planters' Gin, etc., Co., 88 Ark. 77, 113 S. W. 352.

23. **Where goods not shipped in turn.**—Wilson *v.* Atlanta, etc., R. Co., 82 Ga. 386, 9 S. E. 1076. See post, "Perishable Goods," § 907.

24. **Where proper means and facilities furnished.**—Railroad Co. *v.* O'Donnell, 49 O. St. 489, 32 N. E. 476, 34 Am. St. Rep. 579, 21 L. R. A., N. S., 117.

25. Joynes *v.* Pennsylvania R. Co., 235 Pa. 232, 83 Atl. 1016, Ann. Cas. 1913 D, 964.

26. **Where shipper designates time.**—White *v.* North German Lloyd, etc., Co., 113 N. Y. S. 805, 61 Misc. Rep. 268.

27. **Time notice given to carrier.**—Act March 26, 1904 (24 St. at Large, p. 671), § 1; Mills *v.* Southern Railway, 82 S. C. 242, 64 S. E. 238.

28. **To whom notice given.**—Mills *v.* Southern Railway, 82 S. C. 242, 64 S. E. 238.

29. **Where no previous information as to causes of delay given.**—Peet *v.* Chicago, etc., R. Co., 20 Wis. 594, 91 Am. Dec. 446.

waybill in its possession sets forth the true amount, yet it can hold the goods only for a reasonable time.[30]

§ 906. What Constitutes Reasonable Diligence.—Whether goods shipped are delivered by the carrier within a reasonable time depends on the facts of each case,[31] including the time ordinarily required for carriage between the two points, the preparations made by the carrier, whether ample or not, the effort at dispatch, the information given to the shipper of peculiar reasons for speedy transit and delivery, the character of the freight, and kindred circumstances.[32]

Cause of Delay.—A claim for loss of profits by being compelled to stop an electric plant because a shaft used therein was broken en route and returned to the repair shop by the express company to be repaired before it was forwarded to the plant was based upon the owner's being deprived of the use of the shaft, and whether the delay was caused by injury to the shaft or by other reasons is immaterial.[33]

Delivery in Usual Course of Business.—A delivery in the usual course of business is within a reasonable time.[34] Where an unusual contingency has arisen which unexpectedly largely increases the business and thereby prevents the handling of freight with the usual promptness and dispatch, the criterion of reasonable diligence is not the usual average rate of speed in ordinary times, but the average running time under the extraordinary and unusual circumstances existing at the time.[35]

Delivery in Compliance with Custom.—One who ships goods to an agent at a place where a custom not to deliver on a holiday prevails is bound by such custom, though he has no actual knowledge thereof.[36]

Delay during Sundays and Holidays.—Where it is a general and uniform

30. Where goods held for freight.—Beasley *v.* Baltimore, etc., R. Co., 27 App. D. C. 595.

31. What constitutes reasonable diligence.—*United States.*—Missouri Pac. R. Co. *v.* Hall, 14 C. C. A. 153, 66 Fed. 868.

New Jersey.—Higgins *v.* United States Exp. Co., 83 N. J. L. 398, 85 Atl. 450.

New York.—Coffin *v.* New York Cent. R. Co. (N. Y.), 64 Barb. 379, affirmed in 56 N. Y. 632.

South Carolina.—Nettles *v.* South Carolina R. Co. (S. C.), 7 Rich. L. 190, 62 Am. Dec. 409.

Wisconsin.—Peet *v.* Chicago, etc., R. Co., 20 Wis. 594, 91 Am. Dec. 446, 447.

32. Columbus, etc., R. Co. *v.* Flournoy, 75 Ga. 745.

33. Cause of delay.—Stone *v.* Adams Exp. Co. (Ky.), 122 S. W. 200.

34. Delivery in usual course of business.—In the absence of special contract, a railroad company, as a common carrier, is bound to deliver goods at their destination, or at the end of its route to the next carrier, according to the usual course of business, with all convenient dispatch. East Tennessee, etc., R. Co. *v.* Nelson, 41 Tenn. (1 Coldw.) 272.

In an action against the carrier to recover for alleged reasonable delay in the transportation of freight where the only evidence on the subject of reasonable time is that the goods were carried and reached their destination within the usual time occupied, according to the usual course of business in accomplishing the transportation between the point of shipment and the point of delivery, and there is no evidence of any special undertaking for completing the transportation within a definite or fixed time, a verdict for the defendant is not improper. Lowe *v.* East Tennessee, etc., R. Co., 90 Ga. 85, 15 S. E. 692.

35. Michigan Cent. R. Co. *v.* Burrows, 33 Mich. 6.

36. Delivery in compliance with custom.—Though it is error to exclude evidence for defendant in an action against a carrier for injury to a consignment of dressed poultry, resulting from failure to care for and preserve it, and from delay in delivery, that the delay in delivery was caused by the intervention of the 4th of July, which was observed by carriers and among business men of all classes by suspending business, and that the custom of suspending business on that day was an established one—general, certain, and uniform—it is not cause for reversal, under Shannon's Code, § 6351, providing that there shall be no reversal in the supreme court except for errors which affect the merits of the judgment complained of, where the uncontroverted evidence showed that the carrier was negligent in failing to care for and reserve the poultry. Pennsylvania R. Co. *v.* Naive, 112 Tenn. 239, 79 S. W. 124, 64 L. R. A., N. S., 443.

custom at a place to which freight is consigned not to make delivery on a holiday, negligence can not be predicated on the failure of a carrier to make delivery on that day.[37] Under a statute which requires transportation of freight within a reasonable time, and declares that in reckoning what is a reasonable time a delay of two days at the initial point and forty-eight hours at one intermediate point for each one hundred miles of transportation shall not be charged against the carrier as unreasonable, in determining whether a shipment was unreasonably delayed, the court is not authorized to exclude intervening Sundays, because another statute prohibits the running of freight trains on Sundays between sunrise and sunset.[38] This is a remedial statute in response to a public demand that quasi public corporations shall transport freight in a reasonable time. There is no indication that Sundays shall be excluded from the reasonable time prescribed in which railroads shall transport freight, since Sundays are counted in the time in which clerks, sheriffs, lawyers, road overseers, and all others are respectively required to perform certain acts under a penalty if they fail to do so within the time prescribed."[39] Though it is error to exclude evidence for defendant in an action against a carrier for injury to a consignment of dressed poultry, resulting from failure to care for and preserve it, and from delay in delivery, that the delay in delivery was caused by the intervention of a holiday, which was observed by carriers and among business men of all classes by suspending business, and that the custom of suspending business on that day was an established one—general, certain, and uniform—it is not cause for reversal, under a code provision that there shall be no reversal in the supreme court except for errors which affect the merits of the judgment complained of, where the uncontroverted evidence showed that the carrier was negligent in failing to care for and preserve the poultry.[40]

Delay at Transfer Points.—By statute in some states a carrier is allowed certain time at intermediate points for a change of cars and for unloading and

37. Delay during Sundays and holidays.—Pennsylvania R. Co. *v.* Naive, 112 Tenn. 239, 79 S. W. 124, 64 L. R. A., N. S., 443.

38. Revisal 1905, § 2632; Davis *v.* Atlantic, etc., R. Co., 145 N. C. 207, 59 S. E. 53.

Revisal 1905, § 2632, requiring carriers to transport goods within a reasonable time, and imposing a penalty for delay, provides that in reckoning reasonable time a delay of two days at the initial point and forty eight hours at one intermediate point for each one hundred miles of distance or fraction thereof over which freight is to be transported shall not be charged against the carrier. Held, that a carrier was not entitled to a deduction of intervening Sundays, because § 2613 prohibits the running of freight trains on Sunday between sunrise and sunset. Watson *v.* Atlantic, etc., R. Co., 59 S. E. 55, 145 N. C. 236.

Where one of the two days next after the delivery of freight to a carrier for transportation was Sunday, such day was properly deducted in ascertaining whether the freight was transported within a reasonable time, as required by Revisal 1905, § 2632, not as Sunday, but as one of the two initial days of nonaction which the carrier was entitled to before it was required to begin the transportation. Davis *v.* Atlantic, etc., R. Co., 145 N. C. 207, 59 S. E. 53.

"In Keeter *v.* Wilmington, etc., R. Co., 86 N. C. 346, Ashe, J., says that the defendant set up the defense that Sunday should not be counted because the statute (chapters 97 and 203, pp. 182, 359, Laws 1879) forbade freight trains to run on that day, and holds that Sunday is to be counted, not excluded, in making up the time which the railroad is allowed for transportation. Said chapters 97 and 203, pp. 182, 359, Laws 1879, referred to by Judge Ashe, are now Revisal 1905, § 3844, again brought forward as a defense by defendant. The same ruling that Sunday (unless the last day) is to be counted was made in Branch *v.* Wilmington, etc., R. Co., 77 N. C. 347." Davis *v.* Atlantic, etc., R. Co., 145 N. C. 207, 59 S. E. 53.

39. "In the cognate matter of demurrage, as Judge Ruffin notes in Branch *v.* Wilmington, etc., R. Co., 77 N. C. 347, Sundays are counted in the time prescribed. To same effect: Pressed Steel Car Co. *v.* Eastern R. Co., 57 C. C. A. 635, 121 Fed. 609; The Oluf, 19 Fed. 459; Baldwin *v.* Sullivan Timber Co., 142 N. Y. 279, 36 N. E. 1060." Davis *v.* Atlantic, etc., R. Co., 145 N. C. 207, 59 S. E. 53.

40. Pennsylvania R. Co. *v.* Naive, 112 Tenn. 239, 79 S. W. 124, 64 L. R. A., N. S., 443.

reloading, if necessary.[41] A station on the defendant's railroad which is the terminus of two other railroads is not an intermediate point with reference to freight not transferred to the other lines, but shipped through on the defendant's line to points beyond.[42] Under the demurrage and delayage rule of a railroad commission, fixing a charge against carriers for each day's detention of a car in transit, without allowance for free time, and allowing a day's free time at transfer points, a carrier is not deprived of such allowance by a delay in transit, but time not used at one point can not be used at another.[43]

Failure to Deliver at Night.—A regulation of an express company, declining delivery of freight, including dead bodies, from night trains at a small station where no night office is maintained, and providing for carriage to the next station and return the next morning to the destination, is a reasonable rule.[44] The question of the legality of the regulation is similar to that of the legality of such a regulation of a telegraph company.[45] It is competent for such companies to establish reasonable hours within which their business may be transacted; and they may fix those hours with reference to the quantity of business done. They may not be required to employ both a day and night messenger, if it be apparent that the business of the company will not justify such employment.[46]

Computing Time.—Under a statute providing that the time within which an act is to be done shall be computed by excluding the first day and including

41. Delay at transfer points.—The forty-eight hours' allowance to a carrier for delay at intermediate points by Revisal 1905, § 2632, is for change of cars if necessary, and for unloading and reloading. Watson *v.* Atlantic, etc., R. Co., 59 S. E. 55, 145 N. C. 236.

"In Meredith *v.* Seaboard, etc., R. Co., 137 N. C. 478, 50 S. E. 1, this court held that the 'forty-eight hours at intermediate points was, as the statute says, only 'prima facie reasonable delay,' and not to be allowed unless it was a necessary delay. The statute allows the carrier 'the ordinary time for transporting such articles of freight between the receipting and shipping stations,' and, in addition to that, 'a delay of two days at the initial point' (instead of the day of receipt, under Revisal 1905, § 887), and 'forty-eight hours at one intermediate point for each one hundred miles of distance or fractions thereof * * * shall be held prima facie reasonable.' This is the plain language of the body authorized to make laws, and this court has no desire or power to read or construe it except as it is written. If the time allowed is too liberal, or too restricted, it is for the legislature to change it." Davis *v.* Atlantic, etc., R. Co., 145 N. C. 207, 59 S. E. 53, 55.

42. It was so held under North Carolina Revisal 1905, § 2632, providing what shall be a reasonable time for the transportation of freight, and authorizing a delay of forty-eight hours at one intermediate point for each one hundred miles. Davis *v.* Atlantic, etc., R. Co., 145 N. C. 207, 59 S. E. 53.

43. Rule (Miss.), 10 of Railroad Commission, adopted June 8, 1904; Keystone Lumber Yard *v.* Yazoo, etc., R. Co., 97 Miss. 433, 53 So. 8.

44. Failure to deliver at night.—Adams Exp. Co. *v.* Hibbard, 145 Ky. 818, 141 S. W. 397, 38 L. R. A., N. S., 818.

45. Adams Exp. Co. *v.* Hibbard, 145 Ky. 818, 141 S. W. 397, 38 L. R. A., N. S., 818.

46. Western Union Tel. Co. *v.* Harding, 103 Ind. 505, 3 N. E. 172; Adams Exp. Co. *v.* Hibbard, 145 Ky. 818, 141 S. W. 397, 38 L. R. A., N. S., 818; Western Union Tel. Co. *v.* Wingate, 6 Tex. Civ. App. 394, 25 S. W. 439; Western Union Tel. Co. *v.* McCoy (Tex. Civ. App.), 31 S. W. 210.

"In Western Union Tel. Co. *v.* Steinbergen, 107 Ky. 469, 54 S. W. 829, 21 Ky. L. Rep. 1289, we said: 'The office hours of the company, where the message was to be delivered to the sendee, were from 7 o'clock a. m. to the same hour in the evening, and the message in question, having been received during the night of the 19th, need not have been delivered until within a reasonable time after 7 o'clock on the morning of the 20th.' And in Western Union Tel. Co. *v.* Crider, 107 Ky. 600, 54 S. W. 963, 21 Ky. L. Rep. 1336, we again said: 'It seems to be well settled that telegraph companies may make reasonable rules and regulations for the conduct of their business, and may, where the volume of the business does not require it, or justify the expense, close their office for night delivery. Ordinarily, whether such a rule or regulation is a reasonable one, is a question for the court and not for the jury. And certainly such is the law when, as in this case, there is no contrariety of testimony on the subject.'" Adams Exp. Co. *v.* Hibbard, 145 Ky. 818, 141 S. W. 397, 38 L. R. A., N. S., 818.

the last, unless the last day shall be Sunday, when it shall also be excluded, what constitutes a reasonable time for the transportation of freight, must be determined by including the last day, unless it is Sunday.[47] In determining what is a reasonable time for transportation and delivery of freight under ordinary conditions, under a contract fixing no time, extraordinary conditions, not known to the shipper at the time of shipment, can not enlarge the time.[48]

Question for Jury.—See elsewhere.[49]

Particular Instances of Delay.—A delay of twenty-four hours,[50] two,[51] three,[52] twelve,[53] fifteen[54] or seventy[55] days has been held an unreasonable delay. One month[56] has been held unreasonable.

§ 907. Perishable Goods.—A carrier of perishable goods must exercise care in view of the fact that the goods are perishable, and, though it is not liable for losses caused by the inherent nature of the goods, it is liable for damages from unreasonable delay in view of the nature of the goods.[57] A carrier of perishable freight, guilty of negligent delay in the transportation thereof, resulting in a loss of ice necessary to retain the proper temperature to preserve the freight, is liable for the damages attributable to an insufficient quantity of ice.[58] But the carrier owes only the duty of exercising reasonable care to protect it from injury, in the absence of any special contract as to the time of delivery.[59]

What Is Perishable Property.—Corn is not perishable property within the meaning of a stipulation in the contract of shipment releasing the carrier from liability from loss on perishable property, and the carrier is liable for injury to the corn by heating during a delay in shipment.[60]

Natural Tendency to Decay.—Unreasonable delay by a carrier in forwarding perishable goods, for a space of time within which, by the operation of natural laws decay will be produced, renders the carrier liable for the damage

47. **Computing time.**—Revisal (N. C.), 1905, § 887; Davis *v.* Atlantic, etc., R. Co., 145 N. C. 207, 59 S. E. 53.

48. Texas, etc., R. Co. *v.* Langbehn (Tex. Civ. App.), 150 S. W. 1188.

49. **Question for jury.**—See post, "Province of Court and Jury," § 970.

50. **Particular instances of delay.**—Ormsby *v.* Union Pac. R. Co., 2 McCrary 48, 4 Fed. 706.

It is the duty of a carrier receiving freight to be transported to carry it without unnecessary delay and a delay of twenty-four hours at a station on the way will be deemed unnecessary, unless explained by something which the law recognizes as sufficient. Jefferies *v.* Chicago, etc., R. Co., 88 Neb. 268, 129 N. W. 273.

51. **Two days.**—Peck *v.* Weeks, 34 Conn. 145.

52. **Three days.**—Wood *v.* Chicago, etc., R. Co., 68 Iowa 491, 27 N. W. 473, 56 Am. Rep. 861; Hewitt *v.* Chicago, etc., R. Co., 63 Iowa 611, 19 N. W. 790; McGraw *v.* Baltimore, etc., R. Co., 18 W. Va. 361, 41 Am. Rep. 696.

53. **A delay of twelve days** in delivering goods from Adrian to Chicago is unreasonable and the carrier is liable for damages. Michigan, etc., R. Co. *v.* Day, 20 Ill. 375, 71 Am. Dec. 278.

54. **Fifteen days.**—Michigan, etc., R. Co. *v.* Day, 20 Ill. 375, 71 Am. Dec. 278.

55. **Seventy days.**—St. Louis, etc., Railway *v.* Heath, 41 Ark. 476.

56. **A delay of a month** in the transportation of freight a distance of thirty-three miles is unreasonable, and the carrier is liable for the damages sustained. Chesapeake, etc., R. Co. *v.* Saulsberry, 126 Ky. 179, 103 S. W. 254, 31 Ky. L. Rep. 624, 12 L. R. A., N. S., 431.

"Where in case for the nondelivery of a parcel in a reasonable time it appeared that the parcel in question had been delivered to the defendant in London on the eighth of August, addressed to the plaintiff at Birmingham, where it should have arrived on the tenth, but did not arrive until the third or fourth of September, it was held upon this evidence that the plaintiff was entitled to recover; Raphal *v.* Pickford, 6 Scott N. R. 478." Michigan, etc., R. Co. *v.* Day, 20 Ill. 375, 71 Am. Dec. 278.

57. **Perishable goods.**—Trakas *v.* Charleston, etc., R. Co., 87 S. C. 206, 69 S. E. 209. See post, "Arising Proximately from Delay," § 927.

58. St. Louis, etc., R. Co. *v.* White (Tex. Civ. App.), 103 S. W. 673, affirmed in 102 Tex. 591, no op.

59. Pennsylvania R. Co. *v.* Clark, 85 Atl. 613, 118 Md. 514.

60. **What is perishable property.**—Illinois Cent. R. Co. *v.* McClellan, 54 Ill. 58, 5 Am. Rep. 83.

to the goods.[61] The carrier is liable for injury to corn by heating where the transportation is delayed beyond a reasonable time.[62] The carrier is liable for injury to fruit by decay.[63] Where a carrier's agent consented, when requested, to place a car of perishable fruit in position for unloading and failed to do so and the fruit decayed, the carrier is liable for his negligent failure.[64]

Preference to Be Given Perishable Goods.—It is held in Wisconsin that, if a carrier receive for transportation goods perishable and those not perishable at the same time, and there is a press of freight so that the carrier can not transport and deliver all the goods before the perishable will perish, but can deliver the perishable in time to save them if the delivery of the others is delayed, it is the duty of the carrier to give preference to the perishable. There is no invariable rule that freight of all kinds shall be transported and delivered in the order in which it is received.[65] This is followed in New York and Mississippi,[66] but is not followed in Massachusetts, where the court said: "Nothing is required of him in respect to such risks but the use of due care. If the owner of goods, which are liable to injury by freezing, chooses to send them at a season of the year when they are exposed to such a risk, he takes the risk himself. The conductor was bound to assume that it was important to each owner of freight that his property should be carried with all reasonable care and speed, as the company had undertaken to do and had directed him to do, and he could not know that the speedy delivery of the contents of the other cars was not more important than that of the apples."[67] But the Wisconsin court said: "If the carrier received for transportation goods perishable and those not so at the same time, and there was a press of freight, so that he could not transport and deliver all before the perishable goods would perish, but could deliver the perishable in time to save them if the delivery of the others was delayed, can there be any doubt what his duty would be? Can there be any doubt that a preference in such a case would be reasonable, and if reasonable, that the perishable goods, if they did not have the preference, would not be delivered in a reasonable time, and the carrier would be liable?"[68] If the custom of giving such preference has been long established and is well known, the parties are supposed silently to adopt the custom as part of the contract, unless it conflicts with its express terms.[69]

61. Natural tendency to decay.—In St. Louis, etc., R. Co. *v.* Coolidge, 73 Ark. 112, 83 S. W. 333, 108 Am. St. Rep. 21, 67 L. R. A., N. S., 555, 3 Am. & Eng. Ann. Cas. 582, the carrier was held liable for damage to potatoes from hot weather during delayed transportation.

Where there is no agreement in the contract of shipment as to time for transportation of perishable goods, and the carrier neglected to transport the goods within a reasonable time, without legal excuse and the property afterwards and before delivery is injured from its natural tendency to decay, the carrier is liable for the loss of the goods. Place *v.* Union Exp. Co. (N. Y.), 2 Hilt. 19.

62. Illinois Cent. R. Co. *v.* McClellan, 54 Ill. 58, 5 Am. Rep. 83.

63. "The Georgia court announced this rule in regard to perishable goods: 'Unreasonable delay in forwarding fruit would be negligence because prolonging the time within which, by the operation of natural laws, decay will be produced, and therefore such negligence would contribute to causing the damage:' Forrester *v.* Georgia R., etc., Co., 92 Ga. 699, 19 S. E. 811." St. Louis, etc., R. Co. *v.* Coolidge, 73 Ark. 112, 83 S. W. 333, 108 Am. St. Rep. 21, 67 L. R. A., N. S., 555, 3 Am. & Eng. Ann. Cas. 582.

64. Texas, etc., R. Co. *v.* Payne (Tex. Civ. App.), 156 S. W. 1126.

65. Preference to be given perishable goods.—Peet *v.* Chicago, etc., R. Co., 20 Wis. 594, 91 Am. Dec. 446, 449.

66. Yazoo, etc., R. Co. *v.* Blum Co., 88 Miss. 180, 40 So. 748, 10 L. R. A., N. S., 432; Tierney *v.* New York, etc., R. Co., 76 N. Y. 305; Marshall *v.* New York Cent. R. Co., 48 N. Y. 660.

67. Swetland *v.* Boston, etc., R. Co., 102 Mass. 276.

68. Peet *v.* Chicago, etc., R. Co., 20 Wis. 594, 91 Am. Dec. 446.

69. Custom of giving preference.—"Cooper *v.* Kane (N. Y.), 19 Wend. 386, 32 Am. Dec. 512; Kirkman *v.* Shawcross (N. C.), 6 Term Rep. 14; Judd *v.* Evans (N. C.), 6 Term Rep. 398. We doubt, however, whether the proof showed that this custom had been so long established as to make it part of the contract. But we think the practice reasonable, and not in violation of any rule of law." Peet *v.* Chicago, etc., R. Co., 20 Wis. 594, 91 Am. Dec. 446.

Shipment by Next Train.—When perishable goods are placed in cars provided for them for transportation by the carrier in time for the next regular train, the carrier is bound to transport the goods by such train, in preference to other freight, if he has knowledge of the circumstances, and is liable for injury resulting from delay in not shipping the goods by that train.[70]

Shipment on Sundays and Holidays.—Under a statute providing that trains laden exclusively with vegetables and fruit may run on Sunday, and such freight trains as may be in transit which can reach their destination by six o'clock in the forenoon may run on Sunday, a carrier of perishable fruit may not excuse a delay in the transportation on Sunday in the absence of testimony explaining why a train did not go to the point of destination on Saturday evening, and why such train or another train could not reach the destination before six o'clock Sunday morning.[71]

Shipment Over Connecting Carrier.—Where a railroad company accepts perishable goods to be transported for its own line and over connecting roads, it is bound to forward the goods promptly.[72] Where a carrier undertakes to deliver perishable goods to a connecting carrier by a fixed time, and negligently delays delivering them, and they freeze while in the possession of the connecting carrier, the initial carrier is liable therefor.[73] But the contrary has been held.[74]

70. Shipment by next train.—The court charged that it was the duty of defendant to transport the cabbages by the first train, unless a reasonable and proper excuse for the delay was shown, unless there was such a pressure of property of a similar kind which arrived before as to make it impossible; that if there was a pressure of freight this car should have been forwarded before forwarding ordinary nonperishable property. Held, no error. Tierney *v.* New York, etc., R. Co., 76 N. Y. 305, affirming 10 Hun 569, 67 Barb. 538.

Plaintiff on January 6, 1873, loaded upon one of the defendant's cars, at Albany, cabbages for transportation to New York, and paid the freight. On the car was placed a placard, signed by defendant's general freight agent: "Perishable property; this car must run to New York by first train." A way bill delivered to plaintiff showed shipment from Albany January 7. The car arrived at East Albany at 10:40 p. m. of that day; at 10:50 a freight train started thence for New York; this car remained until 3:20 p. m. of January 9, when it proceeded to New York. On arrival the cabbages were found to be frozen. The usual time for a freight train from Albany to New York is from ten to eleven hours. If the cabbages had been delivered in the ordinary course of business, they would not have been frozen. Defendant gave evidence that the car, on arrival at East Albany, was switched on to a side track and blocked up by cars subsequently arriving, so that it could not be moved until they were sent forward. It did not appear that any sudden emergency interfered with the ordinary use of the road, or that the amount of freight was unusual or exceeded the capacity of defendant to remove it, or that the freight sent forward after the car arrived were made up of freight received before. Held, that a verdict for plaintiff was warranted. Tierney *v.* New York, etc., R. Co., 76 N. Y. 305, affirming 10 Hun 569, 67 Barb. 538.

71. Shipment on Sundays and holidays.—Under Civ. Code 1902, § 2122, as amended by Act Feb. 21, 1903 (24 Stat. 83). Trakas *v.* Charleston, etc., R. Co., 87 S. C. 206, 69 S. E. 209.

72. Shipment over connecting carrier.—Blodgett *v.* Abbot, 72 Wis. 516, 40 N. W. 491, 7 Am. St. Rep. 873.

A railroad company chargeable with unreasonable delay in holding a car containing vegetables is liable for the natural consequences thereof, even beyond its own line. San Antonio, etc., R. Co. *v.* Thompson (Tex. Civ. App.), 66 S. W. 792.

73. "In a Massachusetts case where a carrier contracted to deliver apples to a connecting carrier by a fixed time, and negligently delayed delivering them, and they froze in the possession of the connecting carrier, the court said: 'If the freezing had occurred on defendant's line, it can not be doubted that the law would regard the delay as the proximate cause of the damage; it is none the less so because it happened on a connecting line. The damage was not caused by any extraordinary event subsequently occurring, but was caused by the event which was, according to common experience, naturally and reasonably to be

74. The freezing of apples while being transported by a subsequent carrier is not so direct and natural a result of unreasonable delay by the first carrier, as to make such first carrier liable therefor by reason of such delay. Michigan Cent. R. Co. *v.* Burrows, 33 Mich. 6.

A railroad company accepting perishable freight for transportation over its own and connecting roads must forward the same promptly, to the extent of its ability, until it has delivered or offered to deliver it to the connecting carrier, and is not excused from the performance of such duty by the mere fact that its agent supposed there would be a delay in the forwarding of such freight by the connecting carrier.[75]

Particular Goods.—The carrier has been held liable for injury to potatoes,[76] corn,[77] and fruit[78] caused by delay. Where a carrier accepts potatoes to be shipped during a season of the year when the weather is naturally severely cold, although it is not cold at the time the freight is received, where during a delay of two or three days the potatoes freeze, the carrier is liable.[79] Hay not being perishable merchandise, a carrier is not called upon to put forth unusual efforts to remove the same when delivered to it for transportation.[80]

§§ 908-922. Excuses for Delay.—§ 908. In General.—Where goods are actually transported and delivered, but the time of delivery is delayed, such delay, if resulting from causes beyond the control of the carrier, may be excused; if under such circumstances the carrier exercises due care, he is not liable.[81] A carrier may be excused for delay in receiving the goods, or in transporting them after they have been received, whenever the delay is necessarily caused by unforeseen disaster which human prudence can not provide against, or by accident not caused by the negligence of the carrier, or by thieves and robbers, or an uncontrollable mob.[82] All that can be required of a carrier is that he shall exercise due care and diligence to guard against delay, and that if it occur without his fault or negligence, he shall omit no reasonable efforts to secure the safety of the goods.[83]

expected, a change of temperature:' Fox *v.* Boston, etc., R. Co., 148 Mass. 220, 19 N. E. 222, 1 L. R. A., N. S., 702. In the absence of a contract fixing the time for delivery to the connecting carrier, the law fixes a reasonable time, and what is a reasonable time must be determined from the length of the journey, the usual time, the weather, the nature of goods transported, etc.: Hutchinson on Carriers, § 329. Under these authorities, which are consonant to reason and justice, the evidence is sufficient to hold the initial carrier was guilty of a negligent act—the delay in transportation of this class of goods in the season when weather conditions naturally produce delay—which caused, in whole or in part, the condition in which they reached the consignee. It is evident that the last carrier was equally or more negligent than the initial carrier, but that does not change the rule, and merely renders each or both liable when the act of either is an efficient and proximate cause of the injury." St. Louis, etc., R. Co. *v.* Coolidge, 73 Ark. 112, 83 S. W. 333, 3 Am. & Eng. Ann. Cas. 582, 108 Am. St. Rep. 21, 67 L. R. A., N. S., 555.

75. Blodgett *v.* Abbot, 72 Wis. 516, 40 N. W. 491, 7 Am. St. Rep. 873.

76. Potatoes.—St. Louis, etc., R. Co. *v.* Coolidge, 73 Ark. 112, 83 S. W. 333, 108 Am. St. Rep. 21, 67 L. R. A., N. S., 555, 3 Am. & Eng. Ann. Cas. 582; McGraw *v.* Baltimore, etc., R. Co., 18 W. Va. 361, 41 Am. Rep. 696.

77. Corn.—Illinois Cent. R. Co. *v.* McClellen, 54 Ill. 58, 5 Am. Rep. 83.

78. Fruit.—Forrester *v.* Georgia R., etc., Co., 92 Ga. 699, 19 S. E. 811; Place *v.* Union Exp. Co. (N. Y.), 2 Hilt. 19; Trakas *v.* Charleston, etc., R. Co., 87 S. C. 206, 69 S. E. 209.

A carrier, on receiving fruit for transportation, is bound to forward it to its destination immediately. Frey *v.* New York Cent., etc., R. Co., 100 N. Y. S. 225, 114 App. Div. 747.

An express company is liable for damages to fruit injured by delay in its transportation. Adams Exp. Co. *v.* Williams (Ark.), 14 S. W. 40.

79. McGraw *v.* Baltimore, etc., R. Co., 18 W. Va. 361, 41 Am. Rep. 696.

80. Judgment 87 N. Y. S. 30, 92 App. Div. 584, affirmed. Strough *v.* New York, etc., R. Co., 181 N. Y. 533, 73 N. E. 1133.

81. Excuses for delay.—Gulf, etc., R. Co. *v.* Levi, 76 Tex. 337, 13 S. W. 191, 8 L. R. A., N. S., 323, 18 Am. St. Rep. 45; International, etc., R. Co. *v.* Hynes, 3 Tex. Civ. App. 20, 21 S. W. 622; Texas, etc., R. Co. *v.* Langbehn (Tex. Civ. App.), 150 S. W. 1188.

82. Pittsburgh, etc., R. Co. *v.* Hollowell, 65 Ind. 188, 32 Am. Rep. 63; Gulf, etc., R. Co. *v.* Levi, 76 Tex. 337, 13 S. W. 191, 8 L. R. A., N. S., 323, 326, 18 Am. St. Rep. 45.

83. Hutch. on Carr., § 330. See, also, §§ 331-35, 292. Gulf, etc., R. Co. *v.* Levi, 76 Tex. 337, 341, 13 S. W. 191, 8 L. R. A., N. S., 323, 18 Am. St. Rep. 45.

In Absence of Express Contract.—Independent of special contract a common carrier is not liable for a delay in delivery of freight where such delay resulted from causes beyond the carrier's control, and the carrier exercised due care for the protection and preservation of the property.[84] Where the breach of a carrier's undertaking is alleged to be a failure to exercise due care and diligence in making delivery, resulting in delay in delivery, the carrier can allege as a defense any facts which the law recognizes as an excuse for delay, though no exemption from liability on such ground is in the contract of shipment.[85]

Stipulation for Exemption from Particular Cause.—The stipulation in a contract to ship perishable goods within a prescribed time exempting the carrier from liability from unavoidable or extraordinary casualty, and natural tendency of the goods to decay, does not exempt the carrier from liability where the goods are delayed by a connecting carrier because of an excessive amount of freight to be handled.[86]

In Addition to Act of God or Public Enemy.—The absence of negligence excuses a carrier for delay in transporting goods, and it is error to instruct the jury that only an act of God or the public enemy can supply such excuse.[87] If the delay is induced by causes beyond the carrier's control, it is excused, regardless of the agency producing such failure or delay. It is immaterial whether such delay be attributed to the act of God or not.[88] If by accident or misfortune, not amounting to an inevitable casualty or the act of God, the transportation of the goods is retarded, the carrier will not be responsible for such delay, if he has used due care and reasonable diligence, and the goods are finally safely delivered.[89]

Due Diligence in Care for Property.—To render delay excusable the carrier must have exercised due care to protect the property against injury pending the delay.[90]

Carrier on Same Footing as Other Bailees.—In this respect, a common carrier stands upon the same ground with other bailees, and may excuse delay in delivery of the goods by accident or misfortune, although not inevitable or produced by the act of God.[91]

84. **In absence of express contract.**—International, etc., R. Co. *v.* Hynes, 3 Tex. Civ. App. 20, 21 S. W. 622; Gulf, etc., R. Co. *v.* Gatewood, 79 Tex. 89, 95, 14 S. W. 913, 10 L. R. A., N. S., 419; Gulf, etc., R. Co. *v.* Levi, 76 Tex. 337, 13 S. W. 191, 8 L. R. A., N. S., 323, 18 Am. St. Rep. 45.

85. Missouri, etc., R. Co. *v.* Stark Grain Co., 103 Tex. 542, 131 S. W. 410, modifying judgment (Tex. Civ. App.), 120 S. W. 1146.

86. **Stipulation for exemption from particular cause.**—Place *v.* Union Exp. Co. (N. Y.), 2 Hilt. 19.

A stipulation exempting the carrier from liability for delay by reason of the dangers of the sea, does not exempt the carrier from delay by an act of the public enemy. The carrier could not recover for freight where it had undertaken to ship goods, exempting itself from natural loss by waste and the dangers of the sea only, and the goods were captured by a ship of the Confederate States. Tirrell *v.* Gage (Mass.), 4 Allen 245.

87. **In addition to act of God or public enemy.**—Bacon *v.* Cleveland, etc., R. Co., 155 Ill. App. 40.

The carrier may excuse delay by accident or misfortune, although not inevitable, or produced by an act of God. Parsons *v.* Hardy (N. Y.), 14 Wend. 215, 28 Am. Dec. 521.

88. International, etc., R. Co. *v.* Hynes, 3 Tex. Civ. App. 20, 21 S. W. 622.

89. Story on Bailments, § 545 a. Parsons *v.* Hardy (N. Y.), 14 Wend. 215, 28 Am. Dec. 521; Wibert *v.* New York, etc., R. Co., 12 N. Y. 245; Peet *v.* Chicago, etc., R. Co., 20 Wis. 594, 91 Am. Dec. 446, 448.

A common carrier who has been guilty of no negligence, is not liable for delay in the transportation of goods occasioned by an accident not inevitable, if the goods are finally safely delivered. Nashville, etc., R. Co. *v.* Jackson, 53 Tenn. (6 Heisk.) 271.

90. **Due diligence in care for property.**—International, etc., R. Co. *v.* Hynes, 3 Tex. Civ. App. 20, 21 S. W. 622; Gulf, etc., R. Co. *v.* Levi, 76 Tex. 337, 13 S. W. 191, 8 L. R. A., N. S., 323, 18 Am. St. Rep. 45.

91. **Carrier on same footing as other bailees.**—Hutchinson on Carriers, § 330. Gulf, etc., R. Co. *v.* Levi, 76 Tex. 337, 13 S. W. 191, 18 Am. St. Rep. 45, 8 L. R. A., N. S., 323.

Railroad on Same Footing as Other Carriers.—A railroad carrier stands upon the same footing as other carriers, and may excuse delay in the delivery of goods by accident or misfortune not inevitable or produced by the act of God.[92]

Carrier Must Notice Signs of Danger.—The carrier is bound to take notice of the signs of approaching danger, and if of a character to awaken apprehension at a time when the facilities and means of escape are within his control, he is bound to employ such means. It was error, therefore, to charge the jury that, in calculating the extent of the danger and means requisite to meet it, the carrier could act upon the experience, history, and tradition of the past.[93] But mere knowledge of the existence of a snow storm a thousand miles away, on a connecting line, is not such definite knowledge of the existence of an obstruction as will prevent the carrier from excusing itself for a delay caused by the snow.[94]

§ 909. Delay Caused by Act of God, Public Enemy, etc.—A carrier is not liable in transportation of goods for delay caused by an act of God.[95] Where delay in delivery of freight was caused by atmospheric conditions, rendering the telegraphic wires unavailable, so that the employees in charge of the train could not receive orders, it was beyond the carrier's control, and excusable.[96]

Known to Carrier.—A carrier, receiving property for transportation with knowledge of an obstruction on its road, and without informing the shipper, can not offer the obstruction as an excuse for not making a prompt delivery of the freight, though the obstruction is the act of God; and it is bound to take notice of the signs of approaching danger, such as storms, liable to create obstructions, if any are known to it.[97]

The freezing of a river which renders it impossible for a carrier by water to transport goods, is an act of God, which excuses delay.[98]

92. **Railroad on same footing as other carriers.**—Geismer v. Lake Shore, etc., R. Co., 102 N. Y. 563, 7 N. E. 828, 55 Am. Rep. 837.

93. **Carrier must notice signs of danger.**—Lamont & Co. v. Nashville, etc., R. Co., 56 Tenn. (9 Heisk.) 58.

94. Palmer v. Atchison, etc., R. Co., 101 Cal. 187, 35 Pac. 630.

95. **Delay caused by act of God, public enemy, etc.**—Williams Co. v. Pensacola, etc., Co., 57 Fla. 237, 48 So. 630; American Exp. Co. v. Smith, 33 O. St. 511, 31 Am. Rep. 561. And see Starbuck v. Chesapeake, etc., R. Co., 1 Wkly. L. Bull. 110, 7 O. Dec. Reprint 97.

A railroad company is not liable for damages arising from delay in the shipment of goods, owing to the loss of a car on account of extraordinary weather conditions. Unionville Produce Co. v. Chicago, etc., R. Co., 153 S. W. 63, 168 Mo. App. 168.

As to injury to or destruction of goods by act of God, see post, "Loss of or Injury to Goods," XI.

96. International, etc., R. Co. v. Hynes, 3 Tex. Civ. App. 20, 21 S. W. 622.

97. **Known to carrier.**—Nelson v. Great Northern R. Co., 9 R. R. R. 311, 32 Am. & Eng. R. Cas., N. S., 311; S. C., 72 Pac. 642, 28 Mont. 297.

98. Parsons v. Hardy (N. Y.), 14 Wend. 215, 28 Am. Dec. 521.

"'Severe weather is an act of God, for the consequences of which a common carrier is not liable.' Herring v. Chesapeake, etc., R. Co., 101 Va. 778, 45 S. E. 322. Cases are cited to the contrary, among which are the following: Michaels v. New York Cent. R. Co., 30 N. Y. 564, 86 Am. Dec. 415; Read v. Spaulding, 30 N. Y. 630, 86 Am. Dec. 426; Wolf v. American Exp. Co., 43 Mo. 421, 97 Am. Dec. 406 (see, however, American Brewing Ass'n v. Talbot, 141 Mo. 674, 42 S. W. 679, 64 Am. St. Rep. 538); Wald v. Pittsburg, etc., R. Co., 162 Ill. 545, 44 N. E. 888, 35 L. R. A., N. S., 356, 53 Am. St. Rep. 332 (merely adopts the New York rule); Cassilay v. Young (Ky.), 4 B. Mon. 265, 39 Am. Dec. 505 (no discussion of principles); Alabama, etc., R. Co. v. Quarles, 145 Ala. 436, 40 So. 120, 5 L. R. A., N. S., 867, 117 Am. St. Rep. 54, 8 Am. & Eng. Ann. Cas. 308; (carrier's delay—destruction by cyclone); Bibb Broom Corn Co. v. Atchison, etc., R. Co., 94 Minn. 269, 102 N. W. 709, 69 L. R. A., N. S., 509, 110 Am. St. Rep. 361, 3 Am. & Eng. Ann. Cas. 450; Green-Wheeler Shoe Co. v. Chicago, etc., R. Co., 130 Iowa 123, 106 N. W. 498, 5 L. R. A., N. S., 882, 8 Am. & Eng. Ann. Cas. 45; Wabash R. Co. v. Sharpe, 76 Neb. 424, 107 N. W. 758, 124 Am. St. Rep. 823. The last three are 1903 flood cases." Rodgers v. Missouri Pac. R. Co., 75 Kan. 222, 88 Pac. 885, 10 L. R. A., N. S., 658, 12 Am. & Eng. Ann. Cas. 441.

An extraordinary and unprecedented flood is an act of God, and injury caused to the shipper by it solely is not a ground of action against a carrier for damages from delay in the shipment of goods, and where the carrier is free from negligence.[99] A carrier, which undertakes to carry goods over its own route, is not responsible for unavoidable delays, such as might be occasioned by the destruction of a railroad bridge by a flood, and if such delays occur while the goods are in transit it is thereupon the duty of the carrier to exercise sound discretion and reasonable diligence in forwarding the goods to their destination. The carrier is not bound to divert the goods from its own to another route over which it has control, unless in the exercise of such discretion and diligence it appears that the change of route would have prevented the loss attendant upon delay.[1] But admitting that an express company is responsible for the fault or negligence of a railroad, over which it carries, the fact that a bridge of the railroad was carried away by a freshet of unusual violence is not such default or negligence in the railroad company as will make the express company responsible for the loss of perishable property by a delay thus made inevitable.[2]

Whirlwind.—Where, after a carrier had received a wagon for shipment, an unprecedented whirlwind blew it from the platform, the carrier was not liable for the consequent delay in shipment.[3]

A heavy dew can not be a sufficient cause for delay in transporting cattle by railroad, so as to relieve the railroad company from liability for delay.[4]

§ 910. Delay Caused by Seizure under Judicial Process.—Garnishment.—A statute providing that, when a carrier summoned as garnishee in an action has goods in its possession shipped by or consigned to defendant, it shall not be liable for its failure to transport the goods until it is discharged, exonerates the carrier garnished in an action against the shipper or consignee from liability for delay caused by the garnishment, but a carrier merely alleging that a third person was in possession of the goods at the time he was garnished and omitting to allege any fact showing that the possession of the third person was the possession of the carrier is not within the statute.[5] A common carrier after acceptance of freight for shipment from a place within a state to a place without, after the goods have been received, placed in a car for transportation, and a bill of lading issued to the shipper, the service of a garnishee summons upon the carrier does not excuse it from liability for an unreasonable delay in forwarding the goods to their destination.[6]

Quarantine.—A carrier was excused for refusing to deliver a shipment of bananas to the consignee, where, upon its arrival, the carrier was notified by the chief of police that the shipment must not be delivered, and that the consignee would not be allowed to unload and distribute it, if delivery were made; the chief of police acting under instructions from a sanitary commission created by an ordinance establishing a quarantine against all bananas from New Orleans, though the particular shipment was made from Mobile.[7]

Refusal of Clearance by Collector of Port.—The wrongful refusal of a collector of a port to allow a vessel to clear, because of the presence of

99. Norris *v.* Savannah, etc., R. Co., 23 Fla. 182, 1 So. 475, 11 Am. St. Rep. 355; Greismer *v.* Lake Shore, etc., R. Co., 102 N. Y. 563, 7 N. E. 828, 55 Am. Rep. 837.

1. American Exp. Co. *v.* Smith, 33 O. St. 511, 31 Am. Rep. 561.

2. American Exp. Co. *v.* Smith, 33 O. St. 511, 31 Am. Rep. 561.

3. **Whirlwind.**—Gulf, etc., R. Co. *v.* Compton (Tex. Civ. App.), 38 S. W. 220, 221.

4. Missouri, etc., R. Co. *v.* Truskett (Ind. Terr. App.), 17 Am. & Eng. R. Cas., N. S., 273.

5. **Delay caused by seizure under judicial process.**—Haase & Sons Fish Co. *v.* Merchants', etc., Transp. Co., 143 Mo. App. 42, 122 S. W. 362.

6. Baldwin *v.* Great Northern R. Co., 81 Minn. 247, 83 N. W. 986, 51 L. R. A., N. S., 640, 83 Am. St. Rep. 370.

7. **Quarantine.**—Alabama, etc., R. Co. *v.* Tirelli, 93 Miss. 797, 48 So. 962, 17 Am. & Eng. Ann. Cas. 879, 21 L. R. A., N. S., 731.

contraband on board, is no excuse for delay,[8] although the bill of lading provides that the carrier shall not be liable for loss or delay due to a "restraint of princes, rulers, or people."[9]

§§ 911-914. Delay Caused by Unusual Rush of Business—§ 911. In General.—A railroad company is bound to have all reasonable and necessary facilities and appliances for conducting and carrying on in a prompt, skillful and careful manner the business in which it is engaged, and for transporting without unreasonable delay the usual and ordinary quantity of freight offered it for transportation, or which might reasonably and ordinarily be expected;[10] but it is not bound to be prepared for unusual and extraordinary contingencies, which no ordinary prudence or foresight can reasonably foresee or anticipate.[11] It must furnish such facilities for transportation as will meet the ordinary demands of the public, but is not bound to anticipate or provide in advance for an unusual influx of freight.[12] Where a carrier fails or refuses to accept freight tendered to it for transportation because of its inability to transport it, which inability has been occasioned by extraordinary circumstances or an emergency that could not have been reasonably foreseen and for which the carrier is not responsible, such failure or refusal of freight for transportation may not give a shipper the right to recover damages for delays in the transportation of the freight tendered, where the carrier does all that could have been reasonably required of it to meet the demands made upon it for transportation.[13] But it has been held that a rush of business is no defense for failure to transport freight with reasonable care, diligence and dispatch.[14]

8. Refusal of clearance by collector of port.—Northern Pac. R. Co. *v.* American Trading Co., 195 U. S. 439, 49 L. Ed. 269, 25 S. Ct. 84.

Where a railroad contracts to forward lead by a connecting line, within a certain time, by a contract lawful when made, and not since rendered unlawful, the mere fact that the deputy collector wrongfully refuses clearance to the vessel employed by the initial carrier upon the ground that the lead is contraband, does not excuse the carrier from liability for failure to fulfill its contract. Northern Pac. R. Co. *v.* American Trading Co., 195 U. S. 439, 49 L. Ed. 269, 25 S. Ct. 84.

9. Northern Pac. R. Co. *v.* American Trading Co., 195 U. S. 439, 49 L. Ed. 269, 25 S. Ct. 84.

10. Delay caused by unusual rush of business.—Michigan Cent. R. Co. *v.* Burrows, 33 Mich. 6.

11. *United States.*—Helliwell *v.* Grand Trunk Railway, 7 Fed. 68, 10 Biss. 170.

Illinois.—Galena, etc., R. Co. *v.* Rae, 18 Ill. 488, 68 Am. Dec. 574.

Kentucky.—Newport News, etc., R. Co. *v.* Reed, 10 Ky. L. Rep. 1020.

Massachusetts.—Thayer *v.* Burchard, 99 Mass. 508.

Mississippi.—Yazoo, etc., R. Co. *v.* Blum, 89 Miss. 242, 42 So. 282, 11 Am. & Eng. Ann. Cas. 272; Vicksburg, etc., R. Co. *v.* Ragsdale, 46 Miss. 458; Yazoo, etc., R. Co. *v.* Blum Co., 88 Miss. 180, 40 So. 748, 10 L. R. A., N. S., 432.

Missouri.—Ballentine *v.* North Missouri R. Co., 40 Mo. 491, 93 Am. Dec. 315; Faulkner *v.* South Pac. Railroad, 51 Mo. 311; Baker *v.* St. Louis, etc., R. Co. (Mo. App.), 129 S. W. 436; Dawson *v.* Chicago,, etc., R. Co., 79 Mo. 296.

New York.—Wilbert *v.* New York, etc., R. Co. (N. Y.), 19 Barb. 36; Bouker *v.* Long Island R. Co., 89 Hun 202, 35 N. Y. S. 23, 69 N. Y. St. Rep. 219.

Tennessee.—East Tennessee, etc., R. Co. *v.* Nelson, 41 Tenn. (1 Coldw.) 272.

In Michigan Cent. R. Co. *v.* Burrows, 33 Mich. 6, the railroad was excused because of the unusual rush of business caused by the Chicago fire.

12. Yazoo, etc., R. Co. *v.* Blum, 89 Miss. 242, 42 So. 282, 11 Am. & Eng. Ann. Cas. 272.

13. Seaboard Air Line Railway *v.* Rentz, 60 Fla. 429, 54 So. 13.

14. Gulf, etc., R. Co. *v.* McCorquodale, 71 Tex. 41, 9 S. W. 80; Cross *v.* McFaden, 1 Tex. Civ. App. 461, 20 S. W. 846; International, etc., R. Co. *v.* Anderson, 3 Tex. Civ. App. 8, 21 S. W. 691; International, etc., R. Co. *v.* Lewis (Tex. Civ. App.), 23 S. W. 323; Gulf, etc., R. Co. *v.* Hume, 6 Tex. Civ. App. 653, 24 S. W. 915, reversed in 87 Tex. 211; Texas, etc., R. Co. *v.* Felker, 40 Tex. Civ. App. 604, 90 S. W. 530.

The volume of business offered to or accepted by a common carrier can not avail to relieve it from the performance of a contract already entered into. An excess of business might, under some circumstances, justify a refusal to accept goods for shipment, but it could not excuse a nonperformance of contract obligations. International, etc., R. Co. *v.* Anderson, 3 Tex. Civ. App. 8, 21 S. W. 691.

Where Carrier Used Due Diligence.—Where a carrier's failure to transport cotton with reasonable dispatch was caused by an excessive crop, it is not liable for the delay, where it took extraordinary steps to handle the cotton, and the shipper knew at the time it offered the cotton for shipment that, on account of the heavy traffic and large demand for cars, it could not be transported with the usual rapidity.[15]

§ 912. Duty to Provide Proper Facilities.—It is the duty of a common carrier to provide sufficient facilities and means of transportation for all freight which it should reasonably expect will be offered, but it is not bound to provide in advance for extraordinary occasions, nor for an unusual influx of business which is not reasonably to be expected. When an emergency arises and more business is suddenly and unexpectedly cast upon a carrier than he is able to accommodate, unless the carrier decline to receive the excess offered, some shippers must necessarily be delayed; yet if the carrier do receive the goods without notice to the shippers of the circumstances likely to occasion delay, or fail to obtain his assent, express or implied, to the delay, he will be bound to transport the goods within a reasonable time, notwithstanding such emergency.[16] If a delay happen in the transportation in consequence of an unusual press of business, the company, having a reasonable equipment for all ordinary purposes, and the goods being carried with as much expedition as is practicable under the circumstances, is not liable for damages because of the delay, but would be for any injury to the goods during the delay.[17] Just what the measure of the carrier's duty in this connection is in a particular case depended upon the situation and circumstances of the parties. It may be that circumstances here relieved carrier of the duty of notifying shippers, or this particular shipper, of the congestion at the produce yard. But here again such circumstances are not to be presumed, but shown, and, if a question of fact arises in connection therewith, a reference to the jury would be unavoidable.[18]

Car Shortage.—A shipment having been accepted for transportation without notice to the shipper that there was a shortage of cars and an unprecedented amount of business, the carrier should be held liable for damages for unreasonable delay.[19] And where a carrier accepted an automobile for shipment, it is liable for an unreasonable delay in the shipment, and its temporary inability to secure a car large enough to hold the automobile will not exonerate it.[20]

15. Where carrier used due diligence.—Yazoo, etc., R. Co. *v.* Blum, 89 Miss. 242, 42 So. 282, 11 Am. & Eng. Ann. Cas. 272.

16. Duty to provide proper facilities.—Bussey *v.* Memphis, etc., R. Co., 13 Fed. 330, 4 McCrary 405; Dawson *v.* Chicago, etc., R. Co., 79 Mo. 296; Joynes *v.* Pennsylvania R. Co., 235 Pa. 232, 83 Atl. 1016, Ann. Cas. 1913D, 964.

A railroad company is bound to do all that is reasonable, and to use all reasonable means by increasing the number of its tracks and warehouses to accommodate its increased business, and whether it has done this in a given case is a question for the jury. Where delay occurs in the transportation of goods in consequence of a lack of cars or other facilities, the company is liable for the delay unless it can show good cause therefor. Joynes *v.* Pennsylvania R. Co., 235 Pa. 232, 83 Atl. 1016, Ann. Cas. 1913D, 964, citing Illinois Cent. R. Co. *v.* Cobb, etc., Co., 64 Ill. 128.

17. Where carrier has proper equipment.—East Tennessee, etc., R. Co. *v.* Nelson, 41 Tenn. (1 Coldw.) 272.

18. Joynes *v.* Pennsylvania R. Co., 235 Pa. 232, 83 Atl. 1016, Ann. Cas. 1913D, 964.

19. Car shortage.—Missouri, etc., R. Co. *v.* Early-Clement Grain Co. (Tex. Civ. App.), 124 S. W. 1015.

A carrier may not escape liability for delay in furnishing cars on the ground of a car famine resulting from an extension of the carrier's mileage and a natural increase in business. Baker *v.* St. Louis, etc., R. Co. (Mo. App.), 129 S. W. 436.

A carrier is not excused from its failure to move promptly cotton delivered to it for transportation by proving that eighty per cent or more of its equipment was off its line, engaged in the carriage of shipments offered along the line for other points in other states. St. Louis, etc., R. Co. *v.* Phœnix, etc., Oil Co., 115 S. W. 393, 88 Ark. 594.

20. Grigsby *v.* Texas, etc., R. Co. (Tex. Civ. App.), 137 S. W. 709.

During Part of Year.—The rolling stock of a railroad corporation, though sufficient for its ordinary business during nine months of the year, was insufficient to carry promptly all the freight of a particular kind, requiring peculiar cars, in three months of a year in which it had made a special contract with a person to transport his freight of that kind without specifying any quantity to be transported or limiting any time for the performance of the service. During intervals in those months between days when he delivered freight to the corporation under the contract and the days when it was loaded on the cars by his storekeeper, into whose yard the corporation sent cars to be loaded at the storekeeper's discretion, he incurred expenses for storage and insurance on that freight. The cars sent to the storekeeper were more than sufficient to have carried all that freight alone so promptly as to have avoided such expenses; but the storekeeper loaded them with it only proportionally with similar freight of his other customers likewise awaiting transportation but with whom the corporation has no special contract. The fact that in those three months every year there was a great accumulation of such freight for transportation over the road was insufficient to render the corporation liable for those expenses on the ground of negligence in its equipment.[21]

At Time Contract of Shipment Made.—But if, at the time the contract of shipment was made, there was already an accumulation of business on the carrier's lines, which incapacitated it, or might reasonably be expected to incapacitate it, for transporting and delivering the goods within a reasonable time, and this was then known to the carrier, or might have been known by proper effort on its part, or if there were then reasonable grounds for a belief on the part of the carrier that such was the state of the case at the time, then the carrier would be liable for the delay, although it was occasioned by such accumulation of business. In such case it is the carrier's duty to inform the shipper of the condition of its lines, so that he may exercise his right to select some other line for the transportation of his property; and if the carrier fails to do this, and takes the property in the face of threatened inability to transport it with requisite dispatch, it must answer for the consequences of the delay. A carrier has no right to take a shipper's property for transportation, concealing from him at the time existing circumstances within its knowledge, or within its fair and reasonable means of knowledge, and not within the knowledge of the shipper, that may incapacitate, or may be fairly expected to incapacitate it for the full performance of its duty in transporting the property, and then claim exemption from liability.[22] But if, at the time of making the contract of shipment, the carrier had no doubt, and if the condition of business on its lines gave it no ground for doubting, that suitable means would be at its command within the usual and ordinary time for conveying the goods, and if all reasonable efforts were seasonably employed to obtain such means, and the delay was solely occasioned by an extraordinary and unusual influx of freight upon its lines for foreign export, arising subsequently to the making of the contract, so that it was thereby rendered impossible for the carrier, with proper diligence on its part, to procure vessels to carry the flour within a reasonable time, the carrier would not be responsible for the delay.[23]

Shipment over Connecting Carrier.—Through bills of lading impose on the railroad company, as carrier, the obligation to provide means of transportation for the goods shipped to their ultimate destination without delay, and it is no excuse for the nonperformance of this duty that it could not procure transportation by boat by reason of a previous accumulation of freight, of which it was advised when it received the goods for transportation.[24]

21. **During part of year.**—Thayer *v.* Burchard, 99 Mass. 508.

22. **At time contract of shipment made.**—Helliwell *v.* Grand Trunk Railway, 7 Fed. 68, 10 Biss. 170.

23. Helliwell *v.* Grand Trunk Railway, 7 Fed. 68, 10 Biss. 170.

24. **Shipment over connecting carrier.**—Bussey *v.* Memphis, etc., R. Co., 13 Fed. 330, 4 McCrary 405.

Defective Road Bed.—Results attributed to a defective roadbed and equipment do not excuse nonperformance of a carrier's duty to safely deliver a shipment at its destination within a reasonable time.[25]

Burning of Tunnel.—A railroad company is excused for delay in the delivery of goods caused by the burning of a tunnel on its line between the place of shipment and that to which the goods were consigned.[26]

§ 913. Where Carrier Could Have Avoided Delay.—Delay in transporting freight can not be excused by the fact that crews were taken from freight trains to handle an extraordinary amount of passenger traffic of which the carrier had previous warning and could have provided for.[27] A railroad company receiving goods to be carried by its own and connecting lines is not excused for a failure to transport to the end of its own line and deliver, or offer to deliver, to the next carrier, merely by the fact, which its agents knew, that there was a block of freight at a certain bridge, and the further fact that there was no room for the goods in the defendant company's depot at an intermediate point; especially where it is not clear that the general block of freight for the east at the bridge would have prevented the transportation of plaintiffs' goods.[28] The fact that the accumulation of cars and freight at the place of delivery was such that the company could not reach that point within a reasonable time would not exonerate the carrier, it being within the power of the company to have removed the obstruction. The interest or mere convenience of the carrier should not be allowed to stand in the way of his duty, in that respect. And, moreover, the carrier should provide in his contract for such a contingency, if he would limit his liability.[29]

§ 914. Notice to Shipper.—To relieve a carrier from liability for delay in delivery due to a congestion of traffic, the shipper must be notified of such condition before the shipment is received, in the absence of an express agreement of exemption.[30] A carrier failing to notify the shipper of probable delay in the shipment by reason of its having unexpectedly received more business than it can accommodate is bound to transport the goods within reasonable time notwithstanding the emergency.[31] Though a carrier, which has provided facilities for handling the traffic which may ordinarily be expected, need not provide in advance for an extraordinary amount of traffic, and may refuse to accept freight, yet, if it accepts freight without notifying the shipper of the congested condition of the traffic, it can not excuse delay in delivery because of such condition, so that, even if a carrier could take its freight crews for the purpose of handling an extraordinary passenger traffic, it was bound to notify shippers of freight of the crippled condition of its freight traffic by the diversion of freight crews, in order to excuse delay in transportation from such cause.[32]

Where Shipper Has Notice.—Where a carrier's failure to transport cotton with reasonable dispatch was caused by an excessive crop, it was not liable

25. Defective road bed.—Thompson *v.* Quincy, etc., R. Co., 136 Mo. App. 404, 117 S. W. 1193.

26. Burning of tunnel.—Railroad Co. *v.* O'Donnell, 49 O. St. 489, 32 N. E. 476, 34 Am. St. Rep. 579, 21 L. R. A., N. S., 117.

27. Where carrier could have avoided delay.—Daoust *v.* Chicago, etc., R. Co., 149 Iowa 650, 128 N. W. 1106.

28. McLaren *v.* Detroit, etc., R. Co., 23 Wis. 138.

29. Illinois Cent. R. Co. *v.* McClellan, 54 Ill. 58, 5 Am. Rep. 83.

30. Notice to shipper.—Missouri, etc., R. Co. *v.* Stark Grain Co., 103 Tex. 542, 131 S. W. 410.

31. Joynes *v.* Pennsylvania R. Co., 235 Pa. 232, 83 Atl. 1016, Ann. Cas. 1913D, 964; Texas, etc., R. Co. *v.* Kolp (Tex. Civ. App.), 88 S. W. 417; International, etc., R. Co. *v.* Anderson, 3 Tex. Civ. App. 8, 11, 21 S. W. 691; Gulf, etc., R. Co. *v.* McCorquodale, 71 Tex. 41, 48, 9 S. W. 80; Texas, etc., R. Co. *v.* Felker, 40 Tex. Civ. App. 604, 90 S. W. 530; International, etc., R. Co. *v.* Lewis (Tex. Civ. App.), 23 S. W. 323; Gulf, etc., R. Co. *v.* Hume, 6 Tex. Civ. App. 653, 24 S. W. 915, reversed in 87 Tex. 211.

32. Missouri, etc., R. Co. *v.* Stark Grain Co., 103 Tex. 542, 131 S. W. 410.

for the delay, where it took extraordinary steps to handle the cotton, and the shipper knew at the time it offered the cotton for shipment that, on account of the heavy traffic and large demand for cars, it could not be transported with the usual rapidity.[33]

Goods Delayed by Connecting Carrier.—Where, while goods received by the first carrier are in transit, the connecting line notifies it that it can not receive the goods and transport them to their destination because of a block in freight, this will not relieve the first carrier from liability for damages caused by the delay, where it fails to notify the shipper and give him an opportunity to dispose of the property or take measures for its preservation.[34]

Sufficiency of Notice.—Notice possessed by the public generally is not sufficient notice to a particular shipper.[35] In an action for delay in transporting wheat allegations that the delay was due to a congestion of traffic which was generally known, and that all contracts made with the carrier for shipment of grain on the lines where such conditions existed were made with reference to such conditions, and with full notice thereof by the shippers of their existence, does not show notice to a shipper whose grain was delayed.[36]

Notice after Acceptance.—Where goods shipped by a carrier are delayed by unusual and unprecedented floods, a mere failure to notify the consignor or consignee, is not of itself an act of negligence rendering the carrier liable for the consequences of such delay. Where there is no evidence that had such notice been given, the damages would have been avoided or lessened.[37]

§ 915. Delay Caused by Act of Consignor or Consignee.—The fact that a shipper was negligent in delaying the ordering of goods before he delivered them to a carrier for transportation, and had already sustained damages because of his delay, will not prevent him from recovering the damages, arising from the negligence of the carrier in delaying such transportation, which can be shown with reasonable certainty to have resulted therefrom.[38]

Refusal to Pay Freight.—A shipper can not recover from a carrier damages for delay in delivery of goods caused by his refusal to pay the freight charges.[39] But a carrier can not justify a delay in delivery from a failure to place a solid car shipment where it could be unloaded after its arrival on the

33. **Where shipper has notice.**—Yazoo, etc., R. Co. *v.* Blum, 89 Miss. 242, 42 So. 282, 11 Am. & Eng. Ann. Cas. 272.

A carrier's delay in the transportation of cotton was caused by an unprecedented cotton crop, for the transportation of which it could not provide necessary cars. It took unusual pains to handle the cotton as promptly as possible. The shipper knew the situation when the cotton was offered for transportation. Held, that the carrier was not liable for delay. Yazoo, etc., R. Co. *v.* McKay (Miss.), 44 So. 780.

34. **Goods delayed by connecting carrier.**—In re Petitions of Petersen, 21 Fed. 885.

35. **Sufficiency of notice.**—Missouri, etc., R. Co. *v.* Stark Grain Co., 103 Tex. 542, 131 S. W. 410.

36. Missouri, etc., R. Co. *v.* Stark Grain Co., 103 Tex. 542, 131 S. W. 410.

37. **Notice after acceptance.**—Norris *v.* Savannah, etc., R. Co., 23 Fla. 182, 1 So. 475, 11 Am. St. Rep. 355.

38. **Delay caused by act of consignor or consignee.**—A railroad company can not escape recovery of damages through its negligent delay in transporting cattle feed for plaintiff by showing that he had unreasonably delayed ordering such feed. Belcher *v.* Missouri, etc., R. Co., 92 Tex. 593, 598, 50 S. W. 559, reversing 47 S. W. 384.

In such case a charge which informed the jury, in effect, that if the plaintiff failed to use ordinary care to prevent the injury which might arise from the defendant's negligence, he could not recover from the railroad company for any damages sustained by him through its negligence, is error. Such a charge applies strictly the rule of contributory negligence to acts which occurred after the injury had been inflicted, whereas the rule stated is applicable only to those acts which concur in producing the injury. Beleher *v.* Missouri, etc., R. Co., 92 Tex. 593, 597, 50 S. W. 559, reversing 47 S. W. 384, 1020.

39. **Refusal to pay freight.**—Missouri Pac. R. Co. *v.* Weissman, 2 Tex. Civ. App. 86, 87, 21 S. W. 426.

ground that the consignee did not tender the freight, unless notice was given of the arrival of the car and a demand made for the freight.[40]

Refusal to Accept.—In an action to recover for loss occasioned by delay in the transportation of merchandise, it is no defense that the consignor did not appoint an agent to receive the goods at their destination, and inform defendants of the appointment, if the contract and usage of trade did not require it, and the delay was not due to the plaintiff's failure to appoint a receiving agent.[41]

Failure to Unload Cars.—Where a railway company refused to furnish cars for the transportation of grain to Cairo during the war, on account of the large accumulation of cars on its track at that point waiting to be unloaded, and finally furnished cars upon the promise of the shipper to unload the same, which was not done either by him or the consignee, but refused, it was held, in a suit against the company to recover damages for delay in transporting the grain, the jury were justified in finding for the defendant.[42]

Failure of Consignee to Present Bill of Lading.—A carrier delaying the delivery of freight may not excuse the delay on the ground that the bills of lading were not presented, where it did not decline to deliver because thereof.[43]

Where Bill of Lading Indorsed to Purchaser.—Though a consignor of goods shipped to his own order may divert them from their original destination, and generally this is not changed because they are shipped with directions to notify the proposed vendee, as between the parties that the right does not exist when the carrier has given a bill of lading for the goods, and it has been indorsed and forwarded with draft attached to the proposed vendee, and he has paid it and taken over the bill of lading, without notice, and because the goods would have reached their original destination in the ordinary course of shipment, and in the latter circumstances the proposed vendee may recover against the carrier or shipper damages suffered through a delay caused by diverting a shipment and replacing it.[44]

Burning of Tunnel.—In an action against a common carrier for the conversion of goods delivered to it for transportation, where defendant's justification for its failure to deliver the goods in due course of transit was that a tunnel on its line had been set on fire by plaintiff's associates, and with his knowledge, the court properly charged that, if the tunnel was rendered impassable, defendant was excused from making delivery until the obstruction ceased, or other means of effecting the delivery could reasonably be procured, and then further delay in making the delivery, on account of the tunnel, was not excused, unless the obstruction was caused in whole or in part by plaintiff.[45]

Delay Caused by Act of Third Person.—Where an owner of goods delivers them to a railroad company to be shipped to a designated point, and a bill of lading is issued to the owner, in which he is named as both shipper and consignee, and which contains the words, "notify" a third person, it is the duty of the railroad company, unless otherwise instructed by the owner, or by some holder of the bill of lading properly indorsed, to transport the goods, within a reasonable time, to the point of destination mentioned in the bill of lading. The company will not be relieved of liability to the owner for loss occasioned by a failure to comply with this obligation, by showing that the failure to deliver the

40. Georgia, etc., R. Co. *v.* Elliott, 3 Ga. App. 773, 60 S. E. 363.

41. **Refusal to accept.**—Salter *v.* Kirkbride, 4 N. J. L. 223.

42. **Failure to unload cars.**—Cobb, etc., Co. *v.* Illinois Cent. R. Co., 88 Ill. 394.

43. **Failure of consignee to present bill of lading.**—Hall Grain Co. *v.* Louisville, etc., R. Co., 148 Mo. App. 308, 128 S. W. 42.

44. **Where bill of lading indorsed to purchaser.**—Davidson Development Co. *v.* Southern R. Co., 147 N. C. 503, 61 S. E. 381.

45. **Burning of tunnel.**—Baltimore, etc., R. Co. *v.* O'Donnell, 49 O. St. 489, 32 N. E. 476, 21 L. R. A., N. S., 117, 34 Am. St. Rep. 579.

goods at the point of destination within a reasonable time was due to instructions not to deliver, given by the person whom it was directed in the bill of lading to notify of the arrival of the goods at their destination, who at the time of such instructions was not in possession of the bill of lading nor entitled to its possession. Such person could not acquire any title to the goods or right to control the shipment until he came into possession of the bill of lading properly indorsed by the consignor.[46]

§ 916. Delay Caused by Rule of Carrier.—A carrier is not excused for delay by a rule, to which the consignee had not consented and of which the consignor was ignorant, giving other cars a preference.[47]

§ 917. Delay Caused by Misdirection of Goods.—Where a carrier receives a shipment of goods not properly marked, it is liable for delay in delivery caused thereby.[48]

§ 918. Delay Caused by Strikes and Riots.—Not only storms and floods and other natural causes may excuse delay, but the conduct of men may also do so. An incendiary may burn down a bridge, a mob may tear up the tracks or disable the rolling stock or interpose irresistible force or overpowering intimidation, and the only duty resting upon the carrier, not otherwise in fault, is to use reasonable efforts and due diligence to overcome the obstacles thus interposed, and to forward the goods to their destination.[49]

Strikes of Employees.—For the delay resulting from the refusal of the employees of a carrier to do duty, the carrier is undoubtedly responsible.[50] Where the alleged excuse arises wholly out of the misconduct of the carrier's employees who wrongfully refuse to perform their duty, and thus deprive the

46. **Delay caused by act of third person.**—Florida Cent. R. Co. *v.* Berry, 116 Ga. 19, 42 S. E. 371.

The fact that a shipper who had shipped goods to himself as consignee with direction to notify a third person, insisted upon the payment of drafts drawn on such third person after notice that, in accordance with the directions of such third persons, the goods had been transported to a point other than the original place of destination, does not relieve the company from liability to the shipper for failure to transport the property within a reasonable time. Florida Cent. R. Co. *v.* Berry, 116 Ga. 19, 42 S. E. 371.

47. **Delay caused by rule of carrier.**—A carrier had an arrangement with an elevator company by which it turned into the elevator for storing and drying any grain that arrived in its yards. It was the rule of the railroad to turn into the elevator such cars in the order of their arrival in the yards. The elevator was not a party to prescribing this rule, nor had it agreed to be bound by it. A shipper who delivered corn to the carrier for delivery at the elevator for drying had no knowledge of this rule. The carrier was negligent in delaying the transportation of the corn, and in delivering the same after arrival to the elevator, so that the corn spoiled. Held, that the carrier was liable for the injuries sustained, because it was bound to deliver the corn in a reasonable time, and where the consignee called for the same within a reasonable time, notifying the carrier that the corn was shipped to be dried, and required immediate handling, the refusal to deliver because there were other car loads of grain that had precedence under its rule did not relieve it from liability. Hall Grain Co. *v.* Louisville, etc., R. Co., 148 Mo. App. 308, 128 S. W. 42.

48. **Delay caused by misdirection of goods.**—Gulf, etc., R. Co. *v.* Maetze, 2 Texas App. Civ. Cas., § 631.

49. **Delay caused by strikes and riots.**—Greismer *v.* Lake Shore, etc., R. Co., 102 N. Y. 563, 7 N. E. 828, 55 Am. Rep. 837.

50. **Strikes of employees.** — *United States.*—Sherman *v.* Pennsylvania R. Co., Fed. Cas. No. 12,769.

Georgia.—Central R., etc., Co. *v.* Georgia Fruit, etc., Exch., 91 Ga. 389, 17 S. E. 904.

Illinois.—Pittsburgh, etc., R. Co. *v.* Hazen, 84 Ill. 36, 25 Am. Rep. 422.

Indiana.—Pittsburgh, etc., R. Co. *v.* Hollowell, 65 Ind. 188, 32 Am. Rep. 63.

Missouri.—Read *v.* St. Louis, etc., R. Co., 60 Mo. 199.

New York.—Blackstock *v.* New York, etc., R. Co., 20 N. Y. 48, 75 Am. Dec. 372.

The defendant, as a common carrier, is liable for any interruption to the transit, caused by the refusal of its servants to perform their duty, which occasioned loss to the plaintiffs. Sherman *v.* Pennsylvania R. Co., Fed. Cas. No. 12,769.

carrier, for the time, of the ability to send forward the goods; the question is, whether the carrier's case can be separated from that of the employees, so that it can be held that though the latter are culpable, their employer, the carrier, is without fault and consequently not responsible to the shipper. This involves a consideration of the legal effect of the relations which exist between these several parties. In the first place, there is no privity between the shipper and the employees. The latter owe no duty to the former which the law can recognize. If they had committed a positive tort or trespass upon the property, the owner might pass by the employers and hold them responsible, but for a nonfeasance or simple neglect of duty, they are only answerable to their employees. The maxim in such cases is respondeat superior.[51]

Where Employees Have Quit Work.—But the carrier is not liable where the delay is caused by its late employees who have quit work and ceased to be employees.[52]

Where Other Servants Employed.—Where employees suddenly refuse to work, and are discharged, and delay results from the failure of the carrier to supply promptly their places, such delay is attributable to the misconduct of the employees in refusing to do their duty, and this misconduct in such cases is justly considered the proximate cause of the delay;[53] but when the places of the recusant employees are promptly supplied by other competent men, and the "strikers" then prevent the new employees from doing duty by lawless and irresistible violence, the delay resulting solely from this cause is not attribu-

51. Story on Agency, § 309. Blackstock *v.* New York, etc., R. Co., 20 N. Y. 48, 75 Am. Dec. 372, 373; Denny *v.* Manhattan Co. (N. Y.), 2 Denio 115; S. C. (N. Y.), 5 Denio 639.

"Those who intrust their goods to carriers have no means of ascertaining the character or disposition of their subordinate agents or servants; they have no agency in their selection, and no control over their actions." Blackstock *v.* New York, etc., R. Co., 20 N. Y. 48, 75 Am. Dec. 372, 374.

52. **Where employees have quit work.**—*Georgia.*—Haas *v.* Kansas, etc., R. Co., 81 Ga. 792, 7 S. E. 629.

Kentucky.—Louisville, etc., R. Co. *v.* Bell, 13 Ky. L. Rep. 393.

New York.—Greismer *v.* Lake Shore, etc., R. Co., 102 N. Y. 563, 7 N. E. 828, 55 Am. Rep. 837.

Texas.—International, etc., R. Co. *v.* Tisdale, 74 Tex. 8, 11 S. W. 900, 4 L. R. A., N. S., 545; Southern Pac. R. Co. *v.* Johnson, 4 Tex. App. Civ. Cas., § 45, 15 S. W. 121; Missouri Pac. R. Co. *v.* Levi, 4 Texas App. Civ. Cas., § 9, 14 S. W. 1062.

"For delay resulting solely from the lawless violence of men not in the employment of the company, the company is not responsible, even though the men whose violence caused the delay had, but a short time before, been employed by the company." Pittsburgh, etc., R. Co. *v.* Hazen, 84 Ill. 36, 25 Am. Rep. 422.

The case of Lake Shore, etc., R. Co. *v.* Bennett, 89 Ind. 457, 6 Am. & Eng. R. Cas. 391, decided by the supreme court of Indiana, affirms the rule asserted in Pittsburgh, etc., R. Co. *v.* Hollowell, 65 Ind. 188, 32 Am. Rep. 63, though the case was one under contract. Gulf, etc., R. Co. *v.* Levi, 76 Tex. 337, 13 S. W. 191, 8 L. R. A., N. S., 323, 326, 18 Am. St. Rep. 45.

Where delay in transportation of the goods is caused by the riotous acts of employees of the carrier who had struck and ceased to work, thereby terminating the relation of master and servant, the carrier is excused for delay caused thereby. Greismer *v.* Lake Shore, etc., R. Co., 102 N. Y. 563, 7 N. E. 828, 55 Am. Rep. 837.

53. **Failure to employ other servants.**—Redf. on Carriers, § 28; Edw. on Bailments, § 609. Pittsburgh, etc., R. Co. *v.* Hazen, 84 Ill. 36, 25 Am. Rep. 422; Conger *v.* Hudson River R. Co., 13 N. Y. Super. Ct. 375; Parsons *v.* Hard (N. Y.), 14 Wend. 215, 28 Am. Dec. 521; Blackstock *v.* New York, etc., R. Co., 20 N. Y. 48, 75 Am. Dec. 372; Condict *v.* Grand Trunk R. Co., 54 N. Y. 500.

"In the case of Greismer *v.* Lake Shore, etc., R. Co., 102 N. Y. 563, 7 N. E. 828, 55 Am. Rep. 837, the same ruling was made, and the case distinguished from Weed *v.* Panama R. Co., 17 N. Y. 362, 72 Am. Dec. 474, and Blackstock *v.* New York, etc., R. Co., 20 N. Y. 48, 75 Am. Dec. 372." Gulf, etc., R. Co. *v.* Levi, 76 Tex. 337, 13 S. W. 191, 8 L. R. A., N. S., 323, 18 Am. St. Rep. 45.

"It is a well-settled principle of law that a delay caused by a 'strike,' or a mob, composed solely of the employees of a railroad company, * * * will not excuse the company from receiving and carrying freight according to its contract or public duty." Pittsburgh, etc., R. Co. *v.* Hollowell, 65 Ind. 188, 32 Am. Rep. 63.

table to the misconduct of the employees, but arises from the misconduct of persons for whose acts the carrier is in no manner responsible.[54]

Delay Caused by Other Employees.—Whether a common carrier would or would not be excused for any delay in delivering goods resulting entirely from a strike by some of its employees, in which there was neither violence or lawlessness, yet where it affirmatively appears that the delay was caused in part by the disobedience and failure in the performance of their duties of other employees who did not engage in the strike, but were retained in the company's service, and the carrier not having shown that the injury resulted from the delay caused solely by the striking employees, it is liable for failing to deliver in what would usually be a reasonable time a carload of fruit which became worthless from inherent qualities because alone of detention en route beyond such reasonable time.[55]

Where There Is Violence or Intimidation.—Where a railroad company receives freight for shipment and its employees strike or cease to work for the company it is still bound to forward the freight within a reasonable time; but if the strike is accompanied with violence and intimidation, so as to render it unsafe to forward the freight, the company is thereby relieved from liability for delay, especially when the resistance made by the strikers is of such a character as could not be overcome by the company, or controlled by the civil authorities when called upon by it.[56] Where goods are actually transported and delivered by a carrier, it is not liable for loss resulting from mere delay caused by strikes of its employees accompanied by intimidation and violence[57]

54. A carrier can not be relieved of liability for damages caused by a delay in delivery owing to a strike where the delay in forwarding the freight is not caused by lawless violence on the part of its former servants or their sympathizers in preventing servants from carrying on the company's business, but arises through the carrier's inability to promptly secure new servants to take the place of the strikers. Central R., etc., Co. *v.* Georgia Fruit, etc., Exch., 91 Ga. 389, 17 S. E. 904.

Where other servants employed.—Lake Shore, etc., R. Co. *v.* Bennett, 89 Ind. 457, 6 Am. & Eng. R. Cas. 391.

Illinois.—Pittsburgh, etc., R. Co. *v.* Hazen, 84 Ill. 36, 25 Am. Rep. 422; I., etc., R. Co. *v.* Juntzen (Ill.), 10 Bradwell 295.

Indiana.—Pittsburgh, etc., R. Co. *v.* Hollowell, 65 Ind. 188, 32 Am. Rep. 63.

New York.—Greismer *v.* Lake Shore, etc., R. Co., 102 N. Y. 563, 7 N. E. 828, 55 Am. Rep. 837.

Texas.—Gulf, etc., R. Co. *v.* Levi, 76 Tex. 337, 13 S. W. 191, 8 L. R. A., N. S., 323, 18 Am. St. Rep. 45; International, etc., R. Co. *v.* Server, 3 Texas App. Civ. Cas., § 441.

Where delay is caused merely by the refusal of a carrier's employees to perform their duties as such, the carrier is liable therefor, but if the employees suddenly refused to work and are discharged from or abandoned their employment, and their places are promptly supplied by other competent men who are prevented from doing duty by strikers' use of lawless and irresistible violence, the carrier is not responsible for the delay caused solely by such violence, provided it has used reasonable efforts and diligence to suppress the interference. Missouri Pac. R. Co. *v.* Levi, 4 Texas App. Civ. Cas., § 9, 14 S. W. 1062.

55. Delay caused by other employees.—Central R., etc., Co. *v.* Georgia Fruit, etc., Exch., 91 Ga. 389, 17 S. E. 904.

56. Where there is violence or intimidation.—Haas *v.* Kansas, etc., R. Co., 81 Ga. 792, 7 S. E. 629.

57. International, etc., R. Co. *v.* Tisdale, 74 Tex. 8, 18, 11 S. W. 900, 4 L. R. A., N. S., 545; Missouri Pac. R. Co. *v.* Levi, 4 Texas App. Civ. Cas., § 9, 14 S. W. 1062; Southern Pac. R. Co. *v.* Johnson, 4 Texas App. Civ. Cas., § 45, 15 S. W. 121; International, etc., R. Co. *v.* Hynes, 3 Tex. Civ. App. 20, 21, 21 S. W. 622; Gulf, etc., R. Co. *v.* Levi, 76 Tex. 337, 13 S. W. 191, 8 L. R. A., N. S., 323, 18 Am. St. Rep. 45; Gulf, etc., R. Co. *v.* Gatewood, 79 Tex. 89, 95, 14 S. W. 913, 10 L. R. A., N. S., 419.

The carrier is not liable for loss resulting from delay in delivering freight, caused by a strike of its employees, accompanied by intimidation and violence which could not be prevented or suppressed by either the company or the civil authorities. Haas *v.* Kansas, etc., R. Co., 81 Ga. 792, 7 S. E. 629, 35 Am. & Eng. R. Cas. 572.

Notification to defendant from the superintendent of terminals at the destination of the shipment not to undertake to deliver to the terminals because of a strike of its employees, was admissible on the issue whether the defendant was negligent in detaining the shipment. Sterl-

which could not be prevented or suppressed by the carrier or the civil authorities, the delay being necessarily caused by unforeseen disaster which human prudence could not provide against or by accident not caused by the negligence of the carrier or by thieves or robbers or an uncontrollable mob.[58]

Failure to Exercise Reasonable Diligence.—A carrier is liable for injury by delay in transit where the delay is caused by interference of strikers in the movement of trains only when it fails to exercise reasonable diligence to expedite the shipment. Reasonable diligence, under the circumstances, is what the law requires.[59]

Failure to Suppress Strike.—A railroad company is liable for delay in transporting freight caused by a strike, where it delayed more than a month in calling on the civil authorities to suppress the strike.[60]

Where Strike Is Caused by Carrier.—"Though the delay occasioned by a mob or strike might be a sufficient defense, it would seem that it ought to be made to appear that the mob or strike existed without the fault of the defendant, and the facts should be stated so that the court may determine from them whether the mob or strike was such as occasioned an unavoidable delay." [61]

§ 919. Where Goods Are Perishable.—As to liability where preference given to perishable goods, see elsewhere.[62]

§§ 920-921. Delay under Time Contract—§ 920. In General.—When a party by his own contract creates a duty or charge upon himself, he is bound to make it good.[63] Therefore, where a carrier enters into an express contract to carry and deliver goods within a specified time, the carrier is bound to fulfill his contract, and is liable for delay regardless of the cause thereof.[64] No

ing *v.* St. Louis, etc., R. Co., 38 Tex. Civ. App. 451, 86 S. W. 655, affirmed in 101 Tex. 661, no op.

In an action against a common carrier for the conversion of goods delivered to it for transportation, defendant alleged that when the goods were received a "strike," amounting to an insurrection, existed at the place to which they were consigned, and that the goods, which consisted entirely of firearms and ammunition, were purchased and consigned to plaintiff to be used in aid of the insurrection, knowledge of which having come to defendant's officers, they deemed it improper to deliver the goods to plaintiff, and after consulting the governor of the state, and under his advice, caused them to be shipped out of the state and retained for several months. Held, that a charge that, if the jury found the facts to be as alleged by defendant, the latter was justified in withholding the goods from plaintiff, otherwise not, was as favorable as defendant could ask. Baltimore, etc., R. Co. *v.* O'Donnell, 49 O. St. 489, 32 N. E. 476, 21 L. R. A., N. S., 117, 34 Am. St. Rep. 579.

Under Texas Statute.—Under Rev. St., art. 277, which declares that the duties and liabilities of carriers in Texas shall be the same as at common law, except where otherwise provided, a common carrier is not liable for depreciation in the value of goods, resulting solely from inevitable delay in their transportation, caused by a mob of rioters. Gulf, etc., R. Co. *v.* Levi, 76 Tex. 337, 13 S. W. 191, 18 Am. St. Rep. 45, 8 L. R. A., N. S., 323, overruling 12 S. W. 677; Missouri Pac. R. Co. *v.* Levi, 4 Texas App. Civ. Cas., § 9, 14 S. W. 1062.

58. Gulf, etc., R. Co. *v.* Levi, 76 Tex. 337, 13 S. W. 191, 8 L. R. A., N. S., 323, 18 Am. St. Rep. 45.

59. Failure to exercise reasonable diligence.—Sterling *v.* St. Louis, etc., R. Co., 38 Tex. Civ. App. 451, 86 S. W. 655, affirmed in 101 Tex. 661, no op.

60. Failure to suppress strike.—International, etc., R. Co. *v.* Server, 3 Texas App. Civ. Cas., § 441.

61. Where strike is caused by carrier.—Railroad *v.* Bell, 13 Ky. L. Rep. 393.

62. Where goods are perishable.—See ante, "Perishable Goods," § 4.

63. Time contract.—Deming *v.* Grand Trunk R. Co., 48 N. H. 455, 2 Am. Rep. 267.

64. Deming *v.* Grand Trunk R. Co., 48 N. H. 455, 2 Am. Rep. 267; Harmony *v.* Bingham, 12 N. Y. 99, 62 Am. Dec. 142; Baldwin *v.* New York, etc., Co. (N. Y.), 3 Bosw. 545; Price *v.* Hartshorn, 44 N. Y. 94, 102, 4 Am. Rep. 645; Ward *v.* New York Cent. R. Co., 47 N. Y. 29, 33, 7 Am. Rep. 405; Texas, etc., R. Co. *v.* Nelson, 38 Tex. Civ. App. 605, 86 S. W. 616; Texas, etc., R. Co. *v.* Felker, 40 Tex. Civ. App. 604, 90 S. W. 530.

In Collier *v.* Swinney, 16 Mo. 484, the carrier was held not exempt from liability to deliver the goods within the time stipulated in an absolute contract, because of high water on the river by which the goods were to be transported.

If a carrier has agreed to carry goods to their destination and deliver them

temporary obstruction or even absolute impossibility will be a defense to an action for failure to comply with the engagement,[65] because he might have provided against it by his contract.[66]

What Constitutes Contract.—To make a time contract, there must be mutuality of obligation and express stipulation.[67] It has been held, that the making arrangements to run special fruit trains from fruit growing districts to market, and holding out public notice thereof, and of the time to be made by trains as to their arrival at market, is not regarded in law as creating a special contract between railroad corporations so holding out inducements and the shippers absolutely within the advertised time.[68] A stipulation in a bill of lading in regard to the manner in which goods were to be transported does not constitute a contract to deliver the goods within a particular time, and the carrier is not liable for delay where it undertook to carry the goods by water instead of by rail, and the transportation was delayed by obstructions by ice.[69]

Sufficiency of Contract.—Mere statements by the carrier's agent that the ordinary time of carriage is from ten to fifteen days are not sufficient to show a special parol contract, nor to overcome the effect of bills of lading or receipts as evidence of the real contract.[70] Statements by the commercial agent of a

within a prescribed time, it will be held to a strict performance of the contract. Gulf, etc., R. Co. *v.* Gatewood, 79 Tex. 89, 14 S. W. 913, 10 L. R. A., N. S., 419.

65. *New Hampshire.*—Deming *v.* Grand Trunk R. Co., 48 N. H. 455, 2 Am. Rep. 267.

Texas.—International, etc., R. Co. *v.* Wentworth, 8 Tex. Civ. App. 5, 27 S. W. 680; Gulf, etc., R. Co. *v.* Gatewood, 79 Tex. 89, 95, 14 S. W. 913, 10 L. R. A., N. S., 419.

66. International, etc., R. Co. *v.* Wentworth, 8 Tex. Civ. App. 5, 27 S. W. 680, affirmed in 87 Tex. 311.

67. What constitutes contract.—International, etc., R. Co. *v.* Wentworth, 8 Tex. Civ. App. 5, 11, 27 S. W. 680, affirmed in 87 Tex. 311.

In Pickford *v.* Grand Junction R. Co., 12 M. & W. (Eng. Exch.), 766, it appeared that defendant common carrier published a printed notice, which was posted over the door of their station for the reception of goods in Liverpool, that all goods received after 4 o'clock p. m. would be forwarded on the next working day. Long after the publication of this notice, certain goods were brought to the station about half-past five p. m., to be forwarded to Birmingham by railway. The person who brought them, a servant of the owner, saw the carrier's weigher, and asked if there was time for the goods to proceed that evening, and he said there was, and the goods were placed by the defendant's porters on the trucks on which goods are carried upon such railroad. The same servant had on former occasions taken goods of the same kind to such station at later hour, where they were never refused for being too late, and had been forwarded the same evening. It was held that upon these facts, there was evidence to go to the jury of a special contract by the defendant railroad to forward the goods on the same evening on which they were received.

68. International, etc., R. Co. *v.* Wentworth, 8 Tex. Civ. App. 5, 27 S. W. 680, affirmed in 87 Tex. 311.

69. The bills of lading contained the following conditions: "2. This merchandise may be carried in box cars, covered skeleton cars, or on open platform cars; if destined beyond Philadelphia, it may be transported by water, in vessels, boats, barges or lighters, and if so destined to any point beyond, the same may be intrusted or delivered in the cars of this company, or otherwise, to any other railroad or transportation company or agent." It fully appeared that the established route of the defendants below was by railroad to Philadelphia, and from thence by water to Boston. Is it true, the transportation company were not absolutely bound to this route beyond Philadelphia. They had the option to send the goods forward, either by water, in vessels, boats, barges or lighters, or by any railroad or transportation company, or agent. There was certainly nothing in this option to render it incumbent upon the carriers to send the goods by railroad whenever there was any obstruction of the communication by water. There was nothing in it which gave the plaintiff any right to suppose that the goods would be delivered in Boston without any unnecessary delay, and that if they could not be immediately sent on by water, they would be sent by rail. Obstructions by ice in the river are, in their nature, merely temporary, and of very uncertain duration. Empire Transp. Co. *v.* Wallace, 68 Pa. 302, 8 Am. Rep. 178.

70. Sufficiency of contract.—Strohn *v.* Detroit, etc., R. Co., 23 Wis. 126, 99 Am. Dec. 114.

A mere statement of a station agent, to one about to deliver goods for shipment over a railroad, that the goods

common carrier, duly authorized to solicit shipments of freight, that the time consumed in the transportation of certain live stock will be four days, and that there will be no delays, do not constitute an express contract on the part of the carrier to ship and deliver in that time.[71] Where the agents of a railroad company stated to an owner of perishable goods that the company had a schedule for one of its trains between certain points of a certain number of hours, and expected to maintain the schedule, and that everything possible would be done to maintain it, and such owner, acting on the belief induced by such statements that such train would reach destination in that time, made shipments of such goods, a special contract to transport the shipments in that time was not made by the carrier.[72]

Consideration for Contract.—A promise, without consideration, made by a carrier's agent to use his best efforts to deliver goods arriving at night, at a stated time, will not support an action for damages for failure to so deliver goods shipped several years afterwards from a station in another state, without any contract by the agent at that point to deliver other than in the ordinary course of business.[73]

Carrier Insurer.—When a railroad company, by its agent, agrees to deliver goods within a prescribed time, it does not become an absolute insurer of the goods, and need not deliver at all events or pay for the property. The parties are presumed to contract with reference to the responsibility which the common law imposes upon the carrier in ordinary cases, the carrier assuming the risk in respect to time. If the goods were destroyed by an act of God or the public enemy before the time for delivering them expired, this would excuse the carrier on the special contract.[74]

Where Penalty Stipulated.—A carrier, where perishable goods are injured by delay beyond the time stipulated by the fault of a connecting carrier, is liable for damages therefor notwithstanding there is a special stipulation for a penalty in case of delay beyond a prescribed time.[75] The carrier is liable both for the penalty and for damage to the goods from the delay.[76]

Shipment over Connecting Carrier.—A carrier contracting to deliver a shipment of freight at a place designated within a certain time is liable to the shipper for damages on its own or connecting lines.[77]

Effect of Acceptance of Goods.—Where there has been a delay in the transportation of goods causing a breach of the carrier's contract to deliver at a specified time, by reason of which loss ensues to the consignee, such consignee's right of action for the delay is not waived by a mere acceptance of the goods upon arrival at a later date than that specified in the contract.[78] Where a carrier agrees to deliver certain freight at a point in due time for its transportation to its final destination by a certain steamer and fails to comply with the agreement and the freight, after arriving too late for transhipment, was

should arrive at the proposed destination at a certain time, is not a contract to carry them within such time. Sauter *v.* Atchison, etc., R. Co., 78 Kan. 331, 97 Pac. 434.

71. Atlantic, etc., R. Co. *v.* Wells, 130 Ga. 55, 60 S. E. 170; International, etc., R. Co. *v.* Wentworth, 87 Tex. 311, 28 S. W. 277.

72. Atlantic, etc., R. Co. *v.* Wells, 130 Ga. 55, 60 S. E. 170.

73. **Consideration for contract.**—Lippmann *v.* Pennsylvania R. Co., 111 N. Y. S. 522, 127 App. Div. 187.

74. **Carrier insurer.**—Strohn *v.* Detroit, etc., R. Co., 23 Wis. 126, 99 Am. Dec. 114.

75. **Where penalty stipulated.**—Where a carrier agreed to transport fruit from New York to Milwaukee, within twelve days, but owing to a crowd of fruit on a connecting road there was a delay of twenty days, and the goods decayed, the carrier was held liable for the loss, although the contract stipulated that the carrier should pay five cents per hundred weight for every day beyond the twelve days. Place *v.* Union Exp. Co. (N. Y.), 2 Hilt. 19.

76. Place *v.* Union Exp. Co. (N. Y.), 2 Hilt. 19; Nudd *v.* Wells, 11 Wis. 407.

77. **Shipment over connecting carrier.**—Texas Cent. R. Co. *v.* Miller (Tex. Civ. App.), 88 S. W. 499.

78. **Effect of acceptance of goods.**—Norfolk, etc., R. Co. *v.* Shippers' Compress Co., 83 Va. 272, 2 S. E. 139.

shipped to another point with the consent of the shipper and there sold at a loss, the latter shipment and sale is for the benefit of the carrier and it is the carrier's duty to make good the loss.[79]

Act of God as Excuse.—Under an express contract for transportation and delivery by a certain time, the carrier is bound by his contract and is not excused for liability thereon by an inevitable accident.[80]

Liability for Loss.—The carrier assumes responsibility as to time; but the rule of liability for injury or loss is at common law.[81]

When Action Accrues.—Where there is a promise to transport to and deliver goods, within a reasonable time, an action does not accrue to the plaintiff, instantly on the promise being made, but only after the lapse of a reasonable time; and negligence complained of must occur at a time subsequent to the promise.[82]

§ 921. Power of Agent to Make Contract.—Authority to Vary General Notice.—A station agent who receives and forwards freight has power to bind the carrier that the goods shall be forwarded to a point beyond the carrier's terminus within a particular time, notwithstanding a general notice published that the carrier would not be liable beyond its own road.[83]

Authority of Agent from Holding Out.—Where a person is the only representative of a railroad company at a station and was placed there for the purpose of transporting its business, he is authorized to contract for the transportation of goods, and to bind the company on a contract to deliver within a certain time, if reasonable. By placing him in charge of its business at the station, and empowering him to contract for the shipment of the goods, the railroad company held him out as possessing authority to contract with reference to all necessary and ordinary details of the business.[84]

Statement Made by Agent.—In an action against a connecting carrier for damage to perishable goods caused by delay, the statement of the carrier's agent to whom the goods were delivered as to the time required for the freight to reach its destination, is admissible when such statement may have been the inducement of the contract.[85] Statements of the conductor of a railroad train as to the time for transportation and delivery of goods, made while engaged in the business of the railroad and while in control of the train, are admissible against a railroad in an action for damages from delay.[86] The railroad is not absolutely bound by such statements but the statements are admissible in evidence on the general principles of agency.[87]

Authority as to Perishable Goods.—It is of the highest importance to the shipper that a definite time should be fixed for the shipment of perishable goods: and unless the power of the agent is limited by some rule or instruction of the company, the authority conferred upon him to contract for the transportation of the property carries with it the power to make such agreement with reference to the time when it should be received and shipped as the necessities of the case demand.[88]

79. Skellie *v.* Central R., etc., Co., 81 Ga. 56, 6 S. E. 811.

80. **Act of God as excuse.**—Harmony *v.* Bingham, 12 N. Y. 99, 62 Am. Dec. 142.

81. **Liability for loss.**—International, etc., R. Co. *v.* Wentworth, 8 Tex. Civ. App. 5, 27 S. W. 680, affirmed in 87 Tex. 311.

82. **When action accrues.**—Barker & Co. *v.* Glascow (O.), Tapp. 198.

83. **Power of agent to make contract.**—Deming *v.* Grand Trunk R. Co., 48 N. H. 455, 2 Am. Rep. 267.

84. **Authority of agent from holding out.**—2 Redfield on Rys., 141. Wood *v.* Chicago, etc., R. Co., 68 Iowa 491, 27 N. W. 473, 56 Am. Rep. 861.

85. **Statement made by agent.**—Blodgett *v.* Abbot, 72 Wis. 516, 40 N. W. 491, 7 Am. St. Rep. 873.

86. Price *v.* Marsh, 1 Car. & P. 60; Baring *v.* Clark (Mass.), 19 Pick. 220; Sisson *v.* Cleveland, etc., R. Co., 14 Mich. 489, 90 Am. Dec. 252.

87. Sisson *v.* Cleveland, etc., R. Co., 14 Mich. 489, 90 Am. Dec. 252.

88. **Authority as to perishable goods.**—Wood *v.* Chicago, etc., R. Co., 68 Iowa 491, 27 N. W. 473, 56 Am. Rep. 861.

Authority of Agent at Another Station.—A railroad company is not liable under a contract for delivery of cars at a certain time, made by an agent at a different station from that to which the cars were to be delivered, although the agent at the latter station referred the shipper to the former station agent, where the former had no express authority.[89]

Authority of Agent of Another Carrier.—A statement of the agent of a connecting carrier as to the time the freight would arrive has the force of a contract, where the time is usual and reasonable.[90]

Authority of Agent as to Shipment over Connecting Carrier.—A station agent who receives and forwards freight has power to bind the carrier that the goods shall be forwarded to a point beyond the terminus of that road before a particular hour, notwithstanding a general notice published that the carrier would not be liable beyond its own road.[91]

Shipper's Knowledge of Want of Authority.—Where a shipper is chargeable with knowledge of the fact that the carrier's agent has no authority to contract for the delivery of the goods at their destination at a certain date, and the bill of lading contains no evidence of such an undertaking, no recovery can be had for failure to deliver by the date named.[92]

§ 922. Duty of Carrier after Excusing Cause Removed.—While accidents and obstructions will excuse delay, they do not put an end to the contract. As soon as the impediment to the transportation of the property is removed or can reasonably be overcome, the carrier must complete the contract without further delay.[93]

What Constitutes Due Diligence.—Verdict in an action against a carrier for damage to a carload of perishable fruit from a delay of two days, the train being sidetracked because of unprecedented rains, which overflowed and washed out the track, is properly directed for defendant, though plaintiff expresses the opinion that defendant had not sufficient cause for the delay, and though a light work train went over the road through the water a day earlier than the freight train was moved; the train dispatcher, who was not cross-examined, testifying that no train could go between the place where the train was sidetracked and the destination of the car, before the day it was moved,

89. **Authority of agent at another station.**—Voorhees *v.* Chicago, etc., R. Co., 71 Iowa 735, 30 N. W. 29, 60 Am. Rep. 823.

90. **Authority of agent of another carrier.**—Wood *v.* Chicago, etc., R. Co., 68 Iowa 491, 27 N. W. 473, 56 Am. Rep. 861; Blodgett *v.* Abbot, 72 Wis. 516, 40 N. W. 491, 7 Am. St. Rep. 873; Strohn *v.* Detroit, etc., R. Co., 23 Wis. 126, 99 Am. Dec. 114.

91. **Authority of agent as to shipment over connecting carrier.**—Story on Agency, § 443, 127. Wilson *v.* York, etc., Railway, 18 Eng. Law and Eq. 557; Backman *v.* Charlestown, 42 N. H. 125; Burnside *v.* Grand Trunk R. Co., 47 N. H. 554, 93 Am. Dec. 474; Deming *v.* Grand Trunk R. Co., 48 N. H. 455, 2 Am. Rep. 267.

92. **Shipper's knowledge of want of authority.**—Parks *v.* Gulf, etc., R. Co. (Tex. Civ. App.), 30 S. W. 708.

93. **After excusing cause removed.**—*Illinois.*—Lowe *v.* Moss, 12 Ill. 477, 479.

Mississippi.—Bennett *v.* Byram & Co., 38 Miss. 17, 75 Am. Dec. 90.

New York.—Spann *v.* Erie Boatman's Transp. Co., 11 Misc. Rep. 680, 33 N. Y. S. 566, 67 N. Y. St. Rep. 354; Bowman *v.* Teall (N. Y.), 23 Wend. 306, 35 Am. Dec. 562; Parsons *v.* Hardy (N. Y.), 14 Wend. 215, 28 Am. Dec. 521; Greismer *v.* Lake Shore, etc., R. Co., 102 N. Y. 563, 7 N. E. 828, 55 Am. Rep. 837.

Ohio.—Baltimore, etc., R. Co. *v.* O'Donnell, 49 O. St. 489, 32 N. E. 476, 34 Am. St. Rep. 579, 21 L. R. A., N. S., 117.

After the removal of the obstacle to transportation, the carrier is bound to proceed therewith. Parsons *v.* Hardy (N. Y.), 14 Wend. 215, 28 Am. Dec. 521.

The freezing up of a river may have been a sufficient excuse for the delay in the delivery of the goods at L., and the defendant may have been justified under the circumstances in storing them at H., but his obligation to deliver them at L., within a reasonable time after the resumption of navigation, still continued, unless the plaintiff had agreed to receive them at H., or in some other way released the defendant from his original undertaking. Lowe *v.* Moss, 12 Ill. 477, 479.

and that a locomotive was sent for and brought over the train as soon as it could be done, and that this was the first train run over this section after it was repaired.[94]

Where Goods Accepted by Consignee.—The carrier is relieved from all further responsibility after the removal of the obstacle to transportation by the acceptance of the goods by the consignee, and can collect pro rata freight.[95] Interference of the owner by giving directions as to the care of property, the transportation of which is interrupted by the closing of a river, is not in itself an acceptance of the property; it is merely evidence of acceptance, to be submitted to a jury with the other circumstances of the case.[96]

Acceptance of Part.—It may be that the common carrier, in such a case, would be entitled to the full price for the transportation of all the goods, notwithstanding the withdrawal of a part by the owner before they reached the end of the voyage, but it is clear that his liability for the goods remaining with him would continue the same as if none had been taken away.[97]

The burden of proof is upon the carrier to show that it exercised due care to transport the car within a reasonable time after the track was in proper condition, the question as to what is a reasonable time being one of fact for the jury.[98]

§ 923. Duty of Consignor and Consignee to Avert or Mitigate Injury.—A shipper having delivered goods to a carrier for transportation, has a right to rely upon the fulfillment of the contract in pursuance of which he acted until it is repudiated, or until he is notified that the carrier can not, or does not intend to, transport the goods within a reasonable time.[99] However, a shipper injured by the delay of a carrier to make shipment and delivery of goods must not remain supine and inactive, but must make reasonable exertions to avert the loss and prevent the damage to his property, and if he fail to do this, and the injury results by reason of his negligence, he can not recover.[1] But the fact that a consignee, after discovering the carrier's negligence in failing to transport the goods in a reasonable time, failed to use ordinary care to avoid the

94. **What constitutes due diligence.**—Burnham *v.* Alabama, etc., R. Co., 81 Miss. 46, 32 So. 912.

95. **Where goods accepted by consignee.**—Parsons *v.* Hardy (N. Y.), 14 Wend. 215, 28 Am. Dec. 521.

96. Bowman *v.* Teall (N. Y.), 23 Wend. 306, 35 Am. Dec. 562.

97. **Acceptance of part.**—"The fact that the plaintiff took from the place where they were stored, part of the goods which would justify hauling by land, released the defendant from all future liability in reference to the goods thus taken away, but it would not of itself relieve him from his obligation to deliver the balance of the goods according to his original contract. It would be a great hardship if a merchant who had a stock of goods detained upon one of our rivers, by ice or low water, within a few miles of his place of doing business, could not be permitted, at his own expense, to send for such articles as could be conveniently transported by land, without discharging the common carrier from all responsibility, in reference to the goods left with him." Lowe *v.* Moss, 12 Ill. 477, 479.

98. Burnham *v.* Alabama, etc., R. Co., 81 Miss. 46, 32 So. 912.

99. **Duty of consignor and consignee to avert or mitigate injury.**—Louisville, etc., R. Co. *v.* Sumner, 106 Ind. 55, 5 N. E. 404, 55 Am. Rep. 719; Louisville, etc., R. Co. *v.* Flannagan, 113 Ind. 488, 14 N. E. 370, 3 Am. St. Rep. 674, 680.

1. International, etc., R. Co. *v.* Ritchie (Tex. Civ. App.), 26 S. W. 840, 841; Houston, etc., R. Co. *v.* Smith, 63 Tex. 322, 323.

Where an express company has delayed in delivering samples of cotton, it was the owner's duty to use due care in mitigating injury done him by the express company, and the company would be relieved of liability to the extent of the price received for cotton. Wells Fargo Exp. Co. *v.* Samuels, 11 Tex. Civ. App. 15, 17, 31 S. W. 305.

"'It is the duty of the shipper to exercise reasonable diligence and care to minimize the injury to his shipment caused by delay.' 4 Elliott on Railroads, 1730. And he 'must not remain supine and inactive, but should make reasonable exertions to help himself, and thereby reduce his losses and diminish the responsibility of the party in default to him.' Vicksburg, etc., R. Co. *v.* Ragsdale, 46 Miss. 458." Chicago, etc., R. Co. *v.* Planters' Gin, etc., Co., 88 Ark. 77, 113 S. W. 352.

injury caused by such negligence, will not preclude him from recovering the damages actually caused to him by such negligence, which he could not, by ordinary diligence, have prevented.[2]

§ 924. Duty of Consignee to Accept Goods.—The failure to deliver the goods within a reasonable time by the carrier is only a breach of the contract of carriage, and the carrier is liable for the damages incurred by reason of the delay; but the consignee can not refuse to accept the goods on account of the unreasonable delay in the carriage, and sue for a conversion.[3] But the refusal of the consignee to accept the goods does not discharge the carrier from all liability for the goods. The carrier still owes a duty to the consignee for the care of the goods. It should store the goods in its depot, or in some warehouse where they would be reasonably safe and free from injury. It has no right to abandon the goods or to convert them to its own use.[4]

Effect of Acceptance.—Where there has been a delay in the transportation of goods causing a breach of the carrier's contract to deliver at a specified time, by reason of which loss ensues to the consignee, such consignee's right of action

2. In a suit against a railway for damage through delay in transportation of goods, a charge is not correct to the effect that if plaintiff's injury resulted from his own failure to use ordinary care to avoid injury from defendant's negligence, there can be no recovery. Belcher *v.* Missouri, etc., R. Co., 92 Tex. 593, 597, 50 S. W. 559, reversing 47 S. W. 384.

3. **Duty of consignee to accept goods.**—*Arkansas.*—Chicago, etc., R. Co. *v.* Pfeifer, 90 Ark. 524, 119 S. W. 642, 22 L. R. A., N. S., 1107; St. Louis, etc., R. Co. *v.* Mudford, 44 Ark. 439.

Illinois.—Louisville, etc., R. Co. *v.* Heilprin & Co., 95 Ill. App. 402.

Kentucky.—Chesapeake, etc., R. Co. *v.* Saulsberry, 126 Ky. 179, 31 Ky. L. Rep. 624, 103 S. W. 254, 12 L. R. A., N. S., 431.

New Hampshire.—Hackett *v.* Boston, etc., Railroad, 35 N. H. 390.

New York.—Briggs *v.* New York Cent. R. Co. (N. Y.), 28 Barb. 515; Baumann *v.* New York, etc., R. Co., 71 N. Y. S. 632, 35 Misc. Rep. 223; Scovill *v.* Griffith, 12 N. Y. 509.

South Carolina.—Nettles *v.* South Carolina R. Co., 7 Rich. L. 190, 62 Am. Dec. 409.

Where flour was shipped on February 12, 1906, and thereafter remained in the possession of a railroad company until July 1st, when it was found and tendered to plaintiff, plaintiff was bound to receive the flour when tendered notwithstanding the delay; the carrier's liability being to render compensation for damages growing out of the delay, and not for loss of the flour. Moody *v.* Southern Railway, 60 S. E. 711, 79 S. C. 297.

"In the case of Baumbach *v.* Gulf, etc., R. Co., 4 Tex. Civ. App. 650, 23 S. W. 693, the plaintiff had a car load of lumber on one of defendant's cars, which, by agreement, was to be delivered at a point about one mile distant, where plaintiff was building a house. The lumber was not delivered until about one and one-half months later, and the plaintiff, having, in the meanwhile, purchased other lumber, refused to receive same, and sued for the value of the lumber. In that case it was held that the plaintiff should have accepted the lumber, and held the defendant liable for all actual damages which he had sustained." Chicago, etc., R. Co. *v.* Pfeifer, 90 Ark. 524, 119 S. W. 642, 22 L. R. A., N. S., 1107.

Under statute imposing liability on carrier.—Though a carrier delays delivery of freight for four months, the consignee must accept it when tendered and rely on his right to recover for negligent delay, notwithstanding Act Feb. 23, 1903 (24 St. at Large, p. 81), making a carrier liable for loss of or damage to goods and a penalty for failure to adjust the claim therefor within a time limited. Bullock *v.* Charleston, etc., R. Co., 64 S. E. 234, 82 S. C. 375.

4. Chicago, etc., R. Co. *v.* Pfeifer, 90 Ark. 524, 119 S. W. 642, 22 L. R. A., N. S., 1107.

Where a shipper refuses to receive the goods transported because of delay in the transportation, and the refusal of the carrier to make any concession on account thereof, the carrier has no right to convert the freight to its own use or to dispose of it contrary to law. Chesapeake, etc., R. Co. *v.* Saulsberry, 126 Ky. 179, 31 Ky. L. Rep. 624, 103 S. W. 254, 12 L. R. A., N. S., 431.

"In the case of Bacharach *v.* Chester Freight Line, 133 Pa. 414, 19 Atl. 409, it was held that, although the consignee refused to accept the goods, yet, upon a renewal demand by the consignee, if the carrier failed or refused to deliver the goods, the consignee could sue for the conversion of the goods. Little Rock, etc., R. Co. *v.* Glidewell, 39 Ark. 487, 490." Chicago, etc., R. Co. *v.* Pfeifer, 90 Ark. 524, 119 S. W. 642, 22 L. R. A., N. S., 1107.

for the delay is not waived by a mere acceptance of the goods upon arrival at a later date than that specified in the contract.[5]

The burden of proof is on the carrier to prove the negligence by which the consignee enhanced the amount of the damage or failed to prevent the injury, as well as the extent to which such damages were enhanced, or to which they might have been lessened by the use of ordinary care on the part of the consignee.[6]

Question for Jury.—Whether or not the consignee exercised proper care to avoid injury is a question for the jury.[7]

§ 925. Delay Caused by Connecting Carrier.—See elsewhere.[8]

§§ 926-954. Damages—§ 926. In General.—A carrier is liable for damages resulting from delay in the transportation and delivery of goods if he fails to transport and deliver them within a reasonable time.[9]

As for Breach of Contract.—Damages arising from merely negligent delay in transportation of freight by a common carrier are generally and correctly treated as arising ex contractu. The rule for their admeasurement is well established in our jurisprudence, and can not be modified, and the damage recoverable largely increased, by the simple expedient of changing the form of the action. Especially must this be true in a jurisdiction that pays but little attention to the forms of pleadings, but looks to the substance of the cause.[10] A carrier's failure to carry and deliver within a reasonable time is a breach of contract and not a conversion so that the owner can not refuse to receive them and recover their value.[11]

§ 927. Arising Proximately from Delay.—That the measure of damages for delay in the delivery of goods by a carrier is the difference between their value when actually delivered and what they would have been worth upon seasonable delivery, is the usual, but not the universal, rule. In addition to this difference in market value, the carrier will be liable also for such other and incidental damages as naturally and proximately flow from the delay,[12] and for such as reasonably might have been expected to be within the contemplation of the parties when the contract of carriage was entered into as the probable result of a breach of it.[13] The carrier is liable for such damages as are the

5. **Effect of acceptance.**—Norfolk, etc., R. Co. *v.* Shippers' Compress Co., 83 Va. 272, 2 S. E. 139.

6. Judgment (Civ. App. 1898), 47 S. W. 384, 1020, reversed. Belcher *v.* Missouri, etc., R. Co., 50 S. W. 559, 92 Tex. 593.

7. **Question for jury.**—Belcher *v.* Missouri, etc., R. Co., 92 Tex. 593, 597, 50 S. W. 559, reversing 47 S. W. 384.

8. **Delay caused by connecting carrier.**—See post, "Connecting Carriers," Part V.

9. **Damages.**—International, etc., R. Co. *v.* Server, 3 Texas App. Civ. Cas., § 441; Galveston, etc., R. Co. *v.* Silegman (Tex. Civ. App.), 23 S. W. 298; San Antonio, etc., R. Co. *v.* Josey (Tex. Civ. App.), 71 S. W. 606.

In an action against a carrier for the nondelivery of goods, defendant proved that, after the lapse of some months, the goods were found at the shipping point, and there offered to plaintiff, who refused to take them. It was shown that some of the goods were damaged. Plaintiff proved the value of the goods when shipped. Held, that plaintiff was entitled to some damages. Anderson *v.* Louisville, etc., R. Co. (Miss.), 15 So. 795.

10. **As for breach of contract.**—American Exp. Co. *v.* Jennings, 86 Miss. 329, 38 So. 374, 109 Am. St. Rep. 708.

11. Galveston, etc., R. Co. *v.* Watson, 1 Texas App. Civ. Cas., § 813.

12. **Arising proximately from delay.**—3 Hutchinson, Carr. 3d Ed., § 1366. Clute *v.* Chicago, etc., R. Co. (Kan.), 111 Pac. 431, 30 L. R. A., N. S., 1071.

13. *England.* — Hadley *v.* Baxendale (Eng.), 9 Ex. 341; Hale on Carriers, 408; Sedgw. Meas. Dam. (6th Ed.) 79; Sedgw. Meas. Dam. (6th Ed.) note 81, Field on Dam., § 375; Gee *v.* Lancashire, etc., R. Co. (Eng.), 6 Hurl. & N. 211.

United States.—The Caledonia, 157 U. S. 124, 39 L. Ed. 644, 15 S. Ct. 537.

Arkansas.—Murrell *v.* Pacific Exp. Co., 54 Ark. 22, 14 S. W. 1098, 26 Am. St. Rep. 17.

Florida.—Brock *v.* Gale, 14 Fla. 523, 14 Am. Rep. 356.

Georgia. — Savannah, etc., R. Co. *v.* Pritchard, 77 Ga. 412, 1 S. E. 261, 4 Am.

natural result of the delay, and for such as reasonably might have been expected to be within the contemplation of the parties when the contract of carriage was entered into as a probable result of a breach of it.[14] While the carrier is prima facie only liable for the natural and ordinary consequences of the breach of contract by delay; but where, at the time of entering into the contract, both parties knew and contemplated that if such breach is committed some injury will occur in addition to the natural and ordinary consequences of the breach, the carrier will be liable to give compensation or damages on the occurrence of the injury.[15] It is not necessary always that those facts should be mentioned in the negotiations, or in express terms made a part of the contract, but when they are known to the carrier under such circumstances, or they are of such a character that the parties may be fairly supposed to have them in contemplation in making the contract, such special facts become relevant in determining the question of damages.[16]

Certainty as to Cause of Damage.—The damages must be certain both in their nature and respect to the cause from which they proceed.[17]

Injury to Perishable Goods from Loss of Ice.—A carrier of perishable freight, guilty of negligent delay in the transportation thereof, resulting in a loss of ice necessary to retain the proper temperature to preserve the freight, is liable for the damages attributable to an insufficient quantity of ice.[18]

Interest on Debt to Be Satisfied by Goods.—The fact that a consignee of

St. Rep. 92; Cooper *v.* Young, 22 Ga. 269, 68 Am. Dec. 502.

Kansas.—Johnson *v.* Mathews, 5 Kan. 118.

Massachusetts.—Fox *v.* Boston, etc., R. Co., 148 Mass. 220, 19 N. E. 222, 1 L. R. A., N. S., 702; Swift River Co. *v.* Fitchburg R. Co., 169 Mass. 326, 47 N. E. 1015, 61 Am. St. Rep. 288; Harvey *v.* Connecticut, etc., R. Co., 124 Mass. 421, 26 Am. Rep. 673; Derry *v.* Flitner, 118 Mass. 131; Cutting *v.* Grand Trunk R. Co. (Mass.), 13 Allen 381; Goddard *v.* Barnard (Mass.), 16 Gray 205; Waite *v.* Gilbert (Mass.), 10 Cush. 177; Ingledew *v.* Northern Railroad (Mass.), 7 Gray 86; Scott *v.* Boston Steamship Co., 106 Mass. 468.

Michigan.—Sisson *v.* Cleveland, etc., R. Co., 14 Mich. 489, 90 Am. Dec. 252.

New Jersey.—Higgins *v.* United States Exp. Co., 83 N. J. L. 398, 85 Atl. 450.

New York.—Scovill *v.* Griffith, 12 N. Y. 50; Ward *v.* New York Cent. R. Co., 47 N. Y. 29, 7 Am. Rep. 405; Griffin *v.* Colver, 16 N. Y. 489, 69 Am. Dec. 718

North Carolina.—Harper Furniture Co. *v.* Southern Exp. Co., 148 N. C. 87, 62 S. E. 145, 30 L. R. A., N. S., 483, 128 Am. St. Rep. 588.

Ohio.—Devereaux *v.* Buckley, 34 O. St. 16, 32 Am. Rep. 342.

Texas.—Gulf, etc., R. Co. *v.* McCorquodale, 71 Tex. 41, 9 S. W. 80; Gulf, etc., R. Co. *v.* Pickens (Tex. Civ. App.), 58 S. W. 156, 157; Haberzettle *v.* Trinity, etc., R. Co., 46 Tex. Civ. App. 527, 103 S. W. 219; International, etc., R. Co. *v.* Tisdale, 74 Tex. 8, 11 S. W. 900, 4 L. R. A., N. S., 545; Jones *v.* George, 61 Tex. 345, 48 Am. Rep. 280; Pacific Exp. Co. *v.* Darnell Bros., 62 Tex. 639. See example: Wells Fargo & Co. *v.* Battle, 5 Tex. Civ. App. 532, 24 S. W. 353.

When a common carrier is guilty of unreasonable delay in the performance of his contract, he becomes liable for all the actual and legitimate damages resulting from such unnecessary delay. But he is not liable for hypothetical or chimerical damages. Gerhard *v.* Neese, 36 Tex. 635.

For an inordinate and unnecessary delay in the carriage of goods, the consignor is entitled to recover the loss directly and proximately resulting from the delay. Higgins *v.* United States Exp. Co., 83 N. J. L. 398, 85 Atl. 450.

Consequential damages are only recoverable from a carrier for delay in the delivery of goods when they are the natural and probable consequences of the carrier's default. Davidson Development Co. *v.* Southern R. Co., 147 N. C. 503, 61 S. E. 381.

14. Within contemplation of parties.—Haberzettle *v.* Trinity, etc., R. Co., 46 Tex. Civ. App. 527, 103 S. W. 219.

15. Harper Furniture Co. *v.* Southern Exp. Co., 148 N. C. 87, 62 S. E. 145, 30 L. R. A., N. S., 483, 128 Am. St. Rep. 588, citing Hydraulic Engineering Co. *v.* McHaffie, 4 Q. B. Div. 670.

16. Harper Furniture Co. *v.* Southern Exp. Co., 148 N. C. 87, 62 S. E. 145, 30 L. R. A., N. S., 483, 128 Am. St. Rep. 588.

17. Certainty as to cause of damage.—1 Sutherland on Damages, 71. Savannah, etc., R. Co. *v.* Pritchard, 77 Ga. 412, 1 S. E. 261, 4 Am. St. Rep. 92.

18. Injury to perishable goods from loss of ice.—St. Louis, etc., R. Co. *v.* White (Tex. Civ. App.), 103 S. W. 673, affirmed in 102 Tex. 591, no op.

goods was paying interest on a debt which he depended on the goods to satisfy is not an element of damages in an action against the carrier for a delay in delivering them.[19]

Where Goods Intended for Feed for Cattle.—Where a carrier delays the shipment of goods intended to be fed to cattle, of which the carrier had notice, and injury resulting to the cattle by reason of the delay and the inability of the shipper to get other feed, the carrier is liable to the shipper for the resulting injury to the cattle.[20]

Loss of Profits by Delay in Shipment of Machinery.—A claim for loss of profits by being compelled to stop an electric plant because a shaft used therein was broken en route and returned to the repair shop by the express company to be repaired before it was forwarded to the plant was based upon the owner's being deprived of the use of the shaft, and whether the delay was caused by injury to the shaft or by other reasons was immaterial.[21]

Arising from Act of Shipper.—Where a funeral was voluntarily postponed by the plaintiff, the carrier causing delay in the arrival of the corpse is not liable for the expense of re-embalming the body, necessitated by postponement of the funeral, the corpse having arrived one hour before the time set for the funeral.[22]

Arising from Condition of Goods When Accepted.—Plaintiffs brought suit to recover the value of corn shipped by them over defendant's road, and alleged to have been rendered worthless by delay in transportation. Plaintiffs had control of the loading of the car in which the corn was shipped, and they loaded the corn in the car themselves, while it was wet, and in a condition to be damaged by being bulked in the car. Held, that defendant was not responsible for damages occasioned thereby, notwithstanding the fact of a delay in the transportation thereof.[23]

Arising from Failure of Shipper to Accept.—Where a car load of potatoes is damaged by delay in transportation, and is further damaged by the consignee's delay in unloading the car, the consignee can not recover for the cost of labor and sacks for resacking the potatoes, made necessary by the condition of the potatoes when the consignee unloaded the car, but is only entitled to the cost of the labor and sacks made necessary by the condition of the potatoes at the time he might have taken possession of them.[24]

Right to Inspect.—Where the contract between a buyer and seller that the buyer should have the right to inspect the goods before acceptance was communicated to the carrier, and it refused to allow inspection, which resulted in a refusal to accept, and plaintiff allowed the consignee to handle the goods on consignment, thereby realizing a sum less than the contract price, the carrier was liable for the difference between the sum received and the contract price.[25]

Acceptance on Sunday.—A carrier having refused the consignee the right to inspect the goods until too late to inspect and unload them on Saturday, the carrier is liable for damages to the time the goods were taken in charge by the consignee on Monday morning; the consignee not being bound to unload on Sunday to lessen the damage.[26]

19. Interest on debt to be satisfied by goods.—Houston, etc., R. Co. *v.* Jackson, 62 Tex. 209.

20. Where goods intended for feed for cattle.—Bourland *v.* Choctaw, etc., R. Co., 99 Tex. 407, 90 S. W. 483, 3 L. R. A., N. S., 1111, 122 Am. St. Rep. 647.

21. Loss of profits by delay in shipment of machinery.—Stone *v.* Adams Exp. Co. (Ky.), 122 S. W. 200.

22. Arising from act of shipper.—Alabama City, etc., R. Co. *v.* Brady, 160 Ala. 615, 49 So. 351.

23. Arising from condition of goods when accepted.—Galveston, etc., R. Co. *v.* Smith, 2 Texas App. Civ. Cas., § 138.

24. Arising from failure of shipper to accept.—Gulf, etc., R. Co. *v.* Chinski, 53 Tex. Civ. App. 21, 114 S. W. 851.

25. Right to inspect.—Missouri, etc., R. Co. *v.* Hopkins, 52 Tex. Civ. App. 166, 113 S. W. 306.

26. Acceptance on Sunday.—Missouri, etc., R. Co. *v.* Hopkins, 52 Tex. Civ. App. 166, 113 S. W. 306.

§ 928. Arising at Time of Delivery.—Where a car load of potatoes is damaged by delay in transportation, and after its arrival the consignee neglected to remove the potatoes for several days, which resulted in further damages to the potatoes, the carrier will only be liable for the damages which had accrued at the time of delivery of the car upon its arrival.[27]

§ 929. Nominal Damages.—For unreasonable delay in the transportation of goods the shipper is entitled to recover only nominal damages, when no actual damages are proved.[28] The delay of an express company in delivering goods, when not attached with any actual damage to the shipper, renders the company liable only for nominal damages. The rule that a new trial will be granted to enable a recovery of such damages does not necessarily obtain where the cause of action is such a breach of contract or in the nature of a breach of contract.[29]

§ 930. Stipulated Damages.—The parties may determine the measure of damages by contract. In such case the decrease in the market value does not constitute the measure of damages.[30]

Necessity for Consideration.—A stipulation in a bill of lading that, in case of loss of the goods shipped, the measure of damages shall be their value at the point of shipment, instead of at their destination, is void, in the absence of consideration therefor.[31]

Stipulation for Valuation of Goods at Time of Shipment.—Where bills of lading provide that the amount of any damage for which the carrier should become liable should be computed at the value of the goods shipped at the time and place of shipment, it is error, in an action by the shipper for delay in delivering the goods, to charge that the damages should be estimated according to the price of the goods at the place of delivery.[32] But a provision in a bill of lading that, in case of loss of the property, its value or cost at place of shipment shall govern the settlement does not cover the owner's damages from delay in transportation.[33]

§§ 931-939. Special Damages—§ 931. In General.—The law, as it is to be found in the reported cases, has fluctuated; but the principle is now settled

27. **Arising at time of delivery.**—Gulf, etc., R. Co. *v.* Chinski, 53 Tex. Civ. App. 21, 114 S. W. 851.

28. **Nominal damages.**—Aultman Engine, etc., Co. *v.* Chicago, etc., R. Co., 143 Iowa 561, 121 N. W. 22; Clark *v.* American Exp. Co., 130 Iowa 254, 106 N. W. 642.

Where, in an action for damages for delay in shipping freight, defendant's breach of the contract of shipment by undue delay was not denied, plaintiff was at least entitled to nominal damages, so that a motion for nonsuit was properly denied. Story Lumber Co. *v.* Southern R. Co., 151 N. C. 23, 65 S. E. 460.

29. Eiswald *v.* Southern Exp. Co., 60 Ga. 496.

30. **Stipulated damages.**—Devereaux *v.* Buckley, 34 O. St. 16, 32 Am. Rep. 342.

31. **Necessity for consideration.**—St. Louis, etc., R. Co. *v.* Coolidge, 73 Ark. 112, 83 S. W. 333, 108 Am. St. Rep. 21, 67 L. R. A., N. S., 555, 3 Am. & Eng. Ann. Cas. 582.

32. **Stipulation for valuation of goods at time of shipment.**—Southern R. Co. *v.* Cofer, 149 Ala. 565, 43 So. 102.

A contract fixing the liability for loss at the value at place of shipment is held to be reasonable and valid. Matheson *v.* Southern Railway, 79 S. C. 155, 60 S. E. 437, 438, citing Live Stock Co. *v.* Kansas, etc., R. Co., 100 Mo. App. 674, 75 S. W. 782; Southern Pac. Co. *v.* Phillipson (Tex. Civ. App.), 39 S. W. 958.

33. Morrow *v.* Missouri Pac. R. Co. (Mo. App.), 123 S. W. 1034.

But the measure of damages for a carrier's negligent delay in transporting property is the difference between the market value of the property at the point of destination, in the condition in which it would have been received had it been delivered in a reasonable time, and its market value at that point in the condition which it was in at the time of its arrival, notwithstanding the stipulation in the bill of lading that in the event of loss of property the value of the same at the point of shipment should govern, the stipulation referring to property lost in transit and not to property damaged. Hardin Grain Co. *v.* Missouri Pac. R. Co., 96 S. W. 681, 120 Mo. App. 203.

that whenever either the object of the sender is specially brought to the notice of the carrier, or circumstances are known to the carrier from which the object ought in reason to be inferred, so that the object may be taken to have been within the contemplation of both parties, damages may be recovered for the natural consequences of the failure of that object.[34] For delay of a carrier in delivering freight, there may be recovered not only such damages as normally result therefrom, but such as result from special circumstances known to the carrier at the time of the contract.[35] More than nominal damages can be recovered for breach of a contract of shipment by unreasonable delay when the special purpose or use of the article shipped is expressly made a part of the contract or of the negotiations, or where it is of such a character that the parties may fairly be supposed to have contemplated such special purpose or present use when making the contract.[36]

Where Statute Prevents Restricting Liability.—Special damages may be allowed against a railroad in a state whose laws deprived the carrier of the privilege of declining to receive the shipment, of limiting its liability, or of charging extra compensation for the extra liability.[37]

Damages Not Certain in Amount.—Where notice of the special consequences of delay in delivery is given, and forms the basis of the contract of carriage, the carrier is liable for special damages for delay, though their amount can not be estimated at the time.[38]

Goods Shipped to Fill Penalty Contract.—For negligent delay in delivery of goods, the carrier, who has been requested to ship promptly and notified that the goods were designed to fill a penalty contract, is liable for such special damages as the shipper may reasonably incur by reason of his failure, occa-

34. **Special damages.**—Harper Furniture Co. *v.* Southern Exp. Co., 148 N. C. 87, 62 S. E. 145, 30 L. R. A., N. S., 483, 128 Am. St. Rep. 588.

35. *United States.*—Central Trust Co. *v.* Savannah, etc., R. Co., 69 Fed. 683.

Arkansas.—Chicago, etc., R. Co. *v.* Planters' Gin, etc., Co., 88 Ark. 77, 113 S. W. 352.

Iowa.—Elzy *v.* Adams Exp. Co., 141 Iowa 407, 119 N. W. 705; Cowan *v.* Western Union Tel. Co., 122 Iowa 379, 98 N. W. 281, 101 Am. St. Rep. 268, 64 L. R. A., N. S., 545.

Kansas.—Missouri Pac. R. Co. *v.* Peru-VanZandt Imp. Co., 73 Kan. 295, 85 Pac. 408, 87 Pac. 80, 6 L. R. A., N. S., 1058, 117 Am. St. Rep. 468, 9 Am. & Eng. Ann. Cas. 790.

Kentucky.—Louisville, etc., R. Co. *v.* Mink, 126 Ky. 337, 103 S. W. 294, 31 Ky. L. Rep. 833; Stone *v.* Adams Exp. Co. (Ky.), 122 S. W. 200.

Massachusetts.—Weston *v.* Boston, etc., Railroad, 190 Mass. 298, 76 N. E. 1050, 112 Am. St. Rep. 330, 4 L. R. A., N. S., 569, 5 Am. & Eng. Ann. Cas. 825.

North Carolina.—Rocky Mt. Mills *v.* Wilmington, etc., R. Co., 119 N. C. 693, 25 S. E. 854, 56 Am. St. Rep. 682.

The defendant, at the time of shipping, having had notice of the existing facts out of which special damages would naturally accrue to the plaintiffs by a negligent delay in the delivery, ought to be held liable for such special damages which naturally and proximately resulted from such delay. The rule seems to be well established concerning the liability of the defendant under such circumstances. Morrow *v.* Missouri Pac. R. Co. (Mo. App.), 123 S. W. 1034.

36. Story Lumber Co. *v.* Southern R. Co., 151 N. C. 23, 65 S. E. 460.

37. **Where statute prevents restricting liability.**—The carrier is so held liable because: (1) By the very nature of its business it invites the passage over its line, at the rates fixed by the commission, of the usual commerce of the country, some of which it must know will be tendered to it with notice of such special conditions, and such invitation and tender constitute a contract with reference to such conditions; (2) it must be assumed that the rates fixed by the commission include extra compensation for this class of risks as one of the ordinary and fixed charges of operation, and that therefore the shippers generally have paid for this measure of indemnity; and (3) the carrier has the opportunity to make immediate preparation to guard against the breach. Missouri, etc., R. Co. *v.* Belcher, 89 Tex. 428, 430, 35 S. W. 6.

38. **Damages not certain in amount.**—Gledhill Wall Paper Co. *v.* Baltimore, etc., R. Co., 119 N. Y. S. 623.

sioned by such delay of the carrier, to perform his contract within the stipulated time.[39]

§ 932. Within Contemplation of Parties.—The consignee in an action against a carrier for delay in delivering goods can not recover special damages not within the contemplation of the parties at the time of the execution of the contract of shipment.[40] Where the special circumstances under which a contract of shipment was made were not communicated to the carrier, the measure of damages for the breach of the contract is the amount of injury which would generally arise from such breach.[41] Where the special circumstances are known or have been communicated to the carrier who breaks his contract by delay, and where the damages complained of flow naturally from the breach of contract under the special circumstances, such special damages may be supposed to have been contemplated by the parties and are recoverable.[42]

§§ 933-938. Notice of Special Circumstances—§ 933. Necessity of Notice.—If a shipper would charge the carrier with any special damages, he must have communicated all the facts not ordinarily attending the carriage, or the peculiar character and value of the property.[43] Special damages can not be recovered for delay of a carrier in shipping goods, unless notice of the circumstances by reason of which special damages would result from delay was given the carrier at the time of shipment.[44] Unless a carrier has been notified

39. Goods shipped to fill penalty contract.—Illinois Cent. R. Co. *v.* Southern Seating, etc., Co., 104 Tenn. 568, 58 S. W. 303, 50 L. R. A., N. S., 720, 78 Am. St. Rep. 933.

40. Special damages.—Ligon *v.* Missouri Pac. R. Co., 3 Texas App. Civ. Cas., § 1.

41. Pacific Exp. Co. *v.* Darnell Bros., 62 Tex. 639, 641.

42. Hadley *v.* Baxendale (Eng.), 9 Exch. 341; Harper Furniture Co. *v.* Southern Exp. Co., 148 N. C. 87, 62 S. E. 145, 30 L. R. A., N. S., 483, 128 Am. St. Rep. 588; Story Lumber Co. *v.* Southern R. Co., 151 N. C. 23, 65 S. E. 460.

43. Notice of special circumstances.—Williams *v.* Atlantic, etc., R. Co., 56 Fla. 735, 48 So. 209, 24 L. R. A., N. S., 134.

44. *Arkansas.*—St. Louis, etc., R. Co. *v.* Mudford, 48 Ark. 502, 3 S. W. 814; Murrell *v.* Pacific Exp. Co., 54 Ark. 22, 24, 14 S. W. 1098, 26 Am. St. Rep. 17; Hooks Smelting Co. *v.* Planters' Compress Co., 72 Ark. 275, 79 S. W. 1052; Crutcher *v.* Choctaw, etc., R. Co., 74 Ark. 358, 85 S. W. 770; Pine Bluff Iron Works *v.* Boling & Bro., 75 Ark. 469, 88 S. W. 306; Long *v.* Abeles & Co., 77 Ark. 150, 91 S. W. 29; Chicago, etc., R. Co. *v.* Newhouse Mill, etc., Co., 90 Ark. 452, 119 S. W. 646; Chicago, etc., R. Co. *v.* Planters' Gin, etc., Co., 88 Ark. 77, 113 S. W. 352.

Georgia.—Savannah, etc., R. Co. *v.* Pritchard, 77 Ga. 412, 1 S. E. 261, 4 Am. St. Rep. 92.

Kentucky.—Stone *v.* Adams Exp. Co. (Ky.), 122 S. W. 200; Illinois Cent. R. Co. *v.* Nelson, 97 S. W. 757, 30 Ky. L. Rep. 114; Illinois Cent. R. Co. *v.* Hopkinsville Canning Co., 132 Ky. 578, 116 S. W. 758.

Massachusetts.—Swift River Co. *v.* Fitchburg R. Co., 169 Mass. 326, 47 N. E. 1015, 61 Am. St. Rep. 288.

Michigan.—McKinnon *v.* McEwan, 48 Mich. 106, 11 N. W. 828, 42 Am. Rep. 458.

Missouri.—Morrow *v.* Missouri Pac. R. Co. (Mo. App.), 123 S. W. 1034.

North Carolina.—Harper Furniture Co. *v.* Southern Exp. Co., 148 N. C. 87, 62 S. E. 145, 30 L. R. A., N. S., 483, 128 Am. St. Rep. 588; Asheboro, etc., Mfg. Co. *v.* Southern R. Co., 149 N. C. 261, 62 S. E. 1091; Lewark *v.* Norfolk, etc., R. Co., 137 N. C. 383, 40 S. E. 882; Sharpe *v.* Southern R. Co., 130 N. C. 613, 41 S. E. 799; Neal *v.* Pender-Heyman Hardware Co., 122 N. C. 104, 29 S. E. 96, 65 Am. St. Rep.697; Rocky Mt. Mills *v.* Wilmington, etc., R. Co., 119 N. C. 693, 25 S. E. 854, 56 Am. St. Rep. 682; Foard *v.* Atlantic, etc., R. Co., 53 N. C. 235, 78 Am. Dec. 277; Story Lumber Co. *v.* Southern R. Co., 151 N. C. 23, 65 S. E. 460.

Oklahoma.— St. Louis, etc., R. Co. *v.* Farmers' Union Gin Co., 34 Okla. 270, 125 Pac. 894.

South Carolina.—Traywick *v.* Southern Railway, 71 S. C. 82, 50 S. E. 549, 110 Am. St. Rep. 563; Mills *v.* Southern Railway, 90 S. C. 366, 73 S. E. 772; Moore *v.* Atlantic, etc., R. Co., 85 S. C. 19, 67 S. E. 11; Green Co. *v.* Atlantic, etc., R. Co., 83 S. C. 498, 65 S. E. 639; Wesner, etc., Mfg. Co. *v.* Atlantic, etc., Railroad, 71 S. C. 211, 50 S. E. 789; Guess *v.* Southern Railway, 73 S. C. 264, 53 S. E. 421; Milhous *v.* Atlantic, etc., R. Co., 75 S. C. 351, 55 S. E. 764; McKerall *v.* Atlantic, etc., R. Co., 76 S. C. 338, 56 S. E. 965; Strange *v.* Atlantic, etc., R. Co., 77 S. C. 182, 57 S. E. 724; Matheson *v.* Southern Railway, 79 S. C. 155, 60 S. E. 437; Kolb *v.* Southern Railway, 81 S. C. 536, 62 S. E. 872.

Tennessee.—Illinois Cent. R. Co. *v.* Southern Seating, etc., Co., 104 Tenn.

of the urgent necessity for prompt carriage, he will be liable, in case of his negligent delay, only for the usual and ordinary damages;[45] that is, the difference between the market price at destination at time of delivery and when they should have been delivered, if the goods were intended for sale on the market,[46] or the rental value of the goods if not intended for market.[47] Failure of an express company to deliver, within a reasonable time, the order book of a nurseryman, containing the names of his customers, does not render the company liable for losses resulting through his inability to fill their orders, unless the company had notice that it was necessary for him to have the book to enable him to deliver the trees. But if the company had notice at the point of destination and negligently failed to make prompt delivery of the book, it is liable for special damages.[48] Where a carrier fails to deliver orange boxes within a reasonable time, the contract not fixing any time for delivery, the freezing of the oranges on the trees was not such a direct, natural, and proximate result of such failure to deliver as to render the carrier liable, where the carrier was not informed that the oranges would be left on the trees until the boxes were delivered nor was the carrier liable for loss due to the idleness of the men employed to pick and ship the oranges, where the carrier was not informed that the men had been so hired.[49]

Notice on Return Shipment.—Where mill machinery was shipped to be repaired, and then by a separate contract shipped back, to give the carrier notice of special circumstances from which damage would arise from delay in transportation, so as to make it liable therefor, it is not enough that the agent with whom the first contract was made knew thereof, there having been no delay in the first shipment, but the agent with whom the second contract was made must have been informed of such circumstances.[50]

Notice of Particular Facts.—Where a carrier was without knowledge that if a shipment of goods should be delayed the owner would be unable to store the same on arrival, it is not liable for the difference in price between that which the owner might have obtained by sales in the usual course of his business, if the goods had arrived in due time, and that realized by a forced sale due to a lack of storage capacity when the goods arrived.[51]

568, 58 S. W. 303, 50 L. R. A., N. S., 729, 78 Am. St. Rep. 933.

Texas.—Gulf, etc., R. Co. *v.* Gilbert, 4 Tex. Civ. App. 366, 22 S. W. 760, 23 S. W. 320; Gulf, etc., R. Co. *v.* Pettit, 3 Tex. Civ. App. 588, 22 S. W. 761; Pacific Exp. Co. *v.* Jones, 52 Tex. Civ. App. 367, 113 S. W. 952; Bourland *v.* Choctaw, etc., R. Co., 99 Tex. 407, 90 S. W. 483, 3 L. R. A., N. S., 1111, 122 Am. St. Rep. 647.

In order to impose on the carrier who makes unreasonable and negligent delay to transport and deliver a shipment a further liability than for damages arising naturally and directly, that is, in the ordinary course of things, from a breach of contract, such unusual or extraordinary damages must have been brought within the contemplation of the parties as the probable result of a breach at the time of contracting. Missouri, etc., R. Co. *v.* Webb, 20 Tex. Civ. App. 431, 49 S. W. 526.

In an action against a carrier for failure to deliver goods shipped, special damages can not be recovered unless the facts rendering the carrier liable for such damages were within knowledge of the carrier at the time of entering into the contract of shipment. Ligon *v.* Missouri Pac. R. Co., 3 Texas App. Civ. Cas., § 1.

The same general principle is applied in telegraph cases. Mood *v.* Western Union Tel. Co., 40 S. C. 524, 19 S. E. 67; Rogers *v.* Western Union Tel. Co., 72 S. C. 290, 51 S. E. 773; Smith *v.* Western Union Tel. Co., 72 S. C. 116, 51 S. E. 537; Poteet *v.* Western Union Tel. Co., 74 S. C. 491, 55 S. E. 113.

45. Pacific Exp. Co. *v.* Darnell Bros., 62 Tex. 639.

46. Missouri, etc., R. Co. *v.* Webb, 49 S. W. 526, 20 Tex. Civ. App. 431; Pacific Exp. Co. *v.* Darnell Bros., 62 Tex. 639; Galveston, etc., R. Co. *v.* Watson, 1 Texas App. Civ. Cas., § 813.

47. Galveston, etc., R. Co. *v.* Jessee, 2 Texas App. Civ. Cas., § 403.

48. Wells, Fargo & Co. *v.* Battle, 5 Tex. Civ. App. 532, 24 S. W. 353.

49. Williams *v.* Atlantic, etc., R. Co., 48 So. 209, 56 Fla. 735, 24 L. R. A., N. S., 134.

50. Notice on return shipment.—Louisville, etc., R. Co. *v.* Mink, 126 Ky. 337, 103 S. W. 294, 31 Ky. L. Rep. 833.

51. Notice of particular facts.—Rutland *v.* Southern Railway, 81 S. C. 448, 62 S. E. 865.

§ 934. Sufficiency of Notice.—Generally, notice given at the time of shipment of any special circumstances which would show that the damages to be anticipated from a delay would be enhanced has been held sufficient.[52] A carrier is liable for special damages, although at the time of the shipment it had no knowledge or information of the circumstances from which such damages were liable to arise, if, after the goods reached their destination, notice was given the carrier of such circumstances and the carrier, after such notice, delayed in making delivery of the goods.[53] The carrier has sufficient notice of the peculiar circumstances of the case where, at the time of shipment, notice was given the carrier that the goods were intended for feeding cattle, and when application was made to the carrier's agent for delivery of the goods, the agent was informed that the shipper would suffer great loss if the delivery were not made promptly, as the shipper was feeding cattle on full feed.[54] That a carrier was notified that gin machinery delayed in transportation was badly needed was insufficient to charge the carrier with notice that the consignee conducted a public ginnery and had a special need for the machinery.[55] Notice to a carrier by the shipper that all consignments of cans should be rushed during the packing season is not sufficient to apprise the carrier that a consignee would be compelled to close down its cannery, and that its tomatoes would be spoiled if the shipment were delayed, so as to permit a recovery for such special damages from the delay.[56] Where an agent of the defendant, an express company, asked the plaintiff why he did not ship a shaft for a steam shovel by freight, and was informed that the steam shovel was broken down, and that unless the shipment was hurried the entire plant and crew would be idle, and was told of what the outfit consisted, the defendant was sufficiently notified of the necessity for haste to render it liable for special damages.[57] That electric lights in the office of an express company at a place from which electric machinery was expressed for repairs, and to which it was returned under separate contract, were not burning while the machinery was away for repairs, did not give notice to the express company of the purpose for which the machinery was used, so as to make it liable for special damages by loss of profits; its agent making the return contract of carriage not knowing those facts.[58] Where a shipper of household goods notifies the agent that she needs the goods immediately, there is not a sufficient notice of special damages to authorize a recovery for a cold contracted by the shipper, caused by the lack of the household goods shipped.[59] A carrier, informed by a shipper that tents were intended to be used during severe weather as a stable for the protection of his horses, has sufficient notice to render it liable for the expenses and damages which might result by

52. Sufficiency of notice.—Missouri, etc., R. Co. *v.* Webb, 20 Tex. Civ. App. 431, 49 S. W. 526.

53. Though, at the time of the shipment of the order book of a nurseryman, the express company may have had no notice of the importance of its early delivery, yet if it received such notice at the point of destination, and negligently failed to deliver it within a reasonable time thereafter, it is liable for special damages resulting from inability to fill orders. Wells, Fargo & Co. *v.* Battle, 5 Tex. Civ. App. 532, 24 S. W. 353.

54. "The plaintiff's loss did not arise from delay in transportation, nor from any cause for the prevention of which notice at the time of the contract was important, but from the failure to perform the simple duty to deliver the property, due to the faithfulness of defendant's agent, at a time when the probable consequences thereof were fully disclosed. There would, in our opinion, be manifest injustice in requiring the plaintiff, rather than the defendant, to bear the loss arising from this fault of the agent." Bourland *v.* Choctaw, etc., R. Co., 99 Tex. 407, 90 S. W. 483, 3 L. R. A., N. S., 1111, 122 Am. St. Rep. 647.

55. Kolb *v.* Southern Railway, 81 S. C. 536, 62 S. E. 872.

56. Illinois Cent. R. Co. *v.* Hopkinsville Canning Co., 132 Ky. 578, 116 S. W. 758.

57. Elzy *v.* Adams Exp. Co., 141 Iowa 407, 119 N. W. 705.

58. Stone *v.* Adams Exp. Co. (Ky.), 122 S. W. 200.

59. Alabama, etc., R. Co. *v.* McKenna (Miss.), 61 So. 823.

reason of its failure to deliver them within a reasonable time.[60]

By Whom Notice Given.—Under a statute which requires carriers to transport freight promptly on receiving notice requiring prompt shipment, but prescribes no particular method of giving notice, it may be given by the consignee or holder of the bill of lading through another; direct notice not being essential.[61]

Notice of General Use of Goods.—Proof that the carrier had knowledge of the general use to which the article was to be put will not be sufficient to charge him with liability for loss of the use or the profits which would thereby have been made. The special circumstances of the case requiring care or expedition must have been brought to his attention in such a way that his acceptance of the article under the circumstances could fairly be said to amount to an assumption of risk which naturally and proximately would follow from his default.[62]

§ 935. Time Notice Given.—As to the time notice should be given, it is stated in the leading English case[63] and in many cases following it, that the rule for the recovery of damages of a special or exceptional kind for the breach of a contract for the delivery of property, includes, as essential to liability therefor, notice, at the time of the making of the contract, to the party bound to deliver, or the peculiar conditions under which such damages are likely to result from the breach.[64] Its operation has generally been wise and just, and it is only when it is made the exclusive rule in cases in which the reasons underlying it do not make it applicable that it fails to meet the demands of substantial justice. The truth that it is not to be regarded as an exclusive rule for the measure of damages in all cases of breach of contract for the delivery of property has been expressed many times by eminent jurists.[65] In most of the

60. Pecos, etc., R. Co. *v.* Maxwell (Tex. Civ. App.), 156 S. W. 548.

61. By whom notice given.—Mills *v.* Southern Railway, 82 S. C. 242, 64 S. E. 238.

62. Notice of general use of goods.—Clarke-Lawrence Co. *v.* Chesapeake, etc., R. Co., 63 W. Va. 423, 61 S. E. 364.

63. Time notice given.—Hadley *v.* Baxendale (Eng.), 9 Ex. 341, 3 C. L. R. 517.

64. 3 Hutchinson on Carriers, § 1367; 4 Elliott on Railroads, § 1731.

Arkansas.—Chicago, etc., R. Co. *v.* King, 104 Ark. 215, 148 S. W. 1035; St. Louis, etc., R. Co. *v.* Phelps, 46 Ark. 485; St. Louis, etc., R. Co. *v.* Mudford, 48 Ark. 502, 3 S. W. 814; Choctaw, etc., R. Co. *v.* Walker, 71 Ark. 571, 76 S. W. 1058; Crutcher *v.* Choctaw, etc., R. Co., 74 Ark. 358, 85 S. W. 770.

Kentucky.—Louisville, etc., R. Co. *v.* Mink, 126 Ky. 337, 103 S. W. 294, 31 Ky. L. Rep. 833; Patterson *v.* Illinois Cent. R. Co., 123 Ky. 783, 30 Ky. L. Rep. 78, 97 S. W. 426; Illinois Cent. R. Co. *v.* Nelson, 97 S. W. 757, 30 Ky. L. Rep. 114; Illinois Cent. R. Co. *v.* Hopkinsville Canning Co., 132 Ky. 578, 116 S. W. 758, 760.

Mississippi.—Vicksburg, etc., R. Co. *v.* Ragsdale, 46 Miss. 458.

South Carolina.—Shieder *v.* Southern Railway, 83 S. C. 455, 65 S. E. 631; McMeekin *v.* Southern Railway, 82 S. C. 468, 64 S. E. 413; McKerall *v.* Atlantic, etc., R. Co., 76 S. C. 338, 56 S. E. 965; Kolb *v.* Southern Railway, 81 S. C. 536, 62 S. E. 872.

Texas.—Hassler *v.* Gulf, etc., R. Co. (Tex. Civ. App.), 142 S. W. 629; Haberzettle *v.* Trinity, etc., R. Co., 46 Tex. Civ. App. 527, 103 S. W. 219; Pacific Exp. Co. *v.* Jones, 52 Tex. Civ. App. 367, 113 S. W. 952; Ligon *v.* Missouri Pac. R. Co., 3 Texas App. Civ. Cas., § 1.

West Virginia.—Delaney *v.* United States Exp. Co., 70 W. Va. 502, 74 S. E. 512.

In order to charge a carrier with such special damages for delay in transportation as the rental value of machinery intended for immediate use, special notice of the intention must be given at the time of shipment, and not afterwards. Gulf, etc., R. Co. *v.* Gilbert, 4 Tex. Civ. App. 366, 22 S. W. 760, 23 S. W. 320; Gulf, etc., R. Co. *v.* Pettit, 3 Tex. Civ. App. 588, 589, 22 S. W. 761.

In the case of Strange *v.* Atlantic, etc., R. Co., 77 S. C. 182, 57 S. E. 724, the court expressly ruled that it was error to receive testimony as to notice of plaintiff's business as a traveling salesman after the loss of his sample trunks. Kolb *v.* Southern Railway, 81 S. C. 536, 62 S. E. 872.

65. Bourland *v.* Choctaw, etc., R. Co., 99 Tex. 407, 90 S. W. 483, 122 Am. St. Rep. 647, 649, 3 L. R. A., N. S., 1111.

"Thus, in Newport Dock Company *v.* Wilson, L. R. 1 Ex. 177, Chief Baron Pollock said of it: 'It is quite true that the case is not applicable to and does not

decisions the question as to the exact time when the notice should have been given has not received much attention, there being no difficulty arising from the fact that it was given after the contract was made, but before the damage resulted. But in some cases it has been attempted to establish the right to damages beyond those which would ordinarily arise from the breach of the contract in the particular case by showing notice of the special circumstances after the making of the contract and before the breach; although there was an intimation by one of the judges in one case,[66] that such notice ought to be held to be effectual for the purpose, the decisions have been to the contrary in cases of this character which have come to our attention, where it became necessary to pass upon the point.[67]

Reason for Rule.—The usual reasons stated for the adoption of the rule that such notice should be given at the time the contract is entered into is that the carrier may have an opportunity of demanding additional compensation if it so desires or of refusing to make the contract, or to protect itself by special precautions to avoid loss in event it does make the contract.[68] But under the law as it now is in some states, this rule can not rest upon the ground either that the carrier might have the opportunity to demand a greater rate for the transportation, or to refuse to enter into the contract for the shipment, because the carrier is not now at liberty under the law to require the one or to refuse the other; and yet under the law the carrier is liable for special damages for a breach of its contract to transport the goods within a reasonable time, if notice of the special circumstances is given to it at or before the time the shipment is made.[69]

Notice Given Subsequent to Shipment.—Where a carrier when it contracts to transport goods has no notice of circumstances from which it may be reasonably expected that special damages will result from delay, such damages can not be recovered, though notice is given subsequently and after the expiration of a reasonable time for delivering the goods.[70] A carrier's liability for delay in the transportation of machinery shipped for a specific purpose which was not disclosed to the carrier would not be affected by subsequent notice by the shipper, as to the purpose of the shipment.[71] Notice of special cir-

decide every case. No rule, no formula, could do that. No precise, positive rule can embrace all cases.'" Bourland *v.* Choctaw, etc., R. Co., 99 Tex. 407, 90 S. W. 483, 122 Am. St. Rep. 647, 649, 3 L. R. A., N. S., 1111.

66. Gee *v.* Lancashire, etc., R. Co. (Eng.), 6 Hurl & N. 217.

67. 1 Sedgwick on Damages, § 158. Jordan *v.* Patterson, 67 Conn. 473, 35 Atl. 521; Bourland *v.* Choctaw, etc., R. Co., 99 Tex. 407, 90 S. W. 483, 3 L. R. A., N. S., 1111, 122 Am. St. Rep. 647; Ligon *v.* Missouri Pac. R. Co., 3 Texas App. Civ. Cas., § 1.

68. **Reason for timely notice.**—It is so held upon the principle that the carrier, by reason of the additional risk and the increased liability, may enter into suitable stipulations looking to its protection. Wells Fargo & Co. *v.* Battle, 5 Tex. Civ. App. 532, 534, 24 S. W. 353; Gulf, etc., R. Co. *v.* Gilbert, 4 Tex. Civ. App. 366, 22 S. W. 760, 23 S. W. 320.

The carrier would have the right according to Missouri, etc., R. Co. *v.* Belcher, 89 Tex. 428, 35 S. W. 6, to charge more, or insert other provisions in its contract concerning such special conditions, in order to cover the risk of having to pay such special damages. St. Louis, etc., R. Co. *v.* May (Tex. Civ. App.), 44 S. W. 408.

69. Chicago, etc., R. Co. *v.* Planters' Gin, etc., Co., 88 Ark. 77, 113 S. W. 352; Chicago, etc., R. Co. *v.* King, 104 Ark. 215, 148 S. W. 1035.

70. **Notice given subsequent to shipment.**— Towles *v.* Atlantic, etc., R. Co., 83 S. C. 501, 65 S. E. 638.

After failure of car to arrive.—Notice given to a carrier after a car did not arrive in time, adds nothing to the liability of the carrier. Illinois Cent. R. Co. *v.* Hopkinsville Canning Co., 132 Ky. 578, 116 S. W. 758.

Damages accruing after notice.—Special damages for a carrier's delay in transportation can not be recovered where the carrier had no notice at the time of contract of the special facts; not even those accruing from delay occurring after it is given such notice. Hassler *v.* Gulf, etc., R. Co. (Tex. Civ. App.), 142 S. W. 629.

71. **Given subsequent to shipment.**— Gulf, etc., R. Co. *v.* Gilbert, 4 Tex. Civ. App. 366, 371, 22 S. W. 760, 23 S. W. 320.

cumstances after the shipping contract has been made, and after the goods have been shipped, will not operate to fix a liability for special damages not taken into consideration at the time the contract was made.[72] Where, after freight was shipped, the shipper notified the carrier that it was intended for a particular purpose and was required in a limited time, it is not such notice as would render the carrier liable for special damages for failure to deliver promptly.[73] Notice to the agent of a carrier, at the place of delivery, after cotton seed meal and hulls had failed to arrive on time, of the use to which the consignee intended to put the shipment, was not sufficient to render the carrier liable for special damages accruing by reason of its failure to make prompt delivery thereafter.[74] Though notice of special damages from delay in delivery of freight is not sufficient as to such shipment, being given after the goods were lost, it is sufficient notice to it of the need of haste as to a second shipment, made a few days later to supply the goods lost.[75] Where notice of special damages is not given till after discovery that certain of the goods have been lost, there can be no recovery of such damages, in absence of evidence of negligence of the carrier in attempting to trace the lost freight.[76]

72. Hutchinson on Carriers, vol. 3, pp. 1621-1626.

Alabama.—Pilcher *v.* Central, etc., R. Co., 155 Ala. 316, 46 So. 765.

Kentucky.—Franklin *v.* Louisville, etc., R. Co. (Ky.), 116 S. W. 765.

Massachusetts.—Swift River Co. *v.* Fitchburg R. Co., 169 Mass. 326, 47 N. E. 1015, 61 Am. St. Rep. 288.

Oklahoma.—St. Louis, etc., R. Co. *v.* Farmers' Union Gin Co., 34 Okla. 270, 125 Pac. 894.

Tennessee.—Illinois Cent. R. Co. *v.* Southern Seating, etc., Co., 104 Tenn. 568, 58 S. W. 303, 50 L. R. A., N. S., 729, 78 Am. St. Rep. 933.

Texas.—Missouri, etc., R. Co. *v.* Belcher, 89 Tex. 428, 35 S. W. 6; Gulf, etc., R. Co. *v.* Loonie, 82 Tex. 323, 18 S. W. 221, 27 Am. St. Rep. 891.

Wisconsin.—Bradley *v.* Chicago, etc., R. Co., 94 Wis. 44, 68 N. W. 410.

Subsequent knowledge of facts rendering special damages probable, would not, in absence of fraud or gross negligence on part of railroad, render it responsible beyond general measure in ordinary cases of delay in delivery of goods by carrier. Ligon *v.* Missouri Pac. R. Co., 3 Texas App. Civ. Cas., § 1.

Where a carrier was not notified, until after the contract of shipment had been entered into that the goods were desired for a special purpose, which necessitated their prompt delivery, the carrier was not liable for special damage caused by the failure to deliver promptly. Chicago, etc., R. Co. *v.* Mill Elevator, etc., Co. (Tex. Civ. App.), 87 S. W. 753.

Notice to the carrier, after the date of the contract, that special damage would arise from a delay in the shipment, in time for him to have prevented the delay, does not render him liable for such damages. Missouri, etc., R. Co. *v.* Belcher, 89 Tex. 428, 35 S. W. 6; Belcher *v.* Missouri, etc., R. Co., 92 Tex. 593, 50 S. W. 559, reversing 47 S. W. 384, 1020; Bourland *v.* Choctaw, etc., R. Co., 99 Tex. 407, 90 S. W. 483, 3 L. R. A., N. S., 1111, 122 Am. St. Rep. 647; Gulf, etc., R. Co. *v.* Gilbert, 4 Tex. Civ. App. 366, 370, 22 S. W. 760, 23 S. W. 320; Pacific Exp. Co. *v.* Redman (Tex. Civ. App.), 60 S. W. 677.

It can not be assumed by the courts that the parties, in making such a contract, contemplated that defendant would be liable for such damages on subsequent notice, or that the railroad commission in fixing rates made any allowance for such a risk; for no such liability has ever been fixed upon the carrier by any adjudicated case so far as the court have been able to ascertain. Missouri, etc., R. Co. *v.* Belcher, 89 Tex. 428, 35 S. W. 6.

Plaintiff sued for damages for pain and retarded recovery for failure of an express company to promptly deliver medicine purchased by her. The medicine was ordered by plaintiff's relative, for whom she had worked, which fact was known to defendant's agent at the shipping point. The package was directed to such relative, and, though defendant's agent was informed that it contained medicine, he was not informed that it was for plaintiff. Held, that though defendants, subsequent to the date of shipment, were notified of plaintiff's interest therein and the probable consequence of their failure to deliver, they were not responsible for special damages to plaintiff for their failure to thereafter promptly deliver the medicine. Pacific Exp. Co. *v.* Redman (Tex. Civ. App.), 60 S. W. 677.

73. McKerall *v.* Atlantic, etc., R. Co., 76 S. C. 338, 56 S. E. 965.

74. Illinois Cent. R. Co. *v.* Nelson, 97 S. W. 737, 30 Ky. L. Rep. 114.

75. McMeekin *v.* Southern Railway, 82 S. C. 468, 64 S. E. 413.

76. McMeekin *v.* Southern Railway, 82 S. C. 468, 64 S. E. 413.

Delay in Delivery.—Where notice is given of circumstances which will occasion special damages after the contract to carry has been performed and after the goods have arrived for delivery, the carrier is liable for such special damages where it negligently fails to make such delivery.[77] Where a carrier of freight received no notice of special circumstances requiring prompt delivery at or before the time of the shipment, but it transported the freight promptly to the point of destination, and its agent there negligently and willfully failed to make a delivery for more than a month after the arrival of the freight, though the consignee notified him of the necessity of a prompt delivery and of the special circumstances which would cause special damages for a delay, the consignee could recover special damages sustained by the delay in delivery.[78]

§ 936. Notice to Agent.—Notice to a carrier's agent receiving a package for shipment, that it contained medicine for a sick person, is notice to the carrier of the importance of its prompt delivery.[79] But notice to a station agent of special damages that may result from delayed shipment of car from a distant station is not notice to the company.[80] Nor is notice to an agent at a station to which the goods were to be shipped by a connecting carrier sufficient, in the absence of proof that the goods ever reached the station.[81] Where mill machinery was shipped to be repaired, and then by a separate contract shipped back, to give the carrier notice of special circumstances from which damage would arise from delay in transportation, so as to make it liable therefor, it is not enough that the agent with whom the first contract was made knew thereof, there having been no delay in the first shipment, but the agent with whom the second contract was made must have been informed of such circumstances.[82] And notice of special conditions rendering immediate shipment necessary to a train master is not notice to the railway company upon a matter under control of the station agent, it not appearing that the train master had any control over the station agent in the matter of making contracts for shipment, or that it was

77. **Delay in delivery.**—Southern R. Co. *v.* Lewis, 165 Ala. 451, 51 So. 863.

78. Chicago, etc., R. Co. *v.* King, 104 Ark. 215, 148 S. W. 1035.

The plaintiff was fattening for market a number of beef cattle, and, anticipating that his supply of feed would soon be exhausted, he purchased and delivered to the defendant two car loads of cottonseed cake for transportation. No notice was given to the defendant, at that time, of the purpose for which the cake was needed, and of the damage to result from delay in making delivery. The cars were promptly carried to their destination. An agent of the plaintiff applied to the defendant's station agent for the cake and stated that the plaintiff would suffer a great loss if the cake were not delivered, as he was feeding the cattle on full feed. The cake was not delivered. By some mistake the cars were sent out on another railroad, and the cake was not delivered for more than three weeks, notwithstanding plaintiff from day to day, repeated the notice given and the demand for delivery. The plaintiff's supply of food for the cattle was exhausted about the time the cake should have been delivered, and he could not otherwise obtain sustenance for the cattle, in consequence of which they were greatly depreciated in value. It was held that the plaintiff could recover for the injury to the cattle by reason of the failure to deliver the cake. Bourland *v.* Choctaw, etc., R. Co., 99 Tex. 407, 90 S. W. 483, 3 L. R. A., N. S., 1111, 122 Am. St. Rep. 647.

79. **Notice to agent.**—Pacific Exp. Co. *v.* Black, 8 Tex. Civ. App. 363, 366, 27 S. W. 830.

80. Missouri, etc., R. Co. *v.* Belcher, 88 Tex. 549, 551, 32 S. W. 518.

81. Where special sawmill machinery was ordered from Marshall, Tex., through an intervening concern to be manufactured and shipped from Huntsville, notice given to the carrier's agent at Marshall of special damages resulting from delay in transportation was insufficient to charge the carrier therewith, in the absence of any proof that the machinery ever reached Marshall or was under the control of such agent. Pacific Exp. Co. *v.* Jones, 52 Tex. Civ. App. 367, 113 S. W. 952.

One station agent is not required to transmit to another notice received by former as to special damage likely to result from delay in shipping a car from the latter's station; therefore, such notice to the former is not notice to the latter or to the company. Missouri, etc., R. Co. *v.* Belcher, 88 Tex. 549, 551, 32 S. W. 518.

82. Louisville, etc., R. Co. *v.* Mink, 126 Ky. 337, 103 S. W. 294, 31 Ky. L. Rep. 833.

his duty to communicate to such agent information with reference thereto.[83] Local agents of a carrier receiving a shipment need not be given notice of the special purpose for which the shipment is to be used, in order to charge the carrier for damages resulting from a delay in transportation, where superior traffic officers have such notice.[84]

Notice to Driver of Express Wagon.—Where the plaintiff delivered a camping outfit to an express company for transportation, notice to the driver of the express wagon that plaintiff required the things urgently was not sufficient notice to the carrier that special damages would accrue from delay in transportation so as to entitle the plaintiff to recover the expense of hotel accommodations for the camping party during the delay.[85]

§ 937. Implied Notice.—It is not necessary that the carrier be expressly informed of the special facts, if they are known to it, or are of such a character that the parties may be fairly supposed to have contemplated them in making the contract.[86] The shipper was a firm engaged in the manufacture and sale of furniture; of this the title of the firm, consignee in the bill of lading, taken in connection with the character of the implement ordered and shipped, would give reasonable notice. In this day and time certainly it is a matter of common knowledge that an engine shaft is the part by which the power of the engine is applied to the operating machinery, that it is essential and necessary for the purpose, and without it the engine itself and the machinery dependent upon it are for the time out of action. The style and title of the firm, taken in connection with the nature and description of the implement ordered, together with the unusual mode by which the shipment was provided for, and the nature of the carrier's business, by which it undertook for a greater wage to give additional assurance, both of safety and dispatch, all give notice that damages beyond the ordinary amount might be reasonably expected in case there was delay, in breach of the carrier's contract.[87]

Notice from Mode of Shipment.—A carrier may be charged with sufficient notice of the necessity for haste to entitle the shipper to recover special damages where the goods were shipped by an unusual and expensive mode of transportation. It would assuredly occur to any and every one that a shaft consisting of a piece of metal weighing not less than six hundred and fifty pounds, which under ordinary circumstances could and would be shipped with perfect safety and at a much lower charge by railway, would not have been shipped in this unusual way and at a much higher price unless the call was urgent and some unusual result would follow by reason of delay.[88]

83. Missouri, etc., R. Co. *v.* Belcher, 89 Tex. 428, 35 S. W. 6; S. C., 88 Tex. 549, 32 S. W. 518; Missouri, etc., R. Co. *v.* Faulkner, 88 Tex. 649, 32 S. W. 883, reversing 31 S. W. 543.

84. Gulf, etc., R. Co. *v.* Nelson (Tex. Civ. App.), 139 S. W. 81.

85. **Notice to driver of express wagon.**—Harris *v.* Fargo, 113 N. Y. S. 577.

86. **Implied notice.**—Harper Furniture Co. *v.* Southern Exp. Co., 148 N. C. 87, 62 S. E. 145, 30 L. R. A., N. S., 483, 128 Am. St. Rep 588.

"Notice, in general, does not require positive information, but from facts, and circumstances, if sufficiently brought home to a party, such as to put a person of ordinary caution in the same situation on any inquiry reasonably leading to a knowledge of the truth, a court may justly infer actual knowledge." Morrow *v.* Missouri Pac. R. Co. (Mo. App.), 123 S. W. 1034, 1038.

87. Harper Furniture Co. *v.* Southern Exp. Co., 148 N. C. 87, 62 S. E. 145, 128 Am. St. Rep. 588, 30 L. R. A., N. S., 483.

88. **Notice from mode of shipment.**—Plaintiff, a furniture company, ordered an engine shaft, weighing some 650 pounds, to be shipped to it by express from another state, through defendant and other express companies; but the shaft was not delivered on time, and plaintiff was compelled to close its mills because of delay in delivery and sued to recover damages from the closing of its mills by the delay. Held, that the fact that plaintiff was engaged in manufacturing furniture, which was shown by the bill of lading, taken in connection with the nature of the shaft ordered, and the unusual mode of shipment for such a heavy article, and the nature of defendant's business, by which they undertook for a higher wage to carry with additional safety and dispatch, was sufficient to give defendant notice

Notice from Nature of Goods.—There may be shipments of goods of such character that the carrier would be liable for the value of the rent or use of the property during the time of a delay, although it was not informed of any special object or purpose in the shipment.[89] The carrier may be charged with notice from the nature of the goods shipped where the consignees were a firm engaged in the manufacture and sale of furniture, knowledge of which the carrier is charged with from the name and title of the shipper. The name of the consignee, in the bill of lading, in connection with the character of the shipment shipped, an engine shaft, would be sufficient to charge the carrier with notice of the special circumstances of the case.[90] Where gin stands and machinery for a cotton gin are shipped over a common carrier to a gin company whose plant is located and being built on the carrier's right of way, the carrier is charged with notice of the purpose and use of such machinery, and the period of the year in which it is used, and, in case of unreasonable and diligent delay in shipment, will be held liable for the damages which are the direct result of such delay, although no express mention of the purpose of such machinery and the period in which it is desired for use is made in the shipping contract.[91] But for delay in cases of an ordinary shipment of goods to a merchant of the kind in which he deals, where there is no fact shown which would put the carrier on contemplation or knowledge of the fact that the goods are designed for a special purpose and for a definite use, other than is inferred from the character of the shipment, the measure of damages is the difference in the value of the goods at the time they should have arrived and the time they did arrive.[92] The carrier is not put on notice that goods were intended for a special purpose, and is not liable for damages resulting to the consignee from being compelled to shut down an ice plant, from delay in the receipt of oil shipped over the carrier, where the only notice to the carrier was the fact that the oil was shipped to the "Home Ice Factory," and was to be used for fuel.[93] Cotton seed meal and hulls are not of such character as to put a carrier on notice that their prompt delivery was necessary to avoid loss on cattle being fed by a shipper.[94] Where a shaft used

that damages beyond the ordinary amount might reasonably be expected in case of delay in transportation, so as to render defendant liable for any special damages resulting from such delay. Harper Furniture Co. *v.* Southern Exp. Co., 62 S. E. 145, 148 N. C. 87, 128 Am. St. Rep. 588, 30 L. R. A., N. S., 483.

89. Notice from nature of goods.—Illinois Cent. R. Co. *v.* Nelson, 97 S. W. 757, 30 Ky. L. Rep. 114; Gulf, etc., R. Co. *v.* Pettit, 3 Tex. Civ. App. 588, 590, 22 S. W. 761.

90. Harper Furniture Co. *v.* Southern Exp. Co., 148 N. C. 87, 62 S. E. 145, 128 Am. St. Rep. 588, 30 L. R. A., N. S., 483.

91. St. Louis, etc., R. Co. *v.* Farmers' Union Gin Co., 34 Okla. 270, 125 Pac. 894.

92. It is error in such case to allow rents for delayed machinery. Gulf, etc., R. Co. *v.* Pettit, 3 Tex. Civ. App. 588, 589, 22 S. W. 761.

93. For a delay in delivering fuel oil, a carrier was not liable for damages resulting to plaintiff through being compelled to shut down an ice plant, for expenses paid employees while the plant was idle, for loss of profits, and for loss sustained by not having ice to save meat, etc., in cold storage, where the carrier did not know when the contract was made that such results might follow delayed delivery of the oil, that the shipment was made to the "Home Ice Factory," and it was fuel not putting the carrier on notice. Haberzettle *v.* Trinity, etc., R. Co., 103 S. W. 219, 46 Tex. Civ. App. 527.

94. Cotton seed meal.—Illinois Cent. R. Co. *v.* Nelson, 97 S. W. 757, 760, 30 Ky. L. Rep. 114, citing Newport News, etc., R. Co. *v.* Mercer, 96 Ky. 475, 29 S. W. 301; Wells *v.* National Life Ass'n, 99 Fed. 222, 39 C. C. A. 476, 53 L. R. A., N. S., 33; Duntley *v.* Boston, etc., R. Co., 66 N. H. 263, 20 Atl. 327, 9 L. R. A., N. S., 449, 49 Am. St. Rep. 610; Illinois Cent. R. Co. *v.* Southern Seating, etc., Co., 104 Tenn. 568, 58 S. W. 303, 50 L. R. A., N. S., 729, 78 Am. St. Rep. 933; Baltimore, etc., R. Co. *v.* O'Donnell, 49 O. St. 489, 32 N. E. 476, 21 L. R. A., N. S., 117, 34 Am. St. Rep. 579; Wood on Railway Law, p. 1607.

"In Louisville, etc., Packet Co. *v.* Bottorff, 25 Ky. L. Rep. 1324, 77 S. W. 920, 25 Ky. Law Rep. 1324, the question here raised was not presented, and on the facts it is not in conflict with the views herein expressed. In Illinois Cent. R. Co. *v.* Mossbarger, 91 S. W. 1121, 28 Ky. L. Rep. 1217, it appears that notice was given to the railroad company before any

in an electric plant fell out of a car in transit and was broken, after which the express company had it repaired and forwarded to the owner, damages claimed for loss of profits in being prevented from running the plant while the shaft was being repaired were special damages, and hence could not be recovered unless the carrier had notice of the use for which the shaft was intended, either actually or by plain inference from the nature of the thing transported.[95] Such notice can not be inferred fairly, from the character of the property, or from the fact that the old engine boilers were sent over the defendant's road to the same person who had furnished the new ones soon after those had been shipped.[96]

§ 938. Evidence to Prove Notice.—In an action to recover damages for pain and retarded recovery by reason of failure of a carrier to promptly deliver medicine, ordered by a relative of the plaintiff, for whom he had worked, which facts were known to the carrier's agent at the shipping point; but the package was directed to the relative, and, though the carrier's agent was informed that it was for the plaintiff, the evidence is insufficient to show notice to the carrier of the plaintiff's connection with and interest in the shipment, so as to warrant a finding of special damages in his favor.[97]

§ 939. Where Cause of Delay Known to Shipper.—A shipper claiming special damages for delay in a shipment of goods intended to be followed and sold by him at destination can not recover expenses incurred with knowledge that the goods had been misdirected.[98]

§ 940. Exemplary Damages.—In case of failure to carry and deliver freight in reasonable time, where such failure arose from the mere negligence of the carrier, but that wanton and gross neglect of their duties by common carriers, and reckless disregard of the rights of shippers, and willful refusal to deliver, if alleged in the declaration and sustained by the proof, would authorize a verdict not only for compensatory, but also for exemplary damages.[99]

The mistake of a carrier's clerk in billing goods to the wrong destination, which the carrier immediately corrected on notice by sending out a tracer, and the refusal of the connecting carrier to deliver the goods without payment of charges for the extra haul resulting from the mistake, do not make a case of willfulness, oppression, or wanton disregard of the shipper's rights by the original carrier, authorizing punitive damages for the delay.[1]

of the feed was shipped of the purpose for which it was desired." Illinois Cent. R. Co. *v.* Nelson, 30 Ky. L. Rep. 114, 97 S. W. 757.

95. **Shaft used in electric plant.**—"There was nothing in the appearance of the shaft to indicate the special use that was to be made of it. The shaft, itself, did not therefore give the required notice. Nor did the fact that electric lights were used in the Adams Express Company office at Pikeville, and that they were not burning during the time the shaft was being repaired, bring home to the appellee notice of the use that was intended to be made of the shaft." Stone *v.* Adams Exp. Co. (Ky.), 122 S. W. 200, 201.

96. **Old engine boilers.**—Swift River Co. *v.* Fitchburg R. Co., 169 Mass. 326, 47 N. E. 1015, 61 Am. St. Rep. 288.

97. **Evidence to prove notice.**—Pacific Exp. Co. *v.* Redman (Tex. Civ. App.), 60 S. W. 677.

98. **Where cause of delay known to shipper.**—Franklin *v.* Louisville, etc., R. Co. (Ky.), 116 S. W. 765.

99. **Exemplary damages.** — American Exp. Co. *v.* Jennings, 86 Miss. 329, 38 So. 374, 109 Am. St. Rep. 708, citing Hadley *v.* Baxendale (Eng.), 9 Ex. 341.

"This limitation of the general rule is eminently correct, but neither the averments of plaintiff's declaration nor the facts in evidence bring his case within it." American Exp. Co. *v.* Jennings, 86 Miss. 329, 38 So. 374, 109 Am. St. Rep. 708.

To entitle a shipper to punitive damages for delay in transportation, gross negligence, or willful or wanton disregard of its duty, on the part of the carrier, must be shown. American Exp. Co. *v.* Burke (Miss.), 61 So. 312.

1. Yazoo, etc., R. Co. *v.* Christmas, 89 Miss. 686, 42 So. 169.

Goods Held for Prepayment of Freight.—Where delay in the transportation of goods appears to have been occasioned by inclination of the carrier to enforce its regulations for prepayment of freight, which, though reasonable, had not been brought to the shipper's attention, and the actual injury to the goods resulted without its knowledge, and there was nothing warranting a finding of wrongful intent, exemplary damages were not recoverable.[2]

Where Agent Fails to Locate Car.—Proof that the agent of a carrier at the destination of a shipment did not locate the car in which the same was is proof of simple negligence only, and does not authorize exemplary damages for delay in the delivery of the shipment.[3]

§§ 941-947. Measure and Elements of Damages—§ 941. In General.—The damages recoverable from a carrier for delay in delivering goods received for transportation are such as are the natural and proximate results of its acts and such as reasonably might have been expected to be within the contemplation of the parties at the time of entering into the contract, and where the carrier has notice that delay in the delivery will result in an unusual loss there may be a recovery therefor.[4] In the leading case on this subject[5] it is said that where two parties have made a contract, which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it. Now, if the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants, and thus known to both parties, the damages resulting from the breach of such a contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated. But, on the other hand, if these special circumstances were wholly unknown to the party breaking the contract, he, at the most, could only be supposed to have had in his contemplation the amount of injury which would arise generally, and, in the great multitude of cases, not affected by any special circumstances, from such a breach of contract. This rule has been followed in numerous cases.[6] Where goods are not delivered in a reasonable time by a common carrier, the measure of damages is any reasonable loss and expense occasioned by the delay, together with the value of the goods at the time and place they should have been delivered, less their value at the time and place of actual delivery,[7] with interest from the former date, less the freight, if unpaid.[8]

Damages in Addition to Statutory Penalty.—Under a statute which provides that, on refusal of a railroad to transport any property or deliver it at the regular appointed time, it shall pay all damages sustained, and in case of the transportation of property shall in addition pay special damages of five per centum per month on the value of the property at the time of shipment, for the negligent detention thereof beyond the time reasonably necessary for transportation, a contention that the statute implies that other damages accrued and

2. **Goods held for prepayment of freight.**—Lord *v.* Maine Cent. R. Co., 105 Me. 255, 74 Atl. 117.

3. **Where agent fails to locate car.**—Southern R. Co. *v.* Coleman, 153 Ala. 266, 44 So. 837.

4. **Measure and elements of damages.**—Pilcher *v.* Central, etc., R. Co., 155 Ala. 316, 46 So. 765.

5. Hadley *v.* Baxendale (Eng.), 9 Exch. 341.

6. Withrow *v.* Southern R. Co., 159 N. C. 222, 74 S. E. 925; McDonald *v.* Unaka Timber Co., 88 Tenn. 38, 43, 12 S. W. 420; Illinois Cent. R. Co. *v.* Southern Seating, etc., Co., 104 Tenn. 568, 58 S. W. 303, 50 L. R. A., N. S., 729, 78 Am. St. Rep. 933.

7. Galveston, etc., R. Co. *v.* Douglass, 1 Texas App. Civ. Cas., § 67.

8. Southern Exp. Co. *v.* Hanaw, 134 Ga. 445, 67 S. E. 944, 137 Am. St. Rep. 227.

that the five per centum is to be given only in addition to other damages is without merit.[9]

Actual Injury to Goods.—A carrier is liable for the actual injury to goods which is caused by its delay in shipping.[10]

Rental Value of Goods.—A carrier is liable for the rental value of the goods for the time the shipper has been deprived of their use by the carrier's delay.[11]

§ 942. Decrease in Market Value.—Where goods are intended for market the measure of damages for unreasonable delay in the transportation is the decrease between the market value of the goods at their destination at the time when they should have arrived there if moved with reasonable diligence and the market value of the same goods at their destination at the time when they actually did arrive there,[12] with interest from the former date, less the

9. **Damages in addition to statutory penalty.**—Texas Cent. R. Co. *v.* Hannay-Frerichs & Co., 104 Tex. 603, 142 S. W. 1163.

10. **Actual injury to goods.**—Lord *v.* Maine Cent R. Co., 105 Me. 255, 74 Atl. 117.

11. **Rental value of goods.**—Lord *v.* Maine Cent. R. Co., 105 Me. 255, 74 Atl. 117.

12. **Decrease in market value.**—Moore on Carriers, p. 425; Hutchinson on Carriers, §§ 767, 1367, 5 Am. & Eng. Ency. of Law, 2d ed., 384; Ray, Negligence of Imposed Duties, p. 1036; Simpson *v.* London, etc., R. Co., Q. B. Div. 274; Cory *v.* Thames Iron Works, 3 Q. B. 181; Die Elbinger *v.* Armstrong, 92 Q. B. 473.

England.—Collard *v.* S. E. Railway Co., 7 Hurl. & Norm. (Eng.) 79; Wilson *v.* The Lancashire, etc., R. Co., 99 Eng. C. L. 632; Wilson *v.* N. Castle, etc., R. Co., 18 E. L. & E. 557; Gee *v.* London, etc., Railroad (Eng.), 6 Hurl. & N. 211.

Arkansas.—Murrell *v.* Pacific Exp. Co., 54 Ark. 22, 14 S. W. 1098, 26 Am. St. Rep. 17; St. Louis, etc., R. Co. *v.* Mudford, 48 Ark. 502, 3 S. W. 814; St. Louis, etc., R. Co. *v.* Phelps, 46 Ark. 485; St. Louis, etc., R. Co. *v.* Coolidge, 73 Ark. 112, 83 S. W. 333, 67 L. R. A., N. S., 555, 108 Am. St. Rep. 21, 3 Am. & Eng. Ann. Cas. 582; Chicago, etc., R. Co. *v.* Planters' Gin, etc., Co., 88 Ark. 77, 113 S. W. 352; Chicago, etc., R. Co. *v.* Newhouse Mill, etc., Co., 90 Ark. 452, 119 S. W. 646.

Florida.—Norris *v.* Savannah, etc., R. Co., 23 Fla. 182, 1 So. 475, 11 Am. St. Rep. 355.

Georgia.—Southern Exp. Co. *v.* Hanaw, 134 Ga. 445, 67 S. E. 944, 137 Am. St. Rep. 227; East Tennessee, etc., R. Co. *v.* Johnson, 85 Ga. 497, 11 S. E. 809; Goodin *v.* Southern R. Co., 125 Ga. 630, 54 S. E. 720, 6 L. R. A., N. S., 1054, 5 Am. & Eng. Ann. Cas. 573; Cooper *v.* Young, 22 Ga. 269, 68 Am. Dec. 502, collected cases in note 505; Savannah, etc., R. Co. *v.* Pritchard, 77 Ga. 412, 1 S. E. 261, 4 Am. St. Rep. 92; Atlanta, etc., R. Co. *v.* Texas Grate Co., 81 Ga. 602, 9 S. E. 600; Southern Exp. Co. *v.* Briggs, 1 Ga. App. 294, 57 S. E. 1066.

Illinois.—Priestly *v.* Northern Indiana, etc., R. Co., 26 Ill. 205, 79 Am. Dec. 369; Sangamon, etc., R. Co. *v.* Henry, 14 Ill. 156; Wabash R. Co. *v.* Foster, 127 Ill. App. 201; Galena, etc., R. Co. *v.* Rae, 18 Ill. 488, 68 Am. Dec. 574; McCabe *v.* Atchison, etc., R. Co., 154 Ill. App. 380; Euston & Co. *v.* Erie R. Co., 147 Ill. App. 594.

Indiana.—Pittsburgh, etc., R. Co. *v.* Wood (Ind. App.), 84 N. E. 1009; Pittsburgh, etc., R. Co. *v.* Knox, 177 Ind. 344, 98 N. E. 295.

Iowa.—Hudson *v.* Northern Pac. R. Co., 92 Iowa 231, 60 N. W. 608, 54 Am. St. Rep. 550.

Kentucky.—Illinois Cent. R. Co. *v.* Nelson, 97 S. W. 757, 30 Ky. L. Rep. 114.

Massachusetts.—Fox *v.* Boston, etc., R. Co., 148 Mass. 220, 19 N. E. 222, 1 L. R. A., N. S., 702; Ingledew *v.* Northern Railroad (Mass.), 7 Gray 86; Cutting *v.* Grand Trunk R. Co. (Mass.), 13 Allen 381; Scott *v.* Boston Steamship Co., 106 Mass. 468; Harvey *v.* Connecticut, etc., R. Co., 124 Mass. 421, 26 Am. Rep. 673.

Michigan.—Sisson *v.* Cleveland, etc., R. Co., 14 Mich. 489, 90 Am. Dec. 252.

Mississippi.—American Exp. Co. *v.* Jennings, 86 Miss. 329, 38 So. 374, 109 Am. St. Rep. 708; Silver *v.* Kent. 60 Miss. 124; Railway *v.* Ragsdale, 14 Miss. 460.

Missouri.—Hardin Grain Co. *v.* Missouri Pac. R. Co., 120 Mo. App. 203, 96 S. W. 681; Cowherd *v.* St. Louis, etc., R. Co. (Mo. App), 131 S. W. 755.

New York.—Note to Griffin *v.* Colver, 16 N. Y. 489, 69 Am. Dec. 718; Ward *v.* New York Cent. R. Co., 47 N. Y. 29, 7 Am. Rep. 405; Kent *v.* Hudson River R. Co. (N. Y.), 22 Barb. 278; Medbury *v.* New York, etc., R. Co. (N. Y.), 26 Barb. 564; note to Dana *v.* Fiedler, 12 N. Y. 40, 62 Am. Dec. 130; Shannon *v.* Comstock (N. Y.), 21 Wend. 457, 34 Am. Dec. 262; Bracket *v.* McNair (N. Y.), 14 Johns. 170, 7 Am. Dec. 447; Wibert *v.* New York, etc., R. Co. (N. Y.), 19 Barb. 36; Jones *v.* New York, etc., R. Co. (N. Y.), 29 Barb. 633;

Bracco *v.* Merchants' Despatch Transp. Co., 113 N. Y. S. 131, 61 Misc. Rep. 60.

North Carolina.—Harper Furniture Co. *v.* Southern Exp. Co., 148 N. C. 87, 62 S. E. 145, 30 L. R. A., N. S., 483, 128 Am. St. Rep. 588; Davidson Development Co. *v.* Southern R. Co., 147 N. C. 503, 61 S. E. 381; Lee *v.* St. Louis, etc., R. Co., 136 N. C. 533, 48 S. E. 809; Boyle *v.* Reeder, 23 N. C. 607; Foard *v.* Atlantic, etc., R. Co., 53 N. C. 235, 78 Am. Dec. 277; Rocky Mt. Mills *v.* Wilmington, etc., R. Co., 119 N. C. 693, 25 S. E. 854, 56 Am. St. Rep. 682; Sharpe *v.* Southern R. Co., 130 N. C. 613, 41 S. E. 799; Neal *v.* Pender-Heyman Hardware Co., 122 N. C. 104, 29 S. E. 96, 65 Am. St. Rep. 697.

Ohio.—Wyler Ackerland & Co. *v.* Louisville, etc., R. Co., 83 O. St. 293, 94 N. E. 423; Baltimore, etc., Co. *v.* O'Donnell, 49 O. St. 489, 32 N. E. 476, 34 Am. St. Rep. 579, 21 L. R. A., N. S., 117; Devereaux *v.* Buckley, 34 O. St. 16, 32 Am. Rep. 342, 344.

Pennsylvania.—Eckel *v.* Murphey, 15 Pa. 488, 53 Am. Dec. 607.

South Carolina.—Nettles *v.* South Carolina R. Co., 7 Rich. L. 190, 62 Am. Dec. 409, and note 411; McKerall *v.* Atlantic, etc., R. Co., 76 S. C. 338, 56 S. E. 965; Rutland *v.* Southern Railway, 81 S. C. 448, 62 S. E. 865.

Texas.—Chicago, etc., R. Co. *v.* Mill Elevator, etc., Co. (Tex. Civ. App.), 87 S. W. 753; International, etc., R. Co. *v.* Philips, 63 Tex. 590, 594; Haberzettle *v.* Trinity, etc., R. Co., 46 Tex. Civ. App. 527, 103 S. W. 219; Gulf, etc., R. Co. *v.* McCarty, 82 Tex. 608, 18 S. W. 716; Houston, etc., R. Co. *v.* Foster (Tex. Civ. App.), 86 S. W. 44; Gulf, etc., R. Co. *v.* Pettit, 3 Tex. Civ. App. 588, 589, 22 S. W. 761; Gulf, etc., R. Co. *v.* McCorquodale, 71 Tex. 41, 47, 9 S. W. 80; Texas, etc., R. Co. *v.* Nicholson, 61 Tex. 491; Missouri, etc., R. Co. *v.* Webb, 20 Tex. Civ. App. 431, 440, 49 S. W. 526; Missouri Pac. R. Co. *v.* Fagan, 72 Tex. 127, 9 S. W. 749, 2 L. R. A., N. S., 75, 13 Am. St. Rep. 776; Garlington *v.* Fort Worth, etc., R. Co., 34 Tex. Civ. App. 274, 78 S. W. 368.

Wisconsin.—Peet *v.* Chicago, etc., R. Co., 20 Wis. 594, 91 Am. Dec. 446, 450.

Where goods shipped have a market value, and there is nothing to indicate the specific purpose for which they were ordered, damages for delay in delivery are usually the difference between the market value at the time fixed for delivery and that when they were in fact delivered. Harper Furniture Co. *v.* Southern Exp. Co., 148 N. C. 87, 62 S. E. 145, 30 L. R. A., N. S., 483, 128 Am. St. Rep. 588.

Where there is delay in transportation of goods intended for sale at destination, and the market price has fallen in the meantime, the carrier is liable for the difference in market price between the time when they should have arrived and that when they were delivered, together with any other and incidental damages naturally and proximately flowing from the delay. Missouri, etc., R. Co. *v.* Carpenter, 52 Tex. Civ. App. 585, 114 S. W. 900.

Hutchinson on Carriers, § 771, thus states the rule: "If the goods are intended for sale in the market at destination, and the carrier unreasonably and negligently delay their transportation, it is now universally agreed, whatever doubts may have been at one time entertained upon the subject that the general rule by which the damages are to be computed, if goods of the particular kind have fallen in market value during the delay, or if they have depreciated in quality because of the delay, is the difference between the market value when the goods should have arrived and the value at the time of their delivery, the carrier being liable to the extent of the depreciation, with interest from the time when they should have been delivered." Missouri, etc., R. Co. *v.* Webb, 20 Tex. Civ. App. 431, 49 S. W. 526.

An instruction that the measure of a recovery for delay in the delivery of freight is the difference between the value at the point of shipment and the value at the point of destination, after the lapse of a reasonable time for effecting the carriage, less the freight charges, is incorrect in that it is more favorable to the plaintiff than the measure prescribed by law. Wilson *v.* Atlanta, etc., R. Co., 82 Ga. 386, 9 S. E. 1076.

At common law, the measure of the carrier's liability for negligent delay in transporting goods is the depreciation in market value at the time and place they should have been delivered and the market value according to their condition at the time and place of actual delivery or tender, together with reasonable loss proximately caused by such delay. Bullock *v.* Charleston, etc., R. Co., 64 S. E. 234, 82 S. C. 375.

The selling price at the place of delivery is the true measure of damages. Missouri Pac. R. Co. *v.* Peru-Van Zandt Imp. Co., 73 Kan. 295, 85 Pac. 408, 87 Pac. 80, 117 Am. St. Rep. 468, 6 L. R. A., N. S., 1058, 9 Am. & Eng. Ann. Cas. 790.

Under Georgia Civ. Code 1910, § 2773, the measure of damages for a failure to deliver goods in a reasonable time is the difference between the market value at the time and place they should have been delivered and the time of actual delivery, and it is error to instruct that a carrier could be held liable for the condition the goods were in on the Monday following the Saturday of their arrival, or as soon thereafter "as they could be sold." Western, etc., R. Co. *v.* Summerour, 77 S. E. 802, 139 Ga. 545.

Decisions contra.—"The question in Conger *v.* Hudson River R. Co., 13 N.

freight, if unpaid.[13]

Rule Not Peculiar to Carriers.—The principle which allows the difference in market value between the two periods of time as a measure of damages of course finds its almost universal application in the case of common carriers, as they do the principal, if not the entire, transportation of the country. But it does not proceed from the extraordinary care required of them by the common law, or any other stringent rules applied to them, but is equally binding upon any party who undertakes to do for another a specific thing within a specified time.[14]

Analogy to Case of Loss of Goods.—The rule applied in the case where the goods are lost, that the measure of damages is the difference between the value of the goods at the point of shipment and that at the point of destination, does not apply to the case where there is merely a delay in the transportation of the goods.[15] Where the goods are lost, the injury to the consignee is the excess of the cost of the goods at the point of destination, over the cost of the goods at the point of shipment, which is the loss occasioned him by the necessity of substituting the goods with others purchased at the place of destination,[16] but where the goods are delayed the consignee can not substitute others for them, as it is his duty, despite the delay, to accept the goods.[17] Clearly the two rules are not analogous. However, it has been held that where the carrier agrees to ship the goods to another point after their arrival at the original point of destination, the measure of damages for delay in holding the goods at the original destination is the difference in values at the changed destination.[18]

What Constitutes Market Value.—The measure of damages is the difference between the market value of the lumber at the date of the shipment, as evidenced by the contract price which had been offered at that date, and the market price of the same goods when they were sold after delay in delivery.[19]

Y. Super. Ct. 375, was whether the shipper could recover from the carrier damages occasioned by a loss of market through delay; and the court intimated that such damages are too speculative in their character to form the basis of legal action." Sisson *v.* Cleveland, etc., R. Co., 14 Mich. 489, 90 Am. Dec. 252.

In Wibert *v.* New York, etc., R. Co. (N. Y.), 19 Barb. 36, it was held, in an action against a carrier for failure to deliver butter in a reasonable time, that the difference between the value of butter at the time it should have been delivered and its value at the time of actual delivery could not be recovered as damages, because the loss was not the actual and proximate result of the act complained of. "The reasoning of the court is, that the fall in price was not in consequences of the delay, and therefore the carrier was not liable for the resulting loss. It is to be regretted that this point was not passed upon by the court of appeals when the case reached that tribunal —12 N. Y. 245—as the case seems to us to lay down a rule of damages wholly unwarranted by reason or authority." Sisson *v.* Cleveland, etc., R. Co., 14 Mich. 489, 90 Am. Dec. 252.

13. Southern Exp. Co. *v.* Hanaw, 134 Ga. 445, 67 S. E. 944, 137 Am. St. Rep. 227.

14. **Rule not peculiar to carriers.**—"There is nothing in the point made by appellants' counsel that the measure of damages does not apply when the delay occurred through the fault of the railroad company before they assumed the attitude of common carriers by signing a bill of lading." Texas, etc., R. Co. *v.* Nicholson, 61 Tex. 491.

15. **Analogy to case of loss of goods.**—Texas, etc., R. Co. *v.* Nicholson, 61 Tex. 491.

16. See post, "Loss of or Injury to Goods," chapter 12

17. See ante, "Duty of Consignee to Accept Goods," § 924.

18. San Antonio, etc., R. Co. *v.* Thompson (Tex. Civ. App.), 66 S. W. 792.

19. **What constitutes market value.**—Where an action was brought against a railroad company for delay in delivering a car of lumber the measure of damages was equal to the difference between the market value of the lumber, at the date of shipment, as evidenced by the contract price which had been offered the shipper at that date, and the market price of the same lumber when it was sold, after the delay in delivery, with the storage charges during the time the lumber was held for a rising market, the holding for a rising market and the expense incident thereto having been made necessary by the delay in delivering the shipment according to contract. Norfolk, etc., R. Co. *v.* Wilkinson, 106 Va. 775, 56 S. E. 808.

While a shipper whose commodity fails to reach the market at a proper time through the negligence of the carrier is entitled to recover the market price, nevertheless, where a shipper shipped corn so that it would, if delivered promptly, have reached their destination on a day when for a few hours, because of a corner in the corn market, corn was worth twice as much as it was the day before or the day after, this artificially advanced price could not be considered the market price.[20]

Market Reports in Newspapers.—Newspaper reports of the state of the market are competent evidence to prove the market value as the measure of damages.[21]

At Ultimate Destination.—The measure of damages is the marke value of the goods at the place of ultimate destination, known to the carrier, and not an intermediate point to which the carrier contracts to transport the goods.[22]

Additional Damages.—The measure of damages for delay in delivering goods received by a carrier for transportation is the difference between the market value of the goods at the time of delivery and at the time when by reasonable diligence they should have been delivered, together with incidental damages naturally flowing from the delay, and special damages where the shipper informed the carrier when the contract of shipment was made of special circumstances requiring expedition in the shipment.[23] If there is other deterioration than that in the market value due to the delay of the carrier that must also be taken into consideration.[24]

Where Carrier Has Knowledge Goods Intended for Market.—This rule applies where the carrier is chargeable with knowledge that the goods carried are intended for the market.[25] The cases generally make no mention of knowledge of the shipper, which would undoubtedly arise from the nature of the goods themselves. The rule is said to apply in ordinary cases, and it is an ordinary case where no special information is given the carrier as to the purpose for which the goods are shipped, other than that arising from the nature of the goods themselves. Where, owing to the failure of an express company to deliver a box containing souvenirs, suitable for sale only in the city to which sent, within a reasonable time, they were without market value, the measure of damages was the market value of the souvenirs when shipped, though the express company was not informed of the contents of the box.[26]

Where Goods Injured by Delay.—In an action against a carrier for unreasonable delay in delivering goods, on proof that the goods were such as were called for by the contract, and in good condition when shipped, and of negligent delay of the carrier, resulting in damage to them, the shipper is entitled to recover the difference in the market value of the goods in the condition in which they would have arrived but for the delay, and that in which they did

20. Johnson-Brinkman Comm. Co. *v.* Wabash R. Co., 64 Mo. App. 590.

21. **Market reports in newspapers.**—Sisson *v.* Cleveland, etc., R. Co., 14 Mich. 489, 90 Am. Dec. 252.

22. **At ultimate destination.**—The contract of the defendants was to transport the cattle from Toledo to Buffalo. The defendants were informed when they entered into the contract that the ultimate destination was to an Albany or New York market; and they must be held to have assumed their obligations in reference to that fact. If, in fact, there was no fall in prices before the cattle had reached Buffalo, but afterwards, and before they could be delivered at Albany, a loss had occurred as the direct consequence of defendants' delay, it would be both illogical and unjust to hold that defendants shall be discharged because the injurious consequences of their act did not result until the cattle were out of their own hands. Sisson *v.* Cleveland, etc., R. Co., 14 Mich. 489, 90 Am. Dec. 252.

23. **Additional damages.**—Pilcher *v.* Central, etc., R. Co., 155 Ala. 316, 46 So. 765.

24. Texas, etc., R. Co. *v.* Nicholson, 61 Tex. 491.

25. **Where carrier has knowledge goods intended for market.**—Devereaux *v.* Buckley, 34 O. St. 16, 32 Am. Rep. 342.

26. Lambert-Murry Co. *v.* Southern Exp. Co., 146 N. C. 321, 59 S. E. 991.

arrive.[27] Where a carrier of fruit delayed the transportation and failed to ice the car during transit, causing the fruit to rot, and the consignee refused to accept the fruit, which was of some value, when tendered for delivery at the point of destination, and the carrier sold the fruit for all it was then worth, the proceeds belonged to the consignee, who, in addition to that amount, was entitled to recover the difference between the value of the fruit if delivered in good condition and the value as delivered, less reasonable expenses incurred by the carrier in making the sale.[28]

Where Receipt of Goods Delayed.—This rule has also been applied in cases where the carrier simply delays the receipt of the goods but does not refuse to receive them.[29]

Where Goods Shipped to Another Market.—The rule applies regardless of the fact that the goods were afterwards shipped to a market other than the original destination.[30] If by reason of the delay there is no market value for the goods at destination, and consequently they are shipped to another market, the measure is the difference in market value at destination when they should have arrived and what they sold for on the other market.[31] Where a railroad agent at the point to which goods were consigned agrees to send the car containing them as soon as it arrives to another point, and thereby their destination is changed to the latter, the measure of damages for delay in holding the car at the original destination is the difference in values at the changed destination.[32]

Where Goods Misdirected.—The railroad company is responsible in damages for depreciation in value of goods between the date of misdirection and date of its coming into hands of rightful consignee.[33]

Where Market Value Does Not Fluctuate.—As to perishable articles of fluctuating value, as grain, live stock and such like, this rule is doubtless the true one. But it seems that the difference in market value at the two times is not the measure of damages where the value of the property is not subject to fluctuation during the interval, as where the goods shipped consists of machinery. If this were the measure of damages, there would be no great incentive to carriers to perform promptly a contract for the delivery of such articles, as the articles are not liable to deteriorate in a few days or months.[34]

Goods Having Actual Value.—The shipper of a commodity to the market for sale, who fails to get it to the market through the negligence of the carrier, is entitled to base his claim for damages on the market price, regardless of actual value.[35]

Goods Having Market Value.—This rule applies where the goods have a market value.[36] Where, owing to the failure of an express company to de-

27. **Where goods injured by delay.**—Garlington *v.* Fort Worth, etc., R. Co., 34 Tex. Civ. App. 274, 78 S. W. 368.

28. St. Louis, etc., R. Co. *v.* Cumbie, 101 Ark. 172, 141 S. W. 939.

29. **Where receipt of goods delayed.**—Inman & Co. *v.* St. Louis, etc., R. Co., 14 Tex. Civ. App. 39, 37 S. W. 37, affirmed in 93 Tex. 643, no op., citing Houston, etc., R. Co. *v.* Smith, 63 Tex. 322; Gulf, etc., R. Co. *v.* Hume, 87 Tex. 211, 27 S. W. 110, and Texas, etc., R. Co. *v.* Nicholson, 61 Tex. 491.

30. **Where goods shipped to another market.**—Houston, etc., R. Co. *v.* Foster (Tex. Civ. App.), 86 S. W. 44.

31. Missouri, etc., R. Co. *v.* Carpenter, 52 Tex. Civ. App. 585, 114 S. W. 900.

32. San Antonio, etc., R. Co. *v.* Thompson (Tex. Civ. App.), 66 S. W. 792.

33. **Where goods misdirected.**—Vincent *v.* Rather, 31 Tex. 77, 98 Am. Dec. 516; Gulf, etc., R. Co. *v.* Maetze, 2 Texas App. Civ. Cas., § 631.

34. **Where market value does not fluctuate.**—Priestly *v.* Northern Indiana, etc., R. Co., 26 Ill. 205, 79 Am. Dec. 369; Harper Furniture Co. *v.* Southern Exp. Co., 148 N. C. 87, 62 S. E. 145, 128 Am. St. Rep. 588, 30 L. R. A., N. S., 483.

35. **Goods having actual value.**—Johnson-Brinkman Comm. Co. *v.* Wabash R. Co., 64 Mo. App. 590.

36. **Goods having market value.**—Harper Furniture Co. *v.* Southern Exp. Co., 148 N. C. 87, 62 S. E. 145, 128 Am. St. Rep. 588, 30 L. R. A., N. S., 483.

liver a box containing souvenirs, suitable for sale only in the city to which sent, within a reasonable time, they were without market value, the measure of damages was the market value of the souvenirs when shipped, though the express company was not informed of the contents of the box.[37] Measure of damages for delay in transporting and delivering goods which are not intended for the market is ordinarily the rental value of the goods during the delay, with legal interest from the time the goods should have been delivered.[38]

Goods Valueless.—Where the evidence shows that at the time of delivery the goods have become valueless, a recovery of the full value of the goods when and where they should have been delivered is proper.[39]

Goods Ordered for Specific Purpose.—Where there is nothing to indicate the specific purpose for which the goods were ordered, the damages are usually the difference in the market value of the goods at the time fixed for delivery and that when they were in fact delivered.[40]

Goods Purchased at High Price.—The measure of damages for delay in a shipment of goods is the difference in the market price at the time they ought to have been delivered and of actual delivery, irrespective of whether the goods were purchased at a high or low price.[41]

Goods Redelivered to Consignor.—Where redelivery of the goods to the consignor by a carrier after they had been returned to him was delayed, the shipper's measure of damages was the difference between the market value of the goods when redelivery should have been made and their value at the time redelivery was tendered.[42]

Perishable Goods.—The measure of damages for delay in the shipment of perishable goods is the market price at the place of destination at the time the goods were due there,[43] provided the petition therefor warrants it, and does not specifically plead elements of damage, when the recovery is restricted to the elements alleged.[44]

Goods Consisting of Samples.—In an action against an express company for failure to deliver samples of goods, the damages should be measured by the fall in price of the goods represented by the samples.[45]

Particular Goods.—This rule applies to shipments of machinery,[46] cans to

37. **Where goods have no market value.**—Lambert-Murry Co. *v.* Southern Exp. Co., 146 N. C. 321, 59 S. E. 991.

38. Brown *v.* Adams, 3 Texas App. Civ. Cas., § 390.

39. **Goods valueless.**—Southern Exp. Co. *v.* Briggs, 1 Ga. App. 294, 57 S. E. 1066.

40. **Goods ordered for specific purpose.**—Harper Furniture Co. *v.* Southern Exp. Co., 148 N. C. 87, 62 S. E. 145, 128 Am. St. Rep. 588, 30 L. R. A., N. S., 483.

41. **Goods purchased at high price.**—Rutland *v.* Southern Railway, 81 S. C. 448, 62 S. E. 865.

42. **Goods redelivered to consignor.**—Norfolk, etc., R. Co. *v.* Potter, 110 Va. 427, 66 S. E. 34.

43. **Perishable goods.**—Parsons-Applegate Co. *v.* Louisville, etc., R. Co., 136 Mo. App. 494, 118 S. W. 101.

"It can not be disputed that, in the absence of this contract, the legal liability would be for the price at Chicago at the time the potatoes were due there. St. Louis, etc., R. Co. *v.* Mudford, 48 Ark. 502, 3 S. W. 814; St. Louis, etc., R. Co. *v.* Phelps, 46 Ark. 485; East Tennessee, etc., R. Co. *v.* Johnson, 85 Ga. 497, 11 S. E. 809; Fox *v.* Boston, etc., R. Co., 148 Mass. 220, 19 N. E. 222, 1 L. R. A., N. S., 702; Hutchinson on Carriers, § 767; Ray on Imposed Duties of Freight Carriers, p. 1036." St. Louis, etc., R. Co. *v.* Coolidge, 73 Ark. 112, 83 S. W. 333, 108 Am. St. Rep. 21, 67 L. R. A., N. S., 555, 3 Am. & Eng. Ann. Cas. 582.

44. Parsons-Applegate Co. *v.* Louisville, etc., R. Co., 136 Mo. App. 494, 118 S. W. 101.

45. **Goods consisting of samples.**—Where cotton samples are shipped from an interior market to the market at Galveston, delay in delivering such samples will render the carrier liable for the decline in the price of cotton. Wells Fargo Exp. Co. *v.* Samuels, 11 Tex. Civ. App. 15, 17, 31 S. W. 305.

46. **Machinery.**—In the absence of notice to or knowledge by a carrier as to the special use to be made of a shipment of machinery, the only damages recoverable for a delay in shipment is the difference between the value when delivery should have been made and the value when it was made. Bracco *v.* Merchants' Despatch Transp. Co., 113 N. Y. S. 131, 61 Misc. Rep. 60.

be used in canning vegetables,[47] and berries.[48]

§ 943. Loss of Profits.—The inclination of the earlier authorities to hold that contemplated profits per se were improper elements of damage has given way under the riper wisdom of jurisprudence, and, instead of holding to the earlier inclination, the weight of authorities in modern jurisprudence either holds or concedes that, where a loss of profits is not too remote or conjectural to be susceptible of computation with reasonable accuracy, they are proper elements of damages.[49]

Notice to Carrier.—Before recovery can be had for lost profits the carrier should be notified at the time of making the contract of the specific purpose for which the goods are to be used, and of the losses in profits, or losses expected to be sustained by not having the use of the goods.[50] In an action against the carrier for delay in transportation there may be a recovery of all the damages caused the injured party, which includes gains prevented as well as losses sustained. The damages must, however, be such as may fairly be supposed to have entered into the contemplation of the parties when they made the contract, that is, such as might naturally be expected to follow its violation, and they

47. Cans used in canning.—The measure of damages to a consignee for delay in shipping a car load of cans to be used in canning tomatoes is the difference between the market value of the cans at the time when it should have been delivered and its value at the time of delivery, and, in addition to this, the consignee may recover the amount reasonably spent after the car was delayed in telephoning and telegraphing to locate the car and secure its delivery. Illinois Cent. R. Co. *v.* Hopkinsville Canning Co., 132 Ky. 578, 116 S. W. 758.

48. The measure of the shippers' damages for a delayed shipment of berries which were sold by the carrier on arrival was the market value of the berries on the date which they would have arrived if transported with reasonable diligence, less charges for transportation and refrigeration. Baltimore, etc., R. Co. *v.* Sperber & Co., 117 Md. 595, 84 Atl. 72.

49. Loss of profits.—"This rule is recognized with approval by each and all of the following authorities cited by counsel for plaintiff in error in support of his first proposition. Strawn *v.* Cogswell, 28 Ill. 457; Frazer *v.* Smith, 60 Ill. 145; Galveston, etc., R. Co. *v.* Jessee, 2 Texas App. Civ. Cas., § 403, and authorities cited; People's Sav. Bank *v.* Waterloo, etc., Transit Co., 118 Iowa 740, 92 N. W. 691; Bartow *v.* Erie R. Co., 73 N. J. L. 12, 62 Atl. 489; Houston, etc., R. Co. *v.* Hill, 63 Tex. 381; Western Union Tel. Co. *v.* Crall, 39 Kan. 580, 18 Pac. 719; Moulthrop *v.* Hyett, 105 Ala. 493, 17 So. 32, 53 Am. St. Rep. 139; Williams *v.* Island City Mercantile, etc., Co., 25 Ore. 573, 37 Pac. 49; Brigham & Co. *v.* Carlisle, 78 Ala. 243, 56 Am. Rep. 28; Gas Co. *v.* Glass Co., 56 Kan. 614, 44 Pac. 621; Cutting *v.* Miner, 30 App. Div. 457, 52 N. Y. S. 288, 5 N. Y. Ann. Cas. 348; Griffin *v.* Colver, 16 N. Y. 489, 69 Am. Dec. 718; Western Gravel Road Co. *v.* Cox, 39 Ind. 260; Florida, etc., R. Co. *v.* Southern Supply Co., 112 Ga. 1, 37 S. E. 130; Bell *v.* Reynolds, 78 Ala. 511, 56 Am. Rep. 52; Pollock & Co. *v.* Gantt, 69 Ala. 373, 44 Am. Rep. 519; Witherbee *v.* Meyer, 155 N. Y. 446, 50 N. E. 58." Ft. Smith, etc., R. Co. *v.* Williams, 30 Okla. 726, 121 Pac. 275, 40 L. R. A., N. S., 494.

In an action for damage caused by delay in the shipment of fruit, it would not be a correct rule for the measure of damages to say that "the plaintiffs are entitled to recover only what they paid for the peaches, such other loss as the proof shows that they sustained in consequence of such failure incurred in and about the loading, the superintending or loading, less what they have realized from the sale; not the profits that may have been realized from the sale in New York, in case the instructions had been followed and the fruit delivered earlier in New York." Central R., etc., Co. *v.* Skellie, 86 Ga. 686, 12 S. E. 1017.

50. Notice to carrier.—*Arkansas.*—Chicago, etc., R. Co. *v.* Planters' Gin, etc., Co., 88 Ark. 77, 113 S. W. 352.

Illinois.—Priestly *v.* Northern Indiana, etc., R. Co., 26 Ill. 205, 79 Am. Dec. 369.

Kentucky.—Franklin *v.* Louisville, etc., R. Co. (Ky.), 116 S. W. 765.

Massachusetts.—Harvey *v.* Connecticut, etc., R. Co., 124 Mass. 421, 26 Am. Rep. 673.

Oklahoma.—St. Louis, etc., R. Co. *v.* Farmers' Union Gin Co., 34 Okla. 270, 125 Pac. 894; Chicago, etc., R. Co. *v.* Wolfe, 61 Neb. 502, 86 Pac. 441.

Texas.—Texas, etc., R. Co. *v.* Hassell, 23 Tex. Civ. App. 681, 58 S. W. 54; Gulf, etc., R. Co. *v.* Gilbert, 4 Tex. Civ. App. 366, 22 S. W. 760, 23 S. W. 320.

must be certain both in their nature and in respect to the cause from which they proceed.[51]

Market at Place of Destination.—There is no rule which subjects a common carrier to a greater damage for a breach of his contract than the amount of profits which the shipper might have made over the freight and cost, by a sale at the time and place at which the article to be transported was to be delivered, provided there be a market for the article there. In case there is no market for the article but the owner requires them for his own use, he can not recover profits which he might have realized by the sale of articles into which he might manufacture the article.[52]

§ 944. Expenses Occasioned by Delay.—The shipper is under duty to so handle the goods as to reduce the damages as much as possible, and he is entitled to have considered in estimating his damages the necessary expense to which he was put in thus reducing the damages.[53] Reasonable expenses occasioned by the delay may be allowed as an element of damage.[54] Expenses of the consignee in tracing the goods,[55] as telegraphing or telephoning,[56] are natural results of the carrier's delay in transporting the goods, for which the consignee can recover. Goods, having been billed by mistake of the carrier's agent to the wrong destination, were returned to the correct destination, where an at-

51. Savannah, etc., R. Co. *v.* Pritchard, 77 Ga. 412, 1 S. E. 261, 4 Am. St. Rep. 92.

Allegations of loss of profits which would have accrued to plaintiffs upon the fulfillment of a collateral contract, in consequence of a delay on the part of a common carrier in the delivery of freight, are properly stricken upon demurrer, where it does not appear that the contract, from the fulfillment of which profits would have accrued, was in the contemplation of parties at the time the carrier received the freight for transportation. Goodin *v.* Southern R. Co., 125 Ga. 630, 54 S. E. 720, 6 L. R. A., N. S., 1054, 5 Am. & Eng. Ann. Cas. 573.

52. Market at place of destination.—Cooper *v.* Young, 22 Ga. 269, 68 Am. Dec. 502.

Where there was no special contract sued on or proved, it was error to admit evidence to show that the consignees had bargained off the cotton shipped at three-eighths of a cent per pound over the market price, if they could have received it within a reasonable time, where the carrier knew nothing about the bargain, was not informed of it and not in privity with it at all. Columbus, etc., R. Co. *v.* Flournoy, 75 Ga. 745.

In an action for damages on account of delay by a common carrier in delivering goods, it was error to admit evidence of the profit which the plaintiff would have made by selling such goods if he had received them promptly, after proof only of the shipment and the delay in delivery. Southern Exp. Co. *v.* Hanaw, 134 Ga. 445, 67 S. E. 944, 137 Am. St. Rep. 227.

53. Expenses occasioned by delay.—Pittsburgh, etc., R. Co. *v.* Wood (Ind. App.), 84 N. E. 1009.

54. *England.*—Black *v.* Baxendale, 1 Exch. 410.

Kentucky.—Franklin *v.* Louisville, etc., R. Co. (Ky.), 116 S. W. 765.

North Carolina.—Rocky Mt. Mills *v.* Wilmington, etc., R. Co., 119 N. C. 693, 25 S. E. 854, 56 Am. St. Rep. 682.

Ohio.—Baltimore, etc., R. Co. *v.* O'Donnell, 49 O. St. 489, 32 N. E. 476, 21 L. R. A., N. S., 117, 34 Am. St. Rep. 579.

South Carolina.—McKerall *v.* Atlantic, etc., R. Co., 76 S. C. 338, 56 S. E. 965; Nettles *v.* South Carolina R. Co., 7 Rich. L. 190, 62 Am. Dec. 409.

Texas.—San Antonio, etc., R. Co. *v.* Josey (Tex. Civ. App.), 71 S. W. 606; Galveston, etc., R. Co. *v.* Douglass, 1 Texas App. Civ. Cas., § 67.

55. Missouri, etc., R. Co. *v.* Hazlett, 35 Okla. 12, 128 Pac. 105.

"Amongst the cash items expended by the plaintiff is one for 'telegrams, time, and expenses looking for boilers, and team for hauling expected boilers, $15.' We think that this should have been allowed: Waite *v.* Gilbert (Mass.), 10 Cush. 177." Swift River Co. *v.* Fitchburg R. Co., 169 Mass. 326, 47 N. E. 1015, 61 Am. St. Rep. 288.

Where goods are, through the negligence of the carrier, delivered to the wrong person, the consignee may recover the necessary expenses incurred in finding them and taking possession of them, as the result of the search mitigated the damages and formed a proper claim against the carrier. Savannah, etc., R. Co. *v.* Pritchard, 77 Ga. 412, 1 S. E. 261, 4 Am. St. Rep. 92.

56. Murrell *v.* Pacific Exp. Co., 54 Ark. 22, 14 S. W. 1098, 26 Am. St. Rep. 17; Illinois Cent. R. Co. *v.* Hopkinsville Canning Co., 132 Ky. 578, 116 S. W. 758; Haberzettle *v.* Trinity, etc., R. Co., 46 Tex. Civ. App. 527, 103 S. W. 219.

tempt was made by the connecting carrier to collect charges for the extra haul resulting from the mistake. Here the refusal of plaintiff to pay such charges and leave the matter for future adjustment resulted in a further delay. No willful wrong or oppression on the part of the receiving company was shown. The measure of the plaintiff's damages is the value of the use of the goods during the first delay and any necessary expense incurred in informing the company of its nonreceipt, without including the expense of trying to locate the goods after giving the first notice, or the delay and expense connected with securing an adjustment whereby the goods were eventually released without payment of the extra freight.[57] But a consignee can not recover the expenses incurred by him on a trip to the point of destination to look after the shipment.[58]

Storing and Preserving Goods.—Storage charges during the time that the goods are held at their destination for a rising market, where the holding for a rising market and the expense incident thereto are made necessary by the delay in delivering the shipment according to the contract, are recoverable by the shipper.[59] If a carrier wrongfully delays the transportation and delivery of orange boxes, the shipper can not leave the oranges exposed to the weather at the carrier's loss. It is the duty to preserve the property and house, or protect the same from damage by cold, if it can be reasonably done, and it is his right to recover of the carrier the reasonable expense therefor, together with the proximate damages for the delay.[60]

Demurrage Paid by Shipper.—Where a carrier undertaking to deliver lumber to a vessel knew at the time of the making of the contract that the adverse party would be compelled to pay demurrage charges if the cargo was delayed, but delayed delivery for an unreasonable time and thereby forced the adverse party to become liable for demurrage, the carrier was liable for the amount of the demurrage.[61] Where, owing to unreasonable delay by a railroad in forwarding a car load of grain, the consignee refused to accept it, so that the consignor was compelled to leave it in the car, and the railroad company demanded and received demurrage, the consignor was entitled to recover the demurrage in an action for the damages occasioned by the delay.[62]

Same—Knowledge of Carrier.—That a carrier did not know when contracting for the transportation of lumber that demurrage would accrue by reason of a delay did not relieve it from liability for demurrage charges, where, after the arrival of the lumber at destination, it undertook to deliver the lumber to a vessel with knowledge that a delay in delivery would incur liability for demurrage.[63]

Selling Goods at Another Point.—Where a shipper, in pursuance of the duty to reduce damages, ships the goods to other points, and there sells them, the measure of damages is the difference between the value of the goods at the original destination of the shipment at the time it should reasonably have arrived there and the actual selling price at the point where it was disposed of, allowing for the difference in the cost of transportation.[64]

Expense of Traveling with Goods.—A carrier having no notice that the shipper intended to follow the goods and sell them at destination is not liable

57. Yazoo, etc., R. Co. *v.* Christmas, 89 Miss. 686, 42 So. 169.

58. Southern R. Co. *v.* Coleman, 153 Ala. 266, 44 So. 837.

59. **Storing and preserving goods.**—Norfolk, etc., R. Co. *v.* Wilkinson, 56 S. E. 808, 106 Va. 775.

60. Williams *v.* Atlantic, etc., R. Co., 56 Fla. 735, 48 So. 209, 24 L. R. A., N. S., 134, citing St. Louis, etc., R. Co. *v.* Neel, 56 Ark. 279, 19 S. W. 963, 55 Am. & Eng. R. R. Cas. 428.

61. **Demurrage paid by shipper.**—Southern R. Co. *v.* Lewis, 165 Ala. 451, 51 So. 863.

62. Texas, etc., R. Co. *v.* Kolp (Tex. Civ. App.), 88 S. W. 417.

63. **Same—Knowledge of carrier.**—Southern R. Co. *v.* Lewis, 165 Ala. 451, 51 So. 863.

64. **Selling goods at another point.**—Pittsburgh, etc., R. Co. *v.* Wood (Ind. App.), 84 N. E. 1009.

for special damages arising from delay in shipment, such as loss of the shipper's time and expenses incurred by him in following the goods in ignorance of the delay.[65]

Purchase of Duplicate Goods.—If the goods are absolutely worthless, the shipper can recover the full amount of the cost that he is put to in getting their duplication. The measure of his damage is the cost of the duplicate machinery minus the value of the delayed machinery utilized to its best advantage.[66]

§ 945. Interest on Value of Goods.—The delay of the carrier is a breach of contract and the shipper can recover interest as a part of his damages.[67] When the property is delivered by the carrier, but a loss has ensued to the shipper from a failure to deliver it within a reasonable time, no reason is perceived why interest on the amount of the loss may not also be allowed from the time compensation for the loss is demanded. In actions of pure tort, which do not sound in contract, as where the property of a third party is destroyed or injured through the negligence of a carrier, the usual practice is to leave the allowance of interest on the damages which may be assessed to the sound discretion of the jury. But, as the case at bar is founded upon a breach of contract, it may well be distinguished from the case last cited.[68] In an action against a carrier for delay in the transportation of goods, the shipper is entitled to interest at the legal rate on the value of the shipment for the time it was delayed.[69] Interest is allowed on the decrease in market value.[70]

Interest on Judgment.—See elsewhere.[71]

65. **Expense of traveling with goods.**—Franklin *v.* Louisville, etc., R. Co. (Ky.), 116 S. W. 765.

66. **Purchase of duplicate goods.**—Chicago, etc., R. Co. *v.* Planters' Gin, etc., Co., 88 Ark. 77, 113 S. W. 352; Wabash R. Co. *v.* Harris, 55 Ill. App. 159.

67. **Interest on value of goods.**—St. Louis, etc., R. Co. *v.* Phelps, 46 Ark. 485; Rocky Mt. Mills *v.* Wilmington, etc., R. Co., 119 N. C. 693, 25 S. E. 854, 56 Am. St. Rep. 682. See ante, "Decrease in Market Value," § 942.

"In an action against a common carrier for failure to transport property in accordance with its contract, the general rule is to allow as damages the value of the property, with interest upon such value from the time when it should have been delivered, if it is not delivered at all. New York, etc., R. Co. *v.* Estill, 147 U. S. 591, 622, 37 L. Ed. 292, 13 S. Ct. 444." Missouri, etc., R. Co. *v.* Truskett, 44 C. C. A. 179, 104 Fed. 728, affirmed in 186 U. S. 480, 46 L. Ed. 1259, 22 S. Ct. 943.

Where a common carrier delays in carrying produce, interest on its value after the time when it should have been delivered may be recovered. Houston, etc., R. Co. *v.* Jackson, 62 Tex. 209. See Brown *v.* Adams, 3 Texas App. Civ. Cas., § 390.

But it has been held that in an action against a carrier to recover for delay in transporting plaintiff's freight, in the absence of fraud, delinquency, or injustice on the part of the carrier, plaintiff can not recover interest as a part of his damage. Texas, etc., R. Co. *v.* Wright, 2 Texas App. Civ. Cas., § 339.

68. Missouri, etc., R. Co. *v.* Truskett, 44 C. C. A. 179, 104 Fed. 728, affirmed in 186 U. S. 480, 46 L. Ed. 1259, 22 S. Ct. 943.

69. Texas Cent. R. Co. *v.* Hannay-Frerichs & Co., 104 Tex. 603, 142 S. W. 1163, modifying judgment (Tex. Civ. App.), 130 S. W. 250.

In an action against a carrier for failure to deliver cattle within the time agreed, interest from the date of the breach of the contract (if the suit is considered as ex contractu), or from the date of the injury (if the action be viewed as one in tort), may be allowed, if plaintiff recovers damages. Illinois Cent. R. Co. *v.* Haynes, 64 Miss. 604, 1 So. 765.

For wrongful delay in shipping goods the damages usually supposed to be in contemplation constitute the difference in the value of the goods when they should have been and when they were delivered, and in other cases the value of the use of the goods may be recovered if they are in condition to use, and in the absence of any appreciable loss from either source the interest on the money invested in the goods themselves during the wrongful delay is the correct measure of compensation. Davidson Development Co. *v.* Southern R. Co., 147 N. C. 503, 61 S. E. 381.

70. See ante, "Decrease in Market Value," § 942.

71. **Interest on judgment.**—See post, "Judgment," § 974.

§ 946. Mental and Physical Suffering.—Generally damages for mental and physical suffering are not recoverable against a carrier for delay in the shipment of goods. It has been so held where the shipment of household goods, wearing apparel[72] or goods used in giving an exhibition[73] were delayed. But where a package containing medicine for the plaintiff's wife which was known to an express company was not promptly delivered by the company, physical and mental suffering of the wife caused by the delay were held proper basis for recovery, but damages for sympathetic mental sufferings of the husband on account of the pain of his wife were held too remote.[74] And a carrier being informed, when a package was delivered to it for transportation, that it contained medicine for a sick girl, and that it was important that it should be delivered without delay, it is unnecessary to recovery for suffering by her from delay in its delivery, that the order for the medicine made by her father and doctor, when in fact she was unconscious, should have been with her knowledge and approval.[75]

Delay in Shipping Corpse.—Where a corpse arrived an hour before the time appointed for the funeral, and the plaintiff, the widow of deceased, of her own accord postponed the funeral until the following day, she is not entitled to damages for mental anguish because of delay, though before the arrival of the corpse some of the friends of the family had departed.[76]

§ 947. Liability as for Conversion.—Mere unreasonable delay in transporting does not amount to conversion, so as to authorize the consignee, upon the arrival of the goods, to reject them and sue for their full value. His remedy is to sue for the damages he has sustained by reason of the delay.[77] The

72. **Mental and physical suffering.**—Brown *v.* Adams, 3 Texas App. Civ. Cas., § 390.

73. In an action against a carrier for delay in transporting plaintiff's museum, for a certain exhibition, plaintiff can not recover for mental anguish experienced because of the delay. Yoakum *v.* Dunn, 1 Tex. Civ. App. 524, 21 S. W. 411.

74. **Shipment of medicine.**—Pacific Exp. Co. *v.* Black, 8 Tex. Civ. App. 363, 27 S. W. 830, citing Western Union Tel. Co. *v.* Cooper, 71 Tex. 507, 9 S. W. 598, 1 L. R. A., N. S., 728, 10 Am. St. Rep. 772; Gulf, etc., Tel. Co. *v.* Richardson, 79 Tex. 649, 15 S. W. 689; Western Union Tel. Co. *v.* Hoffman, 80 Tex. 420, 15 S. W. 1048, 26 Am. St. Rep. 759; Hale *v.* Bonner, 82 Tex. 33, 17 S. W. 605, 14 L. R. A., N. S., 336, 27 Am. St. Rep. 850.

There was testimony before the court in this case from which it might be implied that M was the agent of the company to receive the package for shipment. He was notified of the fact that the package contained medicine for Mrs. B, who was sick, and that it was important that it should be sent on the next train. This was notice to the company rendering it liable for the injury occasioned by its neglect in forwarding the package with reasonable dispatch. Pacific Exp. Co. *v.* Black, 8 Tex. Civ. App. 363, 27 S. W. 830.

75. Hendricks *v.* American Exp. Co., 138 Ky. 704, 128 S. W. 1089, 32 L. R. A., N. S., 867.

76. **Delay in shipping corpse.**—Alabama City, etc., R. Co. *v.* Brady, 160 Ala. 615, 49 So. 351.

77. **Liability as for conversion.**—5 Am. & Eng. Ency of Law, 221; Hutchinson on Carriers, §§ 328, 775.

Alabama.—Central, etc., R. Co. *v.* Montmollen, 145 Ala. 468, 39 So. 820, 117 Am. St. Rep. 58; South, etc., R. Co. *v.* Wilson, 78 Ala. 587; Alabama, etc., R. Co. *v.* Grabfelder, 83 Ala. 200, 3 So. 432; Southern R. Co. *v.* Moody, 151 Ala. 374, 44 So. 94.

Arkansas.—Chicago, etc., R. Co. *v.* Nuesch, 99 Ark. 568, 139 S. W. 679; Chicago, etc., R. Co. *v.* Pfeifer, 90 Ark. 524, 119 S. W. 642, 22 L. R. A., N. S., 1107; St. Louis, etc., R. Co. *v.* Cumbie, 101 Ark. 172, 141 S. W. 939; Chicago, etc., R. Co. *v.* Planters' Gin, etc., Co., 88 Ark. 77, 113 S. W. 352.

Michigan.—Michigan Cent. R. Co. *v.* Burrows, 33 Mich. 6.

New Jersey.—Higgins *v.* United States Exp. Co., 83 N. J. L. 398, 85 Atl. 450.

New York.—Briggs *v.* New York Cent. R. Co. (N. Y.), 28 Barb. 515; Magnin *v.* Dinsmore, 70 N. Y. 410, 26 Am. Rep. 608; Wamsley *v.* Atlas Steamship Co., 168 N. Y. 533, 61 N. E. 896, 85 Am. St. Rep. 699; Scovill *v.* Griffith, 12 N. Y. 509.

South Carolina.—Shaw *v.* South Carolina R. Co., 5 Rich. L. 462, 57 Am. Dec. 768.

Texas.—Baumbach *v.* Gulf, etc., R. Co., 4 Tex. Civ. App. 650, 23 S. W. 693; Gulf, etc., R. Co. *v.* Darby, 28 Tex. Civ. App. 229, 67 S. W. 129; Wells Fargo & Co. *v.* Hanson, 41 Tex. Civ. App. 174, 175, 91 S. W. 321; Gulf, etc., R. Co. *v.* Jackson, 4 Texas App. Civ. Cas., § 47, 15 S. W. 128; Gulf, etc., R. Co. *v.* Booton, 4 Texas App. Civ. Cas., § 67, 15 S. W. 502; Galveston,

owner can not charge the carrier with a conversion, or the value of the goods, for a delay, however long, if they are safely kept, unless they have been demanded of the carrier, and their delivery refused. Delay on the part of a carrier does not constitute a conversion of the goods, no matter how long continued, so as to make him liable for their value; and, so long as the goods remain in specie, the plaintiff can recover from the carrier only the damages which he has sustained by the delay.[78] There may be a possible case where the property has ceased to be of any value at all, such as wholly decayed perishable goods.[79]

Damage after Refusal to Accept.—In an action for damages from delay in the transportation of goods, by reason of which they were rendered worthless, plaintiff can not recover for any loss occasioned by his refusal to receive the goods when tendered by the carrier on their arrival.[80]

Where Goods Useless to Consignee.—The consignee must accept the goods although at the time of arrival they are of no use to him. Plaintiff had a carload of lumber on one of defendant's cars which, by agreement, was to be delivered at a point on its track about a mile distant, where defendant was building a house. The lumber was not delivered there until about a month and a half later, when plaintiff refused to receive it, having in the meantime purchased lumber to supply his needs. He sued for the value of the lumber. It is well settled that mere delay, however unreasonable, on the part of the carrier in delivery of the goods, does not amount to a conversion; the consignee must receive it when tendered, so long as it retains its identity and is not rendered wholly valueless. He should have accepted it and held defendant liable for the actual damages which he had sustained.[81] But it has been held that where, by reason of the delay of a carrier in delivering a part of a machine shipped, such part had become useless to the owner, and he was compelled to replace it with another, he is not bound to receive such part when tendered to him, but is entitled to recover its value of the carrier at the time and place it should have been delivered, with interest.[82]

etc., R. Co. *v.* Watson, 1 Texas App. Civ. Cas., § 813; Texas, etc., R. Co. *v.* Martin, 2 Texas App. Civ. Cas., § 342; St. Louis, etc., R. Co. *v.* Tyler Coffin Co. (Tex. Civ. App.), 81 S. W. 826; Gulf, etc., R. Co. *v.* Somerville Mercantile Agency (Tex. Civ. App.), 104 S. W. 1072. See ante, "Duty of Consignee to Accept Goods," § 924.

Mere "delay on the part of the carrier does not constitute a conversion of the goods, no matter how long continued, so as to make him liable for their value; and, so long as the goods remain in specie, however much they may be depreciated in value, the consignee or owner must receive them when tendered, and can recover from the carrier only the damages which he has sustained by the delay." Gulf, etc., R. Co. *v.* Everett, 37 Tex. Civ. App. 167, 83 S. W. 257.

In an action against a common carrier, where the complaint alleged a breach of the contract to deliver certain goods, and the proof showed only unreasonable delay in delivery, the court erred in rendering judgment for the total value of the property. Southern R. Co. *v.* Moody, 151 Ala. 374, 44 So. 94.

Not conversion per se.—If a carrier failed to deliver goods within a reasonable time, it does not amount to a conversion per se. Texas, etc., R. Co. *v.* Martin, 2 Texas App. Civ. Cas., § 342.

Where goods temporarily lost.—Where an express company lost plaintiff's trunk and failed to deliver the same on demand within a reasonable time, but later found the same and offered a delivery, there was no conversion, and it was only liable for the damage occasioned by the delay. Wells Fargo & Co. *v.* Hanson, 41 Tex. Civ. App. 174, 91 S. W. 321; Baumbach *v.* Gulf, etc., R. Co., 4 Tex. Civ. App. 650, 23 S. W. 693.

78. Ryland *v.* Chesapeake, etc., R. Co., 55 W. Va. 181, 46 S. E. 923.

79. Central, etc., R. Co. *v.* Montmollen, 145 Ala. 468, 39 So. 820, 117 Am. St. Rep. 58; Southern Exp. Co. *v.* Hanaw, 134 Ga. 445, 67 S. E. 944, 137 Am. St. Rep. 227.

80. **Damage after refusal to accept.**—In an action for damages from delay in the transportation of fruit trees, etc., it was error to refuse to charge that if the trees, when they arrived, and were tendered to plaintiff, were but partially damaged, he could recover only for such portion as was damaged. St. Louis, etc., R. Co. *v.* Cates, 38 S. W. 648, 15 Tex. Civ. App. 135.

81. **Where goods useless to consignee.** Baumbach *v.* Gulf, etc., R. Co., 4 Tex. Civ. App. 650, 23 S. W. 693.

82. Plaintiff shipped to himself over defendant's road a cotton press, in several pieces, one of which (a sill) was delayed

Where Goods Destroyed by Act of God.—Where a carrier received goods for transportation, and, owing to delay in carriage and delivery at the point of destination, the goods were still in the possession of the carrier, when a large part of them were destroyed by an unusual storm, the carrier is not liable for conversion of the goods so destroyed.[83] But where a carrier received goods for transportation, and while in the company's possession a large portion of them were destroyed by a storm, and the carrier recovered a portion of them and retained them an unreasonable time, the company is liable for conversion of the goods so recovered and retained.[84]

Demand and Refusal.—The owner can not charge the carrier with a conversion, or the value of the goods, for a delay, however long, if they are safely kept, unless they have been demanded of the carrier, and their delivery refused.[85] Where a consignee, having heard nothing from the goods shipped, asked the carrier what had become of the goods, and was told that he did not know, there was no demand, so as to render the carrier guilty of conversion.[86]

Effect of Tender of Goods.—In an action against a carrier for the conversion of certain goods, in which no demand on the carrier for the goods and refusal on its part were shown, and in which it appeared that defendant still had the goods in its possession, a tender of them was a defense to the action.[87]

§ 948. Mitigation of Damages.—A shipper does not lose his right to recover from a carrier for delay in the delivery of goods in consequence of having received them and disposed of a portion of them at private sale. These facts may be considered in mitigation of damages to a certain extent, but the cause of action having accrued by the delay, the carrier is obliged to make good the loss resulting from his neglect, and the acceptance of the goods, it is well settled, is no bar to the action.[88] Damages to which a shipper is entitled by reason of delay are not to be diminished by or in consequence of a statement put upon the record by counsel for the carrier, even with the consent of the shipper's attorney, that on a certain day the goods were sold by the carrier, it not appearing that such sale was made by or with the consent of, or notice to, the shipper.[89] In an action for damages against an express company, for neg-

in its delivery over a month, in consequence of which plaintiff purchased another sill. Held, that plaintiff was not bound to receive the sill when tendered to him, as by reason of the delay it had become useless to him, he having been compelled to replace it with another, and detached, as it was, from the press, it was valueless. Gulf, etc., R. Co. *v.* Maetze, 2 Texas App. Civ. Cas., § 631.

Under Georgia Code.—In a suit against a carrier for failure to deliver goods in a reasonable time, the measure of damages is that prescribed by the Civil Code, § 2319; and where the evidence shows that at the time of the actual delivery the goods had been rendered valueless by the negligent delay of the carrier, a recovery for the full value of the goods when and where they should have been delivered will be upheld. Hutch. Carr. (3d. Ed.), § 651; East Tennessee, etc., R. Co. *v.* Johnson, 85 Ga. 497, 11 S. E. 809; Schulze *v.* Great Eastern R. Co., 19 Q. B. Div. 30, 30 Amer. & Eng. R. Cas. 134. Southern Exp. Co. *v.* Briggs, 1 Ga. App. 294, 57 S. E. 1066.

83. **Where goods destroyed by act of God.**—Gulf, etc., R. Co. *v.* Darby, 28 Tex. Civ. App. 229, 67 S. W. 129.

84. Gulf, etc., R. Co. *v.* Darby, 28 Tex. Civ. App. 229, 67 S. W. 129.

85. **Demand and refusal.**—Ryland *v.* Chesapeake, etc., R. Co., 55 W. Va. 181, 46 S. E. 923.

A carrier is not liable as for converting goods unreasonably delayed, in the absence of a demand for delivery and refusal thereof while the goods are in its possession. Southern R. Co. *v.* Moody, 169 Ala. 292, 53 So. 1016.

86. St. Louis, etc., R. Co. *v.* Tyler Coffin Co. (Tex. Civ. App.), 81 S. W. 826.

87. **Effect of tender of goods.**—St. Louis, etc., R. Co. *v.* Tyler Coffin Co. (Tex. Civ. App.), 81 S. W. 826.

88. **Mitigation of damages.**—Rathbone *v.* Neal, 4 La. Ann. 563, 50 Am. Dec. 579.

89. In an action against a carrier for unreasonable delay in the transportation of certain goods, a statement put in the record by counsel for defendant, with the consent of plaintiff's attorneys, that on "the 26th day of December," the year not appearing, "the goods in question were sold for $163.28" at a certain place, it not appearing that such sale was made by or with the consent of, or upon notice to, plaintiffs, was ineffectual to diminish the damages. Shidlovsky *v.* Mallory, etc., Co., 111 N. Y. S. 778, 60 Misc. Rep. 67.

ligently delaying for a period of fourteen days the shipment of a piece of machinery necessary for the operation of plaintiffs' mill, the fact that the same piece of machinery was delayed for four months at the place where it had been sent for repairs, does not preclude the plaintiffs' right of recovery.[90]

§§ 949-951. Goods Intended for Use of Consignee—§ 949. In General.—In an action against a carrier for delay in the delivery of goods, where the goods are not intended for sale in the market of destination but are intended for some use by the owner, there being no special circumstances such as would make the carrier liable for special loss, the carrier can be held liable only for that inconvenience to which the owner has been put by the deprivation of the property pending the delay.[91] But where the goods are shipped for a special purpose or for present use in a given way, and these facts are known to the carrier, he is responsible for the damages fairly attributable to the delay and in reference to the purpose or the use indicated.[92] The detriment caused by

90. Pacific Exp. Co. *v.* Darnell (Tex.), 6 S. W. 765.

91. **Goods intended for use of consignee.**—American Exp. Co. *v.* Jennings, 86 Miss. 329, 38 So. 374, 109 Am. St. Rep. 708; Illinois Cent. R. Co. *v.* Brookhaven Mach. Co., 71 Miss. 663, 16 So. 252; Silver *v.* Kent, 60 Miss. 124; Railroad Co. *v.* Ragsdale, 46 Miss. 458; Yazoo, etc., R. Co. *v.* Christmas, 89 Miss. 686, 42 So. 169; Gulf, etc., R. Co. *v.* Maetze, 2 Texas App. Civ. Cas., § 631; Gulf, etc., R. Co. *v.* Gilbert, 4 Tex. Civ. App. 366, 22 S. W. 760, 23 S. W. 320.

Where goods are intended for the owner's personal use the measure of damage for delay in delivery, in the absence of special circumstances, is value of the use of such property during the delay, and the carrier is not liable for depreciation in market value by reason of such delay. St. Louis, etc., R. Co. *v.* Hindsman, 1 Texas App. Civ. Cas., § 204.

Where goods shipped are not intended for sale in the market of destination, but are intended to serve some specific purpose of the owner, in the absence of special circumstances which may make the carrier liable for some special loss or for the expense which the owner may be put to by the carrier's negligent delay, the carrier can be held liable only for the inconvenience to which the owner has been put by being deprived of the use of his property during the time of the delay. Galveston, etc., R. Co. *v.* Jessee, 2 Texas App. Civ. Cas., § 403.

Mr. Hutchinson in his work on Carriers, § 776, lays down the rule thus: "Where the goods are not intended for sale in the market of destination, but are intended to serve some specific purpose of the owner, the rule that the carrier will be liable for depreciation in the market value during his negligent delay will, of course, not be applicable; and in the absence of special circumstances which may make the carrier liable for some special loss or for the expense to which the owner may be put by his negligent delay, he could be held liable only for the inconvenience to which the owner had been put by being deprived of the use of his property during the time of the delay; which must be determined as a question of fact by the jury, by ascertaining from the evidence the value of its use, the criterion of which would be, in most cases, its rental value during the delay; or, in case of an absolute refusal to transport according to contract, for such time as would be requisite to obtain the article by another conveyance or from some other source." Texas, etc., R. Co. *v.* Hassell, 23 Tex. Civ. App. 681, 683, 58 S. W. 54.

92. Harper Furniture Co. *v.* Southern Exp. Co., 148 N. C. 87, 62 S. E. 145, 128 Am. St. Rep. 588, 30 L. R. A., N. S., 483; Gulf, etc., R. Co. *v.* Gilbert, 4 Tex. Civ. App. 366, 368, 22 S. W. 760, 23 S. W. 320; Gulf, etc., R. Co. *v.* Pettit, 3 Tex. Civ. App. 588, 589, 22 S. W. 761.

Where a common carrier undertakes to deliver property shipped within a certain time, with notice of the purpose for which shipped, it is liable, on a breach, for any special losses which might reasonably have been anticipated by the parties as a probable result of a delay. Galveston, etc., R. Co. *v.* Watson, 1 Texas App. Civ. Cas., § 813.

In Priestly *v.* Northern Indiana, etc., R. Co., 26 Ill. 205, 79 Am. Dec. 369, damages were allowed for the use of machinery during the time it was wrongfully delayed in shipment. The court said: "The proposition can not be entertained for a moment that, under a contract to deliver in a reasonable time valuable machinery, such as described in the declaration, the difference in the market value of such machinery at the time it was in fact delivered and when it should have been delivered is all the damages the owner of the machinery is entitled to claim. If this was the measure, there could be no great incentive to carriers to perform promptly a contract for the delivery of such articles, as they are not liable to deteriorate in a few days or months." Harper Furniture Co. *v.* Southern Exp.

the delay is the loss of the use of such machinery during the time; and, where the purpose of the machinery and the period of its use are known to the carrier, the expense incurred in obtaining other machinery, the expense of maintaining idle hands, the rental value of the machinery, if ascertainable with reasonable accuracy, or the interest on money invested in idle machinery, are proper elements of damage; but remote and conjectural matters, such as interest on money borrowed for speculative purposes, or damage done to cotton purchased with such borrowed money—matters not proximately growing out of the delay—are not proper elements of damage. Neither are loss of profits a proper element unless expressly mentioned and made a condition of the contract at the time of its execution, and then only when such profits can be estimated with reasonable certainty.[93] A carrier which has notice of the special purpose to which the consignee intends to put machinery shipped over its line may be charged with any special damage resulting from delay in the transportation, which, in the nature of things, was reasonably within the contemplation of the parties at the time of shipment.[94]

Damages Must Be Certain.—The damages recoverable from the carrier must be certain both in their nature and in respect to the cause from which they proceed.[95] An owner of a public gimnery delivered a part of the machinery to a carrier for transportation to a designated point, to be repaired by the consignee. The carrier delayed the delivery of the machinery. The owner testified that a certain definite amount was a fair profit for ginning a bale of cotton, but he could only estimate the number of bales that went to his gin during the days his plant was shut down in consequence of the delay. The profit on each bale depended on contingencies. The owner was held entitled to nominal damages only; the estimate of what he might have earned by operating the gin, had the shipment been promptly delivered, being speculative.[96]

Knowledge of Carrier.—In order to recover lost profits as special damages from a carrier for delay in the shipment of the goods, the carrier at the time of the delivery of the shipment to it must have notice of the use for which the goods are intended,[97] or the character of the goods

Co., 148 N. C. 87, 62 S. E. 145, 128 Am. St. Rep. 588, 30 L. R. A., N. S., 483.

In Griffin *v.* Colver, 16 N. Y. 489, 494, 69 Am. Dec. 718, it is laid down that the broad, general rule in such cases is that the party injured is entitled to recover all his damages, including gains prevented as well as losses sustained; and this rule is subject to but two conditions: "The damages must be such as may fairly be supposed to have entered into the contemplation of the parties when they made the contract, that is, must be such as might naturally be expected to follow its violation; and they must be certain both in their nature and in respect to the cause from which they proceed." Deming *v.* Grand Trunk R. Co., 48 N. H. 455, 2 Am. Rep. 267, 272.

93. "Whatever detriment was caused, or whatever harm was done, resulted not from any fluctuation in market values, but from being deprived of the specific, mechanical use for which this machinery was intended, and without which plaintiff could not operate its gin. Hence it seems to us that whatever net benefit or value the use of this machinery would have been to consignee is the true measure of damages. Its use, in the specific office for which it was designed, is the thing which plaintiff lost. Now, what injury resulted from this loss, what detriment was caused, what harm was done to plaintiff by losing the use of this machinery, and what measure is to be applied in ascertaining such harm, are the questions to be determined." St. Louis, etc., R. Co. *v.* Famers' Union Gin Co., 34 Okla. 270, 125 Pac. 894, 899.

94. Gulf, etc., R. Co. *v.* Gilbert, 4 Tex. Civ. App. 366, 22 S. W. 760, 23 S. W. 320.

95. Damages must be certain.—Deming *v.* Grand Trunk R. Co., 48 N. H. 455, 2 Am. Rep. 267; Griffin *v.* Colver, 16 N. Y. 489, 69 Am. Dec. 718.

96. Southern R. Co. *v.* Coleman, 153 Ala. 266, 44 So. 837.

97. Knowledge of carrier.—*Kentucky.*—Brand *v.* Illinois Cent. R. Co., 108 S. W. 356, 32 Ky. L. Rep. 1335.

New Jersey.—Higgins *v.* United States Exp. Co., 83 N. J. L. 398, 85 Atl. 450.

New York.—Goodfield *v.* Platt (App. Term.), 130 N. Y. S. 180.

Texas.—Ligon *v.* Missouri Pac. R. Co., 3 Texas App. Civ. Cas., § 1; Galveston, etc., R. Co. *v.* Jessee, 2 Texas App. Civ. Cas., § 403; Gulf, etc., R. Co. *v.* Compton

must be such that may be reasonably inferred therefrom.[98] In the leading case on this subject,[99] the action was against the defendants as common carriers for not delivering seasonably a broken iron shaft sent to the manufacturers as a pattern for another for plaintiffs' mill, and it was held that the plaintiffs were not entitled to damages for the loss of profits while their mill was stopped in consequence of defendants' delay; notwithstanding the plaintiffs' agent told the defendants' clerk when the shaft was sent to them that the mill was stopped, and the shaft must be sent immediately, and the clerk replied that it would reach its destination the next day. The opinion of the court was, that this was not notice of such special circumstances as would lead the defendants to contemplate such loss of profits as a natural consequence of a delay in forwarding the shaft, inasmuch as, for aught that was said to defendants, the plaintiffs might have had another shaft; or there might have been other defects in the machinery that would have stopped the mill.[1] Where a carrier contracted with an agent of an undisclosed principal for the transportation of machinery, without being informed of any special circumstances requiring prompt delivery, but was subsequently notified thereof, and negligently delayed the

(Tex. Civ. App.), 38 S. W. 220; Haberzettle *v.* Trinity, etc., R. Co., 46 Tex. Civ. App. 527, 103 S. W. 219.

In a suit against a carrier for delay in shipment of engine to be used in ginning cotton for that season, when it did not appear defendant was notified of such purpose and no special damages were alleged or proved, permitting recovery for rental value was error. Gulf, etc., R. Co. *v.* Gilbert, 4 Tex. Civ. App. 366, 22 S. W. 760, 23 S. W. 320.

Allegations of loss of profits which would have accrued to plaintiffs upon the fulfillment of a collateral contract in consequence of the delay on the part of a common carrier in the delivery of freight are properly stricken upon demurrer, where it does not appear that the contract, from the fulfillment of which profits would have accrued, was in the contemplation of the parties at the time the carrier received the freight for transportation. Goodin *v.* Southern R. Co., 125 Ga. 630, 54 S. E. 720, 6 L. R. A., N. S., 1054, 5 Am. & Eng. Ann. Cas. 573.

Plaintiff shipped a photographic outfit to a certain place by defendant's railroad, for a particular purpose. It did not appear that defendant at any time had notice of the particular purpose of its shipment, or of the particular necessity or advantage to plaintiff of their delivery at the place of destination at a certain date, or that plaintiff would suffer any special damage by delay. Held, that the measure of damages for failure to transport and deliver the goods within a reasonable time was the rental value of the goods during the delay, they not being goods intended for market, and that loss of profits claimed, of an uncertain kind, were not allowable. Galveston, etc., R. Co. *v.* Jessee, 2 Texas App. Civ. Cas., § 403.

Where mill castings were deposited with an express company without instructions as to the necessity for an expeditious transportation, and that pending their return the mill would have to be shut down, the shipper can not recover for loss from the interruption of his business. Higgins *v.* United States Exp. Co., 83 N. J. L. 398, 85 Atl. 450.

Must be pleaded and proved.—If an article is intended for use in business at destination, and the carrier unreasonably delays its transportation, the owner can not recover for the loss of its use during the delay, or the profits which he would thereby have made if it had been seasonably delivered, unless he alleges and proves that the carrier, at the time the contract for its transportation was made, is informed of the special use to which it was to be put. Clarke-Lawrence Co. *v.* Chesapeake, etc., R. Co., 63 W. Va. 423, 61 S. E. 364.

98. Brand *v.* Illinois Cent. R. Co., 108 S. W. 356, 32 Ky. L. Rep. 1335.

99. Hadley *v.* Baxendale, 9 Exch. (Eng.), 341.

"The general doctrine of this case, which was decided in 1854, has been recognized and followed in both the English and American courts, and is regarded as a leading case. Sedg. on Dam. (4th Ed.), 81 to 84, notes and cases, and also pp. 406, 409. See, especially, cases collected on p. 81. Humphreysville Copper Co. *v.* Vermont Copper Min. Co., 33 Vt. 92." Deming *v.* Grand Trunk R. Co., 48 N. H. 455, 2 Am. Rep. 267.

In the absence of knowledge by the carrier of the purpose for which a machine was to be used, the measure of damages does not include the profit consignee might have realized from its operation during the time delayed, nor rental value together with teams, wagons and hands to operate it. Texas, etc., R. Co. *v.* Hassell, 23 Tex. Civ. App. 681, 58 S. W. 54.

1. Deming *v.* Grand Trunk R. Co., 48 N. H. 455, 2 Am. Rep. 267.

transportation, it was liable for special damages so arising after it had a reasonable opportunity to avoid further delay after such notice.[2] In an action for damages for loss of a tobacco crop, on failure to furnish, as per contract, at the stipulated time, certain flues to use in curing tobacco, it was contended that no special damages could be recovered, inasmuch as plaintiff failed to show that defendant had knowledge that such damages would result from a failure to deliver the flues, but the court held that it was a matter of common knowledge in localities where tobacco is cultivated that if it is not cut and cured in apt time serious loss is the necessary consequence, and such knowledge would be assumed against defendant engaged in manufacturing the flues and his agent engaged in selling the same.[3]

Proximate and Remote Damages.—The damages must be such that it might naturally be expected to follow from the violation of the carrier's agreement to transport and deliver the goods.[4] Where a carrier delays the transportation of machinery for a mill, the loss sustained by the shipper of the saving in expense of the operation of the mill as a two-press mill, as contemplated, and as a one-press mill, as it is required to do on account of the carrier's delay in delivering the machinery, is speculative, and not recoverable.[5] The plaintiff alleged, in substance, that he shipped his photographing outfit on the defendant's road, to be transported a distance of one hundred and fifty miles. The shipment was made, and it was the plaintiff's desire to have his outfit at the point of destination, ready for business, two days later. There were troops stationed at that place, and the time selected by the plaintiff to open his business there, was payday of the troops, which continued about six days. His outfit did not reach such place until five days thereafter, and some tent poles did not reach there at all. In consequence of this delay and loss, he was prevented from opening his business until fifteen days after the shipment, when payday had expired. He claimed as damages the value of the articles lost and six hundred dollars loss of profits. It was held, on general demurrer, that the facts alleged showed a good cause of action, but that a special exception to the petition, that the damages claimed were too remote, should have been sustained as to the damages claimed for loss and profits.[6] But it has been held that a consignee may recover for the loss of a tobacco crop from the delay of the carrier to deliver certain flues used in curing tobacco.[7]

Under Interstate Commerce Act.—Where there is a delay in the transportation of machinery intended for a special use known to the carrier, it is responsible for such damages as are fairly attributable to the delay, having been informed that special damages would result therefrom, though it is bound to accept the shipment when tendered, and under the Interstate Commerce Act

2. Virginia-Carolina Peanut Co. *v.* Atlantic, etc., R. Co., 155 N. C. 148, 71 S. E. 71.

3. Neal *v.* Pender-Heyman Hardware Co., 122 N. C. 104, 29 S. E. 96, 65 Am. St. Rep. 697.

4. **Proximate and remote damages.**—Deming *v.* Grand Trunk R. Co., 48 N. H. 455, 2 Am. Rep. 267; Griffin *v.* Colver, 16 N. Y. 489, 69 Am. Dec. 718.

"We think it perfectly clear that the defendant, in view of the allegations of the declaration, can not be held liable for loss and damage in the enforced idleness of persons employed to pack and ship plaintiff's oranges on his orange groves at Rock Ledge. It can not reasonably be supposed that this element of damage entered into the contemplation of the parties to this contract of carriage." Williams *v.* Atlantic, etc., R. Co., 56 Fla. 735, 48 So. 209, 211, 24 L. R. A., N. S., 134.

5. Chicago, etc., R. Co. *v.* Planters' Gin, etc., Co., 88 Ark. 77, 113 S. W. 352.

6. Galveston, etc., R. Co. *v.* Jessee, 2 Texas App. Civ. Cas., § 403.

In a suit against a carrier for delay in shipment, loss of profits can not be allowed as damages, unless data of estimation are so definite and certain that they can be ascertained by calculation and carrier had notice that such damages would ensue from the delay. Galveston, etc., R. Co. *v.* Jessee, 2 Texas App. Civ. Cas., § 403.

7. Neal *v.* Pender-Heyman Hardware Co., 122 N. C. 104, 29 S. E. 96, 65 Am. St. Rep. 697.

can not make a special contract to compensate it for the additional risk.[8]

§ 950. Measure and Elements of Damages.—Expense as Measure of Damages.—Costs and expenses incurred by a shipper in consequence of the delay in the shipment of material to be used in building are recoverable as damages.[9] In an action against a carrier for delay in delivering machinery for plaintiff's mill, plaintiff could recover the difference between the expense of shutting down the plant during the installation of the machinery at the later period and what it would have been at the earlier period had the machinery arrived within a reasonable time, provided the fixed charges of the mill were less when the machinery was due than when it was installed, and such element of the damage was brought to the carrier's attention at the time of shipment.[10] But a shipper, suing a carrier for delay in the transportation and delivery of a shipment, can not recover the expenses incurred by him on a trip to the point of destination to look after the shipment.[11]

Wages Paid Employees.—Wages paid to workmen constitute an element of damages in an action for delay of material used in building[12] or milling.[13] Where, because of delay of a train through the alleged negligence of defendant carrier, a crew of men assembled by plaintiff were detained for four days, the measure of damages, if the delay was negligent, was the aggregate wages paid men and the amount paid for their board and lodging during the time.[14] But in an action for damages from delay in the delivery of certain machinery, the plaintiff, without notice to the carrier that employees' wages would be lost in event of delay, can not recover therefor.[15]

Profits as Elment of Damages.—In order to recover lost profits as special damages from a carrier for delay in the shipment of goods, the carrier at the time of the delivery of the shipment to it must have notice of the use for which the goods are intended, or the character of the goods must be such that such use may be reasonably inferred therefrom.[16] In an action for delay in the

8. **Under Interstate Commerce Act**—Act Feb. 4, 1887, c. 104, 24 Stat. 379, U. S. Comp. St. 1901, p. 3154; Chicago, etc., R. Co. *v.* Planters' Gin, etc., Co., 88 Ark. 77, 113 S. W. 352.

9. **Measure and elements of damages.**—Rocky Mt. Mills *v.* Wilmington, etc., R. Co., 119 N. C. 693, 25 S. E. 854, 56 Am. St. Rep. 682.

10. Chicago, etc., R. Co. *v.* Planters' Gin, etc., Co., 88 Ark. 77, 113 S. W. 352.

11. Southern R. Co. *v.* Coleman, 153 Ala. 266, 44 So. 837.

12. **Wages paid employees.**—Rocky Mt. Mills *v.* Wilmington, etc., R. Co., 119 N. C. 693, 25 S. E. 854, 56 Am. St. Rep. 682.

Where an express company had notice that a steam shovel shaft was necessary to the operation of a railroad construction outfit, it was liable for special damages consisting of the rental value of the outfit and the wages of plaintiff's crew during the period of its negligent delay. Elzy *v.* Adams Exp. Co., 141 Iowa 407, 119 N. W. 705.

In an action for failure of a carrier to deliver goods according to contract, it is proper to admit evidence of losses by reason of an expense of hands, etc., during a necessary suspension of business occasioned by the default of the carrier for a period during which the plaintiff could not, by ordinary diligence, have supplied himself with the article by other means. Cooper *v.* Young, 22 Ga. 269, 68 Am. Dec. 502.

13. Priestly *v.* Northern Indiana, etc., R. Co., 26 Ill. 205, 79 Am. Dec. 369; Morrow *v.* Missouri Pac. R. Co. (Mo. App.), 123 S. W. 1034; Pacific Exp. Co. *v.* Darnell (Tex.), 6 S. W. 765.

Expenses for help of a mill, necessarily under pay and idle while the mill is shut down owing to delay in transportation of freight, which the carrier knew must arrive before the mill could start, are recoverable as damages. Morrow *v.* Missouri Pac. R. Co. (Mo. App.), 123 S. W. 1034.

14. White *v.* Minneapolis, etc., R. Co., 111 Minn. 167, 126 N. W. 533.

15. Missouri, etc., R. Co. *v.* Hazlett, 35 Okla. 12, 128 Pac. 105.

16. **Profits as element of damages.**—Brand *v.* Illinois Cent R. Co., 108 S. W. 356, 32 Ky. L. Rep. 1335; Stone *v.* Adams Exp. Co. (Ky.), 122 S. W. 200.

The shippers of part of a machine by express can not recover, as special damages for delay in delivery, the loss of profits on contracts for goods to have been made on the machine, in the absence of an express contract giving notice to the carriers of the necessity for immediate delivery. Goodfield *v.* Platt (App. Term.), 130 N. Y. S. 180.

shipment of a machine the fact that the profits in operating the machine would have been greater at destination than at other points is not an element of damages where carrier had no knowledge of such fact.[17] Where a shaft used in an electric plant fell out of a car in transit and was broken, after which the express company had it repaired and forwarded to the owner, damages claimed for loss of profits in being prevented from running the plant while the shaft was being repaired were special damages, and hence could not be recovered unless the carrier had notice of the use for which the shaft was intended, either actually or by plain inference from the nature of the thing transported.[18] And to recover for loss of profits of an established business by its interruption, it must be shown what, for a reasonable time previous thereto, were the usual income and expenses, and such average earnings will constitute a standard for measuring the loss. Loss of expected profits of a mill, due to interruption of the business, is recoverable, where the business is an established business, and the amount of such profits is made reasonably certain by competent proof,[19] but not where the profits are merely speculative.[20] Where a pop-corn wagon was delivered to a carrier for transportation, with information that it was wanted at its destination on a certain day, for a special occasion, the measure of damages for failure to transport it in time for the day mentioned is the loss of the profits which would have been made on that day, but, as to other days, the measure of damages would be the fair rental value of the wagon.[21] The court, in an action for loss of anticipated profits from interruption of a business, should define profits for the jury, and call their attention to the rule of law by which they are to be guided in determining the amount of profits.[22] But in an action for wrongful delay in shipping a boiler required for the operation of certain machinery, profits of the enterprise were disallowed as a proper basis of damages, and it was held that the cost of hands necessarily kept unemployed by reason of delay, with interest on capital unproductive for the time, was the correct rule for award of the damages.[23]

Profits on Sales.—A shipper, in an action against a carrier for delay in transporting machinery for his sawmill, can not by way of damages show loss from inability to fill a contract for lumber, because of the delay in transportation, in the absence of evidence that the carrier was notified of the fact of such contract.[24] In an action against a carrier for delay in transporting cotton seed mill machinery, the plaintiff can not recover as special damages losses sustained

17. Texas, etc., R. Co. *v.* Hassell, 23 Tex. Civ. App. 681, 58 S. W. 54.

18. "The damages arising from loss of profits between the time when the shaft should have arrived and the time when it did arrive were special damages. Illinois Cent. R. Co. *v.* Hopkinsville Canning Co., 132 Ky. 578, 116 S. W. 758, and the cases therein cited; Patterson *v.* Illinois Cent. R. Co., 123 Ky. 783, 97 S. W. 426, 30 Ky. L. Rep. 78." Stone *v.* Adams Exp. Co. (Ky.), 122 S. W. 200.

19. Morrow *v.* Missouri Pac. R. Co. (Mo. App.), 123 S. W. 1034.

20. Southern R. Co. *v.* Coleman, 153 Ala. 266, 44 So. 837, citing Reed Lumber Co. *v.* Lewis, 94 Ala. 626, 628, 10 So. 333; Moulthrop *v.* Hyett, 105 Ala. 493, 17 So. 32, 53 Am. St. Rep. 139.

21. Gulf, etc., R. Co. *v.* Compton (Tex. Civ. App.), 38 S. W. 220.

And where a carrier was notified of purpose of shipping a museum, on failure to transport it to its destination, shipper may recover the value of the use of it at such destination during the period of the fair intended to be exhibited at, and such value could not be more properly determined than by ascertaining what the probable net profits would have been. Yoakum *v.* Dunn, 1 Tex. Civ. App. 524, 21 S. W. 411.

22. The word "profits" in a manufacturing or agricultural business means the net earnings, or the excess of returns over expenditures, and relates to any excess which remains after deducting from the returns the operating expenses and depreciation in capital, and also, in a proper case, interest on capital employed. Morrow *v.* Missouri Pac. R. Co. (Mo. App.), 123 S. W. 1034.

23. Railway *v.* Ragsdale, 14 Miss. 460, cited in Harper Furniture Co. *v.* Southern Exp. Co., 148 N. C. 87, 62 S. E. 145, 30 L. R. A., N. S., 483, 128 Am. St. Rep. 588.

24. **Profits on sales.**—Louisville, etc., R. Co. *v.* Mink, 126 Ky. 337, 103 S. W. 294, 31 Ky. L. Rep. 833.

on contracts for seed made, not only subsequent to the notice to the carriers but after the carriers' default; such contracts not having been made in reliance on the carrier's fulfillment of its obligation.[25] But evidence of loss of profits by the necessary suspension of iron works in consequence of the failure of a common carrier to deliver coal according to contract is inadmissible in an action against the carrier for a failure to transport and deliver under his contract.[26]

Rental Value of Goods.—Measure of damages for delay in transporting and delivering goods which are not intended for the market is ordinarily the rental value of the goods during the delay, with legal interest from the time the goods should have been delivered.[27] This is the measure of damages in the absence of special notice to the carrier.[28] The rental value of the property delayed should be estimated with reference to the circumstances of the case; and, if there is a market rental value, such value would control, but, if there was no market, the value may be ascertained by proof of such elements or facts affecting the question as may exist, and by the opinions of witnesses properly informed on the subject.[29] But where goods can not be said to have rental value, the measure of damages for delay in delivering such goods would be the value of the use of goods to the owner during the delay, excluding from estimate remote, speculative and uncertain damages restricting estimate to natural, direct, certain and proximate injury sustained.[30]

Interest on Value of Goods.—Where the period a public ginnery was stopped in consequence of the failure of a carrier to promptly transport and deliver a part of the machinery thereof was so short that the ginnery had no rental value, interest on its value for that period is the proper measure of dam-

25. Chicago, etc., R. Co. *v.* Planters' Gin, etc., Co., 88 Ark. 77, 113 S. W. 352.

26. Cooper *v.* Young, 22 Ga. 269, 68 Am. Dec. 502.

27. Rental value of goods.—Elzy *v.* Adams Exp. Co., 141 Iowa 407, 119 N. W. 705; Lord *v.* Maine Cent. R. Co., 105 Me. 255, 74 Atl. 117; Brown *v.* Adams, 3 Texas App. Civ. Cas., § 390. And see, to the same effect, Galveston, etc., R. Co. *v.* Jessee, 2 Texas App. Civ. Cas., § 403; Gulf, etc., R. Co. *v.* Maetze, 2 Texas App. Civ. Cas., § 631; Gulf, etc., R. Co. *v.* Compton (Tex. Civ. App.), 38 S. W. 220.

Where a shipper is deprived of the use of property and the property is such that it can not be replaced, the measure of his damages for delay in transportation is the ordinary worth of the property for use. Weston *v.* Boston, etc., Railroad, 190 Mass. 298, 76 N. E. 1050, 4 L. R. A., N. S., 569, 112 Am. St. Rep. 330, 5 Am. & Eng. Ann. Cas. 825.

Plaintiff shipped on defendant's railroad a cotton press in several pieces, which was delivered, except one piece, a sill, of which plaintiff immediately notified defendant, and plaintiff sent for and received another sill after a delay of over a month. Held, that the plaintiff's measure of damages was the reasonable cost of replacing the delayed sill, and the fair rental value of the press during the delay caused in the operation thereof by the failure to deliver the sill promptly, together with legal interest on such damages. Gulf, etc., R. Co. *v.* Maetze, 2 Texas App. Civ. Cas., § 631.

Claim was made for a carrier's delay in shipping to M. a new invention for renovating feathers, which had no established rental value. Evidence showed that the machine was moved from town to town as the supply of feathers to be cleaned became exhausted, and that at M. the supply of feathers and the profits were greater than at other places, due to working up the supply during such delay. There was testimony as to the rental value of the machine, together with horses and wagons. Held, that the measure of damages was the fair rental value of the machine, to be determined from its character, capacity, and running expenses, and, in the absence of specific instructions how to arrive at such value, it was error to refuse charges that no recovery could be had for any special benefit from use of the machine at M., and to find the rental value of the machine alone, without teams, wagon, and hands to operate it. Texas, etc., R. Co. *v.* Hassell, 58 S. W. 54, 23 Tex. Civ. App. 681.

28. In an action for negligent delay in delivery of machinery, the measure of damages, in the absence of special notice, is its rental value pending delivery, with the reasonable expenses incurred in endeavoring to secure delivery. Missouri, etc., R. Co. *v.* Hazlett, 35 Okla. 12, 128 Pac. 105.

29. Gulf, etc., R. Co. *v.* Maetze, 2 Texas App. Civ. Cas., § 631.

30. Brown *v.* Adams, 3 Texas App. Civ. Cas., § 390.

ages, if claimed.[31] It not appearing that a carrier of a shipment of brick knew that it was to be used in a building of any special size or kind, or that its diversion would work the delay in the consignee's building operations that resulted, the shipment being ordered for the trade as far as it reasonably appeared to the carrier, and it not appearing that there was any change in value of the brick during the delay in replacing the diverted shipment, the consignee's measure of damage is limited to interest on the amount invested in the shipment during the delay.[32] Where in an action against a railroad for negligently failing to deliver machinery, which caused the shutting down of a flouring mill, the complaint did not allege nor the evidence show that any definite profit was lost, nor that the contract was such as to inform defendant that any loss of special profit would ensue, it was error to admit evidence showing what the special profit would have been during the time the mill was shut down, as the proper measure of damages was the legal interest on the capital invested, and such other damages as were the direct and necessary result of defendant's negligence.[33]

Earning Capacity of Goods.—Plaintiff shipped over defendant's line a grading outfit, consisting of a car of mules and a car of grading implements, and informed defendant's agent that he was sending the outfit to the point of destination to fulfill a contract; that his laborers were also being carried along with him, and their wages would begin as soon as they arrived; that it would be necessary for the cars to go forward together in order that work might commence at once on their arrival. In an action for damages caused by the delay in delivering the car of grading implements, an instruction allowing plaintiff to recover the net earning capacity of the teams and grading implements during the period of the alleged delay was not erroneous, as defendant was put upon notice that plaintiff would suffer this special damage if such delay occurred.[34]

Where Goods Replaced.—Where after an unreasonable delay the consignee replaces the goods with others, he can recover the costs thereof.[35] Where, owing to delay in the transportation of machinery, the shipper was compelled to duplicate the same, but the carrier did not convert the machinery shipped, it was still the property of the shipper, and its damage was the cost of the duplicated machinery less the value of the delayed machinery utilized to its best advantage.[36]

Question for Jury.—The damages must be determined as a question of fact by the jury, by ascertaining from the evidence the value of use of the goods.[37]

Loss on Collateral Contract.—Plaintiff, in an action against a carrier for delay in transporting machinery for its sawmill, can not, by way of damages, show loss from inability to fill a contract for lumber, because of the delay in

31. **Interest on value of goods.**—Southern R. Co. *v.* Coleman, 153 Ala. 266, 44 So. 837; Davidson Development Co. *v.* Southern R. Co., 147 N. C. 503, 61 S. E. 381.

32. Davidson Development Co. *v.* Southern R. Co., 147 N. C. 503, 61 S. E. 381.

33. "The facts in this case are very similar to those in Foard *v.* Atlantic, etc., R. Co., 53 N. C. 235, 78 Am. Dec. 277, where a part of the machinery—a steam pipe—was negligently delayed by the railroad company, on account of which the mill was left idle for some length of time. There the court held that the profits which the mill would have made would be too vague, indeterminate, and uncertain to be correctly estimated, and held the measure of damages to be the legal interest on the capital invested, expenses incurred in endeavoring to get the delayed machinery, of unemployed employees, and such other damages as were the direct and necessary result of defendant's negligence; to which rule we still adhere." Sharpe *v.* Southern R. Co., 130 N. C. 613, 41 S. E. 799, 800.

34. **Earning capacity of goods.**—St. Louis, etc., R. Co. *v.* Lamb, 95 Ark. 209, 128 S. W. 1030.

35. **Where goods replaced.**—Gulf, etc., R. Co. *v.* Maetze, 2 Texas App. Civ. Cas., § 631.

36. Chicago, etc., R. Co. *v.* Planters' Gin, etc., Co., 88 Ark. 77, 113 S. W. 352.

37. **Question for jury.**—Galveston, etc., R. Co. *v.* Jessee, 2 Texas App. Civ. Cas., § 403.

transportation, in the absence of evidence that the carrier was notified of the fact of such contract.[38]

§ 951. Particular Goods.—Used in Household.—The measure of damages for delay in the delivery of goods consisting of household necessities and wearing apparel intrusted to a carrier for shipment is the reasonable value of the use of the property to the owner during the time of the delay.[39]

Used in Trade.—Where the carrier has notice of its nature, the carrier is liable for damages resulting to the shipper from delay in the transportation and delivery of goods intended for use in trade. The carrier is liable to the nurseryman for resulting damages in the delay in the shipment and delivery of an order book, where the delay rendered the nurseryman unable to fill orders.[40] The proper measure of damages for the failure of a railway company to deliver a traveling man's trunk containing samples is the value of the use of the property during the delay, including such incidental expenses and damages as were in the contemplation of the parties when the contract for carriage was entered into.[41]

Used in Manufacturing.—Where a carrier delays the delivery of a piece of machinery used for manufacturing an article, the measure of damages is the value of the crude material which was lost through the delay.[42] Where the delayed goods are gin machinery, the proper measure of damages is the rental value of the machinery during the time it has been delayed.[43] For the delay in the shipment of cotton for use in a mill, special damages may be allowed, if it appears that the carrier had knowledge of the purpose for which the cotton was required, and that stopping the mill would follow from delay.[44] In an action by the shipper against the carrier for delay in shipping a piece of machinery necessary to the operation of plaintiff's sawmill, the jury may, in estimating damages, consider the loss of time, the expense of idle servants, contracts which the shipper had to fill, and profits arising from the operation of the mill. In such case multiplying the amount of loss per day by the number of days, Sunday excepted, will give amount plaintiffs are entitled to recover.[45] Interest on the capital invested in a plant during the time it was necessarily idle as a result of delay in a shipment of iron, and the wages paid during such time, can not be taken as the measure of damages, where there was nothing to indicate the use to which the iron was to be put, or that any special damages would be sustained by delay in prompt shipment.[46]

Used in Milling and Lumbering.—In an action against a carrier for delay in delivery of log wagons to a mill and lumber company, the measure of damages is not the usable value thereof during the delay, but is the difference in

38. **Loss on collateral contract.**—Louisville, etc., R. Co. *v.* Mink, 128 Ky. 337, 103 S. W. 294, 31 Ky. L. Rep. 833.

39. **Goods used in household.**—Missouri, etc., R. Co. *v.* Clifton (Tex. Civ. App.), 80 S. W. 386; Brown *v.* Adams, 3 Texas App. Civ. Cas., § 390.

The measure of damages for delay in transportation of household goods was the value of their use to plaintiff. Missouri, etc., R. Co. *v.* Dement (Tex. Civ. App.), 115 S. W. 635.

40. **Used in trade.**—Wells Fargo & Co. *v.* Battle, 5 Tex. Civ. App. 532, 24 S. W. 353.

41. Conheim *v.* Chicago, etc., R. Co., 104 Minn. 312, 116 N. W. 581, 15 Am. & Eng. Ann. Cas. 389.

42. **Machinery or material used in manufacturing.**—Savannah, etc., R. Co. *v.* Pritchard, 77 Ga. 412, 1 S. E. 261, 4 Am. St. Rep. 92.

"In Savannah, etc., R. Co. *v.* Pritchard, 77 Ga. 412, 4 Am. St. Rep. 92, 1 S. E. 261, damages were allowed for injury caused by wrongful delay in shipping a still worm for a turpentine distillery." Harper Furniture Co. *v.* Southern Exp. Co., 148 N. C. 87, 62 S. E. 145, 128 Am. St. Rep. 588, 30 L. R. A., N. S., 483.

43. Gulf, etc., R. Co. *v.* Gilbert, 4 Tex. Civ. App. 366, 22 S. W. 760, 23 S. W. 320.

44. Gee *v.* London & Lancashire Ry. (Eng.), 6 Hurl. & N., 211, cited in Harper Furniture Co. *v.* Southern Exp. Co., 148 N. C. 87, 62 S. E. 145, 128 Am. St. Rep. 588, 30 L. R. A., N. S., 483.

45. Pacific Exp. Co. *v.* Darnell (Tex.), 6 S. W. 765.

46. Asheboro, etc., Mfg. Co. *v.* Southern R. Co., 149 N. C. 261, 62 S. E. 1091.

their value, if they depreciated during the delay, at the time when they should have been delivered and at the time that they were delivered, after deducting the unpaid cost of transportation, unless the carrier had notice that special damages, or more than ordinary damages, would result from failure to deliver in time.[47]

Used in Building.—Where a shipper, engaged in building a mill, contracted with a carrier for the shipment of the mill machinery from the factory to the mill and the shipment was delayed through the negligence of the carrier, by reason of which workmen employed by the shipper were forced to lie idle, though under pay, the measure of the shipper's damages is the interest on the unemployed capital, the wages paid to the workmen, and such costs and expenses incurred by the shipper in consequence of the delay,[48] reduced by the earnings received, or which by reasonable diligence could have been received, from their employment, during the delay, in other work.[49] But a contractor shipping doors, windows, and blinds by rail, to be used in the construction of a building, can not recover of the railroad company wages paid by him to his employees while they were doing nothing, because of delay in delivery, where the company at the time of shipment did not know that such a delay would probably result in such damages.[50]

Used in Canning and Packing.—Special damages such as shutting down a cannery and the spoiling of tomatoes by the reason of the shut down, resulting from the failure of a carrier to ship a car load of cans in time, can not be recovered in the absence of a showing that the carrier had notice of facts, which would apprise a person of ordinary prudence that such loss would be anticipated from the delay. Notice to a carrier by the shipper that all consignments of cans should be rushed during the packing season is not sufficient to apprise the carrier that a consignee would be compelled to close down its cannery, and that its tomatoes would be spoiled if the shipment were delayed, so as to permit a recovery for such special damages from the delay.[51] In an action against a carrier for loss of a consignment of ice shipped by plaintiffs to themselves, plaintiffs were not entitled to recover for the loss of fish, for the packing of which they intended to use the ice, in the absence of any evidence that the carrier knew or should have known that the ice was intended for that purpose, the damages being limited to the value of the ice at destination at the time it should have arrived.[52]

Used for Theatrical or Amusement Purposes.—The ordinary damages in case of a delay in the transportation of theatrical property are different from the ordinary damages in case of a delay in the transportation of ordinary mer-

47. **Used in milling and lumbering.**—Chicago, etc., R. Co. *v.* Newhouse Mill, etc., Co., 90 Ark. 452, 119 S. W. 646.

48. **Goods used in building.**—Rocky Mt. Mills *v.* Wilmington, etc., R. Co., 119 N. C. 693, 25 S. E. 854, 56 Am. St. Rep. 682.

49. McMeekin *v.* Southern Railway, 82 S. C. 468, 64 S. E. 413.

50. Ligon *v.* Missouri Pac. R. Co., 3 Texas App. Civ. Cas., § 1.

51. **Used in canning and packing.**—Illinois Cent. R. Co. *v.* Hopkinsville Canning Co., 132 Ky. 578, 116 S. W. 758.

52. **Ice used in packing fish.**—"Neal *v.* Pender-Heyman Hardware Co., 122 N. C. 104, 29 S. E. 96, 65 Am. St. Rep. 697, pressed upon our attention by the plaintiff's counsel in his brief and oral argument, differs materially from the case at bar. Tobacco flues are different commodities. Ice is something of general, everyday use all the year round, and required for many different purposes. Persons living in localities where tobacco is cultivated are presumed to know what a tobacco flue is intended for, and that, if tobacco is not cured promptly when cut, serious loss will result. In Sledge *v.* Reid, 73 N. C. 440, Mr. Justice Bynum says: 'The loss of the crop, though following the loss of the mule, was neither a necessary nor natural consequence. * * * The value of the mule taken, and the hire of another, is the measure of the plaintiff's damage. Anything beyond this would be too remote and conjectural, and would lead the courts into a boundless field of investigation.' See, also, Wood's Mayne on Damages, §§ 26, 40." Lewark *v.* Norfolk, etc., R. Co., 137 N. C. 383, 49 S. E. 882, 883.

chandise, and for that reason carriers usually put such property in a different classification from that in which ordinary merchandise is put. As the owner has to pay the expenses, or some of the expenses, incident to using the property, he can not recover the ordinary net earnings, but the ordinary gross earnings, less such expenses, if any, as the deprivation of the use of the property saved him from.[53] As a prerequisite to the recovery of earnings lost by the delay in the transportation of such property, it is necessary to show notice that the freight to be transported is that kind of freight and that it is to be used at its destination.[54] Where a carrier contracts with a shipper to deliver certain machinery, a merry-go-round, to a certain place by a certain day for a specific purpose, and has full notice of the nature of the purpose, it is fully warned of the use of which the machinery is to be put, and of the importance of having it there on the particular day specified, and of the damage or loss of earnings which would result from failure to deliver same on the day agreed upon, and undertakes such shipment with full knowledge that such conditions and the expected earnings are the moving motive on the part of the shipper, and thereupon through want of diligence fails to deliver such machinery until after the day agreed upon, and after the time has expired when such machinery can be operated with any profit, such carrier is liable in such amount as will reasonably compensate the shipper for the damage done. And, if the amount of earnings or profits can be estimated with a reasonable degree of accuracy, they then become the most just and adequate measure of damages.[55]

Used in Feeding Cattle.—A railroad company is liable for special damages for delay in transportation of food for cattle if, at the time of the execution of the contract of shipment, the carrier was aware that such special damages would arise from the delay.[56] In order that a shipper of feed for cattle may recover damages to the cattle which he was feeding, caused by delay in the transportation of the feed, he must show that the carrier was notified of the special circumstances from which such damages would probably flow in

53. Theatrical property.—Where scenery and theatrical properties were shipped under a written contract, but the carrier knew that they were to be used at destination in a widely advertised exhibition, and that the shipper was under a great expense in their use, in an action for negligent delay in transportation, in which no loss of special profits was sought to be recovered, plaintiff was entitled to recover his ordinary gross earnings, less such expenses, if any, as the deprivation of the use of the property saved him from. Weston *v.* Boston, etc., Railroad, 190 Mass. 298, 76 N. E. 1050, 112 Am. St. Rep. 330, 4 L. R. A., N. S., 569, 5 Am. & Eng. Ann. Cas. 825.

In an action against a railroad for damages suffered by a theatrical company by reason of defendant's failure to haul a car of scenery to a certain city within the time agreed, the evidence showed that the show could not get to the city so as to fill an engagement there; that the advance sale of tickets had been refunded to the purchasers; that there was a contract between plaintiff and the opera house whereby plaintiff was to receive a certain per cent of the sales; and there was evidence that the railroad was informed that the object of hauling the car was to give the theatrical performance in question. Held, that it was proper to instruct that plaintiff was entitled to recover all additional expense incurred by him and all profits which he would have received, after deducting the expense of advertising his show, if the car had been hauled in time to enable him to give the performance. It was proper for the jury to take into consideration the nature of plaintiff's business and his profits for a reasonable period next preceding the time when the contract was violated. Illinois Cent. R. Co. *v.* Byrne, 205 Ill. 9, 68 N. E. 720.

54. Weston *v.* Boston, etc., Railroad, 190 Mass. 298, 76 N. E. 1050, 112 Am. St. Rep. 330, 4 L. R. A., N. S., 569, 5 Am. & Eng. Ann. Cas. 825.

55. Ft. Smith, etc., R. Co. *v.* Williams, 30 Okla. 726, 121 Pac. 275, 40 L. R. A., N. S., 494.

56. Used in feeding cattle.—Missouri, etc., R. Co. *v.* Belcher, 89 Tex. 428, 35 S. W. 6.

Where a carrier unreasonably delayed the shipment of meal and hulls, and had notice that they were intended to feed the consignees' cattle, and that they were dependent thereon for the feed, and consignees' supply of feed was exhausted by reason of the delay, the carrier was liable for the depreciation in the value of the cattle caused directly and proximately by the delay. Illinois Cent. R. Co. *v.* Mossbarger, 28 Ky. L. Rep. 1217, 91 S. W. 1121.

case of delay.[57] Where one shipped meal to himself, intending to feed it to his cattle at the point of destination, and after a delay in delivery gave the carrier notice of the purpose for which the meal was consigned, that his supply of feed was almost exhausted, that he could not supply himself elsewhere, and that the cattle could not be changed to other feed without loss, of which the carrier did not have notice at the time of the shipment, he was not entitled to recover special damages for loss in the weight of the cattle, extra work in attempting to care for them, and secure proper feed, arising from further delay in delivery, after the lapse of a reasonable time from the giving of the notice.[58] Where cattle were without feed on account of delay in the shipment of meal and hulls, it was the duty of the consignees to use diligence to secure other meal and hulls or other suitable food, and they are not entitled to damages which they could have prevented by reasonable diligence in procuring other food.[59]

For Immoral Use.—It seems the carrier is not liable for special damages where the goods were intended for an immoral or illegal use.[60]

Fertilizer.—There is no foundation for special damages, where the evidence discloses nothing more than an ordinary shipment of fertilizer, with no notice to the carrier at the time it received the goods of any special use to which it was to be applied, or of such scarcity of fertilizer as to prevent the purchase of two tons of other guano by the plaintiff.[61]

§ 952. Goods Intended for Sale.—Where property is shipped for general sale to such purchasers as may be obtained, and the carrier unreasonably and negligently delays the transportation, the measure of damages for that default is the depreciation in salable quality and market value of the property at the place of destination between the time when it should have arrived and when it did in fact arrive.[62] But, if the property is sold at an advantageous price before shipment on condition that it be delivered within a certain time, and the carrier, with knowledge of that fact, undertakes the transportation, and through negligence fails to make the delivery in time, and the conditional purchaser declines to receive the property on account of the delay, the liability of the carrier is measured by the difference between the market value of the property when it arrived at the place of destination and the price at which it was conditionally sold before shipment.[63] The difference between the modes of

57. Daube *v.* Chicago, etc., R. Co., 39 Tex. Civ. App. 24, 86 S. W. 797.

A carrier was not liable for special damages through a failure to deliver cotton seed meal and hulls within a reasonable time after receiving it, where it did not, at the time of such receipt, have notice of the purpose for which the shipment was intended, nor the urgent necessity of its prompt delivery. Illinois Cent. R. Co. *v.* Nelson, 97 S. W. 757, 30 Ky. L. Rep. 114.

Where cotton seed meal and hulls were to be shipped by a carrier from Memphis to Cecilia, notice that the purpose was to feed cattle in Cecilia, and that they would suffer from the delay, given to the carrier's agent at Cecilia to those in charge of its freight department at Louisville, and to its chief train dispatcher, was sufficient to bind the carrier without notice to the bill of lading clerk at Memphis. Illinois Cent. R. Co. *v.* Mossbarger, 28 Ky. L. Rep. 1217, 91 S. W. 1121.

58. Patterson *v.* Illinois Cent. R. Co., 123 Ky. 783, 30 Ky. L. Rep. 78, 97 S. W. 426.

59. Illinois Cent. R. Co. *v.* Mossbarger, 28 Ky. L. Rep. 1217, 91 S. W. 1121.

60. **Goods for immoral use.**—Gerhard *v.* Neese, 36 Tex. 635.

61. **Fertilizer.**—Matheson *v.* Southern Railway, 79 S. C. 155, 60 S. E. 437, citing Traywick *v.* Southern Railway, 71 S. C. 82, 50 S. E. 549, 110 Am. St. Rep. 563; Wesner, etc., Mfg. Co. *v.* Atlantic, etc., Railroad, 71 S. C. 211, 50 S. E. 789; Guess *v.* Southern Railway, 73 S. C. 264, 53 S. E. 421; Strange *v.* Atlantic, etc., R. Co., 77 S. C. 182, 57 S. E. 724.

62. **Loss of profit on sales.**—Hutchinson, Carr., § 771; 3 Wood, Railway Law, p. 1607; East Tennessee, etc., R. Co. *v.* Hale, 85 Tenn. 69, 1 S. W. 620.

63. Hutchinson, Carr., § 772.

Arkansas.—Murrell *v.* Pacific Exp. Co., 54 Ark. 22, 14 S. W. 1098, 26 Am. St. Rep. 17.

Georgia.—Savannah, etc., R. Co. *v.* Pritchard, 77 Ga. 412, 4 Am. St. Rep. 92, 1 S. E. 261.

Kansas.—Missouri Pac. R. Co. *v.* Peru-

measuring the carrier's liability in the two cases is due to the difference between its obligations and the consequences of their breach. In the former case the obligation is general, and the loss and liability are general, while in the latter case the obligation is special, and the loss and liability are special.[64] If the goods are forwarded by a carrier in pursuance of a contract of sale between the consignor and consignee, the measure of damages is the difference between the contract price and the value of the goods when actually delivered.[65] The measure of damages in an action against a carrier for delay in the transportation and delivery of goods is the loss which the fulfillment of the contract would have prevented, or which the breach of it has entailed. The general intent of the law is to put the injured party, so far as money can do it, in the same position as if the contract had been performed.[66]

Knowledge of Carrier.—The damages for the loss of a sale fall under the denomination of special damages; and, without notice of the fact of such sale, it could not be understood that such a loss would have been foreseen or contemplated by the parties. It is proper that the carrier should understand the extent of the responsibility he assumes, and the consequence of a failure on his part; and if no special circumstances are communicated to him he ought to be held responsible only for the consequences which might ordinarily be supposed to flow from his breach of contract.[67] A carrier not having been informed of

Van Zandt Imp. Co., 73 Kan. 295, 85 Pac. 408, 87 Pac. 80, 117 Am. St. Rep. 468, 6 L. R. A., N. S., 1058, 9 Am. & Eng. Ann. Cas. 790.

New Hampshire.—Deming *v.* Grand Trunk R. Co., 48 N. H. 455, 2 Am. Rep. 267.

"In such case the loss would be the difference between the price at which the goods were bargained, and the price the consignee was enabled to sell them for in market, and the loss would be the direct, immediate and natural result of the carrier's breach of contract as in the other case." Deming *v.* Grand Trunk R. Co., 48 N. H. 455, 2 Am. Rep. 267.

Where a carrier, with knowledge that a shipper has contracted to sell his property at a given price, to be delivered at a certain time, accepts it for transportation, and negligently delays same, the measure of damages is whatever the shipper has lost by reason of the failure to deliver in time. Houston, etc., R. Co. *v.* Hogg (Tex.), 2 Posey 544.

"In this case the plaintiff's evidence tended to prove that he informed the defendant's agent that he had a lot of wool that was sold if it could go immediately to Boston, and that if it could not go at once that way he should send it by another railroad; and that the agent told him to send it the next morning, and it should go by the next freight train. Under the circumstances, the jury might have found that the contract was entered into for the express purpose of enabling the plaintiffs to complete their contract of sale, and we think the defendants ought to be charged with the loss occasioned by the breach of their contract. Griffin *v.* Colver, 16 N. Y. 489, 69 Am. Dec. 718." Deming *v.* Grand Trunk R. Co., 48 N. H. 455, 2 Am. Rep. 267.

64. Illinois Cent. R. Co. *v.* Southern Seating, etc., Co., 104 Tenn. 568, 58 S. W. 303, 50 L. R. A., N. S., 729, 78 Am. St. Rep. 933.

65. Euston & Co. *v.* Erie R. Co., 147 Ill. App. 594.

Where a carrier accepts property with knowledge that the consignor has sold it under a contract to deliver it at a certain time, and by the carrier's negligence the transportation is delayed until the time for delivery has passed, thus causing the consignor to lose said sale, the measure of damages is the difference between the price at which the property was contracted to be sold and its market value when delivered. Houston, etc., R. Co. *v.* Hogg (Tex.), 2 Posey 544.

66. Norfolk, etc., R. Co. *v.* Wilkinson, 106 Va. 775, 56 S. E. 808.

67. Knowledge of carrier.—Deming *v.* Grand Trunk R. Co., 48 N. H. 455, 2 Am. Rep. 267.

In an action for damages, caused by delay in the transportation of fruit trees sold under contract for delivery by a certain day, special damages can not be recovered unless the necessity for such delivery was brought to the knowledge of defendant at the time of the shipment, or from the character of the freight defendant was charged with such knowledge. St. Louis, etc., R. Co. *v.* Cates, 38 S. W. 648, 15 Tex. Civ. App. 135.

"The rule is well established that a carrier may not be required to respond on the breach of its obligation to transport, within a reasonable time, for such consequential damages as the loss of profits which depend upon collateral acts or sales, unless he is informed of the shipper's intention to transport the goods for the particular purpose at the time the contract of shipment is entered into.

the shipper's intention to transport the goods for the purpose of a sale thereof at a certain time which he had advertised, is not liable, because of its delay in transportation, for the consequential damages of loss of profits from such sale, even were they not too remote and speculative.[68] Where a carrier accepting a shipment of berries for transportation did not know that the shipper had sold them at a certain price, or that he would lose the sale, if the berries failed to arrive at a certain point at the time agreed upon, the carrier upon delay in shipment, resulting in loss of the sale, would not be liable in damages for the difference between the figure at which the berries had been contracted for and the amount for which the shipper subsequently disposed of them; the price obtained being the best possible under the circumstances.[69] A carrier is presumed to know what threshing-machines are used for, and that the only purpose implement dealers have in shipping such property into the heart of a great wheat-growing country is to sell it.[70]

Where Full Contract Price Received.—In an action against a railroad company for delaying freight, where the shipper received the full contract price for the freight at the destination, notwithstanding the delay, on sale to a third person, the carrier is not liable for damages for loss of profits.[71]

Where Market Price Same.—A shipper claiming special damages for delay in the shipment of goods intended to be sold by him at destination can not recover for loss on goods returned to him undamaged, without showing that the market price at destination was greater than that at the place of shipment.[72]

The loss of a commission is not so remote as to be excluded as an element of damages, where a carrier delays the delivery of a threshing-machine until after the threshing season, thereby causing the cancellation of previous sales and the loss of commissions of the consignee.[73]

Shipment to Fill Penalty Contract.—For negligent delay in delivery of goods, the carrier, who has been requested to ship promptly and notified that the goods were designed to fill a penalty contract, is liable for such special damages as the shipper may reasonably incur by reason of his failure, occasioned by such delay of the carrier, to perform his contract within the stipulated time.[74]

Unless such purpose is communicated by the shipper to the carrier at the time of entering into the contract, the matter of consequential damages which may arise from the breach is to be regarded as not within the contemplation of the parties, and therefore not recoverable in any event. Though the rule is that announced in Hadley *v.* Baxendale, touching the breach of a contract, it is said to find appropriate application in those cases where a common carrier is sued for the breach of its common-law obligation to deliver goods within a reasonable time, as will appear by reference to the following authorities." Dunne *v.* St. Louis, etc., R. Co., 166 Mo. App. 372, 148 S. W. 997. See Rogan *v.* Wabash R. Co., 51 Mo. App. 665; Steffen *v.* Mississippi River, etc., R. Co., 156 Mo. 322, 56 S. W. 1125; Gray *v.* St. Louis, etc., R. Co., 51 Mo. App. 666.

68. Dunne *v.* St. Louis, etc., R. Co., 166 Mo. App. 372, 148 S. W. 997.

69. Cowherd *v.* St. Louis, etc., R. Co. (Mo. App.), 131 S. W. 755.

70. Missouri Pac. R. Co. *v.* Peru-Van Zandt Imp. Co., 73 Kan. 295, 85 Pac. 408, 87 Pac. 80, 6 L. R. A., N. S., 1058, 117 Am. St. Rep. 468, 9 Am. & Eng. Ann. Cas. 790.

71. Where full contract price received.—Withrow *v.* Southern R. Co., 159 N. C. 222, 74 S. E. 925.

72. Where market price same.—Franklin *v.* Louisville, etc., R. Co. (Ky.), 116 S. W. 765.

73. Missouri Pac. R. Co. *v.* Peru-Van Zandt Imp. Co., 73 Kan. 295, 85 Pac. 408, 87 Pac. 80, 6 L. R. A., N. S., 1058, 117 Am. St. Rep. 468, 9 Am. & Eng. Ann. Cas. 790.

Decision contra.—In an action against a carrier for delay of goods, losses or profits on sales were too remote to furnish basis for recovery. Galveston, etc., R. Co. *v.* Douglass, 1 Texas App. Civ. Cas., § 67.

74. Shipment to fill penalty contract.—Where plaintiff, in shipping pews to a certain church, informed the carrier that its contract with the church was a penalty contract, and directed immediate shipment, plaintiff's measure of damages in an action against the carrier for delay in delivery was the amount of forfeiture paid by it under the terms of the contract. Illinois Cent. R. Co. *v.* Southern Seating, etc., Co., 104 Tenn. 568, 58 S. W. 303, 50 L. R. A., N. S., 729, 78 Am. St. Rep. 933.

Evidence of Shipment and Delay Only.—In an action for damages on account of delay by a common carrier in delivering goods, it is error to admit evidence of the profit which the plaintiff would have made by selling such goods if he had received them promptly, after proof only of the shipment and the delay in delivery.[75]

Delay by Connecting Carrier.—The measure of damages against a carrier contracting to deliver goods over a connecting carrier, where the goods are delayed on the latter, causing loss, extends to gains prevented as well as losses sustained, the damages, however, must be supposed to have entered into the contemplation of the parties when the contract of transportation was made.[76]

§ 953. Goods Intended to Be Repaired.—Notice to Carrier.—Where mill castings were deposited with an express company for delivery to a repair shop, and no specific instructions were given to the carrier as to the necessity for an expeditious transportation of the castings by the carrier to and from the shop, and the carrier was not informed that pending the return of the castings the mill would have to shut down, and the plaintiff's business cease, the damages recoverable for delay in transportation and return of the castings do not extend to special damages.[77] A carrier is, through its station agent and bill clerk, under the agency of whom it receives freight for transportation, charged with notice rendering it liable for special damages for delay in transportation: the shipper having before delivery of the freight to them explained that the articles, the rolls of his mill, were being shipped for repair, and that till their return he could do no business, and marked on the bill of lading "Rush through."[78]

Notice to Agent.—Where mill machinery was shipped to be repaired, and then by a separate contract shipped back, to give the carrier notice of special circumstances from which damages would arise from delay in transportation, so as to make it liable therefor, it is not enough that the agent with whom the first contract was made knew thereof, there having been no delay in the first shipment, but the agent with whom the second contract was made must have been informed of such circumstances.[79]

Measure and Elements of Damages.—An owner of a public ginnery delivered a part of the machinery to a carrier for transportation to a designated point, to be repaired by the consignee. The carrier delayed the delivery of the machinery. The owner testified that seventy-five cents was a fair profit for ginning a bale of cotton, but he could only estimate the number of bales that went to his gin during the days his plant was shut down in consequence of the delay. The seventy-five cents profit depended on contingencies. Held, that the owner was entitled to nominal damages only; the estimate of what he might have earned by operating the gin, had the shipment been promptly delivered, being speculative.[80] The owner of a cotton gin sent a piston rod, necessary to operate his gin, to a machinist for repairs, and the rod was lost by the carrier by whom it was shipped to the owner, and he sued the carrier for damages owing to the enforced idleness of his gin. An instruction authorizing the jury, in determining the rental value of the gin, to consider time lost by plaintiff in going to defendant's office to inquire about the piston rod, was erroneous. The defendant carrier could not be held liable for special damages owing to

75. **Evidence of shipment and delay only.**—Southern Exp. Co. *v.* Hanaw, 134 Ga. 445, 67 S. E. 944, 137 Am. St. Rep. 227.

76. **Delay by connecting carrier.**—Savannah, etc., R. Co. *v.* Pritchard, 77 Ga. 412, 1 S. E. 261, 4 Am. St. Rep. 92.

77. **Goods intended to be repaired.**—Higgins *v.* United States Exp. Co., 83 N. J. L. 398, 85 Atl. 450.

78. Morrow *v.* Missouri Pac. R. Co. (Mo. App.), 123 S. W. 1034.

79. **Notice to agent.**—Louisville, etc., R. Co. *v.* Mink, 126 Ky. 337, 31 Ky. L. Rep. 833, 103 S. W. 294.

80. **Measure and elements of damages.**—Southern R. Co. *v.* Coleman, 153 Ala. 266, 44 So. 837.

the enforced idleness of the gin in the absence of a showing either that it had notice of the special circumstances before it received the shipment, or that the initial carrier contracted for a through shipment, and had such notice before receiving the shipment.[81]

§ 954. Time of Reporting Claim for Damages.—The provision in a bill of lading that as a condition to liability of the carrier all claims for damages must be reported by the consignee within a certain time after arrival of the goods, refers solely to loss of or damage to articles shipped, and not to special damages to the owner from delay in transportation.[82]

§§ 955-974. Actions for Delay—§ 955. Nature of Action.—There is so great a similarity between the action ex contractu and ex delicto in an action against a carrier for damages to perishable goods by delay that it is difficult to determine which it is. The difference is more in form than in substance.[83] In some of the decisions it is considered ex contractu,[84] while in others ex delicto.[85]

§ 956. Jurisdiction and Venue.—A railroad company in partnership with another company may be sued with the latter for delay in transportation, in a county in which the latter operates its road, though the former does not operate a road in such county, nor have an agent there.[86]

§ 957. Joinder of Causes of Action.—The administrator can not recover in the same action for both the mental suffering of the deceased and for his death. The two causes of action, the one, on account of the death of the deceased, which was attributed to the failure to receive in due time oxygen shipped by the carrier, and the other, to recover for the pain and suffering sustained by the deceased on account of the failure to receive the oxygen in time to relieve his distress, can not be set up in the same petition.[87]

§ 958. Parties.—The action must be brought by the owner or one having a beneficial interest in the goods.[88] The ownership need not be extensive, and an agent, factor, broker, bailee or other person having rights in the property to be protected may maintain an action, and recover both for himself and the general owner.[89] One with whom a carrier of goods has made a contract of

81. American Exp. Co. *v.* Jennings, 86 Miss. 329, 38 So. 374, 109 Am. St. Rep. 708.

82. Time of reporting claim for damages.—Morrow *v.* Missouri Pac. R. Co. (Mo. App.), 123 S. W. 1034.

83. Actions for delay.—Blodgett *v.* Abbot, 72 Wis. 516, 40 N. W. 491, 7 Am. St. Rep. 873.

Trover.—"We doubt whether, under the circumstances, trover will lie. Robinson *v.* Austin (Mass.), 2 Gray 564." Swift River Co. *v.* Fitchburg R. Co., 169 Mass. 326, 47 N. E. 1015, 61 Am. St. Rep. 288.

84. Macon, etc., R. Co. *v.* Walton, 127 Ga. 294, 56 S. E. 419; Waring & Co. *v.* Baltimore, etc., R. Co., 3 Wkly. L. Bull. 893, 7 O. Dec. Reprint 553; Commins *v.* Atlantic, etc., R. Co., 78 S. C. 8, 58 S. E. 944.

85. San Antonio, etc., R. Co. *v.* Graves (Tex. Civ. App.), 49 S. W. 1103.

86. Jurisdiction and venue.—San Antonio, etc., R. Co. *v.* Graves (Tex. Civ. App.), 49 S. W. 1103.

87. Joinder of causes of action.—Hendricks *v.* American Exp. Co., 138 Ky. 704, 128 S. W. 1089, 32 L. R. A., N. S., 867, 869.

88. Parties.—Savannah, etc., R. Co. *v.* Commercial Guano Co., 103 Ga. 590, 593, 30 S. E. 555; Missouri Pac. R. Co. *v.* Peru-Van Zandt Imp. Co., 73 Kan. 295, 85 Pac. 408, 87 Pac. 80, 6 L. R. A., N. S., 1058, 117 Am. St. Rep. 468, 9 Am. & Eng. Ann. Cas. 790; Clute *v.* Chicago, etc., R. Co. (Kan.), 111 Pac. 431, 30 L. R. A., N. S., 1071.

89. *Kansas.*—Missouri Pac. R. Co. *v.* Peru-Van Zandt Imp. Co., 73 Kan. 295, 85 Pac. 408, 87 Pac. 80, 117 Am. St. Rep. 468, 6 L. R. A., N. S., 1058, 9 Am. & Eng. Ann. Cas. 790.

Maine.—Boston, etc., R. Co. *v.* Warrior Mower Co., 76 Me. 251.

Massachusetts.—Harrington *v.* King, 121 Mass. 269; Finn *v.* Western R. Corp., 112 Mass. 524, 17 Am. Rep. 128.

Minnesota.—Chamberlain *v.* West, 37 Minn. 54, 33 N. W. 114.

New York.—Green *v.* Clarke, 12 N. Y. 343.

shipment may sue in his own name for damages caused by delay in the shipment, even though he does not own all of the goods.[90]

Consignor and Consignee.—There is considerable confusion among the decisions as to whether the consignee or the consignor is the proper party plaintiff in an action against a carrier for damages by delay in transportation, but it is well settled that the action must be brought by the owner or one having a beneficial interest in the property.[91] The carrier has notice of the interest of both the consignor and consignee, and, if either suffers an injury through its delay, he should be permitted to obtain redress in his own name in a direct action against the carrier.[92] The consignee is always presumed to possess the necessary ownership, until the contrary is shown.[93] Where a threshing machine, shipped consigned to a commission merchant, was delayed in transit by the carrier, so that the consignee was compelled to cancel previous sales, the consignee may recover in his own name damages for loss of the commission and the value of the property.[94]

§ 959. Limitation of Actions.—An action for damages for failure to transport and deliver goods in a reasonable time is ex contractu and the period for limitation for such actions and not for ex delicto applies.[95] Where there is a promise to transport to and deliver goods within a reasonable time, an action for damages for delay does not accrue to the shipper, instantly on the promise being made, but only after the lapse of a reasonable time; so the negligence complained of must have been at a time subsequent to the promise.[96]

§ 960. Prerequisites to Bringing Action.—Acceptance of Goods as Condition Precedent.—The owner of freight may not, because of delay of the carrier in delivering it, refuse to receive it, and sue the carrier for the value of the goods, though he has been obliged to buy other like goods; but he should accept it and sue for the damages.[97] But it has been held the refusal of the consignee to accept the goods, of some value, when tendered for delivery at the point of destination, does not prevent him from bringing an action for

90. Galveston, etc., R. Co. *v.* Barnett (Tex. Civ. App.), 26 S. W. 782.

91. Consignor and consignee.—Hutchinson on Carriers, §§ 731-734; Wood's Browne on Carriers, § 599; Missouri Pac. R. Co. *v.* Peru-Van Zandt Imp. Co., 73 Kan. 295, 85 Pac. 408, 87 Pac. 80, 117 Am. St. Rep. 468, 6 L. R. A., N. S., 1058, 9 Am. & Eng. Ann. Cas. 790.

92. Clute *v.* Chicago, etc., R. Co. (Kan.), 111 Pac. 431, 30 L. R. A., N. S., 1071.

"The consignor has been allowed to recover for the benefit of the consignee (6 Cyc. Law & Proc., p. 513, note 91), and the consignee for the benefit of others having an interest (6 Cyc. Law & Proc., p. 511, note 84). These refinements are not in harmony with the spirit of the Code." Clute *v.* Chicago, etc., R. Co. (Kan.), 111 Pac. 431, 30 L. R. A., N. S., 1071.

93. Consignee.—Ray on Carriers of Freight, 1006.

Indiana.—Pennsylvania Co. *v.* Poor, 103 Ind. 553, 3 N. E. 253.

Kansas.—Missouri Pac. R. Co. *v.* Peru-Van Zandt Imp. Co., 73 Kan. 295, 85 Pac. 408, 87 Pac. 80, 117 Am. St. Rep. 468, 6 L. R. A., N. S., 1058, 9 Am. & Eng. Ann. Cas. 790.

Kentucky.—Smith *v.* Lewis (Ky.), 3 B. Mon. 229.

Pennsylvania. — Griffith *v.* Ingledew (Pa.), 6 Serg. & R. 429, 9 Am. Dec. 444; Arbuckle *v.* Thompson, 37 Pa. 170.

Ordinarily, the right of action for delay or damages is in the consignee. 6 Cyc. Law & Proc. pp. 510, 511; Clute *v.* Chicago, etc., R. Co. (Kan.), 111 Pac. 431, 30 L. R. A., N. S., 1071.

94. Missouri Pac. R. Co. *v.* Peru-Van Zandt Imp. Co., 73 Kan. 295, 85 Pac. 408, 87 Pac. 80, 117 Am. St. Rep. 468, 6 L. R. A., N. S., 1058, 9 Am. & Eng. Ann. Cas. 790.

95. Limitation of actions.—Though a bill of lading is silent as to the goods being delivered within a reasonable time, yet that obligation is part of the written contract, and an action for failure to deliver in a reasonable time is not barred in six years, but in fifteen years. Waring & Co. *v.* Baltimore, etc., R. Co., 3 Wkly. L. Bull. 893, 7 O. Dec. Reprint 553.

96. Barker & Co. *v.* Glascow (O.), Tapp. 198.

97. Prerequisites to bringing action.—Chicago, etc., R. Co. *v.* Pfeifer, 90 Ark. 524, 119 S. W. 642, 22 L. R. A., N. S., 1107.

damages.[98]

Payment of Freight as Condition Precedent.—A carrier is ordinarily entitled to retain possession of the goods shipped until the freight charges thereon are paid;[99] but, when the carrier negligently delays the delivery of the goods, so that the damages occasioned by such delay equal or exceed the amount of freight due for transportation, the consignee may rightfully demand the delivery of the goods without payment of the freight, and a refusal by the carrier to surrender possession upon such demand is wrongful and amounts to a conversion.[1]

Extra Haul Because of Mistake.—The shipper is not bound to pay charges for the extra haul before receiving the goods, where the goods were transported an extra distance by a connecting carrier, owing to a mistake of the initial carrier.[2]

§§ 961-964. Pleading—§ 961-963. Plaintiff's Pleadings—§ 961. In General.—Sufficiency.—In an action for damages for delay in the transportation and delivery of goods it is sufficient to allege facts showing that the carrier received the goods for transportation and failed to deliver them in a reasonable time.[3] It is not necessary for the shipper to allege that the delay was

98. St. Louis, etc., R. Co. *v.* Cumbie, 101 Ark. 172, 141 S. W. 939.

99. **Payment of freight as condition precedent.**—Sonia Cotton Oil Co. *v.* The Red. River, 106 La. 42, 30 So. 303, 87 Am. St. Rep. 293.

1. 6 Cyc. 497.

Kansas.—Missouri Pac. R. Co. *v.* Peru-Van Zandt Imp. Co., 73 Kan. 295 85 Pac. 408, 87 Pac. 80, 6 L. R. A., N. S., 1058, 1059, 117 Am. St. Rep. 468, 9 Am. & Eng. Ann. Cas. 790; Missouri Pac. R. Co. *v.* Goodholm, 61 Kan. 758, 60 Pac. 1066.

South Carolina.—Miami Powder Co. *v.* Port Royal, etc., R. Co., 38 S. C. 78, 16 S. E. 339, 21 L. R. A., N. S., 123, 55 Am. & Eng. R. Cas. 688.

Vermont.—Dyer *v.* Grand Trunk R. Co., 42 Vt. 441, 1 Am. Rep. 350.

Washington.—Moran Bros. Co. *v.* Northern Pac. R. Co., 19 Wash. 266, 53 Pac. 49, 1101.

"In the case of Moran Bros. Co. *v.* Northern Pac. R. Co., 19 Wash. 266, 53 Pac. 49, the supreme court of Washington said: 'If a carrier has negligently delayed delivery of goods, or otherwise subjected itself to liability for damages in respect to the property carried, equal to or greater than the amount of the freight, the consignee may maintain replevin without a tender; and the claim for freight and the claim for damages may be adjudicated in the replevin suit.'" Missouri Pac. R. Co. *v.* Peru-Van Zandt Imp. Co., 73 Kan. 295, 85 Pac. 408, 87 Pac. 80, 117 Am. St. Rep. 468, 6 L. R. A., N. S., 1058, 9 Am. & Eng. Ann. Cas. 790.

If property is damaged, while in the charge of a common carrier, to a greater extent than the bill for freight, the lien of the carrier is extinguished; and the consignee not only has the right to demand the property of the carrier without payment of the freight charges, but retention by the carrier amounts to a conversion, for which trover will lie. Miami Powder Co. *v.* Port Royal, etc., R. Co., 38 S. C. 78, 16 S. E. 339, 21 L. R. A., N. S., 123; Ewart *v.* Kerr (S. C.), Rice 203, followed.

Not hardship on carrier.—"In argument the plaintiff in error objected to the rule stated by this court because of the embarrassments which might be imposed upon carriers by dissatisfied shippers. But the rule contended for by it would, in our view, enable carriers to impose much greater embarrassment upon shippers. A rule which would require a shipper to pay his debt to a carrier who owes him a greater sum does not seem to be a just and fair way to settle a controversy." Missouri Pac. R. Co. *v.* Peru-Van Zandt Imp. Co., 73 Kan. 295, 85 Pac. 408, 87 Pac. 80, 117 Am. St. Rep. 468, 6 L. R. A., N. S., 1058, 9 Am. & Eng. Ann. Cas. 790.

2. **Extra haul because of mistake.**—Yazoo, etc., R. Co. *v.* Christmas, 89 Miss. 686, 42 So. 169.

3. **Pleading.** — Whittle *v.* Southern Railway, 88 S. C. 172, 70 S. E. 456; Galveston, etc., R. Co. *v.* Jessee, 2 Texas App. Civ. Cas., § 403.

A complaint in an action against a carrier of freight, which alleges that it negligently omitted to deliver the freight for such a length of time that it was spoiled, to the shipper's damage, states a cause of action for negligent delay. Pittsburgh, etc., R. Co. *v.* Knox, 177 Ind. 344, 98 N. E. 295.

A petition which states facts showing delay by the carrier in the delivery of a machine, and asks for judgment for its rental value, during that time, is good on general demurrer as a claim for rent. Gulf, etc., R. Co. *v.* Pettit, 3 Tex. Civ. App. 588, 22 S. W. 761.

caused by a connecting carrier. This is matter of defense, which need not be anticipated by the shipper.[4] A petition alleging that the carrier did on a certain date undertake to transport within a reasonable time certain goods, but that it failed to transport the goods within a reasonable time, and that the goods, having been delayed a certain length of time or more, were damaged thereby to a certain amount, states a cause of action.[5]

Duplicity.—In an action against a carrier for damages to goods by delay in shipment, a paragraph of the petition alleging that, if the goods were not delayed in transit, they were damaged because the company failed to notify the petitioner of the arrival of the car, as is the general custom of railroads, at the point of destination, as well as of this defendant, and that if petitioner was notified it was after the said damages had been sustained and not immediate notice, as is the general custom to give, is duplicitous.[6]

§ 962. Particular Allegations.—Allegation of Negligence.—A complaint alleging that the defendant carrier unreasonably delayed a shipment for one day, without alleging negligent delay, states a cause of action in contract against the carrier for failure to transport with reasonable dispatch.[7]

Allegation as to Form of Contract.—Where a petition alleges shipment, but not a special contract, plaintiff may not be required to amend by stating whether he shipped under an oral or written contract.[8]

4. Whittle *v.* Southern Railway, 88 S. C. 172, 70 S. E. 456.

5. Macon, etc., R. Co. *v.* Walton, 127 Ga. 294, 56 S. E. 419.

A declaration which alleges that the defendant, a common carrier, contracted with the plaintiffs that a consignment would be carried from a certain point on a certain day, and that the consignment was not carried until a later day, whereby the plaintiffs were damaged, sets forth a cause of action. Richmond, etc., R. Co. *v.* Bedell, 88 Ga. 591, 15 S. E. 676.

A complaint in an action against a carrier for delay in the delivery of a car load of stoves, which alleged that there was no market for the stoves at the point of destination, that plaintiff owned teams and hired drivers in peddling stoves, that during the delay in the delivery the teams and drivers were unemployed, resulting in loss to plaintiff, that the carrier, "or its agent, or its agent at" point of destination, knew that there was no market for the stoves, except as above set forth, and that plaintiff was sustaining the expense specially claimed and made necessary by the delay of the carrier, but which failed to allege that any notice was given to the carrier at the time of the making of the contract for shipment of the special circumstances on which plaintiff's claim for damages was based, was insufficient to authorize the recovery of such damages. Pilcher *v.* Central, etc., R. Co., 155 Ala. 316, 46 So. 765.

A declaration which alleges that the defendant, a common carrier, contracted with the plaintiffs that a consignment of cotton would be carried out of a certain port on a certain day, and that the vessel did not leave until a subsequent day, whereby the plaintiffs were damaged, sets forth a cause of action. Richmond, etc., R. Co. *v.* Bedell, 88 Ga. 591, 15 S. E. 676.

6. **Duplicity.**—Macon, etc., R. Co. *v.* Walton, 127 Ga. 294, 56 S. E. 419.

In an action against a carrier for damages to a car of melons by delay in shipment, a paragraph of the petition alleged that, if the melons were not delayed in transit, they were damaged because the company failed to notify petitioner of the arrival of the car, as is the general custom of railroads, at the point of destination, as well as of this defendant, and that if petitioner was notified it was after the said damages had been sustained and not immediate notice, as is the general custom. Held, that duplicity in such paragraph was not cured by an amendment which alleged merely that said paragraph is amended so that it shall read, "petitioner shows that said melons were damaged by reason of the fact that said company failed to notify," etc., "remainder as in petition." Macon, etc., R. Co. *v.* Walton, 56 S. E. 419, 127 Ga. 294.

7. **Particular allegations.**—Commins *v.* Atlantic, etc., R. Co., 78 S. C. 8, 58 S. E. 944.

Where it is alleged that the delay was caused by the negligence of the railroad company, without stating what the negligence was, evidence of the bad condition of the track where the delay occurred is admissible to show such negligence. St. Louis, etc., R. Co. *v.* Turner, 1 Tex. Civ. App. 625, 20 S. W. 1008.

8. **Allegation as to form of contract.**—Union Pac. R. Co. *v.* Beardwell, 79 Kan. 40, 99 Pac. 214.

Allegation of Right of Shipper to Sue.—An allegation that the shipper had sold the goods is not open to the objection that it shows a sale to a third person, who alone may sue, since it merely shows an executory contract of sale with the right of the third person to inspect and reject the goods.[9]

Allegation of Acceptance.—A complaint in an action for delay which fails to allege acceptance of the goods by the carrier is insufficient. An allegation in the declaration that the carrier negligently and carelessly failed and refused to transport and deliver cars loaded by the shipper with reasonable promptness and dispatch after they were loaded and delivered to the carrier to be transported, by reason whereof the shipper suffered loss, is not equivalent to an allegation that the freight was accepted by the carrier for transportation.[10] In an action against a railroad company, seeking to recover damages for its delay in the transportation and delivery of certain freight, where the declaration fails to allege directly or to charge that such freight was ever accepted by the defendant for transportation, but, fairly construed, the declaration would seem to charge no more than a failure upon the part of the defendant to accept and transport certain freight offered to it by the plaintiffs for shipment, it is error to sustain a demurrer to a plea filed to the declaration, which avers, in substance, that, at the times mentioned in the declaration, owing to an unusual and extraordinary condition of affairs which then prevailed, the defendant was unable to meet the demand upon it to furnish sufficient cars to shippers to transport all their freight; that it did use all reasonable and proper diligence in its efforts to supply the plaintiffs with a fair and proper proportion of its available cars; that the plaintiffs knew, or could have known by the use of reasonable diligence, of the existence of such extraordinary condition of affairs, by reason of which the defendant would probably be unable to supply them with the cars required by them with usual promptness.[11]

Allegation as to Deviation.—In an action against a carrier for failure to transport goods within a reasonable time, whereby the goods were damaged, a paragraph of the petition claiming damage alleged to have resulted in consequence of defendant's routing the goods over a different line from that stipulated in the contract of affreightment set out a good cause of action.[12]

Allegation as to Overcharge of Freight.—In an action against a carrier for delay in transportation of goods, a paragraph alleging that the plaintiff was damaged for overcharge of freight on the goods in a certain sum sets forth a legal cause of action.[13]

Allegation of Contributory Negligence.—In an action against a carrier for damages from delay in delivering fruit shipped, a plea attempting to set up contributory negligence of the consignee in failing to call for it for four days after arrival, but averring no duty of the consignee to do so, nor any notice of the

9. **Allegation of right of shipper to sue.**—A complaint in an action by a shipper for delay in the delivery of corn, which alleges a contract for the transportation of the freight from a point in Indiana to Pittsburg, consigned to the order of the shipper, with directions to notify his agent on arrival at yards of the carrier near Pittsburgh that the shipper's agent sold the corn to a third person at fifty-two cents a bushel, which was its value, that the carrier negligently failed to deliver the freight for several days, whereby it was damaged so that the value was reduced to twenty cents a bushel, which was the highest price the shipper could obtain, and for which he was compelled to sell, states a cause of action in favor of the shipper as against the objection that it shows a sale to the third person who alone may sue, since the complaint merely shows an executory contract of sale with the right of the third person to inspect and reject the freight. Pittsburgh, etc., R. Co. *v.* Knox, 177 Ind. 344, 98 N. E. 295.

10. **Allegation of acceptance.**—Seaboard Air Line Railway *v.* Rentz, 60 Fla. 429, 54 So. 13.

11. Seaboard Air Line Railway *v.* Rentz, 60 Fla. 429, 54 So. 13.

12. **Allegation as to deviation.**—Macon, etc., R. Co. *v.* Walton, 127 Ga. 294, 56 S. E. 419.

13. **Allegation as to overcharge of freight.**—Macon, etc., R. Co. *v.* Walton, 127 Ga. 294, 56 S. E. 419.

arrival, nor any facts that would relieve the carrier from giving such notice, was bad.[14]

Allegation of Damages.—A complaint against a carrier for delay in delivering a shipment of goods alleging the difference between their value as delivered and as it should have been delivered, and payment for such difference as damages, is sufficient, though such damages be special damages, because of the goods being wet when delivered to the carrier.[15]

Allegation of Damage to Each Article.—A petition against a carrier to recover damages for delay in delivering goods need not allege the damage done to each article; it being sufficient to itemize the articles alleging the value of each, and the aggregate value of the whole.[16]

Allegation of Special Damages.—To authorize recovery by shipper of special, as distinguished from general, damages for delay, the complaint must specify the grounds for special damages.[17] Where, in an action against a carrier for delay in delivering certain threshing machinery, the consignee claimed special damages, in that he lost the benefit of contracts with certain individuals in the neighborhood of the place to which the machinery was shipped for the threshing of grain, a complaint failing to allege the names of the persons with whom it was claimed the consignee had such contracts is objectionable.[18]

Notice of Special Circumstances.—The complaint must aver that the carrier at the time of taking the contract of shipment, had notice of the special circumstances, to be held liable for special damages.[19] The objects of the ship-

14. **Allegation of contributory negligence.**—A plea which averred the failure of the consignee to present the bill of lading and call for the fruit within a reasonable time as the proximate cause of the damage, and that the bill required notice of arrival of the fruit, but did not aver that notice of its arrival was given, was bad, since the failure to present the bill of lading and call for the fruit might have been due to the want of notice. Western Railway *v.* Hart, 160 Ala. 599, 49 So. 371.

15. **Allegation of damages.**—Texas, etc., R. Co. *v.* Bigham (Tex. Civ. App.), 67 S. W. 522.

16. **Allegation of damage to each article.**—Brown *v.* Adams, 3 Texas App. Civ. Cas., § 390.

17. **Allegation of special damages.**—Delaney *v.* United States Exp. Co., 70 W. Va. 502, 74 S. E. 512.

In an action against a carrier for delay in shipment of goods, facts which authorize the award of special actual damages must be alleged in the petition in order to entitle the complainant to recover such damages. Gulf, etc., R. Co. *v.* Cole, 4 Texas App. Civ. Cas., § 97, 16 S. W. 176.

Loss of sale.—In a suit against a carrier for the loss of sale of goods transported by reason of its unnecessary delay, such damages being special, must be specially pleaded. International, etc., R. Co. *v.* Hatchell, 22 Tex. Civ. App. 498, 500, 55 S. W. 186.

Delay in shipment of samples.—Averment in a petition in an action against an express company for delay in delivering samples of cotton that the samples were consigned to plaintiff's agent at a named point and that plaintiff was damaged in a certain sum by reason of such delay, may admit proof of such damages by reason of a fall in the market price of cotton. Wells Fargo Exp. Co. *v.* Samuels, 11 Tex. Civ. App. 15, 16, 31 S. W. 305.

18. Missouri, etc., R. Co. *v.* Sproles (Tex. Civ. App.), 92 S. W. 40.

19. **Notice of special circumstances.**—Wells Fargo & Co. *v.* Battle, 5 Tex. Civ. App. 532, 534, 24 S. W. 353; Pacific Exp. Co. *v.* Darnell Bros., 62 Tex. 639; Gulf, etc., R. Co. *v.* Gilbert, 4 Tex. Civ. App. 366, 22 S. W. 760, 23 S. W. 320.

Shipper must allege carrier had notice of necessity of promptly forwarding goods to authorize recovery for loss of profits. Pacific Exp. Co. *v.* Darnell Bros., 62 Tex. 639, 641.

Evidence of knowledge on the part of the carrier of the necessity of prompt delivery, and that the consignor's business would be suspended by any delay, is inadmissible, in the absence of any averments to that effect. Pacific Exp. Co. *v.* Darnell Bros., 62 Tex. 639.

A complaint against a carrier for delay in the transportation of certain threshing machinery alleged that plaintiffs used 22 head of horses and 20 men at an expense of not less than $40 per day; that said men and teams were forwarded to the destination of the machinery, so as to be there on the arrival of the machinery, and that because of the delay, plaintiffs incurred an expense of maintaining such employees and teams during four and a half days at $40 a day, and that defendant, at the time of the shipment,

ment of samples of cotton from an interior market to a market at Galveston is too well known to need either averment or proof in an action against an express company for damages for delay in delivering cotton samples so shipped.[20]

§ 963. Amendments.—In an action against an express company for negligently delaying the shipment of a piece of machinery, an amendment to the petition alleging that defendant's agent had notice that the operation of the shipper's mill would be suspended until the machinery should be returned does not state a new cause of action.[21]

§ 964. Defendant's Pleading.—An allegation of loss, in an action for failure to transport orange boxes within a reasonable time, that by reason of the premises plaintiff incurred loss and damage in being unable to pack and ship part of his oranges for the Christmas market, is insufficient.[22] A plea, in an action against a carrier for failure to deliver freight within a reasonable time, which does not show that the cars referred to therein contained the freight, or that the shipper was responsible for the matters set up, and which does not show that the matters alleged might not have had reference to a different shipment, is bad.[23]

Special Plea.—The carrier, in an action for damages for delay, can not, under a general denial, take advantage of the fact that the goods were transported by a connecting carrier from an intervening point to their destination where the goods were damaged by delay,[24] or that the delay was caused by a strike.[25] Where the answer does not contain a general denial, and the special denial does not extend to the shipper's allegations of damages, it is only necessary for the shipper to prove such allegations as are placed in issue by the special denial.[26]

Demurrers and Exceptions.—Where the complaint does not allege the carrier's knowledge, when it received the goods for transportation, of the specific facts pleaded from which shipper's damages accrued, the objection should be made by special exception to the complaint, and a ruling of the trial court invoked upon it, so as to afford the shipper an opportunity to amend his complaint if the exception is sustained; and where the carrier fails to make the objection in that manner and form, he can not thereafter raise it by a special charge,

knew that if there was a delay plaintiffs would be damaged in the manner and form alleged. Held, that the complaint was not objectionable for failure to allege that defendant was notified of the advance shipment of plaintiffs' men and teams, or that expense or injury would result from such delay and the amount thereof. Missouri, etc., R. Co. *v.* Sproles (Tex. Civ. App.), 92 S. W. 40.

20. "It is a matter of common information that samples are so shipped to make sales in the market to which the shipment is made, and not for sale of samples themselves. It would not be unreasonable to say that the parties contemplated such object by the shipment, and that a breach of the carrier's contract would involve liability for decline in the price of cotton—the bales of cotton represented by the samples. Texas, etc., R. Co. *v.* Nicholson, 61 Tex. 491." Wells Fargo Exp. Co. *v.* Samuels, 11 Tex. Civ. App. 15, 16, 31 S. W. 305.

21. **Amendments.**—Such an amendment merely perfects the cause of action already definitely stated. Pacific Exp. Co. *v.* Darnell (Tex.), 6 S. W. 765.

22. **Defendant's pleading.**—Williams *v.* Atlantic, etc., R. Co., 56 Fla. 735, 48 So. 209, 24 L. R. A., N. S., 134.

23. St. Louis, etc., R. Co. *v.* Cash Grain Co., 161 Ala. 332, 50 So. 81.

24. **Special plea.**—In an action for damages through delay in transporting melons, where the complaint alleged that defendant received the melons under an agreement to deliver them at a certain point, and that by its failure so to do within a reasonable time the melons were rendered worthless, it was only necessary to prove that defendant received the melons for transportation and failed to deliver them in a reasonable time, and defendant could not, under a general denial, take advantage of the fact that the melons were transported by an independent carrier from an intervening point to their destination where they were damaged. Whittle *v.* Southern Railway, 70 S. E. 456, 88 S. C. 172.

25. In an action against a carrier for delay in transportation, evidence of a strike that caused the delay was not admissible under the general denial. St. Louis, etc., R. Co. *v.* Pumphrey (Tex. Civ. App.), 42 S. W. 246.

26. Wabash R. Co. *v.* Newton, etc., Co. (Tex. Civ. App.), 110 S. W. 992.

raising the question of the sufficiency of the carrier's complaint to support the damages proved or by exception to the general charge, after all the evidence is adduced upon the trial, or upon a motion for new trial after the verdict is returned.[27]

Sufficiency on Demurrer.—In an action against a carrier for delay in transportation and delivery of freight, where the declaration fails to allege that it was ever accepted by the carrier for transportation, but merely alleges a failure of the carrier to accept and transport freight offered by plaintiff for shipment, it was error to sustain a demurrer to a plea to the declaration alleging that at the time mentioned in the declaration, owing to an unusual condition of affairs then prevailing, the carrier was unable to meet the demand upon it to furnish sufficient cars for shippers to transport all their freight; that it used all reasonable and proper diligence in efforts to supply plaintiff with a proper proportion of its available cars; that plaintiff knew, or could have known by the use of reasonable diligence of the existence of such extraordinary conditions by reason of which the carrier would probably be unable to supply them with usual promptness.[28]

§ 965. Issues, Proof and Variance.—Where a carrier's witness testifies to delays at different points than those specified in the complaint, it can not object to the plaintiff's testimony as to such delays as not within the issues.[29] In an action for damages for delay in the transportation of goods, where the complaint alleges that the carrier received the goods under an agreement to deliver them at a certain point, and that by reason of its failure to do so within a reasonable time the goods were rendered worthless, it is only necessary to prove that the carrier received the goods for transportation and failed to deliver them within a reasonable time.[30] Where it is claimed the goods were injured by delay it is necessary to prove their condition when accepted by the carrier.[31]

Under Separate Counts.—In an action of case against a railway company for nondelivery of goods in proper time, brought by the owner, who was neither consignor nor consignee, and whose pleading describes the property, not by reference to bills of lading, but as a designated number of bushels of grain, the fact that a bill of lading was made out for each car in which the grain was shipped does not confine plaintiff to proof of only one car under each count, but he may prove the entire shipment as one transaction, although made partly on different days.[32]

Under Allegations to Deliver in Specified Time.—The declaration alleging an undertaking to deliver in a specific time, but none to deliver in a reasonable time, evidence of what would be a reasonable time was inadmissible, and no recovery could be had under the declaration as it stands for failure to deliver in a reasonable time. If the necessary allegation is supplied by amendment, all the

27. **Demurrers and exceptions.**—Wabash R. Co. *v.* Newton, etc., Co. (Tex. Civ. App.), 110 S. W. 992.

28. **Sufficiency on demurrer.**—Seaboard Air Line Railway *v.* Rentz, 60 Fla. 429, 54 So. 13.

29. **Issues, proof and variance.**—San Antonio, etc., R. Co. *v.* Griffith (Tex. Civ. App.), 70 S. W. 438.

30. Whittle *v.* Southern Railway, 88 S. C. 172, 70 S. E. 456.

31. Where, in an action by a shipper for damages from the delay of the carrier in notifying him of the refusal of a third person, to whom the goods had been sold, to accept them, the evidence showed that the property was shipped to the shipper's order with directions to notify the third person, that the third person was duly notified, but refused to receive the goods because damaged, and that the shipper was not promptly notified of such refusal, but the evidence did not show the condition of the goods when shipped, the shipper could not recover. St. Louis, etc., R. Co. *v.* Townes, 93 Ark. 430, 124 S. W. 1036, 26 L. R. A., N. S., 572.

In an action predicated upon delay in transporting perishable merchandise, there must be proof of condition at the time both of receipt and of delivery. Leonard Seed Co. *v.* Cleveland, etc., R. Co., 162 Ill. App. 190.

32. **Under separate counts.**—Illinois Cent. R. Co. *v.* Cobb, etc., Co., 64 Ill. 148.

relevant facts and circumstances touching the particular shipment, as well as touching that class of shipments generally, may be shown to ascertain what length of time would be reasonable.[33]

Evidence of Loss of Profits.—Where in an action against a railroad for negligently failing to deliver machinery, which caused the shutting down of a flouring mill, the complaint did not allege nor the evidence show that any definite profit was lost, nor that the contract was such as to inform defendant that any loss of special profit would ensue, it was error to admit evidence showing what the special profit would have been during the time the mill was shut down, as the proper measure of damages was the legal interest on the capital invested, and such other damages as were the direct and necessary result of defendant's negligence.[34]

Variance.—A purchaser from a consignee who obtains the bill of lading stands as consignee, and there is no variance between the declaration in an action for delay which alleges that the freight was consigned to the purchaser and the evidence disclosing that the freight was consigned to the consignee with directions to notify the purchaser, a variance being a material difference.[35]

§ 966. Dismissal and Nonsuit.—Where, in an action for damages for delay in shipping freight, the carrier's breach of the contract of shipment by undue delay is not denied, the consignee is at least entitled to nominal damages, so that a motion for nonsuit is properly denied.[36]

§ 967. Burden of Proof and Presumptions.—One suing for negligent delay in transporting freight must prove negligence and damage.[37] A carrier agreed to transport with reasonable dispatch certain goods. The schedule time between the two points was seven days. The goods arrived ten days after initial delivery. There was no evidence that shipments were put on the first train leaving the

33. **Under allegation to deliver in specified time.**—Central R., etc., Co. *v.* Hasselkus, 91 Ga. 382, 17 S. E. 838, 44 Am. St. Rep. 37.

34. **Evidence of loss of profits.**—Sharpe *v.* Southern R. Co., 130 N. C. 613, 41 S. E. 799.

35. **Variance.**—The allegation in the declaration in an action by a purchaser from a consignee for the delay of the carrier in the delivery of freight, as to when the purchaser became the owner of the freight by payment therefor and delivery of the bill of lading is not descriptive, and the purchaser is not confined to the date, though to make out a case he must show that the freight was injured after he became the owner thereof and while the carrier sustained the relation of carrier to him. Johnson & Co. *v.* Central Vermont R. Co., 79 Atl. 1095, 84 Vt. 486.

Allegations describing consignee.—The variance between a petition, in an action by a shipper against a carrier, which alleges that the carrier agreed to deliver at designated places to third persons, and the proof, which shows that the bills of lading named the shipper as consignee and contained directions to notify the third persons, is immaterial, as the carrier undertook to turn the freight over at destination to the third persons, on their presenting the bills of lading showing they were the persons authorized to take charge of the shipments. Hall Grain Co. *v.* Louisville, etc., R. Co., 148 Mo. App. 308, 128 S. W. 42.

36. **Dismissal and nonsuit.**—Story Lumber Co. *v.* Southern R. Co., 151 N. C. 23, 65 S. E. 460. See ante, "Nominal Damage," § 929.

37. **Burden of proof and presumptions.**—Haase & Sons Fish Co. *v.* Merchants', etc., Transp. Co., 143 Mo. App. 42, 122 S. W. 362.

A shipper suing a carrier for delay in the delivery of freight has the burden of proving delay. Kansas City, etc., R. Co. *v.* Morrison (Ark.), 146 S. W. 853.

Where a consignee seeks to charge a carrier with liability by way of damages or statutory penalty for delay, the burden is on the consignee to show that the goods were not transported according to the contract within a reasonable time. Watson *v.* Atlantic, etc., R. Co., 59 S. E. 55, 145 N. C. 236.

In an action against a carrier for injury by delay in transit, the burden is on the plaintiff to establish by a preponderance of the evidence facts entitling him to recover. Sterling *v.* St. Louis, etc., R. Co., 38 Tex. Civ. App. 451, 86 S. W. 655, affirmed in 101 Tex. 661, no op. See Wells, Fargo & Co. *v.* Battle, 5 Tex. Civ. App. 532, 534, 24 S. W. 353.

place of consignment, or any demand therefor, that the train took more than schedule time, or that any shipment had been carried in less than ten days. No presumption of negligence arose, and the plaintiff did not sustain the burden of proving failure to transport with reasonable dispatch.[38] But where the delay in a shipment is prolonged beyond the time within which a like shipment is usually transported between the point of shipment and the point of delivery, the burden is cast on the carrier to explain such delay and to show that it did not result from its negligence or the negligence of its connecting carrier.[39]

Where notice of special damages from the delay of freight was given to the carrier's agent at destination, it will not be presumed from the carrier's failure to prove affirmatively that the machinery shipped had never arrived at destination, and that it had so arrived and was within the control of its agent at that place, so as to charge it with the agent's knowledge of such special damages.[40]

Perishable Goods.—Delay in the transportation of perishable freight raises a prima facie presumption of negligence of the carrier, and to escape liability it must show that it exercised reasonable diligence in forwarding the freight. Where a prima facie presumption of negligence of a carrier in transporting perishable freight is raised by undisputed proof of delay, whether the carrier's evidence to excuse delay shows reasonable diligence is for the jury.[41]

Of Excuse for Delay.—The burden is always on the carrier to satisfactorily explain the delay by showing want of negligence or the intervening of an overpowering act excusing delay.[42]

38. Gamble-Robinson Comm. Co. *v.* Northern Pac. R. Co., 107 Minn. 187, 119 N. W. 1068.

39. Bacon *v.* Cleveland, etc., R. Co., 155 Ill. App. 40.

Where the delay in transportation is beyond the time usually required, the burden is cast on the carrier in an action for injuries for such delay to explain the delay, and show that it did not result from negligence. Shoot *v.* Cleveland, etc., R. Co., 145 Ill. App. 532.

As a carrier must use ordinary care to avoid unreasonable delay in the transportation of goods, proof of an unusual delay shows negligence prima facie calling on the carrier to excuse the delay and thereby disprove negligence to avoid liability for a loss sustained in consequence of the delay. Chicago, etc., R. Co. *v.* Gillett (Tex. Civ. App.), 99 S. W. 712.

Where, in an action against an express company for delay in the transportation of goods from Erie, Pa., to Lenoir, N. C., the evidence showed that the goods were received for transportation October 28th, and were not delivered until November 9th, a presumption of actionable negligence against the company arose, entitling plaintiff to a submission of his cause to the jury under proper instructions. Harper Furniture Co. *v.* Southern Exp. Co., 57 S. E. 458, 144 N. C. 639, 12 Am. & Eng. Ann. Cas. 924.

As a carrier must use ordinary care to avoid unreasonable delay in the transportation of goods, proof of an unusual delay shows negligence prima facie calling on the carrier to excuse the delay and thereby disprove negligence to avoid liability for a loss sustained in consequence of the delay. Chicago, etc., R. Co. *v.* Gillett (Tex. Civ. App.), 99 S. W. 712.

It seems, that on proof of delay in delivery a prima facie case is made against the carrier, and the burden of proof rests on it to show that the delay was from a cause for which it was not responsible. It rests on the carrier for the additional reason that such facts are peculiarly within the knowledge of the carrier, and not easily ascertained by the shipper. Norfolk, etc., R. Co. *v.* Wilkinson, 106 Va. 775, 780, 56 S. E. 808, quoting 5 Am. & Eng. Ency. of L. (2d Ed.) 254, 255.

Where goods lost.—A railroad company is prima facie liable for damages from a delayed shipment of goods, due to car being lost. Unionville Produce Co. *v.* Chicago, etc., R. Co., 153 S. W. 63, 168 Mo. App. 168.

40. Pacific Exp. Co. *v.* Jones, 52 Tex. Civ. App. 367, 113 S. W. 952.

41. Perishable goods.—Pennsylvania R. Co. *v.* Clark, 118 Md. 514, 85 Atl. 613.

42. Of excuse for delay.—St. Louis, etc., Railway *v.* Heath, 41 Ark. 476.

A carrier delaying the transportation of property has the burden of showing a special excuse, such as unusual rush of business at the time. McMillan *v.* Chicago, etc., R. Co., 147 Iowa 596, 124 N. W. 1069.

Where the delay in delivering freight is extraordinary, the burden is on the carrier in actions for damages for delay to show unusual conditions justifying the delay. Missouri, etc., R. Co. *v.* Stark Grain Co., 103 Tex. 542, 131 S. W. 410, modifying judgment 120 S. W. 1146.

Shipment over Connecting Carriers.—In an action for damages brought against an initial and connecting carrier for delay in the transportation and delivery of goods, if the shipper proves the delivery of the goods to the initial carrier, the delay and the resulting damages, and the defendants introduce no evidence to show by whom the delay was occasioned, the shipper is entitled to a judgment against the initial carrier for the damages shown. Upon such a showing, the burden is on the initial carrier to show proper delivery to the connecting carrier and freedom from negligence on its part.[43]

§§ 968-969. Evidence—§ 968. Admissibility of Evidence.—In an action for delay in transportation of goods, the time ordinarily required for carriage, the preparations by the carrier, the effort at dispatch, the character of the freight, and kindred circumstances are admissible.[44] In an action against an express company for delay in the delivery of plaintiff's trunk, containing articles which he intended to use at a summer resort, evidence that the hotel to which the trunk was to be delivered and where plaintiff was to stop was a high-priced hotel, patronized by people of wealth and prominence in the business and social world, that many social functions and entertainments were conducted there for the benefit of the guests, and that there were tennis courts and golf links for the use of guests, which plaintiff desired to use, had used on former occasions, and which he did use after receiving the apparel contained in the trunk, was admissible, as bearing on plaintiff's damage.[45]

Exact Time of Delay.—Where a considerable delay is shown, evidence is admissible to show the exact time of delay.[46]

Cause of Delay.—In an action for damages caused by the unlawful detention of the plaintiff's property shipped over the defendant's railroad, it is proper to admit evidence showing the cause of delay, and that the defendant used due diligence.[47]

Usage and Custom.—Where in an action for delay in the delivery of the goods the carrier relied on the contributory negligence of the plaintiff in failing to present the bill of lading, and the evidence shows that when the goods arrived at the point of destination the carrier charged the freight on them to the plaintiff and accepted payment for the freight without the presentation of any bill of lading, evidence that it was not the custom of plaintiff to present bills of lading is admissible.[48] Evidence of the custom of the carrier as to the placing of cars in its yards at the terminal point for examination before acceptance is admissible to establish a custom binding on the carrier.[49] Where, in an action

43. **Shipment over connecting carriers.**—Norfolk, etc., R. Co. *v.* Wilkinson, 106 Va. 775, 56 S. E. 808, decided under § 1295 of Va. Code.

44. **Admissibility of evidence.**—Alabama, etc., R. Co. *v.* McKenzie, 139 Ga. 410, 77 S. E. 647, 45 L. R. A., N. S., 18.

45. James *v.* American Exp. Co., 76 N. J. L. 582, 70 Atl. 131.

46. **Exact time of delay.**—Where, in an action against an express company for delay in the transportation of goods, the evidence showed that fourteen days was consumed in transporting goods from Erie, Pa., to Lenoir, N. C., evidence to establish the exact quantum of wrongful delay was admissible. Harper Furniture Co. *v.* Southern Exp. Co., 57 S. E. 458, 144 N. C. 639, 12 Am. & Eng. Ann. Cas. 924.

47. **Cause of delay.**—Beasley *v.* Baltimore, etc., R. Co., 27 App. D. C. 595.

48. **Usage and custom.**—Johnson & Co. *v.* Central Vermont R. Co., 84 Vt. 486, 79 Atl. 1095.

49. Johnson & Co. *v.* Central Vermont R. Co., 84 Vt. 486, 79 Atl. 1095.

Where, in an action against a carrier for delay in the delivery of freight, the issues were whether the liability of the carrier as such had ceased before plaintiff became the owner of the freight by purchase from the consignee, and whether the freight had been put in such a position that it was no longer in transit, evidence of the custom of the carrier as to the placing of cars in its yards at the terminal point for examination before acceptance was admissible to establish a custom binding on the carrier. Johnson & Co. *v.* Central Vermont R. Co., 84 Vt. 486, 79 Atl. 1095.

against a carrier for delay in delivering lumber to a vessel, rendering the plaintiff liable to demurrage charges, the issue is whether the carrier had notice of the charter party making the plaintiff liable for demurrage charges, evidence that all charter parties make provision therefor is competent to show the carrier's knowledge.[50]

Failure to Care for Goods.—In an action against a carrier for damages to a shipment of melons through failure to promptly transport them, testimony that the car was improperly iced at an intervening point is admissible as tending to show the condition of the melons and that the time within which they were delivered was unreasonable.[51]

Contract with Third Person.—The shipper can testify that he had a contract with the carrier to deliver goods to a vessel during her lay days, and by reason of the defendant's delay, was required to pay demurrage.[52]

Evidence of Usual Time.—Evidence as to the customary length of time consumed by freight trains in running between the points on defendant's line over which the shipment was made was admissible to show unnecessary delay.[53]

Evidence of Other Shipment.—In an action against a carrier for delay in shipping fruit, shippers of fruit between the points in question are properly allowed to testify to the usual time required to make the shipment to an intermediate point on the route, and as to their experience as to the time required for the whole shipment.[54] Where bills of lading for cotton bound the railroad only to transport with as reasonable dispatch as its general business would permit, evidence, in an action against the road by the shipper for delay in delivering the goods, that a subsequent shipment reached the same destination prior to the first shipment, is competent in respect to delay on road's part, and in refutation of its plea that an unprecedented amount of freight prevented it from hauling the cotton more expeditiously.[55] Evidence that the drivers of express wagons to whom the goods were delivered agreed at the time that they should go on a certain train, that the shipper had made shipments before with the drivers, and that their contracts had been carried out, is admissible as showing the agency of the drivers to receive goods and contract for their shipment.[56]

Evidence of Want of Damage.—In an action against a carrier for failure to deliver samples of goods, testimony offered to show that the shipper actually received more for his goods than they were actually worth in market at the place of delivery should be admitted.[57]

Evidence of Value of Goods.—The exclusion of testimony offered by the defendant to prove that cotton in bales is inferior to that in samples, is error.[58]

Evidence of Market Value of Goods.—It being shown that the agents of the railway company were informed at the time of receiving the shipment that

50. Southern R. Co. *v.* Lewis, 165 Ala. 451, 51 So. 863.

51. **Failure to care for goods.**—Whittle *v.* Southern Railway, 88 S. C. 172, 70 S. E. 456.

52. **Contract with third person.**—Where the complaint, in an action against a carrier for unreasonable delay in the delivery of lumber to be furnished by plaintiff to a third person under a contract requiring delivery to a vessel under a charter party stipulating for demurrage, alleged that plaintiff had a contract to deliver lumber to a vessel within her lay days, and by which he was required to pay demurrage incurred in furnishing the cargo, plaintiff was properly permitted to testify that he had such a contract to show that demurrage charges proximately resulted from the carrier's delay in delivery. Southern R. Co. *v.* Lewis, 165 Ala. 451, 51 So. 863.

53. **Evidence of usual time.**—Texas, etc., R. Co. *v.* Crowley (Tex. Civ. App.), 86 S. W. 342.

54. **Evidence of other shipment.**—Kemendo *v.* Fruit Dispatch Co. (Tex. Civ. App.), 131 S. W. 73.

55. Southern R. Co. *v.* Cofer, 149 Ala. 565, 43 So. 102.

56. Such evidence was admissible as res gestæ. Pacific Exp. Co. *v.* Needham (Tex. Civ. App.), 94 S. W. 1070, affirmed in 101 Tex. 652, no op.

57. **Evidence of want of damage.**—Wells Fargo Exp. Co. *v.* Samuels, 11 Tex. Civ. App. 15, 17, 31 S. W. 305.

58. **Evidence of value of goods.**—Wells Fargo Exp. Co. *v.* Samuels, 11 Tex. Civ. App. 15, 17, 31 S. W. 305.

it was for immediate sale at their destination, it was relevant to show the state of the market at the destination when it should have been delivered, and the lower price when actually delivered.[59] The plaintiff may introduce evidence of contract price as tending to show market price of goods.[60] In an action against a carrier for unreasonable delay in the transportation of fruit, a witness who has been in the business of shipping fruit to the same destination for fifteen or twenty years and has received from dealers their daily quotations as well as accounts of sales of fruits shipped by him, can testify from returns of sales of shipments by him at a certain time as to the market value of such fruit at the point of destination at that time, also the testimony of a resident of the city to which the fruit was shipped who sold the fruit in question, was admissible.[61]

Evidence of Want of Negligence.—The carrier has the right to show if it can that the shipment in question was shipped on the first freight train on its road after it had been received, and that the transportation began as soon as the road was clear and open to the train.[62]

Declarations and Admissions of Shipper.—It is reversible error, where the plaintiffs has recovered from a carrier a certain amount for loss on a shipment of goods through delay, to exclude evidence of his statement, on his return from the trip, that he had lost a much less amount.[63]

Declarations and Admissions of Agents, etc.—The declarations of the railway conductor as to the time when his train is due at a station on his route, made while he is running the train, is competent evidence.[64] And a conversation between its agent and the shipper is admissible to show defendant's negligence for delay in delivery under the contract in bill of lading.[65] But where it in no way appeared that the delay, concerning which the statements of a conductor were offered as admissions of negligence, was one to the fault of such conductor, or that the schedule of the delayed train was in any manner under his control, or that he had authority to speak for the railway company in such matter, the statements were not admissible.[66]

Expert and Opinion Evidence.—A witness who has had ten years' experience in inspecting cotton seed is qualified as an expert to testify to the extent of the deterioration in value of seed through delay in transportation and subjection to dampness.[67] But an action against a carrier to recover for unreasonable delay in the delivery of freight, the opinion of its agent that the claim was just and should be paid is not admissible as evidence for the plaintiff.[68]

Cumulative Evidence.—In an action for injury to trees by delay in their transportation by an express company, error in admitting evidence as to the good reputation of the nurseryman from whom plaintiff received the goods is

59. **Evidence of market value of goods.**—Ft. Worth, etc., R. Co. *v.* Greathouse, 82 Tex. 104, 17 S. W. 834.

60. Where a commission merchant testified that his order for a carload of potatoes at 60 cents per bushel f. o. b. at B.; he, the shipper, was also entitled to show that he had contracted to sell potatoes to the commission company at 60 cents per bushel f. o. b. cars at B., the point of shipment—not that such contract price was recoverable, the defendant carrier having no notice of the contract, but as bearing on the market price. Garlington *v.* Fort Worth, etc., R. Co., 34 Tex. Civ. App. 274, 78 S. W. 368.

61. Central R., etc., Co. *v.* Skellie, 86 Ga. 686, 12 S. E. 1017.

62. **Evidence of want of negligence.**—Chicago, etc., R. Co. *v.* Kapp, 37 Tex. Civ. App. 203, 83 S. W. 233.

63. **Declarations and admissions of shipper.**—Texas, etc., R. Co. *v.* Fisher, 15 Tex. Civ. App. 63, 38 S. W. 392.

64. **Declarations and admissions of agent, etc.**—Missouri Pac. R. Co. *v.* Fagan, 72 Tex. 127, 9 S. W. 749, 2 L. R. A., N. S., 75, 13 Am. St. Rep. 776.

65. Houston, etc., R. Co. *v.* Houx, 15 Tex. Civ. App. 502, 40 S. W. 327.

66. St. Louis, etc., R. Co. *v.* Carlisle, 34 Tex. Civ. App. 268, 78 S. W. 553, affirmed, no op.; Cooper Grocer Co. *v.* Britton (Tex. Civ. App.), 74 S. W. 91; Standefer *v.* Aultman, etc., Machinery Co., 34 Tex. Civ. App. 160, 78 S. W. 552.

67. **Expert and opinion evidence.**—San Antonio, etc., R. Co. *v.* Josey (Tex. Civ. App.), 71 S. W. 606.

68. East Tennessee, etc., R. Co. *v.* Johnson, 85 Ga. 497, 11 S. E. 809.

not reversible, where the sound condition of the trees when received by the express company was otherwise abundantly established.[69]

Evidence of Excuse for Delay.—Where the defendant, a railroad company, in a suit against it for unreasonable delay in transporting stock from the west to the east, sets up as an excuse that the delay was occasioned by the want of empty cars at a particular point on the route, it is competent for the plaintiff, for the purpose of meeting such excuse, to prove that empty cars passed that point, going west, while the stock was there waiting transportation.[70]

§ 969. Weight and Sufficiency of Evidence.—Mere proof of delay in transportation[71] or of deterioration in goods[72] does not support an inference of negligence of the carrier, but slight evidence of negligence is sufficient to raise the inference that the delay was negligent.[73] The derailment of a train causing delay in transportation of goods by a carrier is prima facie evidence of negligence.[74]

The derailment of the train and the wreck, by which the transportation of the property was so delayed that it caused the damage, made out a prima facie case of negligence against the defendant.[75]

To Prove Notice.—Evidence of the name and title of the consignee, the nature of the goods shipped, the mode of shipment and the destination, may afford sufficient proof of notice to the carrier of the necessity for prompt delivery to avoid special damages to the consignee.[76]

Of Market Value.—In an action against a carrier for damages for delay in transportation of merchandise, evidence of a broker, who had made purchases of merchandise like that in question at the place in question and at or about the time in question, was sufficient to show prima facie the market value of such merchandise at the time and place involved.[77]

Failure to Give Notice of Arrival.—Under a statute requiring the carrier to give notice of arrival of the goods to the consignee, delay in giving such notice is some evidence of delay in shipment.[78]

69. **Cumulative evidence.**—Pacific Exp. Co. *v.* Needham (Tex. Civ. App.), 94 S. W. 1070, 1071, affirmed in 101 Tex. 652, no op.

70. **Evidence of excuse for delay.**—Toledo, etc., R. Co. *v.* Lockhart, 71 Ill. 627.

71. **Weight and sufficiency of evidence.**—Holland *v.* Chicago, etc., R. Co., 123 S. W. 987, 139 Mo. App. 702.

72. The mere fact that the freight was shipped in apparently good order and properly packed, and was in a deteriorated condition when delivered after a delay, is not sufficient to require the carrier to show that it was not negligent. Haase & Sons Fish Co. *v.* Merchants', etc., Transp. Co., 143 Mo. App. 42, 122 S. W. 362.

73. Holland *v.* Chicago, etc., R. Co., 139 Mo. App. 702, 123 S. W. 987.

74. St. Louis, etc., R. Co. *v.* Wallace, 90 Ark. 138, 118 S. W. 412, 22 L. R. A., N. S., 379.

75. St. Louis, etc., R. Co. *v.* Wallace, 90 Ark. 138, 118 S. W. 412, 22 L. R. A., N. S., 379, citing St. Louis, etc., R. Co. *v.* Mitchell, 57 Ark. 418, 21 S. W. 883; St. Louis, etc., R. Co. *v.* Sandiage, 85 Ark. 589, 109 S. W. 551.

76. **To prove notice.**—The facts relied upon by the plaintiff to sustain its contention are: (1) Its name, indicating the character of business engaged in by it. (2) The nature of the article shipped, to wit, an edger, a machine used by sawmills, weighing about 1,000 pounds, indicating an article not of general use but for particular purpose. (3) That the machine was shipped unboxed, uncovered, and open, and thus observable by the defendant. (4) Being a single machine, indicating that it was intended to be used in conjunction with other machinery. (5) The destination, being a section in which lumber was manufactured. All of which were under defendant's observation or knowledge at the time the contract of carriage was made. Held, sufficient evidence of notice of necessity for prompt shipment. Story Lumber Co. *v.* Southern R. Co., 151 N. C. 23, 65 S. E. 460.

77. **Of market value.**—Euston & Co. *v.* Erie R. Co., 147 Ill. App. 594.

78. **Failure to give notice of arrival.**—In view of Code 1896, § 4224, providing that a common carrier, if the place of destination of freight is a city of a certain size, etc., is not relieved from liability as a common carrier by reason of a storage of freight, unless within twenty-four hours after the arrival thereof notice is given the consignee, the fact that a railroad failed to give the consignee of cotton notice of its arrival until a cer-

Statutory Affidavit.—Under a statute providing that, when any action is founded on an open account, the party's affidavit, or that of his agent or attorney, will be sufficient evidence of the claim, an action by a shipper for damages resulting from a delay in transportation of goods is not an open account, within the meaning of the statute.[79]

Sufficient to Go to Jury.—There is sufficient evidence of the carrier's delay in the shipment of perishable goods to go to the jury, where it is shown that the consignee had been advised of the shipment, was on the lookout for the goods and had made sales in advance, and witnesses had testified as to the time the goods were received, it appearing the witnesses meant the time the goods arrived and not the time they were received.[80] Where the evidence shows that the carrier had notice that the goods were needed for a special purpose and that damages would result from unreasonable delay, from the address of the consignee, the mode of shipment and the nature of the goods shipped, it is sufficient to take the question of the amount of special damages for delay in delivery to the jury.[81]

§§ 970-972. Instructions—§ 970. Province of Court and Jury.—Whether a delay is unreasonable and whether damage resulted therefrom are questions for the jury under the circumstances of each particular case.[82]

Cause of Delay.—Under conflicting evidence, the question whether delay of a shipment was due to defendant's negligence, or to an unavoidable congestion of traffic, is for the jury.[83]

Rule of Precedence in Unloading at Elevator.—Where a carrier of corn for delivery to an elevator for drying negligently delayed the transportation, and thereby caused the cars to lose the precedence they would have enjoyed if carried promptly, under a rule providing for the sending of cars to the elevator in the order of their arrival, the question of the liability for the injury to the

tain date, in an action against the road for delay in delivering the cotton, was some evidence that the delivery was delayed until at or close to that date. Southern R. Co. *v.* Cofer, 149 Ala. 565, 43 So. 102.

79. Statutory affidavit.—Galveston, etc., R. Co. *v.* Gildea, 2 Texas App. Civ. Cas., § 271.

80. Sufficient to go to jury.—Gibson *v.* Atlantic, etc., R. Co., 88 S. C. 360, 70 S. E. 1030.

81. Harper Furniture Co. *v.* Southern Exp. Co., 148 N. C. 87, 62 S. E. 145, 30 L. R. A., N. S., 483, 128 Am. St. Rep. 588.

82. Instructions.—*Georgia.*—Western, etc., R. Co. *v.* Summerour, 139 Ga. 545, 77 S. E. 802.

Indiana.—Pittsburgh, etc., R. Co. *v.* Knox, 177 Ind. 344, 98 N. E. 295.

New Jersey.—Carr *v.* Delaware, etc., R. Co., 81 N. J. L. 532, 79 Atl. 322; Higgins *v.* United States Exp. Co., 83 N. J. L. 398, 85 Atl. 450.

Texas.—Garlington *v.* Forth Worth, etc., R. Co., 34 Tex. Civ. App. 274, 78 S. W. 368; Chicago, etc., R. Co. *v.* Kapp, 37 Tex. Civ. App. 203, 83 S. W. 233.

The issue of reasonable diligence in the shipment of freight is for the jury. Cummins *v.* Atlantic, etc., R. Co., 58 S. E. 944, 78 S. C. 8.

Whether an electric railroad company used due diligence in clearing its track of a wreck, so as to transport a corpse with promptness, is a question for the jury. Alabama City, etc., R. Co. *v.* Brady, 160 Ala. 615, 49 So. 351.

Where there is some evidence.—Where there is evidence, in an action against a railroad for damages from the explosion of a car of explosives, that the company allowed the car to be delayed, the question of negligence is for the jury. Ft. Worth, etc., R. Co. *v.* Beauchamp, 95 Tex. 496, 68 S. W. 502, 58 L. R. A., N. S., 716, 93 Am. St. Rep. 864.

Where there is conflict in evidence in an action against an express company for delay in delivering samples of cotton as to whether samples were delivered to the company for shipment, the issue should be submitted to the jury. Wells Fargo Exp. Co. *v.* Samuels, 11 Tex. Civ. App. 15, 17, 31 S. W. 305.

Six days.—Where a carrier refuses to deliver goods to the owner until the amount due for freight is ascertained, it can not be said, as a matter of law, that six days is so clearly a reasonable time that there is no room for submitting the question of due diligence to the jury. Beasley *v.* Baltimore, etc., R. Co., 27 App. D. C. 595.

83. Cause of delay.—Unionville Produce Co. *v.* Chicago, etc., R. Co., 168 Mo. App. 168, 153 S. W. 63.

corn, because of delay in transit, because of the rule, was one of fact, on it being assumed that the rule afforded a valid excuse for failure to deliver promptly.[84]

Excuse for Delay.—Whether a carrier is excused for delay is a question for the jury.[85] Where a carrier seeks to excuse its failure to transfer cars of potatoes to the yard where they were to be delivered because of extraordinary demands and condition of traffic, a question of fact is presented,[86] and it was error to instruct that, if plaintiff and the other dealers helped to block the produce yard after expiration of free days, plaintiff could not recover.[87]

Where Goods Shipped for Sale.—In an action by a seller to recover the value of goods against a carrier to whom they were delivered for transportation to the buyer, but which were not accepted because of delay in delivery, whether the contract of sale provided that the goods were to be delivered into the actual possession of the buyer, or whether they were to be delivered free on board cars, is for the jury.[88]

Where Goods Shipped for Use.—In an action against a carrier for delay in the delivery of goods not intended for sale in the market of destination, where the measure of damages is the owner's inconvenience owing to the deprivation of the property, the question of inconvenience and damage therefrom is for the jury.[89] Where a carrier had sufficient notice that tents were shipped to be used as stable for the protection of horses, during severe weather, the question whether the damages claimed to have resulted from failure to deliver in a reasonable time were the proximate result of such breach, or were within the contemplation of the parties at the time of making the contract, is for the jury.[90]

Instruction Assuming Facts.—Where, in an action against a carrier for delay in the shipment of corn, the evidence as to the time when defendant received the corn was conflicting, it was improper for the court to assume in its charge that the corn was received by the carrier on a particular day.[91]

Instruction on Weight of Evidence.—An instruction in a case where freight was delivered to a carrier on Saturday, and was not shipped till Monday, there being no train Sunday, that in considering the question of negligence of the carrier in failing to transport the freight within a reasonable time it was under no obligation to run its train on Sunday, and can not be charged with negligence in failing to transport on Sunday, if it ran no freight train over the line that day, is not open to the objections that it is on the weight of evidence, that it presents a hypothetical issue, and not a real question of fact, or that it singles out and lays undue stress on an issue not in the case.[92]

§ 971. Necessity and Propriety of Instructions.—In a suit against a railway for damage through delay in transportation of goods, plaintiff is entitled to a charge submitting the question of negligence where the evidence justifies such submission.[93]

84. **Rule of precedence in unloading at elevator.**—Hall Grain Co. *v.* Louisville, etc., R. Co., 148 Mo. App. 308, 128 S. W. 42.

85. **Excuse for delay.**—Whether a carrier is excused by the conduct of the shipper is a question of fact for the jury. Carr *v.* Delaware, etc., R. Co., 81 N. J. L. 532, 79 Atl. 322.

86. Joynes *v.* Pennsylvania R. Co., 235 Pa. 232, 83 Atl. 1016, Ann. Cas. 1913D, 964.

87. Joynes *v.* Pennsylvania R. Co., 235 Pa. 232, 83 Atl. 1016, Ann Cas. 1913 D, 964.

88. **Where goods shipped for sale.**—Acme Paper Box Factory *v.* Atlantic, etc., R. Co., 148 N. C. 421, 62 S. E. 557.

89. **Where goods shipped for use.**—Gulf, etc., R. Co. *v.* Maetze, 2 Texas App. Civ. Cas., § 631.

90. Pecos, etc., R. Co. *v.* Maxwell (Tex. Civ. App.), 156 S. W. 548.

91. **Instruction assuming facts.**—St. Louis, etc., R. Co. *v.* Thompson (Tex. Civ. App.), 103 S. W. 684.

92. **Instruction on weight of evidence.**—Rehearing (Tex. Civ. App.), 47 S. W. 384, denied. Belcher *v.* Missouri, etc., R. Co. (Tex. Civ. App.), 47 S. W. 1020, reversed 92 Tex. 593, 50 S. W. 559.

93. **Necessity and propriety of instructions.**—Belcher *v.* Missouri, etc., R. Co., 92 Tex. 593, 597, 50 S. W. 559, reversing 47 S. W. 384.

Rule as to Assessing Damages.—In an action against a carrier for damages resulting from delay in the delivery of goods, it is erroneous to instruct to assess damages in case of unreasonable delay, without any direction as to the rule by which such damages should be assessed.[94]

That Damages in Excess of Freight.—In an action of trover in such case the damage to the property while in the hands of the carrier must be equal to or greater than the freight charges; and, therefore, where there is no evidence on the trial establishing this fact, it is error for the trial judge, in response to the requests of a defendant carrier, to refuse to place this element of the case before the jury.[95]

Distinguishing Damages from Delay from Subsequent Damage.—Where goods are injured by delay in transportation, and are further injured by the delay of the consignee in removing them from the car, the carrier, being liable only for the damages from delay in transportation, is entitled, in an action to recover damages, to a special instruction to distinguish between the damages to the goods at the time of their arrival and the damages from the consignee's delay in unloading the car, and it is error to refuse such a charge, although the matter is covered in a general charge.[96]

§ 972. Form, Requisites and Sufficiency.—Abstract Instruction.—Goods having been transported an extra distance by a connecting carrier, owing to a mistake of the initial carrier, the connecting carrier demanded payment for such extra haul before permitting the shipper to take his goods. While the shipper is not bound to pay such charge before receiving his goods, it is error to so charge as an abstract proposition, in an action by the shipper to recover from the original carrier for delay resulting from his refusal to pay the charge before the matter is adjusted.[97]

Applicability to Pleadings.—It is not error for the court to refuse an instruction asked by a carrier, excusing the carrier from the duty to notify the shippers of the arrival of the goods, where such question is not raised by the carrier's pleadings.[98] Where suit was brought against a railroad company for failing to deliver to the consignee two car loads of watermelons, to the contract of affreightment, and the evidence showed that they were in fact delivered at the point of destination within a reasonable time, but the consignee refused to receive them on the ground that they were damaged by not being properly loaded, and that they had become bruised and a part of them were rotten, it was error to charge that if the defendant did not put the melons in good safe cars, and they had to be transferred from the cars in which they were loaded, whereby damage accrued, the jury would find for the plaintiff the amount of such damage. This charge changed the issue made by the plaintiff in his declaration.[99]

Instruction Enlarging Damages Pleaded.—An instruction directing the jury to assess the damages at the difference between the market value of the goods when delivered and the market value of the same when they should have been delivered, is erroneous, where the damages so charged are greater than the damages pleaded.[1]

94. **Rule as to assessing damages.**—Yazoo, etc., R. Co. v. Christmas, 89 Miss. 686, 42 So. 169.

95. **That damages in excess of freight.**—Miami Powder Co. v. Port Royal, etc., R. Co., 38 S. C. 78, 16 S. E. 339, 21 L. R. A., N. S., 123.

96. **Distinguishing damages from delay from subsequent damage.**—Gulf, etc., R. Co. v. Chinski, 53 Tex. Civ. App. 21, 114 S. W. 851.

97. **Form, requisites and sufficiency.**—Yazoo, etc., R. Co. v. Christmas, 89 Miss. 686, 42 So. 169.

98. **Applicability to pleadings.**—Gibson v. Atlantic, etc., R. Co., 88 S. C. 360, 70 S. E. 1030.

99. Central R., etc., Co. v. Avant, 80 Ga. 195, 5 S. E. 78.

1. **Instruction enlarging damages pleaded.**—Where the petition alleged that good tomatoes were depreciated in value a specified sum per crate by the decline in the market, that a specified number of crates were spoiled, and that plaintiff incurred expense in sorting the same, and the evidence showed a greater damage to a specified number of crates than that

Applicability to Evidence.—In an action against an express company for refusing to deliver a dead body at night at a station where no night office was maintained, the body being carried to the first night station and returned the next day, an instruction that if defendant's agent at the destination knew before the arrival of the body at night that it would then arrive, and plaintiff was there to receive it, and ready, willing, and able to pay the charges, defendant was bound to deliver to him on the first arrival at the destination, was erroneous, as ignoring the validity of the company's rule preventing delivery at night at that station, and as being unsupported by evidence, there being no showing that the agent had the knowledge predicated by the instruction.[2]

Confusing and Misleading Instructions.—Where in a suit against a carrier for delay in transporting a machine the appellant asked the court to charge that the measure of damages was the cash rental value of the machine during the time of delay, he can not complain of its refusal to give a charge conflicting with that proposition, to wit: that no recovery could be had of the rental value because defendant was not shown to have had notice that the machine was to be used at once.[3] In an action against a carrier for damages caused by its delay in transporting goods which were delivered to it on Saturday, an instruction that the jury should determine whether the defendant was negligent in failing to transport the car within a reasonable time, when qualified by the statement that defendant was under no obligation to run its train on Sunday, and was not chargeable with negligence in failing to do so, if it ran no freight train over its line on that day, was erroneous, since it might have led the jury to believe that defendant was not required to transport the goods until Monday, whereas it was plaintiff's right to have the court instruct the jury upon the very facts proved, and to direct their minds to the very circumstances on which he relied.[4]

Errors Cured by Verdict.—In an action against two railroad companies for damages for delay in the transportation of freight, it appeared that the contract of shipment was made with an associated fast freight line, composed of the two defendant companies. The court submitted to the jury the issue whether, under the contract of association, the roads over which freight was carried were responsible for the entire obligation of the contract of carriage. The error, if any, was cured by verdict for the plaintiff.[5]

§ 973. Verdict.—Where in an action for negligent delay in transporting perishable freight, it is agreed that the freight should have arrived on a certain day, and the plaintiff's evidence shows that it did not arrive until five days later, while evidence of the carrier fixes the arrival on the day the freight should have arrived, the verdict for the plaintiff establishing an unreasonable delay authorizes a recovery, provided such delay was the result of the negligence alleged by the plaintiff.[6]

§ 974. Judgment.—A judgment against a carrier for damages for delay in the transportation of goods does not bear interest, under a code providing for

pleaded, an instruction directing the jury to assess the damages at the difference between the market value of the tomatoes when delivered and the market value of the same when they would have been delivered had no unreasonable delay occurred was erroneous because it enlarged the cause of action pleaded. Parsons-Applegate Co. *v.* Louisville, etc., R. Co., 118 S. W. 101, 136 Mo. App. 494.

2. **Applicability to evidence.**—Adams Exp. Co. *v.* Hibbard, 145 Ky. 818, 141 S. W. 397, 38 L. R. A., N. S., 818.

3. **Confusing and misleading instructions.**—Texas, etc., R. Co. *v.* Hassell, 23 Tex. Civ. App. 681, 683, 58 S. W. 54.

4. Judgment (Tex. Civ. App.), 47 S. W. 284, 1020, reversed. Belcher *v.* Missouri, etc., R. Co., 92 Tex. 593, 50 S. W. 559.

5. **Errors cured by verdict.**—Rocky Mt. Mills *v.* Wilmington, etc., R. Co., 119 N. C. 693, 25 S. E. 854, 56 Am. St. Rep. 682.

6. **Verdict.**—Parsons-Applegate Co. *v.* Louisville, etc., R. Co., 136 Mo. App. 494, 118 S. W. 101.

interest on judgments in recovery for debt.[7]

§§ 975-985. Demurrage, and Liability of Consignee or Owner for Delay—§ 975. In General.—Definition.—Demurrage is a sum fixed by the contract of affreightment as a remuneration to the shipowner for the detention of the ship beyond the lay days allowed for loading or unloading.[8]

Applicability to Railroads.—The term "demurrage," as used in its technical sense, applies to maritime law, and some authorities have held that it is confined to carriers by water, but it is now generally used to signify the charge for the storage of goods in railroad car.[9]

Reference to Maritime Law.—The adoption by the railroad company of the term "demurrage" as a designation for this charge does not require the court to resort to the maritime law as a standard for testing the validity of the regulation.[10]

Terminal Defined.—Two yards of a railroad company were about four miles apart, both were used as terminal points, and cars placed in either yard could be released when ordered by the shipper. There was no evidence that, if the cars had been brought to the yard nearest to the dumping piers instead of to the other yard, the detention of the cars would have been less than if placed in the nearest yard. It was held that both yards were a part of the terminal.[11]

Power to Regulate and Control.—The power to regulate car service and demurrage charges as to cars employed in interstate commerce is not conferred upon the state railroad commission of Ohio by the act of April 2, 1906, creating and prescribing the duties of the state railroad commission. Demurrage charges, as respects matters of interstate commerce, are within the control of the interstate commission, the state railway commission having no power to impose such charges on interstate commerce, but as to interstate commerce the commission has such power.[12]

§ 976. Right of Carrier to Charge.—It is the undoubted right of a common carrier to adopt and enforce, as between itself and its customer, any reasonable regulation for the conducting of its business, the purpose and effect of which is the protection of the carrier and the benefit of the public.[13] The carrier, in addition to its compensation for the carriage of goods, has the right

7. **Judgment.**—Illinois Cent. R. Co. *v.* Southern Seating, etc., Co., 104 Tenn. 568, 58 S. W. 303, 50 L. R. A., N. S., 729, 78 Am. St. Rep. 933. See ante, "Interest on Value of Goods," § 945.

8. **Demurrage, and liability of consignee or owner for delay.**—Davis *v.* Wallace, Fed. Cas. No. 3,657, 3 Cliff. 123; Wordin *v.* Bemis, 32 Conn. 268, 85 Am. Dec. 255; Cross *v.* Beard, 26 N. Y. 85; Fisher *v.* Abeel (N. Y.), 66 Barb. 381.

9. **Applicability to railroads.**—Dixon *v.* Central, etc., R. Co., 110 Ga. 173, 35 S. E. 369.

10. **Reference to maritime law.**—Miller *v.* Georgia R., etc., Co., 88 Ga. 563, 15 S. E. 316, 30 Am. St. Rep. 170, 18 L. R. A., N. S., 323, 50 Am. & Eng. R. Cas. 70.

11. **Terminal defined.**—A carrier adopted demurrage rules for coal cars at a terminal at which it maintained two yards for cars until called for. The yards were about four miles apart, and one yard was a mile and a half from dumping piers. The average time to take a car out of the yards and place it on the piers to unload was from 30 minutes to an hour. Both yards were used as the terminal point, and cars placed in either yard could be released when ordered by the shipper, and there was no evidence that, if the cars had been brought to the yard nearest to the dumping piers instead of to the other yard, the detention of the cars would have been less than it was. Held to justify a finding that both yards were a part of the "terminal," within the demurrage rules. Pennsylvania R. Co. *v.* Marshall, 132 N. Y. S. 41, 147 App. Div. 806, 17 L. R. A., N. S., 193.

12. **Power to regulate and control.**—Railroad Comm. *v.* Ann Arbor R. Co., 12 O. C. C., N. S., 317, 21-31 O. C. D. 337, affirming 8 N. P., N. S., 233, 19 O. D. N. P. 691, affirmed in 83 O. St. 476.

13. **Right of carrier to charge.**—Miller *v.* Georgia R., etc., Co., 88 Ga. 563, 15 S. E. 316, 30 Am. St. Rep. 170, 18 L. R. A., N. S., 323, 50 Am. & Eng. R. Cas. 70.

to charge for their storage and keeping, as a warehousemen, for whatever time they remain in its custody after reasonable opportunity has been afforded the owner to remove them.[14] This right extends to the adoption and enforcement of a reasonable regulation as to the time in which the cars of a common carrier by rail whose customer has the privilege of unloading the cars for himself or has agreed to unload such cars, as to the time within which the cars may be unloaded free of any expense for storage, and to the fixing of the reasonable rate per day at which storage or other demurrage for delay shall thereafter be charged for the use of such cars so long as they remain unloaded.[15] Railroads

14. Compensation as warehouseman.—Hutchinson on Carriers, § 378. Southwestern R. Co. *v.* Felder, 46 Ga. 433; Miller *v.* Georgia R., etc., Co., 88 Ga. 563, 15 S. E. 316, 30 Am. St. Rep. 170, 177, 18 L. R. A., N. S., 323, 50 Am. & Eng. R. Cas. 70.

After the arrival of the goods at their destination, the liability of the carrier as such ceases, but the carrier becomes liable for the custody of the goods as a warehouseman, and if the goods are not removed within a reasonable time, is entitled to compensation, for which the carrier has a lien as warehouseman. Norway Plains Co. *v.* Boston, etc., Railroad (Mass.), 1 Gray 263, 61 Am. Dec. 423.

15. Right to charge demurrage.—11 Ry. & Corp. L. J. 49; Beach, Ry. Law, § 924; Jones, Liens, § 284; 4 Lawson, Rights, Rem. & Pr., p. 3146, §§ 1831, 1832; Wood, Ry. Law, pp. 1592, 1593, 1600; 2 Wat. Corp. 245, 246; Redf. R. R. (6th Ed.), pp. 67-83; Amer. & English Enc. Law, vol. 2, pp. 878-881; Union Pac., etc., R. Co. *v.* Cooke, 50 Am. & Eng. R. Cas. 89, note; Kentucky Wagon Mfg. Co. *v.* Louisville, etc., R. Co., 50 Am. & Eng. R. Cas. 90, note; Pennsylvania Millers State Ass'n *v.* P. & O. Ry. Co., 8 Interst. Com. R. 531.

Alabama.—Southern R. Co. *v.* Lockwood Mfg. Co., 142 Ala. 322, 37 So. 667, 669, 68 L. R. A., N. S., 227, 110 Am. St. Rep. 32, 4 Am. & Eng. Ann. Cas. 12.

Georgia.—Miller *v.* Georgia R., etc., Co., 88 Ga. 563, 15 S. E. 316, 30 Am. St. Rep. 170, 18 L. R. A., N. S., 323, 50 Am. & Eng. R. Cas. 70, 79; Dixon *v.* Central, etc., R. Co., 110 Ga. 173, 35 S. E. 369.

Illinois.—Schumacher *v.* Chicago, etc., R. Co., 207 Ill. 199, 69 N. E. 825; Railway Co. *v.* Propst Lumber Co., 114 Ill. App. 659; Railway Co. *v.* Dorsey Fuel Co., 112 Ill. App. 382.

Kentucky.—Kentucky Wagon Mfg. Co. *v.* Ohio, etc., R. Co., 98 Ky. 152, 32 S. W. 595, 56 Am. St. Rep. 326, 36 L. R. A., N. S., 850, 17 Ky. L. Rep. 726, 2 Am. & Eng. R. Cas., N. S., 722.

Massachusetts.—Miller *v.* Mansfield, 112 Mass. 260.

Mississippi.—New Orleans, etc., R. Co. *v.* George & Co., 82 Miss. 710, 35 So. 193; Yazoo, etc., R. Co. *v.* Searles, 85 Miss. 520, 37 So. 939, 68 L. R. A., N. S., 715.

Missouri.—McGee *v.* Chicago, etc., R. Co., 71 Mo. App. 310; Darlington *v.* Missouri Pac. R. Co., 99 Mo. App. 1, 72 S. W. 122; Owen *v.* St. Louis, etc., R. Co., 83 Mo. 454; Darlington Lumber Co. *v.* Missouri Pac. R. Co., 216 Mo. 658, 116 S. W. 530.

New York.—Crommelin *v.* New York, etc., R. Co., 1 Abb. Dec. 472, 43 N. Y. 90.

North Carolina.—Hockfield *v.* Southern R. Co., 150 N. C. 419, 64 S. E. 181, 134 Am. St. Rep. 945.

Ohio.—Baltimore, etc., R. Co. *v.* Fisher, 3 O. N. P. 122, 5 O. Dec. 659.

Pennsylvania.—Pennsylvania R. Co. *v.* Midvale Steel Co., 201 Pa. 624, 51 Atl. 313, 88 Am. St. Rep. 836.

Tennessee.—Swan *v.* Louisville, etc., R. Co., 106 Tenn. 229, 61 S. W. 57.

Texas.—Galveston, etc., R. Co. *v.* Hunt (Tex. Civ. App.), 32 S. W. 549, 550; Quanah, etc., R. Co. *v.* Drummond (Tex. Civ. App.), 147 S. W. 728; Baumbach *v.* Gulf, etc., R. Co., 4 Tex. Civ. App. 650, 23 S. W. 693.

Virginia.—Norfolk, etc., R. Co. *v.* Adams, 90 Va. 393, 18 S. E. 673, 674, 44 Am. St. Rep. 916, 918, 22 L. R. A., N. S., 530.

Wyoming.—Kansas Pac. R. Co. *v.* McCann, 2 Wyo. 3. But see Cleveland, etc., R. Co. *v.* Holden, 73 Ill. App. 582; Cleveland, etc., R. Co. *v.* Lamm, 73 Ill. App. 592.

In ordinary cases, the railway which delivers a car to be unloaded by consignee may charge reasonable demurrage fixed by regulation and brought to freighter's notice. Baumbach *v.* Gulf, etc., R. Co., 4 Tex. Civ. App. 650, 653, 23 S. W. 693.

The consignee of two car loads of coke was notified upon their arrival that a charge for rental would be made if they were not unloaded within forty-eight hours. The notification was in compliance with the rules of an association of railroads, organized for the purpose of facilitating the unloading of cars, and the charge made for the rental was much less than the average earning capacity of freight cars. The railroad company had at the point of destination no warehouse for the unloading of bulk freight, such as coke. Held, that the railroad company was entitled to charge rental for the use of the cars after the expiration of a reasonable time for unloading. Schumacher *v.* Chicago, etc., R. Co., 207 Ill. 199, 69 N. E. 825.

are entitled to charge and receive extra compensation for extra service rendered after the arrival of freight at its destination, such as reconsignment charges, car service or switching charges, demurrage, and the like.[16] A railroad company as a common carrier is bound to furnish cars for the transportation of freight, and it must have control over its cars in order to perform its duties to the public. If persons to whom shipments of goods and merchandise were consigned might hold the cars without unloading, at their pleasure or convenience, and without extra costs or charges, and thus deprive the railroad company of the use of its cars for the transportation of freight, it is very evident that both the railroad company and the shipping public would suffer serious injury and loss. The right, therefore, of a railroad company to make and enforce reasonable rules and regulations to secure prompt unloading of its cars is clear.[17]

Necessity for Contract.—The right to charge for the storage of goods in cars arises where the goods are necessarily detained by virtue of the failure of the consignee to comply with his obligation to the carrier, whereby the carrier is deprived of the use of its cars.[18] Demurrage is often a matter of contract, but not necessarily so.[19] Independent of any express or implied contract of plaintiffs to be bound by the rules, the modern doctrine in this country is that the right to demurrage, in such circumstances, exists independent of contract or statute.[20] The very circumstance that, in ordinary commercial voyages, a particular sum is deemed by the parties a fair compensation for delays, is the very reason why it is, and ought to be, adopted as a measure of compensation, in cases ex delicto.[21] A corporation was organized to compress cotton and operate a compress. It did not authorize shippers to consign cotton to it, and did not accept any cotton as consignee. As agent of the owners, it delivered cotton to a railroad for transportation and collected from the railroad the charges for compensation. The corporation was not liable to the railroad company for demurrage, there being no contractual relation between the corporation and the railroad with reference to the shipment of cotton.[22]

By Adoption of Regulation.—Where a regulation of this character is known to the customer before the contract for transportation is made, it is to be presumed, in the absence of any evidence to the contrary, that the parties contracted

16. Yazoo, etc., R. Co. *v.* Searles, 85 Miss. 520, 37 So. 939, 68 L. R. A., N. S., 715.

17. Baltimore, etc., R. Co. *v.* Fisher, 3 O. N. P. 122, 5 O. Dec. 659; New York, etc., R. Co. *v.* Seiberling & Co., 8 O. C. C. 593, 4 O. C. D. 210.

18. **Necessity for contract.**—Dixon *v.* Central, etc., R. Co., 110 Ga. 173, 35 S. E. 369.

19. The Apollon (U. S.), 9 Wheat. 361, 6 L. Ed. 111.

20. *United States.*—Hawgood *v.* One Thousand Three Hundred and Ten Tons of Coal, 21 Fed. 681.

Georgia.—Miller *v.* Georgia R., etc., Co., 88 Ga. 563, 15 S. E. 316, 18 L. R. A., N. S., 323, 30 Am. St. Rep. 170, 50 Am. & Eng. R. Cas. 70; Dixon *v.* Central, etc., R. Co., 110 Ga. 173, 35 S. E. 369.

Kentucky.—Kentucky Wagon Mfg. Co. *v.* Ohio, etc., R. Co., 98 Ky. 152, 32 S. W. 595, 17 Ky. L. Rep. 726, 36 L. R. A., N. S., 850, 56 Am. St. Rep. 326.

Massachusetts.—Miller *v.* Mansfield, 112 Mass. 260.

Missouri.—Owen *v.* St. Louis, etc., R. Co., 83 Mo. 454; McGee *v.* Chicago, etc., R. Co., 71 Mo. App. 310; Darlington *v.* Missouri Pac. R. Co., 99 Mo. App. 1, 72 S. W. 122.

New York.—Huntly *v.* Dows (N. Y.), 55 Barb. 310; Erie R. Co. *v.* Waite, 114 N. Y. S. 1115, 62 Misc. Rep. 372.

Virginia.—Norfolk, etc., R. Co. *v.* Adams, 90 Va. 393, 18 S. E. 673, 22 L. R. A., N. S., 530, 44 Am. St. Rep. 916.

"Where the bill of lading contains no provision for the payment of demurrage, no case has been cited to show the consignee or his assignee is liable for demurrage; and the English authorities are uniformly against such a liability: Young *v.* Maeller, 5 El. & B. 755; Chappell *v.* Comfort, 10 Com. B., N. S., 802; Smith *v.* Sieveking, 5 El. & B. 589." Gage *v.* Morse (Mass.), 12 Allen 410, 90 Am. Dec. 155.

In Gage *v.* Morse (Mass.), 12 Allen 410, 90 Am. Dec. 155, the bill of lading was assigned before delivery of the goods.

21. The Apollon (U. S.), 9 Wheat. 361, 6 L. Ed. 111.

22. Missouri, etc., R. Co. *v.* Capital Compress Co., 50 Tex. Civ. App. 572, 110 S. W. 1014.

with reference to it;[23] and it is operative, whether indicated upon the bill of lading or not, and whether the shipments are made to the order of the consignor with the customary direction to notify the customer, or directly to the customer himself.[24] Demurrage is allowed the carrier where it discharges its duty and delivers the car within the proper time, and the consignee, by delay in unloading it, deprives the owner of the car of its use, for, in such case, the parties contracting with reference to the regulation of the carrier for demurrage, the rate so fixed is adopted by the contract; but where the carrier does not deliver the goods according to the contract, and for that reason the consignee refuses to receive it, although he has no right to do so, he can not be said to adopt the rate of demurrage fixed by the regulation of which he is not shown to have had notice, and which seems to apply to a different state of facts.[25]

Damages in Nature of Demurrage.—Damages in the nature of demurrage are recoverable for detention beyond a reasonable time in unloading only, where there is no express stipulation to pay demurrage.[26]

Necessity for Bill of Lading.—As between a carrier and customers who have notice of the regulation before shipments are made and in the absence of evidence of an agreement to the contrary, a regulation of the carrier fixing a rate of storage charges is operative, whether indicated upon the bill of lading or not.[27]

Necessity for Statute.—A reasonable charge may be imposed by carriers by rail on consignees, independent of statute, for the detention of cars beyond a reasonable time.[28]

Goods in Car or Warehouse.—It is not material that the goods remain in the cars of the carrier instead of being put into a storehouse.[29] The carrier is as much entitled to charge for the use of its car as for the use of its warehouse.[30] Where it is the duty of the consignee to unload freight, and failing to do so he accepts the benefit of storage in a car he can not deny the carrier's

23. By adoption of regulation.—Miller *v.* Mansfield, 112 Mass. 260.

24. Miller *v.* Georgia R., etc., Co., 88 Ga. 563, 15 S. E. 316, 30 Am. St. Rep. 170, 18 L. R. A., N. S., 323, 50 Am. & Eng. R. Cas. 70.

25. Baumbach *v.* Gulf, etc., R. Co., 4 Tex. Civ. App. 650, 23 S. W. 693.

26. Damages in nature of demurrage.—Wordin *v.* Bemis, 32 Conn. 268, 85 Am. Dec. 255.

27. Necessity for bill of lading.—Miller *v.* Georgia R., etc., Co., 88 Ga. 563, 15 S. E. 316, 30 Am. St. Rep. 170, 18 L. R. A., N. S., 323, 50 Am. & Eng. R. Cas. 70.

28. Necessity for statute.—Erie R. Co. *v.* Waite, 114 N. Y. S. 1115, 62 Misc. Rep. 372.

"In this state demurrage charges as to shipments of grain in car-load lots are allowed by statute. Section 1115, Rev. St. 1899." Darlington *v.* Missouri Pac. R. Co., 99 Mo. App. 1, 72 S. W. 122.

Virginia Code, §§ 1202, 1203, allow railroad companies to make a certain charge for the shipment of produce and other articles; and "for the weighing, storage, and delivery of articles at any depot or warehouse of the company, a charge may also be made, not exceeding the ordinary warehouse rates charged in the city or town in which, or nearest to which, the depot or warehouse is situated;" but forbid a railroad company "to charge or receive any fee or commission other than the regular transportation fees, storage, and other charges authorized by law for manifesting, receiving, or shipping any goods, or other articles for transportation on such railroad." Held, that said statutes do not forbid a charge of $1 per day for the detention of a car more than seventy-two hours after notice to the consignee of its arrival. Lacy and Hinton, JJ., dissenting. Norfolk, etc., R. Co. *v.* Adams, 90 Va. 393, 18 S. E. 673, 22 L. R. A., N. S., 530, 44 Am. St. Rep. 916.

29. Goods in car or warehouse.—The responsibility of the company for their custody was the same as if they had been stored, and the company has the right to retain them until the charges are paid. Miller *v.* Mansfield, 112 Mass. 260.

30. Compensation for car as warehouse.—"Where the carrier's duty ends with the transportation of the car and its delivery to the customer, and no further service is embraced in the contract, the carrier, after a reasonable time has been allowed for unloading, is as much entitled to charge for the further use of its car as it would be for the use of its warehouse." Miller *v.* Georgia R., etc., Co., 88 Ga. 563, 15 S. E. 316, 30 Am. St. Rep. 170, 18 L. R. A., N. S., 323, 50 Am. & Eng. R. Cas. 70.

right to compensation on the ground that some other method was not resorted to.[31]

Goods Shipped to Consignee or Consignor.—As between a carrier and customers who have notice of the regulation before shipments are made and in the absence of evidence of an agreement to the contrary, a regulation of the carrier fixing a rate for storage charges is operative, whether the shipments are made to the order of the consignor with the customer's direction to notify the carrier or shipped directly to the customer himself.[32]

Goods to Be Shipped Over Connecting Line.—A railroad company which receives freight for transmission beyond its line without demanding prepayment of charges can not claim such charges until it has carried such freight to the end of its line, and is ready to deliver it to the connecting carrier; and the refusal of the consignee to receive the goods or pay the charges at any other point does not entitle the company to charge demurrage.[33]

Goods Refused by Consignee.—The decisions which hold that a carrier which delivers to the consignee a loaded car, to be unloaded by him, may charge reasonable demurrage, fixed by regulation and brought to the notice of the freighter, relate to ordinary cases, where the carrier discharges its duty and delivers the car within the proper time, and by the consignee's delay in unloading is deprived of the use of the car; but where the plaintiff refuses to receive the car, he does not adopt by agreement a rate of demurrage fixed by a rule of which he is not shown to have had notice, and which seems to apply to a different state of facts; and there being no evidence that the charges were reasonable, the court could well conclude that the amount claimed was unreasonable.[34]

Goods Destroyed.—Where the consignee failed to unload goods from a vessel within the time allowed, and afterwards, while the vessel was detained on demurrage, the vessel and cargo were lost without the fault of the master, the consignee is liable for demurrage.[35]

Charges on Cars of Another Carrier.—The carrier may collect demurrage charges on a car owned by another carrier.[36] It is not illegal for one railroad to collect a charge for detention of a car belonging to another road, where the universal practice is that the road into whose custody the cars is delivered is entitled to the earnings of the car as long as it is in its possession.[37]

31. While a customer whose duty it is to unload freight consigned to him and who, failing to do so within a reasonable time, accepts the benefit of storage in a car by requesting or permitting the carrier to continue holding it unloaded in his service and subject to his will and convenience as to the time of unloading, may insist that the rates fixed shall not be unreasonable or excessive, he can not be heard to complain of the method of storage and to deny the carrier's right to any compensation at all for its service on the ground that some other method was not resorted to. Miller *v.* Georgia R., etc., Co., 88 Ga. 563, 15 S. E. 316, 30 Am. St. Rep. 170, 18 L. R. A., N. S., 323, 50 Am. & Eng. R. Cas. 70.

32. **Goods shipped to consignee or consignor.**—Miller *v.* Georgia R., etc., Co., 88 Ga. 563, 15 S. E. 316, 30 Am. St. Rep. 170, 18 L. R. A., N. S., 323, 50 Am. & Eng. R. Cas. 70.

33. **Goods to be shipped over connecting line.**—Grand Rapids, etc., R. Co. *v.* Diether, 10 Ind. App. 206, 37 N. E. 39, 1069, 53 Am. St. Rep. 385.

34. **Goods refused by consignee.**—It was so held where the defendant claimed $200 for storage due, which was more than the value of the lumber. The rules of defendant provided that storage would be charged for cars if not unloaded within twenty-four hours after notice of arrival—for first day, $1, second, $2.50, third and succeeding days, $5 per day; and plaintiff was notified that unless he received the lumber it would be stored for his account. Baumbach *v.* Gulf, etc., R. Co., 4 Tex. Civ. App. 650, 23 S. W. 693.

35. **Goods destroyed.**—Brown *v.* Ralston, 36 Va. (9 Leigh) 532.

36. **Charges on cars of another carrier.**—Kentucky Wagon Mfg. Co. *v.* Ohio, etc., R. Co., 98 Ky. 152, 56 Am. St. Rep. 326, 32 S. W. 595, 17 Ky. L. Rep. 726, 36 L. R. A., N. S., 850.

37. Kentucky Wagon Mfg. Co. *v.* Ohio, etc., R. Co., 32 S. W. 595, 98 Ky. 152, 17 Ky. L. Rep. 726, 36 L. R. A., N. S., 850, 56 Am. St Rep. 326.

A railroad entitled to possession of cars, and liable to the owners thereof for a per diem charge for their use may re-

§§ 977-979. Rules and Regulations of Carrier—§ 977. In General. —Necessity for.—The law compels the carrier to receive the goods of the public and to transport and deliver them within a reasonable time. To do this it is necessary that the means of transportation shall be under the carrier's control, and that after the duty of carriage has been performed, its vehicles shall not be converted into storehouses, at the will of consignees, to remain such indefinitely and without compensation. If no check could be placed upon such detention, it is plain that the business of transportation would be at the mercy of private interest or caprice, and that carriers, thus hampered in their facilities, and unable to foresee the time or extent to which their vehicles would be diverted from the work of carriage, could not provide properly for the demands of traffic or perform with dispatch their legitimate function. It would place upon the carrier the burden and expense of supplying numerous vehicles not needed for the hauling of freights, thus requiring it to provide extra facilities, as well as to render extra service, without compensation beyond that received for transportation. It would result in the accumulation of cars on the carrier's tracks, and the obstruction, in a greater or less degree, of the movement and unloading of trains. Not only would loss ensue to the carrier, but consignees and shippers in general, and the people at large, must suffer seriously from this hindrance to the due and regular course of transportation. In this matter the public have rights paramount to those of any individual or class of individuals, and the business of the common carrier must be so conducted as to subserve the general interest and convenience. Especially is this true as to railroad companies, in view of the important franchises granted them by the public, and the use and control thus acquired of highways upon which the commerce of the country is so largely dependent.[38]

Purpose and Object.—The charge is not for transportation, storage, or delivery of freight, and it is not a device or a pretext for exacting of the shipper or the consignee more than the rate prescribed by law and fixed by schedule; but it is for the use and occupation of the cars and the obstruction of the tracks by the consignee for weeks and months after the contract for transporting and delivering the freight had been fulfilled and ended. It is neither a transportation charge, nor a storage charge, nor a terminal charge, nor a subterfuge for adding to the cost of transportation in excess of the rates prescribed.[39]

cover of a consignee demurrage charges for unreasonable delay. Erie R. Co. *v.* Waite, 114 N. Y. S. 1115, 62 Misc. Rep. 372.

38. Rules and regulations of carrier.—Miller *v.* Georgia R., etc., Co., 88 Ga. 563, 30 Am. St. Rep. 170, 175, 15 S. E. 316, 18 L. R. A., N. S., 323, 50 Am. & Eng. R. Cas. 70.

A railroad company as a common carrier is bound to furnish cars for the transportation of freight, and it must have control over its cars in order to perform its duties to the public. If persons to whom shipments of goods and merchandise were consigned might hold the cars without unloading, at their pleasure or convenience, and without extra costs or charges, and thus deprive the railroad company of the use of its cars for the transportation of freight, it is very evident that both the railroad company and the shipping public would suffer serious injury and loss. The right, therefore, of a railroad company to make and enforce reasonable rules and regulations to secure prompt unloading of its cars is clear. Baltimore, etc., R. Co. *v.* Fisher, 3 O. N. P. 122, 5 O. Dec. 659; New York, etc., R. Co. *v.* Seiberling & Co., 8 O. C. C. 593, 4 O. C. D. 210.

39. Purpose and object.—Norfolk, etc., R. Co. *v.* Adams, 90 Va. 393, 44 Am. St. Rep. 916, 919, 18 S. E. 673, 22 L. R. A., N. S., 530.

The object of the regulation of the carrier fixing a charge for the detention of cars is not for the purpose of raising revenue at all. That feature is insignificant, the purpose being to facilitate transportation, and the less revenue there is derived from the enforcement of the charge the greater the carriers are benefited and their facilities increased for serving the public. The purpose of the regulation is an advantage and not an injury to the customer. Kentucky Wagon Mfg. Co. *v.* Ohio, etc., R. Co., 98 Ky. 152, 56 Am. St. Rep. 326, 32 S. W. 595, 17 Ky. L. Rep. 726, 36 L. R. A., N. S., 850.

Necessity for Counter Penalties.—That there is no reciprocity of indemnity and counter penalty in demurrage rules in favor of the customer against the carrier for not promptly performing its duties as a common carrier, does not invalidate such rules.[40]

General and Uniform Application.—The rule, to be beneficial to all alike, must be of universal application, and a rare or exceptional circumstance, incident to a particular shipper at some particular time, can not be allowed to annul the rule.[41] A rule of a railroad commission forbids railroads to discriminate in demurrage rates, and requires them to collect demurrage at all places on their lines if they collect at any place. The operation of the rule is to be suspended by the commission when justice demands. Other rules of the commission regulate car service associations. Prior to the promulgation of the later set of rules, a car service association had a rule providing for the withdrawal of service on private sidings in case of the failure to consignees to promptly settle bills for car service charges. Where a consignee refused to recognize the car service association, and refused to pay car service or demurrage, the withdrawal of car service on his siding by the car service association did not constitute such oppressive and arbitrary action as to constitute the car service association an illegal trust and combine or criminal conspiracy inimical to the public welfare.[42] A demurrage rule prohibiting discrimination between persons, and providing, if car service be collected from one person, it must be from all who are liable, does not prevent demurrage being collected for cars loaded with certain kinds of freight, though it is not charged where they are loaded with other kinds.[43]

Construction of Rules.—Demurrage rules promulgated by a carrier must be construed most favorably to the shipper.[44] In an action by a carrier for demurrage charges under a rule of the carrier the court will not give the rule a broader construction than its language indicates, unless the reason of the thing and the surrounding circumstances require it to do so.[45]

§ 978. By Whom Promulgated.—That the rule was promulgated by a person or board of persons representing a combination of carriers does not impair its effect as a regulation of a particular carrier. A common carrier, though a corporation, makes a regulation its own by adopting it and acting upon it, irrespective of the source from when it is derived.[46]

Rules Framed by Car Service Association.—A number of railroads entering a city may enter into a car service association without surrendering their corporate autonomy and functions, and delegate the control and management of their business as common carriers to the arbitrary control of the manager and committee of the car service association, and thereby abolish competition, and the rules of the association as to demurrage charges are not for that reason illegal.[47]

40. **Necessity for counter penalties.**—Kentucky Wagon Mfg. Co. *v.* Ohio, etc., R. Co., 98 Ky. 152, 56 Am. St. Rep. 326, 32 S. W. 595, 17 Ky. L. Rep. 726, 36 L. R. A., N. S., 850.

41. **General and uniform application.**—It is not necessary that an exception be made in behalf of shippers by reason of unfavorable weather conditions. Kentucky Wagon Mfg. Co. *v.* Ohio, etc., R. Co., 98 Ky. 152, 56 Am. St. Rep. 326, 32 S. W. 595, 17 Ky. L. Rep. 726, 36 L. R. A., N. S., 850.

42. Yazoo, etc., R. Co. *v.* Searles, 85 Miss. 520, 37 So. 939, 68 L. R. A., N. S., 715.

43. New Orleans, etc., R. Co. *v.* George & Co., 82 Miss. 710, 35 So. 193.

44. **Construction of rules.**—Staten Island Rapid Transit R. Co. *v.* Marshall (App. Term), 117 N. Y. S. 1034, judgment affirmed 121 N. Y. S. 82.

45. Staten Island Rapid Transit Co. *v.* Marshall, 121 N. Y. S. 82, 136 App. Div. 571.

46. **By whom promulgated.**—Miller *v.* Georgia R., etc., Co., 88 Ga. 563, 30 Am. St. Rep. 170, 15 S. E. 316, 18 L. R. A., N. S., 323, 50 Am. & Eng. R. Cas. 70.

47. **Rules framed by car service association.**—Kentucky Wagon Mfg. Co. *v.* Ohio, etc., R. Co., 98 Ky. 152, 56 Am. St.

Shipper Not Consulted.—Where all the carriers in a city formed a car service association and appointed a manager and committee, which promulgated rules to regulate charges for demurrage, the facts that a shipper was not consulted in the framing of the rules and had no voice in the selection and appointment of the manager or committee, do not invalidate such rules.[48]

Subordinate Agents.—Where by a general rule of a railroad company known to the consignee demurrage and storage were chargeable to all patrons but a special contract was made, not with the authorities who promulgated the rule but with subordinate agents, and for the express purpose of avoiding the application of the rule in the given instance, a breach of the contract by one of the same agents who co-operated in making it affords no cause of action against the company.[49]

§ 979. **Notice.—Necessity of Notice.**—A consignee can not be held liable for demurrage fixed by a rule of which he had no notice,[50] unless the rate of demurrage is shown to be reasonable.[51] The consignee being advised of the arrival of cars for him, formal notice is not necessary to make him liable for demurrage.[52]

Rules contained in bills of lading, imposing demurrage for dilatory unloading of cars, are binding upon consignees, though they be in fact ignorant of their existence.[53]

Rep. 326, 32 S. W. 595, 17 Ky. L. Rep. 726, 36 L. R. A., N. S., 850; Phillips Co. *v.* Erie Railway, 6 O. C. C., N. S., 505, 14 O. D. N. P. 706.

The fact that a bill for demurrage charges due a railroad was made out by direction of a car service association, to which the railroad intrusted its business in the collection of demurrage, and on its letter heads, does not justify the consignee in refusing to pay such demurrage. Yazoo, etc., R. Co. *v.* Searles, 85 Miss. 520, 37 So. 939, 68 L. R. A., N. S., 715.

The fact of the enactment of Acts 1898, p. 97, c. 82, making car service associations subject to the control and supervision of the railroad commission, is indicative of a legislative intent that such associations shall not be deemed within the inhibition of Code 1892, § 4437, defining trusts, and declaring them illegal, or of Acts 1900, p. 125, c. 88, which accomplishes the same purpose. Yazoo, etc., R. Co. *v.* Searles, 85 Miss. 520, 37 So. 939, 68 L. R. A., N. S., 715.

Where a number of railroad companies, by mutual agreement, enter into a car-service association and adopt such reasonable rules and regulations, it is the same in effect as if each company for itself had adopted the same. Baltimore, etc., R. Co. *v.* Fisher, 3 O. N. P. 122, 5 O. Dec. 659. And see Phillips Co. *v.* Erie Railway, 6 O. C. C., N. S., 505, 14 O. D. N. P. 706.

48. **Shipper not consulted.**—Kentucky Wagon Mfg. Co. *v.* Ohio, etc., R. Co., 98 Ky. 152, 56 Am. St. Rep. 326, 32 S. W. 595, 17 Ky. L. Rep. 726, 36 L. R. A., N. S., 850.

49. **Subordinate agents.**—Thus, where the rules of the company required payment of demurrage on goods not removed within forty-eight or sixty hours after their arrival and also provided for the storage in warehouses of goods not removed within a certain time, the storage and drayage to be at the expense of the consignee, and these rules were known to the plaintiff who contracted with the defendant's station agent and soliciting agent that in consideration of a large shipment of freight over the defendant's railway no demurrage, drayage or storage would be charged against him, a breach of the contract as to storage gave the plaintiff no right of action against the company to recover the money paid, and it was not error to grant a nonsuit. Harris *v.* Central R., etc., Co., 91 Ga. 317, 18 S. E. 159.

50. **Notice.**—Before such rules or regulations can be enforced against a particular consignee, it must be shown that he had knowledge thereof. Baltimore, etc., R. Co. *v.* Fisher, 30 O. N. P. 122, 5 O. Dec. 659.

51. A consignee who refuses to accept the goods on the ground of delay in delivery by the carrier can not be held liable for demurrage fixed by the rules of the carrier, of which he had no notice, unless the rate of demurrage is shown to be reasonable. Baumbach *v.* Gulf, etc., R. Co., 4 Tex. Civ. App. 650, 23 S. W. 693.

A carrier by rail may establish a rule fixing a reasonable rate for the detention of cars after a sufficient period for unloading, without specific notice to the shippers or consignee. Pennsylvania R. Co. *v.* Bulah Shaft Coal Co., 42 Pa. Super. Ct. 187.

52. New Orleans, etc., R. Co. *v.* George & Co., 82 Miss. 710, 35 So. 193.

53. Yazoo, etc., R. Co. *v.* Searles, 85 Miss. 520, 37 So. 939, 68 L. R. A., N. S., 715.

A shipper who signs a contract under which freight is received by a common carrier, by the terms of which the shipper agrees to remove the freight within forty-eight hours after notice of its arrival, is

Form and Requisites of Notice.—The carrier is not bound to serve a verbatim copy of the rule on the shipper.[54] The shipper is sufficiently charged with knowledge of a demurrage rule by the regular rendering to him of bills for the violation thereof.[55]

§ 980. Time and Amount of Charge.—Reasonableness of Time.—It is reasonable that a railroad company should have some rule as to when freight should be removed from its cars.[56] The rule must allow time to meet all cases likely to arise.[57] The period of forty-eight hours,[58] which, computed under car service rules, extends to near sixty hours, not including Sundays and legal holidays, within which the customer is required to unload the carrier's cars after delivery, is not an unreasonable time from which to start a demurrage charge.[59] Neither is a period of twenty-four hours,[60] nor one of four days.[61] On the issue as to what was a reasonable time, evidence as to the distance of the consignee's home from the station is not admissible.[62]

Computing Time.—Under demurrage rules providing that the delivery of cars consigned to a siding used exclusively by individuals located thereon shall be considered as effected when, if the siding is full, the road offering the cars would have made delivery had the siding permitted, delivery will commence, though the cars filling the siding are for another consignee, having equal right to use the siding.[63] Where the bill of lading provides for a lien for demurrage,

bound by its terms although the contract was not read by him and he failed to know its contents. New York, etc., R. Co. *v.* Seiberling & Co., 8 O. C. C. 593, 4 O. C. D. 210.

The fact that important conditions of the contract are written or printed, after the signature and on an opposite page, does not vary the rule where there is an express reference to such conditions on the face of the contract above the signature. New York, etc., R. Co. *v.* Seiberling & Co., 8 O. C. C. 593, 4 O. C. D. 210.

54. Form and requisites of notice.—Pennsylvania R. Co. *v.* Midvale Steel Co., 201 Pa. 624, 51 Atl. 313, 88 Am. St. Rep. 836.

55. Pennsylvania R. Co. *v.* Midvale Steel Co., 201 Pa. 624, 51 Atl. 313, 88 Am. St. Rep. 836.

56. Time and amount of charge.—New York, etc., R. Co. *v.* Seiberling & Co., 8 O. C. C. 593, 4 O. C. D. 210.

57. Kentucky Wagon Mfg. Co. *v.* Ohio, etc., R. Co., 98 Ky. 152, 32 S. W. 595, 17 Ky. L. Rep. 726, 36 L. R. A., N. S., 850, 56 Am. St. Rep. 326.

58. New York, etc., R. Co. *v.* Seiberling & Co., 8 O. C. C. 593, 4 O. C. D. 210.

"A rule of a railroad company that a party to whom freight is consigned must receive the same within forty-eight hours after notice is a reasonable one, and a charge for storage after that time is legal. Gulf City Constr. Co. *v.* Louisville, etc., R. Co., 121 Ala. 621, 25 So. 579." Southern R. Co. *v.* Lockwood Mfg. Co., 142 Ala. 322, 37 So. 667, 68 L. R. A., N. S., 227, 110 Am. St. Rep. 32, 4 Am. & Eng. Ann. Cas. 12.

A rule of carriers that: "A charge of one dollar shall be imposed for car service for and upon each car carried over any portion of its line of railroad not unloaded by the consignee within forty-eight hours from the time said car arrived at the destination thereof, ready for delivery to such consignee, for each day or part of day after said forty-eight hours, not including Sundays and legal holidays, during which said car should remain unloaded, the said charge being payable by the consignee or person receiving the car," is reasonable and valid. Pennsylvania R. Co. *v.* Midvale Steel Co., 201 Pa. 624, 51 Atl. 313, 88 Am. St. Rep. 836.

59. Kentucky Wagon Mfg. Co. *v.* Ohio, etc., R. Co., 98 Ky. 152, 32 S. W. 595, 17 Ky. L. Rep. 726, 36 L. R. A., N. S., 850, 56 Am. St. Rep. 326.

60. A stipulation in a bill of lading that the carrier may make a reasonable charge for a failure of the consignee to unload his property from the carrier's cars within twenty-four hours after its arrival is a reasonable provision, and hence it was not error for the trial court to charge that the parties were bound thereby. Swan *v.* Louisville, etc., R. Co., 106 Tenn. 229, 61 S. W. 57.

61. A rule or regulation requiring consignees, on receiving notice of the arrival of cars, to unload the same within four days thereafter, or pay the delivering company one dollar per car per day, for all the time over said period of four days that such cars shall remain on the tracks of said company without being unloaded, is a reasonable rule or regulation, and, therefore, legal and valid. Baltimore, etc., R. Co. *v.* Fisher, 3 O. N. P. 122, 5 O. Dec. 659.

62. Schumacher *v.* Chicago, etc., R. Co., 207 Ill. 199, 69 N. E. 825.

63. Computing time.—New Orleans, etc., R. Co. *v.* George & Co., 82 Miss. 710, 35 So. 193.

a railroad company may charge for the time the goods are detained and until demurrage is actually paid.[64] In the rules of a railroad company requiring the payment of demurrage on cars where more than a stated number of days elapse "between the date of arrival of each car and date released," "date of arrival" means the time of the arrival of the car in the yards, and not upon a pier besides a ship, nor the time when notice of arrival is given the shipper, and the "date released" does not mean the date when the car is unloaded, but the date when the consignee's vessel is registered at the pier as ready to load.[65] In the absence of any custom to the contrary, Sundays are computed in the calculation of lay days at the port of discharge; but where the contract specifies working days, Sundays and holidays are excluded in the computation.[66]

Reasonableness of Charge.—As it is the legitimate object of this rule to prevent the diversion of cars from the work of carriage, it would seem but proper that the charge for their use, when detained as a means of storage, should not be such as to encourage customers to adopt that means instead of the more regular and usual methods.[67] Rules of a carrier imposing reasonable charges on consignee for delay in unloading cars are enforceable.[68] The customary rates for storage in warehouses and elevators need not be made the measure of compensation where the storage is in cars on the tracks of a railroad. A uniform charge of so much for a car per day is not unreasonable because the cars vary in capacity, nor because a part of a day is charged for as a whole day.[69] A charge can not be regarded as unreasonable, so long as a reasonable time is allowed for unloading, and so long as the charge for the use of the cars beyond that time is not excessive.[70] A dollar per day for each car is a reasonable charge.[71]

In Excess of Value of Goods.—Where the carrier claims demurrage in an amount in excess of the value of the goods shipped and there is no evidence that such charge is reasonable, the court will conclude that the amount claimed is unreasonable.[72]

64. Pennsylvania R. Co. *v.* Samuel, 45 Pa. Super. Ct. 248.

65. A coal company contracted with a railroad company for the carriage of coal from the mines to tide water at Elizabethport, N. J., where the coal was loaded upon vessels. When cars arrived in Elizabethport they were placed in the railroad company's general yards until a vessel of the shipper was ready to load, when it registered at the railroad company's pier, and such company berthed it, and ran the cars out on the pier, and dumped the coal into the vessel as an incidental part of the transportation. Sometimes there was delay waiting for a vessel or a berth. The schedule of rules respecting charges filed by the railroad company with the Interstate Commerce Commission required the payment of demurrage when there was an average detention of cars for more than five days, computed on the basis of the time "between the date of arrival of each car and date released." Held, that the "date of arrival" meant the time of the arrival of the car in the yards, and not upon the pier, nor the time when notice of arrival was given the shipper's agent, and that the "date released" did not mean the date when the car was unloaded, but the date when the shipper's vessel was registered at the pier as ready to load; the car being then released so far as the shipper was concerned, and any further delay being that of the railroad company. Order, Central R. Co. *v.* Hite, 166 Fed. 976, reversed. Hite *v.* Central Railroad, 171 Fed. 370, 96 C. C. A. 326.

66. Brooks *v.* Minturn, 1 Cal. 481.

67. **Reasonableness of charge.**—Miller *v.* Georgia R., etc., Co., 88 Ga. 563, 15 S. E. 316, 30 Am. St. Rep. 170, 18 L. R. A., N. S., 323, 50 Am. & Eng. R. Cas. 70.

68. New Orleans, etc., R. Co. *v.* George & Co., 82 Miss. 710, 35 So. 193.

69. Miller *v.* Georgia R., etc., Co., 88 Ga. 563, 15 S. E. 316, 30 Am. St. Rep. 170, 18 L. R. A., N. S., 323, 50 Am. & Eng. R. Cas. 70.

70. Miller *v.* Georgia R., etc., Co., 88 Ga. 563, 15 S. E. 316, 30 Am. St. Rep. 170, 18 L. R. A., N. S., 323, 50 Am. & Eng. R. Cas. 70.

71. Miller *v.* Georgia R., etc., Co., 88 Ga. 563, 15 S. E. 316, 30 Am. St. Rep. 170, 18 L. R. A., N. S., 323, 50 Am. & Eng. R. Cas. 70; Pennsylvania R. Co. *v.* Midvale Steel Co., 201 Pa. 624, 51 Atl. 313, 88 Am. St. Rep. 836.

A charge of one dollar a day for each day after four days is reasonable. Baltimore, etc., R. Co. *v.* Fisher, 3 O. N. P. 122, 5 O. Dec. 659.

72. **In excess of value of goods.**—Baumbach *v.* Gulf, etc., R. Co., 4 Tex. Civ. App. 650, 23 S. W. 693.

Interest on Cost of Car.—The charge may be more than the usual per centum on the first cost of the car. The carrier does not construct cars for the purpose of storing property in them, and their use for transportation involves the use of costly railway tracks and other expenditures.[73]

As at Maritime Law.—The fact that the term was adopted from the maritime law by railroad companies as a designation of the charges for goods stored in cars does not require that the principles which govern on this point under maritime law shall control in determining the rates of carriers by land.[74]

Question for Jury.—Whether a particular rule or regulation is or is not reasonable in its requirements is, when the facts are shown, a question of law for the court, and not a question of fact for the jury.[75]

§ 981. Arrival and Continuance at Destination and Nature Thereof.—The obligation of the carrier is not alone to carry the cargo, but it is in addition to deliver it at the place of discharge in the port of destination mentioned in the bill of lading; and the consignee incurs no liability for demurrage until such delivery is made or tendered.[76] A railroad company is not entitled to demand or receive demurrage until it is in a condition to tender a delivery of the goods at a convenient, safe and uninterrupted point at its depot.[77] In the absence of a provision in a bill of lading declaring a lien for delays before reaching private sidings, a carrier of freight can not base a lien for demurrage on provisions for constructive placing of cars contained in schedules filed with the Interstate Commerce Commission.[78]

Arrival at Port.—A contract to deliver goods at a port implies more than bringing the vessel into water within a line drawn across the mouth of the harbor; in the absence of any special provision and of any custom to discharge into lighters, it imports that the carrier is to bring his vessel to some wharf, or convenient or customary place of discharge, where he can deliver and the consignees receive the cargo, according to the usage of the port; and where a vessel can not be brought to any wharf on account of ice, the carrier is not entitled to demurrage for delay.[79] Under a bill of lading requiring a vessel to deliver a cargo of coal at a specified dock, the voyage is not completed, and the lay days for discharging do not commence to run, until she reaches such dock and is in condition to discharge, unless she is prevented from reaching it through the active fault of the charterer or consignee.[80] Where, by the bill

73 **Interest on cost of car.**—Kentucky Wagon Mfg. Co. *v.* Ohio, etc., R. Co., 98 Ky. 152, 32 S. W. 595, 17 K. L. Rep. 726, 36 L. R. A., N. S., 850, 56 Am. St. Rep. 326.

74. **As at maritime law.**—Miller *v.* Georgia R., etc., Co., 88 Ga. 563, 15 S. E. 316, 30 Am. St. Rep. 170, 18 L. R. A., N. S., 323, 50 Am. & Eng. R. Cas. 70.

75. **Question for jury.**—Baltimore, etc., R. Co. *v.* Fisher, 3 O. N. P. 122, 5 O. Dec. 659.

76. **Arrival and continuance at destination and nature thereof.**—Manson *v.* New York, etc., R. Co., 31 Fed. 297, 24 Blatchf. 448, citing McIntosh *v.* Sinclair, 11 Ir. C. L. 456; Aylward *v.* Smith, Fed. Cas. No. 688, 2 Lowell 192; Parker *v.* Winlow, 7 El. & Bl. 942; Hodgdon *v.* New York, etc., R. Co., 46 Conn. 276, 33 Am. Rep. 21.

77. The legal effect of its undertaking is to deliver the goods at a point and in a manner to enable the consignee to receive them without inconvenience, delay or interruption. After notice it may require prompt action on the part of the consignee, but he may demand of it free, convenient, safe and undisturbed access to his goods. East Tennessee, etc., R. Co. *v.* Hunt, 83 Tenn. (15 Lea) 261.

The primary duty of a railroad company in carrying goods includes delivery of the goods to the consignee at destination, and the carrier is not entitled to an additional charge for car service until such duty is performed. Carrizzo *v.* New York, etc., R. Co., 123 N. Y. S. 173, 66 Misc. Rep. 243, 9 L. R. A., N. S., 579.

78. Carrizzo *v.* New York, etc., R. Co., 123 N. Y. S. 173, 66 Misc. Rep. 243, 9 L. R. A., N. S., 579.

79. **Arrival at port.**—Hodgdon *v.* New York, etc., R. Co., 46 Conn. 276, 33 Am. Rep. 21.

80. In re 2,098 Tons of Coal, 67 C. C. A. 671, 135 Fed. 317; Harrison *v.* Smith, 14 C. C. A. 656, 67 Fed. 354; Randall *v.* Sprague, 21 C. C. A. 334, 74 Fed. 247, Hagerman *v.* Norton, 46 C. C. A. 1, 105 Fed. 996.

of lading, the cargo is to be delivered free of handling at the private dock of a consignee known to have special facilities for unloading, the vessel will be entitled to demurrage for unnecessary delay of the consignee in beginning the discharge, although the total time consumed, including the delay, is not longer than would have been occupied in discharging at a public dock of the same port with the inferior facilities there afforded.[81]

Arrival on Particular Track.—A bill of lading, providing that the carrier may charge for detention of cars after they have been held forty-eight hours for unloading, and may hold the property subject to a lien therefor, merely authorizes the carrier to charge demurrage when the cars have been held for unloading, and not to give such right where they have been placed upon a storage track awaiting switching to a place where they could be unloaded.[82] But where the consignees refuse to accept any delivery except on a designated track where delivery can not be made, the carrier is not bound to make delivery elsewhere before commencement of the running of free time.[83] Where on the arrival of certain cars, the carrier offers to deliver by spotting them on any available track for unloading, and the consignee's reply that they want the cars as soon as possible to work so that they can unload and avoid teaming expenses, there is not a refusal by the consignee to accept delivery except on a particular track.[84] A statement in a bill of lading that, where cars are detached from trains on private sidings, the goods shall be at the owner's risk, does not provide a lien for demurrage.[85]

Arrival at Coal Piers.—Rules stipulating that demurrage will be charged at designated coal piers for the detention of coal cars held for transshipment, promulgated by a terminal carrier, required to deliver at such piers a consignee's coal, do not authorize the collection of demurrage for the detention of coal cars at a freight yard under the control of the carrier twelve miles distant.[86]

Awaiting Orders.—A carrier's rule that cars for unloading should be considered placed when they are held awaiting orders from consignors or consignees applies only after the carrier is ready to make delivery and the consignee neglects or refuses to designate the place for delivery.[87]

Held for Transshipment.—Under a demurrage rule of a carrier, stipulating that demurrage would be charged at a designated place for detention of coal cars held for transshipment, the date of arrival of cars at a place twelve miles distant from the place specified, in another state and upon the lines of another railway, was not the proper date to be taken in computing the total detention of the cars where the cars were held solely for the convenience of the carrier.[88]

Contract for Payment before Delivery.—Where the bill of lading under which goods are shipped provides that the delivering carrier may make a reasonable charge for detention of any car which is held twenty-four hours for unloading and may hold the property subject to a lien for demurrage, and that the consignee shall pay all charges before a delivery of the property, and the consignee has a yard to which a side track has been constructed by a carrier other than the plaintiff, though cars can be transferred from the plaintiff's track

81. Pioneer Fuel Co. *v.* McBrier, 28 C. C. A. 466, 84 Fed. 495.

82. **Arrival on particular track.**—Carrizzo *v.* New York, etc., R. Co., 123 N. Y. S. 173, 66 Misc. Rep. 243, 9 L. R. A., N. S., 579.

83. Wooley *v.* Chicago, etc., R. Co., 150 Wis. 183, 136 N. W. 616.

84. Wooley *v.* Chicago, etc., R. Co., 150 Wis. 183, 136 N. W. 616.

85. Carrizzo *v.* New York, etc., R. Co., 123 N. Y. S. 173, 66 Misc. Rep. 243, 9 L. R. A., N. S., 579.

86. **Arrival at coal piers.**—Staten Island Rapid Transit R. Co. *v.* Marshall (App. Term), 117 N. Y. S. 1034, affirmed 121 N. Y. S. 82.

87. **Awaiting orders.**—Wooley *v.* Chicago, etc., R. Co., 150 Wis. 183, 136 N. W. 616.

88. **Held for transshipment.**—Judgment, 117 N. Y. S. 1034, affirmed. Staten Island Rapid Transit Co. *v.* Marshall, 121 N. Y. S. 82, 136 App. Div. 571.

to this side track, the consignee is liable to the payment of demurrage before a delivery of the property, and hence it is not necessary for the plaintiff to place the cars on the consignee's side track before making a demand for demurrage.[89]

Designation of Berth.—A designation by a charterer of a berth for a vessel, on notice of its arrival in port, was given within a reasonable time when delivered within two or three hours from such notice of arrival.[90]

Continuance at Destination.—In order for the carrier to enforce demurrage charges, it must show that the cars on their arrival were placed on its side tracks in suitable and convenient places for unloading and were so kept for the full period allowed the consignee for unloading, without charge.[91] However, the car need not be at all times in a convenient place for unloading, provided the consignee is not unreasonably hindered or delayed in unloading,[92] nor need the car be kept in the same spot or place. If, in receiving other freight and removing unloaded cars, it becomes necessary to shift the position of a car awaiting unloading, such shifting will not relieve the consignee from the duty of unloading in the time allowed therefor without charge, provided the car, after shifting is left in a convenient place for unloading.[93] The cars after their arrival at their destination, though not kept accessible at every moment of time are to be treated as remaining accessible if the carrier is always ready to render them so within the shortest practicable time, not longer than a few hours, after being notified that the consignee is ready to unload.[94]

Notice of Arrival.—Notice to the transferee of a consignee of the arrival of a car of coal is sufficient to establish the right of a carrier to demurrage, whether the notice was given by the railroad company, the consignee, or other parties.[95] Where one ships carloads of grain to himself at a station on a con-

89. **Contract for payment before delivery.**—Plaintiff received three cars of stone over defendant's road. Due notice of its arrival was given plaintiff, together with the amount of the freight charges thereon, but plaintiff did not pay the same until ten days after the arrival of the cars, when defendant refused to deliver the stone until demurrage charges had been paid. Plaintiff had a stone yard to which a side track had been constructed by a company other than defendant, though cars could be transferred from defendant's track to this side track. The bill of lading under which the stone was shipped provided that the delivering carrier might make a reasonable charge every day for the detention of any car and for use of the track after the car had been held twenty-four hours for unloading, and might add such charges to all other charges thereunder, and hold such property subject to lien therefor, and that the consignee should pay all charges before a delivery of the property. It was held, in conversion for the value of the stone, that the defendant was entitled to the payment of the demurrage, under the bill of lading, before a delivery of the property, and hence it was not necessary for the defendant to place the cars on plaintiff's side track before making a demand therefor, as such would constitute a delivery of the property. Swan *v.* Louisville, etc., R. Co., 106 Tenn. 229, 61 S. W. 57.

90. **Designation of berth.**—The St. Bernard, 105 Fed. 994.

91. **Continuance at destination.**—Baltimore, etc., R. Co. *v.* Fisher, 3 O. N. P. 122, 5 O. Dec. 659.

92. If a car is placed and kept in a suitable place for unloading for the four days prescribed by the rule, and the consignee fails to unload it, he will be liable for car service thereafter, though the car may not at all times be in a convenient place for unloading, provided he is not thereafter unreasonably hindered and delayed in unloading. Baltimore, etc., R. Co. *v.* Fisher, 3 O. N. P. 122, 5 O. Dec. 659.

93. **But if a car is shifted** from day to day and from place to place, and is not at any time, for the full period of four days, in a suitable place for unloading, the company can not recover car service therefor. Baltimore, etc., R. Co. *v.* Fisher, 3 O. N. P. 122, 5 O. Dec. 659.

94. It was so held in construing a regulation expressed in this language: "It being understood that said car or cars are to be placed and remain accessible to the consignee for the purpose of unloading during the period in which held free of demurrage and that when the period of such demurrage charge commences they are to remain accessible to the consignee for unloading purposes." Miller *v.* Georgia R., etc., Co., 88 Ga. 563, 15 S. E. 316, 30 Am. St. Rep. 170, 18 L. R. A., N. S., 323, 50 Am. & Eng. R. Cas. 70.

95. **Notice of arrival.**—Chicago, etc., R. Co. *v.* Woolner Distilling Co., 160 Ill. App. 192.

necting line, and the grain in transit is transferred from the cars in which it was first shipped to the cars of the connecting line, on its arrival at its destination, a notice by the carrier to the shipper of the arrival of the number of cars of grain consigned, in its cars bearing certain numbers, is sufficient notice, without informing him in what cars it was originally shipped, or into what cars it had been transferred in transit, to render him liable for demurrage on his failure to unload it within proper time after arrival.[96] Under a carrier's rule that it shall give prompt notice by mail or otherwise of the arrival of freight, such notice can not be given so as to authorize the carrier to charge for storage until the cars containing the freight have been placed in such a position that they may be unloaded and thus change the carrier's relation to that of warehousemen.[97]

§ 982. Persons Liable for Demurrage.—Consignor.—A shipper of corn, who, knowing that the one to whom he consigns it could not pay for it, and knowing also that he himself is expected to pay for the use of the car while the corn is in it, allows it to remain on the tracks until he sells it to another party, is liable for the use of the car.[98] Where the consignor has notice that a consignee had refused to accept car loads of goods, and directs the carrier to reship them, with direction to allow all charges to follow, and the second consignee also refuses to accept the goods, the consignor is liable for demurrage.[99] Where a consignor ships the first of several deliveries of iron, and subsequently the railroad company notifies him that the purchaser will not accept the iron, and thereafter he ships other deliveries, consigning them to his own order, although the purchaser continues the embargo, and the cars remain unloaded on the tracks of the railroad, the consignor is liable to the railroad company for demurrage; and if, after the embargo is raised, the railroad company refuses to release the cars until the demurrage is paid, the consignor is liable for demurrage from the time the embargo is raised until the time when he finally pays the original demurrage, if the bill of lading provides for a lien for demurrage.[1]

Consignee.—A consignee, receiving and disposing of the cargo, is liable for demurrage.[2]

Agent.—An agent who buys produce and ships it for another, having no concern with it afterwards, is not responsible for damages growing out of a failure of the owner to cause delivery within a reasonable time, in the absence of an express stipulation to that effect.[3] Where a person agrees to have a vessel loaded for another at the wharf of a railroad company where it is customary to load vessels in turn, and for the railroad company to do the loading, which was done, causing the delay, such person is not answerable for demurrage, he having no personal control over the loading.[4] The owner of a vessel, having abandoned his lien on the cargo for demurrage, can not maintain an action for damages against the shippers, who were merely agents.[5]

Holder of Bill of Lading.—A carrier, in delivering a cargo, is not bound to look beyond the owner and holder of the bill of lading. As he has the control of the delivery and acceptance of the goods, he is responsible, on

96. Galveston, etc., R. Co. *v.* Hunt (Tex. Civ. App.), 32 S. W. 549.

97. United States *v.* Texas, etc., R. Co., 185 Fed. 820.

98. **Persons liable for demurrage.**—Hunt *v.* Missouri, etc., R. Co. (Tex. Civ. App.), 31 S. W. 523.

99. Baltimore, etc., R. Co. *v.* Samuel, 48 Pa. Super. Ct. 274.

1. Pennsylvania R. Co. *v.* Samuel, 45 Pa. Super. Ct. 248.

2. **Consignee.**—Gates *v.* Ryan, 37 Fed. 154, citing Irzo *v.* Perkins, 10 Fed. 779; Neilson *v.* Jesup, 30 Fed. 138; Reed *v.* Weld, 6 Fed. 304; Sprague *v.* West, Fed. Cas. No. 13,255 Abb. Adm. 548.

3. **Agent.**—Stafford *v.* Watson, 22 Fed. Cas. No. 13,276, 1 Biss. 437, 2 Chi. Leg. News 385.

4. The Schmidt, 27 Fed. 671.

5. Stafford *v.* Watson, 22 Fed. Cas. No. 13,276, 1 Biss. 437, 2 Chi. Leg. News 385; Irzo *v.* Perkins, 10 Fed. 779; The William Marshall, 29 Fed. 328.

accepting the goods under the bill of lading, for demurrage according to its terms. He can not relieve himself from responsibility by subcontracts for a delivery to others, who do not act directly under the bill of lading, but only under the consignee's orders.[6] The fact that the defendant purchased the freight after arrival by obtaining the bills of lading properly indorsed, the freight having been shipped to the order of the consignor, is no defense to an action for demurrage by the carrier.[7] Under a bill of lading which provides for the payment of freight and average accustomed, the indorsee is entitled to take the goods within a reasonable time after their arrival, under the ordinary rules of law as to liability for damages for detention, such as apply in the absence of any specific agreement. Had the bill of lading provided for the payment of freight and all other conditions as per charter party, the consignee would be liable for demurrage as specified in the charter party.[8] Where, after a vessel is loaded, the master signs bills of lading providing for the payment of freight, but neither the bills of lading nor the charter party bind the cargo for the payment of demurrage, and the bills of lading come into the hands of third persons, who make advances on them without notice of any claim for demurrage, the consignees of the bills of lading are not liable for the payment of demurrage.[9]

6. **Holder of bill of lading.**—J., the owner and consignee of certain iron rails, sold them to arrive, to a railroad company, to be delivered "ex ship, free of duties; terms, cash on handing invoice and order on vessel when they arrive in New York." On arrival, J. entered the goods at the customhouse, and paid duties and freight. P. & C., who had acted as agents for J. in some matters concerning the rails, procured the ship a berth, and received from J. the invoice and order on the vessel for delivery, with a request to collect payment from the railroad company, which they subsequently did. There was unreasonable delay in unloading the ship, partly in removing the iron from the dock, and partly through difficulty in getting lighters. Held that, whether or not P. & C. really acted in reference to the delivery of the iron for themselves or for the railroad company, J. was liable to the ship for the demurrage, and must look to his vendees or to P. & C. for his indemnity, if the delay was by their fault. Neilsen *v.* Jesup, 30 Fed. 138.

7. The assignment of the bill of lading and the acceptance of the freight thereunder constituted an adoption by the defendant of the liabilities as well as the rights under the contract of shipment. A denial of a promise to pay under such circumstances is a denial of an express promise only. As a denial of an implied promise it is a mere conclusion. Cincinnati, etc., Tract. Co. *v.* Norfolk, etc., Railway, 18-28 O. C. D. 543, 8 O. C. C., N. S., 134.

8. "The bill of lading for the lumber in question provided for 'paying freight for said lumber as per charter party dated 7th March, 1893, and average accustomed.' A bill of lading in this form imposed upon the indorsee of the bill of lading who received the goods under it none of the stipulations of the charter, except such as pertained to the payment of freight. Chappel *v.* Comfort (Eng.), 10 C. B., N. S., 802; Smith *v.* Sieveking (Eng.), 4 El. & Bl. 945; Fry *v.* Mercantile Bank, L. R. 1 C. P. 689; Dayton *v.* Parke, 142 N. Y. 391, 37 N. E. 642. It was no notice to him of any other provisions of the charter, such as that he must discharge a certain quantity of lumber per day, or, in default thereof, pay a specified price per day for any further detention of the vessel. Under this bill of lading, the vendee was entitled to take the goods within a reasonable time, according to the circumstances, on arrival, and under the ordinary rules of law as to liability to damages for detention, such as apply in the absence of any specific agreement. This is a very different liability from that of a specific agreement that assumes all risks of detention, from whatever cause, and agrees upon a specified rate of damages. Had the bill of lading provided for the payment of freight and 'all other conditions as per charter party,' the latter provision would have been construed ejusdem generis, as imposing upon the consignee the payment of something more than freight, and would have included the obligations referred to in the charter party respecting the rate of delivery, and the payment of the demurrage specified, though not necessarily including independent provisions of the charter party relating to different subjects. Russell *v.* Niemann, 17 C. B., N. S., 162; Serraino *v.* Campbell, 25 Q. B. Div. 501; Id., [1891] 1 Q. B. 283; Wegener *v.* Smith, 15 C. B. 285; Porteus *v.* Watney, 3 Q. B. Div. 534." Burrill *v.* Crossman, 65 Fed. 104.

9. One Hundred and Twelve Sticks of Timber, 18 Fed. Cas. No. 10,524, 8 Ben. 214.

§ 983. Lien for Demurrage.—Under what seems to be the weight of modern authority, a carrier has a lien for demurrage on the goods while in its control,[10] even without an express stipulation therefor in the contract of shipment.[11] But it has been held that all liens are created by law or by contract of the parties; and when the law gives none, neither party can create one without the consent or agreement of the other.[12] A common carrier has no lien upon goods for dam-

10. **Lien for demurrage.**—Southern R. Co. *v.* Lockwood Mfg. Co., 142 Ala. 322, 37 So. 667, 68 L. R. A., N. S., 227, 110 Am. St. Rep. 32, 4 Am. & Eng. Ann. Cas. 12; Schumacher *v.* Chicago, etc., R. Co., 207 Ill. 199, 69 N. E. 825; Kentucky Wagon Mfg. Co. *v.* Ohio, etc., R. Co., 98 Ky. 152, 32 S. W. 595, 17 Ky. L. Rep. 726, 36 L. R. A., N. S., 850, 56 Am. St. Rep. 326.

"We think the right to make the rule and to enforce it is pretty thoroughly established by the modern American cases, and that the defendant had a lien upon the lumber which had not been unloaded from the Oregon car. Barker *v.* Brown, 138 Mass. 340; Steinman *v.* Wilkins (Pa.), 7 Watts & S. 466, 42 Am. Dec. 254; Schmidt *v.* Blood (N. Y.), 9 Wend. 268, 24 Am. Dec. 143." Darlington *v.* Missouri Pac. R. Co., 99 Mo. App. 1, 72 S. W. 122.

The authority of the case of Gage *v.* Morse (Mass.), 12 Allen 410, 90 Am. Dec. 155, is overturned by the later Massachusetts case of Miller *v.* Mansfield, 112 Mass. 260. The Nebraska case followed the case of Chicago, etc., R. Co. *v.* Jenkins, 103 Ill. 588, without comment. Coming to the recent cases, we find the following decisions hold that the right of lien exists independent of contract: McGee *v.* Chicago, etc., R. Co., 71 Mo. App. 310; Miller *v.* Georgia R., etc., Co., 88 Ga. 563, 15 S. E. 316, 30 Am. St. Rep. 170, 18 L. R. A., N. S., 323; Kentucky Wagon Mfg. Co. *v.* Ohio, etc., R. Co., 98 Ky. 152, 17 Ky. L. Rep. 726, 32 S. W. 595, 56 Am. St. Rep. 326, 36 L. R. A., N. S., 850; Miller *v.* Mansfield, supra, and 4 Elliott, R. R., § 156; Darlington *v.* Missouri Pac. R. Co., 99 Mo. App. 1, 72 S. W. 122.

A railroad company has a common law lien upon the property in a car, for its proper demurrage charges against such car, and may enforce the same by refusing to deliver such property until payment of the demurrage charges has been made. Pittsburgh, etc., Railway *v.* Mooar Lumber Co., 6 O. C. C., N. S., 638, 17-27 O. C. D. 588.

"**The railroad commissions of some of the states** have recognized the rule and the right to enforce demurrage charges—the Kansas commission in the case of Davis *v.* Missouri, K. & T. R. Co., Commissioners' Reports of Kansas (1891), p. 21; the Iowa commission, in Rothschild *v.* Railroad, Commissioners' Reports of Iowa (1887), p. 783; the Missouri commission, in the case of E. R. Darlington & Co. *v.* Central Car Ass'n of St. Louis, May 16, 1901." Darlington *v.* Missouri Pac. R. Co., 99 Mo. App. 1, 72 S. W. 122.

11. Darlington *v.* Missouri Pac. R. Co., 99 Mo. App. 1, 72 S. W. 122.

"Nor do we think it necessary to the existence of such lien that it arise from a specific contract providing for the same, but that such right and contract may arise by implication, as in the case of warehouse charges to a railroad company that has stored goods, transported by it, when not received by the consignee promptly at the place of delivery. Miller *v.* Mansfield, 112 Mass. 260; Merchants', etc., Transp. Co. *v.* Moore, 88 Ill. 136, 30 Am. Rep. 541; Illinois Cent. R. Co. *v.* Alexander, 20 Ill. 23; Darlington *v.* Missouri Pac. R. Co., 99 Mo. App. 1, 72 S. W. 122; Barker *v.* Brown, 138 Mass. 340." Schumacher *v.* Chicago, etc., R. Co., 207 Ill. 199, 69 N. E. 825.

"It is claimed, however, by appellant that the case of Chicago, etc., R. Co. *v.* Jenkins, 103 Ill. 588, lays down the rule contrary to the views we have above expressed, and that that case should be controlling in the present case. We think not. That case seems to have related to or grown out of the shipment of goods in less quantity than a car load lot." Schumacher *v.* Chicago, etc., R. Co., 207 Ill. 199, 69 N. E. 825.

A lien for proper demurrage charges exists independently of any stipulation therefor in the contract of shipment, and, in an action to enforce the same, it is not necessary to aver or prove a special contract with reference thereto. Pittsburgh, etc., Railway *v.* Mooar Lumber Co., 6 O. C. C., N. S., 638, 17-27 O. C. D. 588.

12. Nicolette Lumber Co. *v.* People's Coal Co., 213 Pa. 379, 62 Atl. 1060, 3 L. R. A., N. S., 327, 110 Am. St. Rep. 550, 5 Am. & Eng. Ann. Cas. 387.

A railroad company has no lien upon goods for demurrage in absence of contract. East Tennessee, etc., R. Co. *v.* Hunt, 83 Tenn. (15 Lea) 261.

"**The English rule** is that no lien exists for demurrage charges under the maritime law unless it is expressly provided by contract (Birley *v.* Gladstone, 3 Maule & S. 205), and some of the American courts have followed the English doctrine. Gage *v.* Morse (Mass.), 12 Allen 410, 90 Am. Dec. 155; Chicago, etc., R. Co. *v.* Jenkins, 103 Ill. 588; Cleveland, etc., R. Co. *v.* Holden, 73 Ill. App. 582; Burlington, etc., R. Co. *v.* Chicago Lumber Co., 15 Neb. 390, 19 N. W. 451; Crommelin *v.* New York, etc., R. Co., 43 N. Y. 90, 1 Abb. Dec. 472." Darlington *v.* Missouri Pac. R. Co., 99 Mo. App. 1, 72 S. W. 122.

ages arising from the neglect of the consignee to take them away within a reasonable time after notice to him of their arrival. Hence, the consignee of goods shipped by railroad is not bound by rules and regulations of the company providing for a lien for demurrage, though published without his or the consignor's assent thereto when the contract for shipping the goods was made. Even a knowledge of such rules, without assent thereto will not affect the shipper or consignee.[13] The right of a common carrier to a lien extends to charges connected with the expenses of transportation strictly.[14] The inconvenience or expense occasioned by the detention of cars constitutes a claim in the nature of a demurrage, but the carrier must seek his redress in the ordinary manner for the breach of an implied contract to pay for the use and occupation of the cars. He can not enforce it by a detention of the goods.[15]

Statutory Provision.—The provision of the Mississippi Code, giving a lien for freight and storage, coupled with a power to sell therefor, applies to demurrage charges for delay in unloading cars.[16]

A carrier engaged in interstate commerce has a lien for demurrage on a shipment left in the car after the expiration of the free time allowed by the interstate tariffs to which the shipment was made. The last connecting carrier of an interstate shipment can apply the proper interstate tariffs and collect demurrage on foreign cars in its possession used in transporting interstate shipments.[17]

Where Goods Damaged.—The right of a vessel carrying cargo free of handling to a lien for demurrage for delay of the consignee in beginning to discharge is not affected by the fact that the delay arose from the refusal of the consignee to receive the cargo because damaged in transit by an excepted peril, and the fact that during the delay the consignee was negotiating with the owner to purchase the damaged cargo at a reduced price.[18]

For Other Cars.—Where demurrage is due on several cars constituting a shipment, the charge for each car need not be enforced against it separately, but enough may be retained to satisfy the charge against all.[19]

Relinquishment of Lien.—Discharging cargo after giving notice of a claim for demurrage is not a waiver of the lien, where such cargo is placed on the dock, and kept separate from other goods, so as to be capable of identification.[20] The placing by a carrier of a car on the team track, to be unloaded by the consignee, is not such an absolute delivery to him of the lumber therein as to cut off any future right of lien thereon of the carrier for demurrage charges because of the consignee not unloading in the time limit therefor.[21] A carrier does not waive its lien for demurrage on shipments left in cars after the free

13. Chicago, etc., R. Co. *v.* Jenkins, 103 Ill. 588, distinguished in Schumacher *v.* Chicago, etc., R. Co., 207 Ill. 199, 69 N. E. 825.

A carrier has no lien on freight for demurrage for delay in unloading the barges on which it was carried at their point of destination, and has no right to retain possession of the goods until the demurrage is paid. Nicolette Lumber Co. *v.* People's Coal Co., 213 Pa. 379, 62 Atl. 1060, 3 L. R. A., N. S., 327, 110 Am. St. Rep. 550, 5 Am. & Eng. Ann. Cas. 387.

14. 2 Redfield on Railways (6th Ed.), p. 193. Nicolette Lumber Co. *v.* People's Coal Co., 213 Pa. 379, 62 Atl. 1060, 3 L. R. A., N. S., 327, 110 Am. St. Rep. 550, 5 Am. & Eng. Ann. Cas. 387.

15. Crommelin *v.* New York, etc., R. Co., 43 N. Y. 90, 1 Abb. Dec. 472.

16. **Statutory provision.**—Code of Miss. 1892, § 2108; New Orleans, etc., R. Co. *v.* George & Co., 82 Miss. 710, 35 So. 193.

17. Gault Lumber Co. *v.* Atchison, etc., R. Co., 37 Okla. 24, 130 Pac. 291.

18. **Where goods damaged.**—Pioneer Fuel Co. *v.* McBrier, 28 C. C. A. 466, 84 Fed. 495.

19. **For other cars.**—New Orleans, etc., R. Co. *v.* George & Co., 82 Miss. 710, 35 So. 193.

20. **Relinquishment of lien.**—Pioneer Fuel Co. *v.* McBrier, 28 C. C. A. 466, 84 Fed. 495.

21. Southern R. Co. *v.* Lockwood Mfg. Co., 142 Ala. 322, 37 So. 667, 68 L. R. A., N. S., 227, 110 Am. St. Rep. 32, 4 Am. & Eng. Ann. Cas. 12.

time for unloading has expired by permitting a carrier to remove a portion of the shipment.[22]

§§ 984-985. Remedies and Defenses—§ 984. Of Carrier.—Refusal to Switch Cars.—It is the duty of a railroad to switch and place cars coming from its own lines or tended to it with proper transfer switching charges by any connecting line, and it can not excuse itself from the performance of its duty by the existence of disputes as to the correctness of demurrage charges withheld pending adjustment,[23] or the existence of a combination of the consignee and others to resist the enforcement of the rules of a car association as to demurrage and who refuse to pay for car service.[24] This duty, however, can not be enforced by a consignee who has wrongfully refused to pay the demurrage charges under the rules of the association,[25] nor by a consignee who has not only wrongfully refused to pay demurrage charges incurred in the past, but has expressed his intention of persisting in his refusal even if such charges be justly incurred in the future.[26] A rule of a car service association, providing that where consignees refuse to pay, or unnecessarily defer settlement of, car service charges, cars will not be switched to the private sidings of such persons, but deliveries will only be made on public delivery tracks of the company, is legal and enforceable.[27]

Jurisdiction.—A circuit court of the United States has jurisdiction to determine in the first instance the indebtedness of a shipper to a railroad company for demurrage, under the rules adopted by the company and filed with the Interstate Commerce Commission, where it depends on the construction, and not on the reasonableness or unreasonableness, of such rules, although the latter question is one primarily for the commission.[28]

Declaration.—A declaration averring that plaintiff and defendant were parties to a contract of shipment over plaintiff's road, that since the demurrage rule was adopted it has formed part of the contract of shipment, sufficiently avers an implied contract for payment of demurrage.[29]

Issues and Proof.—Where an order of a car service association is reason-

22. Gault Lumber Co. *v.* Atchison, etc., R. Co., 37 Okla. 24, 130 Pac. 291.

23. **Remedies and defenses.**—Yazoo, etc., R. Co. *v.* Searles, 85 Miss. 520, 37 So. 939, 68 L. R. A., N. S., 715.

24. Kentucky Wagon Mfg. Co. *v.* Ohio, etc., R. Co., 98 Ky. 152, 17 Ky. L. Rep. 726, 32 S. W. 595, 56 Am. St. Rep. 326, 36 L. R. A., N. S., 850.

25. A customer having committed the first wrong and thus caused the carriers to do the wrong complained of, is not in a position to ask relief in equity. Kentucky Wagon Mfg. Co. *v.* Ohio, etc., R. Co., 98 Ky. 152, 17 Ky. L. Rep. 726, 32 S. W. 595, 36 L. R. A., N. S., 850, 56 Am. St. Rep. 326.

26. Yazoo, etc., R. Co. *v.* Searles, 85 Miss. 520, 37 So. 939, 68 L. R. A., N. S., 715.

27. Yazoo, etc., R. Co. *v.* Searles, 85 Miss. 520, 37 So. 939, 68 L. R. A., N. S., 715.

Rules of a car-service association of railroads making a reasonable charge for the use of cars and tracks for the time consignee unreasonably delays to unload goods, providing that when cars are not unloaded within the time limit such charge must be paid before the goods can be unloaded, and that, should any consignee, being the owner of a private siding decline to pay such charges in arrear, the companies may refuse to place other cars on such siding for unloading until all arrears are paid, are all reasonable and valid. Phillips Co. *v.* Erie Railway, 6 O. C. C., N. S., 505, 14 O. D. N. P. 706.

28. **Jurisdiction.**—"It is true that, under the decision of the supreme court, in Texas, etc., R. Co. *v.* Abilene Cotton Oil Co., 204 U. S. 426, 27 S. Ct. 350, 51 L. Ed. 553, 9 Am. & Eng. Ann. Cas. 1075, the reasonableness of a rate or charge can not be inquired into in an independent suit by court and jury, prior to action by the interstate commerce commission, finding the established charge to be unreasonable. In the case before us, however, the court is asked to say, as a matter of law, what the schedule of rules in regard to charges for demurrage, filed by the defendant company, actually is, without regard to the reasonableness or unreasonableness thereof." Hite *v.* Central Railroad, 96 C. C. A. 326, 171 Fed. 370.

29. **Declaration.**—Pennsylvania R. Co. *v.* Midvale Steel Co., 201 Pa. 624, 51 Atl. 313, 88 Am. St. Rep. 836.

able in its general tenor and effect, the question whether it was rightfully invoked in a particular instance does not affect the question of whether the association is or is not a trust or combine.[30] Proof that the plaintiff was unable to unload material at once does not of itself establish the carrier's right to collect demurrage, in the absence of proof that the plaintiff failed to unload the cars consigned within the required time.[31]

Sufficiency of Evidence.—Under a statute providing that proof that a party has been compelled to pay more for services by reason of the unlawful act or agreement of a trust than he would have been compelled to pay except for such unlawful act or agreement shall be conclusive proof of damage, mere proof that one has been compelled to pay more for a service than his competitors were paying for the same service, without proof that such excessive payment was due to the alleged wrongful act and agreement complained of, does not constitute the required proof of damage.[32]

Questions of Law and Fact.—A rule on its face may apparently be reasonable, either as time allowed for unloading or as to the extent of the penalty by which it is sought to enforce a reasonable time limit, or the reasonableness of the rule may be doubtful, in either of which cases the evidence is for the jury.[33] Where the rule is manifestly a reasonable one, both as to time and charge, the court will not take up time by instructing a jury to find the fact.[34] Whether a particular rule or regulation is or is not reasonable in its requirements is, when the facts are shown, a question of law for the court, and not a question of fact for the jury.[35]

§ 985. Of Consignee.—Where the bill of lading allows a given number of days to the consignee for unloading, a contract is implied on his part that, from the time when the ship is at the usual place of discharge, he will take the risk of any ordinary vicissitude which may occur to prevent the release of the ship at the expiration of the running days.[36]

Inability to Unload.—The fact that neither the consignee nor the one charged with the duty of unloading cars is able to receive and unload them within the free time, after notice of their arrival will not relieve the consignee of the obligation to pay demurrage or car service charges on cars used in interstate shipments.[37]

Condition of Weather.—A consignee of freight was not excused from noncompliance with his duty to unload it from the cars within the time stipulated

30. **Issues and proof.**—Yazoo, etc., R. Co. *v.* Searles, 85 Miss. 520, 37 So. 939, 68 L. R. A., N. S., 715.

31. Wooley *v.* Chicago, etc., R. Co., 150 Wis. 183, 136 N. W. 616.

32. **Sufficiency of evidence.**—Yazoo, etc., R. Co. *v.* Searles, 85 Miss. 520, 37 So. 939, 68 L. R. A., N. S., 715.

33. **Questions of law and fact.**—Pennsylvania R. Co. *v.* Midvale Steel Co., 201 Pa. 624, 51 Atl. 313, 88 Am. St. Rep. 836.

Whether or not a demurrage charge is reasonable is a question of fact. Kentucky Wagon Mfg. Co. *v.* Ohio, etc., R. Co., 98 Ky. 152, 17 Ky. L. Rep. 726, 32 S. W. 595, 36 L. R. A., N. S., 850, 56 Am. St. Rep. 326.

34. Pennsylvania R. Co. *v.* Midvale Steel Co., 201 Pa. 624, 51 Atl. 313, 88 Am. St. Rep. 836, citing Kentucky Wagon Mfg. Co. *v.* Ohio, etc., R. Co., 98 Ky. 152, 32 S. W. 595, 17 Ky. L. Rep. 726, 36 L. R. A., N. S., 850, 56 Am. St. Rep. 326; Miller *v.* Mansfield, 112 Mass. 260; Norfolk, etc., R. Co. *v.* Adams, 90 Va. 393, 18 S. E. 673, 22 L. R. A., N. S., 530, 44 Am. St. Rep. 916.

A rule of a carrier imposing a charge of $1 per day for time a car remains unloaded after forty-eight hours from time it is ready for delivery to the consignee, the reasonableness of which is not denied, is manifestly reasonable, and need not be submitted to a jury with direction so to find. Pennsylvania R. Co. *v.* Midvale Steel Co., 201 Pa. 624, 51 Atl. 313, 88 Am. St. Rep. 836.

35. Baltimore, etc., R. Co. *v.* Fisher, 3 O. N. P. 122, 5 O. Dec. 659.

36. **Of consignee.**—Manson *v.* New York, etc., R. Co., 31 Fed. 297, 24 Blatchf. 448, citing Tiis *v.* Byers, 34 Law T., N. S., 526; Randall *v.* Lynch, 2 Camp. 352; Cross *v.* Beard, 26 N. Y. 85.

37. **Inability to unload.**—Nebraska Transfer Co. *v.* Chicago, etc., R. Co., 90 Neb. 488, 134 N. W. 163.

in the bill of lading by reason of the extreme condition of the weather.[38]

Seizure by Government.—It seems that where a chartered vessel is seized and detained by a revenue officer of the United States, the charterer can not be made liable for demurrage during the period of such detention.[39]

Rush of Business.—Excuse for failure to unload freight where goods are shipped by a vessel, to be unloaded at a dock and put on railroad cars, but owing to an unexpected number of vessels arriving at one time, the freight was not unloaded immediately but in order of the arrival of the vessel, the shipper is excused from liability for demurrage.[40]

Offset of Claim.—The fact that a consignee has an unadjusted claim for damages against a railroad is no valid excuse for his refusal to pay demurrage on cars unduly detained by him.[41]

Recovery of Overcharges.—A car service rule requiring prompt payment of demurrage charges and providing that no claim of mistake or overcharge will be considered unless the bill for demurrage is first promptly paid, does not subject consignees to a liability to imposition in the collection of demurrage, but leaves them free to prosecute actions for damages for the collection of overcharges or for refusing to render services when no demurrage is due or payment thereof has not been unduly delayed.[42] In a suit by a consignee for damages for extorting excessive demurrage charges or for withholding car service under a pretended claim for demurrage, the burden is on the carrier to prove the proper assessment of unpaid demurrage, and that payment thereof had been refused or unduly delayed, within the terms of a rule requiring the prompt payment of demurrage charges.[43]

Pleading.—In a carrier's action for demurrage, an allegation that the carrier delivered cars to the defendant in such large numbers and so unreasonably concentrated them as to prevent the defendant from handling them promptly, choking and overwhelming the defendant's side track with cars, when they knew it was impossible for defendant to handle and unload them, stated a sufficient defense.[44]

Affidavit of Defense.—Where a declaration for demurrage on cars is accompanied by an account giving exact details as to each car, an affidavit of defense makes no issue by stating generally that the demurrage rule is not applicable to defendant, because in many cases the detention was caused by reloading, and that this is embraced in the charge of delay in unloading, defendant showing that it has the means of specifying particulars by stating that it will produce at the trial its own records to prove that plaintiff's were inadequate as a basis of claim.[45]

38. **Condition of weather.**—Darlington *v.* Missouri Pac. R. Co., 99 Mo. App. 1, 72 S. W. 122.

39. **Seizure by government.**—"If the seizure were legal, and occasioned by any act or neglect on the part of the defendant—such as a neglect to pay duties on the cargo—then, the plaintiffs will be entitled to recover the full amount of freight (see Morgan *v.* Insurance Co. (U. S.), 4 Dall. 455, 1 L. Ed. 907), and perhaps demurrage, upon which latter subject I express no opinion at present. If the seizure were illegal, I think the plaintiffs may, within the principle of the case of Morgan *v.* The Insurance Co. of North American, recover the full amount of freight, but no demurrage. In such case the plaintiffs must look to the collector for their damages." Brooks *v.* Minturn, 1 Cal. 481.

40. **Rush of business.**—Wordin *v.* Bemis, 32 Conn. 268, 85 Am. Dec. 255.

41. **Offset of claim.**—Yazoo, etc., R. Co. *v.* Searles, 85 Miss. 520, 37 So. 939, 68 L. R. A., N. S., 715.

42. **Recovery of overcharges.**—Yazoo, etc., R. Co. *v.* Searles, 85 Miss. 520, 37 So. 939, 68 L. R. A., N. S., 715.

43. Yazoo, etc., R. Co. *v.* Searles, 85 Miss. 520, 37 So. 939, 68 L. R. A., N. S., 715.

44. **Pleading.**—Louisville, etc., R. Co. *v.* Empire State Chemical Co., 189 Fed. 174.

45. **Affidavit of defense.**—Pennsylvania R. Co. *v.* Midvale Steel Co., 201 Pa. 624, 51 Atl. 313, 88 Am. St. Rep. 836.

CHAPTER XII.

Loss or Injury to Goods.

I. What Law Governs, § 986.
II. Nature and Validity of Contract of Transportation, § 987.
III. Care Required of Carrier, §§ 988-1010.
A. In General, § 988.
B. Liability as Insurer, §§ 989-1010.
a. General Rule, § 989.
b. Exceptions and Excuses, §§ 990-1004.
(1) Act of God, §§ 990-994.
(a) In General, § 990.
(b) What Constitutes Act of God, § 991.
(c) Negligence Concurring with Act of God, § 992.
(d) Where Danger Should Have Been Anticipated, § 993.
(e) Duty to Prevent Act of God from Causing Injury, § 994.
(2) Act of Public Enemy, §§ 995-997.
(a) In General, § 995.
(b) Thieves and Robbers, § 996.
(c) Strikers, Rioters, Mobs and Insurrectionists, § 997.
(3) Fault of Shipper or Owner, §§ 998-1002.
(a) In General, § 998.
(b) Goods Improperly Marked, § 999.
(c) Goods Improperly Packed, § 1000.
(d) Goods Improperly Loaded, § 1001.
(e) Misrepresentation or Concealment of Nature or Value of Goods, § 1002.
(4) Inherent Infirmities of Goods, § 1003.
(5) Act or Mandate of Public Authority, § 1004.
c. Carriers to Which Rule Applicable, §§ 1005-1009.
(1) In General, § 1005.
(2) Carriers Not Owning Means of Transportation, § 1006.
(3) Carriers of Money, § 1007.
(4) Persons Occasionally Carrying, § 1008.
(5) Forwarders, § 1009.
d. Commencement and Termination of Liability, § 1010.
IV. Goods Shipped on Chartered or Private Cars, § 1011.
V. Acts or Omissions Rendering Carrier Liable in General, §§ 1012-1016.
A. In General, § 1012.
B. Proximate Cause of Loss or Injury, § 1013.
C. Negligence of Agents or Servants, § 1014.
D. Negligence or Misconduct of Third Person, § 1015.
E. Deviation or Delay, § 1016.
VI. Mode or Means of Transportation, §§ 1017-1021.
A. In General, § 1017.
B. Means of Transportation in General, § 1018.
C. Duty as to Perishable Goods, § 1019.
D. Carrying Goods on Open Cars, § 1020.
E. Means for Loading and Unloading, § 1021.
VII. Duties after Injury, § 1022.
VIII. Effect of Insurance, §§ 1023-1029.
A. In General, § 1023.
B. Contract for Benefit of Insurance, §§ 1024-1029.
a. Power to Stipulate and Validity, § 1024.

b. Operation and Effect, §§ 1025-1028.
(1) Right of Shipper to Recover from Carrier, § 1025.
(2) Right of Carrier to Recover from Insurer, § 1026.
(3) Effect as Defeating Insurer's Right of Subrogation, § 1027.
(4) Inconsistent Stipulations in Contract and Policy, § 1028.
c. Suits against Carrier, § 1029.
IX. Claims for Damages, § 1030.
X. Extent of Liability, § 1031.
XI. Actions for Loss or Injury, §§ 1032-1089.
A. Nature and Form, § 1032.
B. Right of Action and Defenses, §§ 1033-1035.
a. In General, § 1033.
b. Conditions Precedent, § 1034.
c. Defenses, § 1035.
C. Jurisdiction and Venue, § 1036.
D. Parties, § 1037.
E. Pleading, §§ 1038-1051.
a. Declaration, Complaint, Petition or Bill, §§ 1038-1049.
(1) In General, § 1038.
(2) Necessity and Sufficiency of Allegations, §§ 1039-1047.
(a) Plaintiff's Title or Interest, § 1039.
(b) That Defendant a Common Carrier, § 1040.
(c) As to Consideration, § 1041.
(d) Delivery to and Acceptance by Carrier, § 1042.
(e) As to Contract of Carriage, § 1043.
(f) Negligence of Defendant, § 1044.
(g) Description of Property, § 1045.
(h) Damage and Value of Goods, § 1046.
(i) Special Statutory Proceeding, § 1047.
(3) Amendments, § 1048.
(4) Aider by Answer, § 1049.
b. Plea or Answer, § 1050.
c. Admissions in Pleadings, § 1051.
F. Issues, Proof and Variance, §§ 1052-1055.
a. In General, § 1052.
b. Evidence Admissible under Pleadings, § 1053.
c. Matters to Be Proved, § 1054.
d. Variance, § 1055.
G. Evidence, §§ 1056-1067.
a. Presumptions and Burden of Proof, §§ 1056-1060.
(1) Plaintiff's Burden of Proof in General, § 1056.
(2) Defendant's Burden of Proof in General, § 1057.
(3) Condition of Goods When Received by Carrier, § 1058.
(4) Shipment Composed of Several Classes of Goods, § 1059.
(5) Where Transportation under Special Contract, § 1060.
b. Necessity of Producing Bill of Lading, § 1061.
c. Admissibility of Evidence, §§ 1062-1066.
(1) In General, § 1062.
(2) Declarations and Admissions, § 1063.
(3) Opinion Evidence, § 1064.
(4) Documentary Evidence, § 1065.
(5) Parol Evidence, § 1066.
d. Weight and Sufficiency of Evidence, § 1067.
H. Damages, §§ 1068-1085.
a. Extent of Liability, Measure and Elements of Damages, §§ 1068-1080.
(1) In General, § 1068.

(2) Loss of Goods, § 1069.
(3) Injury to Goods, §§ 1070-1072.
(a) In General, § 1070.
(b) Right to Abandon Goods, § 1071.
(c) When Damaged Goods Sold, § 1072.
(4) Freight, Allowance and Deduction, § 1073.
(5) Interest, § 1074.
(6) Expenses of Owner, § 1075.
(7) Goods Shipped under Contract of Sale, § 1076.
(8) Goods Having No Market Value, § 1077.
(9) Profits, § 1078.
(10) Special Damages, § 1079.
(11) Exemplary Damages, § 1080.
b. Duty of Owner to Mitigate or Avert, § 1081.
c. Evidence as to Value or Damage, §§ 1082-1084.
(1) In General, § 1082.
(2) Admissibility, § 1083.
(3) Weight and Sufficiency, § 1084.
d. Recovery as Affected by Allegation of Damages, § 1085.
I. Province of Court and Jury, §§ 1086-1087.
a. In General, § 1086.
b. Particular Questions of Law or Fact, § 1087.
J. Instructions, § 1088.
K. Verdict, § 1089.

§ 986. What Law Governs.—As a general rule the law of the place where the contract of carriage is made governs in determining the liability of the carrier, unless the parties at the time of making it had some other law in view.[1] This rule admits of some variation in practice, dependent sometime upon the question as to where the contract is to be performed,[2] or where it is breached.[3] As to requirements which are to be wholly performed in one state the laws of that state govern;[4] so the laws of the state where delivery is to be made fix the

1. **What law governs.**—Palmer *v.* Atchison, etc., R. Co., 101 Cal. 187, 35 Pac. 630; Bertonneau *v.* Southern Pac. Co., 17 Cal. App. 439, 120 Pac. 53; Liverpool, etc., Steam Co. *v.* Phenix Ins. Co., 129 U. 397, 9 S. Ct. 469, 32 L. Ed. 788.

In transporting goods from Mexico into Texas the liability of a common carrier is determined by the laws of Mexico. Cantu *v.* Bennett, 39 Tex. 303.

2. Bertonneau *v.* Southern Pac. Co., 17 Cal. App. 439, 120 Pac. 53.

Where a package is delivered to a carrier in New York to be delivered in Ohio, and is negligently lost, in an action for such loss the place of delivery is the place of the performance of the contract, and the law of Ohio governs. Jacobson & Co. *v.* Adams' Exp. Co., 1 O. C. D. 212, 1 O. C. C. 381.

Civ. Code, California, § 2200, which exempts carriers of specified valuables, etc., from liability in excess of $50, unless they have notice of the nature of the freight, etc., does not apply to a through shipment from another state over connecting lines; the place of performance of the contract, as affecting the applicability of laws, not being determined by the place of delivery, and the code provision not being applicable on the theory that it affects only the remedy. Bertonneau *v.* Southern Pac. Co., 17 Cal. App. 439, 120 Pac. 53.

Where contract to be partly performed.—A contract of carriage, though made in a foreign state, is not necessarily governed, in matters of construction and effect, by the laws of that state, where the contract is to be partly performed in another state. Carter & Co. *v.* Southern R. Co., 3 Ga. App. 34, 59 S. E. 209; Atlanta, etc., R. Co. *v.* Broome, 3 Ga. App. 641, 60 S. E. 355.

3. A carrier's liability for loss of goods shipped from New York to Kentucky, which loss occurred in Kentucky, was governed by the Kentucky law. Cincinnati, etc., R. Co. *v.* Hansford & Son, 100 S. W. 251, 30 Ky. L. Rep. 1105.

4. Carter & Co. *v.* Southern R. Co., 3 Ga. App. 34, 59 S. E. 209; Atlanta, etc., R. Co. *v.* Broome, 3 Ga. App. 641, 60 S. E. 355.

liability of the carrier for the care of the goods after reaching their destination.[5] Where goods were lost by fire in another state, in which the rule as to a carrier's liability would be different, as the question is a commercial one the courts of the state in which the action is brought will adhere to their own rule in that respect.[6]

Validity of Contract.—On interstate shipments, the general rule is that the lex loci contractus and not the lex fori prevails as to the validity of the contract, but, although a contract be valid where made, yet if it contravenes the public policy of the state where it is to be in part performed and is sought to be enforced, it will not be enforced. The public policy of the latter state can not be set at naught either by comity, or the will of the contracting parties.[7]

§ 987. Nature and Validity of Contract of Transportation.—To render a common carrier liable, a particular agreement for hire is not necessary,[8] nor is it necessary to prove a written contract, as the law implies in the absence of such a contract an obligation to deliver in good condition to the person from whom freight is accepted.[9] But if there is an express written contract, an action can not be brought by the assignee of the bill of lading on an implied promise arising from the carrier's duty to transport and deliver.[10] Where in loading and packing, another's goods were not distinguished from the shipper's and both alike were received by the carrier from the shipper, its liability for loss extends to all the goods, though the contract was made with the shipper alone.[11] Where a carrier's agent, through error, omitted a part of the goods from the bill of lading which were put in the car with his knowledge after its first loading, and the carrier collected its charges therefor, the shipper is entitled to recover for the crates so omitted on proof of loss.[12] A contract, imposing upon a carrier the exclusive duty of safe-keeping, may be implied by usage, or by a particular course of dealing between the parties; but the implication that the carrier assumes the duty of immediate transportation, and hence the responsibility of an insurer, without knowing to what place and to whom goods are to be shipped, must be clear.[13]

What Law Governs.—As to what law governs as to the validity of a contract of carriage, see elsewhere.[14]

Effect of Invalidity of Contract of Carriage.—When a carrier accepts property for transportation, the law imposes upon it, in the absence of a binding contract limiting its liability, the duties of either a common or private carrier, according to the facts, for the violation of which it will be liable, regardless of the legal sufficiency of the contract of carriage.[15] The fact that the contract is in violation of law or involves an illegal act does not prevent or affect the shipper's right to recover for losses occasioned by the negligence or wrongful act of the carrier.[16] And a carrier can not defend an action for damages resulting from

5. Heath *v.* South Bound R. Co., 46 S. C. 104, 24 S. E. 166.

6. Dunham *v.* Boston, etc., R. Co. (N. Y.), 46 Hun 245, 11 N. Y. St. Rep. 472; Faulkner *v.* Hart, 82 N. Y. 413, 37 Am. Rep. 574.

7. **Validity of contract.**—Adams Exp. Co. *v.* Green, 112 Va. 527, 72 S. E. 102.

8. **Agreement for hire unnecessary.**—Allen *v.* Sewall (N. Y.), 2 Wend. 327.

9. **Written contract unnecessary.**—Rubens *v.* Ludgate Hill, etc., Co., 65 Hun. 625, 20 N. Y. S. 481, 48 N. Y. St. Rep. 732.

10. Knight *v.* St. Louis, etc., R. Co., 141 Ill. 110, 30 N. E. 543, affirming 40 Ill. App. 471.

11. Lloyd *v.* Haugh, etc., Transfer Co., 223 Pa. 148, 72 Atl. 516, 21 L. R. A., N. S., 188.

12. **Omission of part of goods from bill of lading.**—Southern R. Co. *v.* Williams, 139 Ga. 357, 77 S. E. 153.

13. Central, etc., R. Co. *v.* Sigma Lumber Co., 170 Ala. 627, 54 So. 205, Ann. Cas. 1912 D, 965.

14. **What law governs.**—See ante, "What Law Governs," § 986.

15. **Effect of invalidity of contract of carriage.**—Judge *v.* Northern Pac. R. Co., 189 Fed. 1014.

16. The fact that one who delivers goods to a carrier for transportation carries on business under a firm name, when in fact he has no partner, and thus violates a law of the state, is no defense

its negligence in transporting goods on the ground that the consignor could not lawfully acquire title to them.[17] But it is held that a shipper of property in violation of the proclamation of the president of the United States can not recover against the carrier,[18] and that in an action for the recovery of the value of intoxicating liquors lost during transportation, the plaintiff must allege and prove that he owned and possessed the liquors with lawful intent.[19]

Where Carrier Refuses to Ship Goods.—A carrier is not liable for negligence in caring for hay after its delivery for shipment where, the hay not being branded as required by statute, it refuses to ship it.[20]

Transportation after Rescission of Contract.—Where the shipper rightfully rescinds the contract for transportation and forbids the carrier to undertake the carriage, the carrier, in insisting on carrying the goods, does so at its own peril, upon risks and responsibilities incident to the employment, without regard to any limitation of liability contained in the contract originally.[21]

Void Provision in Bill of Lading.—A provision of the bill of lading that, if the bill is assigned, it must be presented to the carrier, properly indorsed, before the arrival of the goods at the place of destination, is unreasonable and void.[22]

Preference in Rates.—A shipper's action for loss of goods can not be defeated because he was given a preference in rates under the interstate commerce law, where the right was expressly recognized by the commerce commission in an administrative ruling.[23]

Special Contracts of Carriage.—Where contracts for transporting goods are special contracts, and specify the shipment to be at owner's risk, he can only recover under such special contracts; and if the goods shipped under such special contracts were lost by fire, the carrier or its agents exercising such care as a prudent man would as to his own goods in protecting them from unforeseen accident, plaintiff can not recover.[24]

§§ 988-1010. Care Required of Carrier—§ 988. In General.—A com-

to an action by him against the carrier for injuries to the goods in course of transportation, if in fact he is the true owner of the goods. Wood *v.* Erie R. Co. (N. Y.), 9 Hun 648, affirmed in 72 N. Y. 196, 28 Am. Rep. 125.

Contract violating interstate commerce act.—Act Feb. 4, 1887, c. 104, 24 Stat. 379 (U. S. Comp. St. 1901, p. 3154). Warren *v.* Cleveland, etc., R. Co., 156 Ill. App. 111.

Though goods are shipped under a contract by which a special rate is charged, and a rebate allowed, in violation of the interstate commerce act, such fact will not relieve the carrier of liability for the loss of the goods. Insurance Co. *v.* Delaware Mut., etc., Ins. Co., 91 Tenn. 537, 19 S. W. 755.

Contract violating postoffice laws.—Where the proof shows the delivery of a letter or package containing money, to be carried between two places, at each of which is a postoffice, a recovery may be had on a count charging the defendant as a bailee to deliver the money on request, even if the contract to carry is conceded to be invalid, as opposed to the postoffice laws. Hosea *v.* McCrory, 12 Ala. 349.

That a shipper delivered goods to a carrier with the intention of smuggling them is not a defense to an action against the carrier for the loss of the goods, if the carrier was ignorant of the intent, and was not implicated in the smuggling. Donovan *v.* Compagnie Générale Transatlantique, 39 N. Y. Super. Ct. 519.

17. Farmers', etc., Bank *v.* Detroit, etc., R. Co., 17 Wis. 372.

18. Cantu *v.* Bennett, 39 Tex. 303.

19. Sommer *v.* Cate, 22 Iowa 585.

20. Pickard *v.* Bayley, 46 Me. 200.

21. **Transportation after rescission of contract.**—Dauchy *v.* Silliman (N. Y.), 2 Lans. 361.

22. **Void provision in bill.**—Bishop *v.* Empire Transp. Co., 33 N. Y. Super. Ct. 99.

23. **Preference in rates.**—Santa Fe, etc., R. Co. *v.* Grant Bros. Constr. Co., 13 Ariz. 186, 108 Pac. 467, where the agreement for a reduced rate for the shipment of a railroad contractor's outfit was included in the specifications and contract, under which he was the successful bidder.

24. **Special contracts of carriage.**—Baltimore, etc., R. Co. *v.* Rathbone, 1 W. Va. 87, 88 Am. Dec. 664. See ante, "Special Contracts," chapter 8; post, "Limitation of Liability," chapter 14.

mon carrier as such is bound to exercise the strictest care[25] and extraordinary diligence[26] to transport safely the goods intrusted to it. The carrier must use that degree of attention and care which the occasion and subject committed to its trust demand,[27] and its duty is not measured by that which is usual and customary for other carriers to do under like circumstances.[28] Whenever the situation or condition of the goods, from accident or from any cause, becomes such as to require special care or attention, the carrier must put itself in place of the owner, and do for them all that might reasonably be expected of a careful and prudent person, and, if necessary, it would be its duty to incur any reasonable expense in their preservation.[29] The degree of care necessary depends on the known condition and character of the freight;[30] but is not measured by the value of the goods shipped,[31] or by the amount of freight to be paid where the shipper makes no concealment or misrepresentation, and the carrier has means as ample as the shipper to ascertain the nature and value of the goods.[32]

25. Care required of carrier.—Carpenter *v.* Baltimore, etc., R. Co. (Del.), 6 Pen. 15, 64 Atl. 252; Klair *v.* Philadelphia, etc., R. Co., 2 Boyce's (25 Del.) 274, 78 Atl. 1085; Niagara *v.* Cordes (U. S.), 21 How. 7, 16 L. Ed. 41.

26. Extraordinary diligence. — Central, etc., R. Co. *v.* Manchester Mfg. Co., 6 Ga. App. 254, 64 S. E. 1128. See Bibb *v.* Missouri, etc., R. Co., 37 Tex. Civ. App. 508, 84 S. W. 663.

Extraordinary diligence is that extreme care and caution which very prudent and thoughtful persons use in securing and preserving their own property. Wallace *v.* Clayton, 42 Ga. 443; Richmond, etc., R. Co. *v.* White, 88 Ga. 805, 15 S. E. 802.

By the Georgia Civil Code, § 2264, it is declared that a common carrier "as such is bound to use extraordinary diligence." Atlanta, etc., R. Co. *v.* Jacobs' Pharmacy Co., 135 Ga. 113, 68 S. E. 1039.

27. Wolf *v.* American Exp. Co., 43 Mo. 421, 97 Am. Dec. 406.

A carrier must exercise such diligence as is required by law to protect the goods from destruction and injury resulting from conditions which, in the exercise of due care, may be averted or counter-acted. It must guard the goods from destruction or injury by the elements from the effects of delays, and from other sources of injury which it may avert, by the exercise of care and ordinary intelligence. Taft Co. *v.* American Exp. Co., 133 Iowa 522, 110 N. W. 897, 10 L. R. A., N. S., 614; Beard *v.* Illinois Cent. R. Co., 79 Iowa 518, 44 N. W. 800, 7 L. R. A. 280, 18 Am. St. Rep. 381.

Apples shipped in bulk in winter.—Where plaintiff shipped apples in bulk from New York to Minnesota in winter, it was not for the jury to determine whether the railroad company receiving the freight in Chicago was required to immediately transfer the fruit to another car, or send the car to the roundhouse, but it was only required to exercise reasonable care. The carrier was not required to anticipate that a car of apples so loaded would be delivered in its yard, and be prepared to take extraordinary precautions to protect the fruit from frost. Calender-Vanderhoof Co. *v.* Chicago, etc., R. Co., 109 N. W. 402, 99 Minn. 295.

28. Hinton *v.* Eastern R. Co., 72 Minn. 339, 75 N. W. 373.

29. M. P. R. Co. *v.* Barnes & Co., 2 Texas App. Civ. Cas., § 575.

Danger from inherent infirmity of goods.—When goods become exposed to danger of deterioration or destruction from their own inherent infirmity, it is the carrier's duty to employ at least a reasonable degree of skill and diligence to preserve them. M. P. R. Co. *v.* Barnes & Co., 2 Texas App. Civ. Cas., § 575.

Danger from fire.—The diligence required of a carrier in regard to preserving goods in the course of transportation by him from loss by fire is not limited to avoid setting fire to such goods, but extends also to protecting and preserving them from destruction after a peril from fire has become apparent. Atlanta, etc., R. Co. *v.* Jacobs' Pharmacy Co., 135 Ga. 113, 68 S. E. 1039.

30. Character and condition of goods.—Barron, etc., Co. *v.* C., C., C. & St. L. R. Co., 8 N. P., N. S., 517, 19 O. D. N. P. 710, affirmed in 80 O. St. 707, 11 O. C. C., N. S., 602, 21-31 O. C. D. 142.

Diligence does not require that all goods shall receive the same care. Some may be properly loaded on open cars. Others may be forwarded by regular freight trains; others, on account of their perishable nature, must be sent by fast freight; others, because of their great inherent value, must be shipped under special precautions to prevent loss by theft. Georgia Southern R. Co. *v.* Johnson, etc., Co., 121 Ga. 231, 48 S. E. 807.

31. Value of goods.—Adams Exp. Co. *v.* Green, 112 Va. 527, 72 S. E. 102.

32. Amount of freight as affecting degree of care.—Southern Pac. R. Co. *v.* Maddox, 75 Tex. 300, 12 S. W. 815.

Whether the carrier has discharged the duty of using care and diligence in the transportation of goods is to be judged with reference to the nature of the service, and the circumstances and exigencies under which it is to be performed.[33]

To Anticipate, or Protect Goods from, Act of God.—As to care required of the carrier to anticipate or protect goods from the act of God, see elsewhere.[34]

Contract Limiting Liability.—Where by contract the carrier is exempt from liability for loss from certain causes, it is bound to use ordinary diligence in protecting the goods intrusted to it from loss from such causes.[35]

A carrier of good gratuitously[36] is only liable for losses due to gross negligence.[37] So it is not liable for goods stolen without negligence on its part.[38]

33. Holladay *v.* Kennard (U. S.), 12 Wall. 254, 20 L. Ed. 390.

34. **Act of God.**—See post, "Where Danger Should Have Been Anticipated," § 993; "Duty to Prevent Act of God from Causing Injury," § 994.

35. **Contract limiting liability.**—Little Rock, etc., R. Co. *v.* Talbot, 47 Ark. 97, 14 S. W. 471. See post, "Limitation of Liability," chapter 14.

36. **Carrier of goods gratuitously—Illustration.**—Gold dust was taken on board of the steamer New World, to be carried gratuitously from Sacramento to San Francisco; the clerk of the boat having given the owners of the dust actual notice that he would receive gold dust or money only on condition that no charge should be made and no responsibility incurred. Fay *v.* New World, 1 Cal. 348.

Evidence that the freight clerk of an express company on the day of leaving their employ delivered his trunk to his successor, saying he would send it by express; that he paid nothing for the transportation; and supposed it would go free, but expected to pay if asked; and that the company always forwarded the baggage of the employees to and from the different offices, held to warrant a jury in finding that the bailment was not gratuitous. Gott *v.* Dinsmore, 111 Mass. 45.

The defendant was one of the companies forming a continuous and connecting line of railroads from T. to B., engaged in the business of transporting freight from the former to the latter place. By an arrangement between such companies, cars loaded with freight were run from each terminus over the whole length of said line. The plaintiffs, being shippers of oil, at T., provided and furnished wooden tanks of their own for holding oil to be transported over the said continuous line from T. to B.; and, by an arrangement between them and one of the companies, such tanks were placed on platform cars belonging to that company, and fastened thereto, for safety, but they were to remain the property of the plaintiffs. Cars, with tanks thereon, filled with oil belonging to the plantiffs, were run between T. and B. After the tanks were emptied of their contents at B., the cars, with the empty tanks thereon, were by the same line returned to T. The carriers furnished the plaintiffs with a bill of lading for each shipment of oil, specifying the quantity of oil, but no mention was made of the tanks. No bill of lading was furnished on the return of the empty tanks; nor was any consideration paid for the transportation thereof, independent of that paid for the transportation of the oil from T. to B.; nor was any special arrangement made as to the return transportation. Two of said tanks, filled with oil, owned and shipped by the plaintiffs to B., while being carried on said cars, and while on that part of the line owned and operated by the defendants, were, with their contents, burned up and destroyed. Held, that although no compensation was paid to the companies, directly, for the transportation of the empty tanks, yet that they received a compensation in a legal sense, in the payment of freight on the oil, and that the plaintiffs were entitled to recover the value of the tanks destroyed. Spears *v.* Lake Shore, etc., R. Co. (N. Y.), 67 Barb. 513.

Where the undertaking of a carrier is that persons sending grain over the route are entitled to have the empty bags returned without charge for freight, this is not to be deemed a gratuitous bailment. Pierce *v.* Milwaukee, etc., R. Co., 23 Wis. 387.

That a carrier meant to carry goods gratuitously, if not communicated to the owner, does not render the bailment a gratuitous one. Gray *v.* Missouri River Packet Co., 64 Mo. 47.

37. **Liability of carrier without hire.**—*Alabama.*—Louisville, etc., R. Co. *v.* Gerson, 102 Ala. 409, 14 So. 873.

Massachusetts.—Clark *v.* Eastern R. Co., 139 Mass. 423, 1 N. E. 128.

Mississippi.—Illinois Cent. R. Co. *v.* Tronstine, 64 Miss. 834, 2 So. 255.

Missouri.—Gray *v.* Missouri River Packet Co., 64 Mo. 47.

New Jersey.—Dudley *v.* Camden, etc.,

38. **When goods stolen.**—Fay *v.* New World, 1 Cal. 348.

But it is held that if such carrier enter upon the execution of the business intrusted to it, it is bound to use a degree of diligence and attention adequate to the performance of the undertaking.[39]

A private carrier is bound only to exercise reasonable care in respect to the goods,[40] but is liable for failure to use ordinary care.[41]

§§ 989-1010. Liability as Insurer—§ 989. General Rule.—The rule is that in the absence of contractual stipulations[42] a carrier is responsible as an insurer for the safety of the goods intrusted to it for transportation and is liable for any loss or damage thereto,[43] unless caused by the act of God,[44] or the public

Ferry Co., 42 N. J. L. 25, 36 Am. Rep. 501.

Tennessee.—Kirtland *v.* Montgomery, 51 Tenn. (1 Swan) 452; Jenkins *v.* Motlow, 33 Tenn. (1 Sneed) 248, 60 Am. Dec. 154; Coward *v.* East Tennessee, etc., R. Co., 84 Tenn. (16 Lea) 225.

Wisconsin.—Pierce *v.* Milwaukee, etc., R. Co., 23 Wis. 387.

Failure to provide means for extinguishing fire.—In an action to recover for loss of a trunk in defendant's baggage room, where it was placed without defendant's consent, failure of the defendant to provide suitable means for the extinguishment of fire was not of itself gross negligence, making defendant liable for the loss of the trunk by an accidental fire. Clark *v.* Eastern R. Co., 139 Mass. 423, 1 N. E. 128.

39. Kirtland *v.* Montgomery, 31 Tenn. (1 Swan) 452; Jenkins *v.* Motlow, 33 Tenn. (1 Sneed) 248, 60 Am. Dec. 154.

40. Private carrier.—Faucher *v.* Wilson, 68 N. H. 338, 38 Atl. 1002, 39 L. R. A. 431.

Ordinary care and diligence.—Samms *v.* Stewart, 20 O. 69, 55 Am. Dec. 445.

41. Jackson Architectural Iron Works *v.* Hurlbut, 158 N. Y. 34, 52 N. E. 665, 70 Am. St. Rep. 432, affirming 15 Misc. Rep. 93, 36 N. Y. S. 808.

42. See post, "Limitation of Liability," chapter 14.

Where gold dust is received for transportation, and the carrier delivers to the shipper a bill of lading which states that it is received at San Francisco, and that "on arrival at Panama the same is to be forwarded across the Isthmus, and to be reshipped by one of the United States Mail Steamship Company's ships to New York, * * * and to be delivered in like good order and condition at the port of New York, dangers of the seas (land carriage and river navigation, 'thieves, and robbers) excepted," and the gold dust is not delivered, the carrier's liable, unless he shows that he was prevented from delivering it by some of these causes. Simmons *v.* Law, 21 N. Y. Super. Ct. (8 Bosw.) 213, affirmed in (1866) 42 N. Y. (3 Keyes) 217, 4 Abb. Dec. 241.

43. Carrier liable as insurer.—*United States.*—Railroad Co. *v.* Varnell, 98 U. S. 479, 25 L. Ed. 233; Bank *v.* Adams Exp. Co., 93 U. S. 174, 23 L. Ed. 872; Burritt *v.* Rench, 4 McLean 325, Fed. Cas. No. 2201; Cincinnati, etc., R. Co. *v.* Fairbanks & Co., 33 C. C. A. 611, 90 Fed. 467; Hannibal Railroad *v.* Swift, 12 Wall. 262, 20 L. Ed. 423; Holladay *v.* Kennard, 12 Wall. 254, 20 L. Ed. 390; Myrick *v.* Michigan Cent. R. Co., 107 U. S. 102, 27 L. Ed. 325, 1 S. Ct. 425; New Jersey, etc., Nav. Co. *v.* Merchants' Bank, 6 How. 344, 12 L. Ed. 465; St. John *v.* Southern Exp. Co., Fed. Cas. No. 12228, 1 Woods 612; Saunders *v.* Southern R. Co., 62 C. C. A. 523, 128 Fed. 15, 11 R. R. R. 596, 34 Am. & Eng. R. Cas., N. S., 596; Strouss *v.* Wabash, etc., R. Co., 17 Fed. 209; The Commander-in-Chief, 1 Wall. 43, 17 L. Ed. 609; The Maggie Hammond, 9 Wall. 435, 19 L. Ed. 772; Niagara *v.* Cordes, 21 How. 7, 16 L. Ed. 41; The Snap, 28 Fed. 527; The Zenobia, Fed. Cas. No. 18209, Abb. Adm. 80; Tompkins *v.* Dutchess, Fed. Cas. No. 14,087a; York Co. *v.* Central R. Co., 3 Wall. 107, 18 L. Ed. 170; Inman & Co. *v.* Seaboard, etc., R. Co., 159 Fed. 960.

Alabama.—East Tennessee, etc., R. Co. *v.* Johnston, 75 Ala. 596, 51 Am. Rep. 489, 22 Am. & Eng. R. Cas. 437; Jones *v.* Pitcher & Co., 3 Stew. & P. 135, 24 Am. Dec. 716; Knox *v.* Rives, etc., Co., 14 Ala. 249, 48 Am. Dec. 97; Louisville, etc., R. Co. *v.* Cowherd, 120 Ala. 51, 23 So. 793; Selma, etc., R. Co. *v.* Butts, 43 Ala. 385, 94 Am. Dec. 694; South, etc., R. Co. *v.* Henlein, 52 Ala. 606, 23 Am. Rep. 578; South, etc., R. Co. *v.* Wood, 66 Ala. 167, 41 Am. Rep. 749, 9 Am. & Eng. R. Cas. 419; Southern R. Co. *v.* Levy, 144 Ala. 614, 17 R. R. R. 50, 40 Am. & Eng. R. Cas., N. S., 50, 39 So. 95; Tallassee Falls Mfg. Co. *v.* Western Railway, 128 Ala. 167, 29 So. 203.

Arkansas.—Fordyce *v.* McFlynn, 56 Ark. 424, 19 S. W. 961; Kansas City, etc., R. Co. *v.* Barnett, 69 Ark. 150, 61 S. W. 919; Little Rock, etc., R. Co. *v.* Talbot, 47 Ark. 97, 14 S. W. 471; Packard *v.* Taylor, etc., Co., 35 Ark. 402, 37 Am. Rep. 37; Missouri Pac. R. Co. *v.* Nevill, 60 Ark. 375, 30 S. W. 425, 28 L. R. A. 80, 46 Am. St. Rep. 208; St. Louis, etc., Railway *v.* Lesser, 46 Ark. 236.

California.—Agnew *v.* Steamer Contra

44. Act of God.—See post, "Act of God," §§ 990-994.

Costa, 27 Cal. 425, 87 Am. Dec. 87; Bohannan *v.* Hammond, 42 Cal. 227; Hooper *v.* Wells, Fargo & Co., 27 Cal. 11, 85 Am. Dec. 211; Jackson *v.* Sacramento Val. R. Co., 23 Cal. 268; Scammon *v.* Wells Fargo & Co., 84 Cal. 311, 24 Pac. 284.

Connecticut.—Clark *v.* Richards, 1 Conn. 54; Hale *v.* New Jersey Steam Nav. Co., 15 Conn. 539, 39 Am. Dec. 398; Richards *v.* Gilbert, 5 Day 415; Williams *v.* Grant, 1 Conn. 487, 7 Am. Dec. 235.

Delaware.—Culbreth *v.* Philadelphia, etc., R. Co., 3 Houst. 392; Klair *v.* Wilmington Steamboat Co., 4 Pen. 51, 7 R. R. R. 821, 30 Am. & Eng. R. Cas., N. S., 821, 54 Atl. 694; Pennewill *v.* Cullen, 5 Har. 238; Reed *v.* Wilmington Steamboat Co., 1 Marv. 193, 40 Atl. 955, 1 Hardesty 127; Truax *v.* Philadelphia, etc., R. Co., 3 Houst. 233; Carpenter *v.* Baltimore, etc., R. Co., 6 Pen. 15, 64 Atl. 252.

Florida.—Clyde Steamship Co. *v.* Burrows, 36 Fla. 121, 18 So. 349.

Georgia.—Louisville, etc., R. Co. *v.* Warfield, 129 Ga. 473, 59 S. E. 234; Savannah, etc., R. Co. *v.* Wilcox, etc., Co., 48 Ga. 432; Ohlen *v.* Atlanta, etc., R. Co., 2 Ga. App. 323, 58 S. E. 511; Southern Exp. Co. *v.* Shea, 38 Ga. 519; Southern Exp. Co. *v.* Palmer, 48 Ga. 85; Southern Exp. Co. *v.* Purcell, 37 Ga. 103, 92 Am. Dec. 53; Central R., etc., Co. *v.* Hines, etc., Co., 19 Ga. 203; Central, etc., R. Co. *v.* Lippman, 110 Ga. 665, 36 S. E. 202, 50 L. R. A. 673; Cooper *v.* Berry, 21 Ga. 526, 68 Am. Dec. 468; Cooper *v.* Raleigh, etc., R. Co., 18 Am. & Eng. R. Cas., N. S., 412, 110 Ga. 659, 36 S. E. 240; Dibble *v.* Brown, 12 Ga. 217, 56 Am. Dec. 460; Fish *v.* Chapman, 2 Ga. 349, 46 Am. Dec. 393; Georgia R. Co. *v.* Beatie, 66 Ga. 438, 42 Am. Rep. 75; Georgia R. Co. *v.* Spears, 66 Ga. 485, 42 Am. Rep. 81; Southern Exp. Co. *v.* Newby, 36 Ga. 635, 91 Am. Dec. 783.

By Civil Code, § 2264, the same liability in effect is imposed upon a common carrier as at common law. Cooper *v.* Raleigh, etc., R. Co., 110 Ga. 659, 36 S. E. 240, 18 Am. & Eng. R. Cas., N. S., 412; Louisville, etc., R. Co. *v.* Warfield, 129 Ga. 473, 59 S. E. 234.

Illinois.—Chicago, etc., R. Co. *v.* People, 56 Ill. 365, 8 Am. Rep. 690; Chicago, etc., R. Co. *v.* Sawyer, 69 Ill. 285; Chicago, etc., R. Co. *v.* Shea, 66 Ill. 471; Coles *v.* Louisville, etc., R. Co., 41 Ill. App. 607; Gulliver *v.* Adams Exp. Co., 38 Ill. 503; Illinois Cent. R. Co. *v.* Frankenberg, 54 Ill. 88, 5 Am. Rep. 92; Illinois Cent. R. Co. *v.* McClellan, 54 Ill. 58, 5 Am. Rep. 83; Merchants' Despatch Transp. Co. *v.* Chicago, etc., R. Co., 1 Ill. App. 399; Peoria, etc., R. Co. *v.* United States, etc., Co., 136 Ill. 643, 27 N. E. 59, 29 Am. St. Rep. 348; Porter *v.* Chicago, etc., R. Co., 20 Ill. 407, 71 Am. Dec. 286; United States Exp. Co. *v.* Hutchins, 67 Ill. 348; Western Transp. Co. *v.* Newhall, 24 Ill. 466, 76 Am. Dec. 760; Woods *v.* Devin, 13 Ill. 746; Pittsburg, etc., R. Co. *v.* Chicago, 242 Ill. 178, 89 N. E. 1022, 44 L. R. A., N. S., 358.

Indiana.—Adams Exp. Co. *v.* Darnell, 31 Ind. 20, 99 Am. Dec. 582; Bansemer *v.* Toledo, etc., R. Co., 25 Ind. 434, 87 Am. Dec. 367; Chicago, etc., R. Co. *v.* Woodward, 164 Ind. 360, 17 R. R. R. 7, 40 Am. & Eng. R. Cas., N. S., 7, 72 N. E. 558; Louisville, etc., R. Co. *v.* Nicholai, 4 Ind. App. 119, 30 N. E. 424; Pittsburg, etc., R. Co. *v.* Hollowell, 65 Ind. 188, 32 Am. Rep. 63; Powers *v.* Davenport, 7 Blackf. 497, 43 Am. Dec. 100; Simpson *v.* Dufour, 126 Ind. 322, 26 N. E. 69, 22 Am. St. Rep. 590; Toledo, etc., R. Co. *v.* Tapp, 6 Ind. App. 304, 33 N. E. 462; Cleveland, etc., R. Co. *v.* Henry, 170 Ind. 94, 83 N. E. 710, reversing 80 N. E. 636.

Iowa.—Hart *v.* Chicago, etc., R. Co., 69 Iowa 485, 29 N. W. 597, 27 Am. & Eng. R. Cas. 59; McCoy *v.* Keokuk, etc., R. Co., 44 Iowa 424; Swiney *v.* American Exp. Co. (Iowa) 115 N. W. 212; Gilbert Bros. *v.* Chicago, etc., R. Co. (Iowa) 136 N. W. 911; Cownie Glove Co. *v.* Merchants' Dispatch Transp. Co., 130 Iowa 327, 106 N. W. 749, 114 Am. St. Rep. 419, 4 L. R. A., N. S., 1060.

Kansas.—Kansas City, etc., R. Co. *v.* Patten, 3 Kan. App. 338, 45 Pac. 108; Kansas Pac. R. Co. *v.* Nichols, etc., Co., 9 Kan. 235, 12 Am. Rep. 494; Kansas Pac. R. Co. *v.* Reynolds, 8 Kan. 623; St. Louis, etc., R. Co. *v.* Sherlock, 59 Kan. 23, 51 Pac. 899; Watkins Merchandise Co. *v.* Missouri, etc., R. Co., 108 Pac. 116, 82 Kan. 308; Stiles *v.* Louisville, etc., R. Co., 33 Ky. Rep. 625, 110 S. W. 820.

Kentucky.—Bland *v.* Adams Exp. Co., 1 Duv. 232, 85 Am. Dec. 623; Cincinnati, etc., R. Co. *v.* Webb, 103 Ky. 705, 46 S. W. 11; Farley *v.* Lavary, 107 Ky. 523, 21 Ky. L. Rep. 1252, 54 S. W. 840, 47 L. R. A. 383; Hall & Co. *v.* Renfro, 3 Metc. 51; Robertson & Co. *v.* Kennedy, 2 Dana 430, 26 Am. Dec. 466; Chesapeake, etc., R. Co. *v.* Hall, 136 Ky. 379, 124 S. W. 372; Lewis *v.* Louisville, etc., R. Co., 135 Ky. 361, 122 S. W. 184, 25 L. R. A., N. S., 938, 21 Am. & Eng. Ann. Cas. 527.

Louisiana.—Berje *v.* Texas, etc., R. Co., 37 La. Ann. 468; Cranwell *v.* The Fanny Fosdick, 15 La. Ann. 436, 77 Am. Dec. 190; DeVillers *v.* Schooner John Bell, 6 La. Ann. 544; Hunt *v.* Morris, 6 Mart., O. S., 676, 12 Am. Dec. 489; Thomas *v.* Morning Glory, 13 La. Ann. 269, 71 Am. Dec. 509; Van Hern *v.* Taylor, 7 Rob. 201, 41 Am. Dec. 279.

Maine.—Emery *v.* Hersey, 4 Greenl. 407, 16 Am. Dec. 268; Fillebrown *v.* Grand Trunk R. Co., 55 Me. 462, 92 Am. Dec. 606; Parker *v.* Flagg, 26 Me. 181, 45 Am. Dec. 101; Sager *v.* Portsmouth, etc., R. Co., 31 Me. 228, 50 Am. Dec. 659; Wood *v.* Maine Cent. R. Co., 98 Me. 98, 56 Atl. 457, 9 R. R. R. 721, 32 Am. &

Eng. R. Cas., N. S., 721, 99 Am. St. Rep. 339.

Maryland.—Boyle *v.* McLaughlin, 4 Har. & J. 291; Fergusson *v.* Brent, 12 Md. 9, 71 Am. Dec. 582.

Massachusetts.—Claflin *v.* Boston, etc., R. Co., 7 Allen 341; Evans *v.* Fitchburg R. Co., 111 Mass. 142, 15 Am. Rep. 19; Gage *v.* Tirrell, 9 Allen 299; Hastings *v.* Pepper, 11 Pick. 41; Smith *v.* New Haven, etc., R. Co., 12 Allen 531; Swetland *v.* Boston, etc., R. Co., 102 Mass. 276.

Michigan.—Heller *v.* Chicago, etc., R. Co., 109 Mich. 53, 66 N. W. 667, 63 Am. St. Rep. 541; Black *v.* Ashley, 80 Mich. 90, 44 N. W. 1120.

Minnesota.—Christenson *v.* American Exp. Co., 15 Minn. 270, Gil. 208, 2 Am. Rep. 122; Lindsley *v.* Chicago, etc., R. Co., 36 Minn. 539, 33 N. W. 7, 1 Am. St. Rep. 692; Moulton *v.* St. Paul, etc., R. Co., 31 Minn. 85, 16 N. W. 497, 47 Am. Rep. 781.

Mississippi.—Bennett *v.* Byram & Co., 38 Miss. 17, 75 Am. Dec. 90; Gilmore *v.* Carman, 1 Smedes & M. 279, 40 Am. Dec. 96; Mobile, etc., R. Co. *v.* Weiner, 49 Miss. 725; Neal *v.* Saunderson, 2 Smedes & M. 572, 41 Am. Dec. 609; Powell *v.* Mills, 30 Miss. 231, 64 Am. Dec. 158; Southern Exp. Co. *v.* Moon, 39 Miss. 822; Whitesides *v.* Thurlkill, 12 Smedes & M. 599, 51 Am. Dec. 128.

Missouri.—Costigan *v.* Michael Transp. Co., 33 Mo. App. 269; Daggett *v.* Shaw, 3 Mo. 264, 25 Am. Dec. 439; Davis *v.* Wabash, etc., R. Co., 89 Mo. 340, 1 S. E. 327; Doan *v.* St. Louis, etc., Co., 38 Mo. App. 408; Hill *v.* Sturgeon, 28 Mo. 323; Leonard *v.* Chicago, etc., R. Co., 54 Mo. App. 293; Lupe *v.* Atlantic, etc., R. Co., 3 Mo. App. 77; Read *v.* St. Louis, etc., R. Co., 60 Mo. 199; Wolf *v.* American Exp. Co., 43 Mo. 421, 97 Am. Dec. 406.

Nebraska.—Black *v.* Chicago, etc., R. Co., 30 Neb. 197, 46 N. W. 428; Chicago, etc., R. Co. *v.* Manning, 23 Neb. 552, 37 N. W. 462; Ringwalt *v.* Wabash R. Co., 45 Neb. 760, 64 N. W. 219; Wabash R. Co. *v.* Sharpe, 76 Neb. 424, 107 N. W. 758, 124 Am. St. Rep. 823; Sunderland Bros. Co. *v.* Chicago, etc., R. Co., 89 Neb. 660, 131 N. W. 1047.

New Hampshire.—Moses *v.* Boston, etc., R. Co., 24 N. H. 71, 55 Am. Dec. 222; Moses *v.* Norris, 4 N. H. 304; Rixford *v.* Smith, 52 N. H. 355, 13 Am. Rep. 42.

New Jersey.—Mershon *v.* Hobensack, 22 N. J. L. 372; New Brunswick, etc., Co. *v.* Tiers, 24 N. J. L. 697, 64 Am. Dec. 394.

New York.—Adams *v.* New Jersey Steamboat Co., 151 N. Y. 163, 45 N. E. 369, 34 L. R. A. 682, 56 Am. St. Rep. 616; Allen *v.* Sewall, 2 Wend. 327; Ames *v.* Astor, 6 Cow. 266; Colt *v.* McMechen, 6 Johns. 160, 5 Am. Dec. 200; Conger *v.* Hudson River R. Co., 13 N. Y. Super. Ct. 375; Cragin *v.* New York Cent. R. Co., 51 N. Y. 61, 10 Am. Rep. 559; DeMott *v.* Laraway, 14 Wend. 225, 28 Am. Dec. 523; Howe *v.* Oswego, etc., R. Co., 56 Barb. 121; Jackson Architectural Iron Works *v.* Hurlbut, 158 N. Y. 34, 52 N. E. 665, 70 Am. St. Rep. 432; Kemp *v.* Coughtry, 11 Johns. 107; McArthur *v.* Sears, 21 Wend. 190; McKinney *v.* Jewett, 90 N. Y. 267, 9 Am. & Eng. R. Cas. 209; Mallory *v.* Tioga R. Co., 39 Barb. 488; Merrill *v.* Grinnell, 30 N. Y. 594; Merritt *v.* Earle, 31 Barb. 38, affirmed in 29 N. Y. 115, 86 Am. Dec. 292; Michaels *v.* New York Cent. R. Co., 30 N. Y. 564, 86 Am. Dec. 415; Miller *v.* Steam Nav. Co., 10 N. Y., 431, Seld. Notes 64; Park *v.* Preston, 108 N. Y. 434, 15 N. E. 705; Parsons *v.* Hardy, 14 Wend. 215, 28 Am. Dec. 521; Penn *v.* Buffalo, etc., R. Co., 49 N. Y. 204, N. Y. S. 577, 34 N. Y. St. Rep. 695; 10 Am. Rep. 355; Robinson *v.* Cornish, 13 Schieffelin *v.* Harvey, 6 Johns. 170, 5 Am. Dec. 206; Sherman *v.* Wells, 28 Barb. 403; Waldron *v.* Fargo, 170 N. Y. 130, 62 N. E. 1077.

North Carolina.—Backhouse *v.* Sneed, 5 N. C. 173; Boner *v.* Merchants' Steamboat Co., 46 N. C. 211; Harrell *v.* Owens, 18 N. C. 273; Patterson *v.* North Carolina R. Co., 64 N. C. 147; Thomas *v.* Southern R. Co., 131 N. C. 590, 42 S. E. 543, 6 R. R. R. 860, 29 Am. & Eng. R. Cas., N. S., 860.

North Dakota.—Duncan *v.* Great Northern R. Co., 17 N. Dak. 610, 118 N. W. 826, 19 L. R. A., N. S., 952.

Ohio.—Minnesota Min. Co. *v.* Chapman, 2 West. L. M. 75, 2 O. Dec. Reprint 207; Toledo, etc., R. Co. *v.* Ambach, 10 O. C. C. 490, 6 O. C. D. 574, affirmed in 57 O. St. 38, 47 N. E. 1039; Welsh *v.* Pittsburgh, etc., R. Co., 10 O. St. 65, 75 Am. Dec. 490; Wilson *v.* Hamilton, 4 O. St. 722; Lawrence *v.* McGregor (O.), Wright 193; Long *v.* Louisville, etc., Packet Co., 7 N. P., N. S., 14, 18 O. D. N. P. 699; McGregor & Co. *v.* Kilgore, 6 O. 358; Canal Boat Montgomery *v.* Kent, 20 O. 54; Railroad Co. *v.* O'Donnell, 49 O. St. 489, 32 N. E. 476; Transfer Co. *v.* Kelly, 36 O. St. 86, 38 Am. Rep. 558; Davidson *v.* Graham, 2 O. St. 131.

Oregon.—Oakes *v.* Northern Pac. R. Co., 20 Ore. 392, 26 Pac. 230, 12 L. R. A. 318, 23 Am. St. Rep. 126; Lacey *v.* Oregon R., etc., Co. (Ore.), 128 Pac. 999.

Pennsylvania.—American Exp. Co. *v.* Second Nat. Bank, 69 Pa. 394, 8 Am. Rep. 268; Beckham *v.* Shouse, 5 Rawle 179, 28 Am. Dec. 653; Eagle *v.* White, 6 Whart. 505, 37 Am. Dec. 434; Harrington *v.* M'Shane, 2 Watts 443, 27 Am. Dec. 321; Hart *v.* Allen, 2 Watts 114; Hays *v.* Kennedy, 41 Pa. 378, 80 Am. Dec. 627; Leonard *v.* Hendrickson, 18 Pa. 40, 55 Am. Dec. 587; Simpson *v.* Hand, 6 Whart. 311, 36 Am. Dec. 231; Verner *v.* Sweitzer, 32 Pa. 208; Willock *v.* Penn-

sylvania R. Co., 166 Pa. 184, 30 Atl. 948, 27 L. R. A. 228, 45 Am. St. Rep. 674; Gordon *v.* Little, 8 Serg. & R. 533, 11 Am. Dec. 632.

South Carolina.—Campbell *v.* Morse, Harp. 468; Charleston, etc., Steamboat Co. *v.* Bason, Harp. 262; Cook *v.* Gourdin, 2 Nott & McC. 19; Everleigh *v.* Sylvester, 2 Brev. 178; Ewart *v.* Street, 2 Bailey 157, 23 Am. Dec. 131; Harrington *v.* Lyles, 2 Nott & McC. 88; M'Call *v.* Brock, 5 Strob. 119; McClures *v.* Hammond, 1 Bay 99, 1 Am. Dec. 598; Patton *v.* Magrath, Dud. 159, 31 Am. Dec. 552; Porcher *v.* Northeastern R. Co., 14 Rich. L. 181; Reaves *v.* Waterman, 2 Speers 197, 42 Am. Dec. 364; Singleton *v.* Hilliard, 1 Strob. 203; Slater *v.* South Carolina R. Co., 29 S. C. 96, 6 S. E. 936; Smyrl *v.* Niolon, 2 Bailey 421, 23 Am. Dec. 146.

Tennessee.—Baker *v.* Louisville, etc., R. Co., 10 Lea 304, 16 Am. & Eng. R. Cas. 149; Nashville, etc., R. Co. *v.* Jackson, 53 Tenn. (6 Heisk.) 271; Craig *v.* Childress, 7 Tenn. (Peck) 270, 14 Am. Dec. 751; Jones *v.* Walker, 13 Tenn. (5 Yerg.) 427; Lewis & Co. *v.* Ludwick, 46 Tenn. (6 Coldw.) 368, 98 Am. Dec. 454; Louisville, etc., R. Co. *v.* Katzenberger, 84 Tenn. (16 Lea) 380, 1 S. W. 44, 57 Am. Rep. 232; Nashville, etc., R. Co. *v.* David, 53 Tenn. (6 Heisk.) 261, 19 Am. Rep. 594; Nashville, etc., R. Co. *v.* Lillie, 112 Tenn. 331, 78 S. W. 1055, 105 Am. St. Rep. 947; Nashville, etc., R. Co. *v.* Stone, 112 Tenn. 348, 79 S. W. 1031, 105 Am. St. Rep. 955; Southern Exp. Co. *v.* Womack, 48 Tenn. (1 Heisk.) 256; Turney *v.* Wilson, 15 Tenn. (7 Yerg.) 340, 27 Am. Dec. 515; Watson *v.* Memphis, etc., R. Co., 56 Tenn. (9 Heisk.) 255.

Texas.—Arnold *v.* Jones, 26 Tex. 335, 82 Am. Dec. 617; Chevallier *v.* Straham, 2 Tex. 115, 47 Am. Dec. 639; Gulf, etc., R. Co. *v.* Ellison, 70 Tex. 491, 7 S. W. 785; Gulf, etc., R. Co. *v.* Levi, 12 S. W. 677; International, etc., R. Co. *v.* Bergman (Tex. Civ. App.), 64 S. W. 999; Houston, etc., Nav. Co. *v.* Dwyer, 29 Tex. 376; Philleo *v.* Sanford, 17 Tex. 227, 67 Am. Dec. 654; Texas, etc., R. Co. *v.* Turner (Tex. Civ. App.), 37 S. W. 643; Pacific Exp. Co. *v.* Hertzberg, 17 Tex. Civ. App. 100, 42 S. W. 795; Gulf, etc., R. Co. *v.* Roberts (Tex. Civ. App.), 85 S. W. 479; Texas, etc., R. Co. *v.* Felker, 40 Tex. Civ. App. 604, 90 S. W. 530; International, etc., R. Co. *v.* Halloren, 53 Tex. 46, 37 Am. Rep. 744; Gulf, etc., R. Co. *v.* Browne, 27 Tex. Civ. App. 437, 66 S. W. 341; Houston, etc., R. Co. *v.* Burke, 55 Tex. 323, 9 Am. & Eng. R. Cas. 59; Williamson & Co. *v.* Texas, etc., R. Co. (Tex. Civ. App.), 138 S. W. 807; Texas, etc., R. Co. *v.* Nicholson, 61 Tex. 491; British, etc., Ins. Co. *v.* Gulf, etc., R. Co., 63 Tex. 475, 51 Am. Rep. 661; Gulf, etc., R. Co. *v.* Trawick, 68 Tex. 314, 4 S. W. 567; Gulf, etc., R. Co. *v.* Levi, 76 Tex. 337, 13 S. W. 191; Gulf, etc., R. Co. *v.* McCorquodale, 71 Tex. 41, 9 S. W. 80; International, etc., R. Co. *v.* Wentworth, 8 Tex. Civ. App. 5, 27 S. W. 680, affirmed in 87 Tex. 311; Texas Cent. R. Co. *v.* Hunter & Co., 47 Tex. Civ. App. 190, 104 S. W. 1075; Abbott Gin Co. *v.* Missouri, etc., R. Co., 57 Tex. Civ. App. 263, 122 S. W. 284.

The Texas statute maintains the common-law liability of the carrier. See Rev. St. art. 278, Missouri Pac. R. Co. *v.* Harris, 1 Texas App. Civ. Cas., § 1257; Texas, etc., R. Co. *v.* Nicholson, 61 Tex. 491.

Vermont.—Blumenthal *v.* Brainerd, 38 Vt. 402, 91 Am. Dec. 350; Day, etc., Co. *v.* Ridley, 16 Vt. 48, 42 Am. Dec. 489.

Virginia.—Farish & Co. *v.* Reigle, 52 Va. (11 Gratt.) 697, 62 Am. Dec. 666; Friend *v.* Woods, 47 Va. (6 Gratt.) 189, 52 Am. Dec. 119; Herring *v.* Chesapeake, etc., R. Co., 9 R. R. R. 262, 32 Am. & Eng. R. Cas., N. S., 262, 45 S. E. 322, 101 Va. 778; Murphy, etc., Co. *v.* Staton, 17 Va. (3 Munf.) 239; Chesapeake, etc., R. Co. *v.* Beasley, etc., Co., 104 Va. 788, 790, 52 S. E. 566, 3 L. R. A., N. S., 183.

Under the Virginia statute the liability of an initial carrier of goods with respect to acts done on its own line, remains as at common law. Section 1294, c. 24, Code, 1904. Chesapeake, etc., R. Co. *v.* Pew, 109 Va. 285, 64 S. E. 35.

West Virginia.—Baltimore, etc., R. Co. *v.* Morehead, 5 W. Va. 293; McGraw *v.* Baltimore, etc., R. Co., 18 W. Va. 361, 41 Am. Rep. 696, 9 Am. & Eng. R. Cas. 188; Hurley & Son *v.* Norfolk, etc., R. Co., 68 W. Va. 471, 69 S. E. 904; Hutchinson *v.* United States Exp. Co., 63 W. Va. 128, 59 S. E. 949, 14 L. R. A., N. S., 393.

Wisconsin.—Goldberg *v.* Ahnapee, etc., R. Co., 105 Wis. 1, 80 N. W. 920, 47 L. R. A. 221, 76 Am. St. Rep. 899; Klauber *v.* American Exp. Co., 21 Wis. 21, 91 Am. Dec. 452; Strohn *v.* Detroit, etc., R. Co., 23 Wis. 126, 99 Am. Dec. 114; Wood *v.* Crocker, 18 Wis. 345, 86 Am. Dec. 773.

Wyoming.—Oregon, etc., R. Co. *v.* Blyth, 9 Wyo. 410, 118 Pac. 649, 119 Pac. 875, Ann. Cas. 1913 E, 288.

England.—Coggs *v.* Bernard, 2 Ld. Raym. (Eng.) 909; Culver *v.* Lester, 32 Can. L. J. (Eng.) 421; Foward *v.* Pitland, 1 D. & E. (Eng.) 27; Hill *v.* Scott, 2 Q. B. 371, 713; Nugent *v.* Smith, 1 C. P. Div. 423; Portsmouth, etc., Steampacket Co. (Eng.), 11 Exch. 618; Riley *v.* Horne, 5 Bing. (Eng.) 217; Trent, etc., Nav. Co. *v.* Wood, 4 Doug. (Eng.) 287.

"The liabilities of a common carrier may be distinguished into two distinct classes, according to their nature: the one, a liability for losses by neglect on the part of the carrier or his agents which is the liability of a bailee, arising from omission of duty; the other, a liability for losses by accident, mistake, or other unavoidable occurrence, with-

enemy,[45] the fault of the shipper,[46] inherent infirmities of the goods,[47] or, by an act of public authority.[48] So, where freight is lost or damaged while in the possession of a carrier, it can not escape its common-law responsibility by merely proving that the loss or damage was not occasioned by its negligence,[49] or that it has used the utmost care and diligence.[50] Carriers of goods being insurers are not relieved from liability by the fact that the loss or damage happened from some unknown cause,[51] or could not have been avoided by any human vigilance.[52]

Origin and Foundation of Rule.—The rule imposing such high responsibility upon a carrier of goods grew out of a situation which required that kind of

out any actual fault on the part of the carrier, which is the liability of an insurer, and founded upon a principle of the common law." Davidson *v.* Graham, 2 O. St. 131, followed in Graham & Co. *v.* Davis & Co., 4 O. St. 362, 375.

Liability similar to, but not strictly that of insurer.—"A carrier is not an insurer, though often loosely so called. The extent of his responsibility may be equal to that of an insurer, and even greater, but its nature is not the same. His contract is not one for indemnity, independent of the care and custody of the goods. He is not entitled to a cession of the remains of the property, or to have the loss adjusted on principles peculiar to the contract of insurance; and when a loss occurs, unless caused by the act of God, or of a public enemy, he is always in fault." Hall *v.* Railroad Cos. (U. S.), 13 Wall. 367, 20 L. Ed. 594.

Rule should not be applied to new cases.—In Boyce *v.* Anderson (U. S.), 2 Pet. 150, 7 L. Ed. 379, cited in Chicago, etc., R. Co. *v.* Zernecke, 183 U. S. 582, 46 L. Ed. 339, 22 S. Ct. 229, it was said that the law applicable to common carriers of goods is one of great rigor and should not be applied to new cases, and the court refused to treat slaves as goods and chattels, but regarded them as passengers.

Doctrine not to be overturned by courts.—The general doctrines respecting the liability of common carriers are as clearly and firmly settled by the uninterrupted current of decisions in the English and American courts as any principles of the law can be; they are not to be overturned or shaken by anything short of legislative enactment. Philleo *v.* Sanford, 17 Tex. 227, 67 Am. Dec. 654.

45. Act of public enemy.—See post, "Act of Public Enemy," §§ 995-997.

46. Fault of shipper or owner.—See post, "Fault of Shipper or Owner," §§ 998-1002.

47. Inherent infirmities of goods.—See post, "Inherent Infirmities of Goods," § 1003.

48. Act of public authority.—Duncan *v.* Great Northern R. Co., 17 N. Dak. 610, 118 N. W. 826, 19 L. R. A., N. S., 952. See post, "Acts or Mandate of Public Authority," § 1004.

49. Absence of negligence.—*Delaware.*—Klair *v.* Wilmington Steamboat Co. (Del.), 4 Pen. 51, 7 R. R. R. 821, 30 Am. & Eng. R. Cas., N. S., 821, 54 Atl. 694.

Illinois.—Pennsylvania Co. *v.* Canadian Pac. R. Co., 107 Ill. App. 386; Porter *v.* Chicago, etc., R. Co., 20 Ill. 407, 71 Am. Dec. 286.

Missouri.—Davis *v.* Wabash, etc., R. Co., 89 Mo. 340, 1 S. W. 327; Hill *v.* Sturgeon, 28 Mo. 323.

New Jersey.—Mershon *v.* Hobensack, 22 N. J. L. 372.

New York.—Howe *v.* Oswego, etc., R. Co., 56 Barb. 121; Ladue *v.* Griffith, 25 N. Y. 364, 82 Am. Dec. 360; McArthur *v.* Sears, 21 Wend. 190; Merritt *v.* Earle, 31 Barb. 38, affirmed in 29 N. Y. 115, 86 Am. Dec. 292; Miller *v.* Steam Nav. Co., 10 N. Y. 431, Seld. Notes 64.

Oregon.—Oakes *v.* Northern Pac. R. Co., 20 Ore. 392, 26 Pac. 230, 12 L. R. A. 318, 23 Am. St. Rep. 126.

Pennsylvania.—Harrington *v.* M'Shane, 2 Watts 443, 27 Am. Dec. 321; Verner *v.* Sweitzer, 32 Pa. 208.

South Carolina.—Ewart *v.* Street, 2 Bailey 157, 23 Am. Dec. 131; McCall *v.* Brock, 5 Strob. 119.

Texas.—Texas, etc., R. Co. *v.* Turner (Tex. Civ. App.), 37 S. W. 643.

Virginia.—Murphy, etc., Co. *v.* Staton, 17 Va. (3 Munf.) 239.

50. *California.*—Agnew *v.* Steamer Contra Costa, 27 Cal. 425, 87 Am. Dec. 87.

Georgia.—Richmond, etc., R. Co. *v.* White, 88 Ga. 805, 15 S. E. 802; Ohlen *v.* Atlanta, etc., R. Co., 2 Ga. App. 323, 58 S. E. 511.

New York.—McArthur *v.* Sears (N. Y.), 21 Wend. 190.

Ohio.—Union Mut. Ins. Co. *v.* Indianapolis, etc., R. Co., 1 Disn. 480, 12 O. Dec. 745.

South Carolina.—McCall *v.* Brock (S. C.), 5 Strob. 119; Ewart *v.* Street (S. C.), 2 Bailey 157, 23 Am. Dec. 131.

51. Cause of loss or damage unknown.—Turney *v.* Wilson, 15 Tenn. (7 Yerg.) 340, 27 Am. Dec. 515.

52. Loss unavoidable by human vigilance.—Albright *v.* Penn, 14 Tex. 290.

"No force, however great, no accident however inevitable, no fraud however beyond his control, will excuse him." Chevallier *v.* Straham, 2 Tex. 115, 47 Am. Dec. 639.

security for the protection of the public;[53] and is founded upon public policy,[54] arising from the public nature of the carrier's employment,[55] and the extensive control it exercises over the property of others.[56]

Goods Addressed to Carrier or Agent as Consignee.—The liability of the carrier is not lessened by the fact that the goods were addressed to carrier or its agent as consignee.[57]

Effect of Custom.—The liability of a common carrier can not be altered by evidence of a custom, universally known and recognized in the particular river trade, by which the carrier was exempted from liability for loss, unless it proceeded from negligence or dishonesty on its part.[58]

The Carmack amendment to the Interstate Commerce Act imposed a liability for some default in the carrier's common-law duty as a common carrier, and not liability as an insurer.[59]

§§ 990-1004. Exceptions and Excuses—§§ 990-994. Act of God—§ 990. In General.—The authorities all agree that the carrier is not an insurer in respect to what is called an act of God.[60] And it is not liable for losses result-

53. **Origin of rule.**—Atlantic, etc., R. Co. *v.* Riverside Mills, 219 U. S. 186, 55 L. Ed. 167, 31 S. Ct. 164, 31 L. R. A., N. S., 7.

The rule was not a part of the ancient common law. It had its origin in what was supposed to be the commercial necessities of England at a time when the government afforded imperfect protection to goods in transit, and when robberies were of frequent occurrence. It was first recognized and received its first judicial announcement as a principle of law in the Woodliefe and Curtis case, decided in the thirty-eighth year of the reign of Elizabeth. Gulf, etc., R. Co. *v.* Gatewood, 79 Tex. 89, 14 S. W. 913; Van Santvoord *v.* St. John (N. Y.), 6 Hill 157.

54. **Foundation of rule.**—"The rule is intended as a guard against fraud and collusion, and is founded on the same broad principles of public policy and convenience which govern in the case of innkeepers. This principle of extraordinary responsibility was taken from the edict of the prætor in the Roman law, and it has insinuated itself into the jurisprudence of all the civilized nations of Europe." 2 Kent. 805, 9th Ed. Sword *v.* Young, 89 Tenn. 126, 14 S. W. 481, 604, quoting 2 Kent. (9th Ed.) 805.

"This rule is a politic establishment contrived by the policy of the law for the safety of all persons, the necessity of whose affairs oblige them to trust these sort of persons that they may be safe in their ways of dealing." Lord Holt, in Coggs *v.* Bernard, 2 Ld. Raymond, 909, quoted in Atlantic, etc., R. Co. *v.* Riverside Mills, 219 U. S. 186, 55 L. Ed. 167, 31 S. Ct. 164, 31 L. R. A., N. S., 7; Chicago, etc., R. Co. *v.* Zernecke, 183 U. S. 582, 46 L. Ed. 339, 22 S. Ct. 229; Chevallier *v.* Straham, 2 Tex. 115, 47 Am. Dec. 639.

Should not be departed from.—The old rule that a common carrier is answerable for all losses not occasioned by act of God or the public enemy is founded alike in justice and in sound policy, and ought never to be departed from. Arnold *v.* Jones, 26 Tex. 335, 82 Am. Dec. 617.

55. Hannibal Railroad *v.* Swift (U. S.), 12 Wall. 262, 20 L. Ed. 423; Galt *v.* Adams Exp. Co. (D. C.), McArthur & M. 124, 48 Am. Rep. 742; Samms *v.* Stewart, 20 O. 69, 55 Am. Dec. 445.

56. Davidson *v.* Graham, 2 O. St. 131, followed in Graham & Co. *v.* Davis & Co., 4 O. St. 362, 375.

57. **Goods addressed to carrier as consignee.**—Bennett *v.* Northern, etc., Co., 12 Ore. 49, 6 Pac. 160.

58. **Effect of custom.**—Turney *v.* Wilson, 15 Tenn. (7 Yerg.) 340, 27 Am. Dec. 515.

59. **Carmack amendment** of June 29, 1906, to the act of February 4, 1887, § 20 under which a carrier receiving property for interstate transportation is required to issue a receipt or bill of lading therefor, and is made liable to the holder for "any loss, damage, or injury to such property caused by it," or by any connecting carrier to whom the property may be delivered. Adams Exp. Co. *v.* Croninger, 226 U. S. 491, 57 L. Ed. 314, 33 S. Ct. 148, 44 L. R. A., N. S., 257; Chicago, etc., R. Co. *v.* Latta, 33 S. Ct. 155, 226 U. S. 519, 57 L. Ed. 328, reversing judgments Latta *v.* Chicago, etc., R. Co., 172 Fed. 850, 97 C. C. A. 198, and Chicago, etc., R. Co. *v.* Latta, 184 Fed. 987, 106 C. C. A. 664.

60. **Act of God relieves carrier.**—*United States.*—Bank *v.* Adams Exp. Co., 93 U. S. 174, 23 L. Ed. 872; New Jersey, etc., Nav. Co. *v.* Merchants' Bank (U. S.), 6 How. 344, 12 L. Ed. 465; Pearce *v.* Newton, 41 Fed. 106; Strouss *v.* Wabash, etc., R. Co., 17 Fed. 209; The Maggie Hammond (U. S.), 9 Wall. 435, 19 L. Ed. 772; Reed *v.* United States (U. S.), 11 Wall. 591, 20 L. Ed. 220;

Primrose *v.* Western Union Tel. Co., 154 U. S. 1, 38 L. Ed. 883, 14 S. Ct. 1098; Niagara *v.* Cordes (U. S.), 21 How. 7, 16 L. Ed. 41; The Delaware (U. S.), 14 Wall. 579, 20 L. Ed. 779; York Co. *v.* Central R. Co. (U. S.), 3 Wall. 107, 18 L. Ed. 170; Railroad Co. *v.* Varnell, 98 U. S. 479, 480, 25 L. Ed. 233; Clark *v.* Barnwell (U. S.), 12 How. 272, 13 L. Ed. 985; Railroad Co. *v.* Reeves (U. S.), 10 Wall. 176, 19 L. Ed. 909.

Alabama.—Jones *v.* Pitcher & Co., 3 Stew. & P. 135, 24 Am. Dec. 716; Knox *v.* Rives, etc., Co., 14 Ala. 249, 48 Am. Dec. 97; Louisville, etc., R. Co. *v.* Cowherd, 120 Ala. 51, 23 So. 793; Selma, etc., R. Co. *v.* Butts, 43 Ala. 385, 94 Am. Dec. 694; Smith *v.* Western Railway, 91 Ala. 455, 8 So. 754, 24 Am. St. Rep. 929, 11 L. R. A. 619; South, etc., R. Co. *v.* Henlein, 52 Ala. 606, 23 Am. Rep. 578; South, etc., R. Co. *v.* Wood, 66 Ala. 167, 41 Am. Rep. 749, 9 Am. & Eng. R. Cas. 419; Sprowl *v.* Kellar, 4 Stew. & P. 382; Southern R. Co. *v.* Levy, 144 Ala. 614, 39 So. 95, 17 R. R. R. 50, 40 Am. & Eng. R. Cas., N. S., 50.

Arkansas.—Kansas City, etc., R. Co. *v.* Barnett, 69 Ark. 150, 61 S. W. 919; Little Rock, etc., R. Co. *v.* Talbot, 47 Ark. 97, 14 S. W. 471; Packard *v.* Taylor, etc., Co., 35 Ark. 402, 37 Am. Rep. 37; St. Louis, etc., Railway *v.* Lesser, 46 Ark. 236.

California.—Agnew *v.* Steamer Contra Costa, 27 Cal. 425, 87 Am. Dec. 87; Bohannan *v.* Hammond, 42 Cal. 227; Hooper *v.* Wells, Fargo & Co., 27 Cal. 11, 85 Am. Dec. 211; Jackson *v.* Sacramento Val. R. Co., 23 Cal. 268; Scammon *v.* Wells Fargo & Co., 84 Cal. 311, 24 Pac. 284.

Colorado.—Blythe *v.* Denver, etc., R. Co., 15 Colo. 333, 25 Pac. 702, 11 L. R. A., 615, 22 Am. St. Rep. 403.

Connecticut.—Clark *v.* Richards, 1 Conn. 54; Hale *v.* New Jersey Steam Nav. Co., 15 Conn. 539, 39 Am. Dec. 398; Williams *v.* Grant, 1 Conn. 487, 7 Am. Dec. 235.

Delaware.—Klair *v.* Wilmington Steamboat Co., 4 Pen. 51, 7 R. R. R. 821, 30 Am. & Eng. R. Cas., N. S., 821, 54 Atl. 694; Pennewill *v.* Cullen, 5 Har. 238; Reed *v.* Wilmington Steamboat Co., 1 Marv. 193, 40 Atl. 955, 1 Hardesty 127; Truax *v.* Philadelphia, etc., R. Co., 3 Houst. 233; Klair *v.* Philadelphia, etc., R. Co., 2 Boyce's (25 Del.) 274, 78 Atl. 1085.

Georgia.—Central, etc., R. Co. *v.* Lippman, 110 Ga. 665, 36 S. E. 202, 50 L. R. A. 673; Cooper *v.* Raleigh, etc., R. Co., 110 Ga. 659, 36 S. E. 240, 18 Am. & Eng. R. Cas., N. S., 412; Dibble *v.* Brown, 12 Ga. 217, 56 Am. Dec. 460; Fish *v.* Chapman, 2 Ga. 349, 46 Am. Dec. 393; Georgia R. Co. *v.* Beatie, 66 Ga. 438, 42 Am. Rep. 75; Georgia R. Co. *v.* Spears, 66 Ga. 485, 42 Am. Rep. 81; Southern Exp. Co. *v.* Newby, 36 Ga. 635, 91 Am. Dec. 783; Ohlen *v.* Atlanta, etc., R. Co., 2 Ga. App. 323, 58 S. E. 511; Louisville, etc., R. Co. *v.* Warfield, 129 Ga. 473, 59 S. E. 234; Forrester *v.* Georgia R., etc., Co., 92 Ga. 699, 19 S. E. 811; Brunswick, etc., R. Co. *v.* Smith, 97 Ga. 777, 25 S. E. 759; Savannah, etc., R. Co. *v.* Commercial Guano Co., 103 Ga. 590, 30 S. E. 555.

Illinois.—Gulliver *v.* Adams Exp. Co., 38 Ill. 503; Illinois Cent. R. Co. *v.* McClellan, 54 Ill. 58, 5 Am. Rep. 83; Merchants' Despatch Transp. Co. *v.* Kahn, 76 Ill. 520; Peoria, etc., R. Co. *v.* United States, etc., Co., 136 Ill. 643, 27 N. E. 59, 29 Am. St. Rep. 348; Porter *v.* Chicago, etc., R. Co., 20 Ill. 407, 71 Am. Dec. 286; United States Exp. Co. *v.* Hutchins, 67 Ill. 348; Woods *v.* Devin, 13 Ill. 746; Illinois Cent. R. Co. *v.* Frankenberg, 54 Ill. 88, 5 Am. Rep. 92; Chicago, etc., R. Co. *v.* People, 56 Ill. 365, 8 Am. Rep. 690; Pittsburg, etc., R. Co. *v.* Chicago, 89 N. E. 1022, 242 Ill. 178, 44 L. R. A., N. S., 358.

Indiana.—Ohio, etc., R. Co. *v.* Yohe, 51 Ind. 181, 19 Am. Rep. 727; Pittsburg, etc., R. Co. *v.* Hollowell, 65 Ind. 188, 32 Am. Rep. 63; Powers *v.* Davenport, 7 Blackf. 497, 43 Am. Dec. 100; Toledo, etc., R. Co. *v.* Tapp, 6 Ind. App. 304, 33 N. E. 462; Walpole *v.* Bridges, 5 Blackf. 222; Cleveland, etc., R. Co. *v.* Henry, 170 Ind. 94, 83 N. E. 710, reversing 80 N. E. 636; Reid *v.* Evansville, etc., R. Co., 35 N. E. 703, 10 Ind. App. 385, 53 Am. St. Rep. 391; Bansemer *v.* Toledo, etc., R. Co., 25 Ind. 434, 87 Am. Dec. 367.

Iowa.—Cownie Glove Co. *v.* Merchants' Dispatch Transp. Co., 106 N. W. 749, 130 Iowa 327, 114 Am. St. Rep. 419, 4 L. R. A., N. S., 1060; Swiney *v.* American Exp. Co., 115 N. W. 212; Gilbert Bros. *v.* Chicago, etc., R. Co., 136 N. W. 911; Hewett *v.* Chicago, etc., R. Co., 63 Iowa 611, 19 N. W. 790.

Kansas.—Kansas Pac. R. Co. *v.* Nichols, etc., Co., 9 Kan. 235, 12 Am. Rep. 494; Watkins Merchandise Co. *v.* Missouri, etc., R. Co., 82 Kan. 308, 108 Pac. 116; Santer *v.* Atchison, etc., R. Co., 78 Kan. 331, 97 Pac. 434.

Kentucky.—Cincinnati, etc., R. Co. *v.* Webb, 103 Ky. 705, 46 S. W. 11; Farley *v.* Lavary, 107 Ky. 523, 21 Ky. L. Rep. 1252, 54 S. W. 840, 47 L. R. A. 383; Hall & Co. *v.* Renfro, 3 Metc. 51; Chesapeake, etc., R. Co. *v.* Hall, 136 Ky. 379, 124 S. W. 372; Lewis *v.* Louisville, etc., R. Co., 135 Ky. 361, 122 S. W. 184, 25 L. R. A., N. S., 938, 21 Am. & Eng. Ann. Cas. 527.

Louisiana.—Dalzell *v.* Saxon, 10 La. Ann. 280; Thomas *v.* Morning Glory, 13 La. Ann. 269, 71 Am. Dec. 509.

Maine.—Emery *v.* Hersey, 4 Greenl. 407, 16 Am. Dec. 268; Parker *v.* Flagg, 26 Me. 181, 45 Am. Dec. 101; Sager *v.*

Portsmouth, etc., R. Co., 31 Me. 228, 50 Am. Dec. 659.

Maryland.—Boyle *v.* McLaughlin, 4 Har. & J. 291.

Massachusetts.—Evans *v.* Fitchburg R. Co., 111 Mass. 142, 15 Am. Rep. 19; Gage *v.* Tirrell, 9 Allen 299; Hastings *v.* Pepper, 11 Pick. 41; Smith *v.* New Haven, etc., R. Co., 12 Allen 531; Swetland *v.* Boston, etc., R. Co., 102 Mass. 276.

Michigan.—Black *v.* Ashley, 44 N. W. 1120, 80 Mich. 90.

Minnesota.—Christenson *v.* American Exp. Co., 15 Minn. 270, Gil. 208, 2 Am. Rep. 122; Jones *v.* Minneapolis, etc., R. Co., 91 Minn. 229, 11 R. R. R. 661, 34 Am. & Eng. R. Cas., N. S., 661, 97 N. W. 893, 103 Am. St. Rep. 507.

Mississippi.—Louisville, etc., R. Co. *v.* Bigger, 66 Miss. 319, 6 So. 234; Mobile, etc., R. Co. *v.* Weiner, 49 Miss. 725; Powell *v.* Mills, 30 Miss. 231, 64 Am. Dec. 158; Neal *v.* Saunderson, 2 Smedes & M. 572, 41 Am. Dec. 609.

Missouri.—Ballentine *v.* North Missouri R. Co., 40 Mo. 491, 93 Am. Dec. 315; Daggett *v.* Shaw, 3 Mo. 264, 25 Am. Dec. 439; Davis *v.* Wabash, etc., R. Co., 89 Mo. 340, 1 S. W. 327; Read *v.* St. Louis, etc., R. Co., 60 Mo. 199; Steamboat Lynx *v.* King, 12 Mo. 272, 49 Am. Dec. 135; Wolf *v.* American Exp. Co., 43 Mo. 421, 97 Am. Dec. 406; Merritt Creamery Co. *v.* Atchison, etc., R. Co., 128 Mo. App. 420, 107 S. W. 462.

Nebraska.—Black *v.* Chicago, etc., R. Co., 30 Neb. 197, 46 N. W. 428; Ringwalt *v.* Wabash R. Co., 45 Neb. 760, 64 N. W. 219; Sunderland Bros. Co. *v.* Chicago, etc., R. Co., 89 Neb. 660, 131 N. W. 1047.

New Hampshire.—Moses *v.* Norris, 4 N. H. 304.

New Jersey.—Mershon *v.* Hobensack, 22 N. J. L. 372; New Brunswick, etc., Co. *v.* Tiers, 24 N. J. L. 697, 64 Am. Dec. 394.

New York.—Adams *v.* New Jersey Steamboat Co., 151 N. Y. 163, 45 N. E. 369, 34 L. R. A. 682, 56 Am. St. Rep. 616; Camden, etc., R. Co. *v.* Belknap, 21 Wend. 354; Cragin *v.* New York Cent. R. Co., 51 N. Y. 61, 10 Am. Rep. 559; Hollister *v.* Nowlen, 19 Wend. 234, 32 Am. Dec. 455; Howe *v.* Oswego, etc., R. Co., 56 Barb. 121; McCormick *v.* Pennsylvania Cent. R. Co., 80 N. Y. 353; Merritt *v.* Earle, 31 Barb. 38, affirmed in 29 N. Y. 115, 86 Am. Dec. 292; Miller *v.* Steam Nav. Co., 10 N. Y. 431, Seld Notes 64; Read *v.* Spaulding, 30 N. Y. 630, 86 Am. Dec. 426, affirming 18 N. Y. Super. Ct. 395; Sherman *v.* Wells, 28 Barb. 403; Waldron *v.* Fargo, 170 N. Y. 130, 62 N. E. 1077; Colt *v.* McMechen, 6 Johns. 160, 5 Am. Dec. 200.

North Carolina.—Harrell *v.* Owens, 18 N. C. 273; Thomas *v.* Southern R. Co., 131 N. C. 590, 42 S. E. 543, 6 R. R. R. 860, 29 Am. & Eng. R. Cas., N. S., 860.

North Dakota.—Duncan *v.* Great Northern R. Co., 17 N. Dak. 610, 118 N. W. 826, 19 L. R. A., N. S., 952.

Ohio.—Railroad Co. *v.* O'Donnell, 49 O. St. 489, 32 N. E. 476; Bowman *v.* Hilton, 11 O. 303; Canal Boat Montgomery *v.* Kent, 20 O. 54; Transfer Co. *v.* Kelly, 36 O. St. 86, 38 Am. Rep. 558; Pittsburgh, etc., R. Co. *v.* Barrett, 36 O. St. 448; Welsh *v.* Pittsburg, etc., R. Co., 10 O. St. 65, 75 Am. Dec. 490; Davidson *v.* Graham, 2 O. St. 131; Long *v.* Louisville, etc., Packet Co., 7 N. P., N. S., 14, 18 O. D. N. P. 699.

Oregon.—Oakes *v.* Northern Pac. R. Co., 20 Ore. 392, 26 Pac. 230, 12 L. R. A. 318, 23 Am. St. Rep. 126; Lacey *v.* Oregon, R., etc., Co., 128 Pac. 999.

Pennsylvania.—Beckham *v.* Shouse, 5 Rawle 179, 28 Am. Dec. 653; Eagle *v.* White, 6 Whart. 505, 37 Am. Dec. 434; Harrington *v.* M'Shane, 2 Watts 443, 27 Am. Dec. 321; Hays *v.* Kennedy, 41 Pa. 378, 80 Am. Dec. 627; Long *v.* Pennsylvania R. Co., 147 Pa. 343, 23 Atl. 459, 14 L. R. A. 741, 30 Am. St. Rep. 732; Morrison *v.* Davis & Co., 20 Pa. 171, 57 Am. Dec. 695; Verner *v.* Sweitzer, 32 Pa. 208; Willock *v.* Pennsylvania R. Co., 166 Pa. 184, 30 Atl. 948, 27 L. R. A. 228, 45 Am. St. Rep. 674.

South Carolina.—Campbell *v.* Morse, Harp. 468; Cook *v.* Gourdin, 2 Nott & McC. 19; McCall *v.* Brock, 5 Strob. 119; Porcher *v.* Northeastern R. Co., 14 Rich. L. 181; Reaves *v.* Waterman, 2 Speers 197, 42 Am. Dec. 364; Slater *v.* South Carolina R. Co., 29 S. C. 96, 6 S. E. 936; Smyrl *v.* Niolon, 2 Bailey 421, 23 Am Dec. 146; Ewart *v.* Street, 2 Bailey 157, 23 Am. Dec. 131; Ferguson *v.* Southern Railway, 91 S. C. 61, 74 S. E. 129.

Tennessee.—Jones *v.* Walker, 13 Tenn. (5 Yerg.) 427; Lewis & Co. *v.* Ludwick, 46 Tenn. (6 Coldw.) 368, 98 Am. Dec. 454; Louisville, etc., R. Co. *v.* Katzenberger, 84 Tenn. (16 Lea) 380, 1 S. W. 44 Am. Rep. 232; Nashville, etc., R. Co. *v.* David, 53 Tenn. (6 Heisk.) 261, 19 Am. Rep. 594; Nashville, etc., R. Co. *v.* Stone, 112 Tenn. 348, 79 S. W. 1031, 105 Am. St. Rep. 955; Nashville, etc., R. Co. *v.* King, 53 Tenn. (6 Heisk.) 269; Nashville, etc., R. Co. *v.* Lillie, 112 Tenn. 331, 78 S. W. 1055, 105 Am. St. Rep. 947; Southern Exp. Co. *v.* Glenn, 84 Tenn. (16 Lea) 472, 1 S. W. 102; Turney *v.* Wilson, 15 Tenn. (7 Yerg.) 340, 27 Am. Dec. 515; Watson *v.* Memphis, etc., R. Co., 56 Tenn. (9 Heisk.) 255; Craig *v.* Childress, 7 Tenn. (Peck) 270, 14 Am. Dec. 751.

Texas.—Arnold *v.* Jones, 26 Tex. 335, 82 Am. Dec. 617; Chevallier *v.* Straham, 2 Tex. 115, 47 Am. Dec. 639; Gulf, etc., R. Co. *v.* Levi, 12 S. W. 677; Houston, etc., Nav. Co. *v.* Dwyer, 29 Tex. 376; Texas, etc., R. Co. *v.* Felker, 40 Tex. Civ. App. 604, 90 S. W. 530; International, etc., R. Co *v.* Halloren, 53 Tex. 46, 37 Am. Rep. 744; International,

ing from such cause unless it expressly insures against them.[61]

Must Be Proximate Cause.—A carrier is not exempt from liability for the loss of, or damage to, goods occasioned by the act of God, unless such act is the proximate, not merely the remote, cause of injury complained of.[62]

etc., R. Co. *v.* Wentworth, 8 Tex. Civ. App. 5, 11, 27 S. W. 680, affirmed in 87 Tex. 311; Texas Cent. R. Co. *v.* Hunter & Co., 47 Tex. Civ. App. 190, 104 S. W. 1075; International, etc., R. Co. *v.* Hynes, 3 Tex. Civ. App. 20, 21 S. W. 622; Fentiman *v.* Atchison, etc., R. Co., 44 Tex. Civ. App. 455, 460, 98 S. W. 939; Gulf, etc., R. Co. *v.* Trawick, 68 Tex. 314, 4 S. W. 567; Gulf, etc., R. Co. *v.* Roberts (Tex. Civ. App.), 85 S. W. 479; Abbott Gin Co. *v.* Missouri, etc., R. Co., 57 Tex. Civ. App. 263, 122 S. W. 284.

Vermont.—Day, etc., Co. *v.* Ridley, 16 Vt. 48, 42 Am. Dec. 489; Spencer *v.* Daggett, 2 Vt. 92.

Virginia.—Herring *v.* Chesapeake, etc., R. Co., 101 Va. 778, 45 S. E. 322, 9 R. R. R. 262, 32 Am. & Eng. R. Cas., N. S., 262; Murphy, etc., Co. *v.* Staton, 17 Va. (3 Munf.) 239; Chesapeake, etc., R. Co. *v.* Beasley, etc., Co., 104 Va. 788, 52 S. E. 366, 3 L. R. A., N. S., 183.

West Virginia.—Baltimore, etc., R. Co. *v.* Morehead, 5 W. Va. 293; McGraw *v.* Baltimore, etc., R. Co., 18 W. Va. 361, 41 Am. Rep. 696, 9 Am. & Eng. R. Cas. 188; Maslin *v.* Baltimore, etc., R. Co., 14 W. Va. 180, 35 Am. Rep. 748; Hutchinson *v.* United States Exp. Co., 63 W. Va. 128, 59 S. E. 949, 14 L. R. A., N. S., 393.

Wisconsin.—Klauber *v.* American Exp. Co., 21 Wis. 21, 91 Am. Dec. 452; Strohn *v.* Detroit, etc., R. Co., 23 Wis. 126, 99 Am. Dec. 114.

Wyoming.—Oregon, etc., R. Co. *v.* Blyth, 19 Wyo. 410, 118 Pac. 649, 119 Pac. 875, Ann. Cas. 1913 E, 288.

England.—Coggs *v.* Bernard, 2 Ld. Raym. (Eng.) 909; Forward *v.* Pittard, 1 D. & E. (Eng.) 27.

61. Southern Exp. Co. *v.* Glenn, 84 Tenn. (16 Lea) 472, 1 S. W. 102.

The implication of an exception as to losses occasioned by inevitable accident may be repelled by parol proof, connected with advertisements and circulars of agreement to insure a safe delivery, without any exception, for inevitable accidents. Morrison *v.* Davis & Co., 20 Pa. 171, 57 Am. Dec. 695.

If a carrier specially undertakes to deliver safely any article carried, it will be bound by its undertaking to answer for the loss, although it may happen from an unavoidable accident. Gaither *v.* Barnet (S. C.), 2 Brev. 488.

Stipulation not having such effect.—A provision in a bill of lading, "Damage or deficiency in quantity specified, if any, to be deducted from charges by consignees," should not be construed, in the absence of evidence that such was the intent, as extending the liability of the carrier to losses within the ordinary exception of losses caused by the act of God, but should be restricted to damage or deficiency caused by his default or neglect. Price *v.* Hartshorn, 44 N. Y. 94, 4 Am. Rep. 645, affirming 44 Barb. 655.

62. **Must be proximate cause of injury.**

United States.—Tompkins *v.* Dutchess, Fed. Cas. No. 14,087a; King *v.* Shepherd, Fed. Cas. No. 7,804, 3 Story 439.

Alabama.—Sprowl *v.* Kellar, 4 Stew. & P. 382; Steele *v.* McTyer, 31 Ala. 667, 70 Am. Dec. 516; Jones *v.* Pitcher & Co., 3 Stew. & P. 135, 24 Am. Dec. 716.

Georgia.—Richmond, etc., R. Co. *v.* Benson & Co., 86 Ga. 203, 12 S. E. 357, 22 Am. St. Rep. 446; Richmond, etc., R. Co. *v.* White & Co., 88 Ga. 805, 15 S. E. 802.

Illinois.—Michigan Cent. R. Co. *v.* Curtis, 80 Ill. 324.

Iowa.—Wood *v.* Chicago, etc., R. Co., 68 Iowa 491, 27 N. W. 473, 56 Am. Rep. 861; Hewitt *v.* Chicago, etc., R. Co., 63 Iowa 611, 119 N. W. 790.

Kentucky.—Cassilay *v.* Young, 4 B. Mon. 265, 39 Am. Dec. 505; Cincinnati, etc., R. Co. *v.* Webb, 103 Ky. 705, 46 S. W. 11.

Maryland.—Fergusson *v* Brent, 12 Md. 9, 71 Am. Dec. 582; Boyle *v.* McLaughlin, 4 Har. & J. 291.

Michigan.—Michigan Cent. R. Co. *v.* Burrows, 33 Mich. 6.

Missouri.—Davis *v.* Wabash, etc., R. Co., 13 Mo. App. 449; Read *v.* St. Louis, etc., R. Co., 60 Mo. 199; Wolf *v.* American Exp. Co., 43 Mo. 421, 97 Am. Dec. 406.

New Jersey.—New Brunswick, etc., Co., *v.* Tiers, 24 N. J. L. 697, 64 Am. Dec. 394.

New York.—Merritt *v.* Earle, 31 Barb. 38, affirmed in 29 N. Y. 115, 86 Am. Dec. 292; Michaels *v.* New York Cent. R. Co., 30 N. Y. 564, 86 Am. Dec. 415.

South Carolina.—Ewart *v.* Street, 2 Bailey 157, 23 Am. Dec. 131.

Tennessee.—Adams Exp. Co. *v.* Jackson, 92 Tenn. 326, 21 S. W. 666.

Texas.—Gulf, etc., R. Co. *v.* McCorquodale, 71 Tex. 41, 9 S. W. 80; M. P. R. Co. *v.* Barnes & Co., 2 Texas App. Civ. Cas., § 575.

Washington.—Smith *v.* North American Transp. Co., 20 Wash. 580, 56 Pac. 372, 44 L. R. A. 557.

West Virginia.—McGraw *v.* Baltimore, etc., R. Co., 18 W. Va. 361, 41 Am. Rep. 696, 9 Am. & Eng. R. Cas. 188; Baltimore, etc., R. Co. *v.* Morehead, 5 W. Va. 293; Hutchinson *v.* United States Exp. Co., 63

Providential Delay.—A carrier is not liable for damage to a shipment due to providential delay in transportation.[63]

§ 991. What Constitutes Act of God.—In General.—An act of God which will excuse a carrier for loss of goods is such an unavoidable or inevitable accident[64] as can not be prevented by human care, skill or foresight,[65] but re-

W. Va. 128, 59 S. E. 949, 14 L. R. A., N. S., 393.

Instances where act of God not proximate cause.—In Lang *v.* Pennsylvania R. Co., 154 Pa. 342, 26 Atl. 370, 20 L. R. A. 360, 35 Am. St. Rep. 846, it appeared that a train containing several carloads of whiskey was overtaken by the Johnstown flood, but was not swept away; that the train was left upon the track, and the cars were uninjured, but, owing to the destruction of the track ahead, it could not resume its journey; that while the train was waiting for the track to be repaired, thieves, in open daylight and in presence of the trainmen, who made no resistance, broke open the cars and seized some of the whiskey; that a volunteer guard of citizens interfered and protected the train during the night and part of the following day and then destroyed the remainder of the whiskey to prevent it from falling into the hands of the dangerous element in the community; that the trainmen made no efforts to protect the train, but as soon as the thieves began to break open the car with axes, they turned their backs and left the neighborhood. It was held, that the flood was not the cause of the loss, but merely created the opportunity for plunder.

In an action against a carrier for the loss of goods, it appeared that a severe storm produced an unusually low tide, and thereby caused the carrier's barge to strike against a timber, projecting from the wharf so low in ordinary tides as to be no cause of injury. Held, that the storm would not release the carrier from liability for the loss, on the ground that it was caused by an act of God, since the proximate cause of the loss was the projecting timber. New Brunswick, etc., Co. *v.* Tiers, 24 N. J. L. 697, 64 Am. Dec. 394.

63. **Providential delay.**—M. P. R. Co. *v.* Barnes & Co., 2 Texas App. Civ. Cas., § 575.

64. **What constitutes act of God.**—*United States.*—The Majestic, 116 U. S. 375, 41 L. Ed. 1039, 17 S. Ct. 597.

Delaware.—Carpenter *v.* Baltimore, etc., R. Co., 6 Pen. 15, 64 Atl. 252.

Georgia.—Fish *v.* Chapman, 2 Ga. 349, 46 Am. Dec. 393.

Indiana.—Walpole *v.* Bridges, 5 Blackf. 222.

Louisiana.—Brosseau & Co. *v.* The Hudson, 11 La. Ann. 427.

Tennessee.—Lewis & Co. *v.* Ludwick, 46 Tenn. (6 Coldw.) 368, 98 Am. Dec. 454.

By the phrase, "act of God," is meant all unavoidable or inevitable accidents. Walpole *v.* Bridges (Ind.), 5 Blackf. 222.

The words "inevitable accident," are synonymous with the phrase "the act of God." Neal *v.* Saunderson (Miss.), 2 Smedes & M. 572, 41 Am. Dec. 609. See Blythe *v.* Denver, etc., R. Co., 15 Colo. 333, 25 Pac. 702, 22 Am. St. Rep. 403, 11 L. R. A. 615.

The phrase "unavoidable accidents," is equivalent to "inevitable accidents." Fowler *v.* Davenport, 21 Tex. 626; Fish *v.* Chapman, 2 Ga. 349, 46 Am. Dec. 393.

65. **Not preventable by human care.**—*United States.*—Tompkins *v.* Dutchess, Fed. Cas. No. 14,087a.

Alabama.—Sprowl *v.* Kellar (Ala.), 4 Stew. & P. 382.

Colorado.—Blythe *v.* Denver, etc., R. Co., 15 Colo. 333, 25 Pac. 702, 22 Am. St. Rep. 403, 11 L. R. A. 615.

Delaware.—Carpenter *v.* Baltimore, etc., R. Co. (Del.), 6 Pen. 15, 64 Atl. 252.

Illinois.—Wald *v.* Pittsburg, etc., R. Co., 162 Ill. 545, 44 N. E. 888, 35 L. R. A. 356, 53 Am. St. Rep. 332.

Louisiana.—Brousseau & Co. *v.* The Hudson, 11 La. Ann. 427.

West Virginia.—McGraw *v.* Baltimore, etc., R. Co., 18 W. Va. 361, 41 Am. Rep. 696, 9 Am. & Eng. R. Cas. 188.

Wisconsin.—Klauber *v.* American Exp. Co., 21 Wis. 21, 91 Am. Dec. 452.

The foundation of the rule that the act of God excuses the failure to discharge a duty is the maxim, "Lex neminem cogit impossibilia." If by the use of reasonable care, prudence, and diligence under the circumstances of a particular case it is possible to discharge the duty, then those circumstances do not constitute a valid excuse for a failure to perform it. Nothing less than a fortuitous gathering of circumstances preventing the performance of a duty as could not have been foreseen or overcome by the exercise of reasonable prudence, care, and diligence constitutes an act of God which will excuse the discharge of the duty. Gulf, etc., R. Co. *v.* Boyce, 39 Tex. Civ. App. 195, 196, 87 S. W. 395, affirmed in 101 Tex. 639, no op.

Illustrations.—A carrier is liable for damage to carpets caused by the bursting of casks of chloride of lime, caused by an excess of unslacked lime in the composition, though both lime and carpets were well stored, and the bursting of the casks was unusual. Brousseau & Co. *v.* The Hudson, 11 La. Ann. 427.

Though ships in dock were generally moored with the stern to the stream, defendant's ship was moored with the bow

sults from a direct and violent act of nature,[66] such as lightning, storms, inundations, earthquakes,[67] perils of the sea,[68] or floods, etc.,[69] and is exclusive of human agency.[70] The terms "vis major" and "casus fortuitus" are used in the civil law in the same sense as "act of God" in the common law;[71] but the rule of

to the river, that she might better meet an expected hurricane. On the fall of the tide, the ship grounded; and, owing to a declivity in the dock, water in the ship ran to the bows, injuring plaintiff's goods, which were stored there. Held, that the damage was not occasioned by the act of God, as the bottom of the dock was known, and it must have been foreseen that the water must be thrown to one end of a vessel setting on a declining bottom. Ewart *v.* Street (S. C.), 2 Bailey 157, 23 Am. Dec. 131.

The fact that a moored vessel sprung a leak after it was grounded on the falling of the tide, thereby damaging a shipper's goods, does not show that the damage was an act of God, and unavoidable by human agency. Ewart *v.* Street (S. C.), 2 Bailey 157, 23 Am. Dec. 131.

66. Act of nature.—*United States.*—Tompkins *v.* Dutchess, Fed. Cas. No. 14,087a.

Delaware.—Carpenter *v.* Baltimore, etc., R. Co. (Del.), 6 Pen. 15, 64 Atl. 252.

Illinois.—Wald *v.* Pittsburg, etc., R. Co., 162 Ill. 545, 44 N. E. 888, 35 L. R. A. 356, 53 Am. St. Rep. 332.

Louisiana.—Brousseau & Co. *v.* The Hudson, 11 La. Ann. 427.

Texas.—Chevallier *v.* Straham, 2 Tex. 115, 47 Am. Dec. 639.

Virginia.—Friend *v.* Woods, 47 Va. (6 Gratt.) 189, 52 Am. Dec. 119.

West Virginia.—McGraw *v.* Baltimore, etc., R. Co., 18 W. Va. 361, 41 Am. Rep. 696, 9 Am. & Eng. R. Cas. 188.

Wisconsin.—Klauber *v.* American Exp. Co., 21 Wis. 21, 91 Am. Dec. 452.

Obstruction in river from mixed causes.—In Merritt *v.* Earle (N. Y.), 31 Barb. 38, affirmed in 29 N. Y. 115, 86 Am. Dec. 292, it is held, that loss of a vessel occasioned by an obstruction in a river, produced by mixed causes, and which is not the result of the operation of natural forces upon natural objects alone, or the shores or the bottom, is not, in a logical or legal sense, the act of God.

67. *Alabama.*—Jones *v.* Pitcher (Ala.), 3 Stew. & P. 135, 24 Am. Dec. 716.

Delaware.—Carpenter *v.* Baltimore, etc., R. Co. (Del.), 6 Pen. 15, 64 Atl. 252.

Georgia.—Fish *v.* Chapman, 2 Ga. 349, 46 Am. Dec. 393.

Louisiana.—Brousseau & Co. *v.* The Hudson, 11 La. Ann. 427.

Texas.—Chevallier *v.* Straham, 2 Tex. 115, 47 Am. Dec. 639; International, etc., R. Co. *v.* Halloren, 53 Tex. 46, 37 Am. Rep. 744.

West Virginia.—McGraw *v.* Baltimore, etc., R. Co., 18 W. Va. 361, 41 Am. Rep. 696, 9 Am. & Eng. R. Cas. 188.

Wisconsin.—Klauber *v.* American Exp. Co., 21 Wis. 21, 91 Am. Dec. 452.

68. Perils of the sea.—*United States.*—Reed *v.* United States (U. S.), 11 Wall. 591, 20 L. Ed. 220.

Georgia.—Fish *v.* Chapman, 2 Ga. 349, 46 Am. Dec. 393.

Texas.—Chevallier *v.* Straham, 2 Tex. 115, 47 Am. Dec. 639.

West Virginia.—McGraw *v.* Baltimore, etc., R. Co., 18 W. Va. 361, 41 Am. Rep. 696, 9 Am. & Eng. R. Cas. 188.

69. Carpenter *v.* Baltimore, etc., R. Co. (Del.), 6 Pen. 15, 64 Atl. 252. See post "Floods," this section.

70. Exclusive of human agency.—*United States.*—Dibble *v.* Morgan, Fed. Cas. No. 3,881, 1 Woods 406; The Majestic, 166 U. S. 375, 41 L. Ed. 1039, 17 S. Ct. 597, citing 2 Kent. Com. 592.

Alabama.—Jones *v.* Pitcher & Co. (Ala.), 3 Stew. & P. 135, 24 Am. Dec. 716.

Georgia.—Georgia, etc., R. Co. *v.* Barfield, 1 Ga. App. 203, 58 S. E. 236.

Maryland.—Fergusson *v.* Brent, 12 Md. 9, 71 Am. Dec. 582.

New Jersey.—New Brunswick, etc., Co. *v.* Tiers, 24 N. J. L. 697, 64 Am. Dec. 394.

New York.—Merritt *v.* Earle, 29 N. Y. 115, 86 Am. Dec. 292, affirming 31 Barb. 38.

Texas.—Chevallier *v.* Straham, 2 Tex. 115, 47 Am. Dec. 639.

The term "act of God" means something superhuman, or something in opposition to the act of man. Merchants' Despatch Co. *v.* Smith, 76 Ill. 542.

Contra.—In Hays *v.* Kennedy, 41 Pa. 378, 80 Am. Dec. 627, it is said: "It is impossible to exclude the intervention of man from those accidents which are called acts of God."

And in Price *v.* Hartshorn, 44 N. Y. 94, 4 Am. Rep. 645, affirming 44 Barb. 655, it is held, that where a jettison becomes necessary, for the preservation of the remainder of a cargo, by reason of a violent storm, the loss is by act of God, although occasioned through the immediate agency of men.

71. Civil law terms.—Brousseau & Co. *v.* The Hudson, 11 La. Ann. 427.

Loss not due to vis major or casus fortuitus.—In an action against a carrier for the loss of goods, it appeared that the goods were destroyed by the bursting of casks of chloride of lime in the hold of the vessel, attributed to an excess of unslacked lime in the composition of the chloride. Held, that the carrier was liable, the cause of the loss not being vis major casus fortuitus. Brousseau & Co. *v.* The Hudson, 11 La. Ann. 427.

liability is not the same as under the common law.[72] It is held that the carrier is liable for loss of or injury to goods caused by the collision[73] or stranding of its vessel,[74] or by the vessel striking the mast of a sunken ship.[75] And it is held that the striking of a vessel on a rock is not an act of God, though the officers were misled by a buoy.[76] But it is also held that the striking of a vessel on a rock not generally known, and not actually known to the master of the vessel, is the act of God.[77] There is a conflict as to whether the carrier is liable where its boat runs on an unknown snag in the channel of the river.[78] The carrying of a boat against a bank by a current in the stream has been held not due to an act of God.[79] In an early case it was held that where a vessel ran aground and sank in consequence of the sudden cessation of the wind, the accident was due to an act of God.[80] The upsetting of a carrier's wagon on a decayed bridge across a stream is not an unavoidable accident.[81]

Earthquake.—Where the injury to property transported by a carrier is caused entirely by an earthquake, the carrier is not liable in the absence of negligence on its part.[82]

Floods.—A carrier is not liable for loss of or injury to freight which is caused by an unprecedented flood which could not have been anticipated or guarded against by the exercise of reasonable care.[83]

72. Hunt *v.* Morris (La.), 6 Mart., O. S., 676, 12 Am. Dec. 489, holding that in absence of negligence carrier not liable for loss of goods on steamer destroyed by fire while aground.

73. **Collision of vessel.**—Mershon *v.* Hobensack, 22 N. J. L. 372.

Where defendant's boat, carrying plaintiff's goods, collided with another boat and sunk, without fault on the part of her master or crew, defendant was not relieved from liability for the loss of plaintiff's goods on the ground that the accident was due to the act of God. Hays *v.* Kennedy, 41 Pa. 378, 80 Am. Dec. 627.

74. **Stranding of vessel.**—The stranding of a vessel, and resulting loss of cargo, during a storm, by the reason of the fact that a light of another, previously stranded vessel was mistaken for a range light, which mariners used in steering into the harbor—the range light being invisible, and the false light being nearly in its position—was not an accident due to the act of God, because it had occurred in part through the intervention of human agency. McArthur *v.* Sears (N. Y.), 21 Wend. 190.

Bar in river.—In Friend *v.* Woods, 47 Va. (6 Gratt.) 189, 52 Am. Dec. 119, a carrier stranded his boat upon a bar which had been formed in the river a few days before the boat had proceeded on its voyage, the bar resulting from a rise of a tributary river. The officers and crew of the boat were ignorant of the bar, when the boat stranded upon it. The carrier was held liable.

75. **Steamboat colliding with mast of submerged sloop—Possibility of seeing mast.**—In Merritt *v.* Earle, 29 N. Y. 115, 86 Am. Dec. 292, an action against the owner of a steamboat for the value of property lost while being transported, it appeared that the immediate cause of the accident and loss was the contact of the steamboat with the mast of a sloop which had been sunk in a squall, two days before; and that the mast was out of water fifteen or sixteen feet at low water, and was visible the day before and the same day of the accident. It was held, that the loss was not caused by an inevitable accident, or act of God.

76. **Vessel striking rock.**—Fergusson *v.* Brent, 12 Md. 9, 71 Am. Dec. 582, wherein it appeared that the vessel was overtaken by a heavy fog, which induced the captain to make for a harbor, where there were many vessels safely moored at the time. When approaching the harbor, and while he was at the helm, the lookout notified him of a buoy, whereupon he bore away, and the vessel struck on a rock about thirty yards from the buoy, damaging plaintiff's goods.

77. Williams *v.* Grant, 1 Conn. 487, 7 Am. Dec. 235.

78. **Unknown snag.**—In Steele *v.* McTyer, 31 Ala. 667, 70 Am. Dec. 516, and Turney *v.* Wilson, 15 Tenn. (7 Yerg.) 340, 27 Am. Dec. 515, the carrier was held liable. But in Smyrl *v.* Niolon (S. C.), 2 Bailey 421, 23 Am. Dec. 146, the contrary was held.

79. **Current carrying boat against bank.**—Craig *v.* Childress, 7 Tenn. (Peck) 270, 14 Am. Dec. 751.

80. **Sudden cessation of wind.**—Colt *v.* McMechen (N. Y.), 6 Johns. 160, 5 Am. Dec. 200.

81. Fish *v.* Chapman, 2 Ga. 349, 46 Am. Dec. 393.

82. **Earthquake.**—Slater *v.* South Carolina R. Co., 29 S. C. 96, 6 S. E. 936.

83. **Unprecedented flood.**—*United States.*—Memphis, etc., R. Co. *v.* Reeves (U. S.), 10 Wall. 176, 19 L. Ed. 909; Strouss *v.* Wabash, etc., R. Co., 17 Fed.

Lightning.—Lightning is an act of God relieving a carrier from liability for loss of or damage to goods.[84]

A snowstorm of such violence as to prevent the moving of trains is an act of God.[85]

An unprecedented storm is held to constitute an act of God relieving a carrier from liability for injury to freight.[86] But the carrier is liable where it re-

209; Missouri Pac. Ry. Co. *v.* United States, 47 Ct. Cl. 266.

Alabama.—Smith *v.* Western Railway, 91 Ala. 455, 8 So. 754, 24 Am. St. Rep. 929, 11 L. R. A. 619.

Georgia.—Wallace *v.* Clayton, 42 Ga. 443.

Illinois.—Wald *v.* Pittsburg, etc., R. Co., 162 Ill. 545, 44 N. E. 888, 35 L. R. A. 356, 53 Am. St. Rep. 332.

Louisiana.—Dalzell *v.* Saxon, 10 La. Ann. 280.

Missouri.—Vail *v.* Pacific Railroad, 63 Mo. 230.

Ohio.—See American Exp. Co. *v.* Smith, 33 O. St. 511, 31 Am. Rep. 561.

Pennsylvania.—Morrison *v.* Davis & Co., 20 Pa. 171, 57 Am. Dec. 695; Long *v.* Pennsylvania R. Co., 147 Pa. 343, 23 Atl. 459, 14 L. R. A. 741, 30 Am. St. Rep. 732.

Texas.—Fentiman *v.* Atchinson, etc., R. Co., 44 Tex. Civ. App. 455, 98 S. W. 939.

A flood may be an act of God, although as great a flood occurred at the same place many years before. Fentiman *v.* Atchison, etc., R. Co., 44 Tex. Civ. App. 455, 98 S. W. 939.

The Johnstown flood, caused by the breaking of a dam which retained a large volume of water at a high elevation, due to extraordinary and unprecedented rains, and thereby letting into a narrow valley a volume of water twenty feet to thirty feet in height, was an act of God. Wald *v.* Pittsburg, etc., R. Co., 44 N. E. 888, 162 Ill. 545, 35 L. R. A. 356, 53 Am. St. Rep. 332; Long *v.* Pennsylvania R. Co., 147 Pa. 343, 23 Atl. 459, 14 L. R. A. 741, 30 Am. St. Rep. 732.

Illustrations.—A sudden and unexpected rise in the river to a height never known before, by which goods in a railroad depot were injured, is an act of God, for which the carrier is not liable. Read *v.* Spaulding, 18 N. Y. Super. Ct. 395, affirmed in 30 N. Y. 630, 86 Am. Dec. 426.

A carrier by canal is excused, on the ground of inevitable accident, for a loss of goods caused by a dam in the canal giving way in consequence of an extraordinary flood, if no want of diligence or skill is attributable to the carrier. And, although horses are, in general, part of the equipment of a canal boat, for the sufficiency of which the carrier is responsible, yet the mere fact that the boat was delayed on her way by lameness of a horse, in consequence of which she happened to be at the place of the flood when it occurred, will not render the carrier liable. Morrison *v.* McFadden (Pa.), 5 Clark 23, 3 Am. L. J., N. S., 462; Morrison *v.* Davis & Co., 20 Pa. 171, 57 Am. Dec. 695.

Defendant at New Orleans received, to be delivered at Louisville, molasses which he agreed to reship thence to Pittsburg. In accordance with a usage shown, the molasses was landed at Portland two mudes below, but within the corporation of Louisville, and its reshipment at once engaged. The boat, however, on which the reshipment was to have been made, did not comply with its engagement; and shortly after the river rose so rapidly that, with every exertion the molasses was in part damaged, and in part lost. Held, that defendant was not liable. Dalzell *v.* Saxon, 10 La. Ann. 280.

84. **Lightning.**—Gulf, etc., R. Co. *v.* Levi, 76 Tex. 337, 340, 13 S. W. 191.

85. **Snow storm.**—Ballentine *v.* North Missouri R. Co., 40 Mo. 491, 93 Am. Dec. 315; Black *v.* Chicago, etc., R. Co., 30 Neb. 197, 46 N. W. 428.

A snowstorm in Missouri in the winter season is not an "act of God," in the sense in which that term is used. Texas, etc., R. Co. *v.* Smissen, 31 Tex. Civ. App. 549, 73 S. W. 42, affirmed in 97 Tex. 649, no op.

86. **Unprecedented storm.**—Louisville, etc., R. Co. *v.* McKenzie, 5 Ala. App. 605, 59 So. 345; International, etc., R. Co. *v.* Bergman (Tex. Civ. App.), 64 S. W. 999; Herring *v.* Chesapeake, etc., R. Co., 101 Va. 778, 9 R. R. R. 262, 32 Am. & Eng. R. Cas., N. S., 262, 45 S. E. 322.

Tornado.—A carrier is not liable for the results of a tornado, with no concurring negligence on its part. Gulf, etc., R. Co. *v.* Compton (Tex. Civ. App.), 38 S. W. 220; Galveston, etc., R. Co. *v.* Crier, 45 Tex. Civ. App. 434, 100 S. W. 1177, affirmed in 102 Tex. 583, no op.

Whirlwind.—Carrier is not liable for injury to goods received by it for shipment and blown from its platform by an unprecedented whirlwind, where carrier was not concurrently negligent. Gulf, etc., R. Co. *v.* Compton (Tex. Civ. App.), 38 S. W. 220.

A tempest is an act of God. See Gulf, etc., R. Co. *v.* Levi, 76 Tex. 337, 13 S. W. 191.

Cars blown from track by storm—Fire from stove or lamp.—In Blythe *v.* Denver, etc., R. Co., 15 Colo. 333, 25 Pac. 702, 11 L. R. A. 615, 22 Am. St. Rep. 403, it appeared that the express car containing the package whose value was

ceives goods during a severe storm which causes their loss.[87]

Fire.—A loss occasioned by accidental fire, not arising from negligence or carelessness, is not within the exception of a loss caused by act of God,[88] unless

sued for, with three others, were blown from the track by a violent gale of wind, into such a position that all the freight must have been thrown into one corner, at the top of the car; that the car was immediately set on fire by the stove or lamp therein, and so quickly consumed that the messenger escaped with difficulty; that the wind was so violent as to make it almost impossible to stand or walk at the time; and that the package could not have been rescued by the exercise of proper exertion. It was held, that the finding of the jury that the act of God was the proximate cause of the loss, and that there was no negligence, was fully warranted by the evidence.

Delay of perishable goods.—Where a railroad company, in transporting a car load of melons and green corn, is delayed by a violent and protracted storm, in consequence of which, when the goods arrived at their destination, they were in a decaying and damaged condition, it is not liable therefor, in the absence of negligence on its part. M. P. R. Co. *v.* Barnes & Co., 2 Texas App. Civ. Cas., § 575.

87. New Brunswick, etc., Co. *v.* Tiers, 24 N. J. L. 697, 64 Am. Dec. 394.

88. Accidental fire.—*United States.*—Arthur *v.* Texas, etc., R. Co., 204 U. S. 505, 51 L. Ed. 590, 27 S. Ct. 338; Bank *v.* Adams Exp. Co., 93 U. S. 174, 23 L. Ed. 872; Railroad Co. *v.* Androscoggin Mills (U. S.), 22 Wall. 594, 22 L. Ed. 724; Constable *v.* National Steamship Co., 154 U. S. 51, 38 L. Ed. 903, 14 S. Ct. 1062; York Co. *v.* Central R. Co. (U. S.), 3 Wall. 107, 18 L. Ed. 170; New Jersey, etc., Nav. Co. *v.* Merchants' Bank (U. S.), 6 How. 344, 12 L. Ed. 465.

Georgia.—See Richmond, etc., R. Co. *v.* White, 88 Ga. 805, 15 S. E. 802; Atlanta, etc., R. Co. *v.* Jacobs' Pharmacy Co., 135 Ga. 113, 68 S. E. 1039.

Illinois.—Porter *v.* Chicago, etc., R. Co., 20 Ill. 407, 71 Am. Dec. 286.

Maine.—Parker *v.* Flagg, 26 Me. 181, 45 Am. Dec. 101.

Mississippi. — Gilmore *v.* Carman (Miss.), 1 Smedes & M. 279, 40 Am. Dec. 96. Compare Yazoo, etc., R. Co. *v.* Millsaps, 76 Miss. 855, 25 So. 672, 71 Am. St. Rep. 543, holding that a carrier is not liable for property destroyed by fire not originating on its premises and for which it is not responsible.

New York.—Miller *v.* Steam Nav. Co., 10 N. Y. 431, Seld. Notes 64, affirming 13 Barb. 361; Gould *v.* Hill (N. Y.), 2 Hill 623.

Ohio.—Davidson *v.* Graham, 2 O. St. 131; Graham & Co. *v.* Davis & Co., 4 O. St. 362, 375; Minnesota Min. Co. *v.* Chapman, 2 West. L. M. 75, 2 O. Dec. Reprint 207.

South Carolina.—Patton *v.* Magrath (S. C.), Dud. 159, 31 Am. Dec. 552; Singleton *v.* Hilliard (S. C.), 1 Strob. 203.

Texas.—Chevallier *v.* Straham, 2 Tex. 115, 47 Am. Dec. 639; Houston, etc., R. Co. *v.* Bath, 17 Tex. Civ. App. 697, 44 S. W. 595, affirmed in 93 Tex. 731, no op.

Contra.—In General Fire Extinguisher Co. *v.* Carolina, etc., Co., 137 N. C. 278, 19 R. R. R. 336, 42 Am. & Eng. R. Cas., N. S., 336, 49 S. E. 208, it is held, that though the carrier was negligent in failing to forward goods shipped, it was not liable for the loss of the goods by fire, where it was not negligent with respect to the fire, in absence of evidence that its negligence in failing to forward was the proximate cause of the loss. And see Yazoo, etc., R. Co. *v.* Millsaps, 76 Miss. 855, 25 So. 672, 71 Am. St. Rep. 543.

In Louisiana it is held that while common carriers are not insurers against loss or damage by fire, they are liable under Rev. Civ. Code 1870, art. 2754, unless they can prove that loss or damage was occasioned by accidental or uncontrollable events. Lehman, etc., Co. *v.* Morgan's Louisiana, etc., Co., 38 So. 873, 115 La. 1, 70 L. R. A. 562, 112 Am. St. Rep. 259.

Where a steamboat was destroyed by fire at night, while returning from a trip to procure wood, and while it was aground, defendant was not liable for loss of goods in the absence of proof of negligence. Hunt *v.* Morris (La.), 6 Mart., O. S., 676, 12 Am. Dec. 489.

"The most resistless conflagration, if occasioned by human agency without any negligence whatever on the part of the carrier, will furnish no valid ground of exemption. Chevallier *v.* Straham, 2 Tex. 115, 47 Am. Dec. 639." Gulf, etc., R. Co. *v.* Levi, 76 Tex. 337, 340, 13 S. W. 191.

Fire can not be considered, in itself, an unavoidable danger, and in case of loss from that cause the defendant is bound to show the origin or cause of the fire, to bring himself within the exception; otherwise, the presumption is it might have been avoided by proper care. Union Mut. Ins. Co. *v.* Indianapolis, etc., R. Co., 1 Disn. 480, 12 O. Dec. 745.

Chicago fire.—Loss by fire, as in the great Chicago fire of 1871, will not relieve a carrier from his undertaking. Merchants' Despatch Co. *v.* Smith, 76 Ill. 542.

But in Michigan Cent. R. Co. *v.* Burrows, 33 Mich. 6, it was held that carriers are not bound to be prepared for

the fire was caused by lightning,[89] or the spontaneous combustion of the goods carried.[90]

Changes in Temperature.—A carrier is not an insurer against damage to freight from changes in temperature, unless the circumstances imposed on the carrier that obligation.[91]

Freezing Weather.—Where goods are frozen while in transit, the carrier can not, except under very exceptional circumstances, escape liability on the ground that the damage was caused by an act of God.[92] But it is held that

unusual or extraordinary contingencies, such as the great Chicago fire, which no ordinary prudence or foresight could reasonably foresee or anticipate.

Fire diverted by wind.—Defendants, who, as carriers, were hauling cotton, placed it at night within fifteen feet of a camp fire. The fire was renewed at midnight, at which time no wind was blowing; but in the morning the cotton was found to be on fire, the wind having arisen and blown the fire into the cotton. Held, that the accident was not due to the act of God. Chevallier *v.* Straham, 2 Tex. 115, 47 Am. Dec. 639.

Same—Distant fire.—In Miller *v.* Steam Nav. Co., 10 N. Y. 431, Seld. Notes 64, affirming 13 Barb. 361, it is held, that an accidental fire, not caused by lightning, is not the act of God, although the proximate cause of the burning of the goods was a sudden gust of wind diverting the course of a distant fire so as to drive the flames in the direction of and upon them.

Dry weather and violent wind.—On the day that a carrier received property for transportation a fire broke out a quarter of a mile distant. It being very dry and the wind blowing with great violence, the fire spread rapidly and consumed the carrier's warehouse together with a portion of plantiff's property. Held, that the loss was not the result of inevitable accident or the act of providence. Parsons *v.* Monteath (N. Y.), 13 Barb. 353.

Fire from engine equipped with best spark arrester.—Where a contract of carriage contained no limitation of the carrier's common-law liability, the fact that the carrier used care to equip the engine, handling the car in which the goods were shipped, with the best spark arrester, and that such engine was operated by a skillful engineer, did not exempt the carrier from liability for destruction of the goods by fire communicated by a spark from the engine. Gulf, etc., R. Co. *v.* Roberts (Tex. Civ. App.), 85 S. W. 479.

Fire caused by explosion of boiler of another steamboat.—In McCall *v.* Brock (S. C.), 5 Strob. 119, it is held, that a loss by fire, which, occurring in another boat, renders a common carrier liable, will render him equally so if he carries in a steamboat, even though the loss be caused by an explosion of its boiler—and this without any regard to his diligence or negligence.

89. Fire caused by lightning.—*United States.*—New Jersey, etc., Nav. Co. *v.* Merchants' Bank (U. S.), 6 How. 344, 12 L. Ed. 465.

Ohio.—Davidson *v.* Graham, 2 O. St. 131.

Texas.—Chevallier *v.* Straham, 2 Tex. 115, 47 Am. Dec. 639.

90. Spontaneous combustion.—*Massachusetts.*—Evans *v.* Fitchburg R. Co., 11 Mass. 142, 15 Am. Rep. 19.

New Hampshire.—Rixford *v.* Smith, 52 N. H. 355, 13 Am. Rep. 42.

Texas.—Chevallier *v.* Straham, 2 Tex. 115, 47 Am. Dec. 639.

91. Change in temperature.—White *v.* Minneapolis, etc., R. Co., 111 Minn. 167, 126 N. W. 533.

92. Freezing weather. — *Alabama.* — South, etc., R. Co. *v.* Henlein, 52 Ala. 606, 23 Am. Rep. 578.

Arkansas.—Fordyce *v.* McFlynn, 56 Ark. 424, 19 S. W. 961; St. Louis, etc., Railway *v.* Lesser, 46 Ark. 236.

Georgia.—Cooper *v.* Raleigh, etc., R. Co., 18 Am. & Eng. R. Cas., N. S., 412, 110 Ga. 659, 36 S. E. 240; Georgia R. Co. *v.* Spears, 66 Ga. 485, 42 Am. Rep. 81.

Illinois.—Burke *v.* United States Exp. Co., 87 Ill. App. 505; St. Louis, etc., R. Co. *v.* Dorman, 72 Ill. 504.

Iowa.—McCoy *v.* Keokuk, etc., R. Co., 44 Iowa 424.

Kansas.—Kansas Pac. R. Co. *v.* Nichols, etc., Co., 9 Kan. 235, 12 Am. Rep. 494; Kansas Pac. R. Co. *v.* Reynolds, 8 Kan. 623.

Massachusetts.—Smith *v.* New Haven, etc., R. Co. (Mass.), 12 Allen 531.

Minnesota.—Lindsley *v.* Chicago, etc., R. Co., 36 Minn. 539, 33 N. W. 7, 1 Am. St. Rep. 692; Moulton *v.* St. Paul, etc., R. Co., 31 Minn. 85, 16 N. W. 497, 47 Am. Rep. 781.

Missouri.—Lupe *v.* Atlantic, etc., R. Co., 3 Mo. App. 77.

Nebraska.—Atchinson, etc., R. Co. *v.* Washburn, 5 Neb. 117.

New Hampshire.—Rixford *v.* Smith, 52 N. H. 355, 13 Am. Rep. 42.

New York.—Clarke *v.* Rochester, etc., R. Co., 14 N. Y. 570, 67 Am. Dec. 205; Mynard *v.* Syracuse, etc., R. Co., 71 N. Y. 180, 27 Am. Rep. 28.

Ohio.—Wilson *v.* Hamilton, 4 O. St. 722.

Tennessee.—Louisville, etc., R. Co. *v.* Wynn, 88 Tenn. 320, 14 S. W. 311.

Texas.—Missouri Pac. R. Co. *v.* Fagan,

where the goods are frozen, the carrier is not responsible, if it has been guilty of no previous negligence or misconduct, by which such loss or damage may have been occasioned.[93]

Hot Weather.—A shipper of lard in the summer months takes the risk of damage occasioned by the excessively hot weather, unless some neglect or fault can be charged upon the carrier, contributing to the loss.[94]

Insanity of Employee.—If an engineer, accompanied by the conductor, negligently wrecks a car and causes a loss of goods, the loss is not an act of God so as to excuse the carrier though the engineer was insane at the time.[95]

§ 992. Negligence Concurring with Act of God.—There is a conflict among the authorities as to the liability of a carrier where the loss of goods in its possession is due, not solely and only to an act of God, but to an act of God combined with the negligence of the carrier. Many cases hold that a carrier is not exempt from liability for a loss, if it has been guilty of any previous negligence or misconduct which brings the property in contact with the destructive force of the actus Dei, or unnecessarily exposes it thereto; the act of God must have been the sole cause of the loss.[96] Some cases hold that, although the car-

72 Tex. 127, 9 S. W. 749, 2 L. R. A. 75, 13 Am. St. Rep. 776; Missouri Pac. R. Co. *v.* Harris, 67 Tex. 166, 2 S. W. 574.

Vermont.—Kimball *v.* Rutland, etc., R. Co., 26 Vt. 247, 62 Am. Dec. 567.

West Virginia.—Maslin *v.* Baltimore, etc., R. Co., 14 W. Va. 180, 35 Am. Rep. 748.

Wisconsin.—Ayres *v.* Chicago, etc., R. Co., 71 Wis. 372, 37 N. W. 432, 5 Am. St. Rep. 226.

Cold weather in the latitude of Texas in the month of December is not that act of God which would excuse a carrier from the performance of its contract. The carrier must be held to have anticipated such weather at the time of entering into the contract. Texas, etc., R. Co. *v.* Coggin, 44 Tex. Civ. App. 423, 99 S. W. 1052.

93. McGraw *v.* Baltimore, etc., R. Co., 18 W. Va. 361, 41 Am. Rep. 696, 9 Am. & Eng. R. Cas. 188.

In an action against a railroad company for the loss of fruit trees frozen while en route, plaintiff must show that the freezing was caused by unnecessary delay in transporting the trees, or that they were carelessly exposed and the company is not liable if the trees are frozen while remaining in the cars at the terminus of the route, instead of being placed in the warehouse, if the cars afforded a better shelter than the warehouse. Vail *v.* Pacific Railroad, 63 Mo. 230.

Assumption of risk by shipper.—In Swetland *v.* Boston, etc., R. Co., 102 Mass. 276, it is said in the opinion: "If the owner of the goods, which are liable to be injured by freezing, chooses to send them at a season of the year when they are exposed to such risks, he takes the risk himself."

94. **Hot weather.**—Nelson *v.* Woodruff, Fed. Cas. No. 10,117, affirmed in 1 Black 156, 17 L. Ed. 97.

95. **Insanity of employee.**—Central, etc., R. Co. *v.* Hall, 52 S. E. 679, 124 Ga. 322, 41 L. R. A., N. S., 898, 110 Am. St. Rep. 170.

96. **Negligence concurring with act of God—Carrier held liable.**—*United States.*—Dibble *v.* Morgan, Fed. Cas. No. 3,881, 1 Woods 406; The Zenobia, Fed. Cas. No. 18,209, Abb. Adm. 80; Tompkins *v.* Dutchess, Fed. Cas. No. 14,087a.

Alabama.—McCarthy *v.* Louisville, etc., R. Co., 102 Ala. 193, 14 So. 370, 48 Am. St. Rep. 29, 61 Am. & Eng. R. Cas. 178; Central, etc., R. Co. *v.* Sigma Lumber Co., 170 Ala. 627, 54 So. 205, Ann. Cas. 1912D, 965; Alabama, etc., R. Co. *v.* Quarles, 145 Ala. 436, 40 So. 120, 117 Am. St. Rep. 54, 5 L. R. A., N. S., 867, 42 Am. & Eng. R. Cas., N. S., 69; Alabama, etc., R. Co. *v.* Elliott & Son, 150 Ala. 381, 43 So. 738, 124 Am. St. Rep. 72, 9 L. R. A., N. S., 1264; Louisville, etc., R. Co. *v.* Gidley, 119 Ala. 523, 24 So. 753.

Georgia.—Richmond, etc., R. Co. *v.* Benson & Co., 86 Ga. 203, 12 S. E. 357, 22 Am. St. Rep. 446; Richmond, etc., R. Co. *v.* White & Co., 88 Ga. 805, 15 S. E. 802; Savannah, etc., R. Co. *v.* Commercial Guano Co., 103 Ga. 590, 30 S. E. 555; Brunswick, etc., R. Co. *v.* Smith, 97 Ga. 777, 25 S. E. 759; Forrester *v.* Georgia R., etc., Co., 92 Ga. 699, 19 S. E. 811; Atlanta, etc., R. Co. *v.* Jacobs' Pharmacy Co., 135 Ga. 113, 68 S. E. 1039.

Illinois.—Edison *v.* Pennsylvania Co., 70 Ill. App. 654; Michigan Cent. R. Co. *v.* Curtis, 80 Ill. 324; Wald *v.* Pittsburg, etc., R. Co., 162 Ill. 545, 44 N. E. 888, 35 L. R. A. 356, 53 Am. St. Rep. 332. Compare Pittsburg, etc., R. Co. *v.* Chicago, 242 Ill. 178, 89 N. E. 1022, 44 L. R. A., N. S., 358; Green-Wheeler Shoe Co. *v.* Chicago, etc., R. Co., 130 Iowa 123, 106 N. W. 498, 5 L. R. A., N. S., 882.

Kentucky.—Southern R. Co. *v.* Smith, 31 Ky. L. Rep. 243, 102 S. W. 232.

Louisiana.—See Watts & Co. *v.* Saxon, 11 La. Ann. 43.

Maryland.—Boyle *v.* McLaughlin (Md.),

rier may have contributed in a remote way, by its own negligence or laches, to the loss of the goods, if the proximate cause of the loss is the act of God, it

4 Har. & J. 291; Fergusson *v.* Brent, 12 Md. 9, 71 Am. Dec. 582.

Minnesota.—Jones *v.* Minneapolis, etc., R. Co., 91 Minn. 229, 11 R. R. R. 661, 34 Am. & Eng. R. Cas., N. S., 661, 97 N. W. 893, 103 Am. St. Rep. 507; Bibb Broom Corn Co. *v.* Atchinson, etc., R. Co., 94 Minn. 269, 102 N. W. 709, 14 R. R. R. 407, 34 Am. & Eng. R. Cas., N. S., 407, 110 Am. St. Rep. 361, 69 L. R. A. 509.

Missouri.—Davis *v.* Wabash, etc., R. Co., 89 Mo. 340, 1 S. W. 327; Pruitt *v.* Hannibal, etc., R. Co., 62 Mo. 527; Read *v.* St. Louis, etc., R. Co., 60 Mo. 199; Wolf *v.* American Exp. Co., 43 Mo. 421, 97 Am. Dec. 406; Gratiot St. Warehouse Co. *v.* Missouri, etc., R. Co., 102 S. W. 11, 124 Mo. App. 545.

Nebraska.—Wabash R. Co. *v.* Sharpe, 76 Neb. 424, 107 N. W. 758, 124 Am. St. Rep. 823; see Chicago, etc., R. Co. *v.* Manning, 23 Neb. 552, 37 N. W. 462.

New Jersey.—New Brunswick, etc., Co. *v.* Tiers, 24 N. J. L. 697, 64 Am. Dec. 394.

New York.—Condict *v.* Grand Trunk R. Co., 54 N. Y. 500; Michaels *v.* New York Cent. R. Co., 30 N. Y. 564, 86 Am. Dec. 415; Read *v.* Spaulding, 30 N. Y. 630, 86 Am. Dec. 426, affirming 18 N. Y. Super. Ct. 395; Dunson *v.* New York Cent. R. Co. (N. Y.), 3 Lans. 265; Merritt *v.* Earle, 29 N. Y. 115, 86 Am. Dec. 292, affirming 31 Barb. 38.

Pennsylvania.—Liverey *v.* Philadelphia, 64 Pa. 106, 3 Am. Rep. 578.

South Carolina.—Sonneborn & Co. *v.* Southern R. Co., 65 S. C. 502, 44 S. E. 77; Ferguson *v.* Southern Railway, 91 S. C. 61, 74 S. E. 129.

Texas.—Chavallier *v.* Straham, 2 Tex. 145, 47 Am. Dec. 639; M. P. R. Co. *v.* Barnes & Co., 2 Texas App. Civ. Cas., § 575; Pinkerton *v.* Missouri Pac. R. Co., 117 Mo. App. 288, 93 S. W. 849. See Gulf, etc., R. Co. *v.* Texas Star Flour Mills (Tex. Civ. App.), 143 S. W. 1179.

Where loss or damage is caused by the act of God, a carrier is not liable for such loss or damage, though it may have been negligent, unless it can be made to appear that there was some causal connection recognized by the law between such negligence and the loss or damage incurred. Fentiman *v.* Atchison, etc., R. Co., 44 Tex. Civ. App. 455, 98 S. W. 939, and authorities cited. Galveston, etc., R. Co. *v.* Crier, 45 Tex. Civ. App. 434, 100 S. W. 1177, affirmed in 102 Tex. 583, no op.

West Virginia.—McGraw *v.* Baltimore, etc., R. Co., 18 W. Va. 361, 41 Am. Rep. 696, 9 Am. & Eng. R. Cas. 188.

Illustrations.—Where a railroad company, connecting with a boat, unloaded freight intended for the boat on the river bank below high-water mark, when it was raining and the river was rising, the boat not then being at the wharf and there being no necessity for unloading at that time, the company can not escape liability for damage to the goods caused by their being submerged, on the ground that the damage was caused by an act of God. Savannah, etc., R. Co. *v.* Commercial Guano Co., 30 S. E. 555, 103 Ga. 590.

Where the common carrier received goods at Worcester, Mass., to transport to the consignee at Mattoon, Ill., and carried them by way of Chicago, instead of the most usual and direct route, by way of Indianapolis, and while stored in Chicago, awaiting a reshipment, they were destroyed by the great fire of 1871, held, that the carrier was not excused from liability on the ground of inevitable accident, as there was no compulsion to take the goods through Chicago. Merchants' Despatch Transp. Co. *v.* Kahn, 76 Ill. 520.

Defendant, who engaged to carry freight to a certain port, and there reship to another port, deposited the freight at a port three miles from the agreed destination, and departed, leaving it on the bank, where it remained for several days, when it was partly destroyed by flood. Held, that defendant was liable, though his agent, on discovering the danger, used extraordinary diligence in removing the freight to a place of safety. Watts & Co. *v.* Saxon, 11 La. Ann. 43.

In an action against a common carrier for damages caused by the freezing of certain casks of wine, where it appeared that the cold weather was not the sole cause of injury, and that the loss would not have taken place had not the negligence and inattention of the defendant co-operated with the cold, plaintiff is entitled to recover. Wolf *v.* American Exp. Co., 43 Mo. 421, 97 Am. Dec. 406.

A railroad company cannot excuse themselves, as for inevitable accident, by showing that the cars were thrown off the track by accidentally running over a man, if it also appear that the man was a drover attending to cattle on the train, and fell off because no proper place was provided for such attendants, and he was compelled to stand on the bumpers; and this, though the man fell off by his own carelessness—the company having no right to put him in such a position. Goldey *v.* Pennsylvania R. Co., 30 Pa. 242, 72 Am. Dec. 703.

Where a carrier attempted to cross a fording place in a creek, between sunset and dark, while a shower was approaching, without examining the state of the ford, and the wheels of his wagon stuck fast, and the water rose with ex-

will be excused.[97] The conflict is exemplified in the case where a carrier has negligently delayed a shipment, thereby exposing it to loss by an act of God. One line of cases holds that the carrier is liable,[98] while others sustain the op-

traordinary suddenness, so as to injure the goods in the wagon, he was held liable for the damage thus caused. Campbell *v.* Morse (S. C.), Harp. 468.

If a carrier has departed from the line of duty, and has violated his contract, and while thus in fault, and in consequence of that fault, the goods are injured by an act of God, which would not otherwise have produced the injury, then the carrier is not protected. Michaels *v.* New York Cent. R. Co., 30 N. Y. 564, 86 Am. Dec. 415; Read *v.* Spaulding, 30 N. Y. 630, 86 Am. Dec. 426, affirming 18 N. Y. Super. Ct. 395.

Where a carrier negligently leaves goods exposed on a wharf, he is liable for their loss even though occasioned by immediate act of God. Morgan *v.* Dibble, 29 Tex. 107, 94 Am. Dec. 264.

Must prove foundered vessel seaworthy.—If a vessel founders, the owners, as common carriers, must prove that she was seaworthy, before they can bring themselves within the excuse of its being the act of God. Bell *v.* Reed (Pa.), 4 Bin. 127, 5 Am. Dec. 398.

Wrongful refusal to deliver on demand.—A railroad company transported goods to destination and notified the owner to take them away. In response, the owner promptly called at the freight depot, tendered the charges due and demanded delivery of the goods, which demand the railroad company refused. The next day an unprecedented flood occurred which damaged the goods. Held, that the company having refused the owner's demand and wrongfully detained the goods, held them at its own risk, and was responsible for the damage caused by the flood. Henry *v.* Atchison, etc., R. Co., 109 Pac. 1005, 83 Kan. 104, 28 L. R. A., N. S., 1088.

Loss by perils of sea when goods improperly stowed.—"Goods, though lost by perils of the sea, if they were stowed on deck without the consent of the shipper, are not regarded as goods lost by the act of God within the meaning of the maritime law, nor are such losses regarded as losses by perils of the sea which will excuse the carrier from delivering the goods shipped to the consignee unless it appears that the manner in which the goods were stowed is sanctioned by commercial usage, or unless it affirmatively appears that the manner of stowage did not, in any degree, contribute to the disaster; that the loss happened without any fault or negligence on the part of the carrier, and that it could have been prevented by human skill and prudence, even if the goods had been stowed under deck, as required by the general rules of the maritime law." The Delaware (U. S.), 14 Wall. 579, 598, 20 L. Ed. 779. And see Lawrence *v.* Minturn (U. S.), 17 How. 100, 15 L. Ed. 58.

97. Memphis, etc., R. Co. *v.* Reeves (U. S.), 10 Wall. 176, 19 L. Ed. 909. See cases in second succeeding note.

98. **Authorities holding carrier liable.**—*Alabama.*—Alabama, etc., R. Co. *v.* Quarles, 145 Ala. 436, 40 So. 120, 5 L. R. A., N. S., 867, 117 Am. St. Rep. 54, 19 R. R. R. 69, 42 Am. & Eng. R. Cas., N. S., 69. (Goods detained 11 days.) Alabama, etc., R. Co. *v.* Elliott & Son, 150 Ala. 381, 43 So. 738, 124 Am. St. Rep. 72, 9 L. R. A., N. S., 126. (Goods delayed four days.)

Georgia.—Richmond, etc., R. Co. *v.* White, 88 Ga. 805, 15 S. E. 802 (Goods wrongfully detained after arrival). See, also, Richmond, etc., R. Co. *v.* Benson & Co., 86 Ga. 203, 12 S. E. 357, 22 Am. St. Rep. 446.

Illinois.—Wald *v.* Pittsburg, etc., R. Co., 162 Ill. 545, 44 N. E. 888, 35 L. R. A. 356, 53 Am. St. Rep. 332.

Compare Pittsburg, etc., R. Co. *v.* Chicago, 242 Ill. 178, 89 N. E. 1022, 44 L. R. A., N. S., 358, holding that though defendant railroad was negligent in not getting the car containing plaintiff's butter out of its freight yards before the destructive part of an unprecedented flood, constituting an act of God, came, it was not liable, unless it was warned of the approach, not merely of a rise in the river, but of the flood.

Iowa.—Green-Wheeler Shoe Co. *v.* Chicago, etc., R. Co., 130 Iowa 123, 106 N. W. 498, 5 L. R. A., N. S., 882. See, also, Hewett *v.* Chicago, etc., R. Co., 63 Iowa 611, 19 N. W. 790.

Kentucky.—Cassilay *v.* Young (Ky.), 4 B. Mon. 265, 39 Am. Dec. 505. (Stoppage short of reshipment point.) See, also, Hernsheim *v.* Newport News, etc., Co., 18 Ky. L. Rep. 227, 35 S. W. 1115.

Minnesota.—Bibb Broom Corn Co. *v.* Atchison, etc., R. Co., 9 Minn. 269, 102 N. W. 790, 14 R. R. R. 407, 37 Am. & Eng. R. Cas., N. S., 407, 69 L. R. A. 509, 110 Am. St. Rep. 361.

Nebraska.—Sunderland Bros. Co. *v.* Chicago, etc., R. Co., 89 Neb. 660, 131 N. W. 1047; Wabash R. Co. *v.* Sharpe, 76 Neb. 424, 107 N. W. 758, 124 Am. St. Rep. 823; Chicago, etc., R. Co. *v.* Manning, 23 Neb. 552, 37 N. W. 462.

New York.—Read *v.* Spaulding, 30 N. Y. 630, 86 Am. Dec. 426, affirming 18 N. Y. Super. Ct. 395; Bostwick *v.* Baltimore, etc., R. Co., 45 N. Y. 712; Dunson *v.* New York Cent. R. Co., 3 Lans. 265; Heyl *v.* Inman Steamship Co., 14 Hun

posite doctrine and hold that the carrier is excused, although the goods would not have been exposed to such injury but for the delay.[99] It has been held that the mere fact that the captain of a well-fitted boat was inexperienced is not

564; Tierney *v.* New York, etc., R. Co., 76 N. Y. 305; Michaels *v.* New York Cent. R. Co., 30 N. Y. 564, 86 Am. Dec. 415.

West Virginia.—McGraw *v.* Baltimore, etc., R. Co., 18 W. Va. 361, 41 Am. Rep. 696, 9 Am. & Eng. R. Cas. 188.

99. *United States.*—Memphis, etc., R. Co. *v.* Reeves (U. S.), 10 Wall. 176, 19 L. Ed. 909; Thomas *v.* Lancaster Mills, 19 C. C. A. 88, 71 Fed. 481; Scott *v.* Baltimore, etc., Steamboat Co., 19 Fed. 56; Empire State Cattle Co. *v.* Atchison, etc., R. Co., 135 Fed. 135, affirmed in 147 Fed. 457, 77 C. C. A. 601.

Kansas.—Rodgers *v.* Missouri Pac. R. Co., 75 Kan. 222, 88 Pac. 885, 10 L. R. A., N. S., 658, 12 Am. & Eng. Ann. Cas. 441; Atchison, etc., R. Co. *v.* Henry, 78 Kan. 490, 97 Pac. 465, 18 L. R. A., N. S., 177.

Maine.—O'Brien *v.* McClinchy, 68 Me. 557.

Massachusetts.—Denny *v.* New York Cent. R. Co., 13 Gray 481, 74 Am. Dec. 645. See, also, Hoadley *v.* Northern Transp. Co., 115 Mass. 304, 15 Am. Rep. 106.

Michigan.—See Michigan Cent. R. Co. *v.* Burrows, 33 Mich. 6.

Mississippi.—Yazoo, etc., R. Co. *v.* Millsaps, 76 Miss. 855, 25 So. 672, 71 Am. St. Rep. 543; Merchants', etc., Ass'n *v.* Wood, 64 Miss. 661, 2 So. 76.

Missouri.—Elam *v.* St. Louis, etc., R. Co., 117 Mo. App. 453, 93 S. W. 851; Moffatt Comm. Co. *v.* Union Pac. R. Co., 113 Mo. App. 544, 88 S. W. 117; Lightfoot & Son *v.* St. Louis, etc., R. Co., 126 Mo. App. 532, 104 S. W. 482. Compare Armentrout *v.* St. Louis, etc., R. Co., 1 Mo. App. 158.

New Mexico.—McVeagh *v.* Atchinson, etc., R. Co., 3 N. Mex. 327, 5 Pac. 457.

North Carolina.—General Fire Extinguisher Co. *v.* Carolina, etc., R. Co., 137 N. C. 278, 49 S. E. 208, 42 Am. & Eng. R. Cas., N. S., 336.

Ohio.—Daniels *v.* Ballantine, 23 O. 532, 13 Am. Rep. 264.

Pennsylvania.—Clarke *v.* Needles, 25 Pa. 338; Morrison *v.* Davis & Co., 20 Pa. 171, 57 Am. Dec. 695.

Tennessee.—Lamont & Co. *v.* Nashville, etc., R. Co., 56 Tenn. (9 Heisk.) 58. See, also, White *v.* Conly, 82 Tenn. (14 Lea) 51, 52 Am. Rep. 154.

Texas.—Hunt Bros. *v.* Missouri, etc., R. Co. (Tex. Civ. App.), 74 S. W. 69, affirmed in 97 Tex. 637, no op.; International etc., R. Co. *v.* Bergman (Tex. Civ. App.), 64 S. W. 999; Gulf, etc., R. Co. *v.* Darby, 67 S. W. 129, 28 Tex. Civ. App. 229; Gulf, etc., R. Co. *v.* North Texas Grain Co., 32 Tex. Civ. App. 93, 74 S. W. 567; Fentiman *v.* Atchison, etc., R. Co., 44 Tex. Civ. App. 455, 98 S. W. 939. Compare Gulf, etc., R. Co. *v.* McCorquodale, 71 Tex. 41, 9 S. W. 80.

Vermont.—Davis *v.* Central Vermont R. Co., 66 Vt. 290, 29 Atl. 313.

Virginia.—Herring *v.* Chesapeake, etc., R. Co., 101 Va. 778, 9 R. R. R. 262, 32 Am. & Eng. R. Cas., N. S., 262, 45 S. E. 322.

Illustrations.—A common carrier, who transports goods safely to their destination, is not responsible for injuries to them by a flood while in the depot at that place, although the goods would not have been exposed to such injury but for delay in transportation. Denny *v.* New York Cent. R. Co. (Mass.), 13 Gray 481, 74 Am. Dec. 645.

Wheat shipped by plaintiff over the defendant railroad was damaged, and a part of it totally destroyed, in an unprecedented storm, which occurred while the wheat was still in the possession of the railroad company. The railroad had been guilty of negligence in failing to place the wheat on the proper elevator tracks promptly, so that it could be unloaded, and in other ways; and, but for its negligence, the cars would probably have been unloaded when the storm occurred. Held, that the storm was the proximate, and the company's negligence the remote, cause of the injury to the wheat, and the company was not liable. Hunt Bros. *v.* Missouri, etc., R. Co. (Tex. Civ. App.), 74 S. W. 69.

Where, in an action against a common carrier for goods lost in an unprecedented storm, it appeared that the place of storage was safe under usual conditions, and that, though it was possible to have delivered them on the morning of the storm, the bad weather deterred the drayman, and it did not appear that there was any safer place after the danger became apparent, the company was not liable. International, etc., R. Co. *v.* Bergman (Tex. Civ. App.), 64 S. W. 999.

Lame horse—Canal boat overtaken by flood.—In Morrison *v.* Davis & Co., 20 Pa. 171, 57 Am. Dec. 695, it appeared that freight carried in a canal boat was injured by the wrecking of the boat, caused by an extraordinary flood. It was held, that the carrier was not rendered liable merely by the fact that, when the boat was started on its voyage, one of the horses attached to it was lame, and that in consequence, such delay occurred as prevented the boat from passing the place where the accident happened, though beyond such place it would have been safe.

sufficient to render the boat liable for loss resulting from a sudden storm and not from his incompetency.[1]

§ 993. Where Danger Should Have Been Anticipated.—An act of God is no excuse where the carrier could have anticipated the danger and provided against it or avoided it by the exercise of proper care.[2] Where a carrier undertakes to transport a shipment, knowing at the time that a portion of its route is obstructed by floods, the existence of the floods is not such an act of God as will relieve it from liability for injuries to the shipment while being carried over another route.[3] It is the duty of railroads in constructing their roadbeds to guard against floods which may be anticipated, though some may be extraordinary and unusual;[4] but they are not liable for failure to guard against extraor-

1. Hart *v.* Allen (Pa.), 2 Watts 114.

2. Where danger should have been anticipated.—*United States.*—Southern Pac. Co. *v.* Schoer, 52 C. C. A. 268, 57 L. R. A. 707, 114 Fed. 466, 3 R. R. R. 254, 26 Am. & Eng. R. Cas., N. S., 254.

Georgia.—The carrier is required to exercise extraordinary diligence. Section 2066, Code. Savannah, etc., R. Co. *v.* Commercial Guano Co., 103 Ga. 590, 30 S. E. 555; Richmond, etc., R. Co. *v.* White, 88 Ga. 805, 15 S. E. 802.

Precautions for the protection of the goods which would have been available as against any previous flood of which the carrier (a railroad company) had knowledge, would not necessarily fill the measure of extraordinary diligence, inasmuch as history or tradition might make it incumbent on the carrier to have more knowledge than that actually possessed. In such matters it might be just to treat the means of knowledge as equivalent to actual notice. Richmond, etc., R. Co. *v.* White, 88 Ga. 805, 15 S. E. 802.

Illinois.—Illinois Cent. R. Co. *v.* Ashmead, 58 Ill. 487.

Indiana.—Cleveland, etc., R. Co. *v.* Heath, 22 Ind. App. 47, 53 N. E. 198.

Louisiana.—Carrier is bound to the most exact diligence. See Blocker *v.* Whittenburg, 12 La. Ann. 410; Watts & Co. *v.* Saxon, 11 La. Ann. 43.

Missouri.—Clark *v.* Pacific R. Co., 39 Mo. 184, 90 Am. Dec. 458; Ellet *v.* St. Louis, etc., R. Co., 76 Mo. 518, 12 Am. & Eng. R. Cas. 183; Hill *v.* Sturgeon, 28 Mo. 323; Wolf *v.* American Exp. Co., 43 Mo. 421, 97 Am. Dec. 406.

Montana.—Nelson *v.* Great Northern R. Co., 28 Mont. 298, 9 R. R. R. 311, 32 Am. & Eng. R. Cas., N. S., 311, 72 Pac. 642.

Nebraska.—Chicago, etc., R. Co. *v.* Manning, 23 Neb. 552, 37 N. W. 462.

South Carolina.—Ewart *v.* Street, 2 Bailey 157, 23 Am. Dec. 131.

Tennessee.—Lamont & Co. *v.* Nashville, etc., R. Co., 56 Tenn. (9 Heisk.) 58.

Texas.—Philleo *v.* Sanford, 17 Tex. 227, 67 Am. Dec. 654; St. Louis, etc., R. Co. *v.* Bland (Tex. Civ. App.), 34 S. W. 675.

West Virginia.—Baltimore, etc., R. Co. *v.* Morehead, 5 W. Va. 293.

Whether an extraordinary flood, causing loss of goods in possession of carrier, constituted an act of God, sufficient to relieve the carrier from liability, depends on whether it could have been foreseen and guarded against by the exercise of reasonable care. Ferguson *v.* Southern Railway, 91 S. C. 61, 74 S. E. 129.

Common carriers are not bound to make extraordinary provision for an act of God which could not reasonably have been anticipated. Pennsylvania R. Co. *v.* Fries, 87 Pa. 234.

Reflux of tide—Vessel grounded.—In Charleston, etc., Steamboat Co. *v.* Bason (S. C.), Harp. 262, it appeared that the steamboat of defendants, when going through an inland passage to Charleston, grounded from the reflux of the tide, and, in consequence of which, she fell over and bilge water rose in the cabin and injured a box of books belonging to plaintiff. It was held, that defendants, as common carriers, were liable for the loss so occasioned.

Unusually low tide—Vessel pierced by timber projecting from wharf.—In New Brunswick, etc., Co. *v.* Tiers, 24 N. J. L. 697, 64 Am. Dec. 394, it is held that the fact that a severe storm produced an unusually low tide, and thereby caused the carrier's barge to strike against a timber projecting from the wharf so low as in ordinary tides to be no cause of injury, will not excuse the carrier for the loss of the goods caused by the timber piercing the vessel.

Rain.—In Klauber *v.* American Exp. Co., 21 Wis. 21, 91 Am. Dec. 452, it is held, that against all ordinary occurrences of rain, the carrier is bound to provide; and if it does not, and damage ensues to the goods, it must bear the loss. And see Philleo *v.* Sanford, 17 Tex. 227, 67 Am. Dec. 654.

3. Transportation undertaken with knowledge of flood.—Adams Exp. Co. *v.* Jackson, 92 Tenn. 326, 21 S. W. 666.

4. Duty in constructing roadbeds.—Missouri, etc., R. Co. *v.* Davidson, 60 S. W. 278, 25 Tex. Civ. App. 134. See International, etc., R. Co. *v.* Halloren, 53 Tex. 46, 37 Am. Rep. 744.

Rain overflowing the road bed of a

dinary floods unknown to common experience, and which could not have been reasonably anticipated in the construction of the road.[5] A carrier is not bound to provide against an unprecedented emergency, such as a greater flood than was ever known before in that locality, unless it has reason to suspect that such emergency is about to arise.[6] And it is not required to procure cars of sufficient strength to withstand a storm which it can not reasonably anticipate as likely to occur.[7]

§ 994. Duty to Prevent Act of God from Causing Injury.—A carrier must use reasonable care and diligence to protect freight from loss or danger even from a cause against which it is not an insurer, such as the act of God, and if it fails to do so and loss results therefrom, it is liable.[8] It is generally held

railroad and washing away a part of its embankment from under the cross ties can not be considered an act of God in such sense as to relieve the railroad from liability for not furnishing sufficient drainage to properly carry away the rain, unless it was so far outside the range of ordinary human experience that the duty of exercising reasonable care did not require the railroad to anticipate and provide against it. Gulf, etc., R. Co. *v.* Boyce, 39 Tex. Civ. App. 195, 87 S. W. 395, affirmed in 100 Tex. 639, no op.

5. International, etc., R. Co. *v.* Halloren, 53 Tex. 46, 37 Am. Rep. 744.

The railroad company in constructing its roadbed need not take into account the history of previous floods within the memory of living men, as due care may be shown in locating the road, though information from the inhabitants was not sought after. St. Louis, etc., R. Co. *v.* Bland (Tex. Civ. App.), 34 S. W. 675.

6. Nashville, etc., R. Co. *v.* King, 53 Tenn. (6 Heisk.) 269.

Extraordinary floods, that may reasonably be anticipated, must be guarded against, without reference to the infrequency of their occurrence. The fact that floods not provided for have occurred only at long intervals constitutes no defense. Gulf, etc., R. Co. *v.* Pomeroy, 67 Tex. 498, 3 S. W. 722; Atchison, etc., R. Co. *v.* Madden, etc., Co., 46 Tex. Civ. App. 597, 103 S. W. 1193, affirmed in 102 Tex. 578, no op.

7. Gulf, etc., R. Co. *v.* Texas Star Flour Mill (Tex. Civ. App.), 143 S. W. 1179.

8. **Duty to prevent act of God from doing injury.**—*United States.*—Holladay *v.* Kenard, 12 Wall. 254, 20 L. Ed. 390; Pearce *v.* Newton, 41 Fed. 106; Strouss *v.* Wabash, etc., R. Co., 17 Fed. 209; The Aline, 19 Fed. 875; The M. M. Chase, 37 Fed. 708; Southern Pac. Co. *v.* Schoer, 52 C. C. A. 268, 57 L. R. A. 707, 114 Fed. 466, 3 R. R. R. 254, 26 Am. & Eng. R. Cas., N. S., 254.

Alabama.—Smith *v.* Western Railway, 91 Ala. 455, 8 So. 754, 24 Am. St. Rep. 929, 11 L. R. A. 619.

Connecticut.— Peck *v.* Weeks, 34 Conn. 145.

Georgia.—Wallace *v.* Clayton, 42 Ga. 443.

Illinois.—Illinois Cent. R. Co. *v.* Adams, 42 Ill. 474, 92 Am. Dec. 85; Wald *v.* Pittsburg, etc., R. Co., 162 Ill. 545, 44 N. E. 888, 35 L. R. A. 356, 53 Am. St. Rep. 332.

Indiana.—Cleveland, etc., R. Co. *v.* Heath, 22 Ind. App. 47, 53 N. E. 198; Cincinnati, etc., R. Co. *v.* Webb, 103 Ky. 705, 46 S. W. 11.

Missouri.—Clark *v.* Pacific R. Co., 39 Mo. 184, 90 Am. Dec. 458; Davis *v.* Wabash, etc., R. Co., 89 Mo. 340, 1 S. W. 327; Ellet *v.* St. Louis, etc., R. Co., 76 Mo. 518, 12 Am. & Eng. R. Cas. 183; Hill *v.* Sturgeon, 28 Mo. 323; Read *v.* St. Louis, etc., R. Co., 60 Mo. 199.

Nebraska.—Black *v.* Chicago, etc., R. Co., 30 Neb. 197, 46 N. W. 428; Chicago, etc., R. Co *v.* Manning, 23 Neb. 552, 37 N. W. 462; Sunderland Bros. Co. *v.* Chicago, etc., R. Co., 89 Neb. 660, 131 N. W. 1047; Wabash R. Co. *v.* Sharpe, 76 Neb. 424, 107 N. W. 758, 124 Am. St. Rep. 823.

Pennsylvania.—Morrison *v.* McFadden (Pa.), 5 Clark 23, 3 Am. L. J., N. S., 462.

South Carolina.—Charleston, etc., Steamboat Co. *v.* Bason, Harp. 262; Ewart *v.* Street, 2 Bailey 157, 23 Am. Dec. 131.

Tennessee.—Lamont & Co. *v.* Nashville, etc., R. Co., 56 Tenn. (9 Heisk.) 58.

Texas.—Phillco *v.* Sanford, 17 Tex. 227, 67 Am. Dec. 654; St. Louis, etc., R. Co. *v.* Bland (Tex. Civ. App.), 34 S. W. 675.

Under the Carmack amendment (Act June 29, 1906, c. 3591, § 7, 34 Stat. 593 [U. S. Comp. St. Supp. 1911, p. 1307]) to the Interstate Commerce Act (Act Feb. 4, 1887, c. 104, § 20, 24 Stat. 386 [U. S. Comp. St. 1901, p. 3169]), a carrier is not excused from liability for destruction of goods by flood unless he shows some activity in protecting them as necessity arises. National Rice Mill Co. *v.* New Orleans, etc., R. Co., 61 So. 708, 132 La. 615.

Inaccuracy in a weather bureau's forecast held no defense, where the carrier showed no reasonable activity to protect the shipment after being warned of the

that the carrier is not required to exercise the highest diligence but only such care as an ordinarily prudent person or carrier would use under like circumstances.[9] But in some jurisdictions, the carrier must exercise extraordinary diligence.[10] It is held that where an unprecedented flood is threatened as the result of a general storm, it is the carrier's duty to exercise unusual care to see that a car loaded with lime, likely to become ignited by water, be kept removed a safe distance from the cars loaded with rice.[11] As to goods which arrive too

impending flood. National Rice Mill. Co. *v.* New Orleans, etc., R. Co., 61 So. 708, 132 La. 615.

Where the only means of protection was by occupying the track of another road, it can not be said that a railroad company is guilty of negligence as a matter of law in failing to protect freight in its yards against an unusual and extraordinary flood. Wallace *v.* Clayton, 42 Ga. 443.

Illustrations.—In an action against steamboat owners for the loss of goods, it appeared that on the voyage a storm arose which caused the boat to lay to, and, while thus laying to, it took in water, and was in a sinking condition. Held, that if the loss was caused by the sinking of the boat, and that could have been prevented by prudence and skill on the part of the officers of the boat, the owners were liable. Sprowl *v.* Kellar (Ala.), 4 Stew. & P. 382.

A carrier failed to deliver promptly certain fruit trees, because of high water, rendering a part of its line impassable, whereby the trees were, when received, dead, but did not show that it could not have sent them over another line. Held, that the loss was not occasioned by the act of God. Chicago, etc., R. Co. *v.* Manning, 23 Neb. 552, 37 N. W. 462.

A carrier is responsible for injuries to perishable goods (potatoes) by cold, where due care in view of all the circumstances was not taken to protect them. Wing *v.* New York, etc., R. Co. (N. Y.), 1 Hilt. 235.

Where the grounding of a boat while waiting for the tide was unavoidable, but resulting injury to cargo, by the heeling of the boat, might have been avoided by selecting a level bottom for grounding, or by removing goods after that accident occurred, the carrier is liable. Charleston, etc., Steamboat Co. *v.* Bason (S. C.), Harp. 262.

Defendant undertook to transport plaintiff's cotton, but, owing to the destruction of a bridge by an unusual flood, the cotton was delayed, during which time it was injured and depreciated in weight by the bursting of the bagging, and the manner in which it was handled. Held, that defendant was liable for the damage. Lipford *v.* Charlotte, etc., R. Co. (S. C.), 7 Rich. L. 409.

That the roadbed of a railroad company was damaged by an unprecedented flood, necessitating the shipment of goods by a more circuitous route, does not relieve the carrier from liability for the damages caused thereby, where, by the exercise of reasonable care, it could have guarded against the effect of the floods. St. Louis, etc., R. Co. *v.* Bland (Tex. Civ. App.), 34 S. W. 675.

A steamship brought a consignment of oranges to New York, where she arrived on December 29th. The weather was so cold as to render it impossible to land oranges without freezing them, and continued below zero for several days. The oranges were landed in spite of the consignee's objection, and their value was for the most part destroyed. Held, that the act which destroyed the cargo was not the "act of God," but of man, in discharging the oranges at an unsuitable time. The Aline, 19 Fed. 875.

9. Care of ordinarily prudent person or carrier.—Railroad Co. *v.* Reeves (U. S.), 10 Wall. 176, 19 L. Ed. 909; Black *v.* Chicago, etc., R. Co., 30 Neb. 197, 46 N. W. 428; Nashville, etc., R. Co. *v.* David, 53 Tenn. (6 Heisk.) 261, 19 Am. Rep. 594; Lamont & Co. *v.* Nashville, etc., R. Co., 56 Tenn. (9 Heisk.) 58.

In circumstances of danger, the law requires of a carrier ordinary care, skill, and foresight in attempting to escape; and, in great danger, great care is the ordinary care of prudent men. Morrison *v.* McFadden (Pa.), 5 Clark 23, 3 Am. L. J., N. S., 462.

In case of emergency, or when property confided to his care is placed in jeopardy by some vis major, the carrier is bound to use actively and energetically all the means of his command, that he might, reasonably, be expected to possess, to meet the emergency and save the property. Lamont & Co. *v.* Nashville, etc., R. Co., 56 Tenn. (9 Heisk.) 58.

In order to charge a common carrier with goods lost in an unprecedented storm, plaintiff must show that by ordinary prudence it could have protected the goods after becoming aware of the impending danger. International, etc., R. Co. *v.* Bergman (Tex. Civ. App.), 64 S. W. 999.

10. *Georgia.*—Civ. Code, § 2066. Richmond, etc., R. Co. *v.* White, 88 Ga. 805, 15 S. E. 802.

Louisiana.—Blocker *v.* Whittenburg, 12 La. Ann. 410. See Watts & Co. *v.* Saxon, 11 La. Ann. 43.

11. National Rice Mill. Co. *v.* New Orleans, etc., R. Co., 132 La. 615, 61 So. 708.

late to admit of giving the usual notice to the consignee before a flood occurs, the carrier is bound to the exercise of extraordinary diligence in protecting them from damage; but if they are damaged in spite of such diligence, the carrier will be excused.[12] It is held, that a common carrier, upon our western waters, is not responsible for not drying merchandise which has been wet and damaged by inevitable accident.[13]

§§ 995-997. Act of Public Enemy—§ 995. In General.—A carrier is not an insurer against loss of or damage to freight occasioned by acts of the public enemy, and if the carrier has exercised due diligence it is not liable for losses so caused.[14] In order that the carrier may avail itself of the rule that it

12. Richmond, etc., R. Co. *v.* White, 88 Ga. 805, 15 S. E. 802.

13. Steamboat Lynx *v.* King, 12 Mo. 272, 49 Am. Dec. 135.

14. **Act of public enemy relieves carrier.**—*United States.*—Holladay *v.* Kennard, 12 Wall. 254, 20 L. Ed. 390; Railroad Co. *v.* Reeves, 10 Wall. 176, 19 L. Ed. 909; Primrose *v.* Western Union Tel. Co., 154 U. S. 1, 38 L. Ed. 883, 14 S. Ct. 1098; Niagara *v.* Cordes, 21 How. 7, 16 L. Ed. 41; York Co. *v.* Central R. Co., 3 Wall. 107, 18 L. Ed. 170; Railroad Co. *v.* Varnell, 98 U. S. 479, 25 L. Ed. 233; The Delaware, 14 Wall. 579, 20 L. Ed. 779; Clark *v.* Barnwell, 12 How. 272, 13 L. Ed. 985.

Alabama.—Jones *v.* Pitcher & Co., 3 Stew. & P. 135, 2 Am. Dec. 716; Knox *v.* Rives, etc., Co., 14 Ala. 249, 48 Am. Dec. 97; Louisville, etc., R. Co. *v.* Cowherd, 120 Ala. 51, 23 So. 793; Selma, etc., R. Co. *v.* Butts, 43 Ala. 385, 94 Am. Dec. 695; South. etc., R. Co. *v.* Henlein, 52 Ala. 606, 23 Am. Rep. 578; South. etc., R. Co. *v.* Wood, 66 Ala. 167, 41 Am. Rep. 749, 9 Am. & Eng. R. Cas. 419; Southern R. Co. *v.* Levy, 144 Ala. 614, 39 So. 95, 17 R. R. R. 50, 40 Am. & Eng. R. Cas., N. S., 50.

Arkansas.—Kansas City, etc., R. Co. *v.* Barnett, 69 Ark. 150, 61 S. W. 919; Little Rock, etc., R. Co. *v.* Talbot, 47 Ark. 97, 14 S. W. 471; Packard *v.* Taylor, etc., Co., 35 Ark. 402, 37 Am. Rep. 37; St. Louis, etc., Railway *v.* Lesser, 46 Ark. 236.

California.—Agnew *v.* Steamer Contra Costa, 27 Cal. 425, 87 Am. Dec. 87; Bohannan *v.* Hammond, 42 Cal. 227; Hooper *v.* Wells, Fargo & Co., 27 Cal. 11, 85 Am. Dec. 211; Jackson *v.* Sacramento Val. R. Co., 23 Cal. 268; Scammon *v.* Wells Fargo & Co., 84 Cal. 311, 24 Pac. 284.

Connecticut.—Clark *v.* Richards, 1 Conn. 54; Hale *v.* New Jersey Steam-Nav. Co., 15 Conn. 539, 39 Am. Dec. 398; Williams *v.* Grant, 1 Conn. 487, 7 Am. Dec. 235.

Delaware.—Klair *v.* Wilmington Steamboat Co., 4 Pen. 51, 7 R. R. R. 821, 30 Am. & Eng. R. Cas., N. S., 821, 54 Atl. 694; Pennewill *v.* Cullen, 5 Har. 238; Reed *v.* Wilmington Steamboat Co., 1 Marv. 193, 40 Atl. 955, 1 Hardesty 127; Traux *v.* Philadelphia, etc., R. Co., 3 Houst. 233.

Georgia.—Central, etc., R. Co. *v.* Lippman, 110 Ga. 665, 36 S. E. 202, 50 L. R. A. 673; Cooper *v.* Raleigh, etc., R. Co., 110 Ga. 659, 36 S. E. 240, 18 Am. & Eng. R. Cas., N. S., 412; Dibble *v.* Brown, 12 Ga. 217, 56 Am. Dec. 460; Fish *v.* Chapman, 2 Ga. 349, 46 Am. Dec. 393; Georgia R. Co. *v.* Beatie, 66 Ga. 438, 42 Am. Rep. 75; Georgia R. Co. *v.* Spears, 66 Ga. 485, 42 Am. Rep. 81; Southern Exp. Co. *v.* Newby, 36 Ga. 635, 91 Am. Dec. 783; Ohlen *v.* Atlanta, etc., R. Co., 2 Ga. App. 323, 58 S. E. 511; Savannah, etc., R. Co. *v.* Wilcox, etc., Co., 48 Ga. 432; Louisville, etc., R. Co. *v.* Warfield, 129 Ga. 473, 59 S. E. 234; Richmond, etc., R. Co. *v.* White, 88 Ga. 805, 15 S. E. 802; Forrester *v.* Georgia R., etc., Co., 92 Ga. 699, 19 S. E. 811; Brunswick, etc., R. Co. *v.* Smith, 97 Ga. 777, 25 S. E. 759.

Illinois.—Gulliver *v.* Adams Exp. Co., 38 Ill. 503; Illinois Cent. R. Co. *v.* McClellan, 54 Ill. 58, 5 Am. Rep. 83; Merchants' Despatch Transp. Co. *v.* Kahn, 76 Ill. 520; Peoria, etc., R. Co. *v.* United States, etc., Co., 136 Ill. 643, 27 N. E. 59, 29 Am. St. Rep. 348; Porter *v.* Chicago, etc., R. Co., 20 Ill. 407, 71 Am. Dec. 286; United States Express Co. *v.* Hutchins, 67 Ill. 348; Woods *v.* Devin, 13 Ill. 746, 56 Am. Dec. 483; Illinois Cent. R. Co. *v.* Frankenberg, 54 Ill. 88, 5 Am. Rep. 92; Chicago, etc., R. Co. *v.* People, 56 Ill. 365, 8 Am. Rep. 690; Pittsburg, etc., R. Co. *v.* Chicago, 89 N. E. 1022, 242 Ill. 178, 44 L. R. A., N. S., 358.

Indiana.—Ohio, etc., R. Co. *v.* Yohe, 51 Ind. 181, 19 Am. Rep. 727; Pittsburg, etc., R. Co. *v.* Hollowell, 65 Ind. 188, 32 Am. Rep. 63; Powers *v.* Davenport, 7 Blackf. 497, 43 Am. Dec. 107; Toledo, etc., R. Co. *v.* Tapp, 6 Ind. App. 304, 33 N. E. 462; Walpole *v.* Bridges, 5 Blackf. 222; Cleveland, etc., R. Co. *v.* Henry, 170 Ind. 94, 83 N. E. 710, reversing 80 N. E. 636; Reid *v.* Evansville, etc., R. Co., 35 N. E. 703, 10 Ind. App. 385, 53 Am. St. Rep. 391; Bansemer *v.* Toledo, etc., R. Co., 25 Ind. 434, 87 Am. Dec. 367.

Iowa.—Cownie Glove Co. *v.* Merchants' Dispatch Transp. Co., 106 N. W. 749, 130 Iowa 327, 114 Am. St. Rep. 419, 4 L. R. A., N. S., 1060; Swiney *v.* American Exp. Co., 115 N. W. 212.

Kansas.—Kansas Pac. R. Co. *v.* Nichols, etc., Co., 9 Kan. 235, 12 Am. Rep. 494;

is exempt from liability for injuries resulting from the act of the public enemy,

Watkins Merchandise Co. *v.* Missouri, etc., R. Co., 82 Kan. 308, 108 Pac. 116.

Kentucky.—Hall & Co. *v.* Renfro, 3 Metc. 51; Chesapeake, etc., R. Co. *v.* Hall, 136 Ky. 379, 124 S. W. 372; Lewis *v.* Louisville, etc., R. Co., 135 Ky. 361, 122 S. W. 184, 25 L. R. A., N. S., 938, 21 Am. & Eng. Ann. Cas. 527; Farley *v.* Lavary, 54 S. W. 840, 107 Ky. 523, 21 Ky. L. Rep. 1252, 47 L. R. A. 383; Stiles *v.* Louisville, etc., R. Co., 10 S. W. 820, 33 Ky. L. Rep. 625.

Louisiana.—McCranie *v.* Wood, 24 La. Ann. 406; Thomas *v.* Morning Glory, 13 La. Ann. 269, 71 Am. Dec. 509.

Maine.—Emery *v.* Hersey, 4 Greenl. 407, 16 Am. Dec. 268; Parker *v.* Flagg, 26 Me. 181, 45 Am. Dec. 101; Sager *v.* Portsmouth, etc., R. Co., 31 Me. 228, 50 Am. Dec. 659; Wood *v.* Maine Cent. R. Co., 98 Me. 98, 56 Atl. 457, 9 R. R. R. 721, 32 Am. & Eng. R. Cas., N. S., 721, 99 Am. St. Rep. 339.

Maryland.—Boyle *v.* McLaughlin, 4 Har. & J. 291; Philadelphia, etc., R. Co. *v.* Harper, 29 Md. 330.

Massachusetts.—Evans *v.* Fitchburg R. Co., 111 Mass. 142, 15 Am. Rep. 19; Gage *v.* Tirrell, 9 Allen 299; Hastings *v.* Pepper, 11 Pick. 41; Smith *v.* New Haven, etc., R. Co., 12 Allen 531.

Michigan.—Black *v.* Ashley, 44 N. W. 1120, 80 Mich. 90.

Minnesota.—Christenson *v.* American Exp. Co., 15 Minn. 270, Gil. 208, 2 Am. Rep. 122.

Mississippi.—Louisville, etc., R. Co. *v.* Bigger, 66 Miss. 319, 6 So. 234; Mobile, etc., R. Co. *v.* Weiner, 49 Miss. 725; Powell *v.* Mills, 30 Miss. 231, 64 Am. Dec. 158.

Missouri.—Austin *v.* St. Louis, etc., Packet Co., 15 Mo. App. 197; Clark *v.* Pacific R. Co., 39 Mo. 184, 90 Am. Dec. 458; Daggett *v.* Shaw, 3 Mo. 264, 25 Am. Dec. 439; Davis *v.* Wabash, etc., R. Co., 89 Mo. 340, 1 S. W. 327; Read *v.* St. Louis, etc., R. Co., 60 Mo. 199; Steamboat Lynx *v.* King, 12 Mo. 27, 49 Am. Dec. 135; Wolf *v.* American Exp. Co., 43 Mo. 421, 97 Am. Dec. 406; Merritt Creamery Co. *v.* Atchison, etc., R. Co., 128 Mo. App. 420, 107 S. W. 462.

Nebraska.—Ringwalt *v.* Wabash R. Co., 45 Neb. 760, 64 N. W. 219; Wabash R. Co. *v.* Sharpe, 76 Neb. 424, 107 N. W. 758, 124 Am. St. Rep. 823; Sunderland Bros. Co. *v.* Chicago, etc., R. Co., 89 Neb. 660, 131 N. W. 1047.

New Hampshire.—Moses *v.* Norris, 4 N. H. 304.

New Jersey.—Mershon *v.* Hobensack, 22 N. J. L. 372; New Brunswick, etc., Co. *v.* Tiers, 24 N. J. L. 697, 64 Am. Dec. 394.

New York.—Adams *v.* New Jersey Steamboat Co., 151 N. Y. 163, 45 N. E. 369, 34 L. R. A. 682, 56 Am. St. Rep. 616; Allen *v.* Sewall, 2 Wend. 327; Camden, etc., R. Co. *v.* Belknap, 21 Wend. 354; Cragin *v.* New York Cent. R. Co., 51 N. Y. 61, 10 Am. Rep. 559; Heineman *v.* Grand Trunk R. Co., 31 How. Prac. 430, 1 Sheld. 95; Hollister *v.* Nowlen, 19 Wend. 234, 32 Am. Dec. 455; Howe *v.* Oswego, etc., R. Co., 56 Barb. 121; McArthur *v.* Sears, 21 Wend. 190; Mallory *v.* Tioga R. Co., 39 Barb. 488; Merritt *v.* Earle, 31 Barb. 38, affirmed in 29 N. Y. 115, 86 Am. Dec. 292; Miller *v.* Steam Nav. Co., 10 N. Y. 431, Seld. Notes 64; Read *v.* Spaulding, 30 N. Y. 630, 86 Am. Dec. 426, affirming 18 N. Y. Super. Ct. 395; Robinson *v.* Cornish, 13 N. Y. S. 577, 34 N. Y. St. Rep. 695; Sherman *v.* Wells, 28 Barb. 403; Spaids *v.* New York Mail Steamship Co., 3 Daly 139; Waldron *v.* Fargo, 170 N. Y. 130, 62 N. E. 1077; Colt *v.* McMechen, 6 Johns. 160, 5 Am. Dec. 200.

North Carolina.—Harrell *v.* Owens, 18 N. C. 273; Patterson *v.* North Carolina R. Co., 64 N. C. 147; Thomas *v.* Southern R. Co., 131 N. C. 590, 42 S. E. 543, 6 R. R. R. 860, 29 Am. & Eng. R. Cas., N. S., 860.

North Dakota.—Duncan *v.* Great Northern R. Co., 17 N. Dak. 610, 118 N. W. 826, 19 L. R. A., N. S., 952.

Ohio.—Toledo, etc., R. Co. *v.* Ambach, 10 O. C. C. 490, 6 O. C. D. 574, affirmed in 57 O. St. 38, 47 N. E. 1039; Welsh *v.* Pittsburg, etc., R. Co., 10 O. St. 65, 75 Am. Dec. 490; Railroad Co. *v.* O'Donnell, 49 O. St. 489, 32 N. E. 476, 503; Bowman *v.* Hilton, 11 O. 303; Canal Boat Montgomery *v.* Kent, 20 O. 54; Transfer Co. *v.* Kelly, 36 O. St. 86, 38 Am. Rep. 558; Pittsburgh, etc., R. Co. *v.* Barrett, 36 O. St. 448; Davidson *v.* Graham, 2 O. St. 131.

Oregon.—Oakes *v.* Northern Pac. R. Co., 20 Ore. 392, 26 Pac. 230, 12 L. R. A. 318, 23 Am. St. Rep. 126; Lacey *v.* Oregon R., etc., Co. (Ore.), 128 Pac. 999.

Pennsylvania.—Beckham *v.* Shouse, 5 Rawle 179, 28 Am. Dec. 653; Eagle *v.* White, 6 Whart. 505, 37 Am. Dec. 434; Harrington *v.* M'Shane, 2 Watts 443, 27 Am. Dec. 321; Hart *v.* Allen, 2 Watts 114; Hays *v.* Kennedy, 41 Pa. 378, 80 Am. Dec. 627; Verner *v.* Sweitzer, 32 Pa. 208; Willock *v.* Pennsylvania R. Co., 166 Pa. 184, 30 Atl. 948, 27 L. R. A. 228, 45 Am. St. Rep. 674.

Rhode Island.—Hubbard & Co. *v.* Harnden Exp. Co., 10 R. I. 244.

South Carolina.—Campbell *v.* Morse, Harp. 468; Charleston, etc., Steamboat Co. *v.* Bason, Harp. 262; Harrington *v.* Lyles, 2 Nott & McC. 88; McCall *v.* Brock, 5 Strob. 119; Porcher *v.* Northeastern R. Co., 14 Rich. L. 181; Slater *v.* South Carolina R. Co., 29 S. C. 96, 6 S. E. 936; Smyrl *v.* Niolon, 2 Bailey 421, 23

it must be free from fault at the time.[15] A common carrier is liable if it negligently exposes freight to capture by a public enemy, in consequence of which it is captured or destroyed.[16]

Who Are Public Enemies.—The term "public enemy" is understood to apply to foreign nations, with whom there is open war,[17] and to pirates, who are

Am. Dec. 146; Ewart *v.* Street (S. C.), 2 Bailey 157, 23 Am. Dec. 131.

Tennessee.—Jones *v.* Walker, 13 Tenn. (5 Yerg.) 427; Lewis & Co. *v.* Ludwick, 46 Tenn. (6 Coldw.) 368, 98 Am. Dec. 454; Louisville, etc., R. Co. *v.* Katzenberg, 84 Tenn. (16 Lea) 380, 1 S. W. 44, 57 Am. Rep. 232; Nashville, etc., R. Co. *v.* Lillie, 112 Tenn. 331, 78 S. W. 1055, 105 Am. St. Rep. 947; Nashville, etc., R. Co. *v.* Stone, 112 Tenn. 348, 79 S. W. 1031, 105 Am. St. Rep. 955; Southern Exp. Co. *v.* Glenn, 84 Tenn. (16 Lea) 472, 1 S. W. 102; Southern Exp. Co. *v.* Womack, 48 Tenn. (1 Heisk.) 256; Turney *v.* Wilson, 15 Tenn. (7 Yerg.) 340, 27 Am. Dec. 515; Watson *v.* Memphis, etc., R. Co., 56 Tenn. (9 Heisk.) 255; Adams Exp. Co *v.* Jackson, 92 Tenn. 326, 21 S. W. 666; Louisville, etc., R. Co. *v.* Wynn, 88 Tenn. 320, 14 S. W. 311; Lamont & Co. *v.* Nashville, etc., R. Co., 56 Tenn. (9 Heisk.) 58; Nashville, etc., R. Co. *v.* Jackson, 53 Tenn. (6 Heisk.) 271 Craig *v.* Childress, 7 Tenn. (Peck) 270, 14 Am. Dec. 751.

Texas.—Arnold *v.* Jones, 26 Tex. 335, 82 Am. Dec. 617; Chevallier *v.* Straham, 2 Tex. 115, 47 Am. Dec. 639; Gulf, etc., R. Co. *v.* Levi (Tex.), 12 S. W. 677; International, etc., R. Co. *v.* Bergman (Tex. Civ. App.), 64 S. W. 999; Houston, etc., Nav. Co. *v.* Dwyer, 29 Tex. 376; Gulf, etc., R. Co. *v.* Roberts (Tex. Civ. App.), 85 S. W. 479; Abbott Gin Co. *v.* Missouri, etc., R. Co., 57 Tex. Civ. App. 263, 122 S. W. 284; International, etc., R. Co. *v.* Wentworth, 8 Tex. Civ. App. 5, 27 S. W. 680; Texas Cent. R. Co. *v.* Hunter & Co., 47 Tex. Civ. App. 190, 193, 104 S. W. 1075; Albright *v.* Penn, 14 Tex. 290; Gulf, etc., R. Co. *v.* Trawick, 68 Tex. 314, 4 S. W. 567.

Virginia.—Herring *v.* Chesapeake, etc., R. Co., 101 Va. 778, 45 S. E. 322, 9 R. R. R. 262, 32 Am. & Eng. R. Cas., N. S., 262; Norfolk, etc., R. Co. *v.* Reeves, 97 Va. 284, 33 S. E. 606; Murphy, etc., Co. *v.* Staton, 17 Va. (3 Munf.) 239; Chesapeake, etc., R. Co. *v.* Beasley, etc., Co., 52 S. E. 566, 104 Va. 788, 3 L. R. A., N. S., 183.

West Virginia.—Baltimore, etc., R. Co. *v.* Morehead, 5 W. Va. 293; McGraw *v.* Baltimore, etc., R. Co., 18 W. Va. 361, 41 Am. Rep. 696, 9 Am. & Eng. R. Cas. 188; Maslin *v.* Baltimore, etc., R. Co., 14 W. Va. 180, 35 Am. Rep. 748; Hutchinson *v.* United States Exp. Co., 63 W. Va. 128, 59 S. E. 949, 14 L. R. A., N. S., 393.

Wisconsin.—Klauber *v.* American Exp. Co., 21 Wis. 21, 91 Am. Dec. 452.

Wyoming.—Oregon, etc., R. Co. *v.* Blyth, 19 Wyo. 410, 118 Pac. 649, Ann. Cas. 1913E, 288, rehearing denied 119 Pac. 875.

England.—Coggs *v.* Bernard, 2 Ld. Raym. (Eng.) 909; Forward *v.* Pittard, 1 D. & E. (Eng.) 27.

A contract to deliver goods at the "point proposed" is subject to the common-law qualification of losses occasioned by the act of the public enemy. Neal *v.* Saunderson (Miss.), 2 Smedes & M. 572, 41 Am. Dec. 609.

A bill of lading stipulating that the goods shall be delivered (the dangers of the seas only excepted), without additional compensation, does not enlarge the carrier's liability so as to render it liable for a loss arising from the act of a public enemy. Gage *v.* Tirrell (Mass.), 9 Allen 299.

15. Carrier must be free from fault.—Dunson *v.* New York Cent. R. Co. (N. Y.), 3 Lans. 265.

16. Caldwell *v.* Southern Exp. Co., Fed. Cas. No. 2,303, 1 Flip. 85.

Goods delaying one day.—A railroad company received goods for transportation which were placed on cars, and having gone a part of the distance, the cars containing the goods were detached from the train, and other cars taken up in their place, which train arrived safely at its destination. The cars left behind were taken on the train of the following day, and, while on the way, the train was captured and burnt by the public enemy. Held, that the railroad company was not liable. Clark *v.* Pacific R. Co., 39 Mo. 184, 90 Am. Dec. 458.

17. Who are public enemies.—Foreign nations at open war.—Gulf, etc., R. Co. *v.* Levi (Tex.), 12 S. W. 677; Southern Exp. Co. *v.* Womack, 48 Tenn. (1 Heisk.) 256; Lewis & Co. *v.* Ludwick, 46 Tenn. (6 Coldw.) 368, 98 Am. Dec. 454.

Confederate soldiers on Kentucky soil were held public enemies in Bland *v.* Adams Exp. Co. (Ky.), 1 Duv. 232, 85 Am. Dec. 623; Frank *v.* Keith (Ky.), 2 Bush 123.

Army or government of Confederate States within own territory.—The destruction of the property by the confederate army can not be set up by a common carrier in Tennessee as an act of the "public enemy." Nashville, etc., R. Co. *v.* Estes, 54 Tenn. (7 Heisk.) 622, 24 Am. Rep. 289. See S. C., 78 Tenn. (10 Lea) 749. Compare Lewis & Co. *v.* Ludwick, 46 Tenn. (6 Coldw.) 368, 98 Am. Dec. 454.

And in Patterson *v.* North Carolina R. Co., 64 N. C. 147, it is held, that the destruction of property, under the authority

considered at war with all mankind,[18] but not to thieves and robbers,[19] or to strikers, rioters, mobs and insurrectionists.[20]

Duties of Carrier.—When goods are threatened to be destroyed or seized by a public enemy, the carrier is bound to use due diligence to prevent such destruction or seizure,[21] and ordinary negligence in this respect will render it liable.[22] When property is removed from a car by public enemies, it is incumbent upon the carrier to care for the property and if it fails to do so in such reasonable manner as is necessary and practicable under all the circumstances, and the property is lost, the carrier will be held liable.[23]

§ 996. Thieves and Robbers.—The liability of a carrier as an insurer of goods carried extends to losses caused by the acts of thieves or robbers, such persons not being within the term "public enemies."[24] The reason of the rule

of the Confederate States, in 1862, can not be claimed as the act of a public enemy, by a railroad company situated within the limits of that government and authority.

But in Hubbard & Co. *v.* Harnden Exp. Co., 10 R. I. 244, where certain goods sent by express were seized about the last of April, 1861, by an officer of the Confederate government at Savannah, Ga., and placed in a bonded warehouse, and subsequently sold for nonpayment of duties levied on them, after the consignee had been notified that they would be sold unless he paid the duties, it was held, that the express company had been deprived of the goods by the acts of the public enemies, and was, therefore, not liable for their value.

United States troops.—The liability of a common carrier for the safe delivery of goods is not relieved by showing that they were destroyed by an overwhelming force of United States soldiers under the command of an army officer, this not being a destruction by "public enemies." Seligman *v.* Armijo, 1 N. Mex. 459.

Same—Within Confederate lines.—In the late civil war, the troops of the United States were a "public enemy," against whose act a common carrier, within the Confederate lines, did not insure. Southern Exp. Co. *v.* Womack, 48 Tenn. (1 Heisk.) 256.

18. Pirates.—Southern Exp. Co. *v.* Womack, 48 Tenn. (1 Heisk.) 256; Gulf, etc., R. Co. *v.* Levi (Tex.), 12 S. W. 677; Lewis & Co. *v.* Ludwick, 46 Tenn. (6 Coldw.) 368, 98 Am. Dec. 454. See Hays *v.* Kennedy, 41 Pa. 378, 80 Am. Dec. 627.

19. Thieves and robbers.—See post, "Thieves and Robbers," § 996.

20. Strikers, rioters, etc.—See post, "Strikers, Rioters, Mobs and Insurrectionists," § 997.

21. Diligence required of carrier to prevent loss.—Holladay *v.* Kennard (U. S.), 12 Wall. 254, 20 L. Ed. 390.

22. Ordinary negligence renders carrier liable.—Holladay *v.* Kennard (U. S.), 12 Wall. 254, 20 L. Ed. 390.

What is ordinary negligence depends on the character of the employment. Where skill and capacity are required to accomplish an undertaking, it would be negligence not to employ persons having those qualification. Holladay *v.* Kennard (U. S.), 12 Wall. 254, 20 L. Ed. 390.

23. Wallace *v.* Sanders, 42 Ga. 486.

24. Loss by thieves and robbers.—*Alabama.*—The Belfast *v.* Boon & Co., 41 Ala. 50; Boon & Co. *v.* The Belfast, 40 Ala. 184.

Arkansas.—Missouri Pac. R. Co. *v.* Nevill, 60 Ark. 375, 30 S. W. 425, 28 L. R. A. 80, 46 Am. St. Rep. 208.

Indiana.—Pittsburg, etc., R. Co. *v.* Hollowell, 65 Ind. 188, 32 Am. Rep. 63.

New York.—Schieffelin *v.* Harvey (N. Y.), 6 Johns. 170, 5 Am. Dec. 206.

Ohio.—Davidson *v.* Graham, 2 O. St. 131; Graham & Co. *v.* Davis & Co., 4 O. St. 362, 375.

Pennsylvania.—Hays *v.* Kennedy, 41 Pa. 378, 80 Am. Dec. 627.

Tennessee.—Lewis & Co. *v.* Ludwick, 46 Tenn. (6 Coldw.) 368, 98 Am. Dec. 454; Southern Exp. Co. *v.* Womack, 48 Tenn. (1 Heisk.) 256; Nashville, etc., R. Co. *v.* Estes, 54 Tenn. (7 Heisk.) 622, 24 Am. Rep. 289.

Texas.—Gulf, etc., R. Co. *v.* Levi, 76 Tex. 337, 13 S. W. 191; S. C., 12 S. W. 677; Chevallier *v.* Straham, 2 Tex. 115, 47 Am. Dec. 639.

West Virginia.—Hutchinson *v.* United States Exp. Co., 63 W. Va. 128, 59 S. E. 949, 14 L. R. A., N. S., 393.

Under the laws of Mexico, a carrier is not liable for a shipper's goods stolen by robbers. Cantu *v.* Bennett, 39 Tex. 303.

Larceny by agent or employee.—A carrier is liable for a larceny by its agent in charge of the property. Chesapeake, etc., R. Co. *v.* Hall, 136 Ky. 379, 124 S. W. 372; Southern Exp. Co. *v.* Bank, 108 Ala. 517, 18 So. 664.

The owners of a ship, though there be no fault or negligence on their part, are answerable for goods which they have undertaken to carry, if embezzled or stolen by the crew. Schieffelin *v.* Harvey (N. Y.), 6 Johns. 170, 5 Am. Dec. 206.

furnished by the earlier decisions is that the shipper might lose his goods by collusion between the carrier and lawless persons, thieves, or robbers.[25]

§ 997. Strikers, Rioters, Mobs and Insurrectionists.—Strikers, rioters, mobs and insurrectionists are not public enemies and a carrier's common-law liability extends to losses occasioned by them.[26]

§§ 998-1002. Fault of Shipper or Owner—§ 998. In General.—It may be stated as a general rule that a carrier who has used due care is not responsible for loss of or injury to goods resulting from the neglect, or wrong of the shipper or owner.[27] When the owner accompanies the goods, the general lia-

25. Reason of rule.—Gulf, etc., R. Co. *v.* Gatewood, 79 Tex. 89, 14 S. W. 913; Coggs *v.* Bernard, 2 Ld. Raym. (Eng.) 909.

Lord Mansfield in Forward *v.* Pittard, 1 D. & E. (Eng.) 27, said: "If an armed force come to rob the carrier of the goods he is liable: and a reason is given in the books, which is a bad one, viz, that he ought to have a sufficient force to repeal it; but that would be impossible in some cases, as for instance, in the riots in the year 1780. The true reason is, for fear it may give room for collusion, that the master may contrive to be robbed on purpose, and share the spoil."

Presumption that police of state adequate protection.—In Hays *v.* Kennedy, 41 Pa. 378, 80 Am. Dec. 627, it is said: "By the very nature of his contract, the carrier, by himself or his agents, is bound to be always with the goods during their carriage, and the law presumes, and must in all ordinary cases presume, that, if watchful, the ordinary police of the state will be entirely adequate for his protection. It is, therefore, because he is presumed, and almost conclusively presumed, to be in fault in such case, that he is held liable."

26. Strikers, rioters, etc.—*Arkansas.*—Missouri Pac. R. Co. *v.* Nevill, 60 Ark. 375, 30 S. W. 425, 28 L. R. A. 80, 46 Am. St. Rep. 208.

Illinois.—Pittsburgh, etc., R. Co. *v.* Chicago, 242 Ill. 178, 89 N. E. 1022, 44 L. R. A., N. S., 358, affirming 144 Ill. App. 293.

Indiana.—Pittsburg, etc., R. Co. *v.* Hollowell, 65 Ind. 188, 32 Am. Rep. 63.

Ohio.—Davidson *v.* Graham, 2 O. St. 131, followed in Graham & Co. *v.* Davis & Co., 4 O. St. 362, 375.

Tennessee.—Lewis & Co. *v.* Ludwick, 46 Tenn. (6 Coldw.) 368, 98 Am. Dec. 454; Southern Exp. Co. *v.* Womack, 48 Tenn. (1 Heisk.) 256; Nashville, etc., R. Co. *v.* Estes, 54 Tenn. (7 Heisk.) 622, 24 Am. Rep. 289.

Texas.—Gulf, etc., R. Co. *v.* Levi, 76 Tex. 337, 13 S. W. 191; Chevallier *v.* Straham, 2 Tex. 115, 47 Am. Dec. 639; Gulf, etc., R. Co. *v.* Levi (Tex.), 12 S. W. 677.

West Virginia.—Hutchinson *v.* United States Exp. Co., 63 W. Va. 128, 59 S. E. 949, 14 L. R. A., N. S., 393.

27. Fault of shipper or owner.—*United States.*—Niagara *v.* Cordes (U. S.), 21 How. 7, 16 L. Ed. 41; Railroad Co. *v.* Varnell, 98 U. S. 479, 25 L. Ed. 233; The Delaware (U. S.), 14 Wall. 579, 20 L. Ed. 779; Clark *v.* Barnwell (U. S.), 12 How. 272, 13 L. Ed. 985; Choate *v.* Crowninshield, Fed. Cas. No. 2,691, 3 Cliff. 184; The David & Caroline, 5 Blatchf. 266, Fed. Cas. No. 3,593; The Huntress, Fed. Cas. No. 6,914, 2 Ware (Dav. 82) 89.

Alabama.—McCarthy *v.* Louisville, etc., R. Co., 102 Ala. 193, 14 So. 370, 48 Am. St. Rep. 29, 61 Am. & Eng. R. Cas. 178; Southern R. Co. *v.* Levy, 39 So. 95, 144 Ala. 614, 17 R. R. R. 50, 40 Am. & Eng. R. Cas., N. S., 50.

Arkansas.—St. Louis, etc., R. Co. *v.* Law, 68 Ark. 218, 18 Am. & Eng. R. Cas., N. S., 286, 57 S. W. 258.

California.—Bohannan *v.* Hammond, 42 Cal. 227; Stockton Lumber Co. *v.* California Nav., etc., Co., 10 Cal. App. 197, 101 Pac. 541.

Colorado.—Union Pac. R. Co. *v.* Rainey, 19 Colo. 225, 34 Pac. 986, 61 Am. & Eng. R. Cas. 302.

Connecticut.—Candee *v.* New York, etc., R. Co., 73 Conn. 667, 49 Atl. 17, 21 Am. & Eng. R. Cas., N. S., 434; Clark *v.* Richards, 1 Conn. 54; Williams *v.* Grant, 1 Conn. 487, 7 Am. Dec. 235.

Delaware.—Reed *v.* Philadelphia, etc., R. Co., 3 Houst. 176; Culbreth *v.* Philadelphia, etc., R. Co., 3 Houst. 392; Carpenter *v.* Baltimore, etc., R. Co., 6 Pen. 15, 64 Atl. 252; Reed *v.* Wilmington Steamboat Co., 1 Marv. 193, 40 Atl. 955, 1 Hardesty 127; Pennewill *v.* Cullen, 5 Har. 238.

Georgia.—East Tennessee, etc., R. Co. *v.* Whittle, 27 Ga. 535, 73 Am. Dec. 741; Atlanta, etc., R. Co. *v.* Jacobs' Pharmacy Co., 135 Ga. 113, 68 S. E. 1039; Ohlen *v.* Atlanta, etc., R. Co., 2 Ga. App. 323, 58 S. E. 511; Coweta County *v.* Central, etc., R. Co., 4 Ga. App. 94, 100, 60 S. E. 1018; Louisville, etc., R. Co. *v.* Warfield, 129 Ga. 473, 59 S. E. 234; Central, etc., R. Co. *v.* Lippman, 110 Ga. 665, 36 S. E. 202, 50 L. R. A. 673.

Illinois.—Illinois Cent. R. Co. *v.* McClellan, 54 Ill. 58, 5 Am. Rep. 83; Erie R. Co. *v.* Wilcox, 84 Ill. 239, 25 Am. Rep. 451; Pennsylvania Co. *v.* Kenwood Bridge Co., 170 Ill. 645, 49 N. E. 215.

Indiana.—Toledo, etc., R. Co. *v.* Tapp, 6 Ind. App. 304, 33 N. E. 462; Evansville,

bility of the carrier is limited to the extent that it is in no sense liable for any

etc., R. Co. *v.* Keith, 35 N. E. 296, 8 Ind. App. 57; Reid *v.* Evansville, etc., R. Co., 35 N. E. 703, 10 Ind. App. 385, 53 Am. St. Rep. 391.

Iowa.—Cobb, etc., Co. *v.* Illinois Cent. R. Co., 38 Iowa 601; Hart *v.* Chicago, etc., R. Co., 69 Iowa 485, 27 Am. & Eng. R. Cas. 59, 29 N. W. 597; Cownie Glove Co. *v.* Merchants' Dispatch Transp. Co., 106 N. W. 749, 130 Iowa 327, 114 Am. St. Rep. 419, 4 L. R. A., N. S., 1060.

Kansas.—Watkins Merchandise Co. *v.* Missouri, etc., R. Co., 82 Kan. 308, 108 Pac. 116.

Kentucky.—Farley *v.* Lavary, 107 Ky. 523, 21 Ky. L. Rep. 1252, 54 S. W. 840, 47 L. R. A. 383.

Louisiana.—Santhur *v.* New Orleans, etc., R. Co., 28 La. Ann. 67.

Maryland.—Philadelphia, etc., R Co. *v.* Diffendal, 109 Md. 494, 72 Atl. 193, 458.

Massachusetts.—Hastings *v.* Pepper (Mass.) 11 Pick. 41; Pratt *v.* Ogdensbury, etc., R. Co., 102 Mass. 557.

Michigan.—Black *v.* Ashley, 80 Mich. 90, 44 N. W. 1120.

Missouri.—Haynes *v.* Wabash R. Co., 54 Mo. App. 582. See Daggett *v.* Shaw, 3 Mo. 264, 25 Am. Dec. 439.

New Hampshire.—Stimson *v.* Jackson, 58 N. H. 138; Rixford *v.* Smith, 52 N. H. 355, 13 Am. Rep. 42; Moses *v.* Norris, 4 N. H. 304.

New York.—Harris *v.* Northern Indiana R. Co., 20 N. Y. 232; Nelson *v.* Stephenson, 12 N. Y. Super. Ct. 538; Magnin *v.* Dinsmore, 62 N. Y. 35, 50 How. Prac. 457, 20 Am. Rep. 442. See Sherman *v.* Wells, 28 Barb. 403.

North Carolina.—Lee *v.* Raleigh, etc., R. Co., 72 N. C. 236; Currie *v.* Seaboard, etc., R. Co., 156 N. C. 432, 72 S. E. 493.

North Dakota.—Duncan *v.* Great Northern R. Co., 17 N. Dak. 610, 118 N. W. 826, 19 L. R. A., N. S., 952.

Ohio.—Union Exp. Co. *v.* Graham, 26 O. St. 595; American Exp. Co. *v.* Smith, 33 O. St. 511, 31 Am. Rep. 561; Railroad Co. *v.* O'Donnell, 49 O. St. 489, 32 N. E. 476.

Oklahoma.—Chicago, etc., R. Co. *v.* Beatty, 27 Okla. 844, 116 Pac. 171.

Oregon.—Goodman *v.* Oregon R., etc., Co., 22 Ore. 14, 28 Pac. 894, 49 Am. & Eng. R. Cas. 87; Lacey *v.* Oregon R., etc., Co. (Ore.), 128 Pac. 999.

South Dakota.—Hemmphreus *v.* Fremont, etc., R. Co., 8 S. Dak. 103, 65 N. W. 466, 2 Am. & Eng. R. Cas., N. S., 546.

Tennessee.—Southern Exp. Co. *v.* Kaufman, 59 Tenn. (12 Heisk.) 161; American Lead Pencil Co. *v.* Nashville, etc., Railway, 124 Tenn. 57, 134 S. W. 613, 32 L. R. A., N. S., 323.

Texas.—Bonner *v.* Grumbach, 2 Tex. Civ. App. 482, 21 S. W. 1010; Ft. Worth, etc., R. Co. *v.* Word (Tex. Civ. App.), 32 S. W. 14; Texas Exp. Co. *v.* Scott, 2 Texas App. Civ. Cas., § 72, 16 Am. & Eng. R. Cas. 111; Chevallier *v.* Straham, 2 Tex. 115, 47 Am. Dec. 639; Texas, etc., R. Co. *v.* Scrivener, 2 Texas App. Civ. Cas., § 328; Gulf, etc., R. Co. *v.* Levi, 12 S. W. 677; Gulf, etc., R. Co. *v.* Trawick, 68 Tex. 314, 4 S. W. 567; House *v.* Soder, 36 Tex. 629; Albright *v.* Penn, 14 Tex. 290; M. P. R. Co. *v.* Barnes & Co., 2 Texas App. Civ. Cas., § 575; Fentiman *v.* Atchison, etc., R. Co., 44 Tex. Civ. App. 455, 98 S. W. 939.

Vermont.—Ross *v.* Troy, etc., R. Co., 49 Vt. 364, 24 Am. Rep. 144.

Virginia.—Murphy, etc., Co. *v.* Staton, 17 Va. (3 Munf.) 239.

West Virginia.—Roderick *v.* Baltimore, etc., R. Co., 7 W. Va. 54; McGraw *v.* Baltimore, etc., R. Co., 18 W. Va. 361, 41 Am. Rep. 696, 9 Am. & Eng. R. Cas. 188.

Wisconsin.—Congar *v.* Chicago, etc., R. Co., 24 Wis. 157, 1 Am. Rep. 164; Jenkins *v.* Chicago, etc., R. Co., 41 Wis. 112; Miltimore *v.* Chicago, etc., R. Co., 37 Wis. 190; Klauber *v.* American Exp. Co., 21 Wis. 21, 91 Am. Dec. 452.

England.—Barbour *v.* South Eastern R. Co., 34 L. T. (Eng.) 67.

Illustrations.—If the consignor put combustibles in a car in violation of the carrier's rules, negligently and wrongfully, and a fire was caused thereby, which destroyed his goods, he could not recover. Pratt *v.* Ogdensbury, etc., R. Co., 102 Mass. 557.

Where a contract for the shipment of semi-perishable evaporated apples provided that, if the fruit was not removed by the consignee within twenty-four hours after its arrival at destination, it might be kept in the car at the sole risk of the owner, and the consignee was promptly informed of the arrival of the fruit at its destination, and knew the character of the fruit, the weather conditions, and the provisions of the contract of shipment, but failed to unload the fruit for several days, made no effort to protect it, and did not complain as to its being kept in the car, although fully informed thereof, he was guilty of such negligence as to preclude a recovery from the carrier for injury resulting to the fruit from being left in the car. Becker *v.* Pennsylvania R. Co., 96 N. Y. S. 1, 109 App. Div. 230.

Where a railroad permits consignees of produce to sell it from cars in a yard known as the "market yard," but does not permit any one consignee to have more than three cars at a time in the market, and other cars are kept in another yard until a car is emptied and released, a consignee can not recover for a loss from deterioration of produce in the storage yard, where delay in delivery

injury or loss that may occur through the act of the owner or through any agency

to the market yard was due to the neglect of the consignee in emptying the cars. Laughlin Bros. Co. *v.* Philadelphia, etc., R. Co., 74 Atl. 418, 225 Pa. 540.

Where the car load of freight, when burned, was standing on an industrial switch leading to the shipper's warehouse, and the fire was started by a coal oil stove in the office of the warehouse being turned over by one of the shipper's employees, firing the warehouse, from which the flames spread to the car, destroying its contents, the act of the shipper's employee in starting the fire was the proximate cause of the loss of the car; it then being in the possession of the shipper, and not of the carrier. American Lead Pencil Co. *v.* Nashville, etc., Railway, 124 Tenn. 57, 134 S. W. 613, 32 L. R. A., N. S., 323.

Instances when shipper or consignee not negligent.—The fact that a shipper packed and shipped applies in November from New York to Minnesota in a box car did not constitute contributory negligence so as to proclude recovery for damages by frost, which defendant railroad company might have prevented by reasonable care. Calender-Vanderhoof Co. *v.* Chicago, etc., R. Co., 109 N. W. 402, 99 Minn. 295.

The fact that a shipment remained in the depot at the destination five days after plaintiff paid the freight charges and signed the waybill does not show contributory negligence. Saunders *v.* Southern Railway, 90 S. C. 79, 72 S. E. 637.

Though a shipper discovers before loading or the departure of the car that it is not suitable for carrying perishable goods, he is not thereby guilty of contributory negligence, or does not assume the risk, if he can not relieve himself of the situation. Missouri, etc., R. Co. *v.* McLean, 55 Tex. Civ. App. 130, 118 S. W. 161.

In an action by a consignee against a carrier for damages to fruit from defective drainpipes in a refrigerator car used by plaintiff for storage after the relations of carrier and warehouseman had terminated, where it appeared that, if the fruit had been removed from the car, it would have spoiled immediately because the consignee had no cold-storage facilities, the consignee would not be negligent in failing to do so. And the duty did not devolve upon the consignee to repair the car to prevent damage to the fruit. Missouri, etc., R. Co. *v.* Tripis (Tex. Civ. App.), 117 S. W. 199.

Where plaintiff shipped goods consigned to himself at a flag station on defendant's road, where defendant maintained a warehouse, plaintiff was not guilty of laches in that he was not prepared to receive and remove the same until the day following the day on which he received notice of arrival. Normile *v.* Northern Pac. R. Co., 77 Pac. 1087, 36 Wash. 21, 67 L. R. A. 271.

A shipper who in routing a shipment selected a longer route than he could have taken was not guilty of contributory negligence causing injury to the shipment, where the carrier in the exercise of ordinary care could have transported the shipment without damage. Uber *v.* Chicago, etc., R. Co., 151 Wis. 431, 138 N. W. 57.

Underestimating weight of article shipped.—It is not a part of the implied contract of shipment that a shipper should declare the true weight of an article shipped, and a shipper is not liable for negligence in understating the weight of an article of obvious nature, where an injury occurs because the tackle used in unloading it is insufficient, though adequate for the weight stated. Hanna *v.* Pitt, 106 N. Y. S. 145, 121 App. Div. 420.

Shipping bridge trusses exceeding agreed height.—A bridge builder loaded, upon a flat car, bridge trusses that extended sixteen feet four inches from the platform of the car, after having obtained permission, through the agent, to ship trusses fifteen feet high. In attempting to take the car under a bridge, the trusses were injured. Held, that the shipper could not recover unless the railroad company knew the actual height of the trusses. And a charge that if any agent or employee of the defendant saw the car after it was loaded, and made no objection to it, the defendant was liable, was error. Pennsylvania Co. *v.* Kenwood Bridge Co., 49 N. E. 215, 170 Ill. 645, reversing 69 Ill. App. 145.

Loss by fire—Placing cotton on platform near track.—It is not contributory negligence per se for a shipper to place cotton for shipment on a private platform, so close to passing engines that it is in danger of being ignited, and to leave it there without watch or guard, if the platform was constructed for the purpose of receiving freight and has been used by the railroad company for receiving cotton. St. Louis, etc., R. Co. *v.* Fire Ass'n, 55 Ark. 163, 18 S. W. 43.

Loading in accordance with plaintiff's instructions.—Where a railroad company to whom peaches were delivered for shipment was bound to load the fruit and furnish regulation material necessary to properly load it, and the evidence in an action for the spoiling thereof showed that they were loaded by agents of the company in accordance with instructions from the plaintiff, and that they were

that is under his exclusive control.[28] This rule, however, only requires the owner to exercise care and diligence; that everything was not done that skill or prudence could have suggested is no bar to a recovery.[29] And it is not a ground for limiting the responsibility of the carrier, where no interference is attempted with its control of the property carried, that the owner accompanies it and keeps watch for its safety.[30] Where goods are lost because of latent defects in appliances for unloading furnished by the shipper, the carrier is not liable.[31]

Negligence and Contributory Negligence.—Some cases hold that if lost or injury to freight is caused partly by the negligence of the shipper and partly by the negligence of the carrier, there can be no recovery, unless, by ordinary care, the shipper could not have avoided the consequences of the negligence of the carrier.[32] But it is also held that, in an action against a carrier, on a common-law contract of carriage, without reservations or exception, for failure to deliver property shipped in good condition, contributory negligence on the part of the plaintiff is not available as a defense.[33]

Where a shipper of inflammable and explosive acids does not give notice to the carrier of their nature, it is relieved from liability for the loss of the goods due to explosion and fire caused by a portion of the acids leaking from their containers.[34]

loaded in the best manner possible with the material furnished, there was no such negligence of the plaintiff as will preclude a recovery. St. Louis, etc., R. Co. v. Woldert Grocery Co. (Tex. Civ. App.), 144 S. W. 1194.

28. When owner accompanies goods.—Wilson v. Hamilton, 4 O. St. 722; Nunnelee v. St. Louis, etc., R. Co. (Mo. App.), 129 S. W. 762.

Car under control of shipper's agent.—While a carrier is held to be an insurer of the safety of property while it is in his possession as a carrier, the rule does not apply where the goods were transported in a car which was left in the exclusive control of the shipper's agent, and they were destroyed by his act; and in such case it is immaterial whether the agent was careful or negligent. Hart v. Chicago, etc., R. Co., 69 Iowa 485, 29 N. W. 597, 27 Am. & Eng. R. Cas. 59.

Agreement in violation of law.—Where the owner of property shipped by rail, by agreement with the carrier, undertakes to care for it in the course of transportation, and it is destroyed through his act, the carrier is not liable for the loss, although the agreement may have been in violation of Code, § 1308, providing that "no contract, receipt, rule, or regulation shall exempt any corporation engaged in transportation of persons or property by railway from liability of common carrier." Hart v. Chicago, etc., R. Co., 69 Iowa 485, 29 N. W. 597, 27 Am. & Eng. R. Cas. 59.

29. Wilson v. Hamilton, 4 O. St. 722.

30. Hannibal Railroad v. Swift (U. S.), 12 Wall. 262, 20 L. Ed. 423.

31. Defects in appliances furnished by shipper.—The owner of a hogshead of molasses furnished a common carrier with skids wherewith to unload the same from his wagon; but the skids, owing to a latent defect, broke under the weight of the hogshead, and the contents thereof were lost. Held, that the owner could not maintain an action against the carrier for the loss. Loveland v. Burke, 120 Mass. 139, 21 Am. Rep. 507.

32. Negligence and contributory negligence.—Reed v. Philadelphia, etc., R. Co. (Del.), 3 Houst. 176. See Coweta County v. Central, etc., R. Co., 4 Ga. App. 94, 60 S. E. 1018.

The fact that a consignee, after discovering the carrier's negligence in failing to transport the goods in a reasonable time, failed to use ordinary care to avoid the injury caused by such negligence, will not preclude him from recovering the damages actually caused to him by such negligence, which he could not, by ordinary diligence, have prevented. Belcher v. Missouri, etc., R. Co., 50 S. W. 559, 92 Tex. 593, reversing 47 S. W. 384, 1020.

33. McCarthy v. Louisville, etc., R. Co., 102 Ala. 193, 14 So. 370, 48 Am. St. Rep. 29, 61 Am. & Eng. R. Cas. 178, wherein it is said: "No where in the books can be found any reference to the defense of contributory negligence against the common-law liability of common carriers of goods. And in the nature of things there can be no such defense, to speak with any approach to legal accuracy. There must always be negligence on the part of a defendant or else it cannot be said that a plaintiff has been guilty of contributory negligence. * * * When he (the carrier) relies upon the other exception to that rule of liability, that which rests upon the fault of the shipper, he must bring himself entirely and perfectly within it by negativing all contributory fault of his own."

34. Bradley v. Lake Shore, etc., R. Co., 145 App. Div. 312, 129 N. Y. S. 1045.

Duty of Consignor as to External Protection.—As to external protection of the goods, the owner is not required to cover them so as to be safe against the action of rain or wind or fire not happening by the act of God.[35]

§ 999. Goods Improperly Marked.—It is the duty of the shipper of goods to have them properly marked, and if he neglects to do it, and there is a loss in consequence, without any fault of the carrier, he must bear the loss;[36] but if there is a loss through any want of reasonable caution on the part of the carrier, or its servants, it will be responsible.[37] And negligence on the part of the owner of goods, in delivering them to a carrier incorrectly addressed, does not defeat his right to recover for a loss of the goods upon the ground of contributive negligence, if the carrier's agents received them with knowledge of the error.[38] If the carrier accepts goods which are not marked to any place of destination, or are marked to a place that has no existence, it is liable for a loss where they are carried to another station and there left.[39]

Goods Marked Only with Initial.—Where the consignor marks the goods with the initials only of the consignee, the carrier is liable for entering them on the bill of lading in the name of a stranger, whereby the goods are lost.[40] And where a carrier receives goods which are only marked with the initials of the consignee and gives a bill of lading therefor, specifying the consignee, it is bound to remark the goods if that is necessary to insure their safe delivery.[41]

35. **External protection.**—Klauber *v.* American Exp. Co., 21 Wis. 21, 91 Am. Dec. 452.

36. **Goods improperly marked.**—*United States.*—The Huntress, Fed. Cas. No. 6,914, 2 Ware (Dav. 82) 89.

Alabama.—Broadwood *v.* Southern Exp. Co., 41 So. 769, 148 Ala. 17.

Missouri.—Weaver *v.* Southern R. Co., 135 Mo. App. 210, 115 S. W. 500.

New Hampshire.—Stimson *v.* Jackson, 58 N. H. 138.

Tennessee.—Southern Exp. Co. *v.* Kaufman, 59 Tenn. (12 Heisk.) 161.

Where a box improperly directed was delivered to a railroad for transportation and was safely carried to its destination, and there, after having been kept for two months and due diligence exercised to ascertain the consignee, was delivered, by reason of the improper direction, to the wrong person, the company was not liable for the loss. Lake Shore, etc., R. Co. *v.* Hodapp, 83 Pa. 22.

Goods directed to wrong place.—A. chartered a car, which he loaded with furniture to be sent to O., Pa. He shipped the car via the C. railroad to the B. railroad at G., where it was duly delivered. By mistake of A. or his agent, the car was directed to O., Del. In consequence of this misdirection, the goods were delayed and finally reached A. much damaged. In an action by A. against B. he was nonsuited. Knorr *v.* Philadelphia, etc., R. Co. (Pa.), 2 Wkly. Notes Cas. 187.

County omitted in marking—Two towns of same name.—The contributory negligence of the shipper in only marking goods to the town and state to which it is to be sent, omitting the county, will relieve the carrier from liability for loss which results from the fact that there are two towns of the same name in the state. Congar *v.* Chicago, etc., R. Co., 24 Wis. 157, 1 Am. Rep. 164.

37. The Huntress, Fed. Cas. No. 6,914, 2 Ware (Dav. 82) 89.

The carrier is liable when guilty of negligence without which, notwithstanding the shipper's mistake in directing goods, the loss would not have occurred. So, it is liable for loss of goods where, though improperly directed they would have reached their intended destination but for the changing of the directions by the carrier's agent. Weaver *v.* Southern R. Co., 115 S. W. 500, 135 Mo. App. 210.

38. **Carrier's knowledge of imperfect address.**—O'Rourke *v.* Chicago, etc., R. Co., 44 Iowa 526.

Where the directions are not clear, it is the carrier's duty, unless an emergency arises, to hold the goods and ask further instructions from the shipper. Weaver *v.* Southern R. Co., 135 Mo. App. 210, 115 S. W. 500.

Where goods were marked with the name, but not with the place of destination, when received by the carrier, though it was the shipper's fault that the goods were not properly marked, the carrier can not be heard to complain thereof, because it received the freight in that condition, and thereby waived any defect in the manner in which it was marked or directed. Gulf, etc., R. Co. *v.* Maetze, 2 Texas App. Civ. Cas., § 631.

39. **Goods marked to place that does not exist.**—O'Rourke *v.* Chicago, etc., R. Co., 44 Iowa 526.

40. **Goods marked only with initials.**—Forsythe *v.* Walker, 9 Pa. 148.

41. Krender *v.* Wolcott (N. Y.), 1 Hilt. 223.

§ 1000. Goods Improperly Packed.—In the absence of negligence on their part, carriers are not liable for losses resulting from the defective manner in which goods are packed by the owner.[42] But, though goods be improperly packed, the carrier is liable for other injuries to which the bad packing did not contribute.[43] The owner of liquids, or any articles shipped in casks, of any description, is, in the first instance, chargeable with the duty of supplying proper ones, and would presumptively be responsible for a loss arising from their insufficiency or defects,[44] but the carrier is not excused from liability for loss caused by standing a cask on end, instead of on the bilge, by the fact that the barrel was old and defective.[45]

Duty of Carrier Receiving Goods Improperly Packed.—If a carrier accepts for carriage goods improperly packed, it is bound to exercise due care for their safe carriage;[46] and where goods are not in a proper condition to be shipped in safety, it is bound to stow them with reference to their condition.[47]

Presumption That Goods Properly Packed.—Shippers of large experience, in the absence of evidence to the contrary, are presumed to use the best method of packing for the particular kind of carriage.[48]

42. **Goods improperly packed.**—*Alabama.*—Broadwood *v.* Southern Exp. Co., 148 Ala. 17, 41 So. 769.

Delaware.—Culbreth *v.* Philadelphia, etc., R. Co. (Del.), 3 Houst. 392; Carpenter *v.* Baltimore, etc., R. Co. (Del.), 6 Pen. 15, 64 Atl. 252.

Georgia.—Atlantic, etc., R. Co. *v.* Jacobs' Pharmacy Co., 135 Ga. 113, 68 S. E. 1039; Coweta County *v.* Central, etc., R. Co., 4 Ga. App. 94, 100, 60 S. E. 1018.

Minnesota.—Shriver *v.* Sioux City, etc., R. Co., 24 Minn. 506, 31 Am. Rep. 353.

New Hampshire.—Rixford *v.* Smith, 52 N. H. 355, 13 Am. Rep. 42.

Ohio.—Union Exp. Co. *v.* Graham, 26 O. St. 595.

Oregon.—Goodman *v.* Oregon R., etc., Co., 22 Ore. 14, 28 Pac. 894, 49 Am. & Eng. R. Cas. 87.

Texas.—Albright *v.* Penn. 14 Tex. 290; Pecos, etc., R. Co. *v.* Evans-Snyder-Buel Co., 100 Tex. 190, 97 S. W. 466, affirming 42 Tex. Civ. App. 60; Gulf, etc., R. Co. *v.* Wittnebert, 101 Tex. 368, 108 S. W. 150, 14 L. R. A., N. S., 1227, 16 Am. & Eng. Ann. Cas. 1153, reversing 104 S. W. 424.

Wisconsin.—Klauber *v.* American Exp. Co., 21 Wis. 21, 91 Am. Dec. 452.

Neglect to pack.—If damage is caused to furniture by the shipper's neglect to pack it, the company is not responsible. Barbour *v.* Southern R. Co., 34 L. T. (Eng.) 67.

Notwithstanding the bill of lading acknowledged receipt of goods in good order, the carrier may show, in case of injury to the goods, and as against the owner of them, that it was occasioned by insufficiency in the cask, etc., in which they were packed, and not by any negligence on its part. Zerega *v.* Poppe, Fed. Cas. No. 18,213, Abb. Adm. 397.

The loss must actually result from the defective packing and through no fault of the carrier. Zerege *v.* Poppe, Fed. Cas. No. 18,213, Abb. Adm. 397.

43. **Injuries from another cause.**—Shriver *v.* Sioux City, etc., R. Co., 24 Minn. 506, 31 Am. Rep. 353.

44. **Failure of shipper to furnish proper casks.**—Nelson *v.* Stephenson, 12 N. Y. Super. Ct. 538.

Wrong casks furnished by carrier.—A railroad company by mistake delivered empty casks to consignees which had contained turpentine, when they should have delivered casks which had contained ketchup. The company's servants knew the casks were to be refilled with ketchup. The consignees not knowing of the mistake refilled the casks with ketchup, which was spoiled. In an action by the consignees against the railroad company, it was held that there could be no recovery for the loss of the ketchup. Cunningham *v.* Great Northern R. Co., 16 Am. & Eng. R. Cas. 254, 49 L. T. (Eng.) 394.

45. Thompson *v.* Chicago, etc., R. Co., 27 Iowa, appx., 561.

46. **Duty of carrier as to goods improperly packed.**—Union Exp. Co. *v.* Graham, 26 O. St. 595; Lake Shore, etc., R. Co. *v.* Hotchkiss, 14-24 O. C. D. 431, 435.

Where a carrier accepts goods improperly packed, their condition being open to ordinary observation, the duty attaches of using due care for their safe carriage, and the carrier is subject to all the liabilities ordinarily attaching to an ordinary shipment of the same character. Atlantic, etc., R. Co. *v.* Rice, 169 Ala. 265, 52 So. 918.

47. The David & Caroline, Fed. Cas. No. 3,593, 5 Blatchf. 266.

48. The Moravian, Fed. Cas. No. 9,789, 2 Hask. 157.

Where goods are shipped in cases, and there is nothing in the appearance or condition of the goods, on being opened after delivery, affording ground for reasonable inference that they were improperly packed, or unless some evidence to that effect is given, the presumption is

§ 1001. Goods Improperly Loaded.—A carrier is not liable for any damage resulting solely from the negligence of the shipper in loading the freight on the cars.[49] According to some of the cases, the carrier is not liable for such damage, notwithstanding knowledge of its employees of the improper loading.[50] But according to others the carrier is liable for injury to goods shipped, though they were improperly loaded, if the improper loading was apparent to the ordinary observation of the carrier's servants.[51] And it is held that if, after knowledge by the carrier of the existence of a danger caused by the shipper's negligence in loading a car, the goods may be preserved by the use of extraordinary

that they were properly packed, although the bill of lading contains the clause, "weight, contents and value unknown." English *v.* Ocean Steam Nav. Co., Fed. Cas. No. 4,490, 2 Blatchf. 425.

49. **Goods improperly loaded.**—*Alabama.*—McCarthy *v.* Louisville, etc., R. Co., 102 Ala. 193, 14 So. 370, 61 Am. & Eng. R. Cas. 178, 48 Am. St. Rep. 29.

Georgia.—East Tennessee, etc., R. Co. *v.* Whittle, 27 Ga. 535, 73 Am. Dec. 741.

Illinois.— Pennsylvania Co. *v.* Kenwood Bridge Co., 170 Ill. 645, 49 N. E. 215; Ohio, etc., R. Co. *v.* Dunbar, 20 Ill. 623, 71 Am. Dec. 291.

New Hampshire.—Rixford *v.* Smith, 52 N. H. 355, 13 Am. Rep. 42.

Texas.—Pecos, etc., R. Co. *v.* Evans-Snyder-Buel Co., 100 Tex. 190, 97 S. W. 466; Ft. Worth, etc., R. Co. *v.* Word (Tex. Civ. App.), 32 S. W. 14; Gulf, etc., R. Co. *v.* Wittnebert, 101 Tex. 368, 108 S. W. 150, 14 L. R. A., N. S., 1227, 16 Am. & Eng. Ann. Cas. 1153, reversing 104 S. W. 42.

A carrier is not liable for damages to a wagon caused by its being blown from a platform car during transportation, where the shipper assumed the sole charge and responsibility of loading and fastening the wagon, and there had been a high wind for a sufficient time before the train started to enable him either to further fasten the wagon, or to countermand the order for its shipment. Miltimore *v.* Chicago, etc., R. Co., 37 Wis. 190.

Liability to persons hiring cars.—If a railroad company charters some of its cars to an individual, who loads them himself and in his own way, the company is not liable as a common carrier for any injury to the property in such cars arising from imperfect loading. East Tennessee, etc., R. Co. *v.* Whittle, 27 Ga. 535, 73 Am. Dec. 741; Ohio, etc., R. Co. *v.* Dunbar, 20 Ill. 623, 71 Am. Dec. 291.

Shipper loading cars at his factory.—The fact that a shipper loads his cars at his manufacturing establishment for his own convenience, instead of delivering the freight at the station for loading, does not make him the agent of the carrier, so as to make the latter responsible for damages resulting from improper loading. And the carrier is not required to inspect the manner of loading every load. Pennsylvania Co. *v.* Kenwood Bridge Co., 170 Ill. 645, 49 N. E. 215, reversing 69 Ill. App. 145.

Effect of delay.—Plaintiffs had control of the loading of the car in which corn was shipped, and loaded the corn in the car themselves, while it was wet, and in a condition to be damaged by being bulked in the car. Held, that defendant was not responsible for damages occasioned thereby, notwithstanding the fact of a delay in the transportation thereof. Galveston, etc., R. Co. *v.* Smith, 2 Texas App. Civ. Cas. § 138.

If there is no evidence to remove the presumption of negligence on the part of the carrier, plaintiff is entitled to judgment, though the improper loading of the goods contributed to the injury. McCarthy *v.* Louisville, etc., R. Co., 102 Ala. 193, 14 So. 370, 48 Am. St. Rep. 29, 61 Am. & Eng. R. Cas. 178.

50. **Knowledge of improper loading.**—International, etc., R. Co. *v.* Drought & Co. (Tex. Civ. App.), 100 S. W. 1011.

Negligence of shipping noticed by forwarder of freight.—Where plaintiff loaded heavy machinery upon a platform car, and blocked its wheels with insufficient blocking insecurely nailed, by reason whereof the machinery, while being transported by defendant, broke from its fastening without fault of defendant, in the running of the train, or in maintenance of the track, and was injured, the defendant was not liable therefor, although its yard master and forwarder of freight cars saw the fastenings and noticed their insufficiency, before the injury was done. Ross *v.* Troy, etc., R. Co., 49 Vt. 364, 24 Am. Rep. 144.

51. **Improper loading apparent to carrier.**—McCarthy *v.* Louisville, etc., R. Co., 102 Ala. 193, 14 So. 370, 48 Am. St. Rep. 29, 61 Am. & Eng. R. Cas. 178.

Connecting carrier not chargeable with notice.—Where the goods are improperly loaded by the shipper in close cars, which come from the initial carrier to a connecting carrier with their doors closed, the improper loading is not to be held apparent to the connecting carrier, and no duty rests upon the connecting carrier to open the cars to see whether the loading was properly done. McCarthy *v.* Louisville, etc., R. Co., 102 Ala. 193, 14 So. 370, 48 Am. St. Rep. 29, 61 Am. & Eng. R. Cas. 178.

care on its part, it will not be relieved from liability, if it is negligent in this regard, by setting up the original negligence of the shipper.[52]

Duty of Inspection.—It is held that it is not the duty of a railroad company which receives a loaded car from the consignor or from another railroad company to make an inspection of the manner of loading, when the defect can not be discovered by external examination.[53] But it is also held that where the owner loads the goods the carrier has the duty of seeing that the loading is such as to secure their safety.[54]

Negligence of Consignor Imputed to Consignee.—In an action by a consignee against a common carrier for damages to goods which were improperly loaded by the consignor, the negligence of the consignor is imputed to the consignee.[55]

§ 1002. Misrepresentation or Concealment of Nature or Value of Goods.—It is held that where the consignor fraudulently conceals from the carrier, or misrepresents, the value or nature of goods, the carrier is relieved from liability in case of loss without its default.[56] And in no case is it held

52. Atlanta, etc., R Co. *v.* Jacobs' Pharmacy Co., 135 Ga. 113, 68 S. E. 1039.

53. **Duty of inspection.**—Gulf, etc., Co. *v.* Wittnebert, 101 Tex. 368, 108 S. W. 150, 14 L. R. A., N. S., 1227, 16 Am. & Eng. Ann. Cas. 1153, reversing 104 S. W. 424.

54. Hannibal Railroad *v.* Swift (U. S.), 12 Wall. 262, 20 L. Ed. 423.

55. **Negligence of consignor imputed to consignee.**—McCarthy *v.* Louisville, etc., R. Co., 102 Ala. 193, 14 So. 370, 48 Am. St. Rep. 29, 61 Am. & Eng. R. Cas. 178.

56. **Misrepresentation or concealment of nature or value of goods.**—*Louisiana.*—Levois *v.* Gale, 17 La. Ann. 302.

Massachusetts.—Phillips *v.* Earle (Mass.), 8 Pick. 182.

Mississippi.—Mobile, etc., R. Co. *v.* Phillips & Co. (Miss), 60 S. E. 572.

New York.—Magnin *v.* Dinsmore, 38 N. Y. Super. Ct. 248; S. C., 62 N. Y. 35, 50 How. Prac. 457, 20 Am. Rep. 442; Richards *v.* Westcott, 15 N. Y. Super. Ct. 589; Sewall *v.* Allen (N. Y.), 6 Wend. 335.

Pennsylvania.—Relf *v.* Rapp, 3 Watts & S. 21, 37 Am. Dec. 528; Coxe *v.* Heisley, 19 Pa. 243.

Tennessee.—Shackt *v.* Illinois Cent. R. Co., 94 Tenn. 658, 30 S. W. 742, 28 L. R. A. 176.

Texas.—Missouri Pac. R. Co. *v.* York, 2 Texas App. Civ. Cas., § 638; Texas Exp. Co. *v.* Dupree, 2 Texas App. Civ. Cas., § 318; Texas Exp. Co. *v.* Scott, 2 Texas App. Civ. Cas., § 72, 16 Am. & Eng. R. Cas. 111; Houston, etc., R. Co. *v.* Burke, 55 Tex. 323, 9 Am. & Eng. R. Cas. 59; Pacific Exp. Co. *v.* Pitman, 30 Tex. Civ. App. 626, 71 S. W. 312.

Rationale of Doctrine.—A common carrier is entitled to protection against liability, sought to be thrown upon him, by concealment or fraud, which he would not otherwise have assumed; and no one has a right, by any concealment or artifice, to disarm him of that vigilance, which the nature and extent of the danger reasonably demands; or to deprive him of the increased compensation which a more hazardous or responsible service justly entitles him to receive. Richards *v.* Westcott, 15 N. Y. Super. Ct. 589.

If questions as to the nature and value of the goods are answered improperly, so as to deceive the carrier, there is no contract between the parties and no delivery. Despatch Line *v.* Glenny & Co., 41 O. St. 166, reversing 10 Am. L. Rec. 172, 6 O. Dec. Reprint 1142; Railway Co. *v.* Simon, 15 O. C. C. 123, 8 O. C. D. 540.

Illustrations.—A carrier is not liable for the loss of a box containing valuable articles, when it is so disguised as to resemble those which generally contain articles of small value, and no notice is given him of the contents. Warner *v.* Western Transp. Co., 28 N. Y. Super Ct. 490; Southern Exp. Co. *v.* Everett, 37 Ga. 688.

Where one sent to an express company, by a young negro slave, a box three by four inches in size, tied by a string, and containing a dimond pin worth $500, without notifying the company of the value of the contents, held, that the company was not liable for the loss of the pin from the box. Everett *v.* Southern Exp. Co., 46 Ga. 303.

Where notice that a ship would not be responsible for jewelry, unless the value were disclosed, is brought home to plaintiff, who, without disclosing the nature or value of articles, intentionally ships them so as to conceal their real character, the owners are not liable. Baldwin *v.* Collins (La.), 9 Rob. 468.

Plaintiff shipped by defendant company various parcels, including a basket containing silver and various stuffs used by his wife in her millinery business. The lot had the general appearance of household goods, and the agent receiving the parcels cried out in plaintiff's hearing, "Household goods" to which plain-

that the shipper can recover more than the apparent value of the property according to representation made where he misrepresents its character, or misleads the carrier as to its value.[57] A person omitting, without fraud, to state

tiff made no objection, and they were shipped as such. On the bill of lading was written, "Owners' risk rel. to value $5.00," which meant that defendant's liability was limited to $5 per 100 pounds, but plaintiff testified that he thought that it meant that he would receive $500 in case of loss. Plaintiff was an intelligent German machinist, who had traveled much, and had resided two years in the country, and his wife had been in business. Some of the articles in the basket, being silver, would not have been received as freight, and some would have been carried only at a rate much higher than that for household goods. Plaintiff testified that he did not know that rates of freight were different according to classification. Held, that the plaintiff could not recover for the loss of the contents of the basket. Shackt *v.* Illinois Cent. R. Co., 94 Tenn. 658, 30 S. W. 742, 28 L. R. A. 176.

Where a carrier's charges for transporting packages, when the true value is stated in the receipt, and it exceeds $50, are greater than when no value is stated, and the shipper knows this, and, for the purpose of obtaining a lower freight charge, does not insert the value in the receipt, and the carrier does not know the true value, and, if it did, would, besides making a greater charge, use greater precaution, this is a fraud on the carrier, releasing it from liability where the package is stolen. Pacific Exp. Co. *v.* Pitman, 71 S. W. 312, 30 Tex. Civ. App. 626.

Where one ships a valise containing money by a common carrier, if the agent of the carrier at the time of receiving the valise asked the shipper if it contained money, and he replied that it did not, the carrier will not be responsible for its loss while in his possession. Texas Exp. Co. *v.* Dupree, 2 Texas App. Civ. Cas., § 318.

Reply held not false statement.—A reply by a shipper, in answer to an inquiry of the carrier's agent as to whether the package contained anything breakable or anything requiring it to be given special attention, that it did not, was not a false statement of the facts, though the package contained a valuable diamond ring. Head *v.* Pacific Exp. Co. (Tex. Civ. App.), 126 S. W. 682.

57. Recovery of only apparent value.—*United States.*—Earnest *v.* Express Co., Fed. Cas. No. 4248, 1 Woods 573.

California.—Hayes *v.* Wells, Fargo & Co., 23 Cal. 185, 83 Am. Dec. 89.

Civ. Code, § 2200, provides that "a common carrier of gold, * * * upon loss or injury of such articles, * * * is not liable for more than the value of the articles named in the receipt or bill of lading." Scammon *v.* Wells Fargo & Co., 84 Cal. 311, 24 Pac. 284.

Georgia.—Everett *v.* Southern Exp. Co., 46 Ga. 303; Savannah, etc., R. Co. *v.* Collins, 77 Ga. 376, 3 S. E. 416, 4 Am. St. Rep. 87; Charleston, etc., R. Co. *v.* Moore, 80 Ga. 522, 5 S. E. 769. See Central, etc., R. Co. *v.* Jones, 7 Ga. App. 165, 66 S. E. 492; Way *v.* Southern Ry. Co., 132 Ga. 677, 64 S. E. 1066.

Illinois.—Chicago, etc., R. Co. *v.* Shea, 66 Ill. 471; Chicago, etc., R. Co. *v.* Thompson, 19 Ill. 573. See Oppenheimer & Co. *v.* United States Exp. Co., 69 Ill. 62, 18 Am. Rep. 596; Cincinnati, etc., R. Co. *v.* Marcus, 38 Ill. 219.

Kentucky.—Chesapeake, etc., R. Co. *v.* Hall, 136 Ky. 379, 124 S. W. 372; Southern Exp. Co. *v.* Fox, 131 Ky. 257, 115 S. W. 184, 117 S. W. 270.

Minnesota.—Douglas Co. *v.* Minnesota Transfer R. Co., 62 Minn. 288, 64 N. W. 899, 30 L. R. A. 860.

Ohio.—Despatch Line *v.* Glenny & Co., 41 O. St. 166; Railway Co. *v.* Simon, 15 O. C. C. 123, 8 O. C. D. 540.

South Carolina.—Bottum *v.* Charleston, etc., R. Co., 72 S. C. 375, 51 S. E. 985, 2 L. R. A., N. S., 773, 110 Am. St. Rep. 610; Galveston etc., R. Co. *v.* Quilhot (Tex. Civ. App.), 134 S. W. 261.

Virginia.—Adams Exp. Co. *v.* Green, 112 Va. 527, 72 S. E. 102.

The ignorance of an agent as to the contents of the package delivered for shipment, and innocence of any intention to deceive the carrier, or to conceal the value of the goods, do not affect the liability of the carrier where the principal intended to deceive the carrier or to conceal the value of the goods. Chesapeake, etc., R. Co. *v.* Hall, 136 Ky. 379, 124 S. W. 372.

That articles of greater value are placed in the same box with ordinary freight is not such a concealment of the character of the goods as relieves the carrier from liability for the loss of the ordinary freight. Hyde *v.* New York, etc., Steamship Co., 17 La. Ann. 29.

Illustrations.—Where the shipper made misrepresentations as to the nature of the goods shipped, representing them to be household goods, when in fact a part consisted of jewelry and wearing apparel, the company was exempt from liability as to the jewelry and wearing apparel, because it never contracted to carry such, but was not exempt as to the household goods. Charleston, etc., R. Co. *v.* Moore, 80 Ga. 522, 5 S. E. 769.

Where a shipper delivered to an express company a package wrapped in Manilla paper and tied with a twine string, but not sealed, which contained the music and libretto in manuscript of an opera,

the character and contents of packages, fully, may be precluded from receiving the value of the articles so omitted; but his right to recover for articles enumerated will not be affected.[58] If a shipper is guilty of no fraud or negligence, or deception, which misled the carrier into accepting a shipment for less freight than it was entitled to receive, he may recover the value of the articles lost.[59] If a carrier is told that a package containing money is very valuable, or

valued at $1,050, stating merely that it contained "music," without mentioning its value, and higgled over the thirty-five cents' charges asked, until he obtained a reduction of 10 cents, he could not, on the destruction of the property by the burning of the express car, recover its full value; it appearing that, had the company known the value of the package, it would have charged a much higher rate, and would have shipped the package in a safe as a "money package," in which event it would not have been destroyed. Southern Exp. Co. *v.* Wood, 25 S. E. 436, 98 Ga. 268.

A shipper, by concealing valuable silks and furs in a bundle having the appearance of bedding only, and thereby shipped at a low rate of freight, releases the carrier from liability for loss, except as to what may properly be termed "bedding." Chicago, etc., R. Co. *v.* Shea, 66 Ill. 471. See Savannah, etc., R. Co. *v.* Collins, 77 Ga. 376, 3 S. E. 416, 4 Am. St. Rep. 87.

Where a box of pictures was shipped with household effects and billed as glass, in the absence of actual fraud, the carrier is only liable for the value of a box of household glass. Bottum *v.* Charleston, etc., R. Co., 51 S. E. 985, 72 S. C. 375, 2 L. R. A., N. S., 773, 110 Am. St. Rep. 610.

Cigars misdescribed as smoking tobacco.—A shipper of cigars misdescribed as smoking tobacco, though guilty of fraud, deception, or negligence in misleading the carrier to ship the cigars for less freight than it was entitled to receive, is nevertheless entitled to recover for the loss of the cigars, and the reasonable value of the tobacco as described. Jenkins *v.* Atlantic, etc., R. Co., 66 S. E. 407, 84 S. C. 520.

While the interstate commerce act (Act Feb. 4, 1887, c. 104, § 10, par. 3, 24 Stat. 382, as added by Act March 2, 1889, c. 382, § 2, 25 Stat. 858 [U. S. Comp. St. 1901, p. 3160]) prohibits a shipper from obtaining the transportation of property at less than the regular rates then established and in force, by fraudulent representations as to value, and makes such fraud a misdemeanor and imposes a penalty therefor, it does not prevent the shipper, on loss of the goods, from recovering their apparent value according to fraudulent representations made, since, as the carrier's charges were based on that value, it is fair and just that it should be held liable for their loss upon the same basis of value. Adams Exp. Co. *v.* Green, 112 Va. 527, 72 S. E. 102; Visanska *v.* Southern Exp. Co., 92 S. C. 573, 75 S. E. 962.

58. Southern Exp. Co. *v.* Womack, 48 Tenn. (1 Heisk.) 256.

59. **Where shipper not guilty of fraud or negligence.**—Jenkins *v.* Atlantic, etc., R. Co., 84 S. C. 520, 66 S. E. 407 (shipper may also recover freight paid).

Failure of a carrier to ascertain the true value of a package to be carried and to charge its regular schedule rates therefor as authorized by Michigan Pub. Acts 1909, No. 300, could not defeat the shipper's right to recover the full value of the package if lost, in the absence of any showing of limitation of liability in the contract of carriage or fraud or deceit of the shipper. Farnsworth *v.* National Exp. Co., 166 Mich. 676, 132 N. W. 441.

Illustrations.—A shipper who sent a package to an express company for shipment, inclosed in a pasteboard box, wrapped with heavy brown paper, and containing articles of merchandise or novelty goods of the class that are sold by dry goods stores, retail hardware stores, and others, and which the express company knew the shipper was engaged in dealing in, and he received a receipt stating that the value was asked, but not given, that the package was accepted at the owner's risk of breakage as merchandise only, and contained no money, jewelry, or valuables, the recovery in case of loss being limited to $50, was not guilty of fraud upon the express company in shipping the package in the ordinary freight department, and not in the money department, and in not disclosing its contents to the express company. Fine & Bro. *v.* Southern Exp. Co., 10 Ga. App. 161, 73 S. E. 35.

The defendant corporation gave the plaintiff a receipt for goods to be forwarded, among which was specified "1 cradle." The cradle was wrapped up in a piece of carpet, and bound with cords, and there was evidence introduced tending to show that the plaintiff had told one of the defendants' agents that it contained a valise. Held, that the defendants were liable for the loss of the valise. Harmon *v.* New York & E. R. Co. (N. Y.), 28 Barb 323.

Where the agent of the shipper truthfully says that he does not know the value of a trunk, and he receives a receipt stating that the value was asked and not given, there is no fraudulent concealment of the value of the trunk, whereby a cheaper rate was obtained so as to affect the liability of the carrier for the loss

as valuable as money, though not told that it contains money, his responsibility is not lessened on the ground of concealment or fraud.[60]

Proximate Cause of Loss or Injury.—It is held that the misrepresentation by a shipper as to contents of shipment in order to obtain lower rates does not present a recovery for loss of the shipment where the misrepresentation did not contribute to the loss.[61]

Misstatements Need Not Be Intentional.—If the shipper's misstatements as to the contents of a box shipped were material, and caused the carrier to omit the performance of some attention which the goods required, whereby they were lost, it would not be responsible for such loss, whether the misstatements were intentional or inadvertent.[62]

Carrier Must Exercise Ordinary Care.—Though a carrier is absolved from liability as insurer because of misrepresentations by the shipper as to the nature of the goods shipped, whereby the carrier was induced to omit precautions which it would otherwise have employed, it is liable as bailee for failure to exercise ordinary care to safely deliver the property.[63]

Duty of Carrier to Make Inquiry and of Shipper to State Value and Nature of Goods.—Some of the authorities hold that it is the duty of the carrier to ask questions as to the nature and value of the goods,[64] and that a mere

of the trunk by fire. Southern Exp. Co. *v.* Keeler, 109 Va. 459, 64 S. E. 38.

That an express company accorded shipments of the value of $50 and over a higher degree of care than shipments under that value, that, had it known the value of the shipment involved, it would have accorded it the unusual and extraordinary care that shipments of its value were accorded, that the shipper had knowledge that valuable shipments were handled with more care than shipments of ordinary value, and that the contract prepared by the company had a blank space containing the word "value," as a request to the shipper to value the shipment, and that by his failure to do so it was not informed of its value and was deprived of the opportunity of giving the shipment unusual care, do not amount to a case of fraudulent representation or concealment of the value of the shipment, and afford no defense to an action to recover its full value. Adams Exp. Co. *v.* Green, 112 Va. 527, 72 S. E. 102.

Where the words "Contents unknown" are written above the signature to the bill of lading for cases of domestics, one of which is not delivered, the shipper, on proving that the lost case contained silk goods, and not domestics, may recover its value, where the misdescription was not intended to deceive, and it is not pretended—that a knowledge of the true contents would have induced a higher freight or greater watchfulness. Fassett *v.* Ruark, 3 La. Ann. 694.

A designation of goods shipped as emigrant movables covered the shipper's goods consisting of typewriter, dictionary, wearing apparel, trunk, and personal effects, and did not estop the shipper from claiming their actual value. O'Connor *v.* Great Northern R. Co., 118 Minn. 223, 136 N. W. 743.

Cigars shipped as "smoking tobacco."—The distinction between cigars and smoking tobacco as a basis of separate freight classification and rates, considered with respect to the nature, use, comparative value, and risk, is not so marked that a shipment of cigars as "smoking tobacco" is of itself evidence of the shipper's fraud or negligence; it appearing that cigars "corded and sealed" are subject to the same rate as smoking tobacco, while cigars not corded and sealed take a higher rate. Jenkins *v.* Atlantic, etc., R. Co., 66 S. E. 407, 84 S. C. 520.

Where articles consisting of bedding and clothing are marked "Bedding," the clothing being wrapped up in the bedding and no value being placed on the goods at the time of shipment, in the absence of evidence that the clothing had been so placed to conceal its value, the carrier is liable for the loss of the clothing. Gulf, etc., R. Co. *v.* Clark, 2 Texas App. Civ. Cas. § 512.

60. Dwight *v.* Brewster (Mass.), 1 Pick. 50, 11 Am. Dec. 133; Allen *v.* Sewall (N. Y.), 2 Wend. 327.

61. **Proximate cause of loss or injury.**—Mobile, etc., R. Co. *v.* Phillips & Co. (Miss.), 60 So. 572.

62. **Misstatements need not be intentional.**—St. Louis, etc., R. Co. *v.* Ray (Tex. Civ. App.), 127 S. W. 281.

63. **Carrier must exercise ordinary care.**—Head *v.* Pacific Exp. Co. (Tex. Civ. App.), 126 S. W. 682.

64. **Duty of carrier to make inquiry.**—Merchants' Despatch Transp. Co. *v.* Bolles, 80 Ill. 473; Gorham Mfg. Co. *v.* Fargo (N. Y.), 45 How. Prac. 90; Despatch Line *v.* Glenny & Co., 41 O. St. 166, reversing 10 Am. L. Rec. 172, 6 O. Dec. Reprint 1142; Railway Co. *v.* Simon, 15 O. C. C. 123, 8 O. C. D. 540.

Labeling a box as containing articles

failure on the part of the shipper to inform the carrier as to their value is not, per se, such fraud as will discharge the carrier, though they be of unusual value, where no improper means were used to conceal the value.[65] But it is also held that a shipper, tendering a carrier an article of unusual value not apparent from casual inspection, is bound to disclose the value, and a failure so to do is a fraud in law absolving the carrier from liability for its loss.[66] And in any case the

of a different nature and value from its real contents will dispense with further inquiry by the carrier as to its contents. Relf *v.* Rapp (Pa.), 3 Watts & S. 21, 37 Am. Dec. 528.

Where pictures are shipped in a box marked "Glass," the carrier is not required to inquire into the nature and value of the contents of the box. Bottum *v.* Charleston, etc., R. Co., 51 S. E. 985, 72 S. C. 375, 2 L. R. A., N. S., 773, 110 Am. St. Rep. 610.

65. **Duty of shipper to state value.**—*Illinois.*—Merchants' Despatch Transp. Co. *v.* Bolles, 80 Ill. 473.

Louisiana.—Levois *v.* Gale, 17 La. Ann. 302; Baldwin *v.* Collins (La.), 9 Rob. 468.

Massachusetts.—Phillips *v.* Earle (Mass.), 8 Pick. 182.

New York.—Gorham Mfg. Co. *v.* Fargo, 35 N. Y. Super. Ct. 434; S. C., 45 How. Prac. 90; Sewall *v.* Allen (N. Y.), 6 Wend. 335.

Ohio.—Jacobson & Co. *v.* Adams Exp. Co., 1 O. C. C. 381, 1 O. C. D. 212. See Wilson *v.* Hamilton, 4 O. St. 722.

Pennsylvania.—Caldwell *v.* United States Exp. Co., 36 Pa. Super. Ct. 465.

Texas.—Texas Exp. Co. *v.* Scott, 2 Texas App. Civ. Cas., § 72, 16 Am. & Eng. R. Cas. 111; Galveston, etc., R. Co. *v.* Quilhot (Tex. Civ. App.), 123 S. W. 200; Southern Pac. R. Co. *v.* Maddox, 75 Tex. 300, 12 S. W. 815; Head *v.* Pacific Exp. Co. (Tex. Civ. App.), 126 S. W. 682.

The failure of the shipper to advise a common carrier of the value of the article presented for carriage, and that its actual value is greater than its apparent value, will not affect his rights, unless it justified the carrier in adopting the course of conduct through which the loss occurred. Galt *v.* Adams Exp. Co. (D. C.), McArthur & M. 124, 48 Am. Rep. 742.

Illustrations.—A clause in a carrier's contract, viz "Specie, drafts, bank bills, and other articles of great intrinsic or representative value, will only be taken upon a representation of their value, and by a special agreement assented to by the superintendent," does not apply to a family portrait delivered to the carrier in a wooden case, so as to prevent a recovery against the carrier for the loss of the portrait, in the absence of notice of value or of the making of such special agreement. Green *v.* Boston, etc., R. Co., 128 Mass. 221, 35 Am. Rep. 370.

A box seven or eight inches long, by five or six high and wide, made of three-fourths or seven-eighths inch boards, wrapped in heavy, brown paper, tied with heavy twine, and sealed with sealing wax at every crossing of the twine and on the knot where it was tied, addressed to a well-known silver-manufacturing company, and weighing about twenty pounds, was delivered to a carrier without any statement made as to its value or contents, no questions being asked on those subjects. The box in fact contained silver coin. This box was transmitted to the carrier through an expressman, who knew that the carrier had in his place of business two counters—one for ordinary merchandise, and the other for money packages. He delivered the box at the counter for ordinary merchandise, but he did not know the contents or value of the box, and made no statement on the subject. The sum he charged for the box was less than was ordinarily charged for valuable packages. Held, that these circumstances did not constitute fraud, imposition, unfair concealment, or disguise. Gorham Mfg. Co. *v.* Fargo, 35 N. Y. Super. Ct. 434.

Valuable negatives marked "photo goods."—Plaintiff shipped valuable negatives of prehistoric cities, represented to be, and marked, "photo goods." If their character had been known, a higher transportation rate would have been charged. No inquiry or representations were made as to the value of the shipment. Held, that the evidence did not raise an issue of fraud or concealment as to the character and value of the goods. Southern Pac. R. Co. *v.* D'Arcais, 64 S. W. 813, 27 Tex. Civ. App. 57.

The mere failure of a shipper to state that a package contained a valuable ring does not absolve the carrier from liability for loss of the ring. Head *v.* Pacific Exp. Co. (Tex. Civ. App.), 126 S. W. 682.

The shipment of silverware and expensive china in a box and barrel is not so unusual nor is their value so extraordinary as to require the shipper as a matter of law to give notice to the carrier of their nature and value in absence of a request for such information, in order to recover for their loss en route. Galveston, etc., R. Co. *v.* Quilhot (Tex. Civ. App.), 134 S. W. 261.

66. Southern Exp. Co. *v.* Pope, 5 Ga. App. 689, 63 S. E. 809.

Envelope containing valuable article.—Common carriers who are engaged in transporting and delivering letters are not liable for the loss of any article of special value contained within a letter envelope, unless at the time of its delivery to

neglect of a shipper to disclose the contents of a package offered for transportation is a fraud on the carrier, if there is anything in its form or outward appearance likely to deceive the carrier,[67] whether so designed or not.[68] It is held that where property requires peculiar care and attention for its safe transportation, the shipper should make known to the carrier the necessity, in order that proper precaution may be used.[69] In some instances it is provided by statute that shippers give notice of the character and value of goods.[70]

Property Having Peculiar Value.—Where a carrier has no notice of the peculiar value of an article, only its market value can be recovered for its loss under a statute providing that the peculiar value may be recovered against one who had notice thereof.[71]

Liability Limited Where Value Not Disclosed.—Where a carrier limits its liability to a specified amount, if the value of the property is not stated by the shipper, and the goods are of greater value than the amount specified, silence alone on the part of the shipper as to the real value, although there be no inquiry by the carrier and no artifice to deceive, is fraud in law which discharges the carrier from liability for ordinary negligence.[72]

§ 1003. Inherent Infirmities of Goods.—Carriers are not insurers that goods shall reach their destination in the same condition in which they were shipped; and they are not liable for ordinary wear and tear of goods in the course of transportation, or for their ordinary loss, deterioration in quantity

them they are informed of its value. Hayes *v.* Wells, Fargo & Co., 23 Cal. 185, 83 Am. Dec. 89.

Trunk containing money or jewelry.—A shipper of a trunk by freight must notify the agent of the carrier that it contains money, as a carrier need not accept money to be shipped as freight, unless it is first notified, so that it may charge a rate sufficient to justify it in taking the degree of care observed in the transportation of money, notwithstanding the constitution declaring that the common-law liability of a carrier shall not be limited. Chesapeake, etc., R. Co. *v.* Hall, 136 Ky. 379, 124 S. W. 372.

A trunk, described as a traveler's trunk, was given to expressmen to carry to the passenger depot of a railroad. Among other articles, it contained $432 worth of jewelry, intended for sale as merchandise. It was delivered at the designated place, but the jewelry was missing. Held that the expressmen, being without fault, and having no reason to suppose that the trunk contained anything but the ordinary convenient baggage of a traveler, were not liable for the value of the lost jewelry. Richards *v.* Westcott, 15 N. Y. Super. Ct. 589.

67. Harrington *v.* Wabash R. Co., 108 Minn. 257, 122 N. W. 14, 23 L. R. A., N. S., 745; Galveston, etc., R. Co. *v.* Quilhot (Tex. Civ. App.), 134 S. W. 261.

Silence of one tendering a package to a carrier for shipment may constitute a fraud upon the carrier, without any intent of the shipper to deceive, if the size, shape, or appearance of the package misleads the carrier as to the value of the contents. Porteous *v.* Adams Exp. Co., 112 Minn. 31, 127 N. W. 429.

68. Harrington *v.* Wabash R. Co., 108 Minn. 257, 122 N. W. 14, 23 L. R. A., N. S., 745.

69. **Shipper must notify carrier as to necessity for particular care.**—Wilson *v.* Hamilton, 4 O. St. 722.

An express company, in the transportation of brittle goods without notice of their character, is not liable to the extent of common carriers. American Exp. Co. *v.* Perkins, 42 Ill. 458.

Sufficient notice.—Where a box containing a glass bottle filled with oil of cloves was delivered to a carrier by water, marked: "Glass. With Care. This Side Up," there was a sufficient notice to the carrier of the value and nature of the contents to charge him with loss in transit, occasioned by the breaking of the box. Hastings *v.* Pepper (Mass.), 11 Pick. 41.

70. **Under Rev. St. U. S., § 4281,** requiring shippers of trinkets, lace, etc., to give to carriers by vessel written notice of the true character and value thereof, in order to entitle them to recover for loss, fans and parasols made of delicate and expensive materials, ornamented with carving, fragile in construction, and intended more for ornament than for use, although possessing to some extent the quality of utility, are "trinkets," and, though constituting a part of a lady's paraphernalia, are not clothing. Ocean Steamship Co. *v.* Way, 90 Ga. 747, 17 S. E. 57, 20 L. R. A. 123.

71. **Property having peculiar value.**—S. D. Civ. Code, § 2326; Hess *v.* South Dakota Cent. R. Co., 30 S. Dak. 538, 139 N. W. 334.

72. **Liability limited where value not disclosed.**—Magnin *v.* Dinsmore, 62 N. Y. 35, 50 How. Prac. 457, 20 Am. Rep. 442.

or quality in the course of the trip, or from inherent natural infirmity and tendency to damage.[73] The owner of goods sent by a carrier is not insured by the

73. Inherent infirmities of goods.—*United States.*—Janney *v.* Tudor Co., 3 Fed. 814; Lamb *v.* Parkman, Fed. Cas. No. 8020, 1 Spr. 343; Lawrence *v.* Lieutenant Admiral Callomberg, Fed. Cas. No. 8139; Nelson *v.* Woodruff, Fed. Cas. No. 10, 117; The Howard (U. S.), 18 How. 231, 15 L. Ed. 363.

Arkansas.—Little Rock, etc., R. Co. *v.* Talbot, 47 Ark. 97, 14 S. W. 471.

Delaware.—Klair *v.* Wilmington Steamboat Co., 4 Pen. 51, 7 R. R. R. 821, 30 Am. & Eng. R. Cas., N. S., 821, 54 Atl. 694; Truax *v.* Philadelphia, etc., R. Co., 3 Houst. 233; Carpenter *v.* Baltimore, etc., R. Co., 6 Pen. 15, 64 Atl. 252; Reed *v.* Wilmington Steamboat Co., 1 Marv. 193, 40 Atl. 955, 1 Hardesty 127.

Georgia.—Brown, etc., Co. *v.* Clayton, 12 Ga. 564; Georgia R. Co. *v.* Johnson, 113 Ga. 589, 38 S. E. 954; Southern Exp. Co. *v.* Bailey, 7 Ga. App. 331, 66 S. E. 960; Fish *v.* Chapman, 2 Ga. 349, 46 Am. Dec. 393; Ohlen *v.* Atlanta, etc., R. Co., 2 Ga. App. 323, 58 S. E. 511; Louisville, etc., R. Co. *v.* Warfield, 129 Ga. 473, 59 S. E. 234; Forrester *v.* Georgia R., etc., Co., 92 Ga. 699, 19 S. E. 811; Central, etc., R. Co. *v.* Lippman, 110 Ga. 665, 36 S. E. 202, 50 L. R. A. 673; Pennsylvania R. Co. *v.* Goetchius, 135 Ga. 170, 68 S. E. 1110; Coweta County *v.* Central, etc., R. Co., 4 Ga. App. 94, 60 S. E. 1018.

Illinois.—Illinois Cent. R. Co. *v.* McClellan, 54 Ill. 58, 5 Am. Rep. 83; Ohio, etc., R. Co. *v.* Dunbar, 20 Ill. 623, 71 Am. Dec. 291.

Indiana.—Louisville, etc., R. Co. *v.* Nicholai, 4 Ind. App. 119, 30 N. E. 424; Pittsburgh, etc., R. Co. *v.* Morton, 61 Ind. 539, 28 Am. Rep. 682.

Iowa.—Beard *v.* Illinois Cent. R. Co., 79 Iowa 518, 44 N. W. 800, 7 L. R. A. 280, 18 Am. St. Rep. 381; Gilbert Bros. *v.* Chicago, etc., R. Co., 136 N. W. 911; Cownie Glove Co. *v.* Merchants' Dispatch Transp. Co., 130 Iowa 327, 106 N. W. 749, 114 Am. St. Rep. 419, 4 L. R. A., N. S., 1060.

Kentucky.—Farley *v.* Lavary, 107 Ky. 523, 21 Ky. L. Rep. 1252, 54 S. W. 840, 47 L. R. A. 383; Hall & Co. *v.* Renfro, 3 Metc. 51; Lewis *v.* Louisville, etc., R. Co., 135 Ky. 361, 122 S. W. 184, 25 L. R. A., N. S., 938, 21 Am. & Eng. Ann. Cas. 527; Schwartz & Co. *v.* Erie R. Co., 32 Ky. L. Rep. 777, 106 S. W. 1188; Stiles *v.* Louisville, etc., R. Co., 33 Ky. L. Rep. 625, 110 S. W. 820.

Massachusetts.—Evans *v.* Fitchburg R. Co., 111 Mass. 142, 15 Am. Rep. 19.

Michigan.—Black *v.* Ashley, 80 Mich. 90, 44 N. W. 1120.

Mississippi.—Chicago, etc., R. Co. *v.* Abels, 60 Miss. 1017, 21 Am. & Eng. R. Cas. 105; Louisville, etc., R. Co. *v.* Bigger, 66 Miss. 319, 6 So. 234.

Missouri.—Funsten Dried Fruit, etc., Co. *v.* Toledo, etc., R. Co., 163 Mo. App. 426, 143 S. W. 839; Daggett *v.* Shaw, 3 Mo. 264, 25 Am. Dec. 439.

New Hampshire.—Faucher *v.* Wilson, 68 N. H. 338, 38 Atl. 1002, 39 L. R. A. 431; Rixford *v.* Smith, 52 N. H. 355, 13 Am. Rep. 42.

North Carolina.—Currie *v.* Seaboard, etc., R. Co., 156 N. C. 432, 72 S. E. 493.

North Dakota.—Duncan *v.* Great Northern R. Co., 17 N. Dak. 610, 118 N. W. 826, 19 L. R. A., N. S., 952.

Ohio.—American Exp. Co. *v.* Smith, 33 O. St. 511, 31 Am. Rep. 561; Toledo, etc., R. Co. *v.* Ambach, 10 O. C. C. 490, 6 O. C. D. 574, affirmed in 57 O. St. 38, 47 N. E. 1039; Canal Boat Montgomery *v.* Kent, 20 O. 54; Pittsburgh, etc., R. Co. *v.* Barrett, 36 O. St. 448.

Oregon.—Lacey *v.* Oregon R., etc., Co. (Ore.), 128 Pac. 999.

Texas.—M. P. R. Co. *v.* Barnes & Co., 2 Texas App. Civ. Cas., § 575; Fentiman *v.* Atchison, etc., R. Co., 44 Tex. Civ. App. 455, 98 S. W. 939; Gulf, etc., R. Co. *v.* Levi, 76 Tex. 337, 13 S. W. 191; Texas Cent. R. Co. *v.* Hunter & Co., 47 Tex. Civ. App. 190, 104 S. W. 1075; International, etc., R. Co. *v.* Hynes, 3 Tex. Civ. App. 20, 21 S. W. 622; Gulf, etc., R. Co. *v.* Levi, 12 S. W. 677; Albright *v.* Penn, 14 Tex. 290; Gulf, etc., R. Co. *v.* Trawick, 68 Tex. 314, 4 S. W. 567.

Virginia.—Virginia, etc., R. Co. *v.* Sayers, 67 Va. (26 Gratt.) 328.

West Virginia.—Baltimore, etc., R. Co. *v.* Morehead, 5 W. Va. 293; McGraw *v.* Baltimore, etc., R. Co., 18 W. Va. 361, 41 Am. Rep. 696, 9 Am. & Eng. R. Cas. 188.

A carrier of merchandise is only liable for such deterioration in merchandise carried as is attributable to its negligence. Ruddell *v.* Baltimore, etc., R. Co., 152 Ill. App. 218; Joerg *v.* Atchison, etc., R. Co., 152 Ill. App. 229.

The freezing of potatoes by a carrier will be held to be caused by the nature of the property, so as to exempt him from liability, provided he has been guilty of no previous negligence or misconduct which can be considered the proximate cause of the injury. McGraw *v.* Baltimore, etc., R. Co., 18 W. Va. 361, 41 Am. Rep. 696, 9 Am. & Eng. R. Cas. 188.

Moisture of cotton received prior to lading.—The responsibility of the carrier does not extend to damages resulting to a cargo of cotton in bales, from moisture of the contents of the bales received previous to the time of lading, which could not have been discovered by the master of the vessel and where the vessel was seaworthy, and there was no subsequent negligence on the part of the master with respect to protecting the cotton. Choate *v.* Crowninshield, Fed. Cas. No. 2,691, 3 Cliff 184.

carrier against their explosion,[74] spontaneous combustion,[75] putrefaction, dissolution, growth, disease,[76] fermentation,[77] acidification, effervescence,[78] evaporation,[79] unavoidable leakage,[80] or natural decay.[81] A carrier of perishable goods is liable for damages for its failure to exercise due care in view of the nature of the goods,[82] and must show that the loss was caused by the inherent qualities of the goods unmixed with negligence on its part.[83]

74. **Explosion.**—Rixford *v.* Smith, 52 N. H. 355, 13 Am. Rep. 42; The Nitro-Glycerine Case (U. S.), 15 Wall. 524, 21 L. Ed. 206.

75. **Spontaneous combustion.**—Rixford *v.* Smith, 52 N. H. 355, 13 Am. Rep. 42; Evans *v.* Fitchburg R. Co., 111 Mass. 142, 15 Am. Rep. 19; Pittsburgh, etc., R. Co. *v.* Morton, 61 Ind. 539, 28 Am. Rep. 682.

If a fire destroying a car load of high proof spirits was of spontaneous origin, caused by contact with the air, the carrier was not liable therefor where, on delivery of the car to the consignee, it notified his agent that one of the barrels containing the spirits was broken. Rothchild Bros. *v.* Northern Pac. R. Co. (Wash.), 123 Pac. 1011.

76. **Putrefaction, etc.**—Rixford *v.* Smith, 52 N. H. 355, 13 Am. Rep. 42.

77. **Fermentation.**—Rixford *v.* Smith, 52 N. H. 355, 13 Am. Rep. 42; Evans *v.* Fitchburg R. Co., 111 Mass. 142, 15 Am. Rep. 19.

A common carrier is not liable for the loss of molasses by the bursting of the barrel, caused by the fermentation of the contents. Faucher *v.* Wilson, 38 Atl. 1002, 68 N. H. 338, 39 L. R. A. 431.

78. **Acidification and effervescence.**—Pittsburg, etc., R. Co. *v.* Morton, 61 Ind. 539, 28 Am. Rep. 682.

79. **Evaporation.**—Evans *v.* Fitchburg R. Co., 111 Mass. 142, 15 Am. Rep. 19.

80. **Unavoidable leakage.**—Nelson *v.* Woodruff, Fed. Cas. No. 10,117; Evans *v.* Fitchburg R. Co., 111 Mass. 142, 15 Am. Rep. 19.

In Nelson *v.* Woodruff, Fed. Cas. No. 10,117, it is held, that a common carrier is not responsible for leakage from barrels, if they are such as are commonly used for similar purposes, and became unfitted to hold their contents from causes connected with the nature and condition of the article which the carrier could not control.

Hog's lard having certain qualities which make its leakage from ordinary barrels or wooden casks unavoidable in hot weather, a person who ships it in that condition from a southern port for a long voyage, through low latitudes in midsummer, takes upon himself the risk of all loss necessarily proceeding from that cause. Nelson *v.* Woodruff, Fed. Cas. No. 10,117.

Alcohol reduced in strength—Failure to prove carrier in fault.—In Jordan *v.* American Exp. Co., 86 Me. 225, 29 Atl. 980, which was an action against an express company for not safely carrying alcohol contained in tin cans and boxed, it appeared that the carrier receipted for two boxes, not valued, nor contents specified. The boxes were delivered to the plaintiff, apparently in the condition received, except they were wet, presumably, in the absence of proof, from leakage. There was no proof that the cans were full when delivered to plaintiff. The complaint was that the alcohol was reduced in strength in transit. It was held that the action could not be maintained.

81. **Natural decay.**—*Delaware.*—Carpenter *v.* Baltimore, etc., R. Co., 6 Pen. 15, 64 Atl. 252.

Indiana.—Pittsburgh, etc., R. Co. *v.* Morton, 61 Ind. 539, 28 Am. Rep. 682.

Maryland.—Philadelphia, etc., R. Co. *v.* Diffendal, 109 Md. 494, 72 Atl. 193.

Massachusetts.—Evans *v.* Fitchburg R. Co., 111 Mass. 142, 15 Am. Rep. 19.

New Hampshire.—Rixford *v.* Smith, 52 N. H. 355, 13 Am. Rep. 42.

Ohio.—Long *v.* Louisville, etc., Packet Co., 7 N. P., N. S., 14, 18 O. D. N. P. 699; American Exp. Co. *v.* Smith, 33 O. St. 511, 31 Am. Rep. 561; Railroad Co. *v.* O'Donnell, 49 O. St. 489, 32 N. E. 476.

Fruit shipped being inherently subject to decay, and the bill of lading being qualified with that condition, the vessel is not responsible for its sound delivery, without evidence of some misfeasance of the master which set in action or aggravated such tendency. Lawrence *v.* Lieutenant Admiral Callomberg, Fed. Cas. No. 8,139, affirmed in Fed. Cas. No. 3,716, 1 Black 170, 17 L. Ed. 89.

If the value of peaches was lessened because of natural deterioration while in possession of the carrier without its fault, it would not be liable to the owners. Pennsylvania R. Co. *v.* Goetchius, 135 Ga. 170, 68 S. E. 1110.

82. **Carrier must exercise due care.**—Trakas *v.* Charleston, etc., R. Co., 87 S. C. 206, 69 S. E. 209.

A carrier was liable for damage caused by decay in a shipment of fruit, if by exercise of reasonable skill and diligence the decay could have been prevented. M. P. R. Co. *v.* Barnes & Co., 2 Texas App. Civ. Cas., § 575.

83. **Carrier must be free from negligence.**—Forrester *v.* Georgia R., etc., Co., 92 Ga. 699, 19 S. E. 811; Central R., etc., Co. *v.* Georgia Fruit, etc., Exch., 91 Ga. 389, 17 S. E. 904. See Philadelphia, etc., R. Co. *v.* Diffendal, 109 Md. 494, 72 Atl. 193, 458.

Unreasonable delay in forwarding perishable freight would be negligence on the

§ 1004. Act or Mandate of Public Authority.—Act of Military Authority.—A carrier is not liable for the loss of goods shipped contrary to the directions of the owner in obedience to a military order,[84] or for goods seized and destroyed under military authority.[85]

Seizure under Legal Process.—A carrier, surrendering in good faith and without negligence goods taken under a valid legal process issued against the owner is excused from further liability,[86] and is not liable for losses occasioned thereby.[87]

§§ 1005-1009. Carriers to Which Rule Applicable—§ 1005. In General.—Railroads.—The rule that a common carrier is an insurer of goods and liable for all losses unless occasioned by the excepted causes applies to all classes of common carriers,[88] of which railroads afford the most numerous examples.[89] A railroad company operating a meagerly equipped railway,[90] and a company receiving freight before its road is completed, and when it is only running construction trains,[91] are responsible as common carriers. As to liability of railroad companies conveying chartered or private cars, see elsewhere.[92]

Express Companies.—Express companies are subject to all the common-law liabilities of common carriers,[93] though they have no means of transportation of their own and employ the vehicles of other carriers for that purpose.[94]

part of the carrier because prolonging the time within which by the operation of natural loss decay would be produced and such negligence would therefore contribute to causing the injury. Forrester *v.* Georgia R., etc., Co., 92 Ga. 699, 19 S. E. 811.

84. Losses occurring through act of military authority.—Railroad Co. *v.* Hurst, 58 Tenn. (11 Heisk.) 625.

A carrier shipping goods to a distant place in obedience to a military order, and storing them, is not liable for a loss occurring by fire without his negligence, though the owner had not had sufficient time to look after them after he learned where they were. Railroad Co. *v.* Hurst, 58 Tenn. (11 Heisk.) 625.

85. Nashville, etc., R. Co. *v.* Estes, 54 Tenn. (7 Heisk.) 622, 24 Am. Rep. 289; S. C., 78 Tenn. (10 Lea) 749.

86. Seizure under legal process.—Clifford *v.* Brockton Transp. Co., 214 Mass. 466, 101 N. E. 1092. See ante, "Goods Seized under Legal Process," §§ 870-874.

87. M. P. R. Co. *v.* Barnes & Co., 2 Texas App. Civ. Cas., § 575; Gulf, etc., R. Co. *v.* Belton Oil Co., 45 Tex. Civ. App. 44, 99 S. W. 430.

88. Carrier to which rule applicable—Who are common carriers.—See ante, "Persons and Corporations Who Are Common Carriers," §§ 3-18.

89. Railroads.—Helliwell *v.* Grand Trunk Railway, 7 Fed. 68, 10 Biss. 170. See ante, "Railroad Companies," § 3. And see, also, ante and post, the particular sections.

Railroad companies are subject to liability as common carriers, although their charters do not, in so many words, provide that they shall be. Chicago, etc., R. Co. *v.* Thompson, 19 Ill. 578.

Under the Texas statute, a railroad is responsible as a common carrier. Texas, etc., R. Co. *v.* Nicholson, 61 Tex. 491.

90. White *v.* Minneapolis, etc., R. Co., 111 Minn. 167, 126 N. W. 533.

91. Little Rock, etc., R. Co. *v.* Glidewell, 39 Ark. 487.

92. Chartered or private cars.—See post, "Goods Shipped on Chartered or Private Cars," § 1011.

93. Express companies.—*Alabama.*—Southern Exp. Co. *v.* Hess, 53 Ala. 19; Southern Exp. Co. *v.* Crook, 44 Ala. 468, 4 Am. Rep. 140.

Georgia.—Southern Exp. Co. *v.* Newby, 36 Ga. 635, 91 Am. Dec. 783.

Illinois.—Gulliver *v.* Adams Exp. Co., 38 Ill. 503.

Indiana.—Express companies are made, by statute (1 Gav. & H. St. p. 327), common carriers. American Exp. Co. *v.* Hockett, 30 Ind. 250, 95 Am. Dec. 691; United States Exp. Co. *v.* Rush, 24 Ind. 403.

Missouri.—Kirby *v.* Adams Exp. Co., 2 Mo. App. 369.

New York.—Sherman *v.* Wells, 28 Barb. 403; Belger *v.* Dinsmore, 51 N. Y. 166, 10 Am. Rep. 575; Read *v.* Spaulding, 18 N. Y. Super. Ct. 395; Landsberg *v.* Dinsmore (N. Y.), 4 Daly 490.

Failure to comply with a statute declaring such companies common carriers does not relieve an express company from responsibility as such carrier. United States Exp. Co. *v.* Rush, 24 Ind. 403.

94. *District of Columbia.*—Galt *v.* Adams Exp. Co. (D. C.), McArthur & M. 124, 48 Am. Rep. 742.

Alabama.—Southern Exp. Co. *v.* Ashford, 126 Ala. 591, 28 So. 732.

Massachusetts.—Buckland *v.* Adams Exp. Co., 97 Mass. 124, 93 Am. Dec. 68.

Minnesota.—Christenson *v.* American

And the status of an express company is not changed by an agreement with the shipper that it is to be held liable as a forwarder only,[95] or by calling itself an "express forwarder."[96]

Wagoners who carry goods for hire are subject to the same liability as common carriers.[97]

Transfer companies, are liable as common carriers for loss or damage to goods.[98]

Carriers by Water.—The general rule of a common carrier's liability applies to carriers by water.[99]

Ferrymen.—The law regards a public ferryman as a common carrier, and throws upon him the same duties and liabilities.[1] And a private ferryman, not on a public road, may incur the liabilities of a common carrier by notoriously undertaking to transport for hire all persons indifferently, with their carriages and goods;[2] but this is a question for the jury.[3] But one who keeps a ferry for his own use, and for the convenience of customers to his mill, and who charges no ferriage, is not liable as a common carrier.[4]

Switching Companies.—A railroad company taking loaded cars from its connection with another road, transferring them by a switch engine over its own

Exp. Co., 15 Minn. 270, Gil. 208, 2 Am. Rep. 122.

Ohio.—United States Exp. Co. *v.* Backman, 28 O. St. 144.

South Carolina.—Stadhecker *v.* Combs & Co. (S. C.), 9 Rich. L. 193.

95. Galt *v.* Adams Exp. Co. (D. C.), McArthur & M. 124, 48 Am. Rep. 742.

96. Buckland *v.* Adams Exp. Co., 97 Mass. 124, 93 Am. Dec. 68.

97. Carriers by wagon.—Philleo *v.* Sanford, 17 Tex. 227, 67 Am. Dec. 654; Gordon *v.* Hutchinson (Pa.), 1 Watts & S. 285, 37 Am. Dec. 464; Chevallier *v.* Straham, 2 Tex. 115, 47 Am. Dec. 639. See Herring *v.* Utle, 53 N. C. 270.

98. Transfer companies.—Arkadelphia Mill. Co. *v.* Smoker Merchandise Co., 100 Ark. 37, 139 S. W. 680.

99. Carriers by water.—*United States.*—Niagara *v.* Cordes, 21 How. 7, 16 L. Ed. 41; The Commander-in-Chief, 1 Wall. 43, 17 L. Ed. 609; The Maggie Hammond, 9 Wall. 435, 19 L. Ed. 772. Tompkins *v.* Dutchess, Fed. Cas. No. 14,087a.

Alabama.—Jones *v.* Pitcher & Co., 3 Stew. & P. 135, 24 Am. Dec. 716.

Connecticut.—Hale *v.* New Jersey Steam-Nav. Co., 15 Conn. 539, 39 Am. Dec. 398; Richards *v.* Gilbert, 5 Day 415; Clark *v.* Richards, 1 Conn. 54.

Missouri.—Daggett *v.* Shaw, 3 Mo. 264, 25 Am. Dec. 439.

South Carolina.—McClures *v.* Hammond, 1 Bay 99, 1 Am. Dec. 598; Harrington *v.* Lyles, 2 Nott & McC. 88; Faulkner *v.* Wright, Rice 107; Patton *v.* Magrath, Dud. 159, 31 Am. Dec. 552.

Texas.—Houston, etc., Nav. Co. *v.* Dwyer, 29 Tex. 376.

Carrier on lake.—McArthur *v.* Sears (N. Y.), 21 Wend. 190; Spencer *v.* Daggett, 2 Vt. 92.

A boatman is a common carrier, within the rule. Harrington *v.* Lyles (S. C.), 2 Nott & McC. 88; Turney *v.* Wilson, 15 Tenn. (7 Yerg.) 340, 27 Am. Dec. 515; Gordon *v.* Buchanan, 13 Tenn. (5 Yerg.) 71; Moss *v.* Bettis, 51 Tenn. (4 Heisk.) 661, 13 Am. Rep. 1; Johnson *v.* Friar, 12 Tenn. (4 Yerg.) 48, 26 Am. Dec. 215. Compare Eveleigh *v.* Sylvester (S. C.), 2 Brev. 178.

Contra.—In an early case it was held that the master or owners of a vessel transporting goods on the high seas are not common carriers within the meaning of the rule. Aymar *v.* Astor (N. Y.), 6 Cow. 266.

1. Ferrymen.—*Alabama.*—Babcock *v.* Herbert, 3 Ala. 392, 37 Am. Dec. 695.

Arkansas.—Harvey *v.* Rose, 26 Ark. 3, 7 Am. Rep. 595.

California.—May *v.* Hanson, 5 Cal. 360, 63 Am. Dec. 135.

Kentucky.—Hall & Co. *v.* Renfro, 3 Metc. 51.

Iowa.—Slimmer *v.* Merry, 23 Iowa 90; Whitmore *v.* Bowman, 4 G. Greene 148.

Missouri.—Pomeroy *v.* Donaldson, 5 Mo. 36.

Ohio.—Wilson *v.* Hamilton, 4 O. St. 722.

Pennsylvania.—Smith *v.* Seward, 3 Pa. 342.

Tennessee.—Sanders *v.* Young, 38 Tenn. (1 Head) 219, 73 Am. Dec. 175.

Texas.—Albright *v.* Penn, 14 Tex. 290.

If a ferryman combines, as is frequently the case, with the business of a ferryman, the carrying of merchandise without the presence of the owner, he is bound by the obligations of a common carrier as to such property. New York *v.* Starin, 106 N. Y. 1, 12 N. E. 631.

2. Hall & Co. *v.* Renfro (Ky.), 3 Metc. 51; Littlejohn *v.* Jones (S. C.), 2 McMul. 365, 39 Am. Dec. 132.

3. Littlejohn *v.* Jones (S. C.), 2 McMul. 365, 39 Am. Dec. 132.

4. Self *v.* Dunn, 42 Ga. 528, 5 Am. Rep. 544.

track to a spur of its own, and receiving its compensation from the connecting road, is liable as a common carrier for the safety of the goods transferred.[5]

Carriers of Passengers may by special contract or general course of business become liable as common carriers as to articles not strictly within their line of business.[6]

Trustees and Receivers.—The fact that a railroad is in the custody of the court does not render the receiver appointed by the court any the less liable as a common carrier.[7] Trustees of an insolvent railroad company, who operate the road, are, it seems, liable for loss of goods as common carriers.[8]

A mail carrier may become liable as a common carrier.[9]

One agreeing to tow a vessel out of a port is not liable as a common carrier.[10]

Carriage of Goods Not Transported for Public Generally.—A common carrier of certain kinds of goods is not liable as such where it transports other kinds of goods, which it does not transport for the public generally.[11]

§ 1006. Carriers Not Owning Means of Transportation.—Transportation companies, not owning or controlling any means of conveyance themselves, but engaging on their own behalf in the business of transporting freight through the agency and over the lines of other carriers, of their own selection and employment, are common carriers and insurers of such freight while it is being carried for them by the other carriers.[12]

5. **Switching companies.**—Missouri Pac. R. Co. *v.* Wichita, etc., Grocery Co., 55 Kan. 525, 40 Pac. 899.

6. **Proprietors of stage coach.**—The practice of conveying for hire, in a stage coach, parcels not belonging to passengers, renders the proprietors of the coach liable as common carriers for the loss of such parcels. Dwight *v.* Brewster (Mass.), 1 Pick. 50, 11 Am. Dec. 133; Powell *v.* Mills, 30 Miss. 231, 64 Am. Dec. 158; Beckham *v.* Shouse (Pa.), 5 Rawle 179, 28 Am. Dec. 653; Goodwyn, etc., Co. *v.* Douglas (S. C.), Cheves 174.

A street-railway company, may become liable as a common carrier of merchandise on its cars. Levi *v.* Lynn, etc., R. Co. (Mass.), 11 Allen 300, 87 Am. Dec. 713.

Railroad company.—See Elkins *v.* Boston, etc., R. Co., 23 N. H. 275.

Two instances of the transportation of goods by a passenger train, within two years, for which freight was paid to the baggage master, is not evidence of a custom to thus transport goods, or that the public understood that such a custom existed. Elkins *v.* Boston, etc., R. Co., 23 N. H. 275.

7. **Receivers.**—Beers *v.* Wabash, etc., R. Co., 34 Fed. 244. See Paige *v.* Smith, 99 Mass. 395.

8. **Trustees.**—Faulkner *v.* Hart, 44 N. Y. Super. Ct. 471.

Trustees of a railroad mortgage, given to secure bonds of the company, foreclosed, and, by permission of the court, bid at the sale. They purchased the road, and operated same for the benefit of their cestuis que trustent. Held that, as to the public, they were operating the road as owners, and were liable as common carriers. Rogers *v.* Wheeler, 43 N. Y. 598, affirming 2 Lans. 486.

9. **Mail carrier.**—The statute of the United States (Acts 11th Cong. c. 54) making it unlawful for a mail carrier to take any letter or packet, and deliver it to the person to whom it was sent does not apply where a mail carrier for hire takes bank notes in a sealed envelope, and delivers them according to the direction; and in an action against him, as a common carrier, for the loss of the package, he can not set up such statute as a defense. Dwight *v.* Brewster (Mass.), 1 Pick. 50, 11 Am. Dec. 133.

10. **Towage of vessel.**—Pennsylvania, etc., Nav. Co. *v.* Dandridge (Md.), 8 Gill. & J. 248, 29 Am. Dec. 543.

11. **Carriage of goods not transported for public generally.**—Missouri Pac. R. Co. *v.* Harris, 1 Texas App. Civ. Cas., § 1257.

A statute prohibiting "common carriers of goods, wares, and merchandises from limiting their common-law liability, does not either limit or extend the class of property to be embraced by the carrier transporting goods for hire." Tex. Rev. St. art. 278; Missouri Pac. R. Co. *v.* Harris, 1 Texas App. Civ. Cas., § 1257.

Carriage of money.—See post, "Carriers of Money," § 1007.

12. **Carriers employing means of transportation of other carriers.**—*United States.*—Bank *v.* Adams Exp. Co., 93 U. S. 174, 23 L. Ed. 872.

Alabama.—Southern Exp. Co. *v.* Ashford, 126 Ala. 591, 28 So. 732; Southern Exp. Co. *v.* Crook, 44 Ala. 468, 4 Am.

§ 1007. Carriers of Money.—Where it is the regular occupation of a carrier, as in the case of an express company,[13] to transport money or its representatives, it is liable as a common carrier for loss or damage to the same.[14] It is not to be presumed that a carrier of ordinary freight is also a carrier of money or its representatives. In order to render the carrier liable as such, it must be clearly proved that it held itself out to the public as such.[15] But it is held that the proprietors of a stage coach accustomed to carry parcels not belonging to passengers are liable as common carriers for the loss of a package of money.[16] And it is also held that the owners of a vessel are responsible as common carriers, for money or gold taken on board as freight for transportation.[17]

Liability as Dependent upon Compensation.—It is held, that the liability of the carrier depends upon the fact whether or not it received the money to carry for a compensation; and though there be no stipulated price for the service, yet, if the usage in such cases implies an agreement to pay the carrier for such service, it will be liable.[18] Where the owner of a boat claims that the carriage of banknotes was by private contract between the plaintiff and the captain, the mere fact that the captain was permitted to retain the compensation for carrying does not of itself exonerate the owner from liability as a common carrier for their loss.[19]

Effect of Usage.—To render a boat liable as a common carrier of money, it must be its usage to carry money for hire,[20] or the known usage of the trade

Rep. 140; Southern Exp. Co. *v.* Hess, 53 Ala. 19.

Colorado.—Merchants', etc., Transp. Co. *v.* Cornforth, 3 Colo. 280, 25 Am. 757.

Illinois.—Edison *v.* Pennsylvania Co., 70 Ill. App. 654; Gulliver *v.* Adams Exp. Co., 38 Ill. 503; Merchants' Despatch Transp. Co. *v.* Kahn, 76 Ill. 520; Michigan Cent. R. Co. *v.* Curtis, 80 Ill. 324; Wald *v.* Pittsburgh, etc., R. Co., 162 Ill. 545, 44 N. E. 888, 35 L. R. A. 356, 53 Am. St. Rep. 332.

Indiana.—American Exp. Co. *v.* Hockett, 30 Ind. 250, 95 Am. Dec. 691; United States Exp. Co. *v.* Rush, 24 Ind. 403.

Massachusetts.—Buckland *v.* Adams Exp. Co. 97 Mass. 124, 93 Am. Dec. 68.

Missouri.—Austin *v.* St. Louis, etc., Packet Co., 15 Mo. App. 197.

New York.—Langworthy *v.* New York, etc., R. Co., 2 E. D. Smith 195; Place *v.* Union Exp. Co., 2 Hilt. 19; Mercantile Mut. Ins. Co. *v.* Chase, 1 E. D. Smith 115.

Ohio.—United States Exp. Co. *v.* Backman, 28 O. St. 144.

Pennsylvania.—Chouteaux *v.* Leech, 7 Leg. Int. 109, 9 Leg. Int. 78.

Tennessee.—Merchants' Transp. Co. *v.* Bloch Bros., 86 Tenn. (2 Pickle) 392, 6 S. W. 881.

13. Carriage of money—Express company.—United States Exp. Co. *v.* Hutchins, 67 Ill. 348.

14. Kuter *v.* Michigan Cent. R. Co., Fed. Cas. No. 7,955, 1 Biss. 35; Citizens', etc., Bank *v.* Nantucket Steamboat Co., Fed. Cas. No. 2,730, 2 Story 16; Sherman *v.* Wells (N. Y.), 28 Barb. 403.

15. *Illinois.*—Chicago, etc., R. Co. *v.* Thompson, 19 Ill. 578.

Kentucky.—Lee *v.* Burgess, 9 Bush 652.

New York.—Sewall *v.* Allen, 6 Wend. 335, overruling 2 Wend. 327.

The charter of a common carrier upon Lake Champlain, extended to the carrying of all goods, wares, and merchandise, and "all other articles and things usually transported by water," on that lake, and it appeared that bank bills were usually carried by the water craft upon that lake at the time the corporation received its charter and went into operation. It was held that the carrier's powers extended to the carrying of bank bills, and that if it assumed the risk of carrying such articles, it was liable as a common carrier. Farmers', etc., Bank *v.* Champlain Transp. Co., 23 Vt. 186, 56 Am. Dec. 68.

A carrier of "goods, wares, and merchandise" will not necessarily be presumed to be a common carrier of money and bank bills. Lee *v.* Burgess (Ky.), 9 Bush. 652.

The term "merchandise" does not apply to mere evidence of value, such as notes, bills, and checks. Citizens' Bank *v.* Nantucket steamboat Co., Fed. Cas. No. 2,730, 2 Story 16.

16. Dwight *v.* Brewster (Mass.), 1 Pick. 50, 11 Am. Dec. 133.

17. Sulakowski *v.* Flint, 22 La. Ann. 6.

18. Liability dependent upon compensation.—Kirtland *v.* Montgomery, 31 Tenn. (1 Swan) 452.

19. Farmers' etc., Bank *v.* Champlain Transp. Co., 23 Vt. 186, 56 Am. Dec. 68.

20. Effect of usage.—Choteau *v.* The St. Anthony, 16 Mo. 216, holding that the act of the captain of a boat in taking bank bills for transportation is not prima facie evidence of the liability of the boat as a common carrier.

Proof of the usage of the clerks of steamboats to receive and carry packages from one port to another, without hire, in the expectation that such boat

that it should so carry it.[21] Proof of a custom by boats to carry money for customers to gain patronage does not establish a custom to carry it for hire.[22]

§ 1008. Persons Occasionally Carrying.—A person whose business is not the carrying of goods, and who does not hold himself out to the world as such, will not be liable as an insurer, although he may occasionally carry goods for hire.[23] But such person is liable if he assumes the occupation of carrier,[24] or contracts specially to carry goods and deliver them in "good order and condition, unavoidable accidents only excepted."[25] The question whether a person whose principal occupation is farming, but who at certain seasons of the year makes contracts for transportation of goods with those who chose to employ him, is liable as a common or private carrier is for the jury.[26]

§ 1009. Forwarders.—Parties undertaking merely to forward goods, by a carrier, other than themselves, are only forwarders, and not carriers, of such goods, and do not assume the responsibility of insurers.[27] Where parties doing business as forwarders and also as common carriers, agree orally to transport merchandise, to be delivered to them from time to time, and subsequently,

would be preferred by the parties in their shipments of freight, is insufficient to bind the owners. Cincinnati, etc., Mail Line Co. *v.* Boal, 15 Ind. 345.

21. Choteau *v.* The St. Anthony, 16 Mo. 216.

Although ordinarily a steamboat may not be compelled to take charge of money, yet, if the general usage of boats in a particular trade to take charge of money is shown, the delivery of money to a particular boat will be governed by this common usage. Hosea *v.* McCrory, 12 Ala. 349.

The owners of a steamboat are responsible as common carriers for loss of a cash letter delivered to the clerk, if the jury find that it is the general custom of steamboats to carry such letters, although they are delivered to the clerk and carried without charge. Garey *v.* Meagher & Co., 33 Ala. 630.

22. Chouteau *v.* The St. Anthony, 20 Mo. 519.

23. Persons occasionally carrying.—Allis *v.* Voight, 99 Mich. 125, 51 N. W. 190; Faucher *v.* Wilson, 68 N. H. 338, 38 Atl. 1002, 39 L. R. A. 431; O'Rouke *v.* Bates, 133 N. Y. S. 392, 73 Misc. Rep. 414; Fish *v.* Clark, 49 N. Y. 122, affirming 2 Lans. 176; Satterlee *v.* Groat (N. Y.), 1 Wend. 272; ——— *v.* Jackson, 2 N. C. (1 Hayw.) 14; Samms *v.* Stewart, 20 O. 69, 55 Am. Dec. 445.

Contra.—A person who undertakes, though only pro hac vice, to carry by river for hire, without special contract, incurs the responsibility of a common carrier. Moss *v.* Bettis, 51 Tenn. (4 Heisk.) 661, 13 Am. Rep. 1, citing Gordon *v.* Hutchinson (Pa.), 1 Watts & S. 285, 37 Am. Dec. 464, wherein it is held that one who carries goods for hire is subject to the same liabilities as a common carrier, although that be not his principal and direct business, but only his occasional and incidental employment.

Illustrations.—Where it was proved that defendant owned a sloop, and was specially employed by the plaintiffs to make two trips to carry grain, held, that this fell short of proof sufficient to make him a common carrier. Allen *v.* Sackrider, 37 N. Y. 341.

One who sends his servant to transport goods belonging to a particular person from one place to another, with special instructions not to take the goods of any other person for transportation, is not liable as a common carrier in case of loss of the goods, notwithstanding he was once a common carrier, but had abandoned the business. Satterlee *v.* Groat (N. Y.), 1 Wend. 272.

If the owners of a flatboat only propose to carry the cotton of particular persons, they can not be held liable as common carriers to a third person, with whom the master of the boat, in violation of their instructions, makes a contract for freight. Steele *v.* McTyer, 31 Ala. 667, 70 Am. Dec. 516.

24. Chevallier *v.* Straham, 2 Tex. 115, 47 Am. Dec. 639.

25. Fish *v.* Chapman, 2 Ga. 349, 46 Am. Dec. 393.

26. Haynie *v.* Baylor, 18 Tex. 498.

27. Forwarders.—Goodrich *v.* Thompson, 27 N. Y. Super. Ct. 75; Hersfield *v.* Adams (N. Y.), 19 Barb. 577; American Exp. Co. *v.* Second Nat. Bank, 69 Pa. 394, 8 Am. Rep. 268. See ante, "Transportation and Forwarding Companies," § 8.

Loss by accidental fire.—If goods are under the control of parties as forwarders and not as common carriers, and are consumed by accidental fire in a warehouse without any fault or negligence on their part, they are not liable, unless they had agreed for compensation paid, to insure them, and had failed to do so. Southern Exp. Co. *v.* McVeigh, 61 Va. (20 Gratt.) 264.

on receiving a portion thereof to be transported pursuant to the contract, they execute an instrument stating that the same was received to be forwarded, they are responsible as common carriers, and not as forwarders.[28] Under a contract by a company engaged in assembling car load lots of goods for shipment, it is immaterial, to a recovery for damage to the goods and for cartage and storage charges paid before a delivery of the goods could be obtained, whether such company was a mere forwarder, or a forwarder and distributor, as it was obligated to carry out its undertaking, without regard to what name it used in designating its business.[29]

§ 1010. Commencement and Termination of Liability.—A carrier's common-law liability as an insurer of freight does not attach until the freight has been actually or constructively delivered to and accepted by it for transportation.[30] Where the liability has begun, it continues until there has been a proper delivery,[31] or the carrier has in some way been discharged of his pe-

28. Blossom *v.* Griffin, 13 N. Y. 569, 67 Am. Dec. 75.

Warehouseman and carrier—Freight received for forwarding by his own or other boats.—In Ladue *v.* Griffith, 25 N. Y. 364, 82 Am. Dec. 360, it appeared that a warehouseman at Buffalo was also a carrier on the Erie canal, and used to receive freight from the west and forward it to the east by the first boat going, whether his own or that of other carriers; that he received goods shipped from Detroit addressed to his care at Buffalo and marked "to go from Buffalo to East Albany, at 30 cts. per 100 lbs." it was held, that the presumption was that the goods came to his possession as a carrier, and having been burned, although without his fault, while in his warehouse awaiting transportation, he was liable for their value.

29. Garberson *v.* Transcontinental Freight Co., 51 Wash. 213, 98 Pac. 612.

30. **Commencement of liability.**—See ante, "When Liability Commences," chapter 5.

The rule that carriers are insurers of property intrusted to them is only incidental to the contract of carriage, and does not begin earlier than is necessary to secure faithful execution of such contract. Hutchinson *v.* United States Exp. Co., 63 W. Va. 128, 59 S. E. 949, 14 L. R. A., N. S., 393.

31. **Proper delivery.**—Arkadelphia Mill. Co. *v.* Smoker Merchandise Co., 100 Ark. 37, 139 S. W. 680; Bowman *v.* Hilton, 11 O. 303; Chicago, etc., R. Co. *v.* Kelm, 121 Minn. 343, 141 N. W. 295, 44 L. R. A., N. S., 995.

Where a bill of lading exempts a carrier from liability from loss by fire, and the goods are burned while in the car, but after they had been formally delivered to the consignee, a judgment in his favor, without proof that the fire was caused by the carrier's negligence, cannot be sustained. St. L., I. M. & S. R. Co. *v.* Bone, 52 Ark. 26, 11 S. W. 958.

Mode and sufficiency of delivery.—See ante, "Transportation and Delivery of Carriers," chapter 10.

The liability of a drayage company as a carrier of goods, receiving goods from a car on a house track, continued until it had completed the carriage by the actual delivery of the goods to the consignees at their place of business. Arkadelphia Mill. Co. *v.* Smoker Merchandise Co., 100 Ark. 37, 139 S. W. 680.

Where consignee's agent had surrendered bill of lading, gone to the car which had been spotted on the delivery tracks for delivery, and had broken the seal and entered the car before a fire occurred, there was a delivery and the carrier was not liable. Rothchild Bros. *v.* Northern Pac. R. Co. (Wash.), 123 Pac. 1011.

Delivery at intermediate point.—One who delivers goods to a carrier for transportation to a designated point may accept delivery thereof at an intermediate point, and, when he does so, the liability of the carrier terminates. Whitin *v.* Pendegast, 50 N. Y. 674.

Delivery to connecting carrier.—A bill of lading executed at New York described the goods as marked: "D. W. Mott & Bros., Memphis, Tenn. To be transported to Philadelphia, and there delivered to the Penn. R. R., all rail to Cincinnati, Ohio." Held that, in the absence of any indication to the contrary, the ultimate destination was Memphis, and that the agents of the Pennsylvania Railroad, who at Cincinnati had forwarded them thither by steamboat, were not liable for their loss. Brown & Co. *v.* Mott & Bros., 22 O. St. 149.

Goods, the property of A., were forwarded by B. by railroad from Baltimore to be delivered at St. Louis, and were so injured before reaching their destination as to be valueless. In an action by A. to recover their value from the railroad, it was proved that the damage was done after the goods were transferred to another railroad, and that the receipt given by the company shipping the goods contained the clause that: "The responsibility of the company is to terminate when the goods are unloaded from the cars. Goods intended for all rail must

culiar relation to the property.[32] The liability of a common carrier as an insurer does not continue longer than is necessary to secure faithful and efficient execution of the contract of carriage,[33] and it can be held responsible as such only so long as there remains something necessary to be done or to happen in order to terminate its liability as carrier.[34] Where a common carrier has transported goods to destination, and the consignee has paid the freight and given his receipt for the shipment, the contract of carriage is complete.[35] Where a common carrier takes goods being transported by it from the cars, and places them in a warehouse for reshipment, and they are there destroyed by fire, the goods are still in transit, and the carrier's liability as an insurer continues, and it is liable for the loss.[36] Where a carrier agrees to deliver imported goods in bond to the consignee at an internal port of entry, it is liable for losses sustained while the goods are detained in a warehouse in the original port of entry, because of the carrier's failure to prepare and file the necessary clearance papers.[37]

be marked 'Through by rail.' River goods, via Wheeling or Parkersburg, must be marked on this ticket." Held, that the responsibility of the defendants ceased upon unloading the cars at the terminus of their road, and that the provision that the goods might, in certain contingencies, be transported from that place by steamboat, forbade the interpretation that the unloading of the cars could mean unloading at the place of destination. McCann *v.* Baltimore, etc., R. Co., 20 Md. 202.

Rule requiring removal within certain time.—The liability of a carrier under a rule, fixed by himself, that all articles of freight must be taken away within twenty-four hours after being unloaded, does not, it seems, cease within twenty-four hours, though within that time he unloads them within a warehouse, unless they are delivered to one authorized to receive them. Angle & Co. *v.* Mississippi, etc., R. Co., 9 Iowa 487.

A bill of lading provided that property not removed with twenty-four hours after arrival at destination may be kept in the car, depot, or place of delivery of the carrier at the owner's risk, or may at the carrier's option be stored at the owner's risk and cost, subject to the carrier's freight lien. Held, that such clause was only applicable to property after it had reached its destination and did not apply to hay transported under a contract requiring delivery at ship's side within lighterage limits of the port of New York, which had only reached the rail terminal at the time it was stored and destroyed. Bolles *v.* Lehigh Valley R. Co., 159 Fed. 694, 86 C. C. A. 562.

Delivery in dangerous condition.—Carrier was not liable for loss of goods from fire after delivery, although they were in a dangerous condition when delivered, when the consignee accepted delivery with knowledge of their condition. Rothchild Bros. *v.* Northern Pac. R. Co. (Wash.), 123 Pac. 1011.

32. Cleveland, etc., R. Co. *v.* Sargent, 19 O. St. 138. (Resumption of possession by owner.) Bowman *v.* Hilton, 11 O. 303; McGregor & Co. *v.* Kilgore, 6 O. 358. See ante, "Failure or Refusal of Consignee to Receive Goods," § 868; "Goods Seized under Legal Process," §§ 870-874; post, "Stoppage in Transitu," chapter 17.

33. Hutchinson *v.* United States Exp. Co., 63 W. Va. 128, 59 S. E. 949, 14 L. R. A., N. S., 393.

34. Louisville, etc., R. Co. *v.* Cowherd, 120 Ala. 51, 23 So. 793; Mobile, etc., R. Co. *v.* Prewitt, 46 Ala. 63, 7 Am. Rep. 586; Tallassee Falls Mfg. Co. *v.* Western Railway, 128 Ala. 167, 29 So. 203; Jackson *v.* Sacramento Val. R. Co., 23 Cal. 268; American Exp. Co. *v.* Hockett, 30 Ind. 250, 95 Am. Dec. 691; State *v.* Creeden, 78 Iowa 556, 43 N. W. 673, 7 L. R. A. 295; Norway Plains Co. *v.* Boston, etc., Railroad (Mass.), 1 Gray 263, 61 Am. Dec. 423; Burnell *v.* New York Cent. R. Co., 45 N. Y. 184, 6 Am. Rep. 61; Mierson *v.* Hope, 32 N. Y. Super. Ct. 561; Van Horn *v.* Kermit (N. Y.), 4 E. D. Smith 453.

35. Stewart *v.* Central, etc., R. Co., 3 Ga. App. 397, 60 S. E. 1.

Payment of freight alone.—Goods transported by a railroad arrived at the place of destination, and were placed on the platform of the depot at the usual place of discharging goods ready for delivery to the consignee in good order, and he was notified of their arrival, and paid the freight on them. Held, that it seems that the payment of the freight without any arrangement as to the further custody of the goods is equivalent to delivery, so far as to throw the risk of loss on the consignee. New Albany, etc., R. Co. *v.* Campbell, 12 Ind. 55.

36. Goods being reshipped.—Merchants' Despatch Transp. Co. *v.* Kahn, 76 Ill. 520.

37. Cownie Glove Co. *v.* Merchants' Dispatch Transp. Co., 106 N. W. 749, 130 Iowa 327, 4 L. R. A., N. S., 1060, 114 Am. St. Rep. 419.

§ 1011. Goods Shipped on Chartered or Private Cars—Power of Carrier to Charter.—A common carrier having the exclusive right of transportation of passengers and freight over its road in its own cars and by means of its own motive power has the right to charter or hire an entire train or any part of it to another company or individual.[38]

Liability of Carrier.—In the case of a chartered car, as in other cases of carriage of freight, the responsibility of the carrier begins with the delivery to it of the goods and ends with its delivery of them at the place of destination.[39] But where one hires the use of cars from a railroad company to be used in the transportation of freight, to be loaded as the hirer choose, or to be left in the control of the shipper or his agent, the company does not incur the risk of a common carrier with respect to the contents of such cars while transporting them.[40] The remedy of the hirer for injuries must be on the contract for hire and the implied undertaking of the company that the hired cars are substantial and will be duly carried to their point of destination, etc.[41]

A special contract between a railroad company and one who has chartered a car, as to the liability for loss of the goods shipped in such car, will, if legal and reasonable, be enforced.[42]

Private Cars.—A common carrier's liability does not attach to a railroad company that has contracted to move property in the shipper's own cars controlled by his own agents, and though operated by railway employees, run upon a schedule to suit the shipper.[43] But it is held that, in such case, the defendant

38. Power to charter cars.—East Tennessee, etc., R. Co. *v.* Whittle, 27 Ga. 535, 73 Am. Dec. 741.

39. Central R., etc., Co. *v.* Anderson, 58 Ga. 393.

40. East Tennessee, etc., R. Co. *v.* Whittle, 27 Ga. 535, 73 Am. Dec. 741; Chappell *v.* Western Railway, 8 Ga. App. 787, 70 S. E. 208.

Goods destroyed by shipper's agent.—The rule that a common carrier is an insurer of the safety of freight does not apply where the goods were transported in a car left in the exclusive control of the shipper's agent, and they were destroyed by his act; and in such case it is immaterial whether or not such agent was negligent. Hart *v.* Chicago, etc., R. Co., 69 Iowa 485, 29 N. W. 597, 27 Am. & Eng. R. Cas. 59.

Manner of loading.—Where parties hire the use of cars from a railroad, to be used in the carriage of freight, to be loaded as the hirers choose, the railroad does not incur any risk as to the mode adopted in loading the cars. Ohio, etc., R. Co. *v.* Dunbar, 20 Ill. 623, 71 Am. Dec. 291.

That the employees of the carrier retain the management of a train chartered by it to an individual, does not render the carrier liable as a common carrier for injuries to property shipped on the train. East Tennessee, etc., R. Co. *v.* Whittle, 27 Ga. 535, 73 Am. Dec. 741.

41. East Tennessee, etc., R. Co. *v.* Whittle, 27 Ga. 535, 73 Am. Dec. 741.

Where a railroad company hired to the proprietor of a theatrical company a baggage car for the transportation of theatrical properties, and in connection with the car furnished lamps, one of which exploded on account of having been neglectfully filled, whereby the properties in the car were burned, the value of the properties so burned may be recovered in an action ex contractu brought against the railroad company by the person to whom the car was rented and who owned the properties, on the theory that while the contract did not expressly refer to the lamps, or warrant that they were in reasonably safe condition, nevertheless such was a reasonable implication flowing from the contract as made, and that the burning of the properties was reasonably to have been anticipated from the furnishing of defective lamps. Further damages flowing from the breach may (so far as they were within the contemplation of the parties at the time the contract was made) be also recovered. Chappell *v.* Western Railway, 8 Ga. App. 787, 70 S. E. 208.

42. Special contract.—Central R., etc., Co. *v.* Anderson, 58 Ga. 393.

43. Private cars.—Coup *v.* Wabash, etc., R. Co., 56 Mich. 111, 22 N. W. 215, 56 Am. Rep. 374, wherein the court said: "It is a misnomer to speak of such an arrangement as an agreement for carriage at all. It is substantially similar to the business of towing vessels, which has never been treated as carriage. It is, although on a larger scale, analogous to the business of furnishing horses and drivers to private carriages. Whatever may be the liability to third persons who are injured by carriages or trains, the carriage owner can not hold the persons he employs to draw his vehicles as carriers."

will be liable as a common carrier for an injury to the cars resulting from the derailment of the train.[44]

§§ 1012-1016. Acts or Omissions Rendering Carrier Liable in General—§ 1012. In General.—A loss caused by the negligence of the carrier constitutes a liability of the carrier at common law.[45] A common carrier, to exempt itself from liability for injuries happening to goods, while it is engaged in transporting them for hire, must show that it was free from fault at the time the injury or damage occurred, and that no act or neglect on its part concurred in or contributed to the injury.[46] The carrier is liable for losses occasioned by misdirecting the goods,[47] shipping them prematurely,[48] leaving them in a place exposed to fire,[49] unloading them at an improper time,[50] failing to place them

44. Mallory *v.* Tioga R. Co. (N. Y.), 39 Barb. 488.

45. **Loss caused by negligence of carrier.**—British, etc., Marine Ins. Co. *v.* Gulf, etc., R. Co., 63 Tex. 475, 479, 51 Am. Rep. 661; Gulf, etc., R. Co. *v.* Zimmerman & Co., 81 Tex. 605, 608, 17 S. W. 239.

46. Michaels *v.* New York Cent. R. Co., 30 N. Y. 564, 86 Am. Dec. 415; Read *v.* Spaulding, 30 N. Y. 630, 86 Am. Dec. 426, affirming 18 N. Y. Super. Ct. 395.

It is not necessary, in order to establish the liability of common carriers for the loss of goods carried by them, to show that the loss was occasioned solely by their negligence. If their act or omission was in itself a want of ordinary care and diligence, and contributed to the loss, it is not for the court or jury to measure in what proportion or degree, unless the loss must have happened notwithstanding such negligence. Lamb *v.* Camden, etc., Transp. Co. (N. Y.), 2 Daly 454.

Where a vessel transporting freight was run into and sunk by a steamer in the night, and those in charge of the vessel were guilty of negligence in having no watchman on the deck, the owners of the vessel were liable to a shipper for the value of freight lost, though those in charge of the steamer were also guilty of negligence. Converse *v.* Brainerd, 27 Conn. 607.

47. **Goods misdirected by carrier.**—Vincent *v.* Rather, 31 Tex. 77, 86, 98 Am. Dec. 516.

48. **Injuries caused by premature shipment.**—Where a carrier, after informing the owner of goods delivered to it for transportation that they will be held at place of receipt till the freight charges are prepaid, ships the goods without payment, and without notice to the owner, it is liable for damages resulting from such premature shipment. Campion *v.* Canadian Pac. R. Co., 43 Fed. 775, 11 L. R. A. 128.

49. **Leaving cotton in exposed place.**—When a carrier leaves a car load of cotton at an intermediate station, on a side track, within ten feet of the main track, in danger of fire from sparks from passing engines, and without a guard, this is evidence of gross negligence, and, unexplained, will make the carrier liable for all losses occasioned by such negligence. Purcell *v.* Southern Exp. Co., 34 Ga. 315.

A railway company received a quantity of cotton for transportation, and had it placed on barges for carriage to another city, to be placed on its cars. By direction of the company the barges were detained a mile or two below the proper place for the delivery of freight to the company and at a point where there was such a large amount of shipping as to necessitate the mooring of the barges much nearer the channel of the river and passing steamers than would have been necessary at any point in that neighborhood. The prevailing winds at that season blew from passing steamers towards the barges, and on the bank near by trains were constantly running. After the barges had been so moored for seventeen days, the cotton caught fire from a passing steamer. Held, that the company was negligent in placing the cotton in such an exposed position. Thomas *v.* Lancaster Mills, 71 Fed. 481, 19 C. C. A. 88.

A railroad company received, and issued bills of lading making it liable for loss by fire in case of negligence, for, uncompressed cotton, and, under authority of the assignee of the bills, sent it to a compress company, and, after it was compressed, allowed it to remain for an unreasonable length of time on the platform of the compress company, exposed to sparks from passing engines, and it was burned up. Held, that the company was liable for the cotton. Missouri, etc., R. Co. *v.* McFadden, 89 Tex. 138, 33 S. W. 853.

50. **Unloading goods at improper time.**—A common carrier will be held liable for damage caused to goods which he has transported to the place of destination, and landed during a rainstorm, without giving notice to the consignees of their arrival, although the goods were but a few hours exposed, and his agent made some effort to protect them from

in a warehouse,[51] negligently handling them,[52] or failing to require instructions as to their transportation.[53] Placing a wooden car next to the tender of the locomotive, or permitting the express messenger to ride in the front passenger car,[54] or failing to place cars within fire and police protection when temporarily standing on side tracks,[55] is not evidence of negligence. Unloading goods on Sunday is not fault or negligence on the part of the carrier in the absence of proof that, by the law of the state where the loss happened, such act was unlawful.[56] Where a carrier refuses to receive goods for transportation, because badly packed, it is not liable, as a trespasser, for their destruction, without negligence on its part, while being separated by it from other freight with which they had been improperly mixed, and which it is such carrier's duty to transport.[57] The fact that a station agent persuaded the consignee of freight to receive goods in a damaged condition, and pay the freight does not render the carrier liable for damages when it would not otherwise be responsible unless the agent was authorized to assume such liability.[58]

Effect of Custom.—That it was the custom of steamboats to carry torchlights at night on board does not affect the liability of the owners of a steamboat for a loss by fire caused by the negligent use of such lights.[59]

Goods in Bad Condition When Received by Carrier.—A consignor can not recover for loss of perishable goods shipped in bad condition, even though the carrier's negligence contributed to the loss, unless by ordinary care the former could not have avoided the consequences of the latter's negligence.[60]

the rain by which they were damaged. Withers *v.* New Jersey Steamboat Co. (N. Y.), 48 Barb. 455.

A carrier of perishable goods, with notice that they would be injured by rain, unloaded them after notice to the consignee, but, before the consignee could take all of them from the landing, they were injured by rain, the carrier making no attempt to protect them. Held, that the carrier was liable. McAndrew *v.* Whitlock, 52 N. Y. 40, 11 Am. Rep. 657, affirming 32 N. Y. Super. Ct. 623.

Where a shipment of apples is unloaded from a packet upon a wharfboat in the early evening, and during the night the apples are frozen, the carrier is liable to the consignee for the damages thus sustained. Long *v.* Louisville, etc., Packet Co., 7 N. P., N. S., 14, 18 O. D. N. P. 699.

51. Failure to place goods in warehouse.—Where plaintiff shipped a machine together with certain tools, etc., consigned to himself at a flag station on defendant's road, where defendant maintained a warehouse and side track, but no station or agent, the carrier, not having placed the tools and cable in its warehouse on their arrival, as it might have done, was liable to plaintiff for their loss. Normile *v.* Northern Pac. R. Co., 77 Pac. 1087, 36 Wash. 21, 67 L. R. A. 271.

52. Negligent handling of goods.—When cotton is injured and depreciated in weight by the bursting of the bagging, and the manner in which it is handled, the carrier is liable. Lipford *v.* Charlotte, etc., R. Co. (S. C.), 7 Rich. L. 409.

53. Failure to require instructions.—Plaintiff contracted to transport for defendant, from his works, from 1,200 to 5,000 barrels of salt, annually, for three years. The contract provided in detail for plaintiff's compensation and the deductions to be made therefrom for salt lost in transit. Held, that it was the duty of plaintiff to attend at the works of defendant at such times as suited his convenience, to receive the salt from time to time as he was ready, and commence its transportation, and to apply for the instructions requisite as to its points for transportation, and if he commenced the transportation without requiring such instructions, any loss occasioned thereby was attributable to his own fault. White *v.* Toncray, 46 Va. (5 Gratt.) 179.

54. Placing wooden car next to locomotive.—Adams Exp. Co. *v.* Sharpless & Sons, 77 Pa. 516.

55. Failure to place cars within fire and police protection.—Insurance Co. *v.* Lake Erie, etc., R. Co., 152 Ind. 333, 53 N. E. 382.

56. Unloading goods on Sunday.—Shelton *v.* Merchants', etc., Transp. Co., 59 N. Y. 258, 48 How. Prac. 257.

57. Goods refused because improperly packed.—Gulf, etc., R. Co. *v.* Insurance Co. (Tex. Civ. App.), 28 S. W. 237.

58. Southern R. Co. *v.* Gardner, 127 Ga. 320, 56 S. E. 454.

59. Effect of custom.—Hibler *v.* McCarthy, 31 Ala. 501.

60. Goods in bad condition when received by carrier.—Reed *v.* Philadelphia, etc., R. Co. (Del.), 3 Houst. 176.

Goods Injured While Detained for Freight.—It is held that as a carrier may properly refuse to deliver goods until payment of its charges for freight, negligence in caring for them while so detained is not a cause of action in trover for their conversion.[61]

If the condition of the contents of a box is unknown to a carrier receiving the box for shipment, a failure to guard against liability for the condition of the goods, by examination or stipulation, is negligence.[62]

Payment of Freight in Illegal Currency.—If a common carrier accepts goods to be carried for hire, the fact that the freight was paid and accepted in an illegal currency, would not affect its liability for the loss of the goods by negligence.[63]

Obligation of Carrier to Insure Goods.—An agreement between a warehouseman and a railroad company providing that the latter would deposit all cotton received by it for shipment with the warehouseman, to be compressed, and that he would insure such cotton while in his possession, does not impose upon the railroad company any obligation to insure in event of the warehouseman's failure to do so.[64]

Particular instances of acts not constituting negligence are set out in the notes.[65]

61. **Goods injured while detained for freight.**—Crossan *v.* New York, etc., R. Co., 149 Mass. 196, 21 N. E. 367, 14 Am. St. Rep. 408, 3 L. R. A. 766.

62. Morganton Mfg. Co. *v.* Ohio, etc., R. Co., 121 N. C. 514, 28 S. E. 474, 61 Am. St. Rep. 679.

63. **Payment of freight in illegal currency.**—Southern Exp. Co. *v.* Womack, 48 Tenn. (1 Heisk.) 256.

64. **Obligation of carrier to insure goods.**—Lancaster Mills *v.* Merchants' Cotton-Press Co., 89 Tenn. (5 Pickle) 1, 14 S. W. 317, 24 Am. St. Rep. 586.

65. **Acts not constituting negligence.**—A carrier is not chargeable with negligence in failing to take precautions to guard against the danger from fire to cotton awaiting transportation in locked box cars on a side track, in the open country, established and maintained for the accommodation of the planters in that neighborhood, where the carrier is merely following a practice which has continued for years without any resulting loss or complaint. Charnock *v.* Texas, etc., R. Co., 194 U. S. 432, 48 L. Ed. 1057, 24 S. Ct. 671, affirming 51 C. C. A. 78, 113 Fed. 92.

If a railroad train of nine cars loaded with various lots of freight becomes obstructed by a snowstorm, so that four of the cars must be left behind on a cold night without shelter, and the conductor is able to select which cars shall be left, and knows that one car contains goods which will be injured by freezing, he is not bound as matter of law to take that car forward rather than other cars containing goods of which, in respect to their liability to injury by freezing, he knows nothing. Swetland *v.* Boston, etc., R. Co., 102 Mass. 276.

Where a carrier received a car of organs on a certain day in regular course of business, together with seventy-four other cars, the act of the carrier in tendering such car on the following day with the others to a connecting carrier, which only accepted forty of them, declining the others on account of its inability to handle them because of a flood, did not show negligence of the carrier contributing to the damage of the organs in such car by the flood. Armstrong, etc., Co. *v.* Illinois Cent. R. Co., 26 Okla. 352, 109 Pac. 216, 29 L. R. A., N. S., 671.

A carrier to which fruit was delivered for shipment when the temperature was below freezing point is not negligent in forwarding the fruit on the day of receipt, instead of retaining it in storage until warmer weather. Tucker *v.* Pennsylvania R. Co., 11 Misc. Rep. 366, 32 N. Y. S. 1, reversing 10 Misc. Rep. 35, 30 N. Y. S. 811.

In an action against a carrier for negligence in failing to remove tobacco from a warehouse, by reason of which it was burned, it appeared that plaintiff had purchased tobacco from the owners of the P. warehouse, some of which was stored in the B. warehouse. The warehouse receipts for the tobacco were stamped "P. Warehouse," and, with orders on the warehousemen for delivery of same, were delivered to defendant on July 3d, who had contracted to store the tobacco in a warehouse owned by it. On account of prior orders for work, defendant was unable on that day to handle the tobacco. On the 6th (the 5th being Sunday, and the 4th legal holiday), defendant delivered the orders to the P. warehouse, but, on account of orders ahead of plaintiff's, it could not get the tobacco that day, but on the next day did receive it as fast as it was delivered to it. It did not know any of the

§ 1013. Proximate Cause of Loss or Injury.—Where carriers are responsible by reason of negligence they are only liable for the ordinary and proximate consequences of their faults, and not for those which are remote and extraordinary.[66] It is held that if a carrier has been delinquent in any of its duties, and a loss has occurred while its wrongful act was in force, it is permitted to show, in defense, although prima facie liable, that, although it may have been in default, yet the loss was independent of that default, and must have happened although the delinquency had never existed.[67]

Loss during Negligent Delay.—Where goods are destroyed by fire during a negligent delay it is held that the delay is the proximate cause of the loss rendering the carrier liable;[68] but there are cases holding to the contrary.[69] Where plaintiffs had control of the loading of a car of corn and they loaded the corn while it was wet, and in a condition to be damaged by being bulked in the car, the carrier was not responsible for damages occasioned thereby, notwithstanding the fact of a delay in the transportation.[70] As to loss occasioned by the act of God during negligent delay, see elsewhere.[71]

Particular instances of proximate cause of loss or injury to goods are set out in the notes.[72]

tobacco was stored in the B. warehouse, which was burned the night of the 7th. Held, that defendant was not negligent in failing to remove the tobacco from the B. warehouse, so as to render it liable for its value. Stewart *v.* Gracy, 93 Tenn. (9 Pickle) 314, 27 S. W. 664.

66. **Carrier liable for proximate consequences.**—Morrison *v.* McFadden (Pa.), 5 Clark 23.

When the proof fails to connect the carrier with any fault touching the article intrusted to it for carriage, no action can be maintained against it to recover damages for not safely carrying merchandise. Jordan *v.* American Exp. Co., 86 Me. 225, 29 Atl. 980.

Though a vessel be defective or the carrier negligent, yet, if these circumstances do not contribute to the loss, the carrier is not liable, if otherwise excused. Hart *v.* Allen (Pa.), 2 Watts 114; Hill *v.* Sturgeon, 35 Mo. 212, 86 Am. Dec. 149.

67. Hill *v.* Sturgeon, 28 Mo. 323.

68. **Loss by fire during negligent delay.**—Deming *v.* Merchants' Cotton Press, etc., Co., 90 Tenn. 306, 17 S. W. 89, 13 L. R. A. 518; Hernsheim *v.* Newport News, etc., Co., 18 Ky. L. Rep. 227, 35 S. W. 1115.

The failure of a carrier to move a car load of lumber, after being made ready for shipment and notice thereof, renders it liable for the loss of the lumber by its subsequent destruction in the burning of adjacent property without the carrier's fault. Green *v.* Louisville, etc., R. Co., 163 Ala. 138, 50 So. 937. But see Central, etc., R. Co. *v.* Sigma Lumber Co., 170 Ala. 627, 54 So. 205, Ann. Cas. 1912D, 965.

A railroad company erected a platform for the purpose of shipping cotton, and the course of business adopted was for parties to store cotton on it to be shipped by the next freight train. Plaintiff stored cotton on the platform, but it was not taken by the next freight train, and, after such train had passed, the cotton was destroyed by fire set by a passing locomotive of the company. Held, that the company was liable for the loss of the cotton. Meyer *v.* Vicksburg, etc., R. Co., 41 La. Ann. 639, 6 So. 218, 17 Am. St. Rep. 408; Whitehurst *v.* Texas, etc., R. Co., 131 La. 139, 59 So. 42.

69. Scott *v.* Baltimore, etc., Steamboat Co., 19 Fed. 56; Thomas *v.* Lancaster Mills, 19 C. C. A. 88, 71 Fed. 481.

70. **Contributory negligence of shipper.**—Galveston, etc., R. Co. *v.* Smith, 2 Texas App. Civ. Cas., § 138.

71. **Loss by act of God during delay.**—See ante, "Negligence Concurring with Act of God," § 992.

72. **Instances of proximate cause.**—A traffic agreement required defendant, a standard-gauge road, one of the parties thereto, to maintain a third rail for the accommodation of the other party, a narrow-gauge road. The rail was not maintained; wherefore cotton shipped on the narrow-gauge road could not be forwarded, and was thrown off and injured by the rain and mud. Held, that defendant was not liable; the proximate cause of injury being the exposure of the cotton to the rain and mud, and not the violation of the contract, which imposed no obligation on defendant to receive or care for the cotton. St. Louis, etc., R. Co. *v.* Neel, 56 Ark. 279, 19 S. W. 963.

Where goods were delivered by a railroad company to a transfer company and destroyed by fire while in its possession, the fire was the proximate cause of the loss, and the drayage company could not escape liability on the ground that the consignees had delayed making payment of drafts attached to the bill of lading, and thereby delayed surrender of the

§ 1014. Negligence of Agents or Servants.—Carriers are responsible, by reason of the duties imposed upon them as carriers, for the negligence of their agents or servants in and about the carriage of freight,[73] including its re-

goods to the transfer company. Arkadelphia Mill. Co. *v.* Smoker Merchandise Co., 100 Ark. 37, 139 S. W. 680.

In an action against a railroad company for damage to goods lost by fire the fact that the fire originated in a steam cotton compress erected on the company's premises with its permission, but not under its control, does not establish negligence in the company, the permission to erect the same not being the proximate cause of the injury. Chalk & Co. *v.* Charlotte, etc., R. Co., 85 N. C. 423.

Where a railroad moves a burning car to save its own property, such action, and not the original fire, is the proximate cause of the burning of other property near which the car is moved. Latta *v.* New Orleans, etc., R. Co., 59 So. 250, 131 La. 272, Ann. Cas. 1914A, 988.

Leaving car door open—Loss by fire.—While a car containing binding twine was in the freight yard of a railway company ready for unloading, a fire broke out in a building twenty-three feet away, situated on property, on the other side of an alley, not belonging to the company. The car was then moved promptly, but in the meantime, and within twenty minutes of the breaking out of the fire, the twine caught fire from sparks entering through the car door, which had been left open about ten inches. Held, that the leaving open of the door was not the proximate cause of the loss. Scott *v.* Allegheny Val. R. Co., 172 Pa. 646, 33 Atl. 712.

Carrying high proof spirits with the barrel in a broken condition was not the proximate cause of a fire destroying the spirits, which originated in some way after the consignee had taken possession and when his agents were entering the car to remove the goods. Rothchild Bros. *v.* Northern Pac. R. Co., 68 Wash. 527, 123 Pac. 1011, 40 L. R. A., N. S., 773.

Failure to use ordinary care to extinguish fire.—Where plaintiff's goods, while in the custody of defendant railway company, were destroyed by a fire which originated without defendant's fault, but which might have been extinguished before the goods were destroyed, if defendant had used ordinary care, defendant's negligence was the cause of the loss. Peerless Mfg. Co. *v.* New York, etc., R. Co., 61 Atl. 511, 73 N. H. 328.

Failure to exercise reasonable care in giving notice of arrival of perishable freight held proximate cause of an injury to the freight. Uber *v.* Chicago, etc., R. Co., 151 Wis. 431, 138 N. W. 57.

Where defendant carrier improperly added a charge for icing to the expense bill of a car of cabbage, but this error was not the cause of the consignee's refusal to accept the car and pay a draft attached to bill of lading, which caused a delay resulting in loss from the deterioration of the cabbage, defendant was not liable for such loss because of the addition of the icing charge. Freeman *v.* Quebedeaux (Tex. Civ. App.), 151 S. W. 643.

73. **Liability for negligence of agents or servants.**—*United States.*—Bank *v.* Adams Exp. Co., 93 U. S. 174, 23 L. Ed. 872.

Alabama.—St. Louis, etc., R. Co. *v.* Cavender, 170 Ala. 601, 54 So. 54.

Illinois.—Chicago, etc., R. Co. *v.* Neimann, 84 Ill. App. 272.

Louisiana.—Williams & Sons *v.* Morgan, 32 La. Ann. 168; Watts *v.* Saxon, 11 La. Ann. 43.

Massachusetts.—Hamil *v.* New York, etc., Co., 177 Mass. 474, 59 N. E. 75.

Missouri.—Otis Co. *v.* Missouri Pac. R. Co., 112 Mo. 622, 20 S. W. 676.

New York.—Rosenblum *v.* Weir, 113 N. Y. S. 520, affirmed in 117 N. Y. S. 1146, 132 App. Div. 929; Howe *v.* Oswego, etc., R. Co. (N. Y.), 56 Barb. 121; Fein *v.* Weir, 114 N. Y. S. 426, 129 App. Div. 229.

Pennsylvania.—Willock *v.* Pennsylvania R. Co., 166 Pa. 184, 30 Atl. 948, 45 Am. St. Rep. 674, 27 L. R. A. 228.

Texas.—St. Louis, etc., R. Co. *v.* Brass (Tex. Civ. App.), 133 S. W. 1075; Edwards & Co. *v.* Texas Mid. R. Co. (Tex. Civ. App.), 84 S. W. 1097.

Wyoming.—Oregon, etc., R. Co. *v.* Blyth, 19 Wyo. 410, 118 Pac. 649, 119 Pac. 875, Ann. Cas. 1913 E, 288.

Express company employing railroad company to transport goods.—An express company is liable to a shipper for the full value of goods destroyed through the negligence of a railroad company which it has employed to do its transporting. Boscowitz *v.* Adams Exp. Co., 93 Ill. 523, 34 Am. Rep. 191. See Bank *v.* Adams Express Co., 93 U. S. 174, 23 L. Ed. 872.

When warehouseman becomes agent of owner.—Where a railroad company, on failure of a consignee to receive goods shipped, stores such goods in a warehouse, taking a receipt in its own name, the storing will be held to be for the benefit of the owner, subject to the company's lien for freight charges; and the warehouseman is therefore the agent of the owner, and not of the railroad company. Gregg *v.* Illinois Cent. R. Co., 147 Ill. 550, 35 N. E. 343, 37 Am. St. Rep. 238, affirming 47 Ill. App. 590.

ceipt for future carriage;[74] and where the servant is acting within his authority, the carrier is responsible, though the wrong or damage be done inadvertently and with the purpose to accomplish its business in an unlawful manner.[75]

Negligence in Unloading Goods.—The proprietors of a railroad are liable for want of ordinary care in their servants in unloading freight from their cars, though the consignee, knowing it to be the rule of the carriers that he must unload freight, and that if he did not unload it within a certain time, the carriers would, has neglected to unload it.[76]

Cotton Destroyed by Compress Company.—Where cotton is negligently damaged or destroyed by a compress company after there has been delivery to a carrier for transportation, the carrier is liable as the compress company is its servant.[77]

Delegation of Duties by Carrier.—A common carrier, who undertakes to perform an entire service, has no authority to constitute another person or corporation the agent of the consignor or consignee. He may employ an agency, but it must be subordinate to him, and not to the shipper, who neither employs

74. St. Louis, etc., R. Co. *v.* Cavender, 170 Ala. 601, 54 So. 54.

Joint negligence of servants and another.—Where a truckman is employed to convey heavy articles to a railroad station, and, after agents of the company have received the articles and assumed charge of them for the purpose of transportation, assists them in loading the articles on the cars, the company will be liable for damages resulting from the joint negligence of the truckman and its servants. Merritt *v.* Old Colony, etc., R. Co. (Mass.), 11 Allen 80.

75. St. Louis, etc., R. Co. *v.* Cavender, 170 Ala. 601, 54 So. 54.

76. **Negligence in unloading goods.**—Kimball *v.* Western R. Co. (Mass.), 6 Gray 542.

77. **Cotton injured by negligence of compress company.**—Where the owner of cotton delivers to a railway company the warehouse receipts of a compress company, and the railway company accepts them and issues bills of lading thereon to the owner, and the cotton is injured by exposure to the weather after delivery to the compress company, the railway company is liable for the loss, because it occurred while in the hands of its agent, the compress company. Southern R. Co. *v.* Jones Cotton Co., 167 Ala. 575, 52 So. 899.

Where a carrier, in a bill of lading for the shipment of cotton, reserves the right to have it compressed, and afterwards places it in the hands of a compress company for that purpose, such compress company becomes the agent of the carrier; and, if the cotton is damaged or destroyed by the negligence of the compress company, the railway company is liable to the owner. Otis Co. *v.* Missouri Pac. R. Co., 112 Mo. 622, 20 S. W. 676.

A railroad company received, and issued bills of lading for, uncompressed cotton, and, in accordance with written authority, sent it to be compressed. After having remained an unreasonable length of time with the compress company, it was destroyed by fire. The bill of lading provided that the railroad company should not be liable for loss by fire, except in case of its negligence. Held, that the company was liable for the loss of the cotton. Missouri, etc., R. Co. *v.* McFadden (Tex. Civ. App.), 32 S. W. 18.

A carrier required by the railroad commission regulations, when requested by the shipper of cotton, to deliver the cotton to the nearest compress on the line of its route for compression, but not required to deliver it to any other compress, having, at the request of the shipper, noted on the bill of lading that it was to be compressed at another compress, and there delivered it, is none the less liable for it as a common carrier while in the possession of the compress, though the shipper was interested in such compress, as such delivery must still be deemed a part of the railroad's duty as a common carrier; it having by its bill of lading reserved the right to have the compressing done at its cost. St. Louis, etc., Co. *v.* Brass (Tex. Civ. App.), 133 S. W. 1075.

A carrier which issues bills of lading to a shipper in return for receipts given by a compress company for cotton in the latter's custody is liable for loss by fire due to negligence of the servants of the compress company in caring for the cotton while awaiting the compression and loading which the railway company had ordered done for its own convenience and at its own cost, where such company, if it did not regard the presentation of the receipts as a tender of the cotton, or if it were not a valid tender, could, notwithstanding the rules of the Texas state railroad commission as well as its own rules, have refused to sign the bill of lading. Arthur *v.* Texas, etc., R. Co., 27 S. Ct. 338, 204 U. S. 505, 51 L. Ed. 590, reversing 139 Fed. 127.

it, pays it, nor has any right to interfere with it. Its acts become his, because done in his service, and by his direction.[78]

§ 1015. Negligence or Misconduct of Third Person.—A carrier will not be excused from liability for the loss of goods by the negligence or misconduct of a third person.[79]

§ 1016. Deviation or Delay.—Deviation.—As to liability of a common carrier for loss of or injury to goods accruing during deviation, see elsewhere.[80]

Delay.—The liability of the carrier for losses occurring during delay is treated elsewhere.[81]

Where a carrier fails to furnish cars at the time agreed and because of such failure, freight shipped fails to connect with a train of a connecting carrier and is damaged by delay, the company is liable therefor.[82]

§ 1017-1021. Mode or Means of Transportation—§ 1017. In General.—Mode of Transportation in General.—If a carrier takes the most dangerous of two modes of conveyance round a fall, he does so at his own risk.[83] And where there are two customary routes, one through a cold country and one through a warm one, and the latter route becomes obstructed, the carrier is negligent in sending over the cold route, without notice to shipper or consignee, goods which it is bound to know are destructive by frost.[84]

Must Obey Directions of Owner.—A carrier is liable for damage occasioned by disregard of the directions given by the owner as to the mode of conveyance.[85]

Duty with Regard to External Protection.—A shipper, by consenting that his goods may be carried on deck, does not thereby assume the risk of their loss or injury; and, if the carrier has contracted to cover and protect them, he is liable for damage from rain occasioned by the want of such protection, and the fact that the shipper knew that the goods were not covered when the boat departed is immaterial.[86]

Manner of Stowing or Packing Goods.—A carrier is negligent in stowing a barrel of oil on end in a car, when the safer way is to stow it on the bilge, like other barrels in the same car.[87] The mere fact that a railroad corporation, transporting bales of cotton as a common carrier, packed them into a car so

78. **Delegation of duties.**—Bank *v.* Adams Exp. Co., 93 U. S. 174, 23 L. Ed. 872. See Watts *v.* Saxon, 11 La. Ann. 43.

Where an express company, engaged to transport packages, etc., from one point to another, sends its messenger in charge of them on the car set apart for its use by the railroad company employed to perform the service, the latter company becomes the agent of the former. Bank *v.* Adams Exp. Co., 93 U. S. 174, 23 L. Ed. 872.

79. **Negligence or misconduct of third person.**—Mershon *v.* Hobensack, 22 N. J. L. 372, affirmed in 23 N. J. L. 580; Howe *v.* Oswego, etc., R. Co. (N. Y.), 56 Barb. 121.

Public enemy.—See ante, "Acts of Public Enemy," §§ 995-997.

80. **Losses occurring during deviation.**—See ante, "Route and Deviation Therefrom," §§ 813-834.

81. **Losses occurring during delay.**—See ante, "Negligence Concurring with Act of God," § 992; "Proximate Cause of Loss or Injury," § 1013. See, also, ante, "Delay in Transportation or Delivery," Chapter XI.

82. **Failure to furnish cars at time agreed.**—Midland Valley R. Co. *v.* George, 36 Okla. 12, 127 Pac. 871.

83. **Mode of transportation in general.**—Lawrence *v.* McGregor (O.), Wright 193.

84. Pierce *v.* Southern Pac. Co., 120 Cal. 156, 47 Pac. 874, 52 Pac. 302, 40 L. R. A. 350.

85. **Directions of owner.**—Sager *v.* Portsmouth, etc., R. Co., 31 Me. 228, 50 Am. Dec. 659; Colbath *v.* Bangor, etc., R. Co., 105 Me. 379, 74 Atl. 918.

If a common carrier accepts a package having legible directions as to carriage, it is liable for loss from failure to observe such directions. Colbath *v.* Bangor, etc., R. Co., 74 Atl. 918, 105 Me. 379.

86. **Duty with regard to external protection.**—Schwinger *v.* Raymond, 83 N. Y. 192, 38 Am. Rep. 415.

87. **Stowing goods.**—Thompson *v.* Chicago, etc., R. Co., 27 Iowa, appx., 561.

tightly that on their taking fire the car could not be unloaded is not conclusive of negligence in the packing.[88]

Loss Incident to Particular Mode of Transportation.—A carrier is not responsible for a loss which occurred from a cause necessarily incident to the particular mode of transportation which was equally well known to the carrier and the shipper.[89]

§ 1018. Means of Transportation in General.—A carrier is bound to furnish suitable and safe vehicles and means of transportation for the carriage of goods it undertakes to carry and transport, and is liable for losses caused by its failure to do so,[90] though it is entitled to determine, in the first instance, the sufficiency of the vehicles furnished.[91] The carrier is bound to provide a ve-

88. **Packing goods.**—Pemberton Co. *v.* New York, etc., R. Co., 104 Mass. 144.

89. **Effect of custom.**—Philleo *v.* Sanford, 17 Tex. 227, 67 Am. Dec. 654; Chevaillier *v.* Patton, 10 Tex. 344, 346.

90. **Duty to provide suitable means of transportation.**—*United States.*—Cincinnati, etc., R. Co. *v.* Fairbanks & Co., 33 C. C. A. 611, 90 Fed. 467; Hannibal Railroad *v.* Swift (U. S.), 12 Wall. 262, 20 L. Ed. 423; Railroad Co. *v.* Pratt (U. S.), 22 Wall. 123, 22 L. Ed. 827, 49 How. Prac. 84; The Northern Belle *v.* Robson, 154 U. S. 571, 19 L. Ed. 748, 14 S. Ct. 1166.

Alabama.—Central, etc., R. Co. *v.* Chicago Varnish Co., 169 Ala. 287, 53 So. 832.

Arkansas.—St. Louis, etc., R. Co. *v.* Marshall, 74 Ark. 597, 86 S. W. 802.

Illinois.—Terre Haute, etc., R. Co. *v.* Crews, 53 Ill. App. 50; Beard *v.* Illinois, etc., R. Co., 79 Iowa 518, 44 N. W. 800, 7 L. R. A. 280, 18 Am. St. Rep. 381.

Kentucky.—Cleveland, etc., R. Co. *v.* Louisville, etc., Stove Co., 33 Ky. L. Rep. 924, 111 S. W. 358.

Maine.—Sager *v.* Portsmouth, etc., R. Co., 31 Me. 228, 50 Am. Dec. 659.

Mississippi.—Alabama, etc., R. Co. *v.* Searles, 71 Miss. 744, 16 So. 255.

Missouri.—Nicholson *v.* St. Louis, etc., R. Co., 141 Mo. App. 199, 124 S. W. 573; Potts *v.* Wabash, etc., R. Co., 17 Mo. App. 394.

New York.—Loomis *v.* Lehigh Valley R. Co., 208 N. Y. 312, 101 N. E. 907.

North Carolina.—Forrester & Co. *v.* Southern R. Co., 147 N. C. 553, 61 S. E. 524, 18 L. R. A., N. S., 508, 15 Am. & Eng. Ann. Cas. 143.

Ohio.—Baltimore, etc., R. Co. *v.* O'Donnell, 49 O. St. 489, 32 N. E. 476; Baltimore, etc., R. Co. *v.* Fisher, 3 N. P. 122, 5 O. Dec. 659; State *v.* Cincinnati etc., R. Co., 47 O. St. 130, 23 N. E. 928.

Pennsylvania.—Willock *v.* Pennsylvania R. Co., 166 Pa. 184, 30 Atl. 948, 45 Am. St. Rep. 674, 27 L. R. A. 228.

Tennessee.—Railroad *v.* Dies, 91 Tenn. 177, 18 S. W. 266; Merchants' Dispatch Transp. Co. *v.* Bloch, 86 Tenn. 392, 410, 6 S. E. 881, 6 Am. St. Rep. 847.

Texas.—Hunt *v.* Nutt (Tex. Civ. App.), 27 S. W. 1031.

At common law a common carrier, receiving grain or produce for shipment in bulk, is bound to furnish cars equipped with grain doors or bulkheads rendering the car safe and suitable for the purpose intended. Loomis *v.* Lehigh Valley R. Co., 101 N. E. 907, 208 N. Y. 312, modifying judgment 132 N. Y. S. 138, 147 App. Div. 195.

Any failure of a carrier to furnish cars suitable and safe, which could have been avoided by due care, is negligence. Railroad *v.* Dies, 91 Tenn. 177, 179, 18 S. W. 266.

"**The nature of the goods must be considered** in determining the carrier's duty. Some metals may be transported in open cars. Many articles of commerce, when transported, must be protected from rain, sunshine, and heat, and must have cars fitted for their safe transportation." St. Louis, etc., R. Co. *v.* Jackson & Co., 55 Tex. Civ. App. 407, 118 S. W. 853, 855.

Hidden defect.—A ferryman is liable as a common carrier for a loss resulting from an internal defect in the forging of the hook and chain used to fasten the ferry boat, undiscoverable by the closest inspection, and unavoidable by human care, skill and foresight. Albright *v.* Penn, 14 Tex. 290, 298.

Horses are part of the equipment of a canal boat, and if one of them be lamed, and by reason thereof the carrier is disabled to escape from danger into which he has fallen, he is not excused. Morrison *v.* McFadden (Pa.), 5 Clark 23.

91. Nicholson *v.* St. Louis, etc., R. Co., 141 Mo. App. 199, 124 S. W. 573.

Right of shipper to recover for appliances furnished to car.—In an action by a shipper of hay to recover for standards voluntarily erected by him upon flat cars for safety of transportation, held, that the railroad company was not liable; no special contract being proved, and the rule applying that the carrier is, in the first instance, the judge of the sufficiency of his carriages. Sloan & Co. *v.* St. Louis, etc., R. Co., 58 Mo. 220.

hicle fitted to encounter all ordinary risks of transportation.[92] Thus, if merchandise of one owner is carried in cars in the same train with cars containing a combustible substance of another owner, the carrier must take every precaution against the spreading of any fire which may occur, one of which precautions is a coupling which allows the cars to be quickly separated.[93]

It is not the duty of a shipper to inspect a car furnished by a carrier, or to exercise care to know whether the car is in condition; but he may assume that the carrier would not have directed the placing of the goods in the car unless it was suitable.[94]

Means of Transportation Belonging to Another.—In an action against a carrier for injury to property shipped in a defective car, it is no defense that the car belonged to another carrier.[95] And the carrier is liable for loss caused by defects in cars leased from the consignor under an agreement by which it was to keep the cars in repair at consignor's cost.[96]

Knowledge by Shipper of Defects in Car.—The fact that a person who delivered goods to a carrier for transportation accepted a defective or unsuitable car for their conveyance, knowing it to be defective, does not exempt the carrier from liability for the destruction of the goods, through the defect in the car, while in course of transportation, without proof of a distinct agreement on his part to assume the risk arising from that cause.[97] And it is held that the

92. Empire Transp. Co. *v.* Wamsutta Oil Refin., etc., Co., 63 Pa. 14, 3 Am. Rep. 515.

Where a carrier was relieved from liability as an insurer by the terms of the contract to carry a draft, it was held to have used proper diligence and foresight in placing the draft in a safe while carrying it upon a steamboat, although upon opening the safe, after a fire which had destroyed the boat, the contents of the safe were found in ashes. Frank *v.* Adams Exp. Co., 18 La. Ann. 279.

93. Empire Transp. Co. *v.* Wamsutta Oil Refin., etc., Co., 63 Pa. 14, 3 Am. Rep. 515.

94. Cleveland, etc., R. Co. *v.* Louisville, etc., Stove Co., 111 S. W. 358, 33 Ky. L. Rep. 924.

95. **Means of transportation belonging to another.**—Austin *v.* St. Louis, etc., Co., 15 Mo. App. 197; Wallingford *v.* Columbia, etc., R. Co., 26 S. C. 258, 2 S. E. 19; Central, etc., R. Co. *v.* Chicago Varnish Co., 169 Ala. 287, 53 So. 832; Cincinnati, etc., R. Co. *v.* Fairbanks & Co., 33 C. C. A. 611, 90 Fed. 467.

A common carrier is liable for loss of goods resulting from defects in car used for transportation, the existence of which imply negligence, although the car belonged to another, and was procured by the carrier for the particular shipment at the special request of the shipper, upon his paying the additional expense, and the shipment was made in its then condition—the car being of a kind acceptable to the carrier, and commonly used in making like shipments. Railroad *v.* Dies, 91 Tenn. 177, 18 S. W. 266.

96. Central, etc., R. Co. *v.* Chicago Varnish Co., 169 Ala. 287, 53 So. 832.

97. **Knowledge by shipper of defects in car.**—*United States.*—Railroad Co. *v.* Pratt (U. S.), 22 Wall. 123, 22 L. Ed. 827, 49 How. Prac. 84; Cincinnati, etc., R. Co. *v.* Fairbanks & Co., 33 C. C. A. 611, 90 Fed. 467.

Arkansas.—St. Louis, etc., R. Co. *v.* Marshall, 74 Ark. 597, 86 S. W. 802.

Kentucky.—See Cleveland, etc., R. Co. *v.* Louisville, etc., Stove Co., 33 Ky. L. Rep. 924, 111 S. W. 358.

Massachusetts.—Pratt *v.* Ogdensburg, etc., R. Co., 102 Mass. 557.

New York.—Ogdensburg, etc., R. Co. *v.* Pratt (U. S.), 22 Wall. 123, 22 L. Ed. 827, 49 How. Prac. 84.

North Carolina.—Forrester & Co. *v.* Southern R. Co., 147 N. C. 553, 61 S. E. 524, 15 Am. & Eng. Ann. Cas. 143, 18 L. R. A., N. S., 508.

Texas.—Hunt *v.* Nutt (Tex. Civ. App.), 27 S. W. 1031.

Effect of provisions in contract of shipment.—A provision in the contract of shipment that the shipper accepts the car provided by the company does not protect the latter, if the car proves defective. Wallingford *v.* Columbia, etc., R. Co., 26 S. C. 258, 2 S. E. 19.

A carrier is not protected against liability for loss or injury to goods resulting from defects in a car by a stipulation in the bill of lading, accepted by the shipper, to the effect that he had examined the car himself and found it in good order, and accepted it as suitable and sufficient for the purpose of his shipment. Railroad *v.* Dies, 91 Tenn. 177, 18 S. W. 266.

Shipper's objection to substitution of another car.—Where a carrier tendered a shipper a car in which to load a stock of goods and the shipper went to considerable trouble and expense in loading the car, and thereafter the carrier, because of the car's defective roof, of-

carrier is not relieved from responsibility in such case, even though there was an agreement that it should not be responsible.[98] But the rule does not apply to transportation by wagons where the shipper selects and approves the wagons to be used.[99]

If the consignor undertakes to furnish the cars used in transportation, the carrier is not liable for a loss resulting from their defective condition.[1]

§ 1019. Duty as to Perishable Goods.—A carrier undertaking to transport perishable goods is bound to furnish cars especially adapted to the preservation of such goods during the time required for their transition from the place of shipment to the place of destination under the contract.[2] If it undertakes to carry perishable property in vehicles specially adapted to preserve that kind of property, it becomes responsible for defects in such vehicles, if damage results.[3] The carrier is not relieved of responsibility to the consignee therefor by the fact that it had the car inspected by the shipper from whom the goods were brought.[4]

fered to substitute another car, but finally, upon the shipper's objection to the substitution, undertook the transportation of the goods after ordering the roof repaired, the shipper, because of such objection, was not estopped from claiming damages for the destruction of his goods by water coming in through the roof of the car. Texas, etc., R. Co. *v.* Townsend (Tex. Civ. App.), 106 S. W. 760.

98. Railroad Co. *v.* Pratt (U. S.), 22 Wall. 123, 124, 22 L. Ed. 827, 49 How. Prac. 84.

99. **Transportation by wagon.**—Carr *v.* Schafer, 15 Colo. 48, 24 Pac. 873, distinguishing Merchants' Dispatch & Transp. Co. *v.* Cornforth, 3 Colo. 280, 25 Am. Rep. 757.

1. **When shipper furnishes cars.**—Central, etc., R. Co. *v.* Chicago Varnish Co., 169 Ala. 287, 53 So. 832. See Cleveland, etc., R. Co. *v.* Louisville, etc., Stove Co., 33 Ky. L. Rep. 924, 111 S. W. 358. See ante, "Goods Shipped on Chartered or Private Cars," § 1011.

Where, under an agreement between defendant railroad company and a consignor, the latter was authorized to select cars for the transportation of its merchandise, and it selected a car which had been delivered to it loaded with sand for the shipment of a consignment of glass to plaintiff, and damage resulted by reason of the unsuitableness of the car, the railroad company was not liable to the consignee for negligently furnishing an unsuitable car, since as against the railroad company the consignee was bound by the consignor's selection under such agreement. Edward Frohlich Glass Co. *v.* Pennsylvania Co., 101 N. W. 223, 138 Mich. 116, 110 Ann. St. Rep. 310.

A refrigerator car was loaded by plaintiff with apples, and consigned to defendant carrier, under agreement that the latter should not be liable for loss or damage by causes beyond its control or by heat. The car was under the control of defendant for two days, and the temperature varied from forty-seven to sixty-eight degrees above zero. It was at a season when cold weather was to be anticipated, and the car was selected to keep the apples at a uniform temperature. Before consignment, plaintiff kept the car ventilated by keeping one or more of the side doors open; but these were so constructed that they could not be kept open in transit, and they were air-tight when closed. The car was not designed to be ventilated, and, though there was an ice box open at the top, it could not be kept open while in transit. Held, that there was no such negligence on the part of defendant as to make it liable for damage caused by heat and lack of ventilation. Densmore Comm. Co. *v.* Duluth, etc., Railway, 77 N. W. 904, 101 Wis. 563.

2. **Duty as to perishable goods.**—St. Louis, etc., R. Co. *v.* Renfroe, 82 Ark. 143, 100 S. W. 889, 10 L. R. A., N. S., 317.

3. Chicago, etc., R. Co. *v.* Davis, 54 Ill. App. 130, affirmed in 159 Ill. 53, 42 N. E. 382, 50 Am. St. Rep. 143; Missouri, etc., R. Co. *v.* McLean, 55 Tex. Civ. App. 130, 118 S. W. 161.

Illustrations.—When a carrier undertakes to transport perishable goods in cars having appliances for ventilation, it assumes the duty to make all the appliances available for the safe transportation of the goods, in the absence of anything in the contract to the contrary. Western Railway *v.* Hart, 160 Ala. 599, 49 So. 371.

A railroad company furnishing refrigerator cars for the transportation of meat is liable for damages caused by defects in the car whereby warm air is admitted into the car, causing the meat to spoil. Chicago, etc., R. Co. *v.* Davis, 54 Ill. App. 130, affirmed in 159 Ill. 53, 42 N. E. 382, 50 Am. St. Rep. 143.

4. Chicago, etc., R. Co. *v.* Davis, 159 Ill. 53, 42 N. E. 382, 50 Am. St. Rep. 143, affirming 54 Ill. App. 130.

Carrier Using Cars of Another.—A carrier can not escape responsibility for its failure to provide cars reasonably fit for the conveyance of the particular class of goods it undertakes to carry by alleging that the cars used for the purposes of its own transit were the property of another.[5] A carrier which uses the cars owned and prepared for use by a refrigerator company for the transportation of perishable goods consigned to it by shippers is under the same obligation, as to shippers, to care for the goods, as it would have been had the refrigerator cars belonged to it.[6]

Duty to Carry in Ventilated Car, and as to Ventilation.—Where a carrier receives perishable goods for shipment at a season when a ventilated car is the only reasonably safe means of carrying them, and ships in an ordinary unventilated box car, it is liable for the damage resulting therefrom.[7] Where a shipper directs the carrier to carry goods with ventilators in a certain condition, and the carrier follows the instructions, the carrier is not liable for injury resulting from the ventilation;[8] but otherwise, when the carrier violates the instructions of the shipper and injury occurs thereby.[9] Under a custom that a carrier shall not open or close the ventilators of a car, or change them from the position in which placed by the shipper, unless so notified, the carrier may assume, on failure to give notice, that the shipper does not desire the ventilators changed, and is not liable for failure to do so.[10]

5. **Carrier using cars of another.**—St. Louis, etc., R. Co. *v.* Renfroe, 82 Ark. 143, 100 S. W. 889, 10 L. R. A., N. S., 317.

6. New York, etc., R. Co. *v.* Cromwell, 98 Va. 227, 35 S. E. 444, 49 L. R. A. 462; Gibson *v.* Little Rock, etc., R. Co., 93 Ark. 439, 124 S. W. 1033.

Illustrations.—A carrier using a car of a refrigerator company for the transportation of perishable goods is liable for a loss caused by negligence in failing to keep the drain holes of the car open. Gibson *v.* Little Rock, etc., R. Co., 93 Ark. 439, 124 S. W. 1033.

Where a carrier undertook to transport a shipment of strawberries and to furnish a refrigerator car and to ice the same, it could not escape liability for damage to the shipment because of a failure to properly ice the car by showing that the car belonged to another corporation and that under the agreement between it and the carrier the duty of icing the car devolved on the other corporation. St. Louis, etc., R. Co. *v.* Renfroe, 82 Ark. 143, 100 S. W. 889, 10 L. R. A., N. S., 317.

7. **Duty to carry in ventilated car, and as to ventilation.**—Forrester *v.* Southern R. Co., 147 N. C. 553, 61 S. E. 524, 18 L. R. A., N. S., 508, 15 Am. & Eng. Ann. Cas. 143.

Contra.—A railroad company is not liable for injuries to fruit shipped, resulting from failure to place it in a ventilated car, unless an obligation on the part of the company to place it in such a car is shown. Davenport Co. *v.* Pennsylvania R. Co., 34 Atl. 59, 173 Pa. 398.

Evidence of custom.—In an action against a carrier by railway for damages to lemons shipped in the month of April, occasioned by their negligent transportation in an unventilated car, upon proof of a custom in the fruit trade of shipping lemons in ventilated cars in warm weather, evidence is admissible to show whether, during the period between cold and hot weather, transportation companies used their own judgment in selecting cars, or the shippers gave instructions to the companies. Giles *v.* Fargo, 60 N. Y. Super. Ct. 117, 17 N. Y. S. 476, 43 N. Y. St. Rep. 65.

8. Texas, etc., R. Co. *v.* Davis-Fowler Co. (Tex. Civ. App.), 133 S. W. 309; Gillett *v.* Missouri, etc., R. Co. (Tex. Civ. App.), 68 S. W. 61 (see 95 Tex. 681, no op.); Texas, etc., R. Co. *v.* Smissen, 31 Tex. Civ. App. 549, 551, 73 S. W. 42, affirmed in 97 Tex. 649, no op.

Where a shipment of vegetables was made in the month of February, when freezing weather is not unusual, and the consignors directed the carrier to leave open a vent in the car, they could not recover for loss caused by severe, but not unprecedented, cold weather. Gillett *v.* Missouri, etc., R. Co. (Tex. Civ. App.), 68 S. W. 61 (see 95 Tex. 681, no op.).

9. Texas, etc., R. Co. *v.* Davis-Fowler Co. (Tex. Civ. App.), 133 S. W. 309.

Where a shipper directed the carrier in a bill of lading to carry bananas with the ventilators of the car closed and the plugs all out, and the carrier closed the ventilators but left the plugs all in, the principle that the carrier is not responsible for loss or injury to goods occasioned by their being improperly loaded by the shipper has no application, and the carrier is liable for injury occasioned by violating the instructions. Texas, etc., R. Co. *v.* Davis-Fowler Co. (Tex. Civ. App.), 133 S. W. 309.

10. Schwartz & Co. *v.* Erie R. Co., 32 Ky. L. Rep. 777, 106 S. W. 1188.

Duty to Carry in Refrigerator Cars.—It has been held in cases decided before refrigerator cars had come into general use that a carrier is not, as a matter of law, bound to furnish refrigerator cars to carry perishable goods, but that under certain circumstances it might be a question for the jury whether the carrier acted reasonably in not furnishing such cars.[11] But later cases hold that it is the duty of a carrier to furnish such cars where it is necessary for the safe transportation of perishable goods.[12] A carrier which agrees to ship fruits in a through refrigerator car, so as to guard against frost, is liable for their loss occasioned by being transferred to an ordinary car and frozen, notwithstanding a stipulation in the bill of lading against liability for injuries due to the weather.[13]

Duty as to Icing.—The carrier is required to use proper care for the protection and preservation of the property which it accepts for transportation, and, when a failure to ice cars would amount to want of such care, it would be an act of negligence.[14] And the carrier is not relieved from liability by the fact that it has no refrigerator cars where the goods could have been carried safely by the use of ice in ordinary cars.[15] Though a shipper observed the condition of a car as to insufficient refrigeration, yet if the agent assured him that the railroad company would furnish the ice, the company would be liable.[16] The

11. Duty to carry in refrigerator cars.—Udell *v.* Illinois Cent. R. Co., 13 Mo. App. 254.

A common carrier who runs a refrigerator car is not, in the absence of an express contract to carry by the refrigerator car, liable for damages to an article carried by it, occasioned by heat during transit. Wetzell *v.* Chicago, etc., R. Co., 12 Mo. App. 599.

12. Beard *v.* Illinois Cent. R. Co., 79 Iowa 518, 44 N. W. 800, 7 L. R. A. 280, 18 Am. St. Rep. 381. See International, etc., R. Co. *v.* Welbourne (Tex. Civ. App.), 113 S. W. 780, and Missouri, etc., R. Co. *v.* McLean, 55 Tex. Civ. App. 130, 118 S. W. 161.

By virtue of the care for the preservation of goods transported by them which is required of carriers, a railroad receiving butter for shipment south in summer is bound to ship the same in such manner as to prevent injury by heat. Beard *v.* Illinois Cent. R. Co., 79 Iowa 518, 44 N. W. 800, 7 L. R. A. 280, 18 Am. St. Rep. 381.

The obligation of a railroad company to furnish refrigerator cars for butter received for transportation in hot weather is not discharged by the fact that the freight charges thereon were the rates for common cars, that being no evidence of an agreement that such cars should be used. Beard *v.* St. Louis, etc., R. Co., 79 Iowa 518, 44 N. W. 803, following Beard *v.* Illinois Cent. R. Co., 79 Iowa 518, 44 N. W. 800, 7 L. R. A. 280, 18 Am. St. Rep. 381.

13. Effect of stipulation against liability.—Merchants' Dispatch & Transp. Co. *v.* Cornforth, 3 Colo. 280, 25 Am. Rep. 757.

14. Duty as to icing.—Brennisen *v.* Pennsylvania R. Co., 100 Minn. 102, 110 N. W. 362, 363, 10 Am. & Eng. Ann. Cas. 169.

The duty to provide suitable cars extends to proper refrigeration according to established custom. Missouri, etc., R. Co. *v.* McLean, 55 Tex. Civ. App. 130, 118 S. W. 161.

Though a carrier does not expressly contract to furnish a refrigerator car for perishable commodities, if it accepts such commodities for transportation, and in fact furnishes a refrigerator car, it impliedly undertakes to exercise the diligence as to icing that that class of goods require. International, etc., R. Co. *v.* Welbourne (Tex. Civ. App.), 113 S. W. 780.

A car of cabbage was loaded by ten o'clock a. m. March 15, 1907, and defendant carrier immediately notified, but permitted it to stand on the siding without refrigeration until the night of the 16th, and the car was not then iced until the morning of the 17th, when the cabbage had already begun to spoil. On arrival at destination, it was a total loss. Ninety-five per cent. of all shipments of perishable produce were carried by defendant on its passenger trains, and the car in question could have been shipped on a passenger train which went north at six o'clock on March 15th but for defendant's rule against carrying more than one freight car at a time on its passenger train, and that a tank car was being carried on the train in question. Held, that such rule was no defense for defendant's failure to sooner move and refrigerate the shipment, under its duty to transport perishable property with reasonable dispatch. McLean *v.* Gulf, etc., R. Co. (Tex. Civ. App.), 118 S. W. 578.

15 Beard *v.* Illinois Cent. R. Co., 79 Iowa 518, 44 N. W. 800, 7 L. R. A. 280, 18 Am. St. Rep. 381.

16. Southern R. Co. *v.* Williams, 139 Ga. 357, 77 S. E. 153.

carrier is entitled to obey the consignor's direction not to ice, and will not be responsible for damages consequent on such instruction unless through an unreasonable delay in transportation it becomes the carrier's duty to disregard the instruction.[17] The rule of a railroad company not to re-ice refrigerator cars unless they could get a certain amount of ice in the ice tanks, unknown to a shipper, and not embraced in his contract, does not relieve the company from the duty imposed by the contract of re-icing the refrigerator at specified points in the journey.[18] Where a shipper of fruit undertakes to supply the car with ice, an injury to the goods in consequence of the heat must, in the absence of evidence showing a default on the carrier's part, be assumed to result from the shipper's failure to supply sufficient ice for the car.[19] A carrier receiving a refrigerator car loaded with fruit must use ordinary care to keep the car iced, though the bill of lading showing that the car is loaded with fruit is silent on the subject; and though it is customary among shippers of fruit, when the weather is warm, to cause instructions to be placed in the bill of lading in reference to icing.[20] Where goods are damaged because the cars were not iced, if the plaintiffs knew or had notice that their contract for icing was not with the carrier, the carrier is not liable, even though the bill of lading was given by it and the money for icing the car was paid to its agent.[21]

Injuries after Passing from Defendant's Possession.—Where a carrier was bound to furnish a suitable car for the shipment of cabbages, and to sufficiently ice the same, and the cabbages were damaged by reason of the carrier's negligence, it was liable for damages so sustained, though some of the injuries resulted after the shipment had passed from its possession.[22]

Where the consignee has possession of a refrigerator car, and only he and those authorized by him have access to its interior, the carrier is not bound to repair defective drain pipes therein, unless it has knowledge of the defective condition.[23]

§ 1020. Carrying Goods on Open Cars.—Although the shipment of cotton on open flat cars may not be in itself such negligence as would make the carrier liable under all contingencies, yet, when such shipment is made, there is devolved on the carrier the duty to take additional precautions for the protection and safety of the cotton.[24] A railroad company may carry on a platform

17. **Instructions of consignor.**—Texas Cent. R. Co. *v.* Dorsey, 30 Tex. Civ. App. 377, 70 S. W. 575; Southern Exp. Co. *v.* Fant Fish Co., 12 Ga. App. 477, 78 S. E. 197.

18. **Effect of rule unknown to shipper.**—Orem, etc., Produce Co. *v.* Northern Cent. R. Co., 106 Md. 1, 66 Atl. 436.

19. **Where shipper undertakes to supply ice.**—Chicago, etc., R. Co. *v.* Reyman, 166 Ind. 278, 76 N. E. 970, reversing 73 N. E. 587.

Where the shipper of fruit undertook to supply the refrigerator car with ice, the carrier had a right to assume, except as facts may have existed that put it on notice to the contrary, that the shippers had furnished enough ice to keep the car cool until a delivery to the consignee could be had in the ordinary course of business. Chicago, etc., R. Co. *v.* Reyman (Ind.), 73 N. E. 587, reversed on another point in 76 N. E. 970, 166 Ind. 278.

20. St. Louis, etc., R. Co. *v.* Jackson, 55 Tex. Civ. App. 407, 118 S. W. 853.

21. McConnell Bros. *v.* Southern R. Co., 144 N. C. 89, 56 S. E. 559.

22. **Injuries after passing from defendant's possession.**—Houston, etc., R. Co. *v.* Wilkerson Bros. (Tex. Civ. App.), 82 S. W. 1069.

23. Missouri, etc., R. Co. *v.* Tripis (Tex. Civ. App.), 117 S. W. 199.

24. **Carrying goods on open cars.**—President, etc., Ins. Co. *v.* St. Louis, etc., R. Co., 11 Fed. 380.

Held negligence.—A railroad company loaded cotton on flat cars in a train consisting of both flat and box cars, and, although both classes of cars contained cotton, none was burned, except that on the flat cars. Held, that failure to place the cotton in box cars was negligence. New Orleans, etc., R. Co. *v.* Faler, 58 Miss. 911.

Effect of custom—carrying in open boats.—In an action against a common carrier upon a bill of lading for a failure to deliver cotton in good order, a plea that it was the custom, known to the plaintiff, to transport cotton and other freight between the points named in

car a box so large that it can not be put into a box car, due precaution being taken to keep it from getting wet.[25]

Contract for Shipment on Open Cars.—When the consignor of goods agrees that they may be loaded and transferred on open cars, the carrier, in the absence of negligence on its part, is not liable for any damage caused to the goods by being so loaded and transported.[26] But in such case it is held that the carrier is liable for a loss by fire resulting from its negligently failing to furnish suitable means and appliances to prevent the goods from taking fire.[27]

§ 1021. Means for Loading and Unloading.—A carrier, in taking freight, is bound to use sound and proper hands and machinery for loading and unloading, and the safe handling and removing the goods, and if loss ensue from the failure in any particular the carrier must bear it.[28] A carrier who, in unloading, uses the machinery of another in hoisting the goods from his boat, is liable for damage to the goods resulting from a break in the machinery.[29] But the carrier may show a local usage requiring the consignee to furnish suitable apparatus for unloading goods, and, where such usage is shown, the carrier is not liable for a loss occasioned by the breaking of such apparatus.[30]

§ 1022. Duties after Injury.—It is the duty of a carrier, when goods in its care are injured, to make reasonable exertions to repair the injury or arrest its progress.[31] Where goods arrive at their point of destination and the packages or casks are, by the fault of the carrier, in a damaged condition, so that they can not be handled without loss and further damage, it is the duty of the carrier to repair the casks, if possible, before the owner can be compelled to receive them.[32] Where an express company, on receiving a package for transportation,

the bill of lading in open boats, and that all the damage which the cotton sustained was caused by the rains which fell during the voyage, constitutes a good defense on demurrer. Chevaillier *v.* Patton, 10 Tex. 344, approved in Philleo *v.* Sanford, 17 Tex. 227, 67 Am. Dec. 654.

25. Burwell *v.* Raleigh, etc., R. Co., 94 N. C. 451.

26. Contract for shipment on open cars.—Western, etc., Railroad *v.* Exposition Cotton Mills, 81 Ga. 522, 7 S. E. 916, 2 L. R. A. 102.

27. Chicago, etc., R. Co. *v.* Moss, 60 Miss. 1003, 45 Am. Rep. 428.

28. Duty to provide suitable means for loading and unloading.—McGregor & Co. *v.* Kilgore, 6 O. 358, 27 Am. Dec. 260.

Where carrier not liable.—If A., for whom goods are transported by a railroad company, authorized B. to receive the delivery thereof, and to do all acts incident to the delivery and transportation thereof to A., and B., instead of receiving the goods at the usual place of delivery, requests the agent of the company to permit the car which contains the goods to be hauled to a near depot of another railroad company, and such agent assents thereto, and assists B. in hauling the car to such depot, and B. there requests and obtains leave of that company to use its machinery to remove the goods from the car, then the company that transported the goods is not answerable for the want of care or skill in the persons employed in so removing the goods from the car, nor for the want of strength in the machinery used for the removal of them, and can not be charged with any loss that may happen in the course of such delivery to A. Lewis *v.* Western R. R. Corp. (Mass.), 11 Metc. 509.

29. DeMott *v.* Laraway (N. Y.), 14 Wend. 225, 28 Am. Dec. 523.

30. Loveland *v.* Burke, 120 Mass. 139, 21 Am. Rep. 507.

31. Duties after injury.—Chouteaux *v.* Leech & Co., 18 Pa. 224, 57 Am. Dec. 602. See ante, "Duty to Prevent Act of God from Causing Injury," § 994.

Duty to dry goods.—If packages of fur become wet, the carrier should have them opened and dried. Chouteaux *v.* Leech & Co., 18 Pa. 224, 57 Am. Dec. 602.

If merchandise on board a boat gets wet by accident, and no exertion is made to dry it, the carrier is liable for the damage, though his engagement was to deliver safely, "the dangers of the river excepted." Bird *v.* Cromwell, 1 Mo. 81, 13 Am. Dec. 470; Ewart *v.* Street (S. C.), 2 Bailey 157, 23 Am. Dec. 131.

Contra.—The master of a steamboat carrying wheat, which was wet by inevitable accident, is not liable for damages because he did not dry the wheat. Steamboat Lynx *v.* King, 12 Mo. 272, 49 Am. Dec. 135.

32. Breed *v.* Mitchell, 48 Ga. 533.

is not informed that it contains gold, the company is not negligent in failing to search the ruins of the express car after a fire in order to recover the property.[33] Where a consignee directed the carrier not to re-ice fish in transit, and decay, resulting from failure to re-ice, made transportation unsafe, the carrier could discharge or destroy the shipment without liability.[34]

Where the consignee refuses to receive any part of the shipment, or to co-operate in examining the goods, and claims reimbursement as for total loss, the carrier will not be held guilty of "converting" the goods, by reason of calling in disinterested and competent persons and having broken packages repacked, and unbroken packages opened and examined, in order to ascertain the character and condition of their contents.[35]

§§ 1023-1029. Effect of Insurance—§ 1023. In General.—The shipper or owner of goods may maintain an action against a common carrier for loss of or injury thereto, notwithstanding the goods are insured,[36] or the insurer has advanced the amount of damage.[37] Where a shipper has received from his insurer the part of the loss insured against, he may sue the carrier, not only in his own right, for the unpaid balance due to himself, but as a trustee for the insurer for the amount paid by him; and the carrier can not, in such suit, set up such payment by the insurer as a defense pro tanto, the carrier having no right to call upon the insurer for contribution.[38] A clause, in a policy of insurance on goods in transportation, that in case of loss the insured shall proceed against the carrier in the first instance, is valid, as against the carrier.[39]

Policy Reciting Release of Carrier.—A fire policy obtained by a shipper on goods shipped, reciting the release by assured of the carrier from liability under its bill of lading, and the waiver by the insurer of any right of subrogation against the carrier, constitutes no defense to a claim of the shipper against the carrier for the burning of the goods, there being no such privity between it and the parties to the contract of insurance, with reference thereto, as to authorize it to receive any benefit from it as against insured.[40]

33. Rowan *v.* Wells Fargo & Co., 80 N. Y. S. 226, 80 App. Div. 31.

34. Southern Exp. Co. *v.* Fant Fish Co., 12 Ga. App. 477, 78 S. E. 197.

35. **Refusal to receive goods.**—Silverman *v.* St. Louis, etc., R. Co., 26 So. 447, 51 La. Ann. 1785.

36. **Effect of insurance.**—Merrick *v.* Brainard (N. Y.), 38 Barb. 574.

37. **Effect of payment by insurer.**—*United States.*—Steamship Wellesley Co. *v.* Hooper & Co., 108 C. C. A. 71, 185 Fed. 733.

Pennsylvania.—Gales *v.* Hailman, 11 Pa. 515.

South Carolina.—Burnside *v.* Union Steamboat Co. (S. C.), 10 Rich. L. 113.

Texas.—Gulf, etc., R. Co. *v.* Zimmerman & Co., 81 Tex. 605, 17 S. W. 239.

Where the insurer advanced the value of goods destroyed to the owner as a loan without interest, with the understanding that the latter should sue the carrier, and, if successful, repay the loan, and, if unsuccessful, retain the money as payment of the insurance, it was held that this arrangement was no bar to a libel by the owner against the carrier. The Guiding Star, 53 Fed. 936.

Carrier receiving benefit of insurance.—An express company receipted for goods left to them to be forwarded by a particular vessel, and, that vessel being withdrawn, sent them by another, which was lost. Held, that the fact that the owner demanded and collected the insurance on a portion of the goods could not operate to relieve the express company from liability for such loss, the sum thus received being deducted from the value of the goods for which the express company had become liable, and, having received the benefit thereof, the company had no ground of complaint. Goodrich *v.* Thompson, 44 N. Y. 324, affirming 27 N. Y. Super. Ct. 75.

The action may be brought in the name of the insurer or of the insured for its benefit. Steamship Wellesley Co. *v.* Hooper & Co., 108 C. C. A. 71, 185 Fed. 733.

38. Gales *v.* Hailman, 11 Pa. 515.

39. Inman *v.* South Carolina R. Co., 129 U. S. 128, 9 S. Ct. 249, 32 L. Ed. 612.

40. **Policy reciting release of carrier.**—St. Louis, etc., R. Co. *v.* Brass (Tex. Civ. App.), 133 S. W. 1075.

§§ 1024-1029. Contract for Benefit of Insurance—§ 1024. Power to Stipulate and Validity.—A stipulation in a bill of lading or shipping contract that a carrier, when liable for a loss of the goods, shall have the benefit of any insurance that may have been effected upon them, is valid as between the carrier and the shipper.[41] This results from the right of the carrier to insure the goods for its protection.[42] Such a provision in a bill of lading is not invalid by reason of its being in contravention of any rule based on public policy.[43] Hence it must be that in the absence of stipulation in a policy to the contrary the insured may without invalidating his policy make such contracts with a carrier limiting the liability of the latter as may be lawful under the laws in force at the place of shipment, or such other laws as may be applicable; for the parties ought to be presumed to contract with reference to the right of the carrier to refuse to receive and transport freight without a contract limiting its liability in so far as this may lawfully be done under the law governing the shipment.[44]

Right to Require Shipper to Insure.—A shipper can not be required to insure for the carrier's benefit as a condition on which the freight will be received and transported, and a stipulation in the contract of carriage, requiring the shipper to procure insurance for the benefit of the carrier in case of loss, or one requiring him when he does effect insurance to procure such as will protect the carrier, is void.[45] A refusal to give the carrier the benefit of any insurance already secured is in effect but a refusal to insure for its benefit. And the shipper may reject a bill of lading containing a stipulation by the carrier for the benefit of the insurance and have his goods transported on one that does not contain that provision.[46]

Effect of Statute.—A statute forbidding common carriers to impose restriction of their liability is not infringed by a provision in a bill of lading that the carrier shall have the benefit of any insurance to the owner on the freight.[47]

41. **Contract for benefit of insurance.**—*United States.*—Phœnix Ins. Co. *v.* Erie, etc., Transp. Co., 117 U. S. 312, 29 L. Ed. 873, 6 S. Ct. 750, 1176; Liverpool, etc., Co. *v.* Phenix Ins. Co., 129 U. S. 397, 462, 32 L. Ed. 788, 9 S. Ct. 469; Queen of the Pacific, 180 U. S. 49, 56, 45 L. Ed. 419, 21 S. Ct. 278. See, also, The Germanic, 196 U. S. 589, 599, 49 L. Ed. 610, 25 S. Ct. 317; Phœnix Ins. Co. *v.* Erie, etc., Transp. Co., Fed. Cas. No. 11,112, 10 Biss. 18; Bradley *v.* Lehigh Valley R. Co., 153 Fed. 350, 82 C. C. A. 426; Rintoul *v.* New York Cent., etc., R. Co., 21 Blatchf. 439, 17 Fed. 905; Pennsylvania R. Co. *v.* Burr, 130 Fed. 847, 65 C. C. A. 331.

New York.—Mercantile Mut. Ins. Co. *v.* Calebs, 20 N. Y. 173.

Texas.—Missouri Pac. R. Co. *v.* International, etc., Ins. Co., 84 Tex. 149, 152, 19 S. W. 459; British, etc., Marine Ins. Co. *v.* Gulf, etc., R. Co., 63 Tex. 475, 480, 51 Am. Rep. 661; Gulf, etc., R. Co. *v.* Zimmerman & Co., 81 Tex. 605, 17 S. W. 239.

England.—Peck *v.* North Staffordshire R. Co., 10 H. L. Cas. 473, 9 Jur., N. S., 914, 32 L. J. Q. B. 1023, 8 L. T. 768; Ashden *v.* London B. & S. C. R. Co., L. R. 5, Ex. D. 190, 42 L. T. 586, 28 W. R. 511, 44 T. P. 203.

42. **Right of carrier to insure.**—British, etc., Marine Ins. Co. *v.* Gulf, etc., R. Co., 63 Tex. 475, 51 Am. Rep. 661.

43. **Public policy.**—British, etc., Marine Ins. Co. *v.* Gulf, etc., R. Co., 63 Tex. 475, 51 Am. Rep. 661; Insurance Co. *v.* Easton, 73 Tex. 167, 11 S. W. 180, 37 Am. & Eng. R. Cas. 671.

44. Insurance Co. *v.* Easton, 73 Tex. 167, 176, 11 S. W. 180, 37 Am. & Eng. R. Cas. 671.

45. **Requiring shipper to insure.**—*United States.*—Inman *v.* South Carolina R. Co., 129 U. S. 128, 139, 32 L. Ed. 612, 9 S. Ct. 249; Liverpool, etc., Co. *v.* Phenix Ins. Co., 129 U. S. 397, 32 L. Ed. 788, 9 S. Ct. 469; New York Cent. R. Co. *v.* Lockwood (U. S.), 17 Wall. 357, 21 L. Ed. 627; Bradley *v.* Lehigh Valley R. Co., 153 Fed. 350, 354, 82 C. C. A. 426.

Pennsylvania.—Willock *v.* Pennsylvania R. Co., 166 Pa. 184, 45 Am. St. Rep. 674, 30 Atl. 948, 27 L. R. A. 228.

Texas.—Insurance Co. *v.* Easton, 73 Tex. 167, 179, 11 S. W. 180, 37 Am. & Eng. R. Cas. 671.

England.—Peck *v.* North Staffordshire R. Co., 10 H. L. Cas. 473.

46. **Refusal to give benefit of insurance already secured.**—Insurance Co. *v.* Easton, 73 Tex. 167, 11 S. W. 180, 37 Am. & Eng. R. Cas. 671.

47. **Texas statute.**—British, etc., Marine Ins. Co. *v.* Gulf, etc., R. Co., 63 Tex. 873; Rintoul *v.* New York, etc., R. Co., 475, 51 Am. Rep. 661.

Loss by Negligence of Carrier.—A condition in a bill of lading providing that the carrier shall have the benefit of any insurance on the goods held by the owner is valid as between the parties, though a loss occurs through the negligence of the carrier.[48] Such a stipulation in the contract of shipment is not an unreasonable and unjust exemption from liability for negligence;[49] but the contrary is held in Pennsylvania.[50]

Consideration.—A stipulation that the carrier should have the benefit of any insurance on the goods to be carried is valid without a special consideration therefor to the shipper, and will not be held invalid simply because there was no corresponding reduction of freight charges.[51]

Power of Agent of Shipper to Assent to Stipulation.—In absence of notice to contrary, the carrier may assume that the agent of the shipper, having authority to make contract for shipment, has the power to assent to stipulations for benefit of insurance.[52]

§§ 1025-1028. Operation and Effect—§ 1025. Right of Shipper to Recover from Carrier.—In stipulating for the benefit of insurance the carrier does not limit its common-law liability to the shipper for any loss that may occur.[53] The fact that the carrier may have the right to reimburse itself from an insurer or third party for losses under the shipping contract will afford no defense to an action against it by the shipper. It must first pay and may then sue on the policy.[54] Such a stipulation does not entitle the carrier to receive the benefit of the insurance or to a tender thereof, before an action can be brought against it for the loss.[55] Where the contract of insurance does not cover losses caused by the carrier's negligence, the carrier is liable for losses so occasioned, notwithstanding a stipulation that it should have the benefit of any insurance effected on the goods.[56]

Effect of Payment by Insurer.—Where a carrier provided in its contract of shipment that it should have the benefit of any insurance effected upon the goods to be transported, the owner, if he has received from the insurance company the amount of the loss, will be precluded by such stipulation from recovering against the carrier.[57] Such facts, however, the carrier must show to avoid

48. **Loss by negligence of carrier.**—Phœnix Ins. Co. *v.* Erie, etc., Transp. Co., 117 U. S. 312, 6 S. Ct. 750, 1176, 29 L. Ed. 873; Rintoul *v.* New York Cent., etc., R. Co., 21 Blatchf. 439, 17 Fed. 905; Platt *v.* Richmond, etc., R. Co., 108 N. Y. 358, 13 N. Y. S. R. 660, 15 N. E. 393, 32 Am. & Eng. R. Cas. 517, 11 Cent. Rep. 101.

49. Rintoul *v.* New York Cent., etc., Co., 17 Fed. 905, 21 Blatchf. 439.

50. Willock *v.* Pennsylvania R. Co., 166 Pa. 184, 30 Atl. 948, 45 Am. St. Rep. 674, 27 L. R. A. 228.

51. **Consideration unnecessary.**—Missouri Pac. R. Co. *v.* International, etc., Ins. Co., 84 Tex. 149, 19 S. W. 459.

52. **Power of agent of shipper to assent to stipulation.**—Missouri Pac. R. Co. *v.* International, etc., Ins. Co., 84 Tex. 149, 153, 19 S. W. 459, citing Ryan & Co. *v.* M. K. & T. R. Co., 65 Tex. 13, 23 Am. & Eng. R. Cas. 703.

53. **Right of shipper to recover from carrier.**—British, etc., Marine Ins. Co. *v.* Gulf, etc., R. Co., 63 Tex. 475, 51 Am. Rep. 661.

The shipper does not bind himself to insure, or to do anything which will result in benefit to the carrier. There is, therefore, no contract of exemption against liability for loss by negligence, no agreement that the carrier shall be indemnified, but the contract simply is that, in the contingency of insurance, a consequent benefit will, in case of loss, result to the carrier. British, etc., Marine Ins. Co. *v.* Gulf, etc., R. Co., 63 Tex. 475, 480, 51 Am. Rep. 661.

54. British, etc., Marine Ins. Co. *v.* Gulf, etc., R. Co., 63 Tex. 475, 51 Am. Rep. 661.

55. Inman *v.* South Carolina R. Co., 129 U. S. 128, 9 S. Ct. 249, 32 L. Ed. 612.

56. **Insurance not covering losses by negligence.**—Gulf, etc., R. Co. *v.* Zimmerman & Co., 81 Tex. 605, 17 S. W. 239.

57. **Effect of payment by insurer.**—Gulf, etc., R. Co. *v.* Zimmerman & Co., 81 Tex. 605, 17 S. W. 239; Rintoul *v.* New York Cent., etc., R. Co., 17 Fed. 905, 21 Blatchf. 439.

Right of carrier regarded as counterclaim.—If, the rights of the carrier may be regarded as in the nature of a counterclaim by way of recoupment or set-off, then the question arises as to the extent of the stipulation, assuming it to be otherwise valid, and what would amount to a breach of it. By its terms the ship-

liability.[58]

The "advancement" by the insurer to the insured of the insured value of the goods does not constitute a "payment" in such sense as to preclude the assured from recovering from the carrier the amount of its common-law liability.[59]

Agreement by Insurer to Pay Loss.—In an action against the carrier for damage to goods conveyed under a contract stipulating for the benefit of insurance, it is no defense that the insurer has agreed to pay the shipper for his loss.[60]

Liability Limited to Value at Place of Shipment.—Where a bill of lading limited the liability of the carrier to the value of the goods at the place of shipment, and provided that it should have the benefit of any insurance effected by the owner, the carrier can not claim the benefit of insurance covering the increased value of the goods at the port of destination, which the owner had the right to effect for his own protection.[61]

§ 1026. Right of Carrier to Recover from Insurer.—Where a carrier in a bill of lading reserves the right to recover insurance on goods destroyed in transitu, for destruction of which it is liable, the insurance company is liable to such carrier.[62]

pers were not compelled to insure for the benefit of the railroad company; but if they had insurance at the time of the loss, which they could make available to the carrier, or which, before bringing suit against the company, they had collected, without condition, then, if they had wrongfully refused to allow the carrier the benefit of the insurance, such a counterclaim might be sustained, but otherwise not. Inman *v.* South Carolina R. Co., 129 U. S. 128, 9 S. Ct. 249, 32 L. Ed. 612.

58. Gulf, etc., R. Co. *v.* Zimmerman & Co., 81 Tex. 605, 17 S. W. 239.

59. Advancement not constituting payment.—Gulf, etc., R. Co. *v.* Zimmerman & Co., 81 Tex. 605, 17 S. W. 239.

Illustrations.—A bill of lading provided that, in case of loss or injury of the goods, the damage should be adjusted on the basis of their value at the place and time of shipment, and that the carrier should have the benefit of any insurance effected by the shipper. He insured the goods for their value at the port of destination, but the policy contained a provision that in case of any agreement between the assured and any carrier whereby, in case of loss for which the carrier would be liable, he should have the benefit of the insurance, there should be no liability on the policy beyond the amount which was not recoverable from the carrier, and to make good the loss temporarily by advancing money pending delay in collecting from the carrier, which should not affect the final liability of the insurer. The goods were damaged in shipment, and the insurer advanced a sum to the owner; taking a receipt by which he agreed to prosecute his claim against the carrier, and to refund to the insurer the amount collected. Held, that such advance was strictly within the terms of the policy, and did not constitute a payment of the loss, whereby the carrier could claim the benefit under the bill of lading as set-off in an action by the owner to recover the damages. Pennsylvania R. Co. *v.* Burr, 130 Fed. 847, 65 C. C. A. 331.

A bill of lading provided that, in case of loss or damage to the goods, the carrier should have the benefit of any insurance for or on account of the owner, and should be subrogated to its rights before any demand on account of such loss or damage should be made. The shippers obtained a policy of insurance on the goods, conditioned that it should not inure directly or indirectly to the benefit of any carrier or bailee by stipulation in bill of lading or otherwise, and that it should be null and void to the extent of any amount recovered from any carrier or bailee. The goods having been lost by the carrier, the insurer advanced to the shippers an amount equal to the insurance, taking a receipt reciting that it was received "as a loan without interest, and repayable only to the extent of any net recovery we may make from the carriers responsible for the loss." Held, that the advance made by the insurance company did not extinguish the liability of the carrier nor constitute a defense to an action against it to recover for the loss. Bradley *v.* Lehigh Valley R. Co., 153 Fed. 350, 82 C. C. A. 426, affirming 145 Fed. 569.

60. Effect of agreement by insurer to pay.—Cincinnati, etc., R. Co. *v.* Spratt (Ky.), 2 Duv. 4.

61. Liability limited to value at place of shipment.—Pennsylvania R. Co. *v.* Burr, 130 Fed. 847, 65 C. C. A. 331.

62. Right of carrier to recover from insurer.—British, etc., Marine Ins. Co. *v.* Gulf, etc., R. Co., 63 Tex. 475, 478, 51 Am. Rep. 661.

Where There Are Several Carriers.—Where a part of the goods was shipped from an inland point under a through bill of lading which contained two sets of conditions, the first set relating exclusively to land carriage, and the second to the ocean transportation, the carrier could not avail itself of a clause contained in the first set of conditions concerning the right of the carrier to have the benefit of any insurance on the goods for the loss of which it might be liable when the goods were lost at sea.[63]

§ 1027. Effect as Defeating Insurer's Right of Subrogation.—Where a shipping contract or a bill of lading provides that any insurance on the goods shall be for the benefit of the carrier, payment of the insurance to the shipper discharges the carrier, and prevents the insurance company from maintaining an action against the carrier for causing the loss,[64] although the negligence of the carrier contributed thereto.[65] The rule that an insurer, when he has indemnified an owner of property for a loss occasioned by a carrier, is entitled to all the means of indemnity which the satisfied owner held against the carrier, and that the owner can not, after loss, relinquish any rights to which the insurer is entitled, does not mean that the owner and the carrier may not, at the time the goods are shipped, and before insurance is effected, make, without fraudulent concealment, a valid agreement that any insurance shall inure to the benefit of the carrier.[66]

§ 1028. Inconsistent Stipulations in Contract and Policy.—The effect of a carrier's stipulating in its contract of shipment for the benefit of any insurance that may have been effected upon the goods to be transported, where previously thereto the shipper has obtained a policy providing that the insurer shall be subrogated to the claim of the insured against the carrier, is to invalidate the contract of insurance and defeat a recovery by the insured on the policy.[67] The carrier's liability for loss of goods is the ultimate liability, while that

63. **Where there are several carriers.**—Liverpool, etc., Co. *v.* Phenix Ins. Co., 129 U. S. 397, 9 S. Ct. 469, 32 L. Ed. 788; Liverpool, etc., Co. *v.* Insurance Co., 129 U. S. 464, 9 S. Ct. 480, 32 L. Ed. 800.

64. **Effect as defeating insurer's right of subrogation.**—*United States.*—Phœnix Ins. Co. *v.* Erie, etc., Transp. Co., 117 U. S. 312, 29 L. Ed. 873, 6 S. Ct. 750, 1176; New York Cent. R. Co. *v.* Lockwood (U. S.), 17 Wall. 357, 21 L. Ed. 627; Liverpool, etc., Co. *v.* Phœnix Ins. Co., 129 U. S. 397, 32 L. Ed. 788, 9 S. Ct. 469.

New York.—Platt *v.* Richmond, etc., R. Co., 108 N. Y. 358, 15 N. E. 393, 13 N. Y. S. R. 660, 11 Cent. Rep. 101, 32 Am. & Eng. R. Cas. 517; Connecticut Fire Ins. Co. *v.* Erie R. Co., 73 N. Y. 399, 29 Am. Rep. 171.

Texas.—British, etc., Marine Ins. Co. *v.* Gulf, etc., R. Co., 63 Tex. 475, 51 Am. Rep. 661; Missouri Pac. R. Co. *v.* International, etc., Ins. Co., 84 Tex. 149, 19 S. W. 459.

In Wager *v.* Providence Ins. Co., 150 U. S. 99, 37 L. Ed. 1013, it was said that, in case of loss, the carrier is primarily liable to the shipper, and the position of an insurer is substantially that of a surety. The insurer can recover, therefore, after payment of a loss, by subrogation to the rights of the shipper, and upon no other ground; so that whatever amounts to an extinguishment of the right of action of the shipper against the carrier must defeat the insurer's right to subrogation.

65. A bill of lading contained a provision that the carrier should have the benefit of insurance effected by the insured in case of liability for loss, but provided that the carrier should not be liable for loss by perils of navigation. A loss occurred through the perils of navigation as the proximate cause, but to which the negligence of the carrier remotely contributed, and the insurers paid the loss to the shippers. Held, that the insurers were not subrogated to the rights of the shippers, and could not maintain an action against the carrier. Phœnix Ins. Co. *v.* Erie, etc., Transp. Co., Fed. Cas. No. 11,112, 10 Biss. 18.

Loss by negligent stranding.—Such a stipulation limits the right of an insurer of the goods, upon paying to the shipper the amount of a loss by stranding, occasioned by the negligence of the carrier's servants, to recover over against the carrier. Liverpool, etc., Co. *v.* Phenix Ins. Co., 129 U. S. 397, 462, 32 L. Ed. 788, 9 S. Ct. 469; Phœnix Ins. Co. *v.* Erie, etc., Transp. Co., 117 U. S. 312, 29 L. Ed. 873, 6 S. Ct. 750, 1176.

66. Rintoul *v.* New York Cent., etc., R. Co., 20 Fed. 313.

67. **Effect of inconsistent stipulations.**—Missouri Pac. R. Co. *v.* International, etc., Ins. Co., 84 Tex. 149, 19 S. W. 459.

of the insurer is that of an indemnitor in all cases in which the insurance contract does not stipulate to the contrary, or in which a contrary intention may not be fairly inferred from the time and circumstances of the contract. If the insured wishes a policy that will place the ultimate liability on the insurer, he must so make his contract as to protect the carrier afterwards to be selected by him.[68]

Notice of Stipulation in Policy.—An open policy of insurance which stipulates that "this insurance shall not enure to the benefit of any carrier," is not void as being in restraint of trade, and when violated by a contract between the insured and a carrier by which the latter should be subrogated to the rights of the insured in case of loss, avoids the policy, and neither the insured nor the carrier can assert rights under it in case of loss, and this though both the carrier and the insured were in fact ignorant of the stipulation.[69]

Notice to Insurer of Stipulation in Bill of Lading.—Where the bill of lading is prior in point of time to the policy, which recites the fact of shipment, this is sufficient evidence that the policy was issued with notice of the right secured by the carrier by contract and in subordination to that right.[70]

Effect of Voluntary Payment by Insurer.—Where a shipper has, by inconsistent stipulation with a carrier, defeated the insurer's right to subrogation, payment by the insurer is purely voluntary and gives no rights against the carrier. No subrogation would follow from such payment against the carrier.[71]

§ 1029. Suits against Carrier.—Pleading and Proof.—A petition stating that plaintiff was the owner of certain goods injured while in the carrier's possession; that he had transferred to an insurance company one-half of his right of action, and that his suit was for one-half the damages sustained, for the use of the insurance company, discloses a good cause of action, and the mere allegation that the cause of action had been transferred does not compel him to negative the illegality of such transfer. The allegation that the suit was for the use of the insurance company is proper to protect its interest, and it is not necessary to show by averment or proof how the insurance company acquired its interest.[72]

Supplemental Petition.—A supplemental petition in a suit by an insurance company against a carrier who has received the benefit of insurance, which does not allege that the carrier had notice of want of authority in the shipper's agent to make such a contract, is defective, and an exception thereto should be sustained.[73]

Answer.—Where plaintiff alleges a transfer of one-half of his right of action to the insurance company and that the suit is for the use of such company, if the carrier relies on anything in the transfer to defeat the action, as that the cause of action had been devoted to an illegal purpose, it should set it up in its answer.[74]

68. Insurance Co. *v.* Easton, 73 Tex. 167, 11 S. W. 180, 37 Am. & Eng. R. Cas. 671.

69. **Notice of stipulation in policy.**—Insurance Co. *v.* Easton, 73 Tex. 167, 11 S. W. 180, 37 Am. & Eng. R. Cas. 671.

70. **Notice to insurer of stipulation in bill of lading.**—British, etc., Marine Ins. Co. *v.* Gulf, etc., R. Co., 63 Tex. 475, 51 Am. Rep. 661; Insurance Co. *v.* Easton, 73 Tex. 167, 173, 11 S. W. 180, 37 Am. & Eng. R. Cas. 671.

71. **Effect of voluntary payment by insurer.**—Missouri Pac. R. Co. *v.* International, etc., Ins. Co., 84 Tex. 149, 152, 19 S. W. 459; British, etc., Marine Ins. Co. *v.* Gulf, etc., R. Co., 63 Tex. 475, 51 Am. Rep. 661.

72. **Pleading and proof—Suit by shipper for benefit of insurer.**—East Line, etc., R. Co. *v.* Hall, 64 Tex. 615.

To entitle the shipper to recover for the use of the insurance company, the averment and proof need not go further than to show a right of recovery in the shipper, the record plaintiff; for this purpose the suit is not the suit of the insurance company. East Line, etc., R. Co. *v.* Hall, 64 Tex. 615, 621.

73. **Supplemental petition.**—Missouri Pac. R. Co. *v.* International, etc., Ins. Co., 84 Tex. 149, 152, 19 S. W. 459.

74. **Answer.**—East Line, etc., R. Co. *v.* Hall, 64 Tex. 615.

Evidence.—Where the carrier claims the benefit of insurance, it must show clearly that, under the terms of the contract, it is entitled thereto.[75] It must prove that such insurance was procured by the shipper, and paid by the insurer;[76] and that the shipper had refused to allow the carrier the benefit of it.[77] Where plaintiff suing a carrier for injuries to goods by fire alleges that he had transferred to an insurance company one-half of his right of action the transfer when offered in evidence can not be excluded on the ground that it contained other matters than the bare transfer itself.[78]

§ 1030. Claims for Damages.—Where the contract between a shipper and a carrier contains no stipulation as to the time within which a claim for loss or damage to the shipment must be made, or where such stipulation, if made, is void, the shipper is not required to give notice of his claim, but may sue thereon at any time within that fixed by the statute of limitations of the state.[79] Where a statute required that a claim should be filed with the agent of the carrier at the point of destination, filing the claim with the soliciting freight agent at destination is a sufficient filing.[80]

Waiver of Defect in Claim.—Where a claim was presented for damages to freight, and received without objection, and afterwards treated as pending, a provision that it must be verified is waived.[81]

Effect of Filing Subsequent Claim.—Where a claimant for damages to freight filed a claim against the carrier for the value of the goods and freight within the time required by his contract of shipment, the fact that he also after that time filed a claim for the value of the goods without the item for freight would not preclude his recovery under the first claim.[82]

Adjustment of Claim.—A railroad company has the right in adjusting injury to property caused by its negligence to contract to keep the injured property and pay the owner its value in settlement of the damages.[83]

Waiver of claim for damages by receiving goods, paying freight, etc., is treated elsewhere.[84]

The reasonableness of a rule of an express company requiring that, in case of a claim being made for a package lost in transit, the original receipt must be produced within thirty days annexed to the notice of loss, is one for the jury to determine under all the circumstances of the case and proper instructions by the court.[85]

§ 1031. Extent of Liability.—It may be stated generally that the liability of the carrier in case of loss of or injury to goods extends to the amount of damage sustained.[86] The extent of the carrier's liability may be affected by a contract made subsequent to the consignee's refusal to receive goods damaged by

75. **Burden of proof.**—Inman *v.* South Carolina R. Co., 129 U. S. 128, 32 L. Ed. 612, 9 S. Ct. 249; Liverpool, etc., Co. *v.* Phenix Ins. Co., 129 U. S. 397, 463, 32 L. Ed. 788, 9 S. Ct. 469.

76. **Proof that insurance procured.**—Gulf, etc., R. Co. *v.* Zimmerman & Co., 81 Tex. 605, 609, 17 S. W. 239.

77. Inman *v.* South Carolina R. Co., 129 U. S. 128, 9 S. Ct. 249, 32 L. Ed. 612.

78. **Admissibility of transfer.**—East Line, etc., R. Co. *v.* Hall, 64 Tex. 615.

79. **Claims for damages.**—Southern R. Co. *v.* Mooresville Cotton Mills, 187 Fed. 72, 109 C. C. A. 390.

Generally as to limitation of time for presenting claim, see post, "Limitation of Liability," chapter 14.

80. Act Feb. 23, 1903 (24 St. at Large, p. 81), providing penalty for loss of property. Bell *v.* Southern Railway, 77 S. C. 78, 57 S. E. 689.

81. **Waiver of defect in claim.**—Wabash R. Co. *v.* Brown, 152 Ill. 484, 39 N. E. 273, affirming 51 Ill. App. 656.

82. **Effect of filing subsequent claim.**—Jenkins *v.* Atlantic, etc., R. Co., 65 S. E. 636, 83 S. C. 473.

83. **Adjustment of claim.**—Chicago, etc., R. Co. *v.* Katzenbach, 20 N. E. 709, 118 Ind. 174.

84. **Waiver of claim.**—See post, "Defenses," § 1035.

85. **Question for jury.**—Adams Exp. Co. *v.* Gordon, 5 O. C. C., N. S., 563, 17-27 O. C. D. 243.

86. **Extent of liability.**—See post, "Damages," §§ 1068-1085.

delay.[87] As to the effect of the shipper's misrepresentation or concealment of the nature or value of goods as affecting the extent of liability, see ante, "Misrepresentation or Concealment of Nature or Value of Goods," § 1002.

§§ 1032-1089. Actions for Loss or Injury—§ 1032. Nature and Form.—Ex Contractu or Ex Delicto.—Damages for loss of or injury to property while in a carrier's custody may be recovered either in an action ex contractu or one ex delicto at the option of the pleader.[88] In all actions on the case, against a carrier for a loss or injury done to property, the wrong is the gist of the action, and the contract collateral thereto; but, in all actions of assumpsit against a carrier, the contract to deliver is the gist of the action.[89] In an action in assumpsit against carriers for the loss of goods, where the facts are such that it is a question whether the carriers obtained possession of the goods otherwise than as trespassers, even if they got the goods as trespassers, the form of the action is no obstacle to a verdict against them.[90]

Trover.—Trover will not lie against a common carrier for goods lost or damaged by nonfeasance merely;[91] nor for any act or omission which amounts to negligence merely, and not to an actual wrong.[92] Unless the property shipped is totally destroyed, the carrier is not liable for its full value as for conversion, but the remedy is an action for injuries to the property as for breach of the contract of carriage.[93]

87. **Effect of contract.**—Grinnell *v.* Wisconsin Cent. Co., 47 Minn. 569, 50 N. W. 891.

Effect of agent's mistake.—Where a consignee refused to receive goods on the ground that they were damaged on account of delay, and a contract was made between him and defendant carrier's agent by which the goods were turned over to him, to be disposed of on defendant's account, defendant to pay the difference between the proceeds and the costs and charges for the goods, a mistake of the agent in thinking the goods damaged, does not affect defendant's liability on the contract. Grinnell *v.* Wisconsin Cent. R. Co., 47 Minn. 569, 50 N. W. 891.

88. **Action ex contractu or ex delicto.**—*United States.*—Central Trust Co. *v.* East Tennessee, etc., R. Co., 70 Fed. 764.

Georgia.—Georgia, etc., R. Co. *v.* Elliott, 3 Ga. App. 773, 774, 60 S. E. 363; Lytle *v.* Southern R. Co., 3 Ga. App. 219, 221, 59 S. E. 595.

Missouri.—Blackmer, etc., Pipe Co. *v.* Mobile, etc., R. Co., 137 Mo. App. 479, 119 S. W. 1; Wernick *v.* St. Louis, etc., R. Co., 131 Mo. App. 37, 109 S. W. 1027.

New Jersey.—Mershon *v.* Hobensack, 22 N. J. L. 372.

New York.—Catlin *v.* Adirondack Co., 81 N. Y. 639, 11 Abb. N. C. 377; Hawkins *v.* Hoffman, 6 Hill 586, 41 Am. Dec. 767.

Pennsylvania.—Smith *v.* Seward, 3 Pa. 342; Howard *v.* American Exp. Co., 47 Pa. Super. Ct. 416; Solomon *v.* Adams Exp. Co., 47 Pa. Super. Ct. 423.

Texas.—Kansas, etc., R. Co. *v.* Rosebrook-Josey Grain Co. (Tex. Civ. App.), 114 S. W. 436; Ft. Forth, etc., R. Co. *v.* McAnulty, 7 Tex. Civ. App. 321, 326, 26 S. W. 414. See, also, G., C. & S. F. R. Co. *v.* Levy, 59 Tex. 542, 548, and Galveston, etc, R. Co. *v.* Roemer, 1 Tex. Civ. App. 191, 20 S. W. 843.

Virginia.—Southern Exp. Co. *v.* McVeigh, 61 Va. (20 Gratt.) 264.

89. Carter *v.* Graves, 17 Tenn. (9 Yerg.) 446.

90. Cooper *v.* Berry, 21 Ga. 526, 68 Am. Dec. 468.

91. **Trover.**—*Alabama.*—Central R., etc., Co. *v.* Lampley, 76 Ala. 357, 52 Am. Rep. 334.

Massachusetts.—Bowlin *v.* Nye (Mass.), 10 Cush. 416.

New Hampshire.—Moses *v.* Norris, 4 N. H. 304.

New York.—Hawkins *v.* Hoffman (N. Y.), 6 Hill 586, 41 Am. Dec. 767; Delaware Bank *v.* Smith (N. Y.), 1 Edm. Sel. Cas. 351.

West Virginia.—Dudley *v.* Chicago, etc., R. Co., 58 W. Va. 604, 607, 52 S. E. 718, 3 L. R. A., N. S., 1135, 112 Am. St. Rep. 1027.

Defendant received for transportation certain bars of iron, and, while on the road, his vehicle broke down, and the iron was left on the highway over night. On arriving at his destination, it was discovered that two bars of the iron were missing. Held, that an action of trover would not lie against the carrier, but that the shipper's action was on the contract. Moses *v.* Norris, 4 N. H. 304.

92. Central R., etc., Co. *v.* Lampley, 76 Ala. 357, 52 Am. Rep. 334.

93. *Iowa.*—Parsons *v.* United States Exp. Co., 144 Iowa 745, 123 N. W. 776, 25 L. R. A., N. S., 842.

Missouri.—Redmon *v.* Chicago, etc., R. Co., 90 Mo. App. 68.

Texas.—Gulf, etc., R. Co. *v.* Everett, 37 Tex. Civ. App. 167, 83 S. W. 257.

Where a car load of chops was injured in transit by wetting, the fact that the

Where there is a special contract varying the common-law liability of the carrier, the action is properly brought on the special contract, and not on the common-law liability.[94]

Common-Law or Statutory Liability.—An action to recover for the loss of goods will be presumed to be upon the carrier's common-law liability, and not upon the statute where the essential allegation to statutory liability is not made.[95]

To Recover Proceeds of Goods Sold.—Where the carrier lost part of the goods, and sold the balance at the point of destination in pursuance of authority contained in the contract of shipment, assumpsit is the proper form of action for the shipper to bring to recover the proceeds of the sale from the carrier.[96]

§§ 1033-1035. Right of Action and Defenses—§ 1033. In General. —Persons Entitled to Sue.—As to persons entitled to maintain action against a carrier for loss of or injury to goods, see elsewhere.[97]

That the bill of lading had not been transferred to the owner, at the time he demanded the goods, by the bank to which they were consigned, is not fatal to his right to recover for injury to the goods while being held for the payment of freight in excess of that due where the carrier refused to deliver to him for the specific reason that he would not pay such excessive amount.[98]

Assignability of Right of Action.—A right of action against a common carrier for injury to goods while in its care for transportation is assignable.[99]

§ 1034. Conditions Precedent.—Where state bonds are lost through the carrier's negligence, the owner may recover their value without stating in the complaint, and without having furnished to the carrier as a condition precedent, the numbers or dates of the bonds, there being no rule of the company requiring it.[1]

Payment or Tender of Charges.—It is held that in an action for loss of goods, payment or tender of freight need not be proved.[2] It is the duty of a

consignee was in the wholesale trade, to which the chops, in their damaged condition, were unsuitable, did not entitle him to refuse to accept them and sue the carrier for their original value. Gulf, etc., R. Co. v. Pitts & Son, 37 Tex. Civ. App. 212, 83 S. W. 727.

Where goods retain a substantial value after the injury, the owner can not refuse to take them, and sue the carrier for their entire value; but can recover only for the diminution in value. McGrath Bros. v. Charleston, etc., Railway, 91 S. C. 552, 75 S. E. 44, 42 L. R. A., N. S., 782, Ann. Cas. 1914A, 64.

Machinery being so injured by a carrier that it is valuable only for old iron, for which it would bring, at the price therefor of twenty-five cents a hundred pounds, fifty-five to seventy-seven cents, its net value to its owner, if anything, by reason of the expense of receiving it, finding a purchaser, and delivering it, is so insignificant that it will not be considered as regards his right to sue for and recover its entire value before the injury. McGrath Bros. v. Charleston, etc., Railway, 91 S. C. 552, 75 S. E. 44, 42 L. R. A., N. S., 782, Ann. Cas. 1914A, 64.

94. Special contract.—Boaz v. Central R., etc., Co., 87 Ga. 463, 13 S. E. 711; Indianapolis, etc., R. Co. v. Forsythe, 4 Ind. App. 326, 29 N. E. 1138; Kimball v. Rutland, etc., R. Co., 26 Vt. 247, 62 Am. Dec. 567.

95. Common law or statutory liability. —Central, etc., R. Co. v. Jones, 7 Ga. App. 165, 66 S. E. 492. Ga. Civ. Code, 1895, § 2298.

96. To recover proceeds of goods sold. —Stevens v. Sayward (Mass.), 3 Gray 108.

97. Persons entitled to sue.—See ante, "Right to Maintain Action against Carrier," §§ 809-811.

98. Clegg v. Southern R. Co., 135 N. C. 148, 47 S. E. 667, 65 L. R. A. 717.

99. Assignability of right of action.— Norfolk, etc., R. Co. v. Read, 87 Va. 185, 12 S. E. 395.

1. Conditions precedent.—Martin v. American Exp. Co., 19 Wis. 336.

2. Payment or tender of freight where goods lost.—Ferguson v. Cappeau (Md.), 6 Har. & J. 394.

Where part of the goods are lost by neglect of the carrier, the owner may maintain an action for the value of the goods lost, without previous payment or tender of freight, if he has received the remainder of the goods with the carrier's consent. Alden v. Pearson (Mass.), 3 Gray 342.

consignee whose property is injured while in the control of a carrier to pay all the freight charges, and then sue the carrier for the injury done.[3] But where the damages are equal to or exceed the amount of the charges, it is not necessary that the plaintiff should allege and prove that he had paid or tendered the amount due for freight.[4] And it is held that it is no defense to an action for damages that the freight has not been paid.[5] The fact that the consignor had not paid or tendered the freight charges on goods, in the absence of demand for prepayment, does not absolve the carrier from liability for damages thereto, since the usual custom is to collect the freight on delivery to the consignee, thereby waiving the right to prepayment.[6]

Demand as Condition Precedent.—An action may be maintained against a carrier for loss of goods without proof of demand at the place of destination, when the evidence shows that the goods never reached the destination.[7] Where the carrier lost part of the goods, and sold the balance at the point of destination, no demand on him for the proceeds is necessary to enable the shipper to maintain an action therefor, though, if it were, the commencement by the carrier of an action for a balance of freight, being equivalent to a refusal to account for the proceeds, gave the shipper an immediate right of action.[8]

§ 1035. Defenses.—Receiving Goods.—Receiving from a carrier property which has been damaged by it,[9] or a part of which is missing,[10] is no waiver of plaintiff's claim for the damage sustained, as nothing short of a release or the acceptance of something in satisfaction is a bar to his right of action.[11] And an

3. **Where goods injured.**—Miami Powder Co. *v.* Port Royal, etc., R. Co., 38 S. C. 78, 16 S. E. 339, 21 L. R. A. 123.

4. **When damages exceed charges.**—Miami Powder Co. *v.* Port Royal, etc., R. Co., 47 S. C. 324, 25 S. E. 153.

5. Cleveland, etc., R. Co. *v.* Rudy, 173 Ind. 181, 89 N. E. 951, reversing 87 N. E. 555.

6. **Prepayment of freight.**—Evansville, etc., R. Co. *v.* Keith, 8 Ind. App. 57, 35 N. E. 296.

7. **Demand as condition precedent.**—Louisville, etc., R. Co. *v.* Meyer, 78 Ala. 597.

8. Stevens *v.* Sayward (Mass.), 3 Gray 108.

9. **Waiver by receiving goods.**—Howe *v.* Oswego, etc., R. Co. (N. Y.), 56 Barb. 121; Bowman *v.* Teall (N. Y.), 22 Wend. 306, 35 Am. Dec. 562; Underwriters' Agency *v.* Sutherlin, 55 Ga. 266.

In an action to recover for damage to goods while in defendant's possession for transportation, it is no defense that the consignees accepted the goods if they notified the consignors of their damaged condition, and did not accept as purchasers. Withers *v.* New Jersey Steamboat Co. (N. Y.), 48 Barb. 455.

Receiving goods short of their destination does not relieve the carrier from liability to the consignee for damages to the goods caused by its negligence while transporting them. Lesinsky *v.* Great Western Dispatch, 10 Mo. App. 134.

In the absence of a reasonable regulation upon the subject by the carrier, the fact that the consignee received the goods without giving notice of a claim that they were injured, as he well knew, does not work forfeiture or waiver of his claim for damages. Ohio, etc., R. Co. *v.* Nickless, 73 Ind. 382.

In Louisiana it is held that the consignee's receipt of goods is conclusive that he is satisfied with their condition at delivery. If, from their outward appearance, they have been opened, he should refuse to receive them until the contents be examined or the master notified to attend their examination; but if he take them out of the latter's sight without saying anything, and deposit them where he and his agent alone have access, he can not recover for any deficiency. Monro *v.* The Baltic (La.), 1 Mart., O. S., 194. See Marcy *v.* Warner, 17 La. Ann. 34. Compare Oakley *v.* Russell (La.), 6 Mart., N. S., 58.

A master can not exonerate himself on the ground that the consignees received the goods, if they made objections to which he replied "that they might receive the goods, and he would settle afterwards." Bernadon *v.* Nolte (La.), 7 Mart., O. S., 278.

10. Howe *v.* Oswego, etc., R. Co. (N. Y.), 56 Barb. 121.

The receipt by the owner of the whole number of casks of goods shipped does not prevent him from maintaining an action against the carrier for the loss of part of the contents, unless the jury find that he received the property as and for the compliance with the contract of the carrier. Alden *v.* Pearson (Mass.), 3 Gray 342.

11. Bowman *v.* Teall (N. Y.), 22 Wend. 306, 35 Am. Dec. 562.

acceptance of a portion of a cargo of malt first unloaded by an inspector of the consignees, who examined it as it was taken from the boat, does not constitute an acceptance of the residue, so as to relieve the carrier from liability for subsequent damage by leakage.[12]

Effect of Receipt Given on Obtaining Goods.—A receipt given to the carrier for goods before they are examined does not conclude the consignee from showing the actual condition of his property, in an action for loss of portion of the goods,[13] or for damage thereto.[14]

Act of Saving Goods.—A shipper being notified by the carrier that the boat containing the goods had sunk, and that he could not deliver the goods, does not waive his right to recover damages thereto by his act of saving what he could from the wreck.[15]

Waiver by Paying Freight.—Where a common carrier performs its contract to transport and deliver goods, a payment of the freight, or a submission to judgment therefor, does not preclude the owner of the goods from recovering damages for injuries received by the goods during their transit. He may pay the freight and sue for the damages, or set up his damages by way of counterclaim in an action to recover the freight, or he may bring a cross action.[16]

Selling Goods to Third Person.—The owner may recover from a carrier, where his claim is established by clear and distinct proof, for injury to goods in transportation, discovered after delivery to him, though he sells them before making a claim against the carrier, and without giving it opportunity to inspect them.[17]

Lien for Charges.—Where failure to deliver goods on demand of the consignee is not placed on the ground of a lien for charges, a carrier can not plead such lien in defense of a subsequent action for loss of the goods.[18]

Mistake in Making Out Bill of Lading.—In an action against a carrier for failure to deliver all the articles mentioned in the bill of lading, the carrier may defend on the ground that its agent made a mistake in making out the bill.[19]

Effect on Consignee of Release by Consignor.—A release and contract of indemnity to a common carrier, executed by the consignor without authority from the consignee, is no bar to an action by the consignee for damages to the goods.[20]

Failure to Call for Assessment of Damages.—Where the clerk of the consignee of goods on discovering that they were damaged did not notify the carrier, and did not call for a board of survey to assess damages according to the rule recognized in commercial usage, but assessed the entire damages himself:

12. Scheu *v.* Benedict, 116 N. Y. 510, 22 N. E. 1073, 15 Am. St. Rep. 426.

13. **Effect of receipt given on obtaining goods.**—Porter *v.* Chicago, etc., R. Co., 20 Iowa 73.

A receipt given by a party to common carriers for goods transported by them will not be set aside on the bare allegation that he never received such goods, with no explanation tending to explain how he came to make a formal admission of their receipt. Chapman *v.* Camden, etc., R. Co. (Pa.), 7 Phila. 204.

14. Monell *v.* Northern Cent. R. Co. (N. Y.), 16 Hun 585.

A consignee of goods employed an express company to cart the goods to his home, and its agent at the depot looked at the box containing the goods, and signed a "clear" receipt, making no complaint. Held not to preclude the consignee from showing that the goods were wet. Mears *v.* New York, etc., R. Co., 52 Atl. 610, 75 Conn. 171, 56 L. R. A. 884, 96 Am. St. Rep. 192.

15. **Act of saving goods.**—Lengsfeld *v.* Jones, 11 La. Ann. 624.

16. **Waiver by paying freight.**—Schwinger *v.* Raymond, 83 N. Y. 192, 38 Am. Rep. 415. See Underwriters' Agency *v.* Sutherlin, 55 Ga. 266.

17. **Selling goods to third person.**—The Elmira Shepherd, Fed. Cas. No. 4,418, 8 Blatchf. 341.

18. **Lien for charges.**—Louisville, etc., R. Co. *v.* McGuire, 79 Ala. 395.

19. **Mistake in making out bill of lading.**—Cohen Bros. *v.* Missouri, etc., R. Co., 44 Tex. Civ. App. 381, 98 S. W. 437

20. **Effect on consignee of release by consignor.**—Cream City R. Co. *v.* Chicago, etc., R. Co., 63 Wis. 93, 23 N. W. 425, 53 Am. Rep. 267.

and thereafter, as the packages were opened for sale, he discovered increased damages, the consignee is restricted to the amount of damages first assessed by the clerk.[21]

Goods Damaged before Received by Carrier.—A common carrier, sued on its common-law liability for loss or injury of goods received by it for transportation, may relieve itself of liability by showing that the goods were damaged before it received them.[22]

Effect of Unlawful Rate.—That a rate given to a shipper may be in violation of the rates fixed by the Interstate Commerce Commission does not affect the carrier's liability to respond or the shipper's right to recover for loss of the goods.[23]

A violation of Interstate Commerce Act, § 10, prohibiting false billing, false classification, false weighing, or misrepresentations as to the contents of a package, by which a discrimination is obtained, constitutes no defense to a carrier's liability for loss of goods shipped in interstate commerce, resulting from a violation of its duties as a carrier.[24]

That no person was appointed to receive goods at their destination is no defense in an action to recover for their loss if the goods never in fact arrived at the destination.[25]

That the carrier does not know who is the real owner of goods received for transportation is no defense in an action for their loss.[26]

Plaintiff's failure to procure insurance on the goods is no excuse for a carrier, in an action against him for negligence.[27]

§ 1036. Jurisdiction and Venue.—In many states there are statutes regulating the jurisdiction and venue of actions against carriers for loss of or injury to goods.[28]

21. **Failure to call for assessment of damages.**—Williams *v.* The Columbia, 1 Wash. T. 95.

22. **Goods damaged before received by carrier.**—Ohlen *v.* Atlanta, etc., R. Co., 2 Ga. App. 323, 58 S. E. 511.

23. **Effect of unlawful rate.**—Central, etc., R. Co. *v.* Butler Marble, etc., Co., 8 Ga. App. 1, 68 S. E. 775.

24. **Violation of interstate commerce act.**—Adams Exp. Co. *v.* Chamberlin-Johnson-Du Bose Co., 75 S. E. 601, 138 Ga. 455.

25. **No person to receive goods.**—Phillips *v.* Earle (Mass.), 8 Pick. 182.

26. **Carrier ignorant of real owner.**—Lloyd *v.* Haugh, etc., Transfer Co., 223 Pa. 148, 72 Atl. 516, 21 L. R. A., N. S., 188.

27. **Failure to procure insurance.**—Brenan *v.* Shelton (S. C.), 2 Bailey 152.

28. **Jurisdiction and venue.**—*Arkansas.*—Kirby's Dig., § 6068, provides that an action may be brought against a railroad company upon a liability as carrier in any county through which the road passes. Section 6758 provides that a railroad company leasing another railroad wholly or partly in this state is subject to all the laws of the state governing railroads. Section 6732 provides that the term "railroad corporation" shall include all corporations operating roads in this state, whether as owner, lessee, etc. Section 7792 provides that all general provisions, terms, etc., shall be construed liberally in order to effect the true legislative intent. Defendant did not own a line of road in S. district, but ran a through train into the district over the line of another road. Plaintiff delivered goods at S. for shipment over defendant's line and another road, and sued for defendant's negligent failure to make shipment. Held that, construing all the sections together, defendant's road passed through the S. district within the meaning of § 6068, so as to permit an action against it in that district. Chicago, etc., R. Co. *v.* Jaber, 107 S. W. 1170, 85 Ark. 332.

Georgia.—Civ. Code 1895, § 2334, declaring that a carrier shall be sued in the county in which the cause of action originated for injury to property, and also on all contracts, confers jurisdiction of an action for delivering goods in bad order, on the courts of the county where they were delivered, whether the action be ex contractu or ex delicto. If the action proceed ex delicto the carrier does not defeat the jurisdiction by showing that, physically considered, the loss or damage did not occur in the county where the delivery in good order should have been made. Brooke *v.* Nashville, etc., R. Co., 5 Ga. App. 253, 62 S. E. 1002 (distinguishing and affirming Brooke *v.* Louisville, etc., R. Co., 3 Ga. App. 492, 60 S. E. 218); Louisville, etc., R. Co. *v.* Warfield, 129 Ga. 473, 59 S. E. 234; Lytle *v.* South-

§ 1037. Parties.—As to proper parties to maintain actions against carriers for loss or injury to goods, see elsewhere.[29]

Suit against Receiver.—A receiver appointed to assume charge of the affairs of a railroad company may be held responsible for the damage actually sustained by a shipper of freight, through the negligence of the receiver's agents and employees, in any case in which the company could be so held. But where the receiver is appointed by a court of equity he can not be sued at law without permission of the appointing court.[30]

ern R. Co., 3 Ga. App. 219, 222, 59 S. E. 595; Burns *v.* Louisville, etc., R. Co., 6 Ga. App. 614, 65 S. E. 582.

Cases not falling within the provisions of this section are governed by the general law. Nonresident corporations are within the purview of this section, as to contracts made and torts committed in the state. Lytle *v.* Southern R. Co., 3 Ga. App. 219, 220, 59 S. E. 595.

A suit ex delicto against a nonresident railway company, arising out of its failure to deliver safely a shipment of goods at a point in another state, may be brought in any county in this state in which legal service of process can be made. Lytle *v.* Southern R. Co., 3 Ga. App. 219, 59 S. E. 595.

Under Civ. Code 1895, § 3298, providing that railroad companies shall be sued in the county in which the cause of action originated for the purpose of recovering damages for injuries to personal property, it must affirmatively appear that the cause of action originated in the county where the suit was filed. Brooke *v.* Louisville, etc., R. Co., 3 Ga. App. 492, 60 S. E. 218.

Kentucky.—Civ. Code. Prac., § 73, provides that an action against a carrier must be brought in the county in which defendant resides, or in which the contract is made, or in which the carrier agrees to deliver the property. Brunk *v.* Ohio, etc., R. Co., 32 Ky. L. Rep. 174, 105 S. W. 443.

Plaintiff, who resided in E. county, shipped goods to that county; the shipment being over defendant road from St. Louis to R., in M. county, in this state, and from there to E. county by another road. A suit was brought in the M. county circuit court to recover for damage to the goods while in the St. Louis yards. Defendant's residence is not in M. county. Held that, since the property was to be delivered in M. county, an action to recover damages arising out of the breach of the contract of carriage for injury to the goods, etc., may be brought in that county. Wilson *v.* Louisville, etc., R. Co., 112 S. W. 585, 33 Ky. L. Rep. 985.

In an action against an initial and an intermediate carrier for loss of goods, it appeared that the initial carrier accepted plaintiff's goods for transportation to a town in another county into which the line of neither defendant ran; the bill of lading providing that the responsibility of each company should cease on delivery to a connecting carrier. Held, that a plea to the jurisdiction of the court in the county of final destination was properly sustained. Brunk *v.* Ohio, etc., R. Co., 105 S. W. 443, 32 Ky. L. Rep. 174.

An action to recover damages for loss of property, is properly brought in the county in which plaintiff resides, that being a county into which the carrier passes, and also the county in which the contract was made and the injury occurred. Ploiz *v.* Miller, 51 S. W. 176, 21 Ky. L. Rep. 257.

Louisiana.—Under Code Prac., art. 165, subd. 9, providing that in all cases where any corporation shall commit trespass, or do anything for which an action for damages lies, it may be sued in the parish where the damage is done or trespass committed, as amended by Act No. 44 of 1910 to cover passive violation of contract by public carriers, and by Act No. 93 of 1888, giving the right to sue at the place of delivery, an action against a carrier for damages ex contractu because of negligent handling of machinery shipped, may be brought either in the parish where the property was damaged, at the domicile of defendant, or at the place of delivery of the machinery. Lafayette *v.* Wells Fargo & Co. Exp., 129 La. 323, 56 So. 257.

Texas.—Under an early statute, an action on a contract of transportation by a common carrier could be brought in the county where the goods were to be delivered or in the county where the defendant resided. Barrow *v.* Philleo, 14 Tex. 345, 346.

Where a carrier operating no line of road in Texas, but having agencies in several counties therein, gives a bill of lading for the delivery of goods in a county in which it has no agent, with a stipulation limiting its liability to injuries accruing on its own road, suit for injury to the goods is properly brought in the county of their delivery, under Rev. St. 1895, art. 1194, permitting one who has contracted in writing to perform an obligation in a particular county to be sued therein, or where he has his domicile. Texas, etc., R. Co. *v.* Hornbeck, 90 Tex. 496, 39 S. W. 564.

29. **Parties.**—See ante, "Right to Maintain Action against Carrier," §§ 809-811.

30. **Suit against receiver.**—Melendy *v.* Barbour, 78 Va. 544.

Joinder of Parties.—A shipper who contracts with a carrier may recover damages to a shipment without joining any other person having an interest in the goods as party plaintiff.[31] It is held that the consignor of goods, not to be delivered except upon production of bill of lading and payment of draft, and his assignee of the bill of lading in whose favor the draft was drawn, are properly joined as plaintiffs in an action against the carrier for the loss of the goods.[32] There is a conflict as to whether the consignee can sue alone where another person is part owner of the goods.[33] An action for damage to a shipment is properly brought in tort jointly against the railway and the transportation company which contracted to ship the property.[34]

§§ 1038-1051. Pleading—§§ 1038-1049. Declaration, Complaint, Petition or Bill—§ 1038. In General.—Whether Action on Case or in Assumpsit.—It is sometimes very difficult to distinguish whether a declaration, complaint or petition states a cause of action on the case or in assumpsit.[35] The allegation which especially distinguishes the counts in case from those in assumpsit is the omission of the consideration and the averment of negligence.[36] A declaration against a carrier for loss of goods in transit, alleging the consideration, the promise, the breach, and the giving of the notice of loss required by the bill of lading, states a cause of action in assumpsit upon the contract of carriage.[37]

Construction of Petition.—If a petition is ambiguous as to whether it is a proceeding ex contractu or ex delicto, the court, in the absence of a demurrer adequate to compel the plaintiff to make his allegations more specific, and to relieve the ambiguity, will so construe the petition as to uphold the fullest recovery to which the plaintiff may be entitled under all the facts of the case as they appear.[38]

31. Joinder of parties.—Galveston, etc., R. Co. *v.* Barnett (Tex. Civ. App.), 26 S. W. 782, 783; Missouri Pac. R. Co. *v.* Smith, 84 Tex. 348, 19 S. W. 509; Texas, etc., R. Co. *v.* Klepper (Tex. Civ. App.), 24 S. W. 567.

A contrary doctrine seems to be held in Swift *v.* Pacific Mail, etc., Co., 106 N. Y. 206, 12 N. E. 583, holding that the merchandise being whale oil, the product of a whaling voyage, evidence that seamen on the whaling vessel "were interested in the oil" is not sufficient to establish that they are partners or joint owners, so as to require them to be joined as plaintiffs.

32. Consignor and assignee of bill of lading.—Hartwell *v.* Louisville, etc., R. Co., 15 Ky. L. Rep. 778.

33. Where consignee part owner.—In Alabama it is held that the consignee may sue alone. Southern Exp. Co. *v.* Armstead, 50 Ala. 350, cited in Louisville, etc., R. Co. *v.* Touart, 97 Ala. 514, 516, 11 So. 756.

In Kentucky the Alabama rule seems to prevail. See Adams Exp. Co. *v.* Tingle, 10 Ky. L. Rep. 358.

In Texas the part owner must be made a party to the suit. Missouri Pac. R. Co. *v.* Rushin, 3 Texas App. Civ. Cas., § 317.

34. Parties defendant.—Merchants', etc., Transp. Co. *v.* Eichberg, 71 Atl. 993, 109 Md. 211.

35. Whether action on case or in assumpsit.—See Chesapeake, etc., R. Co. *v.* Stock & Sons, 104 Va. 97, 51 S. E. 161.

Petition setting forth cause of action ex delicto.—Southern R. Co. *v.* Horner, 115 Ga. 381, 41 S. E. 649.

Petition founded on bill of lading.—A petition alleged that plaintiff shipped cattle from Memphis, Tenn., to Ft. Worth, Tex., over several lines of connecting railroad, one of which was defendant's line; that said shipment was made "on through bills of lading, and at agreed and through rates, for the whole route, the contracts and bills of lading of each of said railroads in regard to the shipment of cattle being recognized and carried out by the other;" that the cattle were damaged by the negligence of defendant, etc. Held, that the petition was founded on the special contract evidenced by the bill of lading, and not on the liability of the carrier at common law. Texas, etc., R. Co. *v.* Wheat, 2 Texas App. Civ. Cas., § 165.

36. Wright *v.* McKee, 37 Vt. 161.

37. Chesapeake, etc., R. Co. *v.* Stock & Sons, 51 S. E. 161, 104 Va. 97.

38. Construction of petition.—Southern Exp. Co. *v.* Pope, 5 Ga. App. 689, 690, 63 S. E. 809, wherein it is held that the rule is in no wise inconsistent with the rule that equivocal or ambiguous statements of facts will be construed most strongly against the pleader.

Joint Liability of Connecting Carriers.—A complaint showing that goods were shipped by contract with one of the defendants, to be transferred to a given point in care of another carrier, but, in violation of that contract, they were transferred to the other defendant, and that they were destroyed while in possession of the latter defendant, is sufficient to support the action against the defendants.[39]

The allegations of a bill should be sufficiently explicit to warrant a decree against the defendant, and if they are not, a demurrer thereto will be sustained.[40]

§§ 1039-1047. Necessity and Sufficiency of Allegations—§ 1039. Plaintiff's Title or Interest.—In an action against a carrier for loss of or injury to goods the plaintiff's ownership of the goods or his interest entitling him to sue should be alleged.[41] It is held that where the consignee sues, he need not aver that he is the owner, as the law will presume, when nothing appears to the contrary, that such is the fact, and that the contract for transportation of the goods was made with him as such owner.[42]

§ 1040. That Defendant a Common Carrier.—In order to recover against a common carrier, as such, for loss of or injury to goods, the declaration or com-

39. **Joint liability.**—Independence Mills Co. v. Burlington, etc., R. Co., 72 Iowa 535, 34 N. W. 320, 2 Am. St. Rep. 258.

40. **Allegations not sufficiently explicit.**—A bill against a firm and an express company alleged that complainants, at S., shipped goods to such firm at G., to be delivered on complainant's order, and forwarded by said express company to its office at G. a C. O. D. bill, to which was attached the bill of lading, with instructions to collect, etc.; that the firm claimed the shipment was by mistake, and, after about ten months, proposed to take the goods, and give a note at eight months, and sent, by express, a note to complaints, who acknowledged its receipt by letter, and on the same day they delivered to said express company, in S., an order notifying it that the firm had settled the C. O. D. bill, and to turn over to the firm the bill of lading, and let the C. O. D. bill come back; that nine days afterwards the goods were destroyed by fire in the depot at G., where they had remained; that complainants do not know whether or not such company forwarded said order of release, or refused to deliver said bill of lading to said firm, and, if it appear that said firm were deprived of the right to take said goods from the depot by failure of such company to perform its duty, it would be liable to complainants for the amount of said note, etc., "as charged, which is accordingly done." Held, that the allegations against the express company were not sufficiently explicit to make the company liable and a demurrer to the bill should have been sustained. Cole v. Rankin (Tenn.), 42 S. W. 72.

41. **Plaintiff's title or interest—Allegations held sufficient.**—A complaint which charges the carrier with the loss of "certain goods, the property of the plaintiff," sufficiently shows the interest of the plaintiff. Ames v. First Div., etc., R. Co., 12 Minn. 412, Gil. 295.

A complaint which alleges that the carrier, in consideration of reasonable compensation to be paid by consignor, agreed to safely carry to a certain place and there deliver to the consignee, or order, certain goods and property of consignor of the value of $178.50, sufficiently alleges that the property consigned for shipment belonged to the consignor. Zalk v. Great Northern R. Co., 98 Minn. 65, 107 N. W. 814.

In an action by a consignee against the carrier to recover for damage to goods in transit, the general allegation that the consignee had purchased the goods from the consignor, and was the owner thereof at the time they were damaged, is a sufficient allegation of ownership. Texas Cent. R. Co. v. Dorsey, 70 S. W. 575, 30 Tex. Civ. App. 377.

Allegation that consignor owned the goods is unnecessary, where it appears, and the reviewing court has previously held that consignor had such an interest in the goods that he had a right to stop them in transitu, provided consignee was insolvent, and that defendant railway recognized that right, and made a new agreement with consignor, whereby the company agreed and undertook to deliver the goods to one other than consignor, whereby they were lost. Howe v. Chicago, etc., R. Co., 18 O. C. C. 606, 10 O. C. D. 220.

42. **Where consignee sues.**—United States Mail Line Co. v. Carrollton Furniture Mfg. Co., 101 Ky. 658, 19 Ky. L. Rep. 833, 42 S. W. 342.

plaint must aver that the defendant is a common carrier,[43] or set out facts constituting it such in law.[44]

Aider by Verdict.—Where a petition fails to aver that the defendant is a common carrier, but alleges a contract to carry made with it, the petition is good after verdict, when the proofs showed that defendant was exercising the office of a carrier, and did, in fact, so contract and act in this instance.[45]

§ 1041. As to Consideration.—In an action ex contractu against a carrier the averment of consideration must be direct and explicit, and not by way of inducement merely.[46] It is a sufficient averment of consideration that the defendant agreed to carry the goods "for a valuable consideration."[47] It need not be alleged that the freight charges were paid or tendered.[48]

In an action ex delicto to recover for goods destroyed in transit, it is not necessary to allege that a compensation was paid or agreed to be paid for the carriage of the goods.[49]

§ 1042. Delivery to and Acceptance by Carrier.—The declaration must allege a delivery of the goods to the carrier,[50] and that it accepted or undertook

43. That defendant a common carrier.—Louisville, etc., R. Co. *v.* Gerson, 102 Ala. 409, 14 So. 873; Jones *v.* Pitcher (Ala.), 3 Stew. & P. 135, 24 Am. Dec. 716.

Compare Mershon *v.* Hobensack, 22 N. J. L. 372, holding that in assumpsit it is not necessary to allege that defendant is a common carrier, but that such allegation is necessary in an action on the case.

Allegations held sufficient.—In an action by a consignee to recover for cotton lost by defendants as carriers, an allegation that defendants, "before and at the time of shipment, were the owners and proprietors of the boat, and copartners in freighting, and which boat had been usually employed in conveying and transporting cotton for hire," sufficiently alleged that the owners were common carriers. Jones *v.* Pitcher (Ala.), 3 Stew. & P. 135, 24 Am. Dec. 716.

A complaint against a railroad for the loss of a box, alleging that the box was delivered to defendant "to be carried by it as a common carrier of freight," sufficiently alleges that the box was delivered to defendant as a common carrier. Kansas City, etc., R. Co. *v.* Spann, 40 So. 83, 145 Ala. 679.

44. Southern Exp. Co. *v.* McVeigh, 61 Va. (20 Gratt.) 264.

Illustrations.—The master of a steamboat plying on a navigable river is presumed to be a common carrier, and, in an action for the purpose of charging him as such, the burden is on the defendant to show the contrary, if he denies the fact, although the declaration only alleges that the defendant is master of a certain steamboat, without alleging in so many words that he is a common carrier. Bennett *v.* Filyaw, 1 Fla. 403.

A complaint alleged that plaintiffs caused to be delivered to defendant certain property in good condition to be carried by defendant over its road to E., and thence to be forwarded to plaintiff at L., and that defendant received the goods for said carriage and delivery, but failed to deliver them to plaintiffs in good order. Held, that the words "to be forwarded" import an obligation to assume responsibility for the transportation of the goods from E. to L., and for their delivery to plaintiffs. Davis *v.* Jacksonville Southeastern Line, 126 Mo. 69, 28 S. W. 965.

The allegation that "the defendant, before and at the time of the committing of the grievance hereinafter mentioned, was the owner and proprietor of a certain railroad, to wit, the Baltimore & Ohio Railroad, and of certain carriages used by it for the carriage and conveyance of goods and chattels in, upon, and along said railway, from a certain place, to-wit, Parkersburg, Wood county, West Virginia, for hire and reward to it, the defendant in that behalf," is a sufficient allegation that the defendant was a common carrier. Baltimore, etc., R. Co. *v.* Morehead, 5 W. Va. 293.

45. Aider by verdict.—Kain *v.* Kansas City, etc., R. Co., 29 Mo. App. 53.

46. Consideration—Action ex contractu.—Pennsylvania R. Co. *v.* Smith, 106 Va 645, 56 S. E. 567.

Insufficient averment.—An averment that the defendant, in consideration of the delivery to it of certain goods, issued its bill of lading, by which it "undertook, promised, and agreed" to carry the goods to their destination, is not such an averment of consideration as is necessary in assumpsit. Pennsylvania R. Co. *v.* Smith, 106 Va. 645, 56 S. E. 567.

47. Jarrett *v.* Great Northern R. Co., 74 Minn. 477, 77 N. W. 304; Carter *v.* Graves, 17 Tenn. (9 Yerg.) 446.

48. Jarrett *v.* Great Northern R. Co., 74 Minn. 477, 77 N. W. 304; Ferguson *v.* Cappeau (Md.), 6 Har. & J. 394.

49. Action ex delicto.—Hall *v.* Cheney, 36 N. H. 26. See Wright *v.* McKee, 37 Vt. 161.

50. Delivery to carrier.—Jordan *v.* Hazard, 10 Ala. 221. See Philadelphia, etc., R.

to carry them.[51]

Time of Delivery.—A petition in an action against a carrier for damage to goods must allege the time when the carrier received the goods.[52]

Place of Delivery.—In an action against a carrier for the loss of goods in transit, the refusal to require plaintiffs to show in the bill of particulars where the goods and cars were delivered to defendant was not error where defendant was not embarrassed in making its defense by the lack of such statement.[53]

§ 1043. As to Contract of Carriage.—In declaring on the contract of carriage, great exactness is demanded.[54] Where one elects to sue a carrier for failure to perform its duty instead of suing on the contract, he need not set out the precise terms of the contract.[55] In such case, a petition, alleging that plaintiff delivered to defendant freight for transportation, sufficiently avers the contract of shipment, without alleging its terms or attaching a copy thereof to the petition.[56] A petition alleging that defendant is a common carrier, and fully setting out the fact constituting the cause of action for injuries in transit to a shipment and charging a breach of duty imposed on defendant by law, is sufficient without an express declaration on any bill of lading or contract of carriage which may have been made.[57] And it may be sufficient without any allegation as to the issuance of a bill of lading.[58] Under a statute providing that, where any pleading is founded on a written instrument, a copy thereof must be filed with the complaint, in a suit against a carrier for failure to deliver goods in time and good condition the complaint should be based on the bill of lading.[59]

Conditions Limiting Liability.—Conditions in a contract of carriage limiting the carrier's liability should be stated.[60]

Privity of Contract.—Where suit was brought against two railroad companies for damages on account of an alleged breach of contract, and the petition failed to show any privity of contract between the plaintiff and one of the defendants, a demurrer filed by it was properly sustained.[61]

Immaterial Allegations.—If there are provisions in the contract of carriage other than are usually embodied therein it is not necessary to aver the reasons that influenced or the purposes that controlled the shipper or carrier in inserting

Co. v. Venable Bros., 117 Ga. 142, 43 S. E. 407, holding that an allegation that defendant received the goods as in good order at a named station on its line and transported them to their destination does not make the action one brought solely under the terms of Ga. Civ. Code, § 2298.

51. Acceptance by carrier.—Sommerville v. Merrill (Ala.), 1 Port. 107.

52. Allegation of time when carrier received goods.—Missouri Pac. R. Co. v. Creath, 3 Texas App. Civ. Cas., § 83.

Sufficient allegation.—A complaint for loss of commercial fertilizers declaring on nine invoices of chemicals and dissolved bone, covering different days during three months, and alleging that twenty barrels of chemicals and sixty-six of dissolved bone were never delivered, and that plaintiff does not know on what "days the 86 barrels * * * lost were received * * * for shipment," is not indefinite or uncertain in failing to allege "on what day or days" they were received by the carrier. Dunbar, etc., Co. v. Port Royal, etc., R. Co., 19 S. C. 601.

53. Place of delivery to carrier.—Chesapeake, etc. R. Co. v. Stock & Sons, 51 S. E. 161, 104 Va. 97.

54. Allegations as to contract.—Weed v. Saratoga, etc., R. Co. (N. Y.), 19 Wend. 534; Camp v. Hartford, etc., Steamboat Co., 43 Conn. 333.

Indorsement need not be set out.—Matter printed on the back of the freight receipt is but a notice and not a part of the contract, and therefore the indorsement need not be set out in the declaration as part of the contract. Western Transp. Co. v. Newhall, 24 Ill. 466, 76 Am. Dec. 760.

55. Louisville, etc., R. Co. v. Cody, 119 Ga. 371, 46 S. E. 429; Atlanta, etc., R. Co. v. Jacobs' Pharmacy Co., 135 Ga. 113, 68 S. E. 1039.

56. Charleston, etc., R. Co. v. Duckworth, 7 Ga. App. 350, 66 S. E. 1018.

57. St. Louis, etc., R. Co. v. Berry, 42 Tex. Civ. App. 470, 93 S. W. 1107.

58. Martin v. Fort Worth, etc., R. Co., 3 Tex. Civ. App. 556, 22 S. W. 1007.

59. 2 Ind. Rev. St. 44. Indianapolis, etc., R. Co. v. Remmy, 13 Ind. 518.

60. Conditions limiting liability.—Baltimore, etc., R. Co. v. Rathbone, 1 W. Va. 87, 88 Am. Dec. 664; Ferguson v. Cappeau (Md.), 6 Har. & J. 394.

61. Privity of contract.—Guthrie v. Atlantic, etc., R. Co., 119 Ga. 663, 46 S. E. 824.

them; such allegations add nothing to the legal effect of the contract.[62] As it is no excuse for a carrier, in an action against it for negligence, that the plaintiff engaged to procure insurance on the goods carried, and failed so to do, it is not necessary in declaring against the carrier, to set forth such engagement, nor to allege that it has been fulfilled, nor to aver an excuse for nonfulfillment.[63]

§ 1044. Negligence of Defendant.—Ordinarily to recover for the loss of or damage to property it is sufficient to allege that the defendant undertook the transportation of the property as a common carrier and that it was lost or damaged while in its possession.[64] It need not be alleged that it was defendant's duty to carry the goods safely, since such duty is implied by law.[65] In a count in trover it is unnecessary to allege the carrier's duty as such, if its business is set forth, together with its negligence, and the loss resulting therefrom.[66] When negligence is alleged a general averment of negligence is sufficient, and particular acts of negligence need not be alleged.[67] In such an action specific allegations

62. **Immaterial allegations.**—Baltimore, etc., R. Co. *v.* Rathbone, 1 W. Va. 87, 88 Am. Dec. 664.

63. Brenan *v.* Shelton (S. C.), 2 Bailey 152.

64. **Defendant's negligence.**—McFadden *v.* Missouri Pac. R. Co., 92 Mo. 343, 4 S. W. 689, 1 Am. St. Rep. 721; Kelly *v.* Benedict (La.), 5 Rob. 138, 39 Am. Dec. 530.

In an action against a common carrier to recover the value of a car load of mules destroyed by fire through defendant's negligence, the petition alleged the delivery and loss of the property while in defendant's possession as a common carrier, and charged negligence in managing and operating the train, whereby the car containing the mules was set on fire, and the mules destroyed. Held that, even without the last allegation of negligence, the petition was sufficient. McFadden *v.* Missouri Pac. R. Co., 92 Mo. 343, 4 S. W. 689, 1 Am. St. Rep. 721.

65. **Duty to carry safely.**—Lang *v.* Brady, 73 Conn. 707, 49 Atl. 199.

66. Wright *v.* McKee, 37 Vt. 161.

67. **General averment sufficient.**—*Connecticut.*—Peck *v.* Weeks, 34 Conn. 145.

Georgia.—Louisville, etc., R. Co. *v.* Warfield, 129 Ga. 473, 59 S. E. 234; S. C., 3 Ga. App. 187, 59 S. E. 604.

Illinois.—East St. Louis, etc., R. Co. *v.* Wabash, etc., R. Co., 24 Ill. App. 279, reversed on other grounds in 123 Ill. 594, 15 N. E. 45.

Massachusetts.—School Dist. *v.* Boston, etc., R. Co., 102 Mass. 552, 3 Am. Rep. 502.

Minnesota.—McCauley *v.* Davidson, 19 Minn. 418, Gil. 335.

Unless the pleading is attacked by motion, a general averment of negligence is sufficient. Union Pac. R. Co. *v.* Vincent, 58 Neb. 171, 78 N. W. 457.

Under the New York statute (Code Civ. Proc., § 481), requiring the complaint to state plainly and concisely the facts constituting each cause of action, a complaint against a steamship company for negligence in transporting goods, which avers that defendant undertook to transport certain furs from and to points named, being paid therefor, and that it "so negligently and carelessly misbehaved itself" in the matter that plaintiff sustained damage, is insufficient, and a motion to make more definite should be granted. Rubens *v.* Ludgate Hill Steamship Co., 49 Hun 608, 2 N. Y. S. 30, 21 Abb. N. C. 464, 17 N. Y. St. Rep. 17.

Illustrations.—In an action against a carrier, the declaration, after stating the delivery of poultry to be carried, the defendant's reception of it on board his boat for that purpose, that the boat did not start within a reasonable time, alleged that "the defendant so negligently, carelessly, and improperly conducted himself in this behalf that, for want of due care in said defendant and his servants, said poultry was not conveyed to New York, and delivered to the plaintiffs, until the same became and was, in consequence of said carelessness and negligence, damaged and spoiled, and of no value to the plaintiffs." Held, that these allegations applied not only to negligence in not proceeding to New York, but also in not taking proper care of the poultry while transporting it. Peck *v.* Weeks, 34 Conn. 145.

A declaration alleging that the carrier "negligently unloaded" coal, "mixing it with soil and different kinds," sufficiently sets out the breach of the carrier's duty in unloading in an unsuitable place, or in such a manner that the different kinds were mixed together. Rice *v.* Boston, etc., R. Corp., 98 Mass. 212.

Averment, in a declaration against a carrier for loss of goods, that, by reason of the negligent manner in which defendant conducted himself, the goods "were wholly lost to the plaintiff," is sufficient negation of delivery of the goods according to the contract for carriage. Williams *v.* Baltimore, etc., R. Co., 9 W. Va. 33.

of negligence may be treated as surplusage.[68]

Failure to Ice.—A petition alleging failure of the carrier to properly refrigerate a car of fruit, to ice the car at its destination, to keep it iced so as to properly preserve the fruit, and that the car was almost entirely without ice when turned over to plaintiff, was not demurrable, as not alleging when and where the car should have been iced, or what would have been proper icing.[69]

The carrier's knowledge of the character of the goods shipped with respect to damages likely to result from delay in transit, or facts from which such knowledge may be inferred, should be alleged in an action for recovery of such damages.[70]

Where Carriage Gratuitous.—Allegation of Gross Negligence.—A complaint which alleges a delivery of goods to a common carrier, and acceptance by him, to be conveyed without reward, the loss of the goods occasioned by the gross negligence of the defendants, together with the value of the goods and the amount of the loss to the bailor, states a ground of action.[71]

§ 1045. Description of Property.—The petition or complaint in an action for loss of property should describe the property so as to show what is intended.[72] A complaint in an action for loss of a draft, merely alleging by whom and on whom it was drawn, and not stating the date, amount of the draft, or the time when payable, is insufficient.[73] But it is held that the complaint need not state the number or dates of state bonds.[74] Allegations that a lost box contained pictures of plaintiff's dead wife, etc., which could not be reproduced, and plaintiff's family Bible, containing the family records, were proper as descriptive of the articles charged to have been lost.[75]

§ 1046. Damage and Value of Goods.—Where no motion is made for a more specific statement, a complaint averring plaintiff's ownership of certain goods destroyed, their amount, a demand for the same or payment of its value, and demanding damages in the sum of a certain amount, interest, and costs, is sufficient, although no value of the goods, nor the fact that plaintiff was damaged by their loss, is specifically alleged.[76] A complaint for loss of a draft, merely alleging that the draft was worth a certain sum, is insufficient as a statement of the value, but a statement of the sum for which it was drawn would be sufficient; it being unnecessary to allege that the drawer had funds on deposit sufficient to pay it.[77]

68. Louisville, etc., R. Co. *v.* Warfield, 129 Ga. 473, 59 S. E. 234; Southern Exp. Co. *v.* Bailey, 7 Ga. App. 331, 66 S. E. 960; Deen *v.* Wheeler, 7 Ga. App. 507, 515, 67 S. E. 212.

A petition alleging that defendants undertook as carriers to convey property for hire, and failed to do so, and specifying the acts of negligence which caused the loss, is not subject to exception as uniting distinct causes of action—a cause ex contractu with one ex delicto; the specification of the negligent acts may be regarded as surplusage. Kelly *v.* Benedict (La.), 5 Rob. 138, 39 Am. Dec. 530.

69. **Failure to ice.**—Southern R. Co. *v.* Williams, 77 S. E. 153, 139 Ga. 357.

70. **Carrier's knowledge of character of goods.**—Wyler, etc., Co. *v.* Louisville, etc., R. Co., 6 N. P., N. S., 589, 18 O. D. N. P. 722.

71. **Where carriage gratuitous.**—McCauley *v.* Davidson, 10 Minn. 418, Gil. 335.

72. **Description of property.**—Galveston, etc., R. Co. *v.* Quilhot (Tex. Civ. App.), 123 S. W. 200, holding that a petition describing property as "one chest of silver," and as "one punch bowl, one H. P. vase, and two C. G. bowls," without even stating the material thereof, is subject to special exception to sufficiency of description.

73. **Description of draft.**—Zeigler *v.* Wells, etc., Co., 23 Cal. 179, 83 Am. Dec. 87.

74. **Description of bonds.**—Martin *v.* American Exp. Co., 19 Wis. 336.

75. Missouri, etc., R. Co. *v.* Dement (Tex. Civ. App.), 115 S. W. 635.

76. **Damage and value of goods.**—Independence Mills Co. *v.* Burlington, etc., R. Co., 72 Iowa 535, 34 N. W. 320, 2 Am. St. Rep. 258.

77. Zeigler *v.* Wells, etc., Co., 23 Cal. 179, 83 Am. Dec. 87.

Necessity for Demanding Interest.—Under a statute making the carrier liable for the amount of loss or damage to freight en route, together with interest thereon from the date of filing the claim until its payment, the complaint in an action against the carrier therefor need not demand interest in order to recover it.[78]

§ 1047. Special Statutory Proceeding.—In a special proceeding given by statute it is essential that the complaint set forth those facts and contain those allegations, which show that the case fell within the provisions of the statute.[79]

§ 1048. Amendments.—An action, based on the carrier's common-law liability, can not, by amendment, be converted into a suit founded upon a statutory liability.[80] In a suit to recover damages for freight burned up at the point of delivery to the carrier, an amendment changing the destination, from a point without to a point within the same state, does not introduce a new cause of action.[81] Where a petition has the fault of duplicity, in that it sets up in one count allegations suitable to an action against the carrier receiving the goods "as in good order," and also to an action against it upon a common-law liability for the loss of the goods, and a special demurrer calls attention to this dereliction, the plaintiff may save his suit from dismissal, by filing an amendment showing his election to proceed upon only one of the theories.[82]

§ 1049. Aider by Answer.—Although a complaint be deficient, in that it does not allege that demand was made for the delivery of goods at the point of consignment, such demand is rendered unnecessary by an answer which alleges that the same had been delivered according to the agreement.[83]

§ 1050. Plea or Answer.—Effect of General Denial.—In an action against a common carrier for loss of goods, a general denial puts the plaintiff upon the proof of his cause, whatever else the defendant may have pleaded.[84]

Effect on General Denial of Answer Containing Special Defense.—In an action against a carrier for failure to deliver all the articles mentioned in the bill of lading, the fact that the answer, in addition to a general denial, contained a special defense that the bill was procured by fraud of the shipper did not preclude the defense of a mistake on the part of the carrier's agent in making out the bill.[85]

The sufficiency of the answer must be determined by the case made by the petition, and that it might be a good answer to some case is not sufficient; the

78. Necessity for demanding interest.—Harter *v.* Charleston, etc., R. Co., 67 S. E. 290, 85 S. C. 192.

79. Special statutory proceedings.—The Galena *v.* Beals, 5 Wis. 91; Gray *v.* The Reveille, 6 Wis. 59.

In proceedings under Wisconsin Rev. St. c. 116, to recover damages for the nonperformance of a contract of affreightment, the complaint must set out the jurisdictional facts that the injury resulted from the negligent default or culpable misconduct on the part of those having the vessel in charge, whereby the injury occurred. Gray *v.* The Reveille, 6 Wis. 59.

80. Amendments.—Hartwell R. Co. *v.* Kidd, 10 Ga. App. 771, 74 S. E. 310.

A declaration against a railroad company for damage to machinery in transit, caused by the negligence of the defendant's agents, states a cause of action at common law; and can not be amended by adding an averment that defendant received the machinery from a connecting road "in good order" so as to allege a statutory liability under Code, § 3480, providing that, "where there are several connecting railroads under different companies, the last company which has received the goods as 'in order' shall be responsible to the consignee for any damages." Exposition Cotton Mills *v.* Western, etc., R. Co., 83 Ga. 441, 10 S. E. 113.

81. Charleston, etc., R. Co. *v.* Duckworth, 7 Ga. App. 350, 66 S. E. 1018.

82. Atlanta, etc., R. Co. *v.* Broome, 3 Ga. App. 641, 60 S. E. 355.

83. Aider by answer.—Zalk *v.* Great Northern R. Co., 98 Minn. 65, 107 N. W. 814.

84. Effect of general denial.—Fowler *v.* Davenport, 21 Tex. 626.

85. Answer containing special defense.—Cohen Bros. *v.* Missouri, etc., R. Co., 44 Tex. Civ. App. 381, 98 S. W. 437.

answer must present a defense to the case made by the petition.[86] An answer averring want of authority in the defendant's agent to receive and carry packages of money, without compensation to the defendant, and without its knowledge, is not bad as amounting to the general issue, where there is no averment in the complaint that the defendant was engaged in the business of carrying packages of money for hire.[87] An answer pleading violation of a stipulation as to the giving of notice of the claim for property destroyed within a certain time, should allege that plaintiff knew of the destruction at the time thereof.[88] Where the validity of a carrier's contract depends upon the reasonableness of a provision as to the giving of notice in case of injury to stock the carrier must, in order to avail itself of this provision as a defense, allege in its answer a state of facts showing that the shipper had failed to give the notice before defendant delivered to its connecting line, and that he had the opportunity to do so.[89]

A plea not distinctly denying the averment of the declaration that the carrier did not safely carry the goods, but alleging a limitation of liability in the terms of the bill of lading, is not a good plea.[90]

Matters Which Must Be Specially Pleaded.—Many defenses must be specially pleaded, as that the defendant had been released from contract, or that the goods were only partially lost,[91] that part of goods sued for did not belong to plaintiff,[92] that defendant failed to give notice of loss within a reasonable time.[93] If the carrier wishes to contend that the wholesale and not the retail price of the property should govern in fixing the amount of damages, facts supporting such contentions should be specially pleaded.[94]

An estoppel must be pleaded strictly.[95]

Pleading Contract of Carriage.—In an action against carrier for loss of freight, where plaintiff pleads the contract of carriage, its provisions inure to the benefit of defendant without being pleaded by it.[96]

Right to Damaged Goods.—In an action against a railroad to recover the value of goods damaged in transit, defendant, on being held liable for the damages sued for, is not entitled to an order awarding the damaged goods to it in the absence of a proper pleading on its part seeking to recover such goods.[97]

Right to Claim Reduction of Verdict.—Where, in an action for the loss of cigars shipped as "smoking tobacco," the carrier did not claim in its answer for a difference of unpaid freight at a higher rate prescribed for cigars, it could not claim a reduction of the verdict for plaintiff to the extent of the difference, in

86. **Sufficiency of answer.**—Missouri Pac. R. Co. *v.* Harris, 67 Tex. 166, 172, 2 S. W. 574.

87. **Answer not amounting to general issue.**—Cincinnati, etc., Mail Line Co. *v.* Boal, 15 Ind. 345.

88. St. Louis, etc., R. Co. *v.* Brass (Tex. Civ. App.), 133 S. W. 1075.

89. Houston, etc., R. Co. *v.* Davis, 88 Tex. 593, 32 S. W. 510.

90. Pennsylvania R. Co. *v.* Wilson (Pa.), 3 Atl. 783, 2 Sad. 291.

91. Houston, etc., R. Co. *v.* Harn, 44 Tex. 628.

92. McGregor *v.* Oregon R., etc., Co., 50 Ore. 527, 93 Pac. 465, 14 L. R. A., N. S., 668.

93. Southern R. Co. *v.* Mooresville Cotton Mills, 187 Fed. 72, 109 C. C. A. 390.

94. Houston, etc., R. Co. *v.* Barden (Tex. Civ. App.), 132 S. W. 83.

95. Southern Exp. Co. *v.* Fox, 131 Ky. 257, 115 S. W. 184, 117 S. W. 270.

A plea in an action for damage to goods was insufficient to estop plaintiff from claiming that the value was more than $75, where it alleges that plaintiff fraudulently stated that the value of the goods was $75 in order to obtain a low freight rate, but fails to allege that defendant did not know that the value was more than $75, or that it was deceived by plaintiff's statement as to value. Southern Exp. Co. *v.* Fox, 131 Ky. 257, 115 S. W. 184, 117 S. W. 270.

In an action against a carrier for loss of freight, a plea of estoppel by reason of plaintiff having received the bill of lading after loss, and having forwarded it to defendant with his claim for damages, was insufficient, where it alleged no facts showing that defendant acted on the contents of the bill of lading to its prejudice, or that it was misled by anything plaintiff did with reference thereto. McGregor *v.* Oregon R., etc., Co., 50 Ore. 527, 93 Pac. 465, 14 L. R. A., N. S., 668.

96. Houston, etc., R. Co. *v.* Groves, 48 Tex. Civ. App. 45, 106 S. W. 416.

97. **Right to damaged goods.**—Missouri, etc., R. Co. *v.* Kahn (Tex. Civ. App.), 91 S. W. 816.

order to relieve itself for liability for a statutory penalty, on the ground that plaintiff was not entitled to recover the amount claimed by him.[98]

Time of Amendment of Answer.—It is not error to refuse to allow defendant carrier to amend its answer on the hearing and during the argument so as to rely on a clause in its receipt to complainants providing that claims for damages against it must be presented within thirty days, in the absence of sufficient reason for failure to move to amend earlier, the defense presented by it being merely technical.[99]

§ 1051. Admissions in Pleadings.—When a carrier refuses to pay damages demanded for injury to goods on the ground that they were carried at "owner's risk," the jury may infer a waiver of other grounds of defense, and an admission that the goods were damaged while in possession of the carrier.[1]

General Denial and Special Plea.—Where the plaintiff's right to recover depended upon the fact being shown that defendants were partners in, or joint owners of a boat, upon which cotton was freighted and lost, and there was a plea of the general denial, and a special plea admitting the joint ownership, each plea presented a separate issue and the admissions contained in the special plea must be taken in reference only to the issue presented by it; and the admission thus made does not dispense with the necessity of the plaintiff's proving the partnership or joint ownership except as to the issue presented by such special plea.[2]

§§ 1052-1055. Issues, Proof and Variance—§ 1052. In General.—In an action against a carrier for loss of or injury to goods such matters are in issue as are properly put in issue by the pleadings and proof.[3]

§ 1053. Evidence Admissible under Pleadings.—In General.—In actions against carriers for loss of or injury to goods, the general rule applies that the evidence to be admissible must correspond with the allegations and be restricted to the issues. So evidence is inadmissible to show loss of goods shipped or delivered at any other time than that alleged,[4] or to show damages to other property than that specified in the petition.[5] Where plaintiff sues on a verbal contract for shipment, and relies upon such contract as the law implies from mere delivery of goods to a railroad company to be carried as freight, and no written contract is alleged, a written contract introduced by defendant is not relevant.[6] Where the complaint alleged a contract to "carry and deliver" goods, the bill of lading, showing a contract to carry and deliver such goods upon certain conditions named, can not be excluded as being a different contract from

98. **Right to claim reduction of freight.**—Jenkins *v.* Atlantic, etc., R. Co., 66 S. E. 407, 84 S. C. 520.

99. **Time of amendment.**—Cole *v.* Rankin (Tenn.), 42 S. W. 72.

1. **Admission implied from resting defense on specific ground.**—South, etc., R. Co. *v.* Wilson, 78 Ala. 587, 27 Am. & Eng. R. Cas. 41.

2. Fowler *v.* Davenport, 21 Tex. 626.

3. **Issues—Illustrations.**—Where, in an action to recover of a carrier the value of a package lost in transit, the petition sets out a bill of lading containing a stipulation limiting the liability of the carrier to $50, unless the value of the article is disclosed, and admits that the value was not disclosed, and alleges that the package was lost through the carrier's negligence, and the answer admits the loss and defendant's liability to $50, no issue, except that of negligence, is presented. Wells Fargo & Co. *v.* Bell, 62 N. E. 1035, 65 O. St. 408.

Where, in an action against a carrier for loss of goods, plaintiff did not allege that the loss occurred through the carrier's negligence, and the carrier pleaded a release given in consideration of a lower freight rate by which it was agreed that the goods should be shipped at the owner's risk, the invalidity of such release to relieve the carrier from liability for loss resulting through its negligence was not in issue. Oregon, etc., R. Co. *v.* Blyth, 19 Wyo. 410, 118 Pac. 649, 119 Pac. 875, Ann. Cas. 1913 E, 288.

4. **Evidence admissible under pleadings.**—Witzler *v.* Collins, 70 Me. 290, 35 Am. Rep. 327.

5. Missouri Pac. R. Co. *v.* Smith, 84 Tex. 348, 19 S. W. 509.

6. Seaboard Air Line Railway *v.* Friedman, 128 Ga. 316, 57 S. E. 778.

that set out in the complaint.[7] Where, in an action to recover for injury to freight shipped from a foreign state, the carrier sets up a special contract, the consignee may show that the contract was void under the laws of the foreign state without pleading such laws.[8] And when the carrier offers evidence to prove that loss was occasioned by act of God, it is competent for plaintiff to set it aside by proof of negligence, or other facts establishing that the loss was not in fact proximately caused by the act of God, without specially pleading the same.[9]

Under General Issue or General Denial.—It may be shown under the general issue, in assumpsit against a common carrier, that the goods were destroyed by the public enemy.[10] Under the general denial the defendant may show that it did not receive and agree to transport the goods described in the petition.[11] Under the plea of non assumpsit, not verified as required by statute, defendant can not deny the execution of the bills of lading sued on; but evidence is admissible tending to show that the marks on the cotton, when received by defendant for shipment, answered the marks described in the bills of lading, and that the contract contained in them has been fully performed by defendant.[12]

Particular instances of evidence which have been held admissible[13] or

7. Hill *v.* Georgia, etc., Co., 43 S. C. 461, 21 S. E. 337.

8. Frasier *v.* Charlestown, etc., R. Co., 73 S. C. 140, 52 S. E. 964.

9. M. P. R. Co. *v.* Barnes, 2 Texas App. Civ. Cas., § 575.

10. **What may be shown under general issue.**—Southern Exp. Co. *v.* Womack, 48 Tenn. (1 Heisk.) 256.

11. **What may be shown under general denial.**—Plaintiff averred, that defendant "received and agreed" for a reward to transport a case of "plate" glass, which was broken through defendant's negligence. Under an answer denying each and every allegation, defendant introduced evidence that it gave a receipt for "one case of rough glass," on which receipt was plainly marked "The actual contents of packages must be stated on this receipt." Held, that such evidence was admissible under the general denial, as showing that defendant did not receive and agree to transport plate glass. Great Western Despatch, etc., Shore Line *v.* Glenny, 41 O. St. 166.

12. **Unverified plea.**—Hurd's Rev. St. Ill., p. 1075 (Prac. Act, § 34); St. Louis, etc., R. Co. *v.* Knight, 122 U. S. 79, 7 S. Ct. 1132, 30 L. Ed. 1077.

13. **Evidence admissible.**—An allegation that the defendant not only failed and refused to comply with its obligation, but converted to its own use the goods, was sufficient to admit proof not only of conversion, but of loss by negligent breach of the contract of transportation. M. P. R. Co. *v.* Barnes & Co., 2 Texas App. Civ. Cas., § 575.

In an action for damages to fruit from defective drainpipes in a refrigerator car, which plaintiff, the consignee, after the relations of carrier and warehouseman had terminated, had rented for the storage of fruit at the destination, a petition alleging defendant's negligence in failing to repair the pipes was sufficient to admit proof of any facts going to show the negligence, including the promise of defendant's agent to repair, though no such promise was mentioned in the pleadings; the duty to repair not depending on a specific promise, but arising from the fact that the pipes were defective after knowledge by defendant. Missouri, etc., R. Co. *v.* Tripis (Tex. Civ. App.), 117 S. W. 199.

That defendant not in control of road.—Plaintiff alleged the undertaking on the part of defendant to carry the goods safely, the negligence of the company, and consequent loss of the goods. Defendant specifically denied each allegation. Held, that evidence that the road was not in the control of defendant, but of a receiver, was admissible. Kansas Pac. R. Co. *v.* Searle, 11 Colo. 1, 16 Pac. 328.

That notice given of peculiar value of goods.—In an action for damages for shelling corn shipped in the car, plaintiff may show that he notified defendant that the corn shipped was for seed, and not for ordinary purposes, though such notice was not averred in the petition which alleged that the corn was of peculiar value for such purposes. Missouri Pac. R. Co. *v.* Nevin, 31 Kan. 385, 2 Pac. 795.

That goods lost by inevitable accident.—In an action against a common carrier for the loss of goods, it is error to exclude evidence for the purpose of proving that the goods were lost by inevitable accident, where the defense pleaded was that the goods were lost by inevitable accident. Neal *v.* Saunderson (Miss.), 2 Smedes & M. 572, 41 Am. Dec. 609.

That plaintiff claimed damages on different grounds.—Where, in an action against a carrier for damages to plaintiff's shipment of apples, the complaint charged defendant with negligence in closing the air vents in the cars, whereby

inadmissible [14] under pleadings are set out in the notes.

§ 1054. Matters to Be Proved.—Proof is not required of allegations of the class that are usually denominated impertinent, and which may be struck out as surplusage, but allegations that form the very substance of the contract of carriage must be proved.[15] In an action against a carrier, for a breach of his duty as such, although negligence be averred in the complaint, it is not necessary to show any positive misconduct, to sustain the averment.[16] In Kentucky by statute it is provided that allegations concerning the value or amount of damages, accompanied by a statement of facts showing an implied promise to pay

the apples were spoiled, defendants were properly permitted, on cross-examination of one of plaintiff's witnesses, to ask if plaintiff had not, at another trial, claimed damages on different grounds, without any special allegation in regard thereto in defendant's answer. Cane Hill, etc., Co. *v.* San Antonio, etc., R. Co. (Tex. Civ. App.), 95 S. W. 751.

Under general allegation of ownership.—In an action by a consignee of perishable freight against the carrier and consignor to recover for damages thereto, the consignee's title was in issue; the claim being that the property belonged to the consignor. In a supplemental petition, and by way of estoppel, the consignee alleged that he had presented a claim to the company, which it had refused to pay, saying that, if the goods were damaged, it was the fault of the carrier, from which the consignee must collect his claim, whereby the consignee was induced to sue the carrier. Held, that the facts so alleged were admissible under the consignee's general allegation of ownership. Texas Cent. R. Co. *v.* Dorsey, 70 S. W. 575, 30 Tex. Civ. App. 377.

Proof of custom.—Where the petition in an action for damages to butter, caused by being carried in an ordinary freight car, charges defendant with negligence in not taking proper precautions to preserve the butter, evidence of a custom among railroads of putting butter into cold storage, when refrigerator cars are not ready to receive it, is admissible. Beard *v.* Illinois Cent. R. Co., 79 Iowa 518, 44 N. W. 800, 7 L. R. A. 280, 18 Am. St. Rep. 381.

14. Evidence inadmissible.—On a complaint in two counts—First, on the written contract; and, second, on the carrier's common-law liability—evidence of a prior oral agreement is inadmissible, even under the second count, to vary the written contract. Snow *v.* Indiana, etc., R. Co., 109 Ind. 422, 9 N. E. 702.

In an action against a common carrier for the loss of freight stored in its warehouse, evidence that defendant owned the building in which the fire started that destroyed defendant's warehouse, and had leased it to a lard company' whose use of it made it dangerous to the warehouse, was inadmissible where defendant's negligence in that respect was not pleaded. Standard Milling Co. *v.* White Line Cent., etc., Co., 122 Mo. 258, 26 S. W. 704.

Plaintiff having ordered a boat which was shipped by defendant's steamship line, found when it arrived that it was seriously damaged, and refused to receive it; whereupon defendant agreed that if it did not replace the boat with a new or perfect one within a reasonable time, it would pay plaintiff the value of the damaged boat. It was held that evidence of cost of the boat was properly excluded, there was nothing in the pleadings to authorize the introduction of such evidence. The defendant could not introduce evidence of another and different contract than the one alleged by plaintiff unless it had itself alleged it. New York, etc., Steamship Co. *v.* Island City Boating, etc., Ass'n, 2 Tex. Civ. App. 490, 491, 21 S. W. 1007.

Bill of lading.—In assumpsit against a railroad company to recover goods alleged to have been lost by defendant, who had engaged as common carrier to transport the same for hire, where the declaration contains only the common counts, without regard to the bill of lading, and which contains valid exceptions against loss or damages by fire, etc., the bill is not admissible in evidence, not being applicable to any of the counts. Baltimore, etc., R. Co. *v.* Rathbone, 1 W. Va. 87, 88 Am. Dec. 664.

Loss of profits.—An averment that plaintiff was under contract did not warrant evidence of proof of loss of profits, in the absence of proof of knowledge by the carrier thereof at the time of shipment. Williamsport, etc., Lumber Co. *v.* Baltimore, etc., R. Co., 71 W. Va. 741, 77 S. E. 333.

15. Matters to be proved.—Stout *v.* Coffin, 28 Cal. 65, 68.

Where a complaint alleges that the carrier, warehouseman, and forwarding defendant received goods as a common merchant, to be kept by him and conveyed to a certain place and delivered to the plaintiff, no recovery can be had against the former for the loss of the goods, without proof that he contracted to carry them. Stout *v.* Coffin, 28 Cal. 65.

16. Merritt *v.* Earle, 31 Barb. 38, affirmed in 29 N. Y. 115, 86 Am. Dec. 292.

such value or damage, need not be proved unless traversed.[17]

§ 1055. Variance.—In an action against a carrier for loss of or damage to goods, the general rule applies that the proof must correspond to the allegations and that any material variance is fatal to plaintiff's recovery.[18] The plaintiff

17. **Kentucky statute.**—Civ. Code, § 126. Merchants' Dispatch Transp. Co. *v.* Hoskins, 19 Ky. L. Rep. 799, 41 S. W. 31, 44 S. W. 362.

A petition setting up the value of goods, and a written contract under which defendant agreed to carry and deliver them safely to plaintiff—the contract limiting defendant's responsibility for the goods in a number of particulars—contains an implied promise of defendant to be responsible for the goods, except under the contingencies guarded against, within Civ. Code, § 126. Merchants' Dispatch Transp. Co. *v.* Hoskins, 41 S. W. 31, 44 S. W. 362, 19 Ky. L. Rep. 799.

Formerly it was provided by Civ. Code 1854, § 153, that the value of the articles alleged to have been lost must be proved, though alleged in the declaration and not noticed in the answer. Huston *v.* Peters (Ky.) 1 Metc. 558.

18. **Material variance—Illustrations.**—In an action for damages for the loss of a chest shipped by defendant's railroad, where the allegation in the petition is that the company undertook to carry the chest to Camden, and the bill of lading introduced by plaintiff as evidence of the contract shows the agreement to have been to carry the chest to New York, the terminus of defendant's road, there is a fatal variance, and it is immaterial that on the margin of the bill of lading are the words, "To be shipped for Camden from New York." Jenneson *v.* Camden, etc., Transp. Co. (Pa.), 5 Clark 409.

In an action against a carrier for damages to plaintiff's shipment of apples, damages arising after arrival of the apples and before their delivery could not be recovered under an allegation of the petition that the apples were damaged on their arrival at destination. Cane Hill, etc., Orchard Co. *v.* San Antonio, etc., R. Co. (Tex. Civ. App.), 95 S. W. 751.

There was a variance between an allegation that the damage was caused from delay in transportation and proof that it arose from lack of refrigeration which was not alleged. Missouri, etc., R. Co. *v.* McLean, 55 Tex. Civ. App. 130, 118 S. W. 161.

Where the petition for injuries to goods alleges an express agreement of carriage, no recovery can be had, in the absence of proof of an express agreement. Texas, etc., R. Co. *v.* Rackusin (Tex. Civ. App.), 145 S. W. 734.

Immaterial variance.—In an action against a carrier for injuries sustained by cattle and hogs during transportation, it is not a material variance that they are described in the written contract of shipment as one car load of cattle; the action being treated as one of tort, and not as founded on the contract. Central R. Co. *v.* Pickett, 87 Ga. 734, 13 S. E. 750.

A variance in an action for damages to goods shipped in that the initials of the consignee on the waybill were different from those of plaintiff, though the surname was the same, was not necessarily material or fatal. Georgia, etc., R. Co. *v.* Barfield, 58 S. E. 236, 1 Ga. App. 203.

In a suit against a carrier, the declaration stated the goods to have been delivered to the defendant on board a schooner, to be safely carried from one port to another on Lake Erie, "the dangers of the seas only excepted." The exceptive clause contained in the bill of lading offered in evidence was, "The dangers of the lakes and rivers only excepted." Held, that the variance was immaterial. Harrison *v.* Hixson (Ind.), 4 Blackf. 226.

In an action against a common carrier to recover for goods lost by fire at the end of the transit, but before the liability of the carrier had terminated, the plaintiff alleged a verbal contract by the carrier to carry the goods, by an all-rail route, at an agreed rate, within a specified time. The defendant denied that he carried the goods under the contract as alleged, but admitted that he carried them under bills of lading not differing from the verbal contract as to rate or time, but which provided for carrying them over his usual route, not all-rail, and claimed exemption from the loss by the terms of such bills of lading. Held, that the answer was substantially in avoidance of liability for loss at the end of the transit; and therefore plaintiff was entitled to recover, unless the proof showed that such exemption was a part of the contract for shipment, and that the carrier was without fault, although the special provision as to an all-rail route had not been proved as alleged. Gaines *v.* Union Transp., etc., Co., 28 O. St. 418.

In an action against a carrier for loss of goods by fire after they were delivered to defendant, the petition alleged that the goods were accepted by defendant, and that it had agreed with plaintiff for valuable consideration to transport and deliver the same to their destination, naming the place to which each car was destined, and that defendant negligently delayed the transportation, whereby both the said cars were destroyed. The testimony, which was not objected to at the trial, showed that the cars were delivered to defendant, not for shipment to their

can not declare upon one cause of action and recover upon another.[19] So where the complaint declares on the common-law liability of the carrier if it appears that the shipment was made under a special contract or bill of lading, no recovery can be had.[20] And in an action against a carrier as such, no recovery can be had on evidence showing liability as a warehouseman.[21] Conditions in the contract of carriage limiting the carrier's liability should be stated, and where the declaration sets out merely an ordinary engagement of a common carrier, proof of a contract containing a special exception of the general liability of common carriers constitutes a fatal variance.[22] A suit for goods alleged to have been lost by a carrier out of shipments covering a season can not be maintained as a suit on special contract for a particular shipment, where the allegation as to the loss is general, and it can not be shown out of which shipment the loss occurred.[23]

ultimate destination, but for the sole purpose of being switched onto the transfer tracks of certain other companies, and that the consideration which defendant was to receive for this purpose was no part of the regular freight rate to be paid for the transportation of the cars, but certain fixed switching charges. The evidence further showed the delivery of the cars to defendant and their loss by fire. Held, that the suit was for negligent loss, and not for the failure to transport to points of destination, and that the allegations as to the places of destination were immaterial, and that the variance did not prevent judgment. Kansas, etc., R. Co. *v.* Rosebrook-Josey Grain Co. (Tex. Civ. App.), 114 S. W. 436.

A shipper sued a common carrier on its common-law liability for negligence resulting in injuries to the property shipped. In defense a written contract between the parties was shown, which was not, however, effective to vary the common-law liability of the carrier in the premises. Held, that the variance, if any, was not fatal. San Antonio, etc., R. Co. *v.* Dolan (Tex. Civ. App.), 85 S. W. 302.

Effect of failure to object.—In an action against a carrier, under a complaint which alleges that, before the arrival of the goods at their original destination, the consignee had left that place, and the carrier was directed to forward the goods from thence to him at another place, but that he neglected so to do, and acted so negligently that the goods were lost, evidence that, when the property had reached its destination, the consignee's agent demanded a delivery of it, which was refused by reason of the negligence of the defendant, will sustain a recovery against the carrier; there being no objection taken at the trial to the variance. Rosebrooks *v.* Dinsmore (N. Y.), 4 Abb. Dec. 118, 36 How. Prac. 138, 5 Abb. Prac., N. S., 59.

19. Harris *v.* Hannibal, etc., R. Co., 37 Mo. 307.

Where a plaintiff sets forth in his petition that the defendant, a railroad company, by failing to use ordinary care and diligence in the management of its railroad cars, caused the plaintiff to lose a negro slave who escaped from the company's custody during transportation, but the instructions are predicated on the ground of a contract, and the responsibilities of a bailee or common carrier are applied to the defendant, a judgment for the plaintiff will be set aside, although there was no demurrer to the petition. Harris *v.* Hannibal, etc., R. Co., 37 Mo. 307.

20. Baltimore, etc., R. Co. *v.* Ragsdale, 14 Ind. App. 406, 42 N. E. 1106; Snow *v.* Indiana, etc., R., Co., 109 Ind. 422, 9 N. E. 702.

21. St. Louis, etc., R. Co. *v.* Knight, 122 U. S. 79, 30 L. Ed. 1077, 7 S. Ct. 1132; Alabama, etc., R. Co. *v.* Grabfelder, 83 Ala. 200, 3 So. 432; Stout *v.* Coffin, 28 Cal. 65; Gratiot St. Warehouse Co. *v.* St. Louis, etc., R. Co., 221 Ill. 418, 77 N. E. 675.

Complaint alleging liability as carrier.—A complaint in assumpsit declaring on an undertaking to carry three boxes of goods to a certain point, there to be delivered, which was superseded by another undertaking to reship the goods and deliver them back to the shipper at another point, and alleging that the carrier negligently lost part of the goods during such reshipment, declares on a liability as carrier, and not as warehouseman. Aronson *v.* Cleveland, etc., R. Co., 70 Pa. 68.

22. Declaring on unconditional contract—proving contract limiting liability.—*Connecticut.*—Camp *v.* Hartford, etc., Steamboat Co., 43 Conn. 333.

Maryland.—Ferguson *v.* Cappeau (Md.), 6 Har. & J. 394.

New York.—Fairchild *v.* Slocum (N. Y.), 19 Wend. 329.

Ohio.—Davidson *v.* Graham, 2 O. St. 131.

Pennsylvania.—Stump *v.* Hutchinson, 11 Pa. 533.

West Virginia.—Baltimore, etc., Co. *v.* Rathbone, 1 W. Va. 87, 88 Am. Dec. 664; Baltimore, etc., R. Co. *v.* Skeels, 3 W. Va. 556.

23. Illinois Cent. R. Co. *v.* Gross (Miss), 22 So. 946.

Failure to Prove Allegation of Negligence.—Where, in a declaration in an action against a common carrier, averments which affect only the rule of care and negligence which should govern the case are inserted, the failure to prove the allegation of negligence is no variance, and the plaintiff may recover without such proof, provided the evidence shows a case under the general rule respecting the liability of carriers.[24]

Omission to Set Out Indorsement on Freight Receipt.—As matter printed on the back of the freight receipt is not a part of the contract, omitting to set out the indorsement in the declaration as part of the contract can give rise to no variance.[25]

A recovery based on evidence broader than the allegations of the petition can not be sustained.[26] So, under counts against a defendant merely as carrier or bailee of property, the shipper can not recover for losses resulting from the misrepresentation of the defendant's agent, whereby the plaintiff was induced to ship on a slow instead of a fast train.[27]

§§ 1056-1067. Evidence—§§ 1056-1060. Presumptions and Burden of Proof.[28]—§ 1056. Plaintiff's Burden of Proof in General.—Prima Facie Case.—In an action against a common carrier the plaintiff makes a prima facie case by proving that the goods were received by the carrier for transportation and that it failed to deliver them according to its undertaking.[29]

24. Failure to prove allegation of negligence.—Sargent *v.* Birchard, 43 Vt. 570.

25. Failure to set out indorsement.—Western Transp. Co. *v.* Newhall, 24 Ill. 466, 76 Am. Dec. 760.

26. Atchison *v.* Chicago, etc., R. Co., 80 Mo. 213.

27. Maslin *v.* Baltimore, etc., R. Co., 14 W. Va. 180, 35 Am. Rep. 748.

28. Presumptions and burden of proof.—Generally as to carriers by water.—See post, "Carriers by Water," Part VII.

In action against carrier of live stock.—See post, "Actions," chapter 20.

29. Prima facie case.—*United States.*—The E. M. Norton, 15 Fed. 686.

Alabama.—Southern R. Co. *v.* Levy, 144 Ala. 614, 39 So. 95, 17 R. R. R. 50, 40 Am. & Eng. R. Cas., N. S., 50; Mouton *v.* Louisville, etc., R. Co., 128 Ala. 537, 29 So. 602, 20 Am. & Eng. R. Cas., N. S., 673

Georgia.—Coweta County *v.* Central, etc., R. Co., 4 Ga. App. 94, 60 S. E. 1018.

Illinois.—Chesapeake, etc., R. Co. *v.* Radbourne, 52 Ill. App. 203.

Indiana.—Pennsylvania Co. *v.* Liveright, 14 Ind. App. 518, 41 N. E. 350, 43 N. E. 162.

Iowa.—Angle *v.* Mississippi, etc., R. Co., 18 Iowa 555.

Kentucky.—Adams Exp. Co. *v.* Crawford, 8 Ky. L. Rep. 619; Crawford *v.* Adams Exp. Co., 7 Ky. L. Rep. 362.

Maine.—Little *v.* Boston, etc., Railroad, 66 Me. 239; George *v.* Chicago, etc., R. Co., 57 Mo. App. 358; Bennett *v.* American Exp. Co., 83 Me. 236, 22 Atl. 159, 49 Am. & Eng. R. Cas. 56, 13 L. R. A. 33; Tarbox *v.* Eastern Steamboat Co., 50 Me. 339.

Massachusetts.—Cass *v.* Boston, etc., R. Co. (Mass.), 14 Allen 448.

Minnesota.—Witaker *v.* Chicago, etc., R. Co., 115 Minn. 140, 131 N. W. 1061.

Missouri.—Kirby *v.* Adams Exp. Co., 2 Mo. App. 369.

New York.—Merritt *v.* Earle, 31 Barb. 38; Westcott *v.* Fargo, 63 Barb. 349, 6 Lans. 319.

Pennsylvania.—Grogan *v.* Adams Exp. Co., 114 Pa. 523, 7 Atl. 134, 60 Am. Rep. 360; Adams Exp. Co. *v.* Holmes (Pa.), 9 Atl. 166; Bell *v.* Reed (Pa.), 4 Bin. 127, 5 Am. Dec. 398; Adams Exp. Co. *v.* Holmes (Pa.), 9 Atl. 166.

South Carolina.—McCall *v.* Brock (S. C.), 5 Strob. 119; Ewart *v.* Street (S. C.), 2 Bailey 157, 23 Am. Dec. 131; Smyrl *v.* Niolon (S. C.), 2 Bailey 421, 23 Am. Dec. 146.

Texas.—Missouri Pac. R. Co. *v.* Scott, 4 Tex. Civ. App. 76, 26 S. W. 239; Ryan & Co. *v.* M., K. & T. R. Co., 65 Tex. 13, 23 Am. & Eng. R. Cas. 703; Galveston, etc., R. Co. *v.* Horne, 69 Tex. 643, 9 S. W. 440; Missouri Pac. R. Co. *v.* China Mfg. Co., 79 Tex. 26, 14 S. W. 785; Galveston, etc., R. Co. *v.* Efron (Tex. Civ. App.), 38 S. W. 639; Head *v.* Pacific Exp. Co. (Tex. Civ. App.), 126 S. W. 682; Fentiman *v.* Atchison, etc., R. Co., 44 Tex. Civ. App. 455, 98 S. W. 939; Gulf, etc., R. Co. *v.* Roberts (Tex. Civ. App.), 85 S. W. 479; M. P. R. Co. *v.* Barnes & Co., 2 Texas App. Civ. Cas., § 575.

Virginia.—Murphy, etc., Co. *v.* Staton, 17 Va. (3 Munf.) 239.

Wisconsin.—Black *v.* Goodrich Transp. Co., 55 Wis. 319, 13 N. W. 244, 42 Am. Rep. 713.

Loss of money delivered to express company.—In an action against an express company for the loss of money de-

Delivery to Carrier.—In an action against a common carrier for loss or injury to goods, plaintiff must, in the first instance, show that they were delivered to the carrier.[30]

Nondelivery by Carrier.—The burden of showing that the carrier failed to deliver the goods to the consignee rests upon the plaintiff in an action for their loss;[31] but slight evidence will be sufficient to throw upon the carrier the burden

livered to it for transportation, it is only necessary for plaintiff to prove the delivery of the money to defendant and its failure to deliver it to the consignee. United States *v.* Pacific Exp. Co., 15 Fed. Rep. 867.

30. **Delivery to carrier.**—*United States.*—United States *v.* Pacific Exp. Co., 15 Fed. 867; Manning *v.* Hoover, Fed. Cas. No. 9044, Abb. Adm. 188; The Willie D. Sandhoval, 92 Fed. 286.

Alabama.—Louisville, etc., R. Co. *v.* Echols, 97 Ala. 556, 12 So. 304.

California.—Ringgold *v.* Haven, 1 Cal. 108.

Florida.—Savannah, etc., R. Co. *v.* Harris, 26 Fla. 148, 7 So. 544, 42 Am. & Eng. R. Cas. 457, 23 Am. St. Rep. 551.

Georgia.—Ocean Steamship Co. *v.* Wilder, 107 Ga. 220, 33 S. E. 179; Southern R. Co. *v.* Allison, 115 Ga. 635, 42 S. E. 15.

Indiana.—Fitzgerald *v.* Adams Exp. Co., 24 Ind. 447, 87 Am. Dec. 341.

Michigan.—Bonfiglio *v.* Lake Shore, etc., R. Co., 125 Mich. 476, 84 N. W. 722; Marquette *v.* Kirkwood, 45 Mich. 51, 7 N. W. 209, 40 Am. Rep. 453.

Minnesota.—Boehl *v.* Chicago, etc., R. Co., 44 Minn. 191, 46 N. W. 333.

New York.—Abrams *v.* Platt, 23 Misc. Rep. 637, 52 N. Y. S. 153; Canfield *v.* Baltimore, etc., R. Co., 46 N. Y. Super. Ct. Rep. 238; Jean, etc., Co. *v.* Flagg, 45 N. Y. Misc. Rep. 421.

South Carolina.—Hipp *v.* Southern R. Co., 50 S. C. 129, 27 S. E. 623.

Tennessee.—Illinois Cent. R. Co. *v.* Southern, etc., Co., 104 Tenn. 568, 58 S. W. 303, 50 L. R. A. 729.

Where a shipment consists of a number of articles, and the bill of lading issued by the carrier makes no further reference to the character or identity of the separate articles composing the shipment than the approximate weight of the shipment as a whole, the shipper should show, otherwise than by the bill of lading, that all of the articles contained in the shipment were in fact delivered by him to the carrier. Tryon Co. *v.* Hutchinson Lumber, etc., Co., 8 Ga. App. 643, 70 S. E. 87.

Essential to existence of contract.—In absence of proof that goods were delivered to defendant carrier, or delivered in good condition, any presumption that it received them goes behind its duty and enters into the origin of the contract for carriage, since there is nothing for the contract to act upon until the goods come into the carrier's charge and until that is proved, the contract is not. Marquette *v.* Kirkwood, 45 Mich. 51, 7 N. W. 209, 40 Am. Rep. 453.

Presumption where portion of freight received or delivered.—Where a lot of goods were shipped together and embraced in the same way-bill, and part of them were delivered to the consignee and part not, the presumption is that the entire lot were received by the carrier. Union Pac. R. Co. *v.* Hepner, 3 Colo. App. 313, 33 Pac. [illegible].

Where several packages are shipped by freight, and one bill of lading is issued, and the connecting carrier received a portion of the shipment, it will be presumed to have received it all. Bradley *v.* Northwestern R. Co., 57 S. E. 1101, 77 S. C. 317.

31. **Burden of proving nondelivery by carrier.**—*Alabama.*—Barron *v.* Mobile, etc., R. Co., 2 Ala. App. 555, 56 So. 862.

California.—Ringgold *v.* Haven, 1 Cal. 108.

Illinois.—Chicago, etc., R. Co. *v.* Dickinson, 74 Ill. 249.

Louisiana.—Silverman *v.* St. Louis, etc., R. Co., 51 La. Ann. 1785, 26 So. 447.

Maine.—See Tarbox *v.* Eastern Steamboat Co., 50 Me. 339.

Maryland.—Baltimore, etc., R. Co. *v.* Schumacher, 29 Md. 168, 96 Am. Dec. 510.

Mississippi.—Chicago, etc., R. Co. *v.* Provine, 61 Miss. 288.

New York.—Hirsch *v.* Hudson River Line, 26 Misc. Rep. 823, 57 N. Y. S. 272; Place *v.* Union Exp. Co. (N. Y.), 2 Hilt. 19.

North Dakota.—Morris *v.* Minneapolis, etc., R. Co. (N. Dak.), 141 N. W. 204.

Ohio.—See Zeigler *v.* Freeman, 12 O. C. C., N. S., 122, 21-31 O. C. D. 342; Klunk *v.* Hocking Valley R. Co., 74 O. St. 125, 135, 77 N. E. 752.

Pennsylvania.—Pennsylvania R. Co. *v.* Raiordon, 119 Pa. 577, 13 Atl. 324, 4 Am. St. Rep. 670.

Texas.—Southern Pac. R. Co. *v.* Philipson (Tex. Civ. App.), 39 S. W. 958; Texas, etc., R. Co. *v.* Capper, 38 Tex. Civ. App. 61, 84 S. W. 694; Missouri Pac. R. Co. *v.* Douglas & Sons, 2 Texas App. Civ. Cas., § 28.

Vermont.—Day Catlin & Co. *v.* Ridley, 16 Vt. 48, 42 Am. Dec. 489.

In a shipper's action for a shortage in a shipment of grain upon arrival at destination, the burden was on plaintiff to prove that a portion of the grain received

of showing delivery to the consignee.[32] The fact that the goods have not arrived at destination after the lapse of a reasonable time warrants the inference that they have been lost.[33] Where it was shown that it was the custom of defendant carrier to notify consignees of arrivals of their goods, the presumption is that, if the goods had arrived, notice would have been given.[34] Proof by the plaintiff that the defendants' boat was capsized, and the property damaged, and a portion thereof carried to a place out of their course, throws the burden of proof on the defendants to account for the property.[35]

Delivery to Carrier in Good Condition.—It is held that the plaintiff must introduce evidence tending to prove that the property was in an undamaged condition when received by the carrier and was in a damaged condition when delivered to the consignee.[36] Where the plaintiff proves a bill of lading for transportation to destination, and a delivery of certain goods there a month afterwards in a damaged condition, in the absence of contrary evidence the presumption is that they were the goods covered by the bill.[37]

Actionable Negligence.—The plaintiff is not ordinarily required to show, in the first instance, that the injury upon which the action is based was due to negligence for which the carrier is responsible.[38] But it is held where

by defendant was not delivered. Morris *v.* Minneapolis, etc., R. Co. (N. Dak.), 141 N. W. 204.

Contra.—Wheeler *v.* St. Louis, etc., R. Co., 3 Mo. App. 358.

32. Slight evidence sufficient.—The Falcon, Fed. Cas. No. 4617, 3 Blatchf. 64; Woodbury *v.* Frink, 14 Ill. 279; Chicago, etc., R. Co. *v.* Dickinson, 74 Ill. 249; Chicago, etc., R. Co. *v.* Provine, 61 Miss. 288.

33. Southern R. Co. *v.* Montag, 1 Ga. App. 649, 57 S. E. 933.

34. Jonesville Mfg. Co. *v.* Southern Railway, 58 S. E. 422, 77 S. C. 480.

35. Day Catlin & Co. *v.* Ridley, 16 Vt. 48, 42 Am. Dec. 489.

36. Delivery to carrier in good condition.—*United States.*—The Vincenzo, 10 Ben. 228, Fed. Cas. No. 16,948.

Connecticut.—Mears *v.* New York, etc., R. Co., 75 Conn. 171, 52 Atl. 610, 56 L. R. A. 884, 96 Am. St. Rep. 192.

Illinois.—Chicago, etc., R. Co. *v.* Benjamin, 63 Ill. 283.

Louisiana.—See Silverman *v.* St. Louis, etc., R. Co., 51 La. Ann. 1785, 26 So. 447.

Maine.—Little *v.* Boston, etc., Railroad, 66 Me. 239.

Michigan.—Marquette *v.* Kirkwood, 45 Mich. 51, 7 N. W. 209, 40 Am. Rep. 453; Marquette *v.* Langton, 32 Mich. 251.

Minnesota.—Paterson *v.* Chicago, etc., R. Co., 95 Minn. 57, 103 N. W. 621.

New York.—Brooks *v.* Dinsmore, 6 N. Y. St. Rep. 281; Hirsch *v.* Hudson River Line, 26 Misc. Rep. 823, 57 N. Y. S. 272; Smith *v.* New York Cent. R. Co., 43 Barb. 225, affirmed in 41 N. Y. 620; Thyll *v.* New York, etc., R. Co., 84 N. Y. S. 175.

Oregon.—Goodman *v.* Oregon, R., etc., Co., 22 Ore. 14, 28 Pac. 894.

Texas.—Bath *v.* Houston, etc., R. Co., 34 Tex. Civ. App. 234, 78 S. W. 993; Missouri Pac. R. Co. *v.* Breeding, 4 Texas App. Civ. Cas., § 154, 16 S. W. 184; Texas, etc., R. Co. *v.* Capper, 38 Tex. Civ. App. 61, 84 S. W. 694. See I. & G. N. R. Co. *v.* Blanton, etc., Co., 63 Tex. 109. See post, "Condition of Goods When Received by Carrier," § 1058.

Wet hay.—In an action against a railroad company for negligence in carrying hay, whereby it was wet and damaged, it is essential for plaintiff to show the condition of the hay when delivered to the company. Marquette *v.* Langton, 2 Mich. 251.

Bill of lading endorsed "weight and contents unknown."—In Wentworth *v.* Realm, 16 La. Ann. 18, it appeared that a shipper took a bill of lading with the endorsement upon the margin "weight and contents unknown," and on the arrival of the vessel at New Orleans the freight was condemned by the Port Warden to be sold as damaged goods. It was held that, under such bill of lading, the common carrier has complied with its contract when it has delivered the box containing the goods externally in good order and condition at the time of the proof rests upon the consignee to show that the contents of the box were in good order and condition at the time of the shipment.

Where the defense is that the goods reached destination in good condition it is immaterial whether the burden of proving that the goods were in good condition when they were reached by the carrier is placed on plaintiff or defendant. St. Louis, etc., R. Co. *v.* Musgrove, 153 Ala. 274, 45 So. 229.

37. Identity of goods.—Barrow *v.* Phillco, 14 Tex. 345.

38. Westcott *v.* Fargo (N. Y.), 63 Barb. 349, 6 Lans. 319; Tarbox *v.* Eastern Steamboat Co., 50 Me. 339; Doan *v.* St. Louis, etc., R. Co., 38 Mo. App. 408.

the suit for loss of or injury to freight is based upon the alleged negligence of the carrier, or that of its employees, plaintiff has the burden of proving such allegation,[39] and that the negligence alleged was the proximate cause of the injury.[40]

Value of Lost Freight.—Plaintiff, in an action to recover the value of freight lost while in the defendant carrier's custody, must prove its value.[41] In the absence of all evidence to the contrary, the law will presume that bank notes delivered to a common carrier for transportation are worth their nominal value.[42] The carrier's refusal to count money delivered to it in a sealed package for carriage, at the request of the consignee, will not create any presumption against it as to the amount contained in the package.[43]

That Defendant a Common Carrier.—In an action to recover against defendant as a common carrier, plaintiff must prove that such was defendant's status.[44]

39. Suit based on alleged negligence.—*United States.*—The New Orleans, 26 Fed. 44.

Alabama.—Frederick *v.* Louisville, etc., R. Co., 31 So. 968, 133 Ala. 486.

Iowa.—Taft Co. *v.* American Exp. Co., 133 Iowa 522, 110 N. W. 897, 10 L. R. A., N. S., 614.

Michigan.—George *v.* Chicago, etc., R. Co., 108 Mich. 572, 66 N. W. 479.

Minnesota.—Roehl *v.* Chicago, etc., R. Co., 44 Minn. 191, 46 N. W. 333.

Missouri.—George *v.* Chicago, etc., R. Co., 57 Mo. App. 358; Farr *v.* Adams Exp. Co., 100 Mo. App. 574, 75 S. W. 183; Ficklin *v.* Wabash R. Co., 117 Mo. App. 211, 93 S. W. 861.

Ohio.—Childs *v.* Little Miami R. Co., 1 Cin. R. 480, 13 O. Dec. 672.

Vermont.—Mann *v.* Birchard, 40 Vt. 326, 94 Am. Dec. 398.

Where, in an action against a common carrier for the value of goods delivered for transportation, plaintiff alleges that the goods were destroyed by fire through the negligence of the defendant, and the defendant denies any negligence on its part, and alleges that the goods were destroyed while in its warehouse after having been transported to their destination, the burden is upon the plaintiff to show defendant's negligence. Denton *v.* Chicago, etc., R. Co., 52 Iowa 161, 2 N. W. 1093, 35 Am. Rep. 263.

40. Peterson *v.* Chicago, etc., R. Co., 19 S. Dak. 122, 102 N. W. 595, 18 R. R. R. 48, 41 Am. & Eng. R. Cas., N. S., 48.

41. Value of lost freight. — *United States.*—The E. M. Norton, 15 Fed. 686; Seller *v.* Pacific, Fed. Cas. No. 12,644, Deady 17, 1 Or. 409.

Georgia.—Purcell *v.* Southern Exp. Co., 34 Ga. 315; Richmond, etc., R. Co. *v.* White, 88 Ga. 805, 15 S. E. 802.

Illinois.—Adams Exp. Co. *v.* Stettaners, 61 Ill. 184, 14 Am. Rep. 57.

Iowa.—Cownie Glove *v.* Merchants', etc., Transp. Co., 130 Iowa 327, 106 N. W. 749, 4 L. R. A., N. S., 1060, 114 Am. St. Rep. 419.

Louisiana.—Chapman *v.* New Orleans, etc., R. Co., 21 La. Ann. 224, 99 Am. Dec. 722; Kirk *v.* Folsom, 23 La. Ann. 584.

Maine.—Little *v.* Boston, etc., Railroad, 66 Me. 239.

Missouri.—Grier *v.* St. Louis, etc., R. Co., 108 Mo. App. 565, 84 S. W. 158; Kirby *v.* Adams Exp. Co., 2 Mo. App. 369; Lupe *v.* Atlantic, etc., R. Co., 3 Mo. App. 77; McFall *v.* Wabash R. Co., 117 Mo. App. 477, 94 S. W. 570.

Texas.—Houston, etc., R. Co. *v.* McGlosson, 1 Texas App. Civ. Cas., § 224.

Failure to take bill of lading—Amount of grain.—A shipper of a cargo of grain, who takes no bill of lading from the carrier, is bound, in an action brought for short delivery, to prove the amount delivered by him to the carrier to be transported. Manning *v.* Hoover, Fed. Cas. No. 9044, Abb. Adm. 188.

42. Value of bank notes.—Harris *v.* Moody, 17 N. Y. Super. Ct. 210; S. C., 30 N. Y. 266, 86 Am. Dec. 375.

43. Money in sealed package—Failure of carrier to count.—Fitzgerald *v.* Adams Exp. Co., 24 Ind. 447, 87 Am. Dec. 341.

44. That defendant a common carrier.—*United States.*—Citizens' Bank *v.* Nantucket Steamboat Co., 2 Story 16, Fed. Cas. No. 2730; The Westminister, 62 C. C. A. 406, 127 Fed. 680.

Alabama.—South, etc., R. Co. *v.* Wood, 71 Ala. 215, 46 Am. Rep. 309, 16 Am. & Eng. R. Cas. 267.

California.—Ringgold *v.* Haven, 1 Cal 108.

Texas.—Missouri Pac. R. Co. *v.* Douglas, 2 Texas App. Civ. Cas., § 28.

Carrier's liability beyond its own line.—Where it is sought to extend the liability of a carrier beyond its own line, the burden is upon the party seeking to establish such liability to show an express contract by which the company becomes liable, as common carrier, beyond its own route; and such contract must be shown by real and satisfactory evidence. Taylor *v.* Maine Cent. R. Co., 87 Me. 299, 32 Atl. 905, 2 Am. & Eng. R. Cas., N. S., 614.

Payment or Tender of Charges.—It is not necessary to prove payment or tender of freight charges, as where goods are delivered to a common carrier for transportation a promise to pay the charges will be presumed.[45]

When Loss or Injury Occurred.—Where a shipment delivered to the carrier in good order is received in bad order, it is presumed that it was damaged while in the carrier's possession,[46] whether such damage was open or concealed.[47] And where goods are delivered securely boxed to a common carrier for carriage, and a part only are delivered by it to the consignee, the presumption is that the loss occurred while the goods were in the carrier's possession.[48]

Loss during Common-Carrier Possession.—Some of the cases seem to hold that the burden is upon plaintiff to show that the loss of or injury to freight complained of occurred while the carrier was responsible for the property as a common carrier.[49] But there is a holding that the burden is on the carrier to show that its liability as common carrier had ceased before the loss occurred.[50]

Where Shipper Travels in Charge of Shipment.—Ordinarily, the burden of proof is on the carrier to account for freight lost during transit, but in case of a special contract under which the shipper accompanies the shipment for the purpose of taking charge of it en route, the burden is upon the shipper of proving that a loss was the result of the carrier's negligence.[51]

45. **Payment of freight.**—Winne *v.* Illinois Cent. R. Co., 31 Iowa 583.

46. **When damage occurred.**—Savannah, etc., R. Co. *v.* Hoffmayer, 75 Ga. 410; Kelly *v.* Southern Railway, 84 S. C. 249, 66 S. E. 198.

Where a carrier, instead of delivering a trunk at the port as required by its contract, without giving the owner an opportunity to examine or take charge of it for the purpose of entry, sent it to the customhouse, and, after entry and release, forwarded it by an express company to the owner's address, it had the burden of showing that a loss therefrom did not occur while it was in its actual custody. Judgment (1902) 79 N. Y. S. 1103, 77 App. Div. 469, affirmed. Fasy *v.* International Nav. Co., 70 N. E. 1098, 177 N. Y. 591.

47. Savannah, etc., R. Co. *v.* Hoffmayer, 75 Ga. 410.

48. **Only portion of freight delivered.**—Rice *v.* Indianapolis, etc., R. Co., 3 Mo. App. 27. See Central, etc., R. Co. *v.* Mercantile Claim Co., 8 Ga. App. 17, 68 S. E. 492.

49. **Loss during common-carrier possession.**—South, etc., R. Co. *v.* Wood, 71 Ala. 215, 46 Am. Rep. 309, 16 Am. & Eng. R. Cas. 267. Compare South, etc., R. Co. *v.* Wood, 66 Ala. 167, 41 Am. Rep. 749, holding that the burden is upon the defendant to prove that its liability had terminated before the injury occurred. Atchison, etc., R. Co. *v.* Richardson, 53 Kan. 157, 35 Pac. 1114; Nave *v.* Pacific Exp. Co., 19 Mo. App. 563; Missouri Pac. R. Co. *v.* Heath (Tex. Civ. App.), 18 S. W. 477; Texas, etc., R. Co. *v.* Llano Live Stock Co. (Tex. Civ. App.), 33 S. W. 748; Missouri Pac. R. Co. *v.* Breeding, 4 Texas App. Civ. Cas., § 154, 16 S. W. 184; Curtis *v.* Chicago, etc., R. Co., 18 Wis. 312.

Burden of showing loss of freight between time of delivery to carrier and time car left on side track.—In South, etc., R. Co. *v.* Wood, 71 Ala. 215, 16 Am. St. Rep. 309, 16 Am. & Eng. R. Cas. 267, an action against a railroad company, as a common carrier, to recover for its failure to deliver corn received by it for transportation to a designated point on its road, at which there was neither depot or agent, it appeared that the corn was received by the company and transported in good condition to the place of destination, and the car in which it was shipped, was placed on a side track by the consignee, where it remained for several days, with no one in charge of it or protecting it; and that when the corn was taken from the car, there was a deficiency in quantity. It was held that the burden of proof was on the plaintiff to show that the loss occurred between the time when the corn was received by the company, and the time when the car containing it was left on the side track, that being, under the facts of this case, a delivery, and not on the defendant to show that the loss occurred after the car was placed on the side track.

50. Peoria, etc., R. Co. *v.* United States Rolling Stock Co., 136 Ill. 643, 27 N. E. 59, 29 Am. St. Rep. 348.

51. **Where shipper travels in charge of shipment.**—*Alabama.*—Alabama, etc., R. Co. *v.* Thomas, 89 Ala. 234, 7 So. 762; Central R., etc., Co. *v.* Smith, 85 Ala. 47, 4 So. 708.

Arkansas.—St. Louis, etc., R. Co. *v.* Weakly, 50 Ark. 397, 8 S. W. 134.

California.—Ringgold *v.* Haven, 1 Cal. 108.

Iowa.—Winne *v.* Illinois Cent. R. Co., 31 Iowa 583; Winn *v.* American Exp. Co., 149 Iowa 259, 128 N. W. 663.

Kentucky.—Louisville, etc., R. Co. *v.* Hedger (Ky.), 9 Bush 645.

Missouri.—Clark *v.* St. Louis, etc., R.

Upon What Line Goods Injured.—Where the evidence fails to show that the goods were ever out of the carrier's possession, it is not necessary for the shipper to show upon what line of railway the goods were injured.[52]

§ 1057. Defendant's Burden of Proof in General.—Carrier Must Prove Itself Not Responsible.—After it has been shown that the goods were delivered to the carrier in good condition and that it failed to deliver them or delivered them in a damaged condition, the presumption is that the carrier was negligent and it has the burden of proving that the loss or damage resulted from some cause for which it was not responsible,[53] such as an act of God[54] or the

Co., 64 Mo. 440; McBeath *v.* Wabash, etc., R. Co., 20 Mo. App. 445.

Pennsylvania.—Pennsylvania R. Co. *v.* Raiordon, 119 Pa. 577, 13 Atl. 324, 4 Am. St. Rep. 670.

Texas.—Texas, etc., R. Co. *v.* Arnold, 16 Tex. Civ. App. 74, 40 S. W. 829.

Wisconsin.—Doty *v.* Strong (Wis.), 1 Pin. 313.

Contra.—In Louisiana it is held that the carrier must show that the injury was occasioned by the fault of a shipper or his servants. Roberts *v.* Riley, 15 La. Ann. 103, 77 Am. Dec. 183.

Where defense of special contract not available.—In an action against a buyer for the price of bananas sold, in which defendant filed a cross action against plaintiff and the carriers, the carriers alleged in defense that any damage to the fruit was caused by the negligence of the shipper's agent who accompanied the shipment under the contract between the shipper and the consignee, but no such contract between the carriers and the shipper was alleged. Held that, since no benefit could inure to the carriers from the contract between the shipper and consignee, the burden was not on the consignee to show that any damage to the fruit was not the result of the messenger's negligence. Kemendo *v.* Fruit Dispatch Co. (Tex. Civ. App.), 131 S. W. 73.

52. Upon what line goods injured.—Yoakum *v.* Dunn, 1 Tex. Civ. App. 524, 526, 21 S. W. 411.

53. Burden on carrier to prove itself not responsible.—*United States.*—Argo Steamship Co. *v.* Seago, 42 C. C. A. 128, 101 Fed. 999; Ceballos *v.* Warren Adams, 20 C. C. A. 486, 74 Fed. 413; Choate *v.* Crowninshield, Fed. Cas. No. 2,691, 3 Cliff. 184; Cumming *v.* Barracouta, 40 Fed. 498; Hudson River Lighterage Co. *v.* Wheeler Condenser, etc., Co., 93 Fed. 374; The Jefferson, 31 Fed. 498; Kerr *v.* Norman, Fed. Cas. No. 7,732, 1 Newb. 525; The Martha, Fed. Cas. No. 9,145, Olc. 140; The Queen, 78 Fed. 155; The Samuel E. Spring, 29 Fed. 397; The Staincliffe, 15 Fed. 350; Turner *v.* Black Warrior, Fed. Cas. No. 14,253, 1 McAll. 181; United States *v.* Pacific Exp. Co., 15 Fed. 867; The Westminster, 62 C. C. A. 406, 127 Fed. 680; The Wildcroft, 126 Fed. 229; The Williams Taber (U. S.), 2 Ben. 329; The Zone, Fed. Cas. No. 18, 220 22 L. Rep. 725, 2 Spr. 19; Western Mfg. Co. *v.* Guiding Star, 37 Fed. 641.

Alabama.—Alabama, etc., R. Co. *v.* Little, 71 Ala. 611, 12 Am. & Eng. R. Cas. 37; Louisville, etc., R. Co. *v.* Cowherd, 120 Ala. 51, 23 So. 793; Monton *v.* Louisville, etc., R. Co., 20 Am. & Eng. R. Cas., N. S., 673, 29 So. 602, 128 Ala. 537; Richmond, etc., R. Co. *v.* Trousdale & Sons, 99 Ala. 389, 13 So. 23, 42 Am. St. Rep. 41; Nashville, etc., R. Co. *v.* Parker, 123 Ala. 683, 27 So. 323; South, etc., R. Co. *v.* Wilson, 78 Ala. 587, 27 Am. & Eng. R. Cas. 41; South, etc., R. Co. *v.* Wood, 66 Ala. 167, 41 Am. Rep. 749; Barron *v.* Mobile, etc., R. Co., 2 Ala. App. 555, 56 So. 862; Atlantic, etc., R. Co. *v.* Rice, 169 Ala. 265, 52 So. 918, 29 L. R. A., N. S., 1214.

Arkansas.—St. Louis, etc., R. Co. *v.* Birdwell, 72 Ark. 502, 82 S. W. 835; St. Louis, etc., R. Co. *v.* Coolidge, 73 Ark. 112, 83 S. W. 333.

California.—Agnew *v.* Contra Costa, 27 Cal. 426, 87 Am. Dec. 87; Jackson *v.* Sacramento Valley R. Co., 23 Cal. 268; Wilson *v.* California Cent. R. Co., 94 Cal. 166, 29 Pac. 861, 17 L. R. A. 685.

Colorado.—Union Pac. R. Co. *v.* Stupeck, 50 Colo. 151, 114 Pac. 646.

Connecticut.—Boies *v.* Hartford, etc., R. Co., 37 Conn. 272, 9 Am. Rep. 347; Mears *v.* New York, etc., R. Co., 75 Conn. 171, 52 Atl. 610, 56 L. R. A. 884, 96 Am. St. Rep. 192.

Florida.—Savannah, etc., R. Co. *v.* Harris, 26 Fla. 148, 7 So. 544, 42 Am. & Eng. R. Cas. 457, 23 Am. St. Rep. 551.

Georgia.—Charlotte, etc., R. Co. *v.* Wooten, 87 Ga. 203, 13 S. E. 509; Central R., etc., Co. *v.* Hasselkus, 91 Ga. 382, 17 S. E. 838, 44 Am. St. Rep. 37; Cohen *v.* Southern Exp. Co., 53 Ga. 128; Columbus, etc., R. Co. *v.* Kennedy, 78 Ga. 646, 3 S. E. 267; Cooper *v.* Raleigh, etc., R. Co., 110 Ga. 659, 18 Am. & Eng. R. Cas., N. S., 412, 36 S. E. 240; Georgia R., etc., Co. *v.* Keener, 93 Ga. 808, 21 S. E. 287, 44 Am. St. Rep. 197; Purcell *v.* Southern Exp. Co., 34 Ga. 315; Richmond, etc., R. Co. *v.* White, 88 Ga. 805, 15 S. E. 802; Van

54. Act of God.—See ante, "Act of God," §§ 990-994.

Winkle & Co. *v.* South Carolina R. Co., 38 Ga. 32.

Civil Code, 1895, § 2264, provides that in cases of loss the presumption of law is against the carrier. Southern R. Co. *v.* Montag, 1 Ga. App. 649, 650, 57 S. E. 933.

The provision includes also injury or damage to the goods. Central R., etc., Co. *v.* Hasselkus, 91 Ga. 382, 17 S. E. 838, 44 Am. St. Rep. 37.

Illinois.—Adams Exp. Co. *v.* Stettaners, 61 Ill. 184, 14 Am. Rep. 57; Baltimore, etc., R. Co. *v.* Fox, 113 Ill. App. 180; Burke *v.* United States Exp. Co., 87 Ill. App. 505; Chesapeake, etc., R. Co. *v.* Radbourne, 52 Ill. App. 203; Nonotuck Silk Co. *v.* Adams Exp. Co., 166 Ill. App. 519, judgment affirmed 99 N. E. 893, 256 Ill. 66.

Indiana.—Pennsylvania Co. *v.* Liveright, 14 Ind. App. 518, 41 N. E. 350, 43 N. E. 162; Pittsburg, etc., R. Co. *v.* Racer, 5 Ind. App. 209, 31 N. E. 853; Toledo, etc., R. Co. *v.* Tapp, 6 Ind. App. 304, 33 N. E. 462; Pittsburg, etc., R. Co. *v.* Mitchell (Ind.), 91 N. E. 735.

Iowa.—Angle *v.* Mississippi, etc., R. Co, 18 Iowa 555; Grieve *v.* Illinois Cent. R. Co., 104 Iowa 659, 74 N. W. 192; McCoy *v.* K. & D. M. R. Co., 44 Iowa 424; Mitchell *v.* United States Exp. Co., 46 Iowa 214; St. Clair *v.* Chicago, etc., R. Co., 80 Iowa 304, 45 N. W. 570; Tiller *v.* Chicago, etc., R. Co. (Iowa), 24 R. R. R. 581, 47 Am. & Eng. R. Cas., N. S., 581, 112 N. W. 631; Winne *v.* Illinois Cent. R. Co., 31 Iowa 583; Cownie Glove Co. *v.* Merchants', etc., Transp. Co., 106 N. W. 749, 130 Iowa 327, 114 Am. St. Rep. 419, 4 L. R. A., N. S., 1060.

Kentucky.—Adams Exp. Co. *v.* Walker, 119 Ky. 121, 83 S. W. 106, 47 Am. & Eng. R. Cas., N. S., 145, 24 R. R. R. 145, 67 L. R. A. 412, 26 Ky. L. Rep. 1025; Ohio, etc., R. Co. *v.* Tabor, 98 Ky. 503, 32 S. W. 168, 36 S. W. 18, 17 Ky. L. Rep. 568, 1411, 34 L. R. A. 685; Louisville, etc., R. Co. *v.* Bourne, 15 Ky. L. Rep. 445.

Louisiana.—Chapman *v.* New Orleans, etc., R. Co., 21 La. Ann. 224, 99 Am. Dec. 722; Grieff *v.* Switzer, 11 La. Ann. 324; Lehman, etc., Co. *v.* Morgan's, etc., Steamship Co., 115 La. 1, 38 So. 873, 18 R. R. R. 559, 41 Am. & Eng. R. Cas., N. S., 559; Price, etc., Co. *v.* The Uriel, 10 La. Ann. 413; Roberts *v.* Riley, 15 La. Ann. 103, 77 Am. Dec. 183; Silverman *v.* St. Louis, etc., R. Co., 51 La. Ann. 1785, 26 So. 447; Tardos *v.* Toulon, 14 La. Ann. 429, 74 Am. Dec. 435; Mahon *v.* The Olive Branch, 18 La. Ann. 107; Kirk *v.* Folsom, 23 La. Ann. 584.

Maine.—Bennett *v.* American Exp. Co., 83 Me. 236, 22 Atl. 159, 49 Am. & Eng. R. Cas. 56, 13 L. R. A. 33; Dow *v.* Portland Steam Packet Co., 84 Me. 490, 24 Atl. 945; Little *v.* Boston, etc., Railroad, 66 Me. 239; Tarbox *v.* Eastern Steamboat Co., 50 Me. 339.

Massachusetts.—Alden *v.* Pearson (Mass.), 3 Gray 342; Cass *v.* Boston, etc., R. Co. (Mass.), 14 Allen 448; Lewis *v.* Smith, 107 Mass. 334.

Michigan.—Wallace *v.* Lake Shore, etc., R. Co., 133 Mich. 633, 95 N. W. 750.

Minnesota.—Boehl *v.* Chicago, etc., R. Co., 44 Minn. 191, 46 N. W. 333; Hinton *v.* Eastern R. Co., 72 Minn. 339, 75 N. W. 373; Hull *v.* Chicago, etc., R. Co., 41 Minn. 510, 43 N. W. 391, 5 L. R. A. 587, 16 Am. St. Rep. 722; Lindsley *v.* Chicago, etc., R. Co., 36 Minn. 539, 33 N. W. 7, 1 Am. St. Rep. 692; Shriver *v.* Sioux City, etc., R. Co., 24 Minn. 506, 31 Am. Rep. 353; Powers Mercantile Co. *v.* Wells Fargo & Co., 93 Minn. 143, 12 R. R. R. 504, 35 Am. & Eng. R. Cas., N. S., 504, 100 N. W. 735; Ammon *v.* Illinois Cent. R. Co., 120 Minn. 438, 139 N. W. 819; Brennisen *v.* Pennsylvania R. Co., 101 Minn. 120, 111 N. W. 945; Fockens *v.* United States Exp. Co., 99 Minn. 404, 109 N. W. 834. Compare Jones *v.* Minneapolis, etc., R. Co., 94 Minn. 229, 97 N. W. 893, 103 Am. St. Rep. 507. See Whitaker *v.* Chicago, etc., R. Co., 115 Minn. 140, 131 N. W. 1061, holding that the burden remains on plaintiff throughout the trial to show carrier's negligence, and he is simply aided by the presumption of negligence arising from the delivery to the carrier in sound condition and receipt by consignee in damaged condition.

Mississippi.—Burnham *v.* Alabama, etc., R. Co., 81 Miss. 46, 32 So. 912; Chicago, etc., R. Co. *v.* Abels, 60 Miss. 1017, 21 Am. & Eng. R. Cas. 105; Gardner *v.* New Orleans, etc., R. Co., 78 Miss. 640, 29 So. 469; Southern Exp. Co. *v.* Seide, 67 Miss. 609, 7 So. 547.

Missouri.—Anderson *v.* Atchison, etc., R. Co., 93 Mo. App. 677, 3 R. R. R. 42, 26 Am. & Eng. R. Cas., N. S., 42, 67 S. W. 707; Hill *v.* Sturgeon, 28 Mo. 323; Ketchum *v.* American Merchants' Union Exp. Co., 52 Mo. 390; Kirby *v.* Adams Exp. Co., 2 Mo. App. 369; McFall *v.* Wabash R. Co., 117 Mo. App. 477, 94 S. W. 570; Nave *v.* Pacific Exp. Co., 19 Mo. App. 563; Read *v.* St. Louis, etc., R. Co., 60 Mo. 199; Rice *v.* Indianapolis, etc., R. Co., 3 Mo. App. 27; Wolf *v.* American Exp. Co., 43 Mo. 421, 97 Am. Dec. 406.

New Hampshire.—Hall *v.* Cheney, 36 N. H. 26; Shelden *v.* Robinson, 7 N. H. 157, 26 Am. Dec. 726.

New Jersey.—Hunt *v.* Morris, 12 N. J. L. 175, 22 Am. Dec. 300.

New York.—Blum *v.* Monahan, 73 N. Y. S. 162, 36 Misc. Rep. 179; Bowden *v.* Fargo, 2 Misc. Rep. 551, 22 N. Y. S. 889; Brooks *v.* Dinsmore, 3 N. Y. St. Rep. 587; Campe *v.* Weir, 28 Misc. Rep. 243, 58 N. Y. S. 1082; Canfield *v.* Baltimore, etc., R. Co., 93 N. Y. 532, 16 Am. & Eng. R. Cas. 152, 45 Am. Rep. 268; Colt *v.* McMechen (N. Y.), 6 Johns. 160, 5 Am. Dec. 200; Fairfax *v.* New York, etc., R. Co., 67 N. Y. 11; Heyl *v.* Inman Steamship Co. (N.

Y.), 14 Hun 564; Hoffbert *v.* Bumford, 88 N. Y. S. 940; Hutkoff *v.* Pennsylvania R. Co., 29 Misc. Rep. 770, 61 N. Y. S. 254; Merritt *v.* Earle, 31 Barb. 38; Moore *v.* Evans (N. Y.), 14 Barb. 524; Morris *v.* Wier, 20 Misc. Rep. 586, 46 N. Y. S. 413; Park *v.* Preston, 108 N. Y. 434, 15 N. E. 705; Schmidt *v.* Blood (N. Y.), 9 Wend. 268, 24 Am. Dec. 143; Sejalon *v.* Woolverton, 31 Misc. Rep. 752, 64 N. Y. S. 48; Steers *v.* Liverpool, etc., Steamship Co., 57 N. Y. 1, 15 Am. Rep. 453; Strong *v.* Long Island R. Co., 91 App. Div. 442, 86 N. Y. S. 911; Trimble *v.* New York, etc., R. Co., 39 App. Div. 403, 57 N. Y. S. 437; Wheeler *v.* Oceanic Steam Nav. Co., 125 N. Y. 155, 26 N. E. 248, 21 Am. St. Rep. 729, 3 Silvernail Ct. App. 276.

North Carolina.—Everett *v.* Norfolk, etc., R. Co., 138 N. C. 68, 50 S. E. 557, 1 L. R. A., N. S., 985, 18 R. R. R. 551, 41 Am. & Eng. R. Cas., N. S., 551; Hinkle *v.* Southern R. Co., 126 N. C. 932, 36 S. E. 348, 78 Am. St. Rep. 685; Mitchell *v.* Carolina Cent. R. Co., 124 N. C. 236, 32 S. E. 671, 44 L. R. A. 515; Parker *v.* Atlantic, etc., R. Co., 133 N. C. 335, 45 S. E. 658, 63 L. R. A. 827.

Ohio.—Bowman *v.* Hilton, 11 O. 303; Union Mut. Ins. Co. *v.* Indianapolis, etc., R. Co., 1 Disn. 480, 12 O. Dec. 745; United States Exp. Co. *v.* Bachman, 2 Cin. R. 251, 13 O. Dec. 885, affirmed in 28 O. St. 144; Graham & Co. *v.* Davis & Co., 4 O. St. 362; Davidson *v.* Graham, 2 O. St. 131; Welsh *v.* Pittsburg, etc., R. Co., 10 O. St. 65, 75 Am. Dec. 490; Pennsylvania Co. *v.* Yoder, 1 O. C. C., N. S., 283, 15-25 O. C. D. 32; Fatman & Co. *v.* Cincinnati, etc., R. Co., 2 Disn. 248, 13 O. Dec. 152.

Oklahoma.—Patterson *v.* Missouri, etc., R. Co., 24 Okla. 747, 104 Pac. 31.

Pennsylvania.—Adams Exp. Co. *v.* Holmes (Pa.), 9 Atl. 166; American Exp. Co. *v.* Sands, 55 Pa. 140; Buck *v.* Pennsylvania R. Co., 150 Pa. 170, 24 Atl. 678, 30 Am. St. Rep. 800; Bell *v.* Reed (Pa.), 4 Bin. 127, 5 Am. Dec. 398; Empire Transp. Co. *v.* Wamsutta Oil Refin., etc., Co., 63 Pa. 14, 3 Am. Rep. 515; Grogan *v.* Adams Exp. Co., 114 Pa. 523, 7 Atl. 134, 60 Am. Rep. 360; Hays *v.* Kennedy, 3 Grant 351; Menner *v.* Delaware, etc., Canal Co., 7 Pa. Super. Ct. 135; New York Cent. etc., R. Co. *v.* Eby (Pa.), 12 Atl. 482; Pennsylvania R. Co. *v.* Miller, 87 Pa. 577, 13 Atl. 324, 4 Am. St. Rep. 670; Phœnix Pot-Works *v.* Pittsburgh, etc., R. Co., 139 Pa. 284, 20 Atl. 1058; Haugh, etc., Transfer Co., 72 Atl. 516, 223 Pa. 148, 21 L. R. A., N. S., 188.

South Carolina.—Ewart *v.* Street (S. C.), 2 Bailey 421; Johnstone *v.* Richmond, etc., R. Co., 39 S. C. 55, 17 S. E. 512; McCall *v.* Brock (S. C.), 5 Strob. 119; Smyrl *v.* Niolon (S. C.), 2 Bailey 421, 23 Am. Dec. 146; Wallingford *v.* Columbia, etc., R. Co., 26 S. C. 258, 2 S. E. 19; Wardlow *v.* South Carolina R. Co. (S. C.), 11 Rich. L. 337; McCord *v.* Atlantic, etc., R. Co., 57 S. E. 477, 76 S. C. 469.

Tennessee.—Deming *v.* Merchants' Cotton Press, etc., Co., 90 Tenn. 306, 17 S. W. 89, 13 L. R. A. 518; Louisville, etc., R. Co. *v.* Wynn, 88 Tenn. 320, 14 S. W. 311; Merchants' Dispatch Transp. Co. *v.* Bloch, 86 Tenn. 392, 6 S. W. 881, 6 Am. St. Rep. 847; Nashville, etc., R. Co. *v.* Stone, 112 Tenn. 348, 79 S. W. 1031, 105 Am. St. Rep. 955, 18 R. R. R. 88, 41 Am. & Eng. R. Cas., N. S., 88; Pennsylvania R. Co. *v.* Naive, 112 Tenn. 239, 79 S. W. 124, 64 L. R. A. 443, 12 R. R. R. 126, 35 Am. & Eng. R. Cas., N. S., 126; Turney *v.* Wilson, 15 Tenn. (7 Yerg.) 340, 27 Am. Dec. 515; Gordon *v.* Buchanan, 13 Tenn. (5 Yerg.) 72; Southern Exp. Co. *v.* Womack, 48 Tenn. (1 Heisk.) 256, 267; Craig *v.* Childress, 7 Tenn. (Peck.) 270, 14 Am. Dec. 751; Railroad *v.* Mitchell, 58 Tenn. (11 Heisk.) 400.

Texas.—Atchison, etc., R. Co. *v.* Bryan (Tex. Civ. App.), 37 S. W. 234; Bibb *v.* Missouri, etc., R. Co., 37 Tex. Civ. App. 508, 84 S. W. 663; Fire Ass'n *v.* Leob, 25 Tex. Civ. App. 24, 59 S. W. 617; Ft. Worth, etc., R. Co. *v.* Shanley, 36 Tex. Civ. App. 291, 81 S. W. 1014; Gulf, etc., R. Co. *v.* Browne, 27 Tex. Civ. App. 437, 66 S. W. 341; Missouri Pac. R. Co. *v.* Scott, 4 Tex. Civ. App. 76, 26 S. W. 239; Ryan *v.* M., K. & T. R. Co., 65 Tex. 13, 23 Am. & Eng. R. Cas., 703; Galveston, etc., R. Co. *v.* Ball, 80 Tex. 602, 16 S. W. 441; Gulf, etc., R. Co. *v.* Zimmerman & Co., 81 Tex. 605, 17 S. W. 239; St. Louis, etc., R. Co. *v.* McIntyre, 36 Tex. Civ. App. 399, 82 S. W. 346; Gulf, etc., R. Co. *v.* Trawick, 80 Tex. 270, 275, 15 S. W. 568, 18 S. W. 948; Fentiman *v.* Atchison, etc., R. Co., 98 S. W. 939, 44 Tex. Civ. App. 455; Galveston, etc., R. Co. *v.* Horne, 69 Tex. 643, 9 S. W. 440; Missouri Pac. R. Co. *v.* China Mfg. Co., 79 Tex. 26, 14 S. W. 785.

Vermont.—Day Catlin & Co. *v.* Ridley, 16 Vt. 48, 42 Am. Dec. 489; Mann *v.* Bichard, 40 Vt. 326, 94 Am. Dec. 398.

Virginia.—Murphy, etc., Co. *v.* Staton, 17 Va. (3 Munf.) 239; Norfolk, etc., R. Co. *v.* Reeves, 97 Va. 284, 33 S. E. 606.

West Virginia.—Baltimore, etc., R. Co. *v.* Morehead, 5 W. Va. 293; Bosley *v.* Baltimore, etc., R. Co., 54 W. Va. 563, 10 R. R. R. 458, 33 Am. & Eng. R. Cas., N. S., 458, 46 S. E. 613.

Wisconsin.—Black *v.* Goodrich Transp. Co., 55 Wis. 319, 13 N. W. 244, 42 Am. Rep. 713; Browning *v.* Goodrich Transp. Co., 78 Wis. 391, 47 N. W. 428, 10 L. R. A. 415, 23 Am. St. Rep. 414; Lamb *v.* Chicago, etc., R. Co., 101 Wis. 138, 76 N. W. 1123; Kirst *v.* Milwaukee, etc., R. Co., 46 Wis. 489, 1 N. W. 89; Uber *v.* Chicago, etc., R. Co., 151 Wis. 431, 138 N. W. 57; Struebing Co. *v.* Merchants' Des-

patch Transp. Co., 142 Wis. 657, 126 N. W. 21.

Rationale of rule.—Where goods are delivered into the possession of a common carrier, it must show that it used due care for their preservation, for the shipper is not supposed to be present during the transportation, and the goods are in the custody of the carrier and its agents. Tardos *v.* Toulon, 14 La. Ann. 429, 74 Am. Dec. 435.

It is safest to presume that a carrier is negligent who refuses to show to the contrary, when, if such is the fact, he has but to call his own agents to the witness stand. His employees are with the goods during the whole time they are under his charge, by day and by night. They are with them at all places, whether at depots or when the train is at its greatest speed, or the ship is in mid-ocean. The owner is presumptively absent. Ryan & Co. *v.* M., K. & T. R. Co., 65 Tex. 13, 20, 23 Am. & Eng. R. Cas. 703.

If goods were properly prepared for shipment and loaded under the carrier's inspection, and accepted by it for shipment, it is presumed that any damage to the goods shown when unloaded at destination would not have occurred if they were transported and stored with due care. Carleton *v.* Union Transfer, etc., Co., 121 N. Y. S. 997, 137 App. Div. 225, affirming 117 N. Y. S. 1021, 164 Misc. Rep. 51.

Freight not accounted for.—Where the carrier not only fails to deliver freight, but also fails or refuses to give an account as to the manner of its loss, it must be presumed that such cause was the carrier's negligence. Alabama, etc., R. Co. *v.* Little, 71 Ala. 611, 12 Am. & Eng. R. Cas. 37; Adams Exp. Co. *v.* Walker, 119 Ky. 121, 24 R. R. R. 145, 47 Am. & Eng. R. Cas., N. S., 145, 83 S. W. 106, 26 Ky. L. Rep. 1025, 67 L. R. A. 412; George *v.* Chicago, etc., R. Co., 57 Mo. App. 358; Shelden *v.* Robinson, 7 N. H. 157, 26 Am. Dec. 726; Canfield *v.* Baltimore, etc., R. Co., 93 N. Y. 532, 16 Am. & Eng. R. Cas. 152, 45 Am. Rep. 268; Black *v.* Goodrich Transp. Co., 55 Wis. 319, 13 N. W. 244, 42 Am. Rep. 713.

Goods damaged by wet.—A common carrier has the burden of proving that damage to goods in its custody by wet was not due to its negligence. But a jury need not infer negligence on the part of a common carrier from the mere fact that goods are wet while in its possession, but such fact may be considered in connection with the other evidence in the case. Mears *v.* New York, etc., R. Co., 75 Conn. 171, 52 Atl. 610, 56 L. R. A. 884, 96 Am. St. Rep. 192. See The Queen, 78 Fed. 155.

Steamboat run into river bank.—Negligence must be presumed where it is shown that the steamboat carrying the freight, when proceeding quietly up the river, was run into the bank by the pilot so hard as to knock a hole into the bottom of the boat big enough to sink it, and no reason was shown for the accident. Louisville, etc., Packet Co. *v.* Smith, 22 Ky. L. Rep. 1323, 60 S. W. 524.

Breakage.—Proof of breakage of goods in the hands of the common carrier makes a prima facie case of negligence against the carrier, and the burden of proof is thrown on it to show due care and diligence. Ketchum *v.* American Merchants' Union Exp. Co., 52 Mo. 390. See Heck *v.* Missouri Pac. R. Co., 51 Mo. App. 532 (machine delivered with legs broken); Bowden *v.* Fargo, 2 Misc. Rep. 551, 22 N. Y. S. 889 (safely packed piano broken); Campe *v.* Weir, 28 Misc. Rep. 243, 58 N. Y. S. 1082 (both violin and crate broken); Hutkoff *v.* Pennsylvania R. Co., 29 Misc. Rep. 770, 61 N. Y. S. 254, affirmed in 30 Misc. Rep. 802, 63 N. Y. S. 198 (case of plate glass shattered—other cases in good condition); Hudson River Lighterage Co. *v.* Wheeler Condenser, etc., Co., 93 Fed. 374 (casting found cracked).

Goods stolen at destination.—Where goods are stolen, while in the possession of a carrier after arriving at their destination, in the absence of evidence to the contrary, it is presumed that the loss resulted from the carrier's negligence. Georgia R., etc., Co. *v.* Keener, 93 Ga. 808, 21 S. E. 287, 44 Am. St. Rep. 197.

Failure to account for portion of freight saved from freshet.—In Charlotte, etc., R. Co. *v.* Wooten, 87 Ga. 203, 13 S. E. 509, it is held that though goods saved by a common carrier from the perils of a freshet were damaged by passing through the freshet, yet if some saved are unaccounted for, and it is not shown that the freshet caused their loss, or what their condition was when they disappeared, a recovery for their value may be had against the carrier without deducting anything for conjectural damage which they may have sustained by reason of the freshet before their loss occurred.

Goods carried at "owner's risk."—When loss or damage to goods occurs while they are in the possession of the carrier, though carried at "owner's risk," the carrier must make at least a prima facie showing that it was not caused by its negligence. South, etc., R. Co. *v.* Wilson, 78 Ala. 587, 27 Am. & Eng. R. Cas. 41.

Accidents which usually result from negligence.—When a thing is shown to have been under the management of the defendant common carrier or its servant, and the accident in which the loss or injury to freight occurred is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords, reasonable evidence, in the absence of explanation, that such accident was due to negligence

public enemy,[55] the fault of the owner,[56] inherent infirmities in the goods,[57] act or mandate of public authority,[58] or to some cause against which the carrier had relieved itself from liability by special contract.[59] And it is held that this rule applies to perishable goods,[60] and to carriers using the means of transportation of others.[61] The fact that an article was not properly packed or loaded when delivered to the carrier does not exempt it from making proof that a loss alleged was not attributable to its negligence.[62]

The Carmack Amendment to the Interstate Commerce Act re-established the common-law rule that, when freight is delivered to a carrier in good condition and reaches its destination in bad condition, the presumption of negligence arises throwing the burden on the carrier of exonerating itself from lia-

for which the carrier is responsible. Rintoul *v.* New York Cent., etc., R. Co., 21 Blatchf. 439, 17 Fed. 905.

Occurrence of accident during performance of act not ordinarily cause of injury.—Where plaintiff showed that his goods were injured while in the possession of defendant railroad company as bailee for hire, and that defendant, when applied to by him, gave no account of the injury except merely that it occurred while defendant's agents were performing an act which, when performed with due care, does not ordinarily cause such an injury, the jury were warranted in inferring negligence for which defendant was responsible. Kirst *v.* Milwaukee, etc., R. Co., 46 Wis. 489, 1 N. W. 89. See Gulf, etc., R. Co. *v.* Zimmerman & Co., 81 Tex. 605, 608, 17 S. W. 239.

Failure to find box delivered to carrier—No evidence introduced by carrier.—In Morley *v.* Eastern Exp. Co., 116 Mass. 97, it appeared that A. delivered a box containing his property to a common carrier at one town to be carried to another town; that the box was directed to B. at the later town; that A. had made efforts to find the box, but had not been able to do so; that he had made inquiries at both towns at the offices of the carrier; that he had not seen the box since he sent it; and that he had inquired of B. about the box. It was held that this was not sufficient evidence to maintain an action by A. against the carrier for the value of the box and its contents, although the carrier put in no evidence.

Presumption of negligence not overcome.—Where holly in shipment was injured by freezing, the presumption of negligence of a carrier was not overcome by evidence that defendants accepted the car as loaded by plaintiff and transported it without delay to its destination. Pressley Co. *v.* Illinois Cent. R. Co. (Minn.), 136 N. W. 11.

Statutory presumption strengthened.—In an action against a railroad company for damages to stock carried by it, the defendant's evidence merely consisted of a showing, from the appearance of the car in which the stock had been carried, that the train had not been derailed. No employee in charge of the train was produced to account for the injury. Held, that the statutory presumption of the company's negligence, under Code, § 3033 was strengthened by the presumption of fact arising from this failure to produce material witnesses. Columbus, etc., R. Co. *v.* Kennedy, 78 Ga. 646, 3 S. E. 267.

55. Act of public enemy.—See ante, "Acts of Public Enemy," §§ 995-997.

56. Fault of owner.—See ante, "Fault of Shipper or Owner," §§ 998-1002.

57. Infirmities in goods.—See ante, "Inherent Infirmities of Goods," § 1003.

58. Act of public authority.—See ante, "Act or Mandate of Public Authority," § 1004.

59. Contract relieving from liability.—See post, "Limitation of Liability," chapter 14.

It is incumbent on a carrier having different contracts, by one of which it insures the goods, and by the other the shipper assumes all risk, to show the contract actually made. McIntosh *v.* Oregon R., etc., Co., 105 Pac. 66, 17 Idaho 100.

60. Perishable Goods.—*Georgia.*—Central R., etc., Co. *v.* Hasselkus, 91 Ga. 382, 17 S. E. 838, 44 Am. St. Rep. 37.

Minnesota.—Fockens *v.* United States Exp. Co., 99 Minn. 404, 109 N. W. 834; Brennisen *v.* Pennsylvania R. Co., 101 Minn. 120, 111 N. W. 945.

South Carolina.—Trowbridge *v.* Charleston, etc., R. Co., 90 S. C. 183, 73 S. E. 78.

Evidence that vegetables when loaded were in good condition, that their character was such that if properly handled they would have reached destination without damage, and that they in fact arrived in a damaged condition, is presumptive evidence of negligence, which was not rebutted by proof of proper icing, etc. Ammon *v.* Illinois Cent. R. Co., 139 N. W. 819, 120 Minn. 438.

61. Carrier using means of carriage of others.—Chesapeake, etc., R. Co. *v.* Radbourne, 52 Ill. App. 203.

62. Article improperly packed.—Union Exp. Co. *v.* Graham, 26 O. St. 595; McCarthy *v.* Louisville, etc., R. Co., 102 Ala. 193, 14 So. 370, 48 Am. St. Rep. 29.

bility.[63] The amendment does not invalidate a state law fixing the onus of proof.[64]

Act of God or Public Enemy.—Where the carrier claims that the loss or injury was the result of an act of God or the public enemy, the burden rests upon it of proving such defense.[65] Some of the cases hold that after the carrier has shown in defense that the cause of the loss of or injury to the freight is one covered by a common-law exemption, the plaintiff must introduce evidence to prove that the proximate or contributing cause of the damage sustained was the carrier's negligence.[66] Other cases hold that the burden rests upon the carrier of proving not only that the cause so set up as a defense was the proximate one, but that it was guilty of no negligence, of commission or omission, with respect to protecting the freight.[67]

63. Carmack amendment.—Act June 29, 1906, c. 3591, § 7, 34 Stat. 593 (U. S. Comp. St. Supp. 1911, p. 1307), amending Act Feb. 4, 1887, c. 104, § 20, 24 Stat. 386 (U. S. Comp. St. 1901, p. 3169); Chicago, etc., R. Co. *v.* Scott (Tex. Civ. App.), 156 S. W. 294.

64. National Rice Mill. Co. *v.* New Orleans, etc., R. Co., 132 La. 615, 61 So. 708.

65. Act of God or public enemy.—*United States.*—Memphis, etc., R. Co. *v.* Reeves (U. S.), 10 Wall. 176, 19 L. Ed. 909; The Majestic, 17 S. Ct. 597, 166 U. S. 375, 41 L. Ed. 1039, reversing 60 Fed. 624, 9 C. C. A. 161, 23 L. R. A. 746, modifying 56 Fed. 244.

California.—Jackson *v.* Sacramento Valley R. Co., 23 Cal. 268.

Georgia.—Central R., etc., Co. *v.* Hasselkus, 91 Ga. 382, 17 S. E. 838, 44 Am. St. Rep. 317; Richmond, etc., R. Co. *v.* White, 88 Ga. 805, 15 S. E. 802; Central, etc., R. Co. *v.* Hall, 124 Ga. 322, 52 S. E. 679, 4 L. R. A., N. S., 898, 110 Am. St. Rep. 170; Van Winkle & Co. *v.* South Carolina R. Co., 38 Ga. 32; Atlanta, etc., R. Co. *v.* Jacobs' Pharmacy Co., 135 Ga. 113, 68 S. E. 1039; Wallace *v.* Sanders, 42 Ga. 486. See Civil Code, § 2265.

Louisiana.—Lehman, etc., Co. *v.* Morgan's, etc., Steamship Co., 115 La. 1, 38 So. 873, 18 R. R. R. 559, 41 Am. & Eng. R. Cas., N. S., 559.

Missouri.—Davis *v.* Wabash, etc., R. Co., 89 Mo. 340, 1 S. W. 327.

Oklahoma.—Chicago, etc., R. Co. *v.* Logan, etc., Co., 105 Pac. 343, 23 Okla. 707, 29 L. R. A., N. S., 663.

Pennsylvania.—Hays *v.* Kennedy, 41 Pa. 378, 80 Am. Dec. 627; Leonard *v.* Hendrickson, 18 Pa. 40, 55 Am. Dec. 587.

South Carolina.—Ferguson *v.* Southern Railway, 91 S. C. 61, 74 S. E. 129.

Texas.—Ryan & Co. *v.* M., K. & T. R. Co., 65 Tex. 13, 23 Am. & Eng. R. Cas. 703.

Virginia.—Murphy, etc., Co. *v.* Station, 17 Va. (3 Munf.) 239.

West Virginia.—Baltimore, etc., R. Co. *v.* Morehead, 5 W. Va. 293.

66. Burden of proving carrier's negligence proximate cause.—*United States.*—Memphis, etc., R. Co. *v.* Reeves (U. S.), 10 Wall. 176, 19 L. Ed. 909.

Alabama.—See Western R. Co. *v.* Harwell, 91 Ala. 340, 8 So. 649.

Iowa.—Mitchell *v.* United States Exp. Co., 46 Iowa 214.

Louisiana.—Kirk *v.* Folsom, 23 La. Ann. 584.

Minnesota.—Jones *v.* Minneapolis, etc., R. Co., 91 Minn. 229, 97 N. W. 893, 103 Am. St. Rep. 507.

Missouri.—Davis *v.* Wabash, etc., R. Co., 89 Mo. 340, 1 S. W. 327.

New York.—Lambert *v.* Benner, 31 N. Y. Super. Ct. 665. See Russell Mfg. Co. *v.* New Haven Steamboat Co., 50 N. Y. 121.

Oklahoma.—Armstrong, etc., Co. *v.* Illinois Cent. R. Co., 26 Okla. 352, 109 Pac. 216, 29 L. R. A., N. S., 671.

Texas.—M. P. R. Co. *v.* Barnes & Co., 2 Texas App. Civ. Cas., § 575.

67. *California.*—Jackson *v.* Sacremento Valley R. Co., 23 Cal. 268.

Georgia.—Central, etc., R. Co. *v.* Hall, 124 Ga. 322, 52 S. E. 679, 4 L. R. A., N. S., 898, 110 Am. St. Rep. 170; Central R., etc., Co. *v.* Hasselkus, 91 Ga. 382, 17 S. E. 838, 44 Am. St. Rep. 37; Savannah, etc., R. Co. *v.* Commercial Guano Co., 103 Ga. 590, 30 S. E. 555; Richmond, etc., R. Co. *v.* White, 88 Ga. 805, 15 S. E. 802; Van Winkle & Co. *v.* South Carolina R. Co., 38 Ga. 32; Wallace *v.* Sanders, 50 Ga. 134.

Civil Code, § 2265, provides that in order for a carrier to avail itself of the act of God as an excuse, it must establish not only that the act of God or excepted fact ultimately occasioned the loss, but that his own negligence did not contribute thereto. Atlanta, etc., R. Co. *v.* Jacobs' Pharmacy Co., 135 Ga. 113, 68 S. E. 1039.

Indiana.—See Pittsburg, etc., R. Co. *v.* Mitchell (Ind.), 91 N. E. 735.

Louisiana.—So provided by Rev. Civ. Code, art. 2754. Jean Webre *v.* Kendall, etc., Co., 12 La. Ann. 446; National Rice Mill. Co. *v.* New Orleans, etc., R. Co., 132 La. 615, 61 So. 708.

Pennsylvania.—Hays *v.* Kennedy, 41 Pa. 378, 80 Am. Dec. 627; Leonard *v.* Hendrickson, 18 Pa. 40, 55 Am. Dec. 587.

South Carolina.—Ferguson *v.* Southern Railway, 91 S. C. 61, 74 S. E. 129.

Texas.—Ryan & Co. *v.* M., K. & T. R.

Contributory Negligence of Shipper.—A defendant carrier has the burden of establishing that the alleged contributory negligence of the shipper, in loading or marking, or otherwise affecting the freight, was the proximate cause of the damage sued for,[68] though the shipper accompanied the goods.[69] It is only when the loss is shown to have originated from an act of the shipper, and he seeks to hold the carrier on the ground of its subsequent negligence in not avoiding or lessening the damage, that he has the burden of proof.[70]

Inherent Infirmities of Goods.—Where a common carrier, sued for loss or damage to goods, defends on the ground that the loss or damage accrued through an inherent vice or natural deterioration of the goods, the burden of establishing such defense is upon defendant.[71]

Where a carrier relies upon a special custom to relieve it from liabil-

Co., 65 Tex. 13, 23 Am. & Eng. R. Cas. 703..

West Virginia.—Baltimore, etc, R. Co. *v.* Morehead, 5 W. Va. 293.

After it is shown by dates of shipment that the goods had time to arrive and be delivered to the consignee before a flood occurred which destroyed them, the burden of showing what part of the goods, if any, did not arrive within that time, is upon the carrier. And then the burden is on the consignee to show the damage done to those which did arrive, and the amount thereof, in order to recover on the ground of negligence in not giving notice of arrival, or in not delivering application. Richmond, etc., R. Co. *v.* White, 8 Ga. 805, 15 S. E. 802.

Injury occasioned by natural dangers incident to navigation.—It is not sufficient for the carrier to render it probable that the injury to freight was occasioned by one of the natural dangers incident to the navigation. It is incumbent upon him to show that he has used diligence and proper skill to avoid the accident, and that it was unavoidable. Jean Webre *v.* Kendall, etc., Co., 12 La. Ann. 446.

Possibility of loss notwithstanding utmost endeavors of crew and absence of negligence.—In the case of loss of freight in transit, the onus probandi lies on the carrier, to exempt him also from the liability, and it is not enough for him to prove, where the goods are carried by water, that the navigation is attended with so much danger that a loss may happen notwithstanding the utmost endeavors of the watchman and crew to prevent it and that the person conducting the boat possesses competent skill, has used due diligence, and provided hands of sufficient strength and experience to assist him. Murphy, etc., Co. *v.* Staton, 17 Va. (3 Munf.) 239.

Act of public enemy.—In an action against a railroad company for the loss of goods, where there was evidence tending to show that they were taken from the car by the Confederate army, the burden was on the company to show that they exercised due care to save the goods after they were thrown out of the car or the existence of such circumstances as prevented its exercise. Wallace *v.* Sanders, 42 Ga. 486.

68. Contributory negligence of shipper.—*Alabama.*—See Atlantic, etc., R. Co. *v.* Rice, 169 Ala. 265, 52 So. 918, 29 L. R. A., N. S., 1214.

Arkansas.—St. Louis, etc., R. Co. *v.* Pape, 100 Ark. 269, 140 S. W. 265.

Georgia.—The carrier must negative contributory negligence on its own part. Atlanta, etc., R. Co. *v.* Jacobs' Pharmacy Co., 135 Ga. 113, 68 S. E. 1039.

Ohio.—Lake Shore, etc., R. Co. *v.* Gibson, 8 O. C. C., N. S., 345, 18-28 C. C. D. 538. See Union Exp. Co. *v.* Graham, 26 O. St. 595.

Pennsylvania.—Menner *v.* Delaware, etc., Canal Co., 7 Pa. Super. Ct. 135.

Texas.—Belcher *v.* Missouri, etc., R. Co., 92 Tex. 593, 50 S. W. 559; Kemendo *v.* Fruit Dispatch Co. (Tex. Civ. App.), 131 S. W. 73. See Texas, etc., R. Co. *v.* Capper, 38 Tex. Civ. App. 61, 84 S. W. 694.

Freight carried on deck—Shipper's consent.—The ship-owner has the burden of proving that the shipper consented that his property might be carried on deck. So held in The Peytona, Fed. Cas. No. 11,058, 2 Curt. 21.

Possibility of plaintiff preventing damage.—The burden of proof is upon a defendant carrier to show that any part of the damages occasioned to plaintiff by defendant's negligence with respect to the freight could have been prevented by plaintiff, and what part, if any. Belcher *v.* Missouri, etc., R. Co., 92 Tex. 593, 50 S. W. 559.

69. St. Louis, etc., R. Co. *v.* Pape, 100 Ark. 269, 140 S. W. 265.

70. St. Louis, etc., R. Co. *v.* Pape, 100 Ark. 269, 140 S. W. 265.

71. Inherent infirmities of goods.—Southern Exp. Co. *v.* Bailey, 7 Ga. App. 331, 66 S. E. 960.

In an action against a carrier for delivering a barrel of cider with the head burst, leaving only a small quantity of cider in the barrel, where the only defense relied on was that the cider had fermented, the burden of proving the defense is on the carrier. Green *v.* Indianapolis, etc., R. Co., 56 Mo. 556.

ity for loss of goods to which it is otherwise subject, the burden of proof is upon it to establish such custom.[72]

Burden as to Means of Transportation.—If freight be lost or injured in an accident happening to or by reason of that which a common carrier has provided for the transportation, the law presumes the accident to be due to the want of proper care and puts upon the carrier the burden of relieving itself from that presumption.[73] Where grain shipped on defendant's cars is found on delivery to be damaged by water, the presumption that the cars were in good order, raised by evidence that the cars of defendant were universally inspected, as provided by the rules of the company, and would have been condemned if in bad order, is not conclusive, but the question of their condition is for the jury.[74] Loss of the door to a car containing freight, unexplained, raises a presumption of negligence on the part of the carrier.[75]

Shipper's Knowledge of Defects in Vehicles.—Where the owner of property to be transported makes his own selection of the carrier's vehicles, as to defects not plainly apparent or visible, the burden is on the carrier to show that such owner had knowledge of them, in an action for damages to the property caused by such defects.[76]

As to Tracing Lost Freight.—An express company has it within its power to trace goods and discover where they were lost, while it is not so with the shipper, and, therefore, the burden is upon the company to show that it has used reasonable care, to trace lost goods.[77]

Delivery in Good Condition.—On proof that a carrier received goods in good condition, the burden rests on defendant to show delivery in the same condition to the next carrier or to the consignee; such proof being within its power.[78]

That Plaintiff Received Voucher as Payment.—Where plaintiff received and retained a voucher from a carrier in payment for certain damaged goods but did not take steps to collect the same, the burden was on the carrier to show that plaintiff received the voucher as payment.[79]

Presumption from Failure to Introduce Evidence.—Where the evidence tends to fix a liability on the carrier who has it in its power to offer evidence of all the facts as they existed, and rebut the inferences which the proof tends to establish, and it refuses to offer such proof, the natural inference is that the proof, if produced, instead of rebutting, would support, the inference against it.[80]

72. Special custom.—Irish *v.* Milwaukee, etc., R. Co., 19 Minn. 376 Gil. 323, 18 Am. Rep. 340.

73. Burden as to means of transportation.—Pennsylvania R. Co. *v.* Raiordon, 119 Pa. 577, 13 Atl. 324, 4 Am. St. Rep. 670; Trace *v.* Pennsylvania R. Co., 26 Pa. Super. Ct. 466.

Burden of proving subsequent accident beyond carrier's control.—When the car is defective at the time of injury to freight transported in it, and the defect contributed to the injury, the onus is on the carrier to disprove negligence, and it must show that the defect arose, not from the insufficiency of the vehicle, but from some subsequent accident beyond its control. Empire Transp. Co. *v.* Wamsutta Oil Refin., etc., Co., 63 Pa. 14, 3 Am. Rep. 515.

Unseaworthiness of vessel.—See post, "Carriers by Water," Part VII.

74. Searles *v.* Alabama, etc., R. Co., 69 Miss. 186, 13 So. 815.

75. Little *v.* Boston, etc., Railroad, 66 Me. 239.

76. Shipper's knowledge of defects in vehicles.—Harris *v.* Northern Indiana R. Co., 20 N. Y. 232.

77. As to tracing lost freight.—Adams Exp. Co. *v.* Stettaners, 61 Ill. 184, 14 Am. Rep. 57.

78. Delivery in good condition.—Orem, etc., Produce Co. *v.* Northern Cent. R. Co., 106 Md. 1, 66 Atl. 436.

79. That plaintiff received voucher as payment.—Moody *v.* Southern Railway, 79 S. C. 297, 60 S. E. 711.

80. Presumption from failure to introduce evidence.—Pennsylvania R. Co. *v.* Anoka Nat. Bank, 108 Fed. 482, 486, 47 C. C. A. 454.

Where plaintiff, in an action against a railroad company to recover for a loss of goods in shipment, introduces evidence which tends strongly to show inferentially that defendant managed and controlled the line of road upon which the loss occurred, although it was owned by a separate corporation, such as that the managing officers of the two companies were the same, that defendant

§ 1058. Condition of Goods When Received by Carrier.—Some cases hold that it must be presumed, in the absence of evidence on the subject, that freight was delivered to the carrier in the same condition as that in which it was delivered by it to the consignee.[81] But there are cases holding that when the carrier delivers goods to the consignee in a damaged condition, it must prove, in order to exonerate itself, that they were in such condition when delivered to it by the consignor as it is presumed that the goods were received by it in good order.[82]

Bill of Lading Not Conclusive as to Condition of Freight.—As a general rule, the plaintiff, in an action against a carrier for damage to freight, makes out a prima facie case by producing the receipt of the carrier acknowledging that the freight was delivered to the carrier in good order, but such an acknowledgment is a mere recital and not conclusive.[83]

held itself out to the public as operating the line by advertising it as a part of its system, etc., and defendant, although having it within its power, fails to produce evidence to show the actual relation between the two companies, it is a reasonable presumption that such evidence would support plaintiff's contention, and the jury is justified in determining the issue in favor of the plaintiff. Pennsylvania R. Co. *v.* Anoka Nat. Bank, 108 Fed. 482, 47 C. C. A. 454.

81. Condition of goods when received by carrier.—*United States.*—Ceballos *v.* Warren Adams, 20 C. C. A. 486, 74 Fed. 413; Choate *v.* Crowninshield, Fed. Cas. No. 2,691, 3 Cliff. 184; Kerr *v.* Norman, Fed. Cas. No. 7,732, Newb. 525; Soule *v.* Rodocanachi, Fed. Cas. No. 13,178, Newb. 504; The Martha, Fed. Cas. No. 9,145, Olc. 140; The Williams Taber Co., Fed. Cas. No. 17,757.

Alabama.—Grey *v.* Mobile Trade Co., 55 Ala. 387, 28 Am. Rep. 729; South, etc., R. Co. *v.* Henlein, 52 Ala. 606, 23 Am. Rep. 578; Steele *v.* Townsend, 37 Ala. 247, 79 Am. Dec. 49.

Connecticut.—Mears *v.* New York, etc., R. Co., 75 Conn. 171, 52 Atl. 610, 56 L. R. A. 884, 96 Am. St. Rep. 192.

Florida.—Savannah, etc., R. Co. *v.* Harris, 26 Fla. 148, 7 So. 544, 42 Am. & Eng. R. Cas. 457, 23 Am. St. Rep. 551.

Illinois.—Baltimore, etc., R. Co. *v.* Fox, 113 Ill. App. 180; Chesapeake, etc., R. Co. *v.* Radbourne, 52 Ill. App. 203.

Iowa.—Grieve *v.* Illinois Cent. R. Co, 104 Iowa 659, 74 N. W. 192; McCoy *v.* K. & D. M. R. Co., 44 Iowa 424; Powers *v.* Chicago, etc., R. Co., 130 Iowa 615, 105 N. W. 345; Winne *v.* Illinois Cent. R. Co., 31 Iowa 583.

Louisiana.—Tardos *v.* Toulon, 14 La. Ann. 429, 74 Am. Dec. 435.

Minnesota.—Boehl *v.* Chicago, etc., R. Co., 44 Minn. 191, 46 N. W. 333.

Missouri.—Buddy *v.* Wabash, etc., R. Co., 20 Mo. App. 206; Davis *v.* Wabash, etc., R. Co., 13 Mo. App. 449; Doan *v.* St. Louis, etc., R. Co., 58 Mo. App. 408; Nave *v.* Pacific Exp. Co., 19 Mo. App. 563; Read *v.* St. Louis, etc., R. Co., 60 Mo. 199.

New York.—Brooks *v.* Dinsmore, 6 N. Y. St. Rep. 281; Caldwell *v.* Erie Transfer Co., 13 Misc. Rep. 37, 33 N. Y. S. 993, 67 N. Y. St. Rep. 843; Hoffbert *v.* Bumford, 88 N. Y. S. 940; Smith *v.* New York Cent. R. Co., 43 Barb. 225, affirmed in 41 N. Y. 620; Brooks *v.* Dinsmore, 3 N. Y. St. Rep. 587.

Pennsylvania.—Adams Exp. Co. *v.* Holmes (Pa.), 9 Atl. 166; American Exp. Co. *v.* Sands, 55 Pa. 140; Buck *v.* Pennsylvania R. Co., 150 Pa. 170, 24 Atl. 678, 30 Am. St. Rep. 800; Hays *v.* Kennedy (Pa.), 3 Grant 351; Castellucci *v.* Lehigh Valley R. Co., 40 Pa. Super Ct. 24.

Tennessee.—Louisville, etc., R. Co. *v.* Wynn, 88 Tenn. 320, 14 S. W. 311; Merchants' Dispatch Transp. Co. *v.* Bloch, 86 Tenn. 392, 6 S. W. 881, 6 Am. St. Rep. 847.

Texas.—Missouri Pac. R. Co. *v.* Breeding, 4 Texas App. Civ. Cas., § 154, 16 S. W. 184; Southern Pac. R. Co. *v.* D'Arcais, 27 Tex. Civ. App. 57, 64 S. W. 813.

Where the shipper forwarded goods to a customer for inspection, and the goods were subsequently returned in a damaged condition, there is no presumption that, while in the hands of the customer, they remained in the same condition as when originally shipped. Brooks *v.* Dinsmore, 6 N. Y. St. Rep. 281.

82. *Alabama.*—Montgomery, etc., R. Co. *v.* Moore, 51 Ala. 394.

Georgia.—Bried *v.* Mitchell, 48 Ga. 533; Henry *v.* Central R., etc., Co., 89 Ga. 815, 15 S. E. 757; Hartwell R. Co. *v.* Kidd, 10 Ga. App. 771, 74 S. E. 310; The Ocean Steamship Co. *v.* McAlpin, 69 Ga. 437; Southern R. Co. *v.* Nailon, 7 Ga. App. 430, 431, 67 S. E. 116; Central, etc., R. Co. *v.* Mercantile Claim Co., 8 Ga. App. 17, 19, 68 S. E. 492; Fain *v.* Southern R. Co., 3 Ga. App. 734, 736, 60 S. E. 359; Ohlen *v.* Atlanta, etc., R. Co., 2 Ga. App. 323, 58 S. E. 511.

Goods presumed in good order.—Where it does not appear that the carrier received the goods in bad order, the presumption is they were in good order. Henry *v.* Central R., etc., Co., 89 Ga. 815, 15 S. E. 757.

83. Bill of lading not conclusive as to condition of freight.—*United States.*—Choate *v.* Crowninshield, Fed. Cas. No.

§ 1059. Shipment Composed of Several Classes of Goods.—Where a shipment was composed of several classes of goods, and a portion of it was lost, there is no legal presumption as to whether such portion belonged to the least or most valuable class, or to any particular class.[84]

§ 1060. Where Transportation under Special Contract.—As to presumptions and burden of proof where a special contract is set up as a defense in an action against the carrier for loss or injury to goods, see elsewhere.[85]

§ 1061. Necessity of Producing Bill of Lading.—In an action against a common carrier founded on its common-law liability, it is not necessary to produce in evidence a bill of lading of the property alleged to have been lost or injured, as, if there is a special contract restricting the common-law liability of the carrier, it devolves on the carrier to allege and prove it.[86] But where the action is founded on a bill of lading, then the bill of lading must be produced in evidence, or its nonproduction must be accounted for, and its substance proved as alleged.[87]

2,691, 3 Cliff. 184; Cunard Steamship Co. *v.* Kelley, 115 Fed. 678; The Moravian, Fed. Cas. No. 9,789, 2 Hask. 157; The California, Fed. Cas. No. 2,314, 2 Sawy. 12; The Colombo, Fed. Cas. No. 3,040, 3 Blatchf. 521; The Martha, Fed. Cas. No. 9,145, Olc. 140; Seller *v.* Pacific, Fed. Cas. No. 12,644, Deady 17, 1 Or. 409; Turner *v.* Black Warrior, Fed. Cas. No. 14,253, 1 McAll. 181.

Connecticut.—Mears *v.* New York, etc., R. Co., 75 Conn. 171, 52 Atl. 610, 56 L. R. A. 884, 96 Am. St. Rep. 192.

Louisiana.—Lengsfield *v.* Jones, 11 La. Ann. 624.

Maine.—Tarbox *v.* Eastern Steamboat Co., 50 Me. 339.

Mississippi.—Gardner *v.* New Orleans, etc., R. Co., 78 Miss. 640, 29 So. 469.

New York.—Harnett *v.* Westcott, 56 N. Y. Super. Ct. 213, 3 N. Y. S. 7, 18 N. Y. St. Rep. 962; Jean, etc., Co. *v.* Flagg, 45 Misc. Rep. 421; Thyll *v.* New York, etc., R. Co., 84 N. Y. S. 175.

North Carolina.—Burwell *v.* Raleigh, etc., R. Co., 94 N. C. 451, 25 Am. & Eng. R. Cas. 410.

Oregon.—Seller *v.* Pacific, Deady 17, 1 Or. 409, Fed. Cas. No. 12,644.

South Carolina.—Stadhecker *v.* Combs & Co. (S. C.), 9 Rich. L. 193.

Texas.—Gulf, etc., R. Co. *v.* Holder, 10 Tex. Civ. App. 223, 30 S. W. 383. See ante, "As Warranty or Evidence of Quantity, Quality or Condition of Goods," §§ 488-494.

A bill of lading signed by the carrier acknowledging the receipt of the goods, "to be delivered in good order to A. at B., is prima facie evidence that they were in good condition when received by the carrier, but is not conclusive, and the carrier may prove that the goods were damaged before they came into his possession. In such case, the burden is on the carrier to prove such fact. Tarbox *v.* Eastern Steamboat Co., 50 Me. 339.

84. Shipment composed of several classes of goods.—In Lake Shore Nitro-Glycerine Co. *v.* Illinois Cent. R. Co., 75 Ill. 391, which was a suit against a common carrier, to recover for the loss of the greater part of a shipment of carboys, part containing nitric acid and the others containing sulphuric acid, the former being of much greater value, the proof was unsatisfactory, as to the proportion of each, but there was proof tending to show that the car contained the acids in the usual proportions to be mixed in the manufacture of nitro-glycerine. The court instructed the jury that "the legal presumption is that, the burden of proof being on the plaintiff, all the acids so lost, and not proven to have been nitric, and most valuable, must have been sulphuric, and of the least value." It was held that there was no legal presumption in such a case, but it was a question of fact from the evidence, whether the carboys, or most of those destroyed, contained nitric or sulphuric acid.

85. Special contract.—See post, "Limitation of Liability," chapter 14.

86. Necessity of producing bill of lading.—Missouri Pac. R. Co. *v.* Nicholson, 2 Texas App. Civ. Cas., § 168.

Where the declaration against a carrier for negligent carriage is joint against the party signing the bill of lading and another not signing it, avers an "agreement" disconnected with the bill of lading not alleged to be in writing, states the bill of lading as an inducement to the cause of action, does not make profert of it, and the breaches assigned seem to be of the joint "agreement," and not of the contract contained in the bill of lading, the declaration will be construed as one in tort, and not "founded on" the contract, so as to require profert of the bill of lading, under Code Tenn. § 2893. Whittenton Mfg. Co. *v.* Memphis, etc., Packet Co., 21 Fed. 896.

87. Where bill foundation of action.—Texas, etc., R. Co. *v.* Wheat, 2 Texas App. Civ. Cas., § 165; Missouri Pac. R. Co. *v.* Nicholson, 2 Texas App. Civ. Cas.,

§§ 1062-1066. Admissibility of Evidence—§ 1062. In General.—Relevancy and Materiality of Evidence.—Generally, in an action against a carrier for loss of or damage to goods, evidence which is relevant and material to the issues is admissible.[88] Evidence which is irrelevant and immaterial is inadmissible,[89] and is properly excluded. [90]

§ 168; G. H. & S. A. R. Co. *v.* Van Winkle, 3 Texas App. Civ. Cas., § 443.

Where in a suit against a carrier the petition alleged that plaintiff shipped cattle from Memphis, Tenn., to Ft. Worth, Tex., over several lines of connecting railroad, one of which was defendant's line, and that said shipment was made "on through bills of lading, and at agreed and through rates for the whole route, the contracts and bills of lading of each of said railroads in regard to shipment of cattle being recognized and carried out by the other;" that the cattle were damaged by the negligence of defendant, etc., the suit was upon the bill of lading. Texas, etc., R. Co. *v.* Wheat, 2 Texas App. Civ. Cas., § 165.

88. Relevancy and materiality of evidence.—See ante, "Evidence Admissible under Pleadings," § 1053.

Illustrations.—In an action against a carrier for damages to goods alleged to have been injured by water while in transit, evidence is admissible to show that no rain fell while the property was on defendant's road, and that the car in which it was being transferred was not allowed to be stopped near by any water tank. Burwell *v.* Raleigh, etc., R. Co., 94 N. C. 451, 25 Am. & Eng. R. Cas. 410.

In an action for damages for injury to fruit trees en route plaintiff testified, that the orders for both shipments were obtained by salaried traveling men, and that one shipment was sold for a certain price and was not delivered, and that plaintiff told defendant's agent, on November 2d or 3d, that if he did not receive the shipment promptly and in good condition he would refuse it, and also testified that plaintiff's customers were to receive the shipments at destination on November 2d. Held, that the evidence was admissible on defendant's claim that plaintiff was negligent in not being ready to receive the trees at destination, especially in view of defendant having introduced an order for trees from one of plaintiff's customers requiring them to be delivered at such destination in October, November, or December with notice by mail of the date of delivery. Young *v.* Southern R. Co., 157 N. C. 74, 72 S. E. 835.

When a bridge truss loaded upon a flat car is so high that, in attempting to take it under a bridge upon defendant's railroad, it is injured by coming in contact with the bridge, the load being higher than the shipper agreed it should be, and the shipper claims that the defendant might have taken the car to its destination without going under the bridge, and shows that it afterwards did take cars laden in a similar manner by another route, it is error not to allow the defendant to show that at the time of the injury the route under the bridge was the only track it owned or operated by which it could deliver the shipment. Pennsylvania Co. *v.* Kenwood Bridge Co., 49 N. E. 215, 170 Ill. 645, reversing 69 Ill. App. 145.

In an action against a carrier for the value of a chest and its contents, which were enumerated in the petition, a witness, after stating the value in detail of a number of articles, was asked if she knew the value of the chest and contents, and answered in the affirmative, stating the value. She also stated that, besides the articles she had specially mentioned, there were some others which she had not named. Such statement was not made in answer to any question, but in connection with her testimony relating to the contents of the chest. Held, that an objection to her testimony on the ground that there was evidence tending to show that there were more goods in the chest than was sued for was not well taken. Seyfarth *v.* St. Louis, etc., R. Co., 52 Mo. 449.

89. Irrelevant and immaterial evidence—Illustrations.—In an action against a carrier for failure to deliver cotton shipped, the issue was whether the cotton had lost in weight from natural causes, or through the fault of the carrier. Held, that evidence that other people's cotton had been stolen by the carrier's agents at the place where the plaintiff's cotton had been delivered was

90. In an action by a county against a carrier for loss of a convict car or wagon by fire, evidence of the superintendent of the convicts that he told one of them to look after the fire which was in the car, offered to show diligence by the superintendent in protecting the car, was properly excluded as immaterial, since it did not matter what directions the superintendent gave, but the question was whether they were followed. Coweta County *v.* Central, etc., R. Co., 60 S. E. 1018, 4 Ga. App. 94.

Where a carrier's liability for goods destroyed before their delivery to the consignee was tried on the single issue of defendant's negligence, and so submitted to the jury, the exclusion of an alleged contract offered by defendant, whereby its liability was limited, was not error. Louisville, etc., R. Co. *v.* Plummer (Ky.), 35 S. W. 1113.

Nature of Liability.—For the purpose of showing that goods when injured, were in the possession of defendant as carrier and not as warehouseman, evidence that the failure of defendant's agent to deliver the goods on the morning of their arrival, before they were injured, to those plaintiff sent for them, was wrongful, is material.[91] And as bearing upon the question whether a railroad company had received goods for transportation as a common carrier, and as confirmatory of the statement of an agent that it had not, the defendant may ask the agent whether it was not the custom to weigh and mark goods as they were taken for transportation, the goods in question not having been weighed and marked.[92]

Title to Property Shipped.—In an action by a consignor against a carrier for the loss of property, a contract between the consignee and consignor is admissible to show ownership of the property.[93] And it is error to exclude testimony to show that the property did not belong to the plaintiff but to one of defendants as alleged by them.[94]

Proof of Loss.—The fact that the plaintiff, after the goods should have been delivered, made inquiries for them of the carrier, is admissible in evidence of

inadmissible. Central R. Co. *v.* Brunson, 63 Ga. 504.

In an action against a railroad company for the nondelivery of freight lost from its depot after transportation, proof that other freight of the same kind was always cared for by it in the same manner, and that none had ever been lost, is immaterial. Lane *v.* Boston, etc., R. Co., 112 Mass. 455.

In an action against an express company for damages to fish shipped, evidence that other shipments made on the same day to a different destination from the same batch of fish were paid for without complaint was not admissible, in absence of a showing that all of the fish shipped that day were prepared for shipment in the same manner. Wells Fargo & Co.'s Exp. *v.* Gentry (Tex. Civ. App.), 154 S. W. 363.

In an action against a railroad for damages to plaintiff's shipment of poultry by delay in transportation and failure to properly ice the car, the admission of evidence that certain other poultry rejected by the consignee thereof and thereafter purchased by plaintiff and included in his shipment was error, the cause of the rejection not being stated, and the evidence being calculated to cause the jury to believe that the poultry was rejected because it was tainted or otherwise defective. Patterson & Co. *v.* Gulf, etc., R. Co. (Tex. Civ. App.), 126 S. W. 336.

In an action for loss of goods testimony of plaintiff as to the value to him of the use of the goods during their delayed transportation was inadmissible; there being no evidence of any delay. Missouri, etc., R. Co. *v.* Dement (Tex. Civ. App.), 115 S. W. 635.

Where defendant was sued for injuries to a car of vegetables caused by its neglect to keep them properly iced, evidence that other cars shipped in the same way, just before and just after the injured shipment, arrived in good condition, was irrelevant and inadmissible. Ft. Worth, etc., R. Co. *v.* Harlan (Tex. Civ. App.), 62 S. W. 971.

In an action against a carrier to recover for an engine intrusted to its care, and lost in transit, testimony as to whether or not it was practicable to carry such machine on an ordinary freight car is not admissible on the question of the making of the contract. Ames *v.* First Div., etc., R. Co., 12 Minn. 412, Gil. 295.

Where a contract for the shipment of goods contained no exception as to loss by fire, although the usual bills of lading issued by the carrier did contain this provision, in an action for the price of the goods, the same having been destroyed by fire, a copy of such bills of lading is not evidence for the transporter. Clyde *v.* Graver, 54 Pa. 251.

Value of car containing goods.—In an action against a railroad company to recover the value of cotton received for transportation, and destroyed by fire while on board of the cars, the value of the car burnt has no relevancy to the question at issue. Montgomery, etc., R. Co. *v.* Edmonds, 41 Ala. 667.

Evidence of damage to other freight than that specified in the statement of the cause of action, and as to the amount of such damage, is inadmissible and it is error to admit such testimony. Missouri Pac. R. Co. *v.* Smith, 84 Tex. 348, 351, 19 S. W. 509.

91. Nature of liability.—Louisville, etc., R. Co. *v.* Dunlap, 148 Ala. 23, 41 So. 826.

92. Vaughan *v.* Raleigh, etc., R. Co., 63 N. C. 11.

93. Title to property shipped.—Hess *v.* South Dakota Cent. R. Co., 30 S. Dak. 538, 139 N. W. 334.

94. Missouri, etc., R. Co. *v.* Moore, 47 Tex. Civ. App. 531, 105 S. W. 532.

their having been lost.[95] To charge a carrier with an alleged deficiency in the goods delivered, the testimony of the persons who actually loaded the vessel is the best evidence.[96]

Evidence of Other Losses.—In an action for loss of goods, evidence as to losses of other goods by other persons is incompetent.[97]

Value of Goods and Amount of Damage.—Generally as to admissibility of evidence as to the value of the goods shipped and the amount of damage sustained by loss of or damage thereto, see elsewhere.[98]

Character of Goods.—In an action against a carrier for the loss of a box of goods, evidence as to its contents is admissible.[99] And where the bill of lading described goods as two "bundles of carpet," evidence that the bundles contained other articles than carpet is admissible, where the appearance of the bundles suggested that they contained something besides carpet, and the articles were not shipped at a reduced rate.[1]

Condition of Goods.—Generally, evidence as to the condition of goods is admissible.[2] Plaintiff can not introduce evidence of the condition of property at a distant point, from which it was shipped by vessel to the place where it was delivered to defendant, unless more direct proof is unavailable; and where such evidence has been admitted it is proper, on cross-examination, to inquire into the mode of transshipment, the manner of its storage, the weather, and the condition of the property on its arrival.[3] Evidence that the person receiving goods made no complaint as to their condition,[4] and that he signed a receipt reciting that they were in good condition,[5] is admissible.

Weight of Goods.—Where some of the contents of a box have been lost, it is competent to show what goods were in the box when it started, and when it was delivered, and for that purpose to show the weight at the beginning and end of its transportation; but it is not error, upon objection, to refuse to allow

95. **Proof of loss.**—Ingledew *v.* Northern R. Co. (Mass.), 7 Gray 86.

96. Cañero *v.* Welsh (Pa.), 8 Phila. 130, Fed. Cas. No. 2286.

97. **Evidence of other losses.**—Ragsdale *v.* Southern R. Co., 69 S. C. 429, 48 S. E. 466. See Central R. Co. *v.* Brunson, 63 Ga. 504.

In an action against the driver of a stagecoach for nondelivery of money intrusted to him, evidence that third persons had admitted that another package of money was stolen from the stage on the same day is not competent to prove the loss. Shelden *v.* Robinson, 7 N. H. 157, 26 Am. Dec. 726.

98. **Value of goods and amount of damage.**—See post, "Admissibility," § 1083.

99. **Character of goods.**—Bottum *v.* Charleston, etc., R. Co., 51 S. E. 985, 72 S. C. 375, 2 L. R. A., N. S., 773, 110 Am. St. Rep. 610.

1. Benson *v.* Oregon, etc., R. Co., 35 Utah 241, 99 Pac. 1072, 19 Am. & Eng. Ann. Cas. 803.

2. **Condition of goods.**—Where it appeared in an action against an express company for damages to a shipment of fish that the fish shown to witness was of the same batch of fish as those shipped, evidence of such witness as to the condition of the fish at a certain time was admissible. Wells Fargo & Co.'s Exp. *v.* Gentry (Tex. Civ. App.), 154 S. W. 363.

Condition week after shipped.—Where potatoes were left by the plaintiff at a certain depot, under a contract for their transportation to Chicago on the same day, and they were not shipped until the next day, it was not error, in an action for injuries to the same, by freezing, alleged to have occurred in transitu, in consequence of such delay, to permit a witness to testify as to their condition when seen by him in the warehouse of the consignee, at Chicago, a week or more after they were shipped. It was a question to be determined, upon the whole evidence, whether the potatoes were frozen in transitu, or subsequent to their arrival at Chicago. Curtis *v.* Chicago, etc., R. Co., 18 Wis. 312.

3. **Condition when delivered to defendant.**—Marquette *v.* Langton, 32 Mich. 251.

4. **Failure to make complaint.**—Patterson & Co. *v.* Gulf, etc., R. Co. (Tex. Civ. App.), 126 S. W. 336.

In an action against a railroad company for damage to freight by water, defendant was properly allowed to show that the expressman receipting for the goods at the depot looked at the box containing them, and made no complaint. Mears *v.* New York, etc., R. Co., 52 Atl. 610, 75 Conn. 171, 56 L. R. A. 884, 96 Am. St. Rep. 192.

5. Patterson & Co. *v.* Gulf, etc., R. Co. (Tex. Civ. App.), 126 S. W. 336.

a witness to testify that plaintiff knowingly only paid the freight rate on a certain number of pounds of freight.[6] To establish the weight of a number of bales of cotton burned while in the carrier's possession, it is competent for plaintiff to prove the average weight of a greater number of bales, of which the burned bales were a portion,[7] or he may prove the weight of all the bales which were delivered to the carrier, and of the bales which were not lost,[8] in order to enable the jury to ascertain the weight of the bales which were destroyed.

Evidence of Custom.—In some instances evidence of custom is admissible, such as a custom to deliver goods without requiring the production of the bill of lading,[9] a custom respecting deliveries for immediate shipment,[10] the custom and usage of well-appointed and managed railway companies as to the mode of shipment of baled cotton,[11] the custom as to the time for unloading damaged fruit,[12] and the custom of defendant's servant to examine and keep open air vents in cars.[13] But where goods in transit, while lying in the carrier's freight house, were destroyed by fire, evidence as to the custom of other railroad companies to keep oil and to fill and light their lamps in their freight rooms is inadmissible.[14] And in an action against a ferryman for a loss occasioned by his neglect to put up the chain at the end of his boat, he can not give in evidence a custom at other ferries on the same river to put up the chain at the request of passengers, and not otherwise.[15] The fact of delivery not being susceptible of positive proof, evidence of usage or custom as to delivery is inadmissible.[16]

As to Care Exercised.—Generally, evidence is admissible to show the care exercised by the carrier, whether it was negligent or the contrary.[17] So in an

6. Louisville, etc., R. Co. *v.* Yudelson, 135 Ga. 731, 70 S. E. 576.

7. **Weight of cotton destroyed.**—Smith *v.* North Carolina R. Co., 68 N. C. 107.

8. Montgomery, etc., R. Co. *v.* Edmonds, 41 Ala. 667.

9. **Evidence of custom.**—Where, in an action against a carrier for loss of goods destroyed in the delivering carrier's depot, defendant claimed that the goods had been destroyed by fire after the expiration of a reasonable time within which the consignee should have removed them, and after defendant had refused to deliver when delivery was first demanded because no waybill had been received from the initial carrier, it was competent for plaintiff to show that the delivering station was a prepay station, and that it was the custom of defendant's agent to deliver freight at such station to the owner or consignee without requiring the production of a bill of lading. Bowdon *v.* Atlantic, etc., R. Co., 41 So. 294, 148 Ala. 29.

10. St. Louis, etc., R. Co. *v.* Burrow & Co., 116 S. W. 198, 89 Ark. 178.

11. Louisville, etc., R. Co. *v.* Manchester Mills, 88 Tenn. 653, 14 S. W. 314.

12. Presley Co. *v.* Illinois Cent. R. Co., 139 N. W. 609, 120 Minn. 295.

13. **Custom as to air vents.**—In an action against a carrier for damages to plaintiff's shipment of apples through defendant's negligence in failing to keep open air vents in its car, testimony of defendant's conductor that it was his custom to carefully examine all vents and see whether they were open or closed, was admissible, witness having previously testified, in response to plaintiff's question, that it was his duty to keep the vents open, and having, on redirect examination, stated that it was his custom to perform such duty. Cane Hill, etc., Co. *v.* San Antonio, etc., R. Co. (Tex. Civ. App.), 95 S. W. 751.

14. Texas, etc., R. Co. *v.* Payne, 15 Tex. Civ. App. 58, 38 S. W. 366.

15. Miller *v.* Pendleton (Mass.), 8 Gray 547; see Lewis *v.* Smith, 107 Mass. 334.

16. **Fact of delivery.**—Missouri Pac. R. Co. *v.* Fagan, 72 Tex. 127, 130, 9 S. W. 749, 2 L. R. A. 75, 13 Am. St. Rep. 776.

17. **On an issue as to whether a railroad carrier was negligent** in failing to control a fire which started in its yards, evidence as to the facilities provided by the city for extinguishing fires was properly admitted. Peerless Mfg. Co. *v.* New York, etc., R. Co., 61 Atl. 511, 73 N. H. 328.

Remonstrances to carrier's servants.—In an action against a carrier to recover for injuries received by cattle while in course of transportation, remonstrances to the defendant's employees because the cattle were improperly stowed were held admissible to show that the attention of those in charge was called to the difficulty. Black *v.* Camden, etc., Transp. Co. (N. Y.), 45 Barb. 40.

Whether flood might have been anticipated.—In an action against a carrier for loss of goods while in a railroad yard by a flood submerging the yard, evidence of a flood fifty-nine years before and of the tradition of a flood about one hundred years before, followed by proof

action for injury to goods it may be shown that similar articles shipped in the same way were usually in a damaged and broken condition on their arrival, or that they usually arrived uninjured,[18] and where goods have been lost by reason of a collision, it is proper to introduce evidence as to contrivances employed by other carriers to prevent similar accidents, and to show that such contrivances were not in use by defendant.[19] The fact that the shipper places a small valuation on his property is admissible on the question of whether the proper manner of shipment was adopted by the carrier in view of such valuation.[20] Evidence as to care taken on rainy days is not admissible to show care taken on fine days, nor evidence as to care generally taken on rainy days to show care taken on a certain rainy day.[21]

Condition of Car.—In an action against a carrier for damage to goods shipped, evidence as to the condition of the car is admissible.[22] And it is error to exclude testimony tending to show that plaintiff had knowledge of the character and condition of the car.[23]

Competency of Servant.—The plaintiff may introduce evidence that the carrier's servant was unfit for service.[24] And where goods were injured as the result of the negligent driving of defendant's drayman, evidence that he was drunk when he called for them is admissible.[25] But defendant can not introduce evidence of the caution and skill of the servant who had charge of the goods lost unless plaintiff attempts to predicate his claim to damages on proof of the want of skill of such servant.[26]

Evidence of Subsequent Precautions.—Evidence of precautions taken after the happening of the injury is not admissible to prove antecedent negligence.[27]

that the high-water mark of the more recent flood was higher than the flood in question, and that, before the location of the yard, the chief engineer of the carrier had knowledge of the prior floods, was admissible on the issue of whether the flood in question might reasonably have been anticipated by the carrier. Atchison, etc., R. Co. *v.* Madden, etc., Co., 103 S. W. 1193, 46 Tex. Civ. App. 597.

18. Steele *v.* Townsend, 37 Ala. 247, 79 Am. Dec. 49.

19. Boscowitz *v.* Adams Exp. Co., 93 Ill. 523, 34 Am. Rep. 191.

20. Winn *v.* American Exp. Co., 149 Iowa 259, 128 N. W. 663.

21. The man who carted the goods to plaintiff's house testified that the weather was clear at the time. It appeared that it rained later in the day. Held, that a question asked him by defendant as to the care he took on rainy days was properly excluded. Mears *v.* New York, etc., R. Co., 52 Atl. 610, 75 Conn. 171, 56 L. R. A. 884, 96 Am. St. Rep. 192.

22. Condition of car.—Georgia, etc., R. Co. *v.* Barfield, 58 S. E. 236, 1 Ga. App. 203.

23. Missouri, etc., R. Co. *v.* Moore, 105 S. W. 532, 47 Tex. Civ. App. 531.

24. Brakeman unfit for service.—In an action against a railroad company for damage done to cattle while in transit over its road, where it appeared that the cars became uncoupled while in motion, and the bringing of the cars violently together again caused the injury, evidence that one of the brakemen on the train was unfit for service in coupling the cars again by reason of a wound received in an accident the night before was relevant. Galveston, etc., R. Co. *v.* Johnson (Tex.), 19 S. W. 867.

25. Kates Transfer, etc., Co. *v.* Klassen, 6 Ala. App. 301, 59 So. 355.

26. Caution and skill of servant.—Montgomery, etc., R. Co. *v.* Edmonds, 41 Ala. 667.

27. Evidence of subsequent precautions.—Cunningham *v.* Pennsylvania R Co., 40 Pa. Super. Ct. 212.

In an action against a carrier for the death of chickens smothered while carried in an ordinary express car, the admission of evidence that, after the shipper had complained of the loss, the carrier began to use another kind of a car for like shipments, was error, though the trial occurred more than two and one half years after the loss, and though it did not appear that the change was not made until long after the loss. Wells Fargo & Co.'s Exp. *v.* Mitchell (Tex. Civ. App.), 139 S. W. 926.

Evidence not violating rule.—In an action against a railroad company to recover for the loss of cement which was destroyed in cars on a siding during a flood, there was testimony that prior to the particular flood the tracks had been raised as a precautionary measure. A witness for the company testified that, after the tracks had been raised, cars had not been removed from the siding at times of flood. Held, that plaintiff was

Why a car was not re-iced may not be shown in an action for breach of a carrier's contract to re-ice a car of tomatoes at certain points on the route.[28]

Offer of Reward.—On the question of whether a carrier admitted his liability for goods lost, evidence of his having offered a reward for their recovery is admissible.[29]

Mode of Shipment.—Evidence that the person shipping the goods was offered two modes of shipment, one called "owner's risk," at a certain rate, and the other "shipper's risk," at a higher rate, and chose the former, is admissible.[30]

Evidence insufficient to fix the identity of the goods is properly excluded in an action against the carrier for freight improperly delivered.[31]

Hearsay Evidence.—In an action for damages to a car of vegetables caused by not keeping them sufficiently iced, evidence by the consignor that all the vegetables were fresh from farm wagons, and accepted by his foreman as being in first-class condition, is not hearsay.[32]

Impeaching or Contradicting Evidence.—Evidence intended for impeaching or contradicting a witness should be excluded unless it would have that tendency.[33]

Manufactured Evidence.—Papers which constitute no part of the contract for the delivery of the goods are inadmissible on behalf of the carrier, as this would permit it to manufacture evidence for itself.[34]

Harmless Error.—A party can not complain of the admission of evidence which does not prejudice him.[35]

§ 1063. Declarations and Admissions.—The declarations and admissions of the carrier's agent respecting business within the scope of his authority to

entitled to show in contradiction of the defendant's witness that cars had been removed subsequent to the elevation of the tracks, the admission of such testimony not violating the rule of the text. Cunningham v. Pennsylvania R. Co., 40 Pa. Super. Ct. 212.

28. **Why a car not re-iced.**—Pennsylvania R. Co. v. Orem, etc., Produce Co., 111 Md. 356, 73 Atl. 571.

29. **Offer of reward.**—Bennett v. Northern Pac. Exp. Co., 12 Ore. 49, 6 Pac. 160.

30. Mears v. New York, etc., R. Co., 75 Conn. 171, 52 Atl. 610, 56 L. R. A. 884, 96 Am. St. Rep. 192.

31. **Evidence insufficient to fix identity of goods.**—Callaway v. Southern R. Co., 126 Ga. 195, 55 S. E. 23.

32. **Hearsay evidence.**—Ft. Worth, etc., R. Co. v. Harlan (Tex. Civ. App.), 62 S. W. 971.

33. **Impeaching or contradicting evidence.**—In a suit against a carrier for damage to a shipment, where witness testified he did not know the origin of the fire, it was error to admit an affidavit previously made by him that he supposed it was caused by passing engines. Houston, etc., R. Co. v. Bath & Co., 17 Tex. Civ. App. 697, 711, 44 S. W. 595, affirmed in 93 Tex. 731, no op.

Agent's certificate giving amount of goods destroyed.—An agent of a railroad company, on the day after a fire, drew up a statement in the form of a certificate, giving the amount of plaintiff's goods destroyed while in the possession of the company, etc. The railroad company introduced the deposition of the agent as to the same facts. Held, that the statement was admissible evidence to contradict the deposition in case it disagreed with the statement, and the attention of the witness was called to that fact. East Line, etc., R. Co. v. Hall, 64 Tex. 615.

34. **Manufactured evidence.**—Erb v. Keokuk Packet Co., 43 Mo. 53, which was an action to recover the value of three boxes of goods shipped at St. Louis on board of one of the defendant's boats, to be delivered at Leavenworth. It appeared that the boxes were included in the bill of lading, but not included in the receipt given at the place of destination. Held, that evidence of a waybill on a railroad, and a manifest of a steamboat running over a portion of the line over which the goods had to pass, was inadmissible to explain the discrepancy between the bill of lading and the receipt.

35. **Harmless error.**—On an issue of a carrier's negligence in permitting a consignment of perishable freight to remain on its tracks in summer without icing, the admission of a telegram from the carrier's servant to its claim agent, that when the car was inspected the goods appeared in good condition, that one-third of the ice remained, and a certain quantity was put in, the inspection being shortly before the ice was put in, does not prejudice defendant. Lamb v. Chicago, etc., R. Co., 76 N. W. 1123, 101 Wis. 138.

transact and made while he was engaged in such business are admissible.[36]

36. **Declarations and admissions of carrier's agent.**—Texas, etc., R. Co. *v.* Felker, 40 Tex. Civ. App. 604, 90 S. W. 530; Baltimore, etc., R. Co. *v.* Christie, 5 W. Va. 325.

Illustrations.—Where an agent of a carrier, while engaged in tracing and locating a car, stated that it had not yet reached a certain place, the declaration was admissible as part of the res gestæ in an action for damages to the shipment contained in the car, as was also a statement made by another agent when he was attempting to adjust plaintiff's claim for damages, and when he and plaintiff were examining the shipment to ascertain the damages. St. Louis, etc., R. Co. *v.* Watkins, 45 Tex. Civ. App. 321, 100 S. W. 162.

In an action for damage and loss to a shipment of oil, there was no error in admitting evidence of statements by the soliciting freight agent of one of the carriers and the local freight agent of the other that, if consignee would accept the oil, "they would see them through," as it tended to show the inducement offered consignee to receive the oil, and that by receiving it consignee did not intend to waive damages. Baltimore, etc., R. Co. *v.* Oriental Oil Co., 51 Tex. Civ. App. 336, 111 S. W. 979.

In an action against a carrier for deficiency in cotton seed shipped, where there was evidence that the witness was the agent of defendant railroad at a certain station, and had received as such agent the cotton seed in question, and that one B. was agent of defendant, and as such had weighed the cotton seed in question, it was competent for the witness to testify what the correspondence was between these two agents of the defendant in regard to such matter. Ragsdale *v.* Southern R. Co., 51 S. E. 540, 72 S. C. 120.

In an action to recover for the loss of a trunk shipped by express, evidence that, on demand being made to the president of the express company, he admitted that the trunk had been in the company's possession, is admissible. Harnett *v.* Westcott, 56 N. Y. Super. Ct. 213, 3 N. Y. S. 7, 18 N. Y. St. Rep. 962.

In an action for loss of goods, interviews with the carrier's agent in an attempt to locate the goods were admissible. Fein *v.* Weir, 114 N. Y. S. 426, 129 App. Div. 299, affirmed in 92 N. E. 1084.

Declaration of freight claim agent.—In an action for loss of freight, evidence that declarations were made by a general agent of the railway company, invested with authority to adjust claims against it, within the scope of his agencies, show that the authority of the freight claim agent was such as to render his report as to the claim in question binding as admissions against carrier. Missouri Pac. R. Co. *v.* Gernon, 84 Tex. 141, 142, 19 S. W. 461.

Written communications.—In an action for freight burned after delivery for shipment, a postal card written the shipper by the carrier's agent after the fire, stating that the carrier would not assume further responsibility for the freight, was admissible to show that the agent knew the freight had been delivered for shipment. St. Louis, etc., R. Co. *v.* Burrow & Co., 116 S. W. 198, 89 Ark. 178.

An express company received at St. Louis a box of goods directed to the town of J., stipulating that its liability should cease upon delivering the goods to another carrier at the agency of the company nearest J. The box was delivered to the other carrier at M., and never reached J. In tracing it, the St. Louis agent directed his letter to an agent at T., which was nearer to J. than M., and received a reply that the box had been lost in the burning of a car. This reply the St. Louis agent indorsed, asking the shipper to present claim, invoice, and receipt for settlement. Held, in an action for the loss, that the letter, reply, and indorsement were competent as an admission of liability. Schutter *v.* Adams Exp. Co., 5 Mo. App. 316.

A letter received by due course of mail, purporting to be written by the general claim agent of a railroad corporation, and upon its printed letter heads, in reply to a letter addressed to the corporation or to such claim agent and sent through the mail, is presumptively genuine and authorized, and is admissible in evidence without further proof that such person is the general claim agent of the corporation or that the letter was written by the party by whom it purports to be signed. St. Louis, etc., R. Co. *v.* McIntyre, 36 Tex. Civ. App. 399, 82 S. W. 346.

Declarations held inadmissible.—C. sought to recover the value of a trunk and contents, lost from the cars of defendant. On the trial the evidence admitted that B., who was since deceased, a clerk in an office of defendant, declared some time after the loss that he had discovered what had become of the trunk; that it had been put off the cars at a certain point and the contents lost. Held, that there being no effort in the case to fix the liability of the defendant by reason of any act or agreement of the supposed agent B., but a mere attempt to prove by his declarations a fact with which he was not in any way connected, and of which he did not appear to have any personal knowledge, the evidence was improperly admitted. Baltimore, etc., R. Co. *v.* Christie, 5 W. Va. 325.

Where some of the contents of a box have been lost, any admission which may have been made by the consignee in reference thereto is admissible.[37]

§ 1064. Opinion Evidence.—In an action against carriers for injuries to goods, witnesses who have qualified as experts may give their opinion as to the cause of the damage.[38] A non-expert witness can only testify as to facts.[39] In an action to recover the value of cotton lost by fire it is not error to refuse to permit the question to be answered, whether everything was done which could be done to save the cotton from being burned.[40]

§ 1065. Documentary Evidence.—Bill of Lading.—A bill of lading acknowledging the receipt of goods is evidence of their delivery to the carrier.[41]

Waybill.—In an action for loss of freight, the waybill which went with the freight is competent evidence against the carrier.[42] Where the plaintiff introduces a waybill in evidence by offering a part of it, the defendant has the right to have the entire paper submitted to the jury.[43]

37. **Admission of consignee.**—Louisville, etc., R. Co. *v.* Yudelson, 135 Ga. 731, 70 S. E. 576.

38. **Expert and opinion evidence.**—Houston, etc., R. Co. *v.* Bath, 40 Tex. Civ. App. 270, 90 S. W. 55, affirmed in 101 Tex. 641, no op. (that damage caused by fresh, and not by salt water).

39. **Illustrations of testimony as to facts.**—In an action for the loss of several barrels of molasses in shipment, testimony that the witness had inspected the shipment at a certain point, but was unable to stop the leakage, as all of the barrels seemed to be in good condition, and the leakage appeared to be from fermentation, was not a conclusion of the witness. International, etc., R. Co. *v.* Drought & Co. (Tex. Civ. App.), 100 S. W. 1011.

In an action for the loss of several barrels of molasses in shipment, testimony that "some of the barrel heads showed to have been staved inwards by heavy blows from the outside," was not a conclusion of the witness, but testimony as to a fact. International, etc., R. Co. *v.* Drought & Co. (Tex. Civ. App.), 100 S. W. 1011.

On an issue as to the cause of damage to a shipment in transit, the testimony of a witness that it was his judgment, from the general appearance of the shipment, that it was due to the improper storing or packing of the goods in the car, was admissible as the statement of a fact, and not merely an opinion. Texas, etc., R. Co. *v.* Warner, 42 Tex. Civ. App. 280, 93 S. W. 489, affirmed in 101 Tex. 664, no op.

In an action against a railroad for damages to a car of vegetables, caused by not keeping them sufficiently iced, evidence that the vegetables were carefully packed, and that the car was well iced with five hundred pounds of ice when it left the starting point, is not objectionable, as stating a conclusion. Ft. Worth, etc., R. Co. *v.* Harlan (Tex. Civ. App.), 62 S. W. 971.

Statement of opinion.—Testimony of a carrier's agent at the delivering point, that barrels in which flour was shipped were green when loaded on the cars, and that, by piling them several tiers deep, the barrels were bent out of shape, and the flour spoiled, may be regarded as a statement of an opinion. Gulf, etc., R. Co. *v.* Frank Co. (Tex. Civ. App.), 48 S. W. 210.

40. Montgomery, etc., R. Co. *v.* Edmonds, 41 Ala. 667.

41. **Bill of lading.**—Harrison *v.* Hixson (Ind.), 4 Blackf. 226; Mussellam *v.* Cincinnati, etc., R. Co., 31 Ky. L. Rep. 908, 104 S. W. 337; Fasy *v.* International Nav. Co., 177 N. Y. 591, 70 N. E. 1098, affirming 79 N. Y. S. 1103, 77 App. Div. 469.

Sufficient identification of consignee.—In an action against a carrier for loss of freight alleged to have been consigned to "A. G. B.," the bill of lading issued to "W. R. B." is admissible in evidence on it appearing that the goods had been ordered and paid for by "A. G. B.," and that the seller had always addressed him as "W. R. B." Bullock *v.* Charleston, etc., R. Co., 64 S. E. 234, 82 S. C. 375.

That the defendant acknowledges in a bill of lading the receipt of other goods also, is no objection to its admission as evidence of the delivery of certain goods to the carrier. Wallace *v.* Vigus (Ind.), 4 Blackf. 260.

Bill executed by one defendant admissible against all.—Where, in an action against a carrier for damages to a shipment, plaintiff alleged that defendants belonged to a certain system and were partners, and partnership was not denied, the bill of lading, although executed by one of the partners, was admissible against them all. St. Louis, etc., R. Co. *v.* Watkins, 45 Tex. Civ. App. 321, 100 S. W. 162.

42. Mussellam *v.* Cincinnati, etc., R. Co., 104 S. W. 337, 31 Ky. L. Rep. 908.

43. **Part of waybill introduced in evidence.**—Where, in an action against a

Memorandum.—An instrument dated at the place and time of shipment, and in the form of the ordinary bill of lading, but without signature, which was delivered to the consignee, with the goods, on payment of the charges, is admissible as an original memorandum of the shipment, notwithstanding a certificate attached thereto, dated more than a year after the time of shipment, and signed by the carrier's agent at the place of shipment, to the effect that the instrument was a copy.[44]

The books of a shipper, shown to have been kept by a competent bookkeeper in the usual course of its business, are admissible against the carrier to establish the weights of carloads of cotton seed as shown by entries therein, though neither the bookkeeper making the entries nor the person who weighed the cars and announced the result testify with reference thereto.[45]

Written Admissions.—The admissibility in evidence of written admissions is treated elsewhere.[46]

Necessity for Proof of Execution.—A bill of lading not declared upon is not evidence in an action to recover goods lost by a carrier without proof of its execution.[47] But where the bill of lading is alleged in the petition to have been signed by the defendant, it is admissible in evidence without proof of its execution, if its execution be not denied by the defendant under oath in its answer.[48] Where, in an action against connecting carriers for injuries to cotton, certain dray receipts were given by witness for the cotton on delivery thereof to a steamship company, such receipts are not objectionable, in that they are not shown to have been executed by the witness.[49] A certificate of weight not shown to be an exact copy of the book of original entries, or that it was given in the regular course of business, by one authorized to do so, is inadmissible in an action against a carrier for loss of grain in transit, to prove the delivery of the grain to and reception thereof by the carrier.[50]

§ 1066. Parol Evidence.—Where the consignor of goods, in an action against the carrier for their loss, introduces the bill of lading to prove the delivery of goods, he may show by parol testimony that the goods belong to himself, and not to the consignee.[51] But it is held that where, in an action to recover for goods lost by a carrier, plaintiff produces a bill of lading, parol proof that the goods were shipped by the shipper named therein as the agent of plaintiff is inadmissible.[52] When the bill of lading, by reason of contradictions therein, is not conclusive as to the contract between the parties, the plaintiff may show the real contract under which the carrier received the property.[53] In

carrier for damages to goods in transit, plaintiff introduces in evidence a waybill of a prior connecting road, with the exception of a sentence written in lead pencil, reciting that the goods, when received, were in a badly-damaged condition, it is error to exclude that sentence when subsequently offered by defendant; it not appearing that the sentence was written subsequent to the making of the waybill. Goodman *v.* Oregon R., etc., Co., 22 Ore. 14, 28 Pac. 894.

44. Memorandum.—Weide *v.* Davidson, 15 Minn. 327, Gil. 258.

45. Books of shipper.—Gulf, etc., R. Co. *v.* Belton Oil Co., 45 Tex. Civ. App. 44, 99 S. W. 430.

46. Written admissions.—See ante, "Declarations and Admissions," § 1063.

47. Necessity for proof of execution.—Peck *v.* Dinsmore (Ala.), 4 Port. 212; St. Louis, etc., R. Co. *v.* Watkins, 45 Tex. Civ. App. 321, 100 S. W. 162.

48. Barrow *v.* Philleo, 14 Tex. 345, 346; Texas, etc., R. Co. *v.* Logan, 3 Texas App. Civ. Cas., § 186.

49. Dray receipts.—Houston, etc., R. Co. *v.* Bath, 40 Tex. Civ. App. 270, 90 S. W. 55.

50. Certificate of weight.—Emison *v.* Ohio, etc., R. Co., 12 O. C. D. 727.

51. Parol evidence.—Harrison *v.* Hixson (Ind.), 4 Blackf. 226.

52. Peck *v.* Dinsmore (Ala.), 4 Port. 212.

53. When bill not conclusive.—Saltsman *v.* New York, etc., R. Co., 65 Hun 448, 20 N. Y. S. 361, 48 N. Y. St. Rep. 55, in which case the body of the bill stated that defendant agreed to forward its car of plaintiff's property from Avoca, N. Y., to Buffalo, N. Y., and the heading of the bill showed that the car was to be taken from Avoca to Elkhart, Ind.

an action for loss of freight, evidence of the circumstances of the giving of a receipt by the carrier for the freight is admissible to support the defense that the freight had not been delivered to it.[54]

§ 1067. Weight and Sufficiency of Evidence.—In General.—The rules as to the weight and sufficiency of evidence in actions against carriers for loss of or damage to goods are the same as in other civil actions.[55]

54. **Circumstances of giving receipt.**—Mussellam *v.* Cincinnati, etc., R. Co., 104 S. W. 337, 31 Ky. L. Rep. 908.

55. **Weight and sufficiency of evidence.—In actions against carriers of live stock,** see also, post, "Actions," chapter 20.

As to loss occurring at sea, see post, "Carriers by Water," Part VII.

Evidence sufficient to sustain verdict or judgment for plaintiff.—Central, etc., R. Co. *v.* Mercantile Claim Co., 8 Ga. App. 17, 68 S. E. 492; Oostanaula, etc., Steamboat Co. *v.* Hampton, 65 S. E. 303, 6 Ga. App. 499; Atlanta, etc., R. Co. *v.* Broome, 60 S. E. 355, 3 Ga. App. 641; Illinois Cent. R. Co. *v.* Mossbarger, 28 Ky. L. Rep. 1217, 91 S. W. 1121; Illinois Cent. R. Co. *v.* Watkins, 28 Ky. L. Rep. 1254, 91 S. W. 1122; Brennisen *v.* Pennsylvania R. Co., 100 Minn. 102, 110 N. W. 362, 10 Am. & Eng. Ann. Cas. 169; Banks *v.* Pennsylvania R. Co., 111 Minn. 48, 126 N. W. 410; Ft. Worth, etc., R. Co. *v.* Garrison (Tex. Civ. App.), 79 S. W. 611; Houston, etc., R. Co. *v.* Japhet & Co. (Tex. Civ. App.), 129 S. W. 1194.

In an action against a railroad company for the loss of a bale of cotton, plaintiff's evidence showed that the bale was loaded on a dray to be delivered to defendant, and that defendant's check clerk had signed a receipt for the bale in the drayman's receipt book, but that the receipt had been erased. Defendant's check clerk testified that he had signed the receipt, but, on being informed by the head clerk that he had made a mistake, he erased his signature. Defendant's head clerk testified that, in billing out the cotton in the depot for shipment, he had been unable to find the bale in question; that he then directed the check clerk to mark off his receipt for the bale; and that, had the bale been received, witness would have discovered it when he billed out the cotton. Held, that a verdict for plaintiff was warranted by the weight of the evidence. Savannah, etc., R. Co. *v.* Steininger, 84 Ga. 579, 11 S. E. 236.

Defendant received a piano from plaintiff at W. to be carried to L., and to be there delivered to a connecting line. Defendant's tracks crossed the tracks of the other line at L., where they were connected by a "Y." Defendant delivered the piano to two draymen at L. to be transferred to the station of the other carrier, and while in the draymen's possession it was injured by a fall from the dray. Held sufficient evidence to sustain a verdict for plaintiff. Missouri Pac. R. Co. *v.* Young, 25 Neb. 651, 41 N. W. 646.

Where goods were delivered to a carrier and placed in a sealed car and set on a switch, and an unprecedented flood came, and no evidence as to the condition after the flood was offered, the goods in question not being identified in the car after the flood, the perishable goods caught in the flood being dumped in the river, and the goods in controversy were not of such character and those identified were forwarded to their destination, and those not identified were forwarded to the claim department, and the goods in controversy never reached their destination, and there was no showing as to the same by the claim department, a verdict against the carrier will not be disturbed. Chicago, etc., R. Co. *v.* Logan, etc., Co., 23 Okla. 707, 29 L. R. A., N. S., 663, 105 Pac. 343.

Evidence that plaintiff delivered a basket to a servant of defendant railroad company to be shipped over its road, that this servant was the same person who had repeatedly shipped baskets for her, and that on this occasion he said that he shipped it, and that neither she nor any one for her ever received the basket, justifies a judgment in favor of plaintiff for the value of the basket. Quarrier *v.* Baltimore, etc., R. Co., 20 W. Va. 424, 18 Am. & Eng. R. Cas. 535.

Evidence insufficient to sustain verdict for plaintiff.—St. Louis, etc., R. Co. *v.* Beach, 26 Okla. 155, 108 Pac. 1098.

Evidence held insufficient to sustain a recovery on count of the complaint based on carrier's common-law liability as an insurer under its contract. Southern R. Co. *v.* Adams Mach. Co., 165 Ala. 436, 51 So. 779.

Evidence for plaintiff in an action against a railroad company for loss of freight by fire, showing a hole in the smokestack of a certain locomotive, claimed to have set the fire, but shown by the proof not to have been in the vicinity at the time, was ground for reversing a judgment for plaintiff, though there was evidence tending to show that another engine set the fire; it not appearing that the latter was defective. Denver, etc., R. Co. *v.* Peterson, 69 Pac. 578, 30 Colo. 77, 97 Am. St. Rep. 76.

Where there is no evidence to show that the machine injured was delivered to the carrier in good condition, or that

Nature of Liability.—Evidence that defendant received the goods sued for under a contract to ship them and gave a bill of lading therefor, is sufficient to show liability as a common carrier.[56]

Capacity to Contract.—Parol evidence that a railroad corporation established by law in one state has held itself out, through its agents, as a common carrier over a railroad in another state, is sufficient prima facie evidence of its capacity to contract for such carriage to maintain an action against it for the loss of merchandise intrusted to it.[57]

Contract to Carry.—In an action against a carrier for the loss of goods, evidence that the goods were shipped in the name of a person as the agent of plaintiff, and were the property of plaintiff, is not sufficient to establish an undertaking to carry.[58]

Execution of Bill of Lading.—In an action against a carrier for damages to a shipment, proof of the execution of the bill of lading may be made by circumstantial evidence.[59]

Ownership.—In an action for injuries to goods the plaintiff can not recover, in the absence of sufficient evidence that he is the owner of the goods or has an interest therein entitling him to maintain the action.[60]

it was injured while in the carrier's possession, a verdict for plaintiff for $137 is unsupported by the evidence, though he testifies that at the time of the trial—two years after the receipt of the machine—it is worthless, but that he has used it during that time with only $37.50 paid for repairs. Missouri Pac. R. Co. *v.* Breeding, 4 Texas App. Civ. Cas., § 154, 16 S. W. 184.

Verdict against weight of evidence.—In an action against a railroad company for loss of freight destroyed in a fire which burned the company's freight depot, two witnesses for plaintiff testified that engine No. 553 passed the freight depot shortly before the fire, and that sparks were escaping from a small hole in its smokestack; and other witnesses testified to seeing such engine in the yard at the time, and to subsequent examination of the engine, revealing a hole in the smokestack, several weeks later. The engineer, fireman, and brakeman of the train supposed to have set the fire testified that its engine was No. 554, a companion engine of No. 553; and the latter was shown by its engineman and other railroad employees, and the engine record, to have been at another place on the day of the fire. Held, that a verdict for plaintiff based on the theory that the fire was set by engine No. 553 was manifestly against the weight of the evidence. Denver, etc., R. Co. *v.* Peterson, 69 Pac. 578, 30 Colo. 77, 97 Am. St. Rep. 76.

More than nominal damages.—Evidence held to show damage justifying more than nominal damages. New York, etc., Transp. Line *v.* Baer & Co., 84 Atl. 251, 118 Md. 73.

56. Nature of liability.—Lengsfeld *v.* Jones, 11 La. Ann. 624.

57. Capacity to contract.—McCluer *v.* Manchester, etc., Railroad (Mass.), 13 Gray 124, 74 Am. Dec. 624.

58. Contract to carry.—Peck *v.* Dinsmore (Ala.), 4 Port. 212.

59. Execution of bill of lading.—St. Louis, etc., R. Co. *v.* Watkins, 100 S. W. 162, 45 Tex. Civ. App. 321. See ante, "Proof of Execution of Bill," § 599.

60. Ownership — Illustrations.—Where, in an action for injuries to goods, plaintiffs testified that he made the shipment, and that it was consigned to H., but there was no evidence that the property belonged to plaintiff, or that he had any interest therein after it was delivered to the carrier, he could not recover. Mexican Cent. R. Co. *v.* Locke (Tex. Civ. App.), 126 S. W. 296.

In an action to recover for loss of property, a letter from the carrier acknowledging receipt of the property to be forwarded is a sufficient recognition of the plaintiff as its owner. Stadhecker *v.* Combs & Co. (S. C.), 9 Rich. Law. 193.

In an action for damages to cattle shipped over defendant's railroad, and which were bruised and injured by improper transportation, so that they lost 25 per cent in value, plaintiffs alleged that they were partners, and the cattle were shipped on defendant's road through plaintiffs. A witness testified that he knew plaintiffs; that he bought thirty of the cattle, for which he paid them a certain sum each for the smallest; that they were in the stock pen at the railroad. P. testified that the cattle were the lot shipped by him over defendant's road. Held, that the partnership, not being denied under oath, need not be proved (Rev. St., art. 1265), and that the evidence, on demurrer to it, authorized the inference that the cattle belonged to plaintiffs. Good *v.* Galveston, etc., R. Co. (Tex.), 1 S. W. 854, 4 L. R. A. 801.

In an action by "E. F. Dawson" for damages to a shipment, evidence of a

Defense of a Common-Law Exemption.—When a carrier sets up the defense that the loss of property delivered to him for transportation was occasioned by the public enemies of the state, he must establish that fact by clear and satisfactory evidence.[61]

That Carrier Received Goods.—In absence of proof that the carrier received for transportation the goods claimed to be lost and damaged, a judgment against the carrier in an action for damages for loss and damage in transit is not sustained by evidence.[62] In an action to recover for loss of property, a letter from the carrier acknowledging receipt of the property to be forwarded is a sufficient recognition of its receipt by the carrier.[63]

That Goods Lost While in Custody of Carrier.—In an action against a carrier for the loss of property while in its custody, the plaintiff must furnish satisfactory proof of the loss;[64] but he is not required to prove it to a mathe-

shipment by "Dawson & Co." was insufficient to show ownership. Atchison, etc., R. Co. *v.* Dawson (Tex. Civ. App.), 90 S. W. 65.

61. Clear and satisfactory evidence.—Wallace *v.* Sanders, 50 Ga. 134.

62. That carrier received goods.—Missouri, etc., R. Co. *v.* Cumby Mercantile, etc., Co. (Tex. Civ. App.), 122 S. W. 568.

Illustrations.—In an action for the value of cotton alleged to have been delivered by plaintiff to defendant railroad company for shipment, evidence held to support a verdict for defendant on the ground that the cotton had never been delivered to or received by it. Smith *v.* St. Louis, etc., R. Co., 96 Ark. 647, 132 S. W. 926.

In an action against two express companies for breakage of plate glass intrusted to them as carriers, the bill of lading purporting to be issued by only one of them, and nothing in the record tending to show that the other ever assumed any liability in their carriage, the judgment, being against both, was reversed as unsupported by the evidence. Merchants' Despatch *v.* Smith, 44 Ill. 319.

Suit against the South Carolina Railroad Company for cotton lost. Proof that the cotton was delivered to an interior railroad company, terminating at the interior end of defendants' railroad, and consigned to a firm in Charleston, but no proof that it came into the possession of defendants, nor that the two roads were joint contractors. Held, that the proof was insufficient. South Carolina R. Co. *v.* Bradford (S. C.), 10 Rich. L. 307.

Evidence held to show that tobacco was delivered to a carrier for transportation before its destruction by fire, so as to charge the carrier as an insurer with liability for its loss, though no notice was given to the carrier after the loading had been completed. Pittsburg, etc., R. Co. *v.* American Tobacco Co., 104 S. W. 377, 31 Ky. L. Rep. 1013.

Evidence that wool was delivered at the station of a common carrier in sacks marked with the name and address of the owners, whose place of business was in Boston, and with the initial of the agent who had purchased it; that the weights and numbers were upon all the sacks; that previous shipments had been made by the same agent at the same place to the same principals, during the same season; and that when said agent delivered this wool, he piled it in on part of the building, pointed it out to the defendants' agent, and said, "That pile of wool is for Boston"—is evidence of a delivery to the carrier for shipment to the principals at Boston. Nichols *v.* Smith, 115 Mass. 332.

Evidence held to justify a finding that the goods were delivered to an authorized agent and that they were never delivered by him at the carrier's office. Fein *v.* Weir, 114 N. Y. S. 426, 129 App. Div. 299, affirmed 92 N. E. 1084.

63. Stadhecker *v.* Combs & Co. (S. C.), 9 Rich. L. 193.

64. That goods have been lost.—Baltimore, etc., R. Co. *v.* Schumacher, 29 Md. 168, 96 Am. Dec. 510.

Loss not shown.—In an action against the last of several connecting carriers for failure to deliver one barrel of molasses of a car load shipped to plaintiff, he did not show what number of barrels was shipped, or that their condition was different on arriving at their destination. The evidence showed that the empty barrel was dry, and that no head for it was found in the car. Held, that no loss in transit was shown, and plaintiff is not entitled to recover. Cooper *v.* Georgia Pac. R. Co., 92 Ala. 329, 9 So. 159, 25 Am. St. Rep. 59.

In an action against a carrier to recover the value of a box and its contents, the evidence showed the delivery of the box to the carrier directed to B. at L., to be delivered to D.; that plaintiff had made efforts to find the box, but had not been able to do so; that he had made inquiries at the office of the carrier in both towns, and had also inquired of B.; and that he had not seen the box since he shipped it. Held not sufficient evidence that the carrier had lost the box, to entitle plaintiff to maintain an action for

matical certainty, but simply to such degree as would be sufficient to satisfy the minds of the jury of the fact.[65] On proof of delivery of property to a carrier in a sound condition, and of a failure to deliver it, a sufficient cause is made to sustain a recovery for loss by the shipper.[66] Mere proof of the difference between initial and terminal weights may be sufficient to make out a prima facie case of loss of part of a shipment of grain during transportation.[67] Where the property asserted to have been lost by the carrier is accounted for, and the apparent discrepancy explained by a slight mistake in numbering, a verdict against the carrier should be set aside.[68]

Delivery to Carrier in Sound Condition and Delivery to Consignee in Damaged Condition.—Proof of delivery of goods to a carrier in sound condition,[69] and of their redelivery at the end of the route in damaged condition,[70]

its value. Morley *v.* Eastern Exp. Co., 116 Mass. 97.

In an action against a carrier to recover for a package of jewelry lost from a box, the loss not being discovered until after delivery to the consignee, there was evidence that the box had been opened, and the nails redriven, but none as to the care taken of the box from the time of the delivery to the discovery of the loss. Held insufficient to warrant a finding that the package was abstracted while in the carrier's possession. Canfield *v.* Baltimore, etc., R. Co., 75 N. Y. 144, reversing 4 N. Y. Super. Ct. 562.

Evidence held insufficient to show that the loss occurred before delivery to consignee. Brown *v.* Missouri, etc., R. Co., 112 Pac. 147, 83 Kan. 574.

65. Baltimore, etc., R. Co. *v.* Schumacher, 29 Md. 168, 96 Am. Dec. 510.

Evidence showing loss while in carrier's possession.—Where, in an action against a carrier for loss of freight, the original bill of lading showing receipt of six boxes of goods consigned to plaintiff, and the carrier's receipt to plaintiff for freight charges on five of the boxes acknowledged a shortage of one box, for loss of which the action was brought, the evidence showed that the loss occurred while the goods were in the carrier's possession. De Lorme *v.* Atlantic, etc., R. Co., 60 S. E. 440, 79 S. C. 370.

In an action against a railroad corporation for the loss of a case of goods intrusted to it for carriage, there was evidence that the case, together with other goods filling two cars, was delivered to the defendant at L., to be transported to P., whence it was to be carried by a line of steamers to A.; that the two cars were received by the agents of the steamer from the defendant, "unopened, and just as they were received," and were kept on their wharf, carefully watched and guarded, until the goods were transferred to the steamer; and that, on unloading the cars, it was found that the case was not in either car. The defendant asked the judge to rule that there was no evidence of the loss of the case between L. and the depot at P. Held, that this ruling was rightly refused. Green *v.* Boston, etc., R. Co., 128 Mass. 221, 35 Am. Rep. 370.

In an action to recover for loss of a traveling bag from a carrier of parcels for hire, to whom it was intrusted to be delivered at a designated depot in time for a particular train, a prima facie case it made out by the testimony of the plaintiff that he inquired at the baggage room at the proper time, and was unable to find his baggage. Zeigler *v.* Freeman, 12 O. C. C., N. S., 122, 21-31 O. C. D. 342.

66. Duncan *v.* Great Northern R. Co., 16 N. D. 610, 118 N. W. 826; Taugher *v.* Northern Pac. R. Co., 21 N. D. 111, 129 N. W. 747. See ante, "Plaintiff's Burden of Proof in General," § 1056.

Evidence sufficient to show nondelivery to consignee.—Tradewell *v.* Chicago, etc., R. Co. (Wis.), 136 N. W. 794; Central, etc., R. Co. *v.* Manchester Mfg. Co., 64 S. E. 1128, 6 Ga. App. 254.

67. Morris *v.* Minneapolis, etc., R. Co. (N. D.), 141 N. W. 204.

68. Alabama, etc., R. Co. *v.* Goforth (Miss.), 14 So. 457.

69. Delivery to carrier in sound condition.—Swiney *v.* American Exp. Co. (Iowa), 115 N. W. 212; Duncan *v.* Great Northern R. Co., 16 N. D. 610, 118 N. W. 826; Armstrong, etc., Co. *v.* Illinois Cent. R. Co., 26 Okla. 352, 109 Pac. 216, 29 L. R. A., N. S., 671.

Illustrations.—Evidence of a witness that he assisted in packing the goods, and that he knew they were put up in such a manner that there was no possibility of their sustaining injury, except from neglect or carelessness, was sufficient to show a delivery to the carrier in

70. Redelivery in damaged condition.—Swiney *v.* American Exp. Co. (Iowa.), 115 N. W. 212; Duncan *v.* Great Northern R. Co., 16 N. Dak. 610, 118 N. W. 826; Armstrong, etc., Co. *v.* Illinois Cent. R. Co., 26 Okla. 352, 109 Pac. 216, 29 L. R. A., N. S., 671.

Evidence held insufficient to warrant a finding that the goods were damaged prior to carrier's delivery to a drayman at destination. St. Louis, etc., R. Co. *v.* Musgrove, 153 Ala. 274, 45 So. 229.

makes a sufficient case to sustain a recovery of damages by the shipper. The fact that a consignee has received of a common carrier the goods, without objection, and receipted for them as in good order, is only presumptive evidence that they have not been damaged in the carrier's hands.[71] Where plaintiff gave no evidence that goods were in good condition when delivered to the carrier; but defendant, in attempting to show that the goods were damaged by reason of bad packing, produced evidence which proceeded on the assumption that the damage occurred while the property was in transit, and the evidence as to the mode of packing was conflicting, the jury might find from defendant's testimony that the damage occurred while the goods were in transit, without accepting the theory of the witnesses that it was caused by careless packing.[72]

Negligence.—The general rules as to the weight and sufficiency of evidence to prove,[73] or disprove negligence,[74] apply to actions against carriers for loss

good order. Hall *v.* Morrison's Adm'r, 20 Tex. 179.

In an action against a carrier for damages to property transported by it, evidence that the property was in good condition when loaded on the car, and that the car was receipted for in good condition when it reached defendant's road, tends to show that the property was in good condition when received by defendant. Modern Match Co. *v.* Baltimore, etc., R. Co., 104 N. W. 19, 140 Mich. 570.

Where, in an action for damages to an automobile in transit, plaintiff testified that it was in good condition when delivered, and in a damaged condition when received it was sufficient to establish prima facie that the automobile was received by defendant in good condition. Paterson *v.* Chicago, etc., R. Co., 103 N. W. 621, 95 Minn. 57.

Where the recital in a receipt given by a carrier, that goods received by it for transportation were in good condition, was corroborated by evidence, the fact that it rained on the day the goods were shipped did not show that they were exposed to rain while being delivered to the carrier and did not prevent a finding that the goods were in good condition when delivered to it. Struebing Co. *v.* Merchants Despatch Transp. Co., 126 N. W. 21, 142 Wis. 657.

71. Effect of receipt given by consignee.—Bloomingdale *v.* Durell, 1 Idaho 33.

72. Leo *v.* St. Paul, etc., R. Co., 30 Minn. 438, 15 N. W. 872.

73. Evidence sufficient to show negligence.—Marande *v.* Texas, etc., R. Co., 42 C. C. A. 317, 102 Fed. 246, reversed in 22 S. Ct. 340, 184 U. S. 473, 46 L. Ed. 487; Presley Co. *v.* Illinois Cent. R. Co., 139 N. W. 609, 120 Minn. 295; Fockens *v.* United States Exp. Co., 99 Minn. 404, 109 N. W. 834; Brennisen *v.* Pennsylvania R. Co., 101 Minn. 120, 11 N. W. 945; Peerless Mfg. Co. *v.* New York, etc., R. Co., 61 Atl. 511, 73 N. H. 328; Farmer *v.* United States Exp. Co., 25 S. Dak. 96, 125 N. W. 575; Fire Ass'n *v.* Loeb, 25 Tex. Civ. App. 24, 59 S. W. 617, affirmed in 94 Tex. 690; Atchison, etc., R. Co. *v.* Madden, etc., Co., 103 S. W. 1193, 46 Tex. Civ. App. 597 (negligence in depositing goods in yard in view of approaching flood); Texas, etc., R. Co. *v.* Gilmore (Tex. Civ. App.), 152 S. W. 1102 (negligence in not notifying consignee of arrival of freight); National Rice Mill. Co. *v.* New Orleans, etc., R. Co., 61 So. 768, 132 La. 615 (negligence in failing to save property from impending flood).

Where an express company contracted to carry certain berries in a refrigerator car, evidence that, when the car arrived, the ice bunkers of the car were found to be nearly empty and the berries spoiled, was sufficient to establish the carrier's negligence. Taft Co. *v.* American Exp. Co., 133 Iowa 522, 110 N. W. 897, 10 L. R. A., N. S., 614.

Proof by the plaintiff that the injury might have been avoided by the exercise

74. On an issue as to the liability of a railroad company for goods damaged in an unprecedented storm, where there was no evidence as to the effect of the storm on its cars, or to show that they were broken or leaks caused as a result thereof, mere evidence that the cars containing the goods appeared to be good, close, dry cars, and the testimony of the conductor that the cars were in good condition at a certain point, was insufficient to clear the company of negligence, not excluding the possibility of their leaky condition. Gulf, etc., R. Co. *v.* Browne, 66 S. W. 341, 27 Tex. Civ. App. 437.

Cotton was destroyed at the burning of a compress. Several witnesses were near when the alarm sounded, but did not know what caused the fire. The switch engine had not been near for three and one-half hours. The cotton was on two cars on a side track near the compress. One of the cars was saved. What effort was made to save the other was not shown, nor what precautions had been taken for the protection of cotton in cars on the side track. Held, that the evidence did not show that the loss occurred without fault on the part of the carrier. Missouri Pac. R. Co. *v.* China Mfg. Co., 79 Tex. 26, 14 S. W. 785.

of or injury to goods. It is enough for the plaintiff to disclose circumstances sufficient to raise a fair inference of negligence.[75] Where, in an action

of reasonable skill and attention on the part of the carrier sufficiently establishes the negligence of the defendant. Read *v.* St. Louis, etc., R. Co., 60 Mo. 199.

Where in an action for clay pots damaged in transitu, it is shown that the pots were sound and carefully packed in the car, but that they were shifted about and badly damaged when received, though similar pots, packed in like manner, had uniformly arrived unbroken, the jury were warranted in finding that damage was due to the negligence of the carrier. Phœnix Pot-Works *v.* Pittsburgh, etc., R. Co., 139 Pa. 284, 20 Atl. 1058.

Evidence that the pier where the vessel lay was covered by a building owned by the defendant steamship company, whose interior was open throughout, and whose ends and sides were made of pine boards; that in one room was a stove, two feet from a partition, with the pipe running through the ceiling, and with no protection around either stove or pipe; that the fire came from that room, and soon consumed the steamship; and that there was no sufficient watch, warranted a finding that the fire was caused by the negligence of the defendant. Hill Mfg. Co. *v.* Providence, etc., Steamship Co., 125 Mass. 292.

In an action for injury to wheat from a flood while in a car standing on a side track, it appeared that at 7:30 a train which had put from the station was driven back by water over the track. Before that time the company's agent at the station had noticed that the water was rising. At about 8:30 the agent asked the conductor and engineer to haul the cars from the side track to the main track, which was on higher ground, and which was at no time covered by the water; but they refused, fearing that the water, which was then over the side track, would put out the fire in the engine. They testified, however, that a short time after they got back to the station they looked, and the water was not over the side track. Held, that the evidence was sufficient to warrant a verdict for plaintiffs, on the ground that the loss was due to the failure of defendant's agents to exercise ordinary care and diligence in removing it to a place of safety. Baltimore, etc., R. Co. *v.* Keedy, 75 Md. 320, 23 Atl. 643.

Where the evidence showed that the fruit when shipped was in good condition, and properly packed in a refrigerator car, and the only reason for its failure to reach its destination in sound condition was the failure of the carrier to keep the car ventilated and iced, the evidence showed the negligence of the carrier and not the character of the fruit. St. Louis, etc., R. Co. *v.* Jackson & Co., 55 Tex. Civ. App. 407, 118 S. W. 853.

Plaintiff shipped two lots of fruit trees over defendant's railway; one lot to purchasers, which were delayed in their arrival, on account of which the purchasers refused to take them, and plaintiff had to sell them at a loss. When plaintiff shipped these trees, he notified the agent of defendant of his contract with the purchasers, and that, if the trees did not reach them by a certain time, they would be a total loss to him, as the purchasers would not take them after that date. The other lot were frozen and killed in transit. They were in good order when shipped. Held, that a verdict awarding plaintiff damages for both lots would be sustained, the evidence showing negligence on the part of the carrier's servant. Texas, etc., R. Co. *v.* Talley, 2 Texas App. Civ. Cas., § 765.

Negligence of compress company.—Evidence that the carrier, after receiving cotton, placed it in the hands of a third party, to be compressed; that the compress was a large shed, open on the east, where a platform forty-five feet wide reached a railroad track on which were several cars loaded with cotton, from one of which a servant of the compress company removed a bale in which the fire originated about five minutes afterwards; that the officers and employees of the compress company indulged in smoking under and around the shed; that one employee had been seen carrying matches behind his ear; that on the day of the fire an officer of the company was seen under the shed walking over some cotton with a lighted cigar in his hand, held, sufficient to support a finding that the fire arose from the negligence of the compress company. Otis Co. *v.* Missouri Pac. R. Co., 112 Mo. 622, 20 S. W. 676.

Evidence insufficient to show negligence.—The fact that the floor of a railroad warehouse was saturated with oil, and that the company permitted combustible material to be collected there, where there is nothing to show the cause of the fire that destroyed the warehouse and its contents, does not show negligence so as to authorize a recovery by one whose goods were burned. Texas Cent. R. Co. *v.* Flanary (Tex. Civ. App.), 50 S. W. 726.

75. Witting *v.* St. Louis, etc., R. Co., 101 Mo. 631, 14 S. W. 743, 20 Am. St. Rep. 636, 10 L. R. A. 602, holding that where plaintiff's evidence was that a fountain was properly packed and delivered to the carrier in good order, and that when it reached its destination one side of the crate was broken, and one of the inside stays broken, and the others out of place, there is no error in refusing an instruction in the nature of a demurrer to the evidence.

on the contract of carriage, plaintiff does not plead that the loss was due to the carrier's negligence, mere proof of nondelivery of the goods by the carrier is not prima facie evidence that the goods were lost by reason of the carrier's negligence within the rule that a carrier can not limit its liability for the negligent loss of goods by a special contract, though, if negligence be alleged, proof of the nondelivery of the goods would be sufficient prima facie evidence to require the carrier to show that the loss was due to a cause for which it was not responsible.[76] Evidence that cabbages had just been cut, were sound and hard when shipped, but decayed in transit, and were badly damaged on reaching destination, warranted a finding that defendant railroad's cars were either not properly constructed or not refrigerated.[77]

Identification of Goods Lost.—It is held that no recovery can be had in a suit for a general shortage of two bales of cotton alleged to have been lost by a carrier out of shipments covering a whole season, where no cotton is identified as that which was lost.[78] In an action to recover for nine bales of cotton, the average weight, class, and value of which is shown by the evidence, it is not necessary to identify the cotton by marks or brands, or by a certain number of pounds, if the jury are satisfied in regard to the nine particular bales of cotton, and are able to say the nine bales sued for were the property of the plaintiff.[79]

As to Value or Damage.—Generally, as to the weight and sufficiency of evidence to show value or damage, see post, "Weight and Sufficiency," § 1084.

Additional Instances.—In the notes are set out numerous decisions of the courts as to the weight and sufficiency of evidence to show particular facts, such as the cause of the loss or damage,[80] misrepresentation or concealment of the nature of goods by the shipper,[81] to what destination goods were marked,[82]

76. Oregon, etc., R. Co. *v.* Blyth, 19 Wyo. 410, 118 Pac. 649, 119 Pac. 875, Am. Cas. 1913 E, 288.

77. Missouri, etc., R. Co. *v.* McLean, 55 Tex. Civ. App. 130, 118 S. W. 161.

78. Identification of goods lost.—Illinois Cent. R. Co. *v.* Gross (Miss.), 22 So. 946.

79. Montgomery, etc., R. Co. *v.* Kolb, 73 Ala. 396, 49 Am. Rep. 54.

80. Cause of loss—Sparks from engine.—Testimony of a witness that he saw sparks coming from defendant's engine and blowing in the direction of the cotton, either on the night in which the fire occurred or the night before, and about two and one-half hours earlier than the hour at which the fire occurred, authorized the jury to conclude that the cotton was set on fire by the sparks seen by the witness. Missouri, etc., R. Co. *v.* Beard, 78 S. W. 253, 34 Tex. Civ. App. 188.

Removal from one car to another.—The mere fact that oranges and lemons shipped in boxes were transferred from one car to another of the same kind, due to the defective condition of the car on which they were originally shipped—the unloading being accomplished by running the cars on parallel tracks, thereby requiring the carrying of the boxes only about twenty feet—does not sufficiently show that the fruit was damaged by such removal, or the extent of the damage, so as to entitle the shipper to recover for damages to the fruit from decay. Corso *v.* New Orleans, etc., R. Co., 48 La. Ann. 1286, 20 So. 752.

Spontaneous combustion.—Where spontaneous combustion was merely shown to have been a possible cause of the fire, and the carrier's expert testified that the evidence did not indicate any particular cause of the fire, and that no substance had been mentioned which would refer it to spontaneous combustion, the evidence was insufficient to justify a finding upon the theory that the fire was due to spontaneous combustion. Lloyd *v.* Haugh, etc., Transfer Co., 72 Atl. 516, 223 Pac. 148, 21 L. R. A., N. S., 188.

Act of God.—Evidence held to show that the damage was caused by an act of God. Gulf, etc., R. Co. *v.* Texas Star Flour Mills (Tex. Civ. App.), 143 S. W. 1179.

81. Concealment by a shipper of the nature of the goods, discharging the carrier from liability, is not shown by the fact that the initial carrier's agent issuing the bill of lading did not give a full and complete description thereof. Central, etc., R. Co. *v.* Jones, 66 S. E. 492, 7 Ga. App. 165.

Evidence held to sustain finding that carrier was not misled as to the character or value of the goods by any statement of the shipper, or by the nature of the packages or the markings thereon. Galveston, etc., R. Co. *v.* Quilhot (Tex. Civ. App.), 134 S. W. 261.

82. Destination.—Evidence held insufficient to support a finding that goods

that the name of destination was changed by the carrier,[83] that cars were ordered with ice,[84] that goods were received for immediate shipment,[85] that the carrier consented to goods being placed on the platform before ready for shipment,[86] that a shipment was diverted,[87] that a fire in a carload of cotton had been in the cotton at the time of loading the car,[88] that cotton took fire while on side track,[89] that carrier waived notice of limitation as to the amount of its liability in case of loss, and that limitation was not assented to by plaintiffs,[90] that there was a total loss,[91] that property was of no value after injury,[92] that a compress company was defendant's agent for receiving the cotton destroyed,[93] that plaintiff's claim was filed for a certain amount,[94] that defendant's agent refused to give plaintiff the key to warehouse until it was too late to move the freight before fire spread to the building,[95] the amount of the loss of each of the plaintiffs,[96] that lost goods were of a certain value,[97] and a custom extending liability.[98]

were marked for a certain destination. Southern Exp. Co. *v.* Hill, 84 Ark. 362, 105 S. W. 877.

A receipt given by a carrier for goods shipped, and stating the destination, is only prima facie evidence that the goods were marked for such destination. Southern Exp. Co. *v.* Hill, 105 S. W. 877, 84 Ark. 368.

83. Change of name of destination.—Where the name of the place of destination specified in the waybill is changed in the course of transportation, evidence that the copy given by defendant to the consignee did not show the change; that it was passed to a connecting company, when, if it ran to the place named in the alteration, defendant would have retained it; and that the waybill delivered by the connecting company specified the original place of destination—will justify a finding that the change was made by defendant. Harris *v.* Cheshire R. Co. (R. I.), 16 Atl. 512.

84. That ice was ordered.—Where, in an action for damages to cabbages by failure to properly ice the cars, plaintiff testified that defendant's agents had instructions to ice all the cars, that the records covering the movements of cars showed with one or two exceptions that the cars were ordered without ice, and the written requisition for the cars failed to contain an order for ice, did not tend to disprove a finding that ice was ordered. Missouri, etc., R. Co. *v.* McLean, 55 Tex. Civ. App. 130, 118 S. W. 161.

85. Goods received for immediate shipment.—St. Louis, etc., R. Co. *v.* Burrow & Co., 116 S. W. 198, 89 Ark. 178.

86. Yarborough *v.* Southern Railway, 78 S. C. 103, 58 S. E. 936.

87. Diversion.—In an action against a carrier for injury to four car loads of grain by a flood, an averment in the statement of claim that the cars were diverted from the usual course of transit by placing them in a certain yard, instead of carrying them to a certain other yard, is not borne out by the proof, where it was specified in the bill of lading that the grain should be carried to "the usual place of delivery at said destination," and the undisputed evidence was that for seven years prior to the flood all consignments of grain for delivery at the point in question, unless specially consigned to consignees who had private sidings, had been placed in the yard in which the grain was placed for inspection and reconsignment, and that plaintiff knew of the usage and expected the cars to be placed there. Smith *v.* Baltimore, etc., R. Co., 72 Atl. 264, 223 Pa. 118.

88. Latta *v.* New Orleans, etc., R. Co., 59 So. 250, 131 La. 272, Ann. Cas. 1914A, 988.

89. That cotton was burned while in a car on a side track does not show that the cotton took fire while on such side track, there being no other evidence to such effect. Insurance Co. *v.* Lake Erie, etc., R. Co., 53 N. E. 382, 152 Ind. 333.

90. Wells Fargo & Co. *v.* Cutter, 140 Ill. App. 324, judgment affirmed Cutter *v.* Wells, Fargo & Co. (Ill.), 86 N. E. 695.

91. Total loss.—In an action by a consignee for damages to a keg of syrup which had soured, and for a penalty for delay in allowing the claim, evidence held to warrant a finding that there was a total loss, although the keg itself was probably in good condition and worth about twenty-five cents, thus relieving the consignee from the duty of accepting the goods and giving him the right to sue for the entire value of the goods. Wilkins *v.* Atlantic, etc., R. Co. (N. C.), 75 S. E. 1090.

92. Berley *v.* Columbia, etc., R. Co., 64 S. E. 397, 82 S. C. 232.

93. Texas Mid. Railroad *v.* Edwards & Co., 56 Tex. Civ. App. 643, 121 S. W. 570.

94. Harter *v.* Charleston, etc., R. Co., 67 S. E. 290, 85 S. C. 192.

95. Donnell *v.* Canadian Pac. R. Co., 84 Atl. 1002, 109 Me. 500.

96. Arkadelphia Mill. Co. *v.* Smoker Merchandise Co., 100 Ark. 37, 139 S. W. 680.

97. Kettenhofen *v.* Globe Transfer, etc., Co., 70 Wash. 645, 127 Pac. 295.

98. Custom extending liability.—Evi-

§§ 1068-1085. Damages—§§ 1068-1080. Extent of Liability, Measure and Elements of Damages—§ 1068. In General.—The liability of a common carrier to make compensation for goods or property lost by it extends at common law not only to the duty imposed upon it by law to safely transport the goods, but also to its responsibility to make reparation by way of damages in favor of the owner of the property to the fullest extent fixed and allowed by law in such cases.[99] The owner may recover the actual damages sustained,[1] as the direct and necessary consequences of the loss or injury of goods.[2] He is restricted to such actual loss and can not recover what erroneously appeared to be the damages when the goods first arrived.[3]

Remote and Speculative Damages.—The general, if not the universal, rule applicable in cases where compensation is sought for the consequences of the wrongful or negligent act of a carrier, or for the violation of its contract, is that it is responsible only for the proximate and not the remote consequences of its actions.[4] Damages which are uncertain and speculative are not recoverable.[5]

Liability for Acts of Agent.—While a carrier is liable for the actual damages to goods shipped caused by the act of his agent done in the usual course of his employment, yet he is not responsible for wanton and willful damages done by the agent without his consent or subsequent ratification.[6]

Where No Loss Is Sustained.—If, by an actual sale and receipt of the price, the consignee protects himself against any loss resulting from the goods

dence held not to show a custom extending a railroad's liability as common carrier for goods ready for delivery at destination. Knight *v.* Southern Railway, 67 S. E. 16, 85 S. C. 78.

99. **Common-law liability.**—Galveston, etc., R. Co. *v.* Ball, 80 Tex. 602, 606, 16 S. W. 441.

As to effect of stipulations limiting liability or fixing value of goods, see post, "Limitation of Liability," chapter 14.

Under the Texas statutes, the liability of a common carrier for loss of freight is that imposed by the rules of the common law. Gulf, etc., R. Co. *v.* Levi, 76 Tex. 337, 340, 13 S. W. 191; Missouri Pac. R. Co. *v.* Douglas & Sons, 2 Texas App. Civ. Cas., § 28.

1. **Actual damages—Illustrations.**—In an action against a carrier for injury to goods, part of which plaintiff had sold, he may recover actual damages for injury to the portion unsold. Henry *v.* Central R., etc., Co., 89 Ga. 815, 15 S. E. 757.

Where the injury to the goods is lessened by the action of the plaintiff, the carrier should only be charged with actual loss, and plaintiff should be allowed for expenses incurred in so doing. Robertson *v.* National Steamship Co., 60 N. Y. Super. Ct. 132, 17 N. Y. S. 459, 42 N. Y. St. Rep. 694.

Where, through the negligence of a carrier, meat consigned to Europe was partly destroyed, and a portion taken for the ship's use, the shipper can recover of the carrier for the meat used by the ship as well as for that destroyed. Sherman *v.* Inman Steamship Co. (N. Y.), 26 Hun 107.

2. The plaintiff was about to commence the publishing of a newspaper in Cincinnati, and was waiting for the machinery to arrive from New York, where it had been purchased. The carriers had been notified of these facts when they contracted to carry the machinery to Cincinnati in four days. A part of the machinery was lost. Held, that the carrier was liable for the direct and necessary consequences, including wages of men who were idle for want of the machinery after the time when it was to have been delivered, and the cost of efforts made to recover the machinery, as well as the cost of replacing that which was lost, and which could only be replaced by ordering it from the manufactory in New York. Cincinnati Chronicle Co. *v.* White Line Cent. Transit Co., 1 Cin. R. 300, 13 O. Dec. 561.

3. Gulf, etc., R. Co. *v.* Godair, 3 Tex. Civ. App. 514, 22 S. W. 777.

4. **Remote damage.**—Evans *v.* Rudy, 34 Ark. 383; Daniels *v.* Ballatine, 23 O. St. 532, 13 Am. Rep. 264; Alderson *v.* Gulf, etc., R. Co. (Tex. Civ. App.), 23 S. W. 617, affirmed in 93 Tex. 678, no op.

5. Yoakum *v.* Dunn, 1 Tex. Civ. App. 524, 21 S. W. 411, holding that the following charge was erroneous: "If you find that by reason of the total or partial loss of some of the articles belonging to the collection or museum, the whole collection is depreciated in value, and rendered unfit for profitable exhibition, you will consider such incidents and results, for the purpose of determining the actual damage you find the plaintiff has sustained."

6. **Liability for acts of agent.**—Mendelsohn *v.* Anaheim Lighter Co., 40 Cal. 657.

being damaged in transitu, he can not recover of the carrier anything beyond nominal damages and costs, although he may be liable, on account of warranty or fraud in making the sale, to refund to the purchaser a part of the price.[7]

Possibility That Goods Damaged by Freshet before Loss.—Though goods saved by a carrier from the perils of a freshet were damaged by passing through the freshet without its fault, yet, if some not saved are unaccounted for, and it is not shown that the freshet caused their loss, or what their condition was when they disappeared, a recovery for their full value may be had.[8]

§ 1069. Loss of Goods.—The general rule is that where goods are lost or destroyed the carrier is liable for their value at the place of destination at the time they should have been delivered,[9] with interest thereon from that time,[10]

7. **Where no loss sustained.**—Henry *v.* Central R., etc., Co., 89 Ga. 815, 15 S. E. 757.

8. **Goods damaged before loss.**—Charlotte, etc., R. Co. *v.* Wooten, 87 Ga. 203, 13 S. E. 509.

9. **Loss of goods—Value at destination.**—*United States.*—Mobile, etc., R. Co. *v.* Jurey, 111 U. S. 584, 28 L. Ed. 527, 4 S. Ct. 566; New York, etc., R. Co. *v.* Estill, 147 U. S. 591, 622, 37 L. Ed. 292, 13 S. Ct. 444, 54 Am. & Eng. R. Cas. 487; Primrose *v.* Western Union Tel. Co., 154 U. S. 1, 14, 38 L. Ed. 883, 14 S. Ct. 1098; Woodward *v.* Illinois Cent. R. Co., 1 Biss. 403, Fed. Cas. No. 18006; Ormsby *v.* Union Pac. R. Co., 4 Fed. 706, 2 McCrary 48.

Alabama.—South, etc., R. Co. *v.* Wood, 72 Ala. 451, 18 Am. & Eng. R. Cas. 634; Louisville, etc., R. Co. *v.* Gilmer, 89 Ala. 534, 7 So. 654, 42 Am. & Eng. R. Cas. 450; Echols *v.* Louisville, etc., R. Co., 90 Ala. 366, 7 So. 655; Louisville, etc., R. Co. *v.* Kelsey, 89 Ala. 287, 7 So. 648, 42 Am. & Eng. R. Cas. 584; East Tennessee, etc., R. Co. *v.* Johnston, 75 Ala. 596, 22 Am. & Eng. R. Cas. 437, 51 Am. Rep. 489; Southern R. Co. *v.* Hatter & Son, 165 Ala. 423, 51 So. 723.

California.—Ringgold *v.* Haven, 1 Cal. 108; Hart *v.* Spalding, 1 Cal. 213.

Georgia.—Wilson *v.* Atlanta, etc., R. Co., 82 Ga. 386, 9 S. E. 1076; Chattanooga Southern R. Co. *v.* Thompson, 133 Ga. 127, 131, 65 S. E. 285; Taylor & Co. *v.* Collier, 26 Ga. 122.

Indiana.—Wallace *v.* Vigus (Ind.), 4 Blackf. 260.

Illinois.—Chicago, etc., R. Co. *v.* Dickinson, 74 Ill. 249; Northern Transp. Co. *v.* McClary, 66 Ill. 233; Plaff *v.* Pacific Exp. Co., 159 Ill. App. 493; S. C., 251 Ill. 243, 95 N. E. 1089.

Iowa.—Robinson Bros. *v.* Merchants' Despatch Transp. Co., 45 Iowa 470; Cobb, etc., Co. *v.* Illinois Cent. R. Co., 38 Iowa 601.

Kentucky.—Adams Exp. Co. *v.* McDonald (Ky.), 1 Bush. 32; Cincinnati, etc., R. Co. *v.* Spratt (Ky.), 2 Duv. 4; Cincinnati, etc., R. Co. *v.* Hansford, 30 Ky. L. Rep. 1105, 100 S. W. 251.

Louisiana.—Burke *v.* Clarke, 11 La. 206; Price, etc., Co. *v.* The Uriel, 10 La. Ann. 413; Rathbone *v.* Neal, 4 La. Ann. 563, 50 Am. Dec. 579; Lewis *v.* The Success, 18 La. Ann. 1; Porter *v.* Curray, 7 La. 233.

Maine.—Little *v.* Boston, etc., Railroad, 66 Me. 239; Perkins *v.* Portland, etc., R. Co., 47 Me. 573, 74 Am. Dec. 507.

Maryland.—Baltimore, etc., R. Co. *v.* Pumphrey, 59 Md. 390, 9 Am. & Eng. R. Cas. 331.

Minnesota.—Jellett *v.* St. Paul, etc., R. Co., 30 Minn. 265, 16 Am. & Eng. R. Cas. 246, 15 N. W. 237.

Mississippi.—Vicksburg, etc., R. Co. *v.* Ragsdale, 46 Miss. 458. See Mobile, etc., R. Co. *v.* Robbins Cotton Co., 94 Miss. 351, 48 So. 231.

Missouri.—Union R., etc., Co. *v.* Traube, 59 Mo. 355, 8 Am. R. Rep. 441; Davis *v.* Wabash, etc., R. Co., 13 Mo. App. 449, reversed on other grounds, 89 Mo. 340; Rice *v.* Indianapolis, etc., R. Co., 3 Mo. App. 27; Sturgeon *v.* St. Louis, etc., R. Co., 65 Mo. 569.

Nebraska.—Atchison, etc., R. Co. *v.* Lawler, 40 Neb. 356, 58 N. W. 968, 61 Am. & Eng. R. Cas. 255.

New Hampshire.—Hackett *v.* Boston, etc., Railroad, 35 N. H. 390.

New York.—Sturgess *v.* Bissell, 46 N. Y. 462; Harris *v.* Delaware, etc., R. Co., 61 N. Y. 656; Sherman *v.* Wells (N. Y.), 28 Barb. 403; Rice *v.* Ontario Steamboat Co. (N. Y.), 56 Barb. 384; Harris *v.* Panama R. Co., 18 N. Y. Super. Ct. 312; Davis *v.* New York, etc., R. Co. (N. Y.), 1 Hilt. 543.

North Carolina.—Lewark *v.* Norfolk, etc., R. Co., 137 N. C. 383, 49 S. E. 882.

Ohio.—Erie R. Co. *v.* Lockwood, 28 O. St. 358, 14 Am. R. Rep. 143; McGregor & Co. *v.* Kilgore, 6 O. 358, 27 Am. Dec. 260; Louis *v.* Buckeye, 1 Handy 150, 12 O. Dec. 74.

Oregon.—Prettyman *v.* Oregon R., etc., Co., 13 Ore. 341, 25 Am. & Eng. R. Cas. 413, 10 Pac. 634.

Pennsylvania.—Lucesco Oil Co. *v.* Pennsylvania R. Co., 2 Pittsb. (Pa.) 477; Gillingham *v.* Dempsey (Pa.), 12 Serg. & R. 183; Ruppel *v.* Allegheny Valley R. Co., 167 Pa. 166, 31 Atl. 478, 46 Am. St. Rep. 666; Hand *v.* Baynes (Pa.), 4 Whart. 204,

10. **Interest as element of damages.**—See post, "Interest," § 1074.

33 Am. Dec. 54; Warden *v.* Greer (Pa.), 6 Watts 424.

South Carolina.—Kyle *v.* Laurens R. Co. (S. C.), 10 Rich. L. 382, 70 Am. Dec. 231; Shaw *v.* South Carolina R. Co. (S. C.), 5 Rich. L. 462, 57 Am. Dec. 768; Wallingford *v.* Columbia, etc., R. Co., 26 S. C. 258, 2 S. E. 19, 30 Am. & Eng. R. Cas. 40; Brown *v.* Northwestern Railroad, 75 S. C. 20, 54 S. E. 829.

Tennessee.—Dean *v.* Vaccaro, 39 Tenn. (2 Head) 488, 75 Am. Dec. 744; East Tennessee, etc., R. Co. *v.* Kelly, 91 Tenn. 699, 20 S. W. 312, 17 L. R. A. 691, 30 Am. St. Rep. 902; Louisville, etc., R. Co. *v.* Mason, 79 Tenn. (11 Lea) 116, 16 Am. & Eng. R. Cas. 241. See Cole *v.* Rankin (Tenn.), 42 S. W. 72. Compare, Edminson *v.* Baxter, 5 Tenn. (4 Hayw.) 112, 9 Am. Dec. 75.

Texas.—Fowler *v.* Davenport, 21 Tex. 626; Missouri, etc., R. Co. *v.* Cook, 8 Tex. Civ. App. 376, 27 S. W. 769; M. P. R. Co. *v.* Barnes & Co., 2 Texas App. Civ. Cas., § 575; Gulf, etc., R. Co. *v.* Clark, 2 Texas App. Civ. Cas., § 512, 18 Am. & Eng. R. Cas. 628; Texas, etc., R. Co. *v.* Tankersley, 63 Tex. 57; Texas, etc., R. Co. *v.* Nicholson, 61 Tex. 491; Southern Pac. R. Co. *v.* D'Arcais, 64 S. W. 813, 27 Tex. Civ. App. 57; Texas, etc., R. Co. *v.* Payne, 38 S. W. 366, 15 Tex. Civ. App. 58; Wolfe *v.* Lacy, etc., Co., 30 Tex. 349, 351; Missouri Pac. R. Co. *v.* Fagan, 72 Tex. 127, 132, 9 S. W. 749, 2 L. R. A. 75, 13 Am. St. Rep. 776; Galveston, etc., R. Co. *v.* Efron (Tex. Civ. App.), 38 S. W. 639; Texas, etc., R. Co. *v.* Taylor, 3 Texas App. Civ. Cas., § 192; Gulf, etc., R. Co. *v.* Booton, 4 Texas App. Civ. Cas., § 67, 15 S. W. 909; T. B. & H. R. Co. *v.* Montgomery, 4 Texas App. Civ. Cas., § 238, 16 S. W. 178; Galveston, etc., R. Co. *v.* Ball, 80 Tex. 602, 16 S. W. 441; Missouri, etc., R. Co. *v.* Webb, 20 Tex. Civ. App. 431, 439, 49 S. W. 526; Texas, etc., R. Co. *v.* Hoffecker (Tex. Civ. App.), 123 S. W. 617; Texas, etc., R. Co. *v.* Davis, 2 Texas App. Civ. Cas., § 191; Pacific Exp. Co. *v.* Hertzberg, 17 Tex. Civ. App. 100, 42 S. W. 795; International, etc., R. Co. *v.* Parish, 18 Tex. Civ. App. 130, 132, 43 S. W. 1066; Gulf, etc., R. Co. *v.* Roberts (Tex. Civ. App.), 85 S. W. 479; Missouri, etc., R. Co. *v.* Dement (Tex. Civ. App.), 115 S. W. 635; Missouri Pac. R. Co. *v.* Hewett, 2 Texas App. Civ. Cas., § 273; Texas, etc., R. Co. *v.* Martin, 2 Texas App. Civ. Cas., § 342.

Vermont.—Laurent *v.* Vaughn, 30 Vt. 90.

Virginia.—Chesapeake, etc., R. Co. *v.* Stock & Sons, 104 Va. 97, 51 S. E. 161.

West Virginia.—Quarrier *v.* Baltimore, etc., R. Co., 20 W. Va. 424, 18 Am. & Eng. R. Cas. 535.

Wisconsin.—Chapman *v.* Chicago, etc., R. Co., 26 Wis. 295, 7 Am. Rep. 81; Whitney *v.* Chicago, etc., R. Co., 27 Wis. 327, 5 Am. R. Rep. 291; Dean *v.* Chicago, etc., R. Co., 43 Wis. 305.

England.—Brandt *v.* Bowlby, 2 B. & Ad. 932, 22 E. C. L. 214; O'Hanlan *v.* Great Western R. Co., 6 B. & S. 484, 118 E. C. L. 484; Anderson *v.* North Eastern R Co., 9 W. R. 519. See also Redman's Law of Ry. Carr. (2d Ed.), p. 134; Hiort *v.* London, etc., R. Co., 4 Exch. Div. 188, 27 W. R. 778; Waller *v.* Midland Great Western R. Co., L. R. 4 Ir. 376, reversing L. R. 1 Ir. 520.

Canada.—Worden *v.* Canadian Pac. R. Co., 13 Ont. Rep. 652, 30 Am. & Eng. R. Cas. 127; Leader *v.* Northern R. Co., 3 Ont. C. & Div. 92, 16 Am. & Eng. R. Cas. 287.

By the terms of a sale of machinery, $400 of the price was to be paid on delivery, and of this the buyers had paid $100, and the seller had it consigned to its own order, and drew on the buyers, bill of lading attached, for $300. Held, that the seller under these conditions could sue the carrier in case of its loss for its full value, and recovery could not be reduced by the amount paid on account for which it was bound to account to the buyers. Southern R. Co. *v.* Adams Mach. Co., 165 Ala. 436, 51 So. 779.

Not credit price.—Where freight is lost, the carrier is liable to the consignee for its value at the time of the loss at the place of destination, and not for the credit price at which the consignee bought it. Brown *v.* Northwestern Railroad, 54 S. E. 829, 75 S. C. 20.

Where title passed to buyer.—A seller and purchaser agreed that the property in goods should pass to the purchaser when delivered to the carrier at the place of shipment, but that the seller should retain the right of possession until a draft for the purchase price, with bill of lading attached, was paid. The carrier lost the goods in transit. Held that, the title having passed to the buyer, the carrier was liable, not merely for the sale price, but for the value of the goods, unless a less amount would cover the damage. Texas, etc., R. Co. *v.* Wilson Hack Line, 46 Tex. Civ. App. 38, 101 S. W. 1042.

Market value at date of destruction.—Measure of damages for total loss of goods, caused by the carrier's negligence while they remained in the depot of destination, is the market value of the goods at that place at date of their destruction. East Tennessee, etc., R. Co. *v.* Kelly, 91 Tenn. 699, 20 S. W. 312, 17 L. R. A. 691, 30 Am. St. Rep. 902.

Freight in which there is inherent defects.—The measure of damages for total loss of freight in which there is an inherent defect is the price it would have brought in the market at the place of destination in the condition they would have been in had the carrier exercised due care, less freight charges. Missouri Pac. R. Co. *v.* Fagan, 72 Tex. 127, 9 S. W. 749, 2 L. R. A. 75, 13 Am. St. Rep. 776.

deducting the unpaid cost of transportation.[11] The standard of value to be taken in such case is the wholesale price.[12] Where the only evidence as to the value of lost goods is the price stated in the bill, made out at the time they were bought, the jury should be limited, in assessing the damages, to the price stated in the bill, with interest thereon from the time of the loss to the time of trial.[13]

Carrier by Water.—Where goods are lost during a voyage the carrier is liable for their value at the port of destination,[14] but when the loss occurs at the place of landing before the voyage begins, the carrier is liable for their value at such port.[15]

Value at Nearest Market.—The measure of damages for the destruction by a carrier of a collection of birds and animals in a museum is the value of such specimens at the nearest market, rather than the value of the owner's time in collecting them.[16]

Loss of Draft.—The measure of damages for the loss of a draft is prima facie the amount due thereon, the company being entitled to reduce that valuation by showing payment, insolvency of the maker, or invalidity of the draft.[17]

Partial Loss.—Where the goods are uninjured in quality, but there is a partial loss, the owner can not abandon the goods and recover their entire value; he can recover only the price, at the place of delivery, of the goods actually lost.[18]

Agreed Valuation.—If two or more articles of an interstate shipment are shipped on an agreed valuation fixed by the shipper, and a part of them is delivered and the balance lost, the shipper can recover only a portion of the agreed value, determined by the ratio of the aggregate value to the amount stipulated as such value.[19]

Deduction of Factor's Commissions.—Where a common carrier undertakes to carry cotton to a market, and it is lost, it is not allowable for the jury to deduct the factor's commissions from the value.[20]

Shipment at Reduced Rate.—Where a common carrier receives goods for transportation, at a value lower than their actual value, and, in consequence thereof, ships the same at a reduced rate, it remains liable for the full value of the goods, if there is no agreement or contract in the bill of lading as to any limitation on account of loss or damage, by reason of any reduction of freight.[21]

§§ 1070-1072. Injury to Goods—§ 1070. In General.—As a general rule where goods are injured under such circumstances as to render the common carrier liable, the owner may recover the difference between the value of the goods in their damaged state and what would have been their value at destination if

11. **Deduction of unpaid charges.**—See post, "Freight, Allowance and Deduction," § 1073.

12. **Wholesale price.**—Wallace *v.* Vigus (Ind.), 4 Blackf. 260; Texas, etc., R. Co. *v.* Payne, 38 S. W. 366, 15 Tex. Civ. App. 58.

13. Blumenthal *v.* Brainerd, 38 Vt. 402, 91 Am. Dec. 350.

14. **Goods lost during voyage.**—*Kansas.*—Emily *v.* Carney, 5 Kan. 645.

New York.—Krohn *v.* Oechs, 48 Barb. 127; Watkinson *v.* Laughton, 8 Johns. 213.

Pennsylvania.—Gillingham *v.* Dempsey, 12 Serg. & R. 183.

Texas.—Fowler *v.* Davenport, 21 Tex. 626.

15. **Goods lost before voyage begins.**—Lakeman *v.* Grinnell, 18 N. Y. Super. Ct. 625; Krohn *v.* Oechs (N. Y.), 48 Barb. 127; Dusar *v.* Murgatroyd, Fed. Cas. No. 4,199, 1 Wash. C. C. 13.

16. **Value at nearest market.**—Yoakum *v.* Dunn, 1 Tex. Civ. App. 524, 21 S. W. 411.

17. **Loss of draft.**—Zeigler *v.* Wells, etc., Co., 23 Cal. 179, 83 Am. Dec. 87.

18. **Partial loss.**—Gulf, etc., R. Co. *v.* Booton, 4 Texas App. Civ. Cas., § 67, 15 S. W. 909; Shaw *v.* South Carolina R. Co. (S. C.), 5 Rich. L. 462, 57 Am. Dec. 768.

19. **Portion of agreed value.**—Fielder *v.* Adams Exp. Co., 69 W. Va. 138, 71 S. E. 99.

20. **Deduction of factor's commissions.**—Kyle *v.* Laurens R. Co. (S. C.), 10 Rich. L. 382, 70 Am. Dec. 231.

21. **Shipment at reduced rate.**—L. & N. R. Co. *v.* Levi, 18 O. C. C. 873, 8 O. C. D. 373.

delivered in good order,[22] with interest,[23] less the unpaid costs of transportation.[24] The rule also applies where goods are taken for transportation to a point beyond the initial carrier's line.[25] The common carrier is not liable for the whole value of property damaged by his want of care, so long as its character is not so changed but that it may be applied to the ordinary uses of such property, though he will be answerable for the depreciation in its value by reason of its being rendered unfit for some particular uses.[26]

Determination of Damages.—The measure of damages in an action against a carrier for injury to goods, caused by its negligence, should be fixed according to the average of the range of prices of such goods in the entire market,

22. Where goods injured.—*Arkansas.*—St. Louis, etc., R. Co. *v.* Phoenix Cotton Oil Co., 115 S. W. 393, 88 Ark. 594.

Delaware.—Carpenter *v.* Baltimore, etc., R. Co. (Del.), 6 Pen. 15, 64 Atl. 252.

Iowa.—Parsons *v.* United States Exp. Co., 144 Iowa 745, 123 N. W. 776, 25 L. R. A., N. S., 842.

Kentucky.—Stone *v.* Adams Exp. Co. (Ky.), 122 S. W. 200.

Louisiana.—Henderson *v.* Maid of Orleans, 12 La. Ann. 352; Oakey *v.* Russell (La.), 6 Mart., N. S., 58; Silverman *v.* St. Louis, etc., R. Co., 26 So. 447, 51 La. Ann. 1785.

Michigan.—See Marquette *v.* Langton, 32 Mich. 251.

Minnesota.—Paterson *v.* Chicago, etc., R. Co., 103 N. W. 621, 95 Minn. 57.

Missouri.—Heil *v.* St. Louis, etc., R. Co., 16 Mo. App. 363.

New York.—Robertson *v.* National Steamship Co., 60 N. Y. Super. Ct. 132, 17 N. Y. S. 459, 42 N. Y. St. Rep. 694; King *v.* Sherwood, 48 N. Y. S. 34, 22 App. Div. 548.

Ohio.—Harshman *v.* Litle Miami, etc., R. Cos. (O.), Dayton 175.

Texas.—Galveston, etc., R. Co. *v.* Bell (Tex.), 2 Posey Unrep. Cas. 517; Texas, etc., R. Co. *v.* Avery (Tex. Civ. App.), 33 S. W. 704; Texas, etc., R. Co. *v.* Berchfield, 12 Tex. Civ. App. 145, 33 S. W. 1022; Galveston, etc., R. Co. *v.* Silegman (Tex. Civ. App.), 23 S. W. 298; Missouri Pac. R. Co. *v.* Breeding, 4 Texas App. Civ. Cas., § 154, 16 S. W. 184; St. Louis, etc., R. Co. *v.* Henry (Tex. Civ. App.), 81 S. W. 334; Chicago, etc., R. Co. *v.* Calvert, 41 Tex. Civ. App. 236, 91 S. W. 825; Texas Cent. R. Co. *v.* Watson, 54 Tex. Civ. App. 509, 118 S. W. 175; Gulf, etc., R. Co. *v.* Stewart (Tex. Civ. App.), 141 S. W. 1020; Houston, etc., R. Co. *v.* Jackson, 62 Tex. 209, 213, 21 Am. & Eng. R. Cas. 126; Texas, etc., R. Co. *v.* Truesdell, 21 Tex. Civ. App. 125, 51 S. W. 272, affirmed in 93 Tex. 125, no op.; Missouri, etc., R. Co. *v.* Webb, 20 Tex. Civ. App. 431, 49 S. W. 526; Missouri, etc., R. Co. *v.* Jarrell, 38 Tex. Civ. App. 425, 86 S. W. 632, affirmed in 101 Tex. 649, no op.; Texas, etc., R. Co. *v.* Arnold, 16 Tex. Civ. App. 74, 40 S. W. 829; Texas, etc., R. Co. *v.* Klepper (Tex. Civ. App.), 24 S. W. 567; Reeves *v.* Texas, etc., R. Co., 11 Tex. Civ. App. 514, 32 S. W. 920; Gulf, etc., R. Co. *v.* Eddins, 7 Tex. Civ. App. 116, 26 S. W. 161; Gulf, etc., Co. *v.* Stanley, 89 Tex. 42, 33 S. W. 109, affirming 29 S. W. 806; San Antonio, etc., R. Co. *v.* Wright, 20 Tex. Civ. App. 136, 49 S. W. 147; St. Louis, etc., R. Co. *v.* Smith, 11 Tex. Civ. App. 550, 32 S. W. 828; International, etc., R. Co. *v.* Dimmit County Pasture Co., 5 Tex. Civ. App. 186, 189, 23 S. W. 754; Missouri, etc., R. Co. *v.* Harris (Tex. Civ. App.), 138 S. W. 1085.

Virginia.—Southern Exp. Co. *v.* Jacobs, 109 Va. 27, 63 S. E. 17.

Defendant, a common carrier, agreed to transport apples from two of its stations to Albany, and there deliver them to a steamboat line for New York. On the ship's arrival in New York, they were found injured by frost caused by delay in delivery at Albany. Held, in the absence of any proof of difference in value between the two places, or that the fruit was injured after leaving Albany, the value of the apples is their value as proved in New York, deducting the freight from Albany to New York City. Marshall *v.* New York Cent. R. Co., 45 Barb. 502, affirmed in 48 N. Y. 660.

In an action against a carrier for injuries to peaches by its failure to properly ice the cars, plaintiff's damage depended upon the market value of the peaches at destination. Perkins Co. *v.* American Exp. Co., 85 N. E. 895, 199 Mass. 561.

Machine broken in transit.—The measure of damage for breaking a machine in transit is the difference between the value of the machine at the place of delivery at the time and in the condition in which it was delivered not including which it ought to have arrived, and its value at the time and in the condition in which it was delivered not including the amount plaintiff may have expended in repairing it. Missouri Pac. R. Co. *v.* Breeding, 16 S. W. 184, 4 Texas App. Civ. Cas., § 154.

23. See post, "Interest," § 1074.

24. See post, "Freight, Allowance and Deduction," § 1073.

25. Southern Exp. Co. *v.* Jacobs, 109 Va. 27, 63 S. E. 17.

26. Hackett *v.* Boston, etc., Railroad, 35 N. H. 390.

and not according to any sudden inflation or depression of prices.[27] Sale by auction in a great mart of commerce is a proper method of determining the value of goods damaged in the hands of a carrier.[28]

Time for Estimating Damages.—Where a shipment arrived at its destination in the night, its market value on the next day was the market value to be employed in determining the measure of damages in an action against the carrier for damages caused by improper handling.[29]

§ 1071. Right to Abandon Goods.—Where property is injured in transportation through the negligence of the carrier, but is not entirely worthless, the owner can not refuse to accept it and sue for its marget value, but may recover only for the injury.[30] But where the goods are injured so as to entirely destroy their

27. **Determination of damages.**—Smith *v.* Griffith (N. Y.), 3 Hill 333, 38 Am. Dec. 639.

28. The Queen, 78 Fed. 155; Pacific Coast Steamship Co. *v.* Bancroft-Whitney Co., 94 Fed. 180, 36 C. C. A. 135, reversed on other grounds in Queen of the Pacific, 21 S. Ct. 278, 180 U. S. 49, 45 L. Ed. 419.

29. **Time for estimating damages.**—St. Louis, etc., R. Co. *v.* Henry (Tex. Civ. App.), 81 S. W. 334.

30. **Right of owner to abandon goods.**—*Alabama.*—See Central, etc., R. Co. *v.* Montmollen, 39 So. 820, 145 Ala. 468, 117 Am. St. Rep. 58.

Louisiana.—The mere fact that fruit is slightly damaged does not entitle the consignee to refuse to receive it and recover its full value. Corso *v.* New Orleans, etc., R. Co., 48 La. Ann. 1286, 20 So. 752. Compare Meyer *v.* Vicksburg, etc., R. Co., 41 La. Ann. 639, 6 So. 218, 17 Am. St. Rep. 408. See Henderson *v.* Maid of Orleans, 12 La. Ann. 352, holding that the doctrine of abandonment for a constructive total loss does not apply to a contract of affreightment.

Michigan.—Reason *v.* Detroit, etc., R. Co., 113 N. W. 596, 150 Mich. 50.

New York.—Mills *v.* National Steamship Co., 5 N. Y. S. 258, 25 N. Y. St. Rep. 856.

Texas.—Gulf, etc., R. Co. *v.* Jackson, 4 Texas App. Civ. Cas., § 47, 15 S. W. 128; Baumback *v.* Gulf, etc., R. Co., 4 Tex. Civ. App. 650, 23 S. W. 693; Gulf, etc., R. Co. *v.* Pitts & Son, 37 Tex. Civ. App. 212, 83 S. W. 727; Gulf, etc., R. Co. *v.* Everett, 37 Tex. Civ. App. 167, 83 S. W. 257; Gulf, etc., R. Co. *v.* Booton, 4 Texas App. Civ. Cas., § 67, 15 S. W. 909; Missouri, etc., R. Co. *v.* Moore, 47 Tex. Civ. App. 531, 105 S. W. 532; G., H. & S. A. R. Co. *v.* Van Winkle & Co., 3 Texas Civ. Cas., § 443; Houston, etc., R. Co. *v.* Harn, 44 Tex. 628.

Where a car load of chops was injured in transit by wetting, the fact that the consignee was in the wholesale trade, to which the chops, in their damaged condition, were unsuitable, did not entitle him to refuse to accept them and sue the carrier for their original value. Gulf, etc., R. Co. *v.* Pitts & Son, 37 Tex. Civ. App. 212, 83 S. W. 727.

Where a carrier undertook in good faith to repair a machine injured in transit, the fact that the machine when tendered was in a condition which rendered it worthless for the purpose intended, but could, at a moderate expenditure, have been so repaired as to render it as useful as before the injury, does not justify the shipper in abandoning the machine or refusing to accept it; his remedy being an action for damages. Parsons *v.* United States Exp. Co., 144 Iowa 745, 123 N. W. 776, 25 L. R. A., N. S., 842.

Where only a part of property is injured, and the remainder arrives safely, the consignee can not reject the uninjured portion, and hold the carrier liable for the whole. Michigan, etc., R. Co. *v.* Bivens, 13 Ind. 263; Silverman *v.* St. Louis, etc., R. Co., 26 So. 447, 51 La. Ann. 1785.

Offer to deliver damaged goods on unreasonable conditions.—In Texas, etc., R. Co. *v.* Martin, 2 Texas App. Civ. Cas., § 342, which was a case of a total loss of a part of the goods, and an offer upon unreasonable conditions to deliver the remainder in a damaged condition, it was held that the owner is not bound to receive the remaining damaged portion thereof, but may maintain an action against the carrier for the value of all the goods as shipped.

Effect of verdict.—Where the verdict in favor of the consignee in an action for the value of damaged chops injured in transportation was the same as plaintiff would have been entitled to recover had he accepted and sold the chops for their reasonable value in their damaged condition, the fact that he unlawfully refused to accept the same and sued for their value, instead of the difference between the value as shipped and as delivered, was immaterial. Gulf, etc., R. Co. *v.* Pitts & Son, 83 S. W. 727, 37 Tex. Civ. App. 212.

value, the consignee may refuse to accept them, and hold the carrier for their value.[31]

§ 1072. When Damaged Goods Sold.—Where goods delivered to a carrier are damaged by the rising of a sudden flood, the measure of damages to the owner of goods, where a part of them have been sold by him, is the difference between the general value and the amount realized by the sale.[32] Where the carrier sells damaged goods, on the refusal of the consignee to receive them, it is bound by such sale as evidence of their value, and must repay the owner so much of the loss as has not been paid by the insurers.[33] Where a contract of affreightment was entire, and part of the goods were lost, and, on the consignee's refusing to accept the remainder, the carrier sold them, the shipper is entitled to recover the proceeds of the sale, less charges for care, storage, wharfage, and expenses of the sale, but no charges for freight are to be deducted.[34] In allowing damages to a consignee of goods, the carrier should be credited with the amount realized from a sale of the goods for the benefit of the consignee's creditors.[35]

§ 1073. Freight, Allowance and Deduction.—Where recovery is based on the value of goods at destination, freight charges unpaid should be deducted;[36] and, if the charges have already been paid, the plaintiff can not re-

31. Brand *v.* Weir, 57 N. Y. S. 731, 27 Misc. Rep. 212.

Where a machine is so damaged that the cost of repairing it would equal the cost of a new one, the consignee may recover its value, the freight paid, and interest from the time when it should have been delivered, but not damage resulting from the loss of its use, unless the carrier knew of the contemplated use. Thomas, etc., Mfg. Co. *v.* Wabash, etc., R. Co., 62 Wis. 642, 22 N. W. 827, 51 Am. Rep. 725.

32. **When damaged goods sold.**—Strouss *v.* Wabash, etc., R. Co., 17 Fed. 209. See Magdeburg General Ins. Co. *v.* Paulson, 29 Fed. 530.

Necessity of selling injured goods in order to establish damage.—See post, "In General," § 1082.

33. Cassilay *v.* Young & Co. (Ky.), 4 B. Mon. 265, 39 Am. Dec. 505.

34. Stevens *v.* Sayward (Mass.), 3 Gray 103.

35. Chesapeake, etc., R. Co. *v.* Lavin, 136 Ky. 205, 124 S. W. 274.

36. **Deduction of unpaid charges.**—*Georgia.*—Wilson *v.* Atlanta, etc., R. Co., 82 Ga. 386, 9 S. E. 1076; Taylor & Co. *v.* Collier, 26 Ga. 122.

Indiana.—Wallace *v.* Vigus (Ind.), 1 Blackf. 260.

Kentucky.—Cincinnati, etc., R. Co. *v.* Spratt (Ky.), 2 Duv. 4.

Louisiana.—Porter *v.* Curray, 7 La. 233.

Michigan.—Marquette *v.* Langton, 32 Mich. 251.

Missouri.—Gray *v.* Missouri River Packet Co., 64 Mo. 47.

New York.—Rice *v.* Ontario Steamboat Co. (N. Y.), 56 Barb. 384; Robertson *v.* National Steamship Co., 60 N. Y. Super. Ct. 132, 17 N. Y. S. 459, 42 N. Y. St. Rep. 694.

Ohio.—Erie R. Co. *v.* Lockwood, 28 O. St. 358, 14 Am. R. Rep. 143.

Pennsylvania.—Tuesco Oil Co. *v.* Pennsylvania R. Co. (Pa.), 2 Pittsb. R. 477.

Texas.—Galveston, etc., R. Co. *v.* Ball, 80 Tex. 602, 606, 16 S. W. 441; Houston, etc., R. Co. *v.* Jackson, 62 Tex. 209, 21 Am. & Eng. R. Cas. 126; Fowler *v.* Davenport, 21 Tex. 626; International, etc., R. Co. *v.* Nicholson, 61 Tex. 550; Texas, etc., R. Co. *v.* Hoffecker (Tex. Civ. App.), 123 S. W. 617.

Virginia.—Chesapeake, etc., R. Co. *v.* Stock & Sons, 51 S. E. 161, 104 Va. 97.

Where, in an action for the loss of corn by the sinking of a barge, the proof showed that the corn was worth forty-two to forty-three cents per bushel at destination, and at the price of forty-two cents, after deducting the value of the corn saved and the freight, there was left an amount due to plaintiff exceeding the amount of the verdict, an objection that the cost of transportation should have been deducted from the judgment was not sustainable. Marsden Co. *v.* Bullitt & Co., 72 S. W. 32, 24 Ky. L. Rep. 1697.

Reason of rule.—The object of the law is to give compensation for the injury, and no more. The carrier is compelled to pay the enhanced value of the property at the place of delivery. The owner, therefore, in recovering this value at the terminal point receives in substance and effect the benefits of the transportation as fully as if the goods had been transported and delivered to him, in which event he would have been bound to pay the cost of transportation. For these reasons, perhaps, the law gives the carrier the benefit of the freight charges in assessing the damages. Galveston, etc., R. Co. *v.* Ball, 80 Tex. 602, 607, 16 S. W. 441.

cover the amount so paid in addition to the value of the goods, with interest.[37] It is held that no deduction can be made for unpaid charges, unless the amount is proved.[38] And it has been held that no deduction will be made where the defendant sets up no counterclaim for freight;[39] but it is also held that evidence of the amount of freight unpaid is admissible on the issue of damage though not pleaded as a counterclaim.[40] Where the freight due a carrier, entered into the amount of damages for which the carrier was liable for loss of the goods, limitations did not run against the carrier's right to have the freight deducted from such damages.[41] A carrier who, by his own fault, loses part of the goods sent by one entire contract, and sells the remainder at the port of delivery, after waiting for an owner the stipulated time, can not set off against the consignee, who sues for the proceeds of the sale, any sum for freight, since freight has not been earned.[42]

Where plaintiff recovers the value of goods at the point of shipment, in an action for the loss thereof or damage thereto, it is proper to add the amount of charges paid by plaintiff;[43] and unpaid charges will not be deducted in estimating the damages.[44]

Verdict Not Deducting Charge.—Where the verdict is for the full amount of the damage alleged, it is erroneous, since no allowance was made for the amount due the carrier for freight; and it can not be insisted that this was accounted for by the jury by balancing the amount due for freight with the amount due as interest, when no claim is set up in the complaint for interest, and there is no testimony, and no direction in the charge of the court, in relation thereto.[45]

§ 1074. Interest.—It seems to be settled by the later authorities that in actions against carriers for loss of or injury to goods, interest may be recovered as an element of damages.[46]

37. Galveston, etc., R. Co. *v.* Ball, 80 Tex. 602, 16 S. W. 441; Galveston, etc., R. Co. *v.* Kelley (Tex. Civ. App.), 26 S. W. 470; Gulf, etc., R. Co. *v.* Kemp (Tex. Civ. App.), 30 S. W. 714. See Thomas, etc., Mfg. Co. *v.* Wabash, etc., R. Co., 62 Wis. 642, 22 N. W. 827, 51 Am. Rep. 725. Contra, Sherman *v.* Inman Steamship Co. (N. Y.), 26 Hun 107.

38. **Charges must be proved.**—Gray *v.* Missouri River Packet Co., 64 Mo. 47; International, etc., R. Co. *v.* Nicholson, 61 Tex. 550.

39. Bamberg *v.* South Carolina R. Co., 9 S. C. 61, 30 Am. Rep. 13.

40. Texas, etc., R. Co. *v.* Hoffecker (Tex. Civ. App.), 123 S. W. 617.

41. Texas, etc., R. Co. *v.* Hoffecker (Tex Civ. App.), 123 S. W. 617.

42. Stevens *v.* Sayward (Mass.), 8 Gray 215. And see Sayward *v.* Stevens (Mass.), 3 Gray 97.

43. Jenkins *v.* Atlantic, etc., R. Co., 66 S. E. 407, 84 S. C. 520; Galveston, etc., R. Co. *v.* Ball, 80 Tex. 602, 607, 16 S. W. 441; M. P. R. Co. *v.* Barnes & Co., 2 Texas App. Civ. Cas., § 575.

44. M. P. R. Co. *v.* Barnes & Co., 2 Texas App. Civ. Cas., § 575. See Fine & Bro. *v.* Southern Exp. Co., 10 Ga. App. 161, 73 S. E. 35.

45. **Verdict not deducting charges.**—Miami Powder Co. *v.* Port Royal, etc., R. Co., 38 S. C. 78, 16 S. E. 339, 21 L. R. A. 123.

46. **Interest as an element of damages.**—*United States.*—Mobile, etc., R. Co. *v.* Jurey, 111 U. S. 584, 28 L. Ed. 527, 4 S. Ct. 566; New York, etc., R. Co. *v.* Estill, 147 U. S. 591, 622, 37 L. Ed. 292, 13 S. Ct. 444, 54 Am. & Eng. R. Cas. 487; Primrose *v.* Western Union Tel. Co., 154 U. S. 1, 14, 38 L. Ed. 883, 14 S. Ct. 1908; Westray *v.* Miletus, Fed. Cas, No. 17,461, affirmed in Fed. Cas. No. 9,545, 5 Blatchf. 335; Insurance Co. *v.* St. Louis, etc., R. Co., 9 Fed. 811 (gross negligence on part of carrier); Woodward *v.* Illinois Cent. R. Co., 1 Biss. 403, Fed. Cas. No. 18,006.

Arkansas.—St. Louis, etc., Railway *v.* Phelps, 46 Ark. 485.

Georgia.—East Tennessee, etc., R. Co. *v.* Johnson, 85 Ga. 497, 11 S. E. 809.

Illinois.—In Northern Transp. Co. *v.* McClary, 66 Ill. 233, and Chicago, etc., R. Co. *v.* Ames, 40 Ill. 249, it was held that interest was properly allowed as an element of damages. But the contrary was held in Chicago, etc., R. Co. *v.* Davis, 54 Ill. App. 130, following Illinois Cent. R. Co. *v.* Cobb, 72 Ill. 148, holding that interest is not recoverable unless its recovery is authorized by statute.

Iowa.—Robinson Bros. *v.* Merchants' Despatch Transp. Co., 45 Iowa 470; Cobb, etc., Co. *v.* Illinois Cent. R. Co., 38 Iowa 601.

Louisiana.—Murrell *v.* Dixey, 14 La. Ann. 298; Clines *v.* Frisbee (La.), 5 Rob.

That the owner was paying interest on a debt which the goods shipped

192. Compare Morgan *v.* Bell (La.), 4 Mart., O. S., 615.

Massachusetts.—Cushing *v.* Wells, etc., Co., 98 Mass. 550; Spring *v.* Haskell (Mass.), 4 Allen 112.

Minnesota.—Cowley *v.* Davidson, 13 Minn. 92, Gil. 86.

Missouri.—It seems to be impossible to reconcile the Missouri decisions with one another. In Gray *v.* Missouri River Packet Co., 64 Mo. 47, it was held that where live stock is killed in the course of shipment through the gross negligence of the carrier, interest is properly allowed on its value. But the allowance of interest in such cases is, to some degree, within the discretion of the court, and where there has been no negligence on the carrier's part, the recovery of interest is not permitted. See, also, Dunn *v.* Hannibal, etc., R. Co., 68 Mo. 268. In Padley *v.* Catterlin, 64 Mo. App. 629, 2 Mo. App. Rep. 1258, however, the court seems to be of the opinion that it is settled by these decisions that plaintiff in such actions is entitled to recover interest on the damages allowed. But in New York, etc., R. Co. *v.* Estill, 147 U. S. 591, 13 S. Ct. 444, 37 L. Ed. 292, 54 Am. & Eng. R. Cas. 487, modifying 41 Fed. 849, it was held that under the statute and decisions of Missouri it is improper to allow interest on the amount of damages, in an action against a carrier of live stock.

New York.—The New York decisions do not harmonize with each other. While Sherman *v.* Wells (N. Y.), 28 Barb. 403, and Harris *v.* Delaware, etc., R. Co., 61 N. Y. 656, support the general rule, in Black *v.* Camden, etc., Transp. Co. (N. Y.), 45 Barb. 40, it was held that whether interest should be allowed on damages for injury to property through the negligence of the carrier, was a matter within the discretion of the jury. See, also, Wilson *v.* Troy, 135 N. Y. 96, 32 N. E. 44, 18 L. R. A. 449, 31 Am. St. Rep. 817, citing Walrath *v.* Redfield, 18 N. Y. 457, 462; Mairs *v.* Manhattan Real Estate Ass'n, 89 N. Y. 498; Duryee *v.* New York, 96 N. Y. 477, 499; Home Ins. Co. *v.* Pennsylvania R. Co. (N. Y.), 11 Hun 182, 188; Moore *v.* New York, etc., R. Co., 126 N. Y. 671, 27 N. E. 791, 4 Silvernail Ct. App. 486. It is also held that interest is not allowable unless the carrier has been guilty of negligence (Lakeman *v.* Grinnell, 18 N. Y. Super. Ct. 625) or misconduct. Watkinson *v.* Laughton (N. Y.), 8 Johns. 213.

Ohio.—Erie R. Co. *v.* Lockwood, 28 O. St. 358, 14 Am. R. Rep. 143.

Pennsylvania.—Lucesco Oil Co. *v.* Pennsylvania R. Co. (Pa.), 2 Pittsb. 477.

South Carolina.—Kyle *v.* Laurens R. Co. (S. C.), 10 Rich. L. 382, 70 Am. Dec. 231. See Brown *v.* Northwestern Railroad, 54 S. E. 829, 75 S. C. 20.

Texas.—Rio Grande R. Co. *v.* Cross, 5 Tex. Civ. App. 454, 23 S. W. 529; Ft. Worth, etc., R. Co. *v.* Greathouse, 82 Tex. 104, 17 S. W. 831, 49 Am. & Eng. R. Cas. 157; Galveston, etc., R. Co. *v.* Ball, 80 Tex. 602, 16 S. W. 441; Galveston, etc., R. Co. *v.* Johnson (Tex.), 19 S. W. 867; Gulf, etc., R. Co. *v.* McCarty, 82 Tex. 608, 18 S. W. 716; Houston, etc., R. Co. *v.* Jackson, 62 Tex. 209, 21 Am. & Eng. R. Cas. 126; Watkins *v.* Junker, 90 Tex. 584, 587, 40 S. W. 11, reversing 38 S. W. 1129; Carter *v.* International, etc., R. Co. (Tex. Civ. App.), 93 S. W. 681; Missouri Pac. R. Co. *v.* Hewett, 2 Texas App. Civ. Cas., § 273. Some of the cases hold that interest should not be allowed unless there is fraud, delinquency, or injustice on the part of the carrier; and that in such case it is allowed by way of punishment. Fowler *v.* Davenport, 21 Tex. 626; Texas, etc., R. Co. *v.* Martin, 2 Texas App. Civ. Cas., § 342; Wolfe *v.* Lacy, etc., Co., 30 Tex. 349. In San Antonio, etc., R. Co. *v.* Addison, 96 Tex. 61, 70 S. W. 200, it was held that interest is not recoverable, eo nomine, but may be allowed by way of indemnification, as a part of the damages; it is an element of the damages, to be included as such by plaintiff in his claim and by the jury in the verdict.

Vermont.—Blumenthal *v.* Brainerd, 38 Vt. 402, 91 Am. Dec. 350; Newell *v.* Smith, 49 Vt. 255; Laurent *v.* Vaughn, 30 Vt. 90.

Virginia.—Chesapeake, etc., R. Co. *v.* Stock & Sons, 104 Va. 97, 51 S. E. 161.

West Virginia.—Clarke-Lawrence Co. *v.* Chesapeake, etc., R. Co., 63 W. Va. 423, 61 S. E. 364.

Wisconsin.—Chapman *v.* Chicago, etc., R. Co., 26 Wis. 295, 7 Am. Rep. 81; Thomas, etc., Mfg. Co. *v.* Wabash, etc., R. Co., 62 Wis. 642, 22 N. W. 827, 51 Am. Rep. 725; Whitney *v.* Chicago, etc., R. Co., 27 Wis. 327, 5 Am. R. Rep. 291.

Interest recoverable from time of loss or damage.—M. P. R. Co. *v.* Barnes, 2 Texas App. Civ. Cas., § 575; Texas, etc., R. Co. *v.* Payne, 15 Tex. Civ. App. 58, 69, 38 S. W. 366; Galveston, etc., R. Co. *v.* Efron (Tex. Civ. App.), 38 S. W. 639; International, etc., R. Co. *v.* Dimmit County Pasture Co., 5 Tex. Civ. App. 186, 23 S. W. 754; Gulf, etc., R. Co. *v.* McCarty, 82 Tex. 608, 18 S. W. 716.

Need not be asked in pleadings.—Interest may be allowed on the amount of damages sustained, though it is not asked for in the pleadings. Ft. Worth, etc., R. Co. *v.* Greathouse, 82 Tex. 104, 17 S. W. 834, 49 Am. & Eng. R. Cas. 157; International, etc., R. Co. *v.* Lewis (Tex. Civ. App.), 23 S. W. 323, 324; Houston, etc., R. Co. *v.* Jackson, 62 Tex. 209, 21 Am. &

was intended to satisfy neither adds to his right to recover interest nor enlarges the liability of the carrier.[48]

§ 1075. Expenses of Owner.—The plaintiff may recover reasonable expenses incurred in an effort to restore injured property to its former condition,[49] the expense incurred in lessening the loss,[50] and the cost of efforts made for the recovery of lost property,[51] including a reward paid for such purpose.[52] It is held that the plaintiff may recover compensation for the actual expenses and loss of time caused by the loss of property in addition to its value.[53] Actual expenses incurred by plaintiff during a period of delay in making a journey, necessitated by defendant's negligence in transporting her baggage to the station, is recoverable as special damages.[54] But it is held that the owner of machinery lost in transportation can not recover special damages for time lost and expense incurred in making successive calls for the freight at the carrier's office without proof of notice to the carrier's agent of the value of the time or attendant expense or the distance that would have to be traveled in making such calls.[55] A carrier is not liable for the expense of discovering whether goods have been injured,[56] or expenses of shipper's agent in going to the place of delivery to investigate as to the goods which had been rejected.[57]

Attorney's fees are not recoverable by the plaintiff in an action against the carrier for loss of or injury to goods.[58]

Eng. R. Cas. 126. But see Missouri, etc., R. Co. *v.* Dawson Bros. (Civ. App.), 84 S. W. 298, holding that interest can not be recovered as an element of damages sustained, unless it is specifically pleaded, or the amount sued for is sufficient to cover the damages allowed as interest and such other sum as may be included in the recovery.

Rate.—Where, in an action to recover for goods lost in transitu over defendant railroad company's road, there was judgment for plaintiff, the court properly allowed interest on the value of the goods at 8 per cent until the law changing such rate to 6 per cent went into effect, since plaintiff was entitled to the current rate of legal interest on the value of the goods lost. Rio Grande R. Co. *v.* Cross, 5 Tex. Civ. App. 454, 23 S. W. 529; Rio Grande R. Co. *v.* Munoz Successors (Tex. Civ. App.), 23 S. W. 531; Rio Grande R. Co. *v.* Cross (Tex. Civ. App.), 23 S. W. 1004. See Galveston, etc., R. Co. *v.* Johnson (Tex.), 19 S. W. 867.

48. **Paying interest on debt.**—Houston, etc., R. Co. *v.* Jackson, 62 Tex. 209, 21 Am. & Eng. R. Cas. 126.

49. **Repairing injury.**—Galveston, etc., R. Co. *v.* Tuckett (Tex. Civ. App.), 25 S. W. 670.

The plaintiff recover what it cost to put goods in a salable condition after its arrival at the place of consignment, it appearing that such expenditure was beneficial to the defendants, by reducing the damages which they would otherwise have sustained under the operation of the general rule. Winne *v.* Illinois Cent. R. Co., 31 Iowa 583.

50. Robertson *v.* National Steamship Co., 60 N. Y. Super. Ct. 132, 17 N. Y. S. 459, 42 N. Y. St. Rep. 694.

51. **Cost of recovering property.**—Cincinnati Chronicle Co. *v.* White Line Cent. Transit Co., 1 Cin. R. 300, 13 O. Dec. 561.

52. **Reward.**—Greenfield Bank *v.* Leavitt (Mass.), 17 Pick. 1, 28 Am. Dec. 268

53. Evans *v.* Rudy, 34 Ark. 383.

54. Kates Transfer, etc., Co. *v.* Klassen, 6 Ala. App. 301, 59 So. 355.

55. Pacific Exp. Co. *v.* Jones, 52 Tex. Civ. App. 367, 113 S. W. 952.

56. **Expense of discovering whether there is injury.**—Eleven cases of a car of eggs being broken, and an examination of twenty unbroken cases showing internal injury in seventeen, the consignee can not collect of the carrier for expense of examining the other two hundred and fifty-two cases, having no external injury, and showing, on examination, no internal damage. Martin *v.* Delaware, etc., R. Co., 141 N. Y. S. 942.

57. Western Mfg. Co. *v.* Guiding Star, 37 Fed. 641.

58. **Attorney's fees.**—Richmond, etc., R. Co. *v.* Benson, 86 Ga. 203, 12 S. E. 357, 22 Am. St. Rep. 446, holding that in the absence of evidence that the carrier acted in bad faith or was stubbornly litigious or put the plaintiff to unnecessary expense, an instruction that the jury could add reasonable attorney's fees to the actual damages, was erroneous.

Interstate Commerce Act Feb. 4, 1887, as amended by Acts Cong. June 29, 1906, and April 13, 1908, does not authorize the recovery of attorney's fees in actions against carriers, for loss of or damage to goods in transportation. Blair *v.* Wells Fargo & Co. (Iowa), 135 N. W. 615; Missouri Pac. R. Co. *v.* Harper Bros., 201 Fed. 671, 121 C. C. A. 570.

Where General Measure of Damages Allowed.—The rule that the owner of property which is injured in transportation must exert himself to prevent damages or render the injury as slight as possible, and, when he has done so, may recover his reasonable and necessary labor or expense performed or incurred for the purpose, has no application where he had been allowed to recover the general measure of damages.[59]

§ 1076. Goods Shipped under Contract of Sale.—Generally where goods are shipped under a contract of sale the contract price furnishes the standard for the damages to be assessed.[60] Where goods are shipped to a consignee with an option to take and pay for them at a price fixed, or return them, in an action against the carrier for their loss the measure of damages is not the market value at the place of destination, but, at most, the price fixed, with interest, from a day when the goods would, in the usual course of carriage, have reached the consignee and have been accepted.[61]

§ 1077. Goods Having No Market Value.—Loss of Goods.—The measure of damages in a suit against a carrier for loss of articles having no market value and useful chiefly to owner, such as second-hand clothing and household goods, is the actual money value of the articles to the owner or the actual loss in money sustained by him,[62] not any financial price that he might for special rea-

59. **Where general measure of damages allowed.**—St. Louis, etc., R. Co. *v.* Foster (Tex. Civ. App.), 89 S. W. 450.

60. **Goods shipped under contract of sale.**—Where the owner of goods shipped had sold the same for part cash and part credit, and lost the sale by the goods having been damaged in transit, his measure of damage was the difference between the value of the goods in their damaged condition at the time they reached their destination and the present value of his contract with the buyer. Gulf, etc., R. Co. *v.* Coulter (Tex. Civ. App.), 138 S. W. 16.

Where, in an action against a carrier for injuries to a shipment of potatoes, it appeared that the shipper had sold the potatoes for delivery at a distant point, that the buyer at the point of delivery, because of the damaged condition of the shipment, refused to accept the potatoes, but there was no evidence to show what the sound potatoes were sold for at the place of delivery, or that diligence had been used to secure their market price, the shipper's measure of damages was the difference between the total amount of the contract price of the whole shipment agreed to be paid by the buyer, less the freight charges paid and the amount for which the sound potatoes, in the exercise of ordinary care to obtain on their delivery at the point of delivery the market price, were sold. Texarkana, etc., R. Co. *v.* Shivel (Tex. Civ. App.), 114 S. W. 196.

61. Magnin *v.* Dinsmore, 62 N. Y. 35, 50 How. Prac. 457, 20 Am. Rep. 442.

62. **Goods having no market value—Actual loss to owner.**—*Alabama.*—Kates Transfer, etc., Co. *v.* Klassen, 6 Ala. App. 301, 59 So. 355.

Kentucky.—Adams Exp. Co. *v.* Hoeing, 9 Ky. L. Rep. 814.

Oklahoma.—St. Louis, etc., R. Co. *v.* Dunham, 36 Okla. 724, 129 Pac. 862.

Pennsylvania.—Lloyd *v.* Haugh, etc., Transfer Co., 223 Pa. 148, 72 Atl. 516, 21 L. R. A., N. S., 188.

Texas.—Texas, etc., R. Co. *v.* Wilson Hack Line, 46 Tex. Civ. App. 38, 101 S. W. 1042, affirmed in 102 Tex. 595, no op.; International, etc., R. Co. *v.* Nicholson, 61 Tex. 550; Gulf, etc., R. Co. *v.* Clark, 2 Texas App. Civ. Cas., § 512, 18 Am. & Eng. R. Cas. 628; Texas, etc., R. Co. *v.* Cook, 2 Texas App. Civ. Cas., § 659; Houston Transfer, etc., Co. *v.* Whitcomb (Tex. Civ. App.), 147 S. W. 358; Missouri, etc., R. Co. *v.* Dement (Tex. Civ. App.), 115 S. W. 635.

The measure of damages for loss by a carrier of household goods and personal effects is the actual value of the thing destroyed to the owner, considering its cost, the practicability and expense of replacing it, and such other considerations as affect its value to the owner. Lloyd *v.* Haugh, etc., Transfer Co., 72 Atl. 516, 223 Pa. 148, 21 L. R. A., N. S., 188.

The measure of a carrier's liability for property destroyed by his negligence, which has not been the subject of traffic, is the fair value of the property at or near the place of its destruction. Harris *v.* Panama R. Co., 16 N. Y. Super. Ct. 7, affirmed in 58 N. Y. 660.

Second-hand vehicles.—In an action for the value of second-hand vehicles lost by a carrier, where they have no market value, the measure of recovery is their actual value. Texas, etc., R. Co. *v.* Wilson Hack Line, 46 Tex. Civ. App. 38, 101

sons place on them, nor, on the other hand, the amount for which he could sell them to others.[63] Where a package lost by an express company in transit has an actual value as part of a work, and its loss must be supplied, the measure of damages is the cost of supplying it, which, nothing else appearing, is the cost of its production.[64]

Where Goods Injured.—Where household goods in use are injured while being transported by a carrier, the measure of damages, is the difference in their actual value just prior to and just subsequent to the injury, and not the difference in the market value of similar goods at the nearest second-hand stores.[65]

Portraits.—In an action against a carrier for the loss of a portrait the measure of damages is the actual value of the portrait to the plaintiff.[66] Damages because of the peculiar value attached by the owner to the portrait are not recoverable.[67] Where the portrait may be reproduced the owner is entitled to supply the lost portrait, and to recover of the carrier the cost.[68]

§ 1078. Profits.—Where goods intended for sale are lost the carrier is not liable for profits which plaintiff might have made had he resold the goods in the ordinary course of his business.[69] Also the carrier is not liable for profits anticipated from the multiplication of copies of a lost picture and the sale thereof.[70] Nor is it liable for the rental value of property.[71]

S. W. 1042, affirmed in 102 Tex. 595, no op.

Cost of reproducing or replacing goods.—In Houston, etc., R. Co. *v.* Ney (Tex. Civ. App.), 58 S. W. 43, it was held that the measure of damages is the cost of reproducing or replacing the goods, if they can be reproduced or replaced. Compare Houston Transfer, etc., Co. *v.* Whitcomb (Tex. Civ. App.), 147 S. W. 358.

Original cost.—Where, in an action against a carrier for damages sustained in transit to goods which have no market value, the only evidence of value is the price at which plaintiff has sold similar articles, it is error to instruct the jury to look to the original cost of the articles injured, in estimating plaintiff's damage. Houston, etc., R. Co. *v.* Ney (Tex. Civ. App.), 58 S. W. 43.

Questions for jury—Evidence.—Where there is no market value for the article in question, alleged to have been lost through carrier's negligence, the value must be ascertained by the jury as a fact, considering the circumstances which would have affected the market value had there been one. G. H. & S. A. R. Co. *v.* Watson, 1 Texas App. Civ. Cas., § 813.

In ascertaining the value of household goods in use for the purpose of ascertaining the damages sustained by the injury or destruction thereof, the original cost of the property, the manner in which it has been used, its general condition and quality, the percentage of its depreciation from use, damage, age, decay, or otherwise, are all proper to be submitted to the jury. Wells Fargo Exp. Co. *v.* Williams (Tex. Civ. App.), 71 S. W. 314.

63. Houston, etc., R. Co. *v.* Ney (Tex. Civ. App.), 58 S. W. 43; International, etc., R. Co. *v.* Nicholson, 61 Tex. 550; Gulf, etc., R. Co. *v.* Clark, 2 Texas App. Civ. Cas., § 512, 18 Am. & Eng. R. Cas. 628.

In a suit against a carrier to recover for the loss of household goods and clothing, the value of these articles as second-hand articles in the public market is not the measure of their value in fixing damages. Denver, etc., R. Co. *v.* Frame, 6 Colo. 382.

64. Adams Exp. Co. *v.* Hoeing, 9 Ky. L. Rep. 814.

Architect's plans.—In an action against a common carrier for loss of a package containing architect's plans, the measure of damages is the reasonable expense of procuring new plans. Mather *v.* American Exp. Co., 138 Mass. 55, 52 Am. Rep. 258.

65. Where goods injured.—Benedict *v.* Chicago, etc., R. Co. (Tex. Civ. App.), 91 S. W. 811; Wells Fargo Exp. Co. *v.* Williams (Tex. Civ. App.), 71 S. W. 314; Atchison, etc., R. Co. *v.* Smythe, 55 Tex. Civ. App. 557, 119 S. W. 892.

66. Loss of portrait.—Houston, etc., R. Co. *v.* Burke, 55 Tex. 323, 40 Am. Rep. 808; Green *v.* Boston, etc., R. Co., 128 Mass. 221, 35 Am. Rep. 370, holding that in an action for the loss of portrait of plaintiff's father, evidence that plaintiff has no other portrait of his father is admissible.

67. Houston, etc., R. Co. *v.* Burke, 55 Tex. 323, 40 Am. Rep. 808.

68. Houston, etc., R. Co. *v.* Burke, 55 Tex. 323, 343, 40 Am. Rep. 808.

69. Profits.—Texas, etc., R. Co. *v.* Payne, 15 Tex. Civ. App. 58, 38 S. W. 366; Cincinnati, etc., R. Co. *v.* Hansford & Son, 30 Ky. L. Rep. 1105, 100 S. W. 251

70. Bennett *v.* Drew, 16 N. Y. Super. Ct. 355.

71. Missouri Pac. R. Co. *v.* Hewett, 2 Texas App. Civ. Cas., § 273 (rental value of machine); Burke *v.* Clarke, 11 La. 206 (wages of slaves).

§ 1079. Special Damages.—In order to render a carrier liable for special damages resulting from a loss of or injury to goods, notice of the conditions from which they would result should be given the carrier at the time the contract of carriage is made.[72] So where, on shipment of property, there was no notice to the carrier of any special use to which it was to be applied or of such scarcity as to prevent another purchase of a like amount by consignee, consignee was not entitled to special damages for its loss.[73] It is held that notice to a carrier subsequent to the receipt of goods will render it liable for damages accruing after that time because of negligence in not tracing and finding the goods.[74] A

72. **Special damages.**—American Exp. Co. v. Jennings, 86 Miss. 329, 38 So. 374, 109 Am. St. Rep. 708; Gulf, etc., R. Co. v. Pickens (Tex. Civ. App.), 58 S. W. 156; Pacific Exp. Co. v. Jones, 52 Tex. Civ. App. 367, 113 S. W. 952, 954.

In Missouri, etc., R. Co. v. Belcher, 88 Tex. 549, 32 S. W. 518, the court said: "The rule seems to be settled that plaintiff, in order to recover special damages for breach of a contract, must show that at the date of the contract defendant had notice of the special conditions rendering such damages the natural and probable result of such breach under circumstances showing that the contract was to some extent based upon or made with reference to such conditions. Waller v. Railway, L. R. 4 C. L. Ir. 376; Harvey v. Connecticut, etc., Railroad, 124 Mass. 421, 26 Am. Rep. 673."

Reasons for rule.—"Various reasons have been assigned for the limitations thus placed upon the right to recover such damages. For instance, it is sometimes said that defendant is entitled to the notice at the time of entering into the contract, so that he may protect himself against such special or extraordinary liability by declining to make the contract, by inserting stipulations protecting himself against such liability, by charging additional compensation to cover the extra risk, or by making immediate extra preparation to guard against the breach; and, again, it has been said that plaintiff 'ought not to be allowed to obtain an advantage which he has not paid for.'" Pacific Exp. Co. v. Jones, 52 Tex. Civ. App. 367, 113 S. W. 952, quoting Missouri, etc., R. Co. v. Belcher, 88 Tex. 549, 32 S. W. 518.

Illustrations.—In an action against a carrier for the loss of a piston rod necessary for the operation of plaintiff's gin, the carrier could not be held liable for special damages, owing to the enforced idleness of the gin, in the absence of a showing, either that it had notice of the special circumstances before it received the shipment, or that the initial carrier contracted for a through shipment, and had such notice before receiving the shipment. American Exp. Co. v. Jennings, 38 So. 374, 86 Miss. 329, 109 Am. St. Rep. 708.

In an action against a carrier for loss of a consignment of ice shipped by plaintiffs to themselves, plaintiffs were not entitled to recover for the loss of fish, for the packing of which they intended to use the ice, in the absence of any evidence that the carrier knew or should have known that the ice was intended for that purpose. Lewark v. Norfolk, etc., R. Co., 49 S. E. 882, 137 N. C. 383.

Defendant railroad was not liable for special damages where it had no notice that plaintiff's shipments of cabbages were made to fill a sale at a special price. Missouri, etc., R. Co. v. McLean, 55 Tex. Civ. App. 130, 118 S. W. 161.

In an action against a railroad for damages done to a thresher and consequent loss of profits resulting from time lost in having the thresher repaired, plaintiff was entitled to recover damages sustained by reason of not being able to thresh all the grain he had contracted to thresh, where it appeared that he had shipped the thresher for the purpose of threshing wheat, and had made contracts to thresh certain crops, and had notified defendant's agent of that fact prior to the shipment. Chicago, etc., R. Co. v. Calvert, 91 S. W. 825, 41 Tex. Civ. App. 236.

Where plaintiff notified defendant, when he shipped a museum, of the purpose for which it was being shipped, defendant is liable for such damages as plaintiff might probably sustain by reason of the failure to have the museum thereof or exhibition, in the way of lost profits; not eo nomine as net profits, but as damages, to be determined by ascertaining the probable net profits. Yoakum v. Dunn, 1 Tex. Civ. App. 524, 21 S. W. 411.

Insufficient notice.—Where the owner of a steam shovel ships it by rail, stating at the time to the agent of the railroad company that he "had got a contract," and wanted to ship his shovel, and the shovel is injured in transit, the company is not liable on that account for loss of profits that would have been made by using the shovel, since the statement as to the use to which the shovel would put is too vague to charge the carrier with special damages. Gray v. St. Louis, etc., R. Co., 54 Mo. App. 666.

73. Matheson v. Southern Railway, 79 S. C. 155, 60 S. E. 437.

74. Matheson v. Southern Railway, 79 S. C. 155, 60 S. E. 437.

Where, after notice to a carrier after

carrier is not liable for special damages caused by the loss of machinery in transportation because of the failure of its agent at destination to notify the owner of such loss, in the absence of proof that such agent had knowledge thereof.[75]

Pleading and Proof.—The pleadings and evidence must show that special damages were contemplated by the carrier when the property was received for shipment.[76] Evidence as to special items of damage can not be given unless alleged in the petition.[77]

§ 1080. Exemplary Damages.—A carrier is liable for punitive damages for a gross, willful, and tortious breach of the duty enjoined upon it by law as a common carrier for hire.[78] Where reckless or willful disregard of consignee's rights or even indifference to them does not appear, but all the testimony tends to show a loss by theft from the carrier or some mistake, which after diligent effort it can not account for, the carrier is not liable for punitive damages.[79]

§ 1081. Duty of Owner to Mitigate or Avert.—A shipper of property that became injured during the transportation can not recover for such further injuries as he might have averted by properly caring for the property.[80] After the carrier has committed a wrong the damaged party must not increase it, and, if he does, he can not complain of loss or injury sustained by his willful acts of commission or omission.[81]

§§ 1082-1084. Evidence as to Value or Damage—§ 1082. In General.—Presumption.—A court can not presume that goods lost by a carrier

shipment of fertilizer of the special use to which it was to be applied, it made diligent and prompt effort to find and deliver the same, it was not liable for special damages for failure to do so, within the rule of the text. Matheson *v.* Southern Railway, 79 S. C. 155, 60 S. E. 437.

75. Pacific Exp. Co. *v.* Jones, 52 Tex. Civ. App. 367, 113 S. W. 952.

76. Pleading and proof.—Houston, etc., R. Co. *v.* Brown, 33 Tex. Civ. App. 237, 238, 76 S. W. 580; Gulf, etc., R. Co. *v.* Gilbert, 4 Tex. Civ. App. 366, 22 S. W. 760, 23 S. W. 320; Wells Fargo & Co. *v.* Battle, 5 Tex. Civ. App. 532, 534, 24 S. W. 353.

To lay a basis for greater damage against a carrier for injury to or nondelivery of property shipped than the difference in value when shipped and when the goods are received or lost, plaintiff must allege such special damages as will render the carrier amenable to damages beyond the general rule. Galveston, etc., R. Co. *v.* Bell (Tex.), 2 Posey Unrep. Cas. 517.

Where, in an action against a carrier for failure to deliver cotton at the destination named in the bill of lading, the consignor claimed damages suffered by reason of the consignee's refusal to accept after having procured samples, which he would not have done if the cotton had been delivered at the proper place, plaintiff could not recover, in the absence of proof that the carrier was instrumental in permitting the consignee to procure the samples, or that it had any knowledge of the contract between plaintiff and the consignee, since such damages were special, and not the proximate result of the carrier's breach of contract. Gulf, etc., R. Co. *v.* Pickens (Tex. Civ. App.), 58 S. W. 156.

77. Missouri Pac. R. Co. *v.* Breeding, 4 Texas App. Civ. Cas., § 154, 16 S. W. 184.

78. Exemplary damages.—Mendelsohn *v.* Anaheim Lighter Co., 40 Cal. 657.

Evidence held to show a reckless disregard of the consignee's rights, entitling him to punitive damages. Mills *v.* Southern Railway, 73 S. E. 772, 90 S. C. 366.

79. Matheson *v.* Southern Railway, 79 S. C. 155, 60 S. E. 437.

80. Duty to mitigate or avert damages.—Missouri Pac. R. Co. *v.* Rushin, 3 Texas App. Civ. Cas., § 317 (fruit trees).

81. Armistead *v.* Shreveport, etc., R. Co., 108 La. 171, 32 So. 456.

A carrier having failed to take certain cotton seed, and to carry it from one point to another according to contract, and the other contracting party, being in possession of the cotton seed at the place of intended shipment, having abandoned it, so that it was lost or destroyed, the measure of damages for which the carrier is liable is the value of the seed at the place of intended delivery, after deducting its value at the place of intended shipment and the freight as agreed upon, and adding to the remainder the expense which would have been incurred in preserving the seed. Armistead *v.* Shreveport, etc., R. Co., 32 So. 456, 108 La. 171.

had no market value in place of destination, and a finding "of full value" by jury will be deemed the value at that place.[82]

Necessity of Selling Injured Goods to Establish Damage.—It is held not necessary, in order to give a right of action against a shipmaster for damage to goods alleged to have been injured by his fault, that the damaged goods should be sold. The plaintiff may prove his damages in any other competent manner.[83] In Louisiana it is held that the amount of damage must be established by sale of the goods at public auction.[84]

§ 1083. Admissibility.—In General.—Evidence as to the cost of the goods,[85] that the shipper placed a small valuation on them,[86] the statement of owner's agent as to value at the time of shipment,[87] and evidence tending to fix the amount that damaged goods would have brought had they reached their destination in good condition,[88] is admissible. Evidence that some of the articles were torn and some full of grease and dirt and unfit for use is admissible as descriptive of the extent of the damage.[89] The original account of sales at destination of a car of damaged vegetables is admissible to show the amount realized.[90] And testimony that the amount realized from the sale of vegetables at destination was the cash market price in their damaged condition, and that they were sold for the best market value obtainable, is admissible.[91] It is proper to exclude evidence insufficient to show the market price of freight lost by the carrier.[92]

Amount Paid by Consignee in Settlement.—In an action by a consignee against a carrier for damage to goods defendant may show the amount paid by the consignee to the purchaser of the goods in settlement of the action against him by such purchaser.[93]

Value of Whole Shipment Where Loss Partial.—In a suit against a carrier for loss of cotton by fire, testimony as to the value of the whole amount destroyed is admissible as showing the value of the part involved in the suit.[94]

82. **Presumptions as to market value at destination.**—Galveston, etc., R. Co. *v.* Ball, 80 Tex. 602, 16 S. W. 441.

83. **Necessity of selling injured goods in order to establish damage.**—Shackelford *v.* Patrick (S. C.), 1 Mill Const. 311, 12 Am. Dec. 632.

84. **Rule in Louisiana.**—Smith *v.* The Wall, 18 La. Ann. 724; Henderson *v.* Maid of Orleans, 12 La. Ann. 352. See Elkins & Co. *v.* New York, etc., Steamship Co., 14 La. Ann. 647.

Where the goods are so damaged as to be unsalable, the shipper is not bound to send them to auction to be sold as a prerequisite to his right of action against the carrier. Elkins & Co. *v.* New York, etc., Steamship Co., 14 La. Ann. 647.

It is proper to give notice of an auction sale of damaged goods, but the failure to do so will not preclude the owner from recovering, when the proof of damage is corroborated by independent testimony, and there is no pretense of any bad faith or sacrifice of the goods, which have been sold by a duly licensed auctioneer. Greenwood *v.* Cooper, 10 La. Ann. 796.

Expenses of sale.—In an action by the shipper against a carrier for damage to goods in transportation, either party has a right to require a sale of the goods by auction, and the expenses will form part of the costs. Elkins & Co. *v.* New York, etc., Steamship Co., 14 La. Ann. 647.

85. **Cost of goods.**—In an action for damage and loss to a shipment of oil, there was no error in admitting evidence that the oil cost consignee, plus the freight, a certain amount a gallon. Baltimore, etc., R. Co. *v.* Oriental Oil Co., 51 Tex. Civ. App. 336, 111 S. W. 979.

86. **Valuation placed on goods.**—Winn *v.* American Exp. Co., 149 Iowa 259, 128 N. W. 663.

87. **Statement of agent.**—Savannah, etc., R. Co. *v.* Collins, 77 Ga. 376, 3 S. E. 416, 4 Am. St. Rep. 87.

88. Pennsylvania R. Co. *v.* Orem, etc., Produce Co., 111 Md. 356, 73 Atl. 571.

89. Kates Transfer, etc., Co. *v.* Klassen, 6 Ala. App. 301, 59 So. 355.

90. **Original account of sales.**—Pennsylvania R. Co. *v.* Orem, etc., Produce Co., 73 Atl. 571, 111 Md. 356.

91. Missouri, etc., R. Co. *v.* McLean, 55 Tex. Civ. App. 130, 118 S. W. 161.

92. Callaway *v.* Southern R. Co., 126 Ga. 195, 55 S. E. 23.

93. **Amount paid by consignee in settlement.**—St. Louis, etc., R. Co. *v.* McDurmitt Grain Co. (Tex. Civ. App.), 87 S. W. 355.

94. **Value of whole shipment where loss partial.**—Missouri Pac. R. Co. *v.* Sherwood, 84 Tex. 125, 137, 19 S. W. 455, 17 L. R. A. 643.

Retail Price and Profits.—Evidence of the amount that might be realized from a sale of the goods at retail, or as to the price they would have sold for at public auction,[95] or as to what profit might be derived from such sale,[96] is inadmissible.

Cost of Reproduction or Repairs.—In an action for loss of a family portrait the original cost and the probable expense of reproduction may be considered in estimating the damages.[97] Where it does not distinctly appear that a machine injured in transportation has a market value at destination, evidence as to the cost of repairing it is admissible.[98]

Value at Point Other than Destination.—Generally unless it is shown that goods had no market value at destination, evidence of their market value at some other place—as the point of shipment—is incompetent.[99] Where there was evidence that the goods had no market value at the place of delivery, it was proper to admit evidence of the amount paid for them in other cities, where it was also shown that the prices paid were those charged by dealers in such goods, and that the goods were reasonably worth the same amount at the place of delivery.[1] It is held competent to show the price of goods at another place, in ascertaining its value at destination where the facilities for railroad transportation are so great that the value in the one place would tend to fix its price in the other.[2] It is not error to exclude evidence of the value of goods shipped at the point of their destination, where the freight contract provides that in case of loss the amount thereof shall be computed at the value of the goods at the time and place of their shipment.[3]

Intrinsic Value.—Where it is shown that goods have no market value, evidence of their intrinsic value is admissible, otherwise not.[4] The owner of a lost manuscript may testify as to the time spent in the preparation of the manuscript and what he considered it worth.[5]

95. Retail price.—Texas, etc., R. Co. *v.* Payne, 38 S. W. 366, 15 Tex. Civ. App. 58; Miller *v.* Jannett, 63 Tex. 82, 87; Schoolher *v.* Hutchins, 66 Tex. 324, 332, 1 S. W. 266.

96. Profits.—Texas, etc., R. Co. *v.* Payne, 15 Tex. Civ. App. 58, 60, 38 S. W. 366; Miller *v.* Jannett, 63 Tex. 82, 87.

97. Cost of reproduction.—Houston, etc., R. Co. *v.* Burke, 55 Tex. 323, 40 Am. Rep. 808.

98. Cost of repairs.—Chicago, etc., R. Co. *v.* Calvert, 41 Tex. Civ. App. 236, 91 S. W. 825.

99. Value at point other than destination.—Texas, etc., R. Co. *v.* Dishman, 38 Tex. Civ. App. 277, 85 S. W. 319; Texas, etc., R. Co. *v.* Barber (Tex. Civ. App.), 30 S. W. 500; Gulf, etc., R. Co. *v.* Roberts (Tex. Civ. App.), 85 S. W. 479.

1. New York, etc., Steamship Co. *v.* Weiss (Tex. Civ. App.), 47 S. W. 674. See East Tennessee, etc., R. Co. *v.* Hale, 85 Tenn. 69, 1 S. W. 620.

In an action against a carrier for the value of property destroyed in transit through its negligence, at a place where such property has not been the subject of trade, the jury may, in determining the fair value of the property, take into consideration the fact that the property has a market value at a place other than that where it was destroyed, and to which it was destined, and towards which the carrier, in the course of the usual and regular communication with such place, was then taking it, in connection with the hazards and expenses attendant upon the residue of the intended voyage. Harris *v.* Panama R. Co., 16 N. Y. Super. Ct. 7, affirmed in 58 N. Y. 660.

2. Fort *v.* Saunders, 52 Tenn. (5 Heisk.) 487.

3. Caples *v.* Louisville, etc., R. Co., 17 Mo. App. 14.

4. **Intrinsic value.**—Gulf, etc., R. Co. *v.* Roberts (Tex. Civ. App.), 85 S. W. 479.

Household goods.—Missouri, etc., R. Co. *v.* Davidson, 25 Tex. Civ. App. 134, 60 S. W. 278; Benedict *v.* Chicago, etc., R. Co. (Tex. Civ. App.), 91 S. W. 811.

Second-hand vehicles.—In an action for the value of a consignment of second-hand vehicles lost by a carrier, where they had no market value, the jury, in determining their actual value, could take into consideration their cost when new and at second-hand, what plaintiff paid for them, and their condition when they left the seller, and all facts disclosing their history which would enable them to determine what they were fairly worth. Texas, etc., R. Co. *v.* Wilson Hack Line, 46 Tex. Civ. App. 38, 101 S. W. 1042.

5. **Loss of manuscript.**—Southern Exp. Co. *v.* Owens, 41 So. 752, 146 Ala. 412, 8 L. R. A., N. S., 369, 119 Am. St. Rep. 41.

Pedigree of Dog.—In an action against an express company for damages to a dog while in transit, evidence of the breeding and characteristics of her dam, of the elements constituting her value, and of the value of her sire and dam, is admissible.[6]

Proof of Value by Party.—In a suit against a carrier for loss of or damage to property it is competent for the plaintiff to testify as to its value,[7] although he had a written bill showing the cost of the goods.[8] So to prove the value of cotton lost in transit, the consignor may testify as to its cash value, at the time of the loss, per pound gross.[9]

Claim for Damages.—In an action against a carrier for injuries to goods, plaintiff's claim, filed before suit brought, is admissible as tending to show that at that time he claimed a less amount of damages than the amount stated in his petition.[10] And where the carrier's agent testified that plaintiff had never claimed more than a certain amount of damages to a shipment, plaintiff could introduce, in rebuttal, a written claim for a larger sum, which he had presented to the carrier through such agent.[11]

A finding of arbitrators not resulting in adjusting the dispute, as to damaged freight, in a suit afterwards brought to recover the damages, is not admissible in evidence, at the instance of either party, over the objection of the other, even though made in writing, and even though it had been long the custom of the carrier, and its custom at that place, to adjust such disputes in that manner.[12]

Payment of Freight.—In an action for damages to property in transportation, it is competent for plaintiff to prove payment of freight charges, in order that the charge should not be deducted from the difference in value at destination in the condition in which the property arrived and that in which it was delivered.[13] And so nonpayment of charges may be shown.[14]

Hearsay Evidence.—Testimony of a witness as to the market value of property shipped at a certain point, based upon daily reports of the market at that point, is not hearsay evidence.[15]

Expert and Opinion Evidence.—Where a witness shows that he is acquainted with the market at the place fixed by law as the standard of value, and also with the property, he may then give his opinion of the value of such property in its differing conditions of which he has knowledge, and thereby furnish the data from which the jury may assess the damages.[16] Persons shown

6. **Pedigree of dog.**—Winchell *v.* National Exp. Co., 64 Vt. 15, 23 Atl. 728.

7. **Proof of value by party.**—Savannah, etc., R. Co. *v.* Hoffmayer, 75 Ga. 410; Oppenheimer *v.* Edney, 28 Tenn. (9 Humph.) 385.

8. Savannah, etc., R. Co. *v.* Hoffmayer, 75 Ga. 410.

9. **Cash value.**—Missouri Pac. R. Co. *v.* Gernon, 84 Tex. 141, 19 S. W. 461.

10. **Claim for damages.**—Missouri, etc., R. Co. *v.* Clayton (Tex. Civ. App.), 84 S. W. 1069.

11. Galveston, etc., R. Co. *v.* Tuckett (Tex. Civ. App.), 25 S. W. 150.

12. **Finding of arbitrators.**—Central Railroad *v.* Rogers & Sons, 66 Ga. 251.

13. **Payment of freight.**—Missouri, etc., R. Co. *v.* Jarrell, 38 Tex. Civ. App. 425, 86 S. W. 632, affirmed in 101 Tex. 649, no op.

14. St. Louis, etc., R. Co. *v.* Woldert Grocery Co. (Tex. Civ. App.), 144 S. W. 1194.

15. **Market reports.**—International, etc., R. Co. *v.* Dimmit County Pasture Co., 5 Tex. Civ. App. 186, 23 S. W. 754; Southern Pac. R. Co. *v.* Maddox, 75 Tex. 300, 301, 12 S. W. 815.

16. **Expert and opinion evidence.**—Texas, etc., R. Co. *v.* Barber (Tex. Civ. App.), 30 S. W. 500.

The opinion of a witness, not conversant with the market at the place of destination, as to the amount of the damages, is inadmissible. Texas, etc., R. Co. *v.* Barber (Tex. Civ. App.), 30 S. W. 500.

Injury to bees.—Where, prior to the shipment of bees, plaintiff informed the carrier's agent that he had sold the bees at $3.65 per stand, delivered, and after the bees had been injured in transportation plaintiff examined them, and was familiar with their market value and the extent of their injury, he was entitled to testify as to the amount of damages sustained, less than the price for which the bees had been sold. International, etc., R. Co. *v.* Aten (Tex. Civ. App.), 81 S. W. 346.

to have sufficient knowledge of the cost and value of second-hand goods, are competent to testify as experts in an action against a carrier for the loss of such goods.[17] A witness may testify as to the weight of hogs at the time of shipment, based on his opinion where it is shown that he is qualified to give such an opinion.[18]

Indorsement on a package by the company's agents, "Said to contain $300," is evidence of value, in a suit to recover its loss.[19]

That one said before the shipment that he would give a certain amount for the property is no evidence of its value, and is inadmissible.[20]

Evidence that the whisky had been shipped in fraud of the revenue laws, no tax having been paid thereon, is admissible to determine its value, since, if the tax had been paid, the value of the raw material would be enhanced to that extent, and, if not paid, it would be decreased to that amount.[21]

Harmless Error.—In an action against a carrier for injury to property, the admission of incompetent evidence as to market value at an earlier time than the injury, is harmless, where the verdict is for much less than is warranted by all the competent evidence.[22]

§ 1084. Weight and Sufficiency.—Value of Goods.—A judgment in an action against a carrier for goods lost can not be sustained, where the evidence fails to show the character and value of the goods.[23] In an action to recover for the loss of a trunk it is not necessary to prove specifically every article contained in the trunk, and the value of each article.[24] Under a provision in a bill of lading that the amount of any loss shall be computed at the value of the property at the time and place of shipment, the invoice price of the goods is not conclusive as to value.[25]

Value at Destination.—Where in a suit against a carrier for loss of or injury to property the measure of damages is determined by the value at destination in the absence of evidence of what its value would have been at its destination had

17. **Value of second-hand goods.**—Texas, etc., R. Co. *v.* Wilson Hack Line, 46 Tex. Civ. App. 38, 101 S. W. 1042, affirmed in 102 Tex. 595, no op., holding that such evidence is not objectionable as invading the province of the jury.

It is not error to exclude the testimony of a witness as to the relative value of new and second-hand goods, when he states that he has no knowledge as an expert as to the value of second-hand clothing. International, etc., R. Co. *v.* Nicholson, 61 Tex. 550.

18. Southern Pac. R. Co. *v.* Duncan, 3 Texas App. Civ. Cas., § 234.

19. **Indorsement on package.**—Weil *v.* Express Co. (Pa.), 7 Phila. 88.

20. Galveston, etc., R. Co. *v.* Silegman (Tex. Civ. App.), 23 S. W. 298.

21. Toledo, etc., R. Co. *v.* Kichler, 48 Ill. 438.

22. **Harmless error.**—Galveston, etc., R. Co. *v.* Williams (Tex. Civ. App.), 25 S. W. 1019, reversing 25 S. W. 311.

23. **Value of goods.**—Houston, etc., R. Co. *v.* McGlosson, 1 Texas App. Civ. Cas., § 224.

Sufficient proof of value.—In an action against a carrier for damages to goods, plaintiff's testimony as to their cost, the amount of their use and deterioration, and what they were worth to him, will be treated as sufficient proof of their value. Galveston, etc., R. Co. *v.* Giles (Tex. Civ. App.), 126 S. W. 282.

Amount received at sale.—In an action against an express company for the value of goods lost or destroyed by reason of defendant's negligence, the amount for which it appears the goods were a short time previously sold by complainants is sufficient proof of their value, in the absence of other proof or of any question as to the value. Cole *v.* Rankin (Tenn.), 42 S. W. 72.

Evidence of the value of an entire shipment of which the cotton lost was a part, while admissible, is not sufficient to prove the value of the lost property in the absence of facts at least showing the average weight, value and the quality of the cotton, or showing that such average weight, value or quality could not be ascertained. Missouri Pac. R. Co. *v.* Sherwood, 84 Tex. 125, 19 S. W. 455, 17 L. R. A. 643.

Value at place of shipment.—Evidence held to sustain a finding as to the value of the freight at the place of shipment. Weinberg *v.* Atlantic, etc., R. Co., 65 S. E. 634, 83 S. C. 468.

24. Stadhecker *v.* Combs & Co. (S. C.), 9 Rich. L. 193.

25. **Invoice price.**—Sanders *v.* Southern Railway, 72 S. E. 637, 90 S. C. 79.

it been properly transported, a verdict can not stand.[26] But it is held that direct testimony as to the value at the place of their destination is not indispensable, if there is proof of the value in the markets of an adjoining state, and other evidence from which the jury may properly make an estimate.[27] And it is held that a sufficient basis to support a finding by the court is given by evidence, unobjected to, of the cost at retail in the regular course of business at the place of shipment just prior to the shipment.[28] Evidence by plaintiff as to the market value of goods at their destination is sufficient to sustain a finding in accordance with such evidence, although witnesses for defendant who saw the goods, or part of them, at the point of shipment, estimated the value of those which they saw at a much less figure than plaintiff's estimate.[29]

Amount of Damage.—Where, in an action against a carrier for injury to property, the evidence shows the value of the property when shipped and that it was damaged to the extent of one-half of such value, the amount of the damage is sufficiently shown.[30] Where in a suit against a carrier to recover for injuries to dress goods damaged by sea water and soda ash, there is no evidence of the amount of the damage, a finding that the goods were damaged one-third of their invoice value is justified by common experience.[31] Under an allegation that some of the grates were delivered in a broken and damaged condition, evidence that "the grates" were delivered in that condition will not justify an inference either that all or any particular number of them were broken and damaged; but it ought to appear, approximately at least, how many were so injured, and how much the injury impaired or diminished their value.[32]

Experts' evidence that the value of merchandise was fixed by the cost price plus the cost of carriage, and that, except as varied by the freight to different points, such property had a uniform value in the section of the state in which the business was carried on, was sufficient to establish the extent of the loss.[33]

Conflicting Evidence.—Where the evidence as to the amount of the damages is conflicting, that on behalf of the plaintiff sustaining the finding of the jury, there is no error in refusing to grant a new trial on the ground that the verdict was contrary to law and without evidence to support it.[34]

Improbable Testimony.—In an action against a carrier for household goods destroyed in transportation, damages will not be held excessive merely because

26. Value at destination.—Galveston, etc., R. Co. *v.* Silegman (Tex. Civ. App.), 23 S. W. 298, 300.

In an action to recover the value of whisky destroyed by fire while in transit, it appeared by the evidence that plaintiffs had shipped with defendant, "1,264 gallons of whisky, then worth $2.25." Held, that the evidence should be construed as showing the market value per gallon at the place of destination. Toledo, etc., R. Co. *v.* Kickler, 51 Ill. 157.

Contract price.—In an action to recover for cotton shipped over defendant's road and alleged to have been destroyed by defendant's negligence, proof of the price at which cotton was contracted to be sold is insufficient to show the market value at its destination. Galveston, etc., R. Co. *v.* Efron (Tex. Civ. App.), 38 S. W. 639.

Where carriers sold a car load of potatoes without giving the buyers an opportunity to inspect them, the amount received at the sale does not show the market value of the potatoes. Carter *v.* International, etc., R. Co. (Tex. Civ. App.), 93 S. W. 681.

27. Louisville, etc., R. Co. *v.* Mason, 79 Tenn. (11 Lea) 116.

28. Plaff *v.* Pacific Exp. Co., 159 Ill. App. 493, judgment affirmed in 95 N. E. 1089.

29. Gulf, etc., R. Co. *v.* Roberts (Tex. Civ. App.), 85 S. W. 479.

30. Amount of damage.—Autrey *v.* Georgia, etc., R. Co., 113 Ga. 618, 38 S. E. 941.

31. Bradford *v.* Cunard Steamship Co., 147 Mass. 55, 16 N. E. 719.

32. Atlanta, etc., R. Co. *v.* Texas Grate Co., 81 Ga. 602, 9 S. E. 600.

33. Expert evidence.—Texas, etc., R. Co. *v.* Townsend (Tex. Civ. App.), 106 S. W. 760.

34. Conflicting evidence.—Western, etc., Railroad *v.* Mathis, 77 Ga. 488, 2 S. E. 692.

plaintiff's testimony as to their value seems improbable.[35]

§ 1085. Recovery as Affected by Allegation of Damages.—Where the petition claims damages only for the injury to and loss of property through a collision, there can be no recover for injury caused by delay and detention.[36] As to necessity for pleading special damages, see ante, "Special Damages," § 1079.

§§ 1086-1087. Province of Court and Jury—§ 1086. In General.[37]—In an action against a carrier for loss of or injury to goods, the case should be submitted to the jury where the evidence is such that different minds might reasonably draw different inferences therefrom,[38] or where there is any evidence from which the jury might properly find the existence of a fact material to the issues.[39] Where the carrier discharges its burden of proof as to an issue it is entitled to have the question submitted to the jury, although, under the evidence, they may find a verdict against it.[40] In an action by a consignee against a car-

35. **Improbable testimony.**—Missouri, etc., R. Co. *v.* Davidson, 25 Tex. Civ. App. 134, 60 S. W. 278.

36. **Damages not alleged.**—Texas, etc., R. Co. *v.* Sims (Tex. Civ. App.), 26 S. W. 634.

37. **Province of court and jury—In actions against carriers of live stock.**—See, also, post, "Carriers of Live Stock," Part III.

As to carriers by water generally.—See post, "Carriers by Water," Part VII.

38. **Where different inferences may be drawn from evidence.**—Mouton *v.* Louisville, etc., R. Co., 128 Ala. 537, 29 So. 602, 20 Am. & Eng. R. Cas., N. S., 673.

Plaintiff was the consignee of a car of wagons, which was destroyed by fire while in transit over the defendant road. The fire in the car was discovered a little after midnight, when the train was between stations, about four miles from B., a station with a large water tank, and which the train had just left. The wagons were properly packed in the car without any inflammable material, and the car door sealed, with the usual car seals. On discovering smoke issuing from the car, the train was stopped, but no flame was discovered until the conductor opened the door of the car. A small hole was cut through the roof of the car, through which a few pails of water were poured, but, the hole being so small, some of the water was lost. On the conductor's orders, the train was cut, and the burning car taken four miles, to W., a station where there was no water tank or appliances for extinguishing fires. Held, that the evidence, though not conflicting, was such that different minds might reasonably draw different inferences therefrom in regard to defendant's diligence in attempting to extinguish the fire, and hence it was error for the court to give a general charge in favor of the defendant. Mouton *v.* Louisville, etc., R. Co., 29 So. 602, 128 Ala. 537, 20 Am. & Eng. R. Cas., N. S., 673.

39. Where, plaintiff testified without objection that B. delivered his trunk to the carrier for transportation, such evidence justified a submission of the issue of the delivery of the trunk to the carrier to the jury. Wells Fargo & Co. *v.* Hanson, 91 S. W. 321, 41 Tex. Civ. App. 174.

Evidence insufficient.—In an action for cotton alleged to have been delivered to the defendant as a common carrier and destroyed by fire, evidence tending to show that the course of dealing and custom was to place goods to be shipped on the platform where the cotton was destroyed, and that it was the expectation and intention of the owner and also of the railway company that they were placed there for shipment, and would ultimately be shipped when instructions were given or when the party was ready for shipment, but not showing that such goods were, by virtue of the custom or course of dealing, to be thereafter regarded as in the actual possession of the railway, was insufficient to authorize submission to the jury of the question of delivery by reason of such custom. Missouri, etc., R. Co. *v.* Beard, 78 S. W. 253, 34 Tex. Civ. App. 188.

40. **Where carrier discharges burden of proof as to an issue.**—Texas, etc., R. Co. *v.* Richmond, 94 Tex. 571, 63 S. W. 619, 621.

"If the law required that the carrier should prove its defense so conclusively that a jury could not find against it before the court would be allowed to submit the issue, then there could be no state of case in which such issue could be properly submitted on the evidence of the carrier alone; for, if the evidence was not sufficient to permit the submission, the court must direct the jury to find for the plaintiff. On the other hand, if the evidence should be so conclusive that the jury could not find to the contrary, then there would be the duty of the court to intrust them to find for the defendant." Texas, etc., R. Co. *v.* Richmond, 94 Tex. 571, 63 S. W. 619, 621.

In an action against a carrier for loss

rier, proof that the latter received the goods, and on demand failed to deliver or account for them, is sufficient to require the submission of the case to the jury.[41] Where goods transported under a bill of lading were injured by fire, alleged to have resulted from the carrier's negligence, plaintiff was entitled to go to the jury on a count alleging a cause of action in contract, as well as on a count in tort, though it could not recover on both.[42]

Direction of Verdict.—Where the evidence makes out a prima facie case,[43] as where there is positive evidence of defendant's negligence,[44] or there is some evidence to establish plaintiff's case,[45] it is error to direct a verdict for defendant. Where the evidence is insufficient to sustain a verdict for one party, it is properly directed for the other.[46] In an action for loss of goods through the alleged negligence of a carrier, where there is no direct evidence whether the loss was caused by the alleged negligence or by a defect in the tank furnished by the consignee, or by causes specified in the bill of lading as relieving the

of goods by fire after arrival at destination, evidence that there was no fire left in the depot where the goods were, and that the place was fastened up, sufficiently negatived its negligence so as to require the jury's determination of that issue. Central, etc., R. Co. *v.* Burton, 165 Ala. 425, 51 So. 643.

41. Cass *v.* Boston, etc., R. Co. (Mass.), 14 Allen 448.

42. Garvan *v.* New York, etc., R. Co., 210 Mass. 275, 96 N. E. 717.

43. **Direction of verdict.**—Morris *v.* Minneapolis, etc., R. Co. (N. Dak.), 141 N. W. 204.

Where there is evidence of a delivery of an entire shipment by the carrier in a damaged condition, and that the goods were originally shipped in a good condition, and evidence as to the amount of damages authorizing recovery of a larger amount as damages on the entire shipment, it was error to direct a verdict for only a portion of the damaged goods as to which defendant conceded liability. Ohlen *v.* Atlanta, etc., R. Co., 58 S. E. 511, 2 Ga. App. 323.

44. **Positive evidence of negligence.**—Where syrups were delivered to a carrier to be transported in barrels in good order, and on arrival some of the barrels were in such condition that the contents had escaped, a charge that the verdict must be for defendant was properly refused. New York Cent., etc., R. Co. *v.* Eby (Pa.), 12 Atl. 482.

Where, while a freight car loaded with stoves was waiting at its destination to be unloaded, rain went through the roof of the car, and the stoves were found damaged by rust, and a casual inspection of the roof would have revealed the unsuitableness of the roof, it was error to give a peremptory instruction for the railroad in an action by the consignee. Gardner *v.* New Orleans, etc., R. Co., 29 So. 469, 78 Miss. 640.

45. Bank *v.* Southern Exp. Co., 86 S. C. 532, 68 S. E. 647.

46. **Evidence insufficient to sustain verdict.**—Verdict in an action against a carrier for damage to a car load of perishable fruit from a delay of two days, the train being side-tracked because of unprecedented rain, which overflowed and washed out the track, is properly directed for defendant, though plaintiff expresses the opinion that defendant had not sufficient cause for the delay, and though a light work train went over the road through the water a day earlier than the freight train was moved; the train dispatcher, who was not cross-examined, testifying that no train could go between the place where the train was side-tracked and the destination of the car, before the day it was moved, and that a locomotive was sent for and brought over the train as soon as it could be done, and that this was the first train run over this section after it was repaired. Burnham *v.* Alabama, etc., R. Co., 32 So. 912, 81 Miss. 46.

Plaintiff showed by himself and other competent witnesses that the inside doors referred to were properly closed and fastened with the device furnished by defendant for that purpose. The only evidence claimed to create a conflict arises from the fact that, a few minutes after the car started on its journey, one of the inside doors referred to came open, and a quantity of flax with which the car was loaded ran out through the opening so made. Held, that such door opening may as readily be attributed to other causes as to the failure of the shipper to properly fasten it, and, had the question been submitted to a jury, a verdict for defendant, based upon the fact that such door came open in transit, could only have been arrived at by inference, and would have been mere guesswork on the part of the jury under the facts of the case, and that the opening of this door did not create a sufficient conflict in the evidence to constitute error on the part of the trial court in directing a verdict for plaintiff. Duncan *v.* Great Northern R. Co., 16 N. Dak. 610, 118 N. W. 826.

carrier from liability, the court should not sustain a demurrer to the evidence or direct a verdict.[47]

A nonsuit can be ordered only when there is an entire failure of proof of a material fact.[48] Where, in an action for injuries to household goods during transportation, evidence as to the actual value of the goods at their destination was erroneously excluded, the failure of the court to set aside the judgment of nonsuit was reversible error.[49]

§ 1087. Particular Questions of Law or Fact.—What constitutes a common carrier is a question of law.[50] Whether defendant comes under the definition is one of fact for the jury.[51]

Whether defendant acted as a common carrier or as a forwarder where there is evidence tending to establish that he acted in the latter capacity and also evidence tending to show that his general business was that of a common carrier is a question for the jury.[52]

Delivery to Carrier.—Where an action is brought to recover for loss of articles alleged to have been delivered to a common carrier, the question of delivery is for the jury.[53]

Effect of Contract.—Whether a contract whereby the plaintiff, in consideration of a lower rate of freight, assumed the loss and damage to his property changed the relation of defendant from that of a common carrier to a private carrier is one of law.[54]

Whether goods were shipped under a special contract is a question of fact for the jury.[55]

47. Missouri, etc., R. Co. *v.* Watkins Merchandise Co., 76 Kan. 813, 92 Pac. 1102.

48. Nonsuit.—Wallingford *v.* Columbia, etc., R. Co., 26 S. C. 258, 2 S. E. 19, 30 Am. & Eng. R. Cas. 40.

Illustrations.—In an action against a railroad company for injury to stock shipped in a defective car, plaintiff made out a prima facie case; and defendant's only evidence to overthrow it was the testimony of the one of plaintiff's witnesses on cross-examination, together with a contract shown him by defendant, and claimed to be the real contract between the parties. Held, that defendant's motion for a nonsuit was properly refused. Wallingford *v.* Columbia, etc., R. Co., 26 S. C. 258, 2 S. E. 19, 30 Am. & Eng. R. Cas. 40.

In an action to recover a shipment of cotton alleged to have been destroyed by fire while in the custody of defendant carrier, where there was some evidence that the cotton was delivered to defendant, though no bill of lading was given, together with evidence that it was the custom of plaintiff to place cotton on the railroad depot platform, which the carrier would accept without special notice to that effect, it was error to direct a nonsuit. Copeland *v.* Southern Railway, 57 S. E. 535, 76 S. C. 476.

49. Benedict *v.* Chicago, etc., R. Co. (Tex. Civ. App.), 91 S. W. 811.

50. What constitutes common carrier. —Pennewill *v.* Cullen (Del.), 5 Har. 238; Avinger *v.* South Carolina R. Co., 29 S. C. 265, 7 S. E. 493, 13 Am. St. Rep. 716.

51. Pennewill *v.* Cullen (Del.), 5 Har. 238.

A charge that if defendant, after a refusal to carry plaintiff's freight, had carried for a certain company alone goods received at a private platform, plaintiff cannot recover, is properly refused, as it assumes that the position of common carrier has not been established, which is a question for the jury. Avinger *v.* South Carolina R. Co., 29 S. C. 265, 7 S. E. 493, 13 Am. St. Rep. 716.

52. Whether common carrier or forwarder.—Schloss *v.* Wood, 11 Colo. 287, 17 Pac. 910.

53. Delivery to carrier.—Southern R. Co. *v.* Johnson, 2 Ga. App. 36, 58 S. E. 333.

54. Effect of contract.—Kimball *v.* Rutland, etc., R. Co., 26 Vt. 247, 62 Am. Dec. 567.

55. Whether goods shipped under special contract.—Wallingford *v.* Columbia, etc., R. Co., 26 S. C. 258, 2 S. E. 19, 30 Am. & Eng. R. Cas. 40.

In an action to recover damages for the death of hogs which had been transported over a railroad, the shipper claimed and testified that an oral contract was made for transportation to a point beyond the line of the contracting company, in which there was no limitation of liability, and that the stock was shipped under that contract; that, after the stock was loaded and had left the station, he signed a paper, which he could not well read, and did not read, but which he supposed to be a receipt. The company contended, and offered testimony to show, that the only contract made with the

Plaintiff's Title or Ownership.—Where it appears that plaintiff transferred the bill of lading to a third party, for value, but there is evidence that such transfer was only as security for money borrowed, and without intention to pass the title the questions of fact so raised are for the jury.[56]

Authority of Agent.—Whether or not an agent of a common carrier has authority to do certain acts for which it is sought to charge the common carrier,[57] and whether, in a particular case, a merchant shipping goods to his correspondent, had authority to make a contract on behalf of the correspondent for shipment on different terms from those ordinarily adopted by common carriers,[58] are questions for the jury.

Negligence of Carrier.—Ordinarily what constitutes negligence on the part of the carrier is a question for the jury to determine.[59] But there are some

shipper was the written one embodied in the bill of lading signed by the shipper, and which, to a great extent, limited the liability of the company. Held, that the court was warranted in submitting to the jury the question of what constituted the contract of the parties. St. Louis, etc., R. Co. *v.* Clark, 48 Kan. 321, 329, 29 Pac. 312.

56. **Plaintiff's title or ownership.**—Hipp *v.* Southern R. Co., 50 S. C. 129, 27 S. E. 623.

57. **Authority of agent.**—Thurman *v.* Wells, Fargo & Co. (N. Y.), 18 Barb. 500.

Whether a freight claim agent of a carrier who passes on claims and either rejects or orders them paid has authority to adjust a freight claim and communicate the decision to the claimant so as to make his statement to the claimant bind the carrier held for the jury. Tenhet *v.* Atlantic, etc., R. Co., 64 S. E. 232, 82 S. C. 465.

58. American Transp. Co. *v.* Moore, 5 Mich. 368.

59. **Negligence of carrier.**—*United States.*—Arthur *v.* Texas, etc., R. Co., 204 U. S. 505, 51 L. Ed. 590, 27 S. Ct. 338; Marande *v.* Texas, etc., R. Co., 184 U. S. 173, 192, 46 L. Ed. 487, 22 S. Ct. 340.

Illinois.—Louisville, etc., R. Co. *v.* Cunningham, 88 Ill. App. 289.

Massachusetts.—Aigen *v.* Boston, etc., Railroad, 132 Mass. 423.

Michigan.—Modern Match Co. *v.* Baltimore, etc., R. Co., 140 Mich. 570, 104 N. W. 19.

South Carolina.—Ferguson *v.* Southern Railway, 91 S. C. 61, 74 S. E. 129.

Wisconsin.—Hecht *v.* Grand Trunk R. Co., 132 Wis. 605, 113 N. W. 68; Congar *v.* Galena, etc., R. Co., 17 Wis. 477.

Illustrations.—The question as to whether a carrier by a canal boat agreeing to deliver goods in good condition, "the dangers of the navigation excepted," was negligent, is for the jury, where the boat struck a stone in the bottom of the canal, and caused the goods to become wet and damaged. Humphreys *v.* Reed (Pa.), 6 Whart. 435.

In an action by a shipper to recover the value of certain clay pots damaged in transit, it was shown that the pots were sent carefully packed in the car, but on arrival they were found to be shifted about and badly damaged, and that like goods packed in the same manner had always arrived unbroken. Held that, though there was no proof of a collision or derailment, the question of the carrier's negligence was one of fact for the jury. Phœnix Pot-Works *v.* Pittsburgh, etc., R. Co., 139 Pa. 284, 20 Atl. 1058.

A plaintiff entrusted a shipment of cotton to a carrier to be carried by boat to a certain port. During the transportation the boat was injured by running into a snag in the river, and it was found necessary to transfer the cotton to the bank. This the carrier proceeded to do, but as the river threatened to rise, he left a small amount of cotton in the boat for his hands to unload and went to a near-by town to secure another boat. The hands were dilatory and delayed unnecessarily in the unloading of the cotton so that the part that remained in the boat, when the carrier left, was damaged. It was held, that it was a question for the jury as to whether the carrier was guilty of negligence in leaving the cotton before it was entirely unloaded. Johnson *v.* Friear, 12 Tenn. (4 Yerg.) 48, 26 Am. Dec. 215.

Where, in an action against a railway company for the value of cotton burned while being transported, all engineers and conductors of trains in which the car was carried testified that the engines were in good condition and carefully managed, and that the car was tight and securely sealed, and carefully handled and managed while in their trains, and there was no evidence as to how the fire originated, the question of the negligence of the company was for the jury. Judgment (Tex. Civ. App.), 61 S. W. 410, reversed. Texas, etc., R. Co. *v.* Richmond, 63 S. W. 619, 94 Tex. 571.

Leaving shipment at out of way station.—In an action for destruction of goods by fire, whether the carrier was negligent in leaving the shipment at an out of the way station, where there was neither station agent nor water, no inhabitants, and no one to look after the safety of the cars

cases in which the court can determine what constitutes negligence, as where the precise measure of duty is determinate, the same under all circumstances.[60]

containing it, held for the jury. Santa Fe, etc., R. Co. *v.* Grant Bros. Constr. Co., 13 Ariz. 186, 108 Pac. 467.

Leaving shipment at place exposed to danger.—Even if a carrier of a car load of explosives was liable for its destruction by fire only in case of negligence, yet it is a question for the jury whether it was not negligence to allow it to stand for several days unguarded on a transfer track, half a mile from the business part of a town, exposed to the risk of fires built by tramps, who infested the vicinity, and from sparks of passing locomotives, the nature of its contents being announced by a placard thereon. Phœnix Powder Mfg. Co. *v.* Wabash R. Co., 101 Mo. App. 442, 74 S. W. 492.

In an action against a railroad company for goods destroyed by fire while in a car standing alongside a freight house, which was burned, it appeared that the freight house was a wooden building, standing close to the track, with a shingle roof, covered with moss; that the roof had often before taken fire from sparks from passing engines, as defendant knew; and that a high wind was blowing at the time, and the car was directly in the path of the flames. Held, that it was for the jury to say whether defendant was negligent in leaving the car so exposed. Tanner *v.* New York, etc., R. Co., 108 N. Y. 623, 15 N. E. 379, 1 Silvernail Ct. App. 569.

In an action for injury to four car loads of grain by a flood, whether the master of the yard in which the cars were placed and his assistant, who knew that floods in which the river rose over twenty-eight feet were not unusual, and that it had been above that height four or five times in the five preceding years, and had reached a height of 32.4 feet, and that there had been a rapid rise during the day, were negligent in placing explicit reliance on the reports from the weather bureau, and the manager of a river coal company, whose experience gave weight to his opinion that the water would rise twenty-six or twenty-eight feet, and possibly higher, and in not removing the cars to higher grounds, was for the jury. Smith *v.* Baltimore, etc., R. Co., 72 Atl. 264, 223 Pa. 118.

Negligence in not getting goods to place of safety after knowledge of danger.—Pinkerton *v.* Missouri Pac. R. Co., 117 Mo. App. 288, 93 S. W. 849.

Whether carrier negligent in exposing goods to danger.—Fentiman *v.* Atchison, etc., R. Co., 98 S. W. 939, 44 Tex. Civ. App. 455.

Knowledge of defects in car and negligence in failing to repair.—Missouri, etc., R. Co. *v.* Tripis (Tex. Civ. App.), 117 S. W. 199.

Negligent delay in transporting freight.—Funsten Dried Fruit, etc., Co. *v.* Toledo, etc., R. Co., 163 Mo. App. 426, 143 S. W. 839.

Delivering goods during stormy weather.—Defendants, common carriers, running a line of steamers between New Orleans and the gulf ports of Texas, were also carriers of the mails; and the times of arrival and departure of their steamers were well known at such ports. There was evidence that it was the uniform custom to discharge the cargo of these steamers on the wharf immediately after their arrival, to be left until called for by the consignees. It appeared from the testimony that the weather upon one of the days of arrival when the plaintiff's goods were landed upon the wharf was rainy and threatening. The goods were discharged as usual, and covered so as to protect them against rain, but no notice was given to the plaintiff. In the night following, the goods were destroyed by a hurricane. Held, that it was a question for the jury, upon all the facts in the case, whether the defendant was guilty of negligence, so as to make him liable, and that it was error to instruct them that such a landing of goods was prima facie evidence of willful negligence on the part of the carrier. Morgan *v.* Dibble, 29 Tex. 107, 94 Am. Dec. 264.

As to means of transportation.—Where there was considerable testimony as to whether a stall in an express car in which plaintiff's horse was placed for shipment was properly constructed, the express company's negligence was a question for the jury. Armstrong *v.* United States Exp. Co., 159 Pa. 640, 28 Atl. 448.

Where a railway carrier is not, as a matter of law, bound to furnish refrigerator cars to carry perishable goods, whether it is negligence not to do so is a question for the jury. Udell *v.* Illinois Cent. R. Co., 13 Mo. App. 254.

Excessive speed in running train.—It is a question for the jury whether the carrier was negligent in running its freight train at the rate of fifteen miles an hour around a curve, and over a high embankment; that being the greatest speed allowed for such a train anywhere on the road. Lucesco Oil Co. *v.* Pennsylvania R. Co. (Pa.), 2 Pittsb. 477.

60. Empire Transp. Co. *v.* Wamsutta Oil Refin., etc., Co., 63 Pa. 14, 3 Am. Rep. 515.

Negligence and liability on the part of a common carrier are inferences of law from the fact that every available precaution was not taken to prevent the spread of fire on a railroad train on which

Where the facts in relation to the loss by fire at a depot of goods are undisputed, the question of negligence on the part of the carrier is one of law for the court.[61] What constitutes extraordinary diligence,[62] whether the carrier has exercised due diligence to avert a loss[63] or taken proper care of the goods,[64] and whether goods could have been saved by the use of ordinary diligence and care,[65] are questions for the jury. The question whether a delay was due to an obstruction which defendant by the exercise of reasonable care could have avoided is for the jury.[66]

Negligence or Wrong of Shipper.—What acts of the shipper constitute negligence releasing the carrier from liability should not be laid down by the court, but determined by the jury.[67] Whether the carrier was misled by the

merchandise was carried together with a combustible substance. The question need not be submitted to the jury. Empire Transp. Co. *v.* Wamsutta Oil Refin., etc., Co., 63 Pa. 14, 3 Am. Rep. 515.

61. Braunton *v.* Southern Pac. Co., 2 Cal. App. 173, 83 Pac. 265.

62. As to diligence.—Richmond, etc., R. Co. *v.* White, 88 Ga. 805, 15 S. E. 802.

63. Wallace *v.* Clayton, 42 Ga. 443; Lawrence *v.* McGregor (O.), Wright 193.

In an action to recover from a railroad company for goods lost by an unprecedented rise of a river, it is for the jury to determine whether the carrier had such premonitions of approaching danger as to awaken the apprehensions of men of prudence, or whether, in view of the means of escape, the carrier used energetically all the means at command to meet the emergency and save the property. Lamont & Co. *v.* Nashville, etc., R. Co., 56 Tenn. (9 Heisk.) 58.

64. After the arrival of goods at their destination, and notice to the consignee, the latter commenced to remove them; but, residing at a distance, he could not take more than one load per day. The goods were thrown out of the car on the ground, and while in this situation were damaged by rain. Held, that the question whether defendant carrier had taken proper care of the goods was for the jury. Cook *v.* Erie R. Co. (N. Y.), 58 Barb. 312.

Where defendant carrier agreed to carry plaintiff's trunk to a station, and, in his absence left it on the platform, in the usual place for such deliveries, and it was stolen therefrom, but the evidence whether plaintiff was to be there to receive it was conflicting, the question whether defendant exercised reasonable care in protecting it was for the jury. Ft. Worth Transfer Co. *v.* Isaacs (Tex. Civ. App.), 40 S. W. 39.

65. In an action for injury to wheat from a flood while in a car standing on a side track, it being in evidence that, though the water rose only a few inches in the car, the door was never opened, though the car remained there some eight days, and that the wheat was substantially destroyed, it was proper to allow the jury to determine whether defendant's agents could not, by the use of ordinary diligence and care, have removed and saved some of the wheat from destruction. Baltimore, etc., R. Co. *v.* Keedy, 75 Md. 320, 23 Atl. 643.

66. Joynes *v.* Pennsylvania R. Co., 239 Pa. 93, 86 Atl. 653.

67. Negligence of shipper.—Cobb, etc., Co. *v.* Illinois Cent. R. Co., 38 Iowa 601. See Missouri, etc., R. Co. *v.* Tripis (Tex. Civ. App.), 117 S. W. 199.

In an action against truckmen for negligence in unloading machinery which they had moved, the question as to contributory negligence, in that plaintiff ordered the machinery to be unloaded at once, on its delivery after dark, is for the jury. Jackson Architectural Iron Works *v.* Hurlbut, 52 N. E. 665, 158 N. Y. 34, 70 Am. St. Rep. 432, affirming 36 N. Y. S. 808, 15 Misc. Rep. 93.

In an action against a railroad company for failure to ship certain seed, the question of contributory negligence in exposing the seed to rains, and permitting it to remain so exposed for a period during which rains would likely fall upon it, whereby it would heat and spoil, thereby contributing to the injury, is for the jury within Const., art. 23, § 6, providing that the defense of contributory negligence shall in all cases be a question of fact for the jury. Chicago, etc., R. Co. *v.* Beatty, 116 Pac. 171, 27 Okla. 844.

Failure of shipper to furnish caretaker and means to protect against fire.—Where there was evidence of an express contract between the common carrier and the shipper of the goods whereby the shipper was to send a man along with the goods, shipped on an open car, with a tarpaulin to cover them, and buckets of water to protect them against fire; and that the shipper failed to do this, and the goods were destroyed by fire, it was held that, although the carrier was liable for negligence, yet it was a question for the jury whether the goods were destroyed by the negligence of the defendant, or in consequence of the failure of the plaintiff to perform the contract on his part, under the evidence in the case. Southern Exp. Co. *v.* Purcell, 37 Ga. 103, 92 Am. Dec. 53.

shipper's fraud or negligence is a question for the jury.[68]

Reasonable Time for Removal of Goods.—What is a reasonable time for the consignee to remove his goods from a carrier's depot is generally a question for the jury.[69] But where there is no dispute about the material facts, the question what is a reasonable time is for the court.[70] Reasonable diligence on consignee's part to inform himself of the arrival of goods, is generally a question for the jury.[71]

Notice to Consignee.—Where the evidence is conflicting as to whether the consignee had been given notice of the arrival of the goods, the question is for the jury.[72]

Duty as to Tracing Lost Goods.—Ordinarily what railway companies should do where the shipper demands that lost goods be traced is a question for the jury, but where the question admits of but one conclusion, it is for the court to decide.[73]

Time of Loss.—Whether goods were lost before or after the carrier had deposited them in its warehouse, in order to fix the liability of defendant either as carrier or warehouseman, is a question for the jury.[74]

The cause of a loss or damage to goods in charge of a common carrier is a question for the jury,[75] as whether it was caused by the carrier's negligence,[76]

68. Jenkins *v.* Atlantic, etc., R. Co., 84 S. C. 520, 66 S. E. 407 (cigars shipped as "tobacco").

69. **Reasonable time for removal of goods.**—Lewis *v.* Louisville, etc., R. Co., 135 Ky. 361, 122 S. W. 184, 25 L. R. A., N. S., 938, 21 Am. & Eng. Ann. Cas. 527; Gulf, etc., R. Co. *v.* Ferguson-Mckinney Dry Goods Co., 97 Miss. 266, 52 So. 797; Southern R. Co. *v.* Adams Mach. Co., 165 Ala. 436, 51 So. 779; Berry *v.* West Virginia, etc., R. Co., 30 S. E. 143, 44 W. Va. 538, 67 Am. St. Rep. 781.

In McGregor *v.* Oregon R., etc., Co., 50 Ore. 527, 93 Pac. 465, 14 L. R. A., N. S., 668, it is held that it is proper to submit the question to the jury only in case of a conflict in the testimony, or when the facts are doubtful or complicated, etc.

70. McGregor *v.* Oregon R., etc., Co., 50 Ore. 527, 93 Pac. 465, 14 L. R. A., N. S., 668; Berry *v.* West Virginia, etc., R. Co., 44 W. Va. 538, 30 S. E. 143, 67 Am. St. Rep. 781; Normile *v.* Northern Pac. R. Co., 36 Wash. 21, 77 Pac. 1087, 67 L. R. A. 271.

71. Lewis *v.* Louisville, etc., R. Co., 135 Ky. 361, 122 S. W. 184, 25 L. R. A., N. S., 938, 21 Am. & Eng. Ann. Cas. 527.

72. **Notice to consignee.**—Citizens', etc., Bank *v.* Southern R. Co., 153 N. C. 346, 69 S. E. 261; Texas, etc., R. Co. *v.* Gilmore (Tex. Civ. App.), 152 S. W. 1102.

73. **Duty as to tracing lost goods.**—Freiberg *v.* Cleveland, etc., R. Co., 11 O. C. C., N. S., 241, 20-30 O. C. D. 669, affirmed in 83 O. St. 482.

74. **Time of loss.**—Sessions *v.* Western R. Corp. (Mass.), 16 Gray 132.

75. **Cause of loss or damage.**—Hall *v.* Renfro (Ky.), 3 Metc. 51.

The question whether cotton was set on fire by sparks from a locomotive is for the jury, where the cotton was stored in and along the side of open sheds in close proximity to railroad tracks on each side, although the only locomotive near the cotton on the day that the fire was discovered did not go near the shed where the fire started, and is not shown to have been throwing out any sparks, while, if there had been any, the wind would have carried them in the opposite directions, since one possibility is that the fire was set by other locomotives on a preceding day, and smouldered until the day it was discovered. Marande *v.* Texas, etc., R. Co., 22 S. Ct. 340, 184 U. S. 173, 46 L. Ed. 487, reversing 102 Fed. 246, 42 C. C. A. 317.

Plaintiff shipped by defendant a car load of fruit in good condition, under defendant's contract to keep the car below a certain temperature. When the car arrived at its destination the temperature was found to be very much higher than agreed, and the fruit was greatly damaged. Held, without other proof, it was for the jury to say what caused the damage. Perishable Freight Transp. Co. *v.* O'Neill, 41 Ill. App. 423.

76. Congar *v.* Galena, etc., R. Co., 17 Wis. 477; Funsten Dried Fruit, etc., Co. *v.* Toledo, etc., R. Co., 163 Mo. App. 426, 143 S. W. 389. See Missouri, etc., R. Co. *v.* Tripis (Tex. Civ. App.), 117 S. W. 199.

Whether the escape of molasses from a barrel is the result of defective cooperage or of the carrier's negligence, there being evidence that the barrel was defective, is for the jury. Menner *v.* Delaware, etc., Canal Co., 7 Pa. Super. Ct. 135.

Whether the lack of ice caused the damage is a question for the jury. McConnell Bros. *v.* Southern R. Co., 144 N. C. 89, 56 S. E. 559.

In an action against a carrier for the loss of a car load of tomatoes alleged by

or by an act of God.[77]

What constitutes an act of God, such as will relieve a common carrier from its common-law liability, is ordinarily a question for the jury.[78]

Whether a carrier is bound to know the character of the contents of packages intrusted to it is a question of law upon the facts, not a question of fact for a jury to find.[79]

Whether the carrier discharged its burden of proof that the goods were destroyed by an act of God, the public enemy, inherent defects therein, or negligence of the shipper is for the jury, except where evidence is so overwhelming as to leave no room for a reasonable doubt that the prima facie case has been destroyed.[80]

Whether Whole Shipment Transported.—Where the railway company retained, at the point of destination, cotton sealed in the same cars in which it was transported, and there was no evidence that the whole quantity delivered to it was transported to such point, except the mere fact that the cars, on arrival, were still sealed, it was for the jury to determine as to whether the whole quantity delivered to the company had been actually so transported.[81]

Whether Claim Made in Time Required.—In an action against a carrier for damage to goods, the question whether the claim for damages was made within the time required is one of fact for the jury.[82]

Whether Value of Premium Included in Claim.—In an action for the loss of a part of a shipment of goods, it was for the jury to say whether the value of a premium which the purchaser received was included in the claim and should be deducted.[83]

Effect of Receipt and Retention of Voucher for Damaged Goods.—Where plaintiff received a voucher from a carrier in payment for certain damaged goods, whether plaintiff's failure to return the voucher estopped him from

plaintiff to have rotted from the neglect of the company to properly ice them, where the evidence is conflicting as to whether the condition of the tomatoes was caused by lack of ice which defendant had agreed to supply, the case is for the jury. Conrad Schopp Fruit Co. v. Pittsburg, etc., R. Co., 43 Pa. Super. Ct. 481.

Whether a lack of sufficient watchmen contributed to the loss of cotton by fire is a question for the jury, notwithstanding the contention that the watchmen actually present discovered the fire as soon as it started, where it is possible for the jury to infer that the fire might have been smouldering for a considerable period before its discovery, and a sufficient force of watchmen, if present, might have materially aided in extinguishing the fire. Marande v. Texas, etc., R. Co., 102 Fed. 246, 42 C. C. A. 317; S. C., 22 S. Ct. 340, 184 U. S. 173, 46 L. Ed. 487.

Failure to provide facilities for extinguishing fire.—The question whether the negligence of a railroad company in failing to provide proper facilities for extinguishing fire in cotton sheds contributed to a loss of the cotton by fire is for the jury, where the cotton was piled up high around the platforms on which hose was kept, and when an attempt was made to use the hose the water would not come, either because the hose had become tangled, or otherwise, and the valve was found already open when one of the men tried to open it, although the railroad company contends, but without any positive proof of the fact, that one of the employees had opened the valve and tangled the hose after the alarm of fire, especially when there had been no systematic inspection thereof, and no fire drill had, and no instructions given as to the use of the apparatus. Judgment 102 Fed. 246, 42 C. C. A. 317, reversed. Marande v. Texas, etc., R. Co., 22 S. Ct. 340, 184 U. S. 173, 46 L. Ed. 487.

77. Gulf, etc., R. Co. v. Boyce, 39 Tex. Civ. App. 195, 196, 87 S. W. 395, affirmed in 101 Tex. 639, no op.

78. **What constitutes act of God.**—Fentiman v. Atchison, etc., R. Co., 44 Tex. Civ. App. 455, 460, 98 S. W. 939. See Southern R. Co. v. Smith, 125 Ky. 656, 31 Ky. L. Rep. 243, 102 S. W. 232.

79. Berley v. Newton (N. Y.), 10 How. Prac. 490.

80. **Whether the carrier discharged its burden of proof.**—Fentiman v. Atchison, etc., R. Co., 44 Tex. Civ. App. 455, 98 S. W. 939.

81. **Whether whole shipment transported.**—Hipp v. Southern R. Co., 27 S. E. 623, 50 S. C. 129.

82. **Whether claim made in time required.**—McConnell Bros. v. Southern R. Co., 144 N. C. 89, 56 S. E. 559.

83. **Whether value of premium included in claim.**—Burress v. Atlantic, etc., R. Co., 60 S. E. 692, 79 S. C. 250.

claiming the value of the goods and a statutory penalty, and whether its receipt and retention constituted payment, are questions for the jury.[84]

Additional instances of questions held to be for the determination of the jury are set out in the notes.[85]

84. **Effect of receipt and retention of voucher for damaged goods.**—Moody *v.* Southern Railway, 79 S. C. 297, 60 S. E. 711.

85. **Additional instances.**—An agent for a shipper of goods, making inquiry over the telephone as to the arrival of goods, directed what other persons should say while he stood at their elbow, and an operator at a telephone connection repeated the inquiry to the carrier's agent. Held, that the reliability and accuracy of the means of communication was for the jury in an action for loss of the goods, and that it was for them to say, also, whether the message which finally reached defendant fairly apprised it of the fact that plaintiff was inquiring for the particular goods in question. Southern R. Co. *v.* Adams Mach. Co., 165 Ala. 436, 51 So. 779.

In an action against the owners of a steamboat to recover the value of a sealed package of money delivered by plaintiff to the clerk of such boat for transportation, the proof was that, although it was the uniform custom of steamboats to carry cash letters, no charge was made for such service, unless a receipt was demanded by the shipper, when a charge of one-fourth of 1 per cent was made upon the amount of the bills. Held, that it was not improper for the court to leave to the jury the question of fact, whether cash letters belonged to that class or character of goods which the boat undertook to carry for hire. Knox *v.* Rives, etc., Co., 14 Ala. 249.

Where initials on waybill different from those of consignee.—Where, in an action against a carrier for damage to goods shipped, it appears that the initials of the consignee on the waybill are different from those of plaintiff, but that the waybill was issued without the knowledge of plaintiff and in his absence, and that the carrier treated plaintiff as the owner, delivering to him the freight and accepting from him the charges, such difference is not a question of variance between the allegations and proof, but, instead, raises an issue of fact for determination by the jury. Georgia, etc., R. Co. *v.* Barfield, 58 S. E. 236, 1 Ga. App. 203.

Whether more definite tender of damaged goods excused.—Where the demand read, "We feel justified in putting in a claim for the entire shipment, and hold the goods subject to your inspection," and where a later letter contained complaints that the consignees had lost the use of their money for the intervening period, it was a question for the jury whether a flat denial of liability by the express company did not excuse a more definite tender of the almost worthless books. Hardy *v.* American Exp. Co., 65 N. E. 375, 182 Mass. 328, 59 L. R. A. 731.

Amount of damage.—Where plaintiff testified that ninety-eight cents was the damage to a case of goods in shipment and there was no direct evidence in contradiction, and he relied for corroboration on the facts that he filed his claim for ninety-eight cents, and that defendant did not contest the claim, but paid it to another, while defendant's evidence was the itemized bill from plaintiff's vendor filed with the claim, which showed the price of a dozen bottles of olives was $2.15 less 10 per cent and the claim for loss of six bottles, whether the damage was for the amount claimed or for ninety-seven cents as claimed by defendant was for the jury. Sumrell *v.* Atlantic, etc., R. Co., 67 S. E. 585, 152 N. C. 269.

Whether damages within reasonable contemplation of parties.—Defendant railroad company received certain batteries for transportation, packed with excelsior in four open crates. On the top of each box was pasted a bill, with a label in large red letters. "This side up. Batteries. Handle with care." When the batteries were delivered it was found that they had been spoiled by being turned over, and the contents spilled out. Held that, whether the damages sustained were within the reasonable contemplation of the parties after the railroad company had accepted the crates with such injunction of caution was for the jury. Hoye *v.* Pennsylvania R. Co., 100 N. Y. S. 190, 114 App. Div. 821, affirmed in 191 N. Y. 101, 83 N. E. 586.

Whether goods tendered for immediate shipment.—In an action against a carrier for the loss of cotton destroyed by fire while on defendant's platform, the question whether it had been placed there by defendant's consent as cotton tendered for immediate shipment, notwithstanding a rule that the carrier assumed no risk for cotton put upon its platform, unless tendered for immediate shipment, held for the jury. Griffin *v.* Atlantic, etc., R. Co., 72 S. E. 463, 89 S. C. 547.

Reasonableness of explanation why petition claimed more than claim.—Where, in an action against a carrier for loss of goods, plaintiff's claim before suit brought, which was for less than the amount sued for, was introduced in evidence, and he undertook in his evidence to give an explanation why some of the items were omitted from the claim and why the petition claimed more than the

§ 1088. Instructions.—In General.—In an action against a carrier for loss of or damage to goods, it is error to give instructions which are calculated to mislead the jury,[86] or are conflicting,[87] or which require too high a degree

claim presented to the railroad, whether his explanation was reasonable and proper was for the jury. Missouri, etc., R. Co. v. Clayton (Tex. Civ. App.), 84 S. W. 1069.

86. Misleading instructions—Illustrations.—In trover against a carrier to recover for goods lost in transit, it was improper to instruct that the jury could find a conversion if defendant so managed as to interfere with the rights of plaintiff to, and his control over, the property, so that plaintiff lost the same, since such instruction was too indefinite for application by the jury, and was calculated to mislead them, by permitting them to find a conversion though the goods were lost through the negligence of the carrier. Bowlin v. Nye (Mass.), 10 Cush. 416.

An instruction, that the measure of damages is the difference in the value of the goods in the condition in which they were delivered and their value if delivered in good order, is erroneous, as leading the jury to include injuries necessarily incident to the shipping of the goods, while the carrier is liable only for injury resulting from its negligence. Texas Cent. R. Co. v. Watson, 54 Tex. Civ. App. 118 S. W. 175.

Instruction held not misleading.—An instruction, in an action for failure to deliver cotton, that a carrier is bound to exercise extraordinary diligence, and in case of loss the presumption is against it, and no excuse avails unless the loss was caused by the act of God or public enemy, was not misleading, without first charging that, before any presumption would arise against the carrier, the burden was on plaintiff to show that the cotton was never delivered, where upon the whole charge the jury was made to understand that the principle stated was not applicable unless the jury was first satisfied that the cotton was never delivered to plaintiff. Central, etc., R. Co. v. Manchester Mfg. Co., 64 S. E. 1128, 6 Ga. App. 254.

Where it was doubtful from the evidence whether goods, for the loss of which suit was brought against a railroad company, were ever received by defendant, an instruction that one railroad is not responsible for loss occurring on another is not erroneous as being unauthorized or misleading. McCaffrey v. Georgia, etc., R. Co., 69 Ga. 622.

An instruction that, in transferring express matter from one train to the other, the law imposed on the servants of the express company the duty of exercising ordinary care, was not erroneous as misleading the jury and authorizing them to find the company guilty of negligence other than that charged in the declaration, which was in placing the chute in the car, where such act was a preparation for and a part of the transfer of the express matter. American Exp. Co. v. Risley, 179 Ill. 295, 53 N. E. 558, affirming 77 Ill. App. 476.

In an action against a carrier for loss of cigars shipped as "smoking tobacco," an instruction that as a general proposition the highest price of the article at destination with the freight added is the true measure of damages, is not objectionable as intimating that the carrier is responsible for the price of the shipment regarded as cigars. Jenkins v. Atlantic, etc., R. Co., 66 S. E. 407, 84 S. C. 520.

Plaintiffs imported cattle for breeding purposes, and in the course of their transportation by defendant railroad company they were so injured in a collision that many of them, which were with calf, miscarried. Held, in an action for damages, that instructions that the carrier was bound to deliver the cattle at their destination in as good order as it received them, and that if it failed so to do it must pay the difference between their value in such condition and their value in the condition in which they were actually delivered, are not misleading, when the jury are told in the same charge that the carrier is liable only for injuries directly traceable to its negligence. New York, etc., R. Co. v. Estill, 147 U. S. 591, 13 S. Ct. 444, 37 L. Ed. 292, 54 Am. & Eng. R. Cas. 487.

Verdict showing jury not misled.—In an action against a carrier for loss of goods, the jury were instructed that the plaintiff was entitled to recover the value of the goods which the carrier failed to deliver, "for which you may find the defendant liable under the instructions and evidence," "unless you believe from the evidence that the defendant was excused from such delivery by such cause as is set out in instructions given you for the

87. Conflicting instructions.—In an action against a railway company for the value of goods placed near its tracks for shipment and destroyed by fire, an instruction on the theory that the evidence of the custom and course of dealing in permitting goods to accumulate on the platform for shipment might be sufficient to constitute possession by defendant as a carrier, was irreconcilably conflicting with an instruction that the defendant would not be liable as a common carrier unless the cotton was received by it for immediate shipment and it had received shipping instructions from the plaintiff. Missouri, etc., R. Co. v. Beard, 78 S. W. 253, 34 Tex. Civ. App. 188.

of proof,[88] or which invade the province of the jury,[89] or which are on the weight of the evidence.[90] It is proper to refuse a requested charge which does not correctly state the law.[91] It is not error to give an instruction stating a sound principle of law and applicable to a phase of the case as developed by the evidence.[92] Where the charge affirmatively sets out the plaintiff's rights in regard to the delivery and receipt of goods, the converse of the affirmative part of the charge is sufficiently given by the use of a negative phrase implying the plaintiff's duty in regard to such delivery and receipt of goods.[93]

defendant." In one of the instructions for defendant the jury were told that under Rev. St. U. S., § 4281, the plaintiff could not recover for any articles composed of silk, manufactured or unmanufactured, wrought up or not with any other material, furs, or laces, unless a written notice of the character of the articles and their value had been given the carrier at the time it received the box; that in assessing damages such articles must be omitted from the estimate. Plaintiff stated that the aggregate value of the goods in the box was $2,336, and the evidence indicated that the value of the lace and silk goods was about $600. The jury gave plaintiff a verdict for $1,604.30. Held, that they were not misled by the first instruction. Hamburg-American Packet Co. *v.* Gattman, 127 Ill. 598, 20 N. E. 662.

88. **Instruction requiring too high degree of proof.**—Louisville, etc., R. Co. *v.* Gidley, 119 Ala. 523, 24 So. 753 (charge requiring carrier to "satisfy" jury that loss could not have been prevented by exercise of due care).

89. **Instructions invading province of jury.**—In an action against a railway company for its failure to deliver goods shipped, in which the evidence is conflicting as to whether they were ever received for shipment, and whether freight was ever paid on them, an instruction, given by the court of its own motion, that, "if the jury believe from the evidence that defendant received pay on the freight for the goods in question, that was sufficient evidence that the defendant had the goods at that time in possession," is erroneous, as invading the province of the jury. Mobile, etc., R. Co. *v.* Williams, 52 Ala. 278.

It being a question for the jury whether the carrier exercised the proper degree of care under the circumstances, it is error to instruct that, if the jury find that the loss was in any respect due to the crowded condition of the depot, or to the want of sufficient hands, the carrier is liable. Richmond, etc., R. Co. *v.* White, 88 Ga. 805, 15 S. E. 802.

90. **Instruction on weight of evidence.**—It is a charge on the weight of evidence to tell the jury that lost articles have no general market value where the evidence as to the nature of the articles, and the manner of their collection and preparation, tends to show that they are all such specimens as might have a market value. Yoakum *v.* Dunn, 1 Tex. Civ. App. 524, 21 S. W. 411.

Instruction held not erroneous.—In an action to recover for the loss of a package of money shipped with defendant, the court instructed the jury that if they believed that the express company received the envelope with money in it, and afterwards had the envelope in its possession without the money, the jury might infer that the money was abstracted while in defendant's possession. Held, that the instruction was not erroneous as directing the jury on the weight of the evidence. Southern Exp. Co. *v.* Thornton, 41 Miss. 216.

91. In an action against a carrier for loss of goods in transit, there was no error in refusing a charge that if the conductor of a freight train ascertained that a car was on fire, and an emergency arose without negligence of the carrier, and if the conductor in good faith took a certain course which he thought was that offering the best prospect of saving the goods from destruction, though the course so taken was a mistake, such mistake would not be chargeable to the carrier as negligence. Atlanta, etc., R. Co. *v.* Jacobs' Pharmacy Co., 135 Ga. 113, 68 S. E. 1039.

92. Southern R. Co. *v.* Williams, 139 Ga. 339, 77 S. E. 168, holding that an instruction that if a carrier carried lumber to its destination, and delivered it to another railroad, which undertook to carry it to the particular point of destination, and if the other carrier acted as agent of the defendant, it would be immaterial on which line the damage was done, was not error.

93. In an action against a railroad company for injury to trees en route, the court instructed that, if plaintiff called for the trees at destination within a reasonable time and made a reasonable effort to receive them if they reached there within a reasonable time, he was not required to stay until they arrived, unless he had notice as to when they would arrive; but if he made reasonable effort to get them, and if they did not arrived within a reasonable time and were damaged for that reason, he would be entitled to recover damages, "but otherwise he would not be." Held, that by the quoted phrase the court gave the converse of the affirmative part of the

Must Be Applicable to Pleadings and Evidence.—It is error to give an instruction not applicable to the issues raised by the pleadings, though it may be entirely correct as an abstract proposition of law;[94] and so it is proper to refuse an instruction not applicable.[95] It is error to give an instruction on an issue not raised by the evidence,[96] or opposed to the evidence,[97] and it is proper to refuse an instruction not raised or supported by the evidence.[98] When the

instruction, and sufficiently charged as to plaintiff's duty to use reasonable efforts to receive the goods even if they did not arrive within a reasonable time. Young *v.* Southern R. Co., 157 N. C. 74, 72 S. E. 835.

94. **Applicability to issues raised by pleading.**—Central R., etc., Co. *v.* Cooper 95 Ga. 406, 22 S. E. 549.

Illustrations.—It is error to charge that, if the property was damaged by being placed in unsafe cars, the jury should find for plaintiff, where the declaration merely alleges failure to deliver. Central R., etc., Co. *v.* Avant, 80 Ga. 195, 5 S. E. 78.

Where the sole ground of liability alleged in a declaration against a railroad company for damages to goods was that defendant negligently unloaded the goods in the rain and stored the same in the open air, it was error to charge that, if the goods were delivered to the wrong person by the company, it would constitute a conversion by defendant for which plaintiff could recover the full value of the goods, though the evidence was conflicting as to whether the one who unloaded the goods was the agent of plaintiff or of defendant. Central R., etc., Co. *v.* Cooper, 95 Ga. 406, 22 S. E. 549.

A charge that a railroad company might be found liable for the loss of cotton deposited by the plaintiff on their depot platform, and burned, held to be erroneous; the declaration not alleging that they received the cotton in their character of common carrier. Smith *v.* King's Mountain R. Co., 3 S. C. 53.

Where the petition claims damages only for the injury to and loss of horses through a collision, it is error to charge that plaintiff may recover for injury caused by delay and detention. Texas, etc., R. Co. *v.* Sims (Tex. Civ. App.), 26 S. W. 634.

95. In an action against a carrier for loss of the goods shipped, after they were unloaded, and plaintiff notified of their arrival, based on its liability as a common carrier, instructions as to its liability as a warehouseman are properly refused, no claim being made in the complaint against defendant as a warehouseman. Wynantskill Knitting Co. *v.* Murray, 90 Hun 554, 36 N. Y. S. 26, 71 N. Y. St. Rep. 33.

96. **Applicability to issues raised by evidence.**—Where there is nothing in the pleadings or evidence properly presenting as an issue in the case the question whether the person by whom the shipper's goods were unloaded from the carrier's car was or was not authorized to receive the goods for the shipper, and the controlling question being whether that person in unloading and storing the goods was acting as agent of the shipper or carrier, it is error to so shape the instructions to the jury as to present for their consideration the question as to the authority of such person to receive the goods and in so qualifying the written request of the carrier as to submit that question for the jury's determination in connection with, and as a part of, the question of agency. Central R., etc., Co. *v.* Cooper, 95 Ga. 406, 22 S. E. 549.

97. **Instructions opposed to evidence.**—The uncontradicted evidence being that some efforts were made by the carrier to save the plaintiff's goods, it was error to charge the jury upon any hypothesis grounded on the assumption or contingency that no efforts whatever were made. Richmond, etc., R. Co. *v.* White, 88 Ga. 805, 15 S. E. 802.

In an action of assumpsit brought to recover the value of oil claimed by the plaintiff, the declaration containing no good counts except the common counts, which was in the possession of defendant at the time the action was brought, and which had not been sold or in any way tortiously disposed of by the defendant, and which came into the possession of the defendant as a common carrier, and not wrongfully, it was held, error for the lower court to instruct the jury that if they believed from the evidence that the oil was the property of the plaintiff, it was their duty to find a verdict for the plaintiff for the value of the oil, there not being evidence before the jury tending to prove a sale of the oil by the plaintiff to the defendant, but the evidence clearly proving that there had been no such sale, and that the defendant had only refused to deliver the oil to plaintiff on demand, under the peculiar circumstances shown by the evidence, as stated in the opinion of the court in Dresser *v.* West Virginia Transp. Co., 8 W. Va. 553.

98. **Instructions not raised or supported by evidence.**—In an action to recover for loss of goods, the refusal to instruct the jury "that the mere fact of delivery of the goods to the defendant corporation for transportation raised a presumption that such delivery was made and the goods received for immediate transportation," etc., is justified, when it can not be gathered from the case that there was any

liability of the carrier has changed to that of a warehouseman, it is error to submit to the jury the question of liability as carrier.[99] Where the only issue is as to defendant's liability as a carrier,[1] it is error to charge that it might be held liable upon its responsibility as a warehouseman.[2] So where the petition charges defendants as warehousemen, and not as common carriers,[3] instructions

such "mere fact of delivery of the goods" in evidence, unaccompanied by proof of verbal communication between the agents of the parties, and of the contract they entered into, the true character and terms of which were really the subjects of the controversy between the parties. Jones *v.* New England, etc., Steamship Co., 71 Me. 56.

In an action against a company for loss by fire of cotton deposited at a switch where there was neither agent, station, nor platform, an instruction that, if plaintiffs contracted with defendant to furnish a car for shipment of the cotton, and failed to do so, by reason of which the cotton was damaged by fire, defendant is liable, should be refused, where there is no evidence connecting the fire with the failure to furnish a car. Kansas City, etc., R. Co. *v.* Lilly (Miss.), 8 So. 644.

In an action for failure to adjust a freight loss claim, it was proper to refuse to instruct as to the liability of a gratuitous bailee, where there was no testimony that the company had given notice that it would no longer hold as warehouseman; its liability being either that of carrier or warehouseman. Sanders *v.* Southern Railway, 72 S. E. 637, 90 S. C. 79.

In an action to recover for breach of a contract in failing to transport a quantity of cord wood, by reason of which the wood was washed away by a freshet and was lost, the court properly refused to instruct the jury that "the measure of damages in case of a failure to deliver goods according to contract, and which are lost, is their market value," etc., defendants not being sued as common carriers, and there being no evidence of a delivery of the wood to them. And a further instruction that plaintiff is entitled to recover as damages whatever he may have expended in the recovery of the wood washed away, if the jury believe that it would not have been washed away if defendants had kept their contract, is also properly refused, in the absence of any evidence to show that such damage can be fairly and reasonably considered as naturally arising from the breach of the contract in question. Slaughter *v.* Denmead, 88 Va. 1019, 14 S. E. 833.

99. Hurley & Son *v.* Norfolk, etc., R. Co., 68 W. Va. 471, 69 S. E. 904.

1. In an action of assumpsit against a railroad company for failure to deliver five hundred and twenty-five bales of cotton described in the bills of lading, the evidence was that one P., a cotton broker, purchased large quantities of cotton from time to time, and, under a contract with the defendant railway company, caused the cotton to be compressed, and made ready for shipping. When compressed, each bale was by him weighed, classed, and marked; and, when a number of bales had been so marked, he made out a bill of lading, describing them by their appropriate marks, and obtained the certificate of the superintendent of the compress company, indorsed thereon, that the cotton called for by the bill was in the warehouse; also the signature of the defendant's freight agent. Whenever a sale was made, P. assigned the proper bills of lading to the purchaser. Plaintiffs claimed as such purchasers and assignees of P. There was evidence that, at the time plaintiff's bills of lading were made out and signed as above, there was no cotton of the grade called for in the warehouse (and it was conceded that, by an arrangement between P. and defendant, bills of lading were often issued before the cotton called for had arrived), but that in this instance there was other cotton on hand of an inferior grade, some of which certain employees of P., with knowledge of defendant's freight agent, re-marked with marks indicating the grade called for by plaintiff's bills, and that defendant forwarded this inferior cotton to plaintiffs. Held, that in such action the only issue was as to defendant's liability upon the bills of lading as a common carrier. St. Louis, etc., R. Co. *v.* Knight, 122 U. S. 79, 7 S. Ct. 1132, 30 L. Ed. 1077.

2. St. Louis, etc., R. Co. *v.* Knight, 122 U. S. 79, 30 L. Ed. 1077, 7 S. Ct. 1132.

3. **Petition alleging liability as warehouseman.**—In an action against a railroad company for the value of certain goods, the petition alleged that on the 4th of December, 1864, the defendants were engaged in the business of common carriers and as warehousemen, running and operating a road from Chicago to Nevada, and having a warehouse at the latter place. On this day, the plaintiff's goods were delivered to the defendants at Chicago, to be transported to Nevada, as per receipt, etc., and that said goods were duly transported by the defendants to their said warehouse in Nevada, and were therein so carelessly and negligently kept, that the aforesaid articles were entirely lost and destroyed, and the defendants both utterly failed and refused to deliver the same, etc. Held, that defendants were charged as warehousemen, and not as common carriers. Porter *v.* Chicago, etc., R. Co., 20 Iowa 73.

assuming that they are to be held as common carriers are erroneous.[4] Where the shipper claims and testifies that an oral contract was made for transportation in which there was no limitation of liability, but that he signed a paper, which he supposed to be a receipt, and the carrier offered testimony to show that the only contract made was the written one embodied in the bill of lading signed by the shipper and which limited its liability, the court is warranted in defining the common-law liability of the carrier in case the jury should find in favor of the theory of the shipper.[5]

Necessity for Instructions.—The defendant is entitled to have any defense which the evidence tends to support submitted to the jury under a proper charge.[6] Where the defendant claims that the goods were damaged before received for shipment it is entitled to have that issue distinctly submitted to the jury.[7] When a contract stipulates that after defendant's delivery of the goods to a connecting line it should not be liable for injuries, and the evidence shows that a large part of the damages were sustained after such delivery, the court should instruct that defendant was not liable therefor.[8] And where the allegations of the complaint that the goods were damaged while in transit over defendant's line are unsupported by evidence, defendant is entitled to an instruction to that effect.[9]

Ignoring or Excluding Pertinent Questions.—Instructions which ignore or exclude from the consideration of the jury questions pertinent to the issues are erroneous.[10] So it is proper to refuse an instruction as to defendant's com-

4. Porter *v.* Chicago, etc., R. Co., 20 Iowa 73.

5. St. Louis, etc., R. Co. *v.* Clark, 48 Kan. 321, 29 Pac. 312.

6. **Necessity for instruction.**—Where, in an action for the value of a puncheon of molasses which burst while in the custody of a carrier, there is evidence that the cause was the fermentation of the molasses, defendant is entitled to have it considered by the jury under a proper charge, as the carrier is not liable for loss or damage resulting from defects inherent in the goods. Currie *v.* Seaboard, etc., R. Co., 72 S. E. 493, 156 N. C. 432.

7. Texas Cent. R. Co. *v.* Dorsey, 70 S. W. 575, 30 Tex. Civ. App. 377.

8. Gulf, etc., R. Co. *v.* Allcorn (Tex. Civ. App.), 23 S. W. 186.

9. Goodman *v.* Oregon R., etc., Co., 22 Ore. 14, 28 Pac. 894.

10. **Instructions ignoring or excluding pertinent questions.**—In an action against a railroad corporation for the loss of cotton which was destroyed by fire while on board of the defendant's cars, S. testified that the plaintiff made an oral agreement with the superintendent of the road, that he (the plaintiff) would cover the cotton with a tarpaulin, and send a man along with it, with buckets of water. The court charged that, if the contract was made as testified by S., it was still incumbent on the defendants to prove that there was no negligence on their part. Held, that this was erroneous, as the effect of it was to exclude from the consideration of the jury the question in dispute—whether the cotton was destroyed by the negligence of the defendants, or by the failure of the plaintiff to perform his part of the express contract, if they should believe such a contract was made. Southern Exp. Co. *v.* Purcell, 37 Ga. 103, 92 Am. Dec. 53.

In an action for the value of a shipment of lumber, it was error to charge that, if plaintiff was entitled to recover at all, he was entitled to the full amount claimed, there being no controversy as to the value of lumber, as disregarding the amount due for freight charges unpaid and value of the lumber saved from a wreck. Southern R. Co. *v.* Williams, 77 S. E. 153, 139 Ga. 357.

An instruction that if the jury find for plaintiff, suing defendant carrier for injuries to fruit owing to insufficient refrigeration, they should find the full amount proven, and look to the evidence and see what the amount proven is, is improper, as authorizing damages to the highest amount without considering inherent defects in the fruit. Southern R. Co. *v.* Williams, 77 S. E. 153, 139 Ga. 357.

In an action against common carriers at sea, to recover the value of a cask of brandy, the contents of which have been lost on the voyage by leakage, it is erroneous to charge the jury that the only question is whether the cask was properly made, and sufficient, so that with ordinary or proper care the leakage would not have occurred. Such an instruction withdraws from the jury the question whether the cask was properly stowed. Tysen *v.* Moore (N. Y.), 56 Barb. 442.

A shipper, having sole charge of the loading, loaded corn while it was wet. The car itself was secure against leakage from rain. There was a delay in transportation of about two days, caused by

mon-law liability as an insurer which pretermits all inquiry whether the goods were ready for delivery.[11] Where there is practically no dispute as to a matter, it is proper to give an instruction withdrawing the question from the jury, thereby clearing the atmosphere at the trial and confining and directing their attention to the remaining questions.[12] Where the question is whether defendant was liable as a common carrier or as a warehouseman, depending upon whether a certain car had been placed in a proper position for unloading, it is not error for the court in an instruction to eliminate every question except that as to defendant's liability as a carrier, where it charges that, if the car was put in a proper place for unloading, defendant was not liable on any ground.[13]

Withdrawing proper evidence from the jury is error.[14]

Submitting Issue Proved by Undisputed Evidence.—Where the evidence is undisputed that goods were second-hand, an instruction that the jury, in determining the value of the property, are authorized to take into consideration, among other things, the question whether the property was new or second-hand, is not objectionable as submitting the issue as to whether the property was new or second-hand.[15]

Slight Technical Inaccuracy.—An instruction is not rendered erroneous by a slight technical inaccuracy, which does not mislead the jury.[16]

Repetition of Charge.—It is not error for the court to give a charge, requested by plaintiff, which includes a statement of the issues as they have al-

the drawhead of the car being broken. In an action by the shipper for damages, the court charged that if the corn was in a worthless condition when shipped, and the damage did not result from lack of proper care on the company's part, and the car was forwarded within a reasonable time, the jury should find for the company. Held insufficient, in failing to call attention to the act of plaintiff in loading the corn in a wet condition, and submitting to the jury to determine how far such action contributed to the loss complained of. Galveston, etc., R. Co. *v.* Smith, 2 Texas App. Civ. Cas., § 138.

In an action against a railway company for goods which had been placed near its tracks for shipment and destroyed by fire, in which one theory for recovery was that the fire was caused by the negligence of the railway, and another theory was that it was burned after it had been delivered into the possession of the railway as a common carrier, it was error to instruct that, if the fire was caused by the defendant's locomotive, defendant was liable, as defendant, on the theory first stated, was entitled to have submitted the issue of plaintiff's contributory negligence in exposing the cotton to danger by fire. Missouri, etc., R. Co. *v.* Beard, 78 S. W. 253, 34 Tex. Civ. App. 188.

11. Southern R. Co. *v.* Adams Mach. Co., 165 Ala. 436, 51 So. 779.

12. Smith *v.* Baltimore, etc., R. Co., 223 Pa. 118, 72 Atl. 264, wherein it was held that the question of a diversion of cars from the usual course by placing them in a certain yard, instead of carrying them to a certain other yard, was in effect withdrawn from the jury by a charge that the custom of delivering at the yard where the cars were placed had been established to the judge's satisfaction, that this was a delivery within the meaning of the law because agreed to by the parties, and that the only question remaining was as to negligence.

13. Independence Mills Co. *v.* Burlington, etc., R. Co., 72 Iowa 535, 34 N. W. 320, 2 Am. St. Rep. 258.

14. In an action against a railroad company for the loss of goods shipped by it, defendant's agent testified that, at the time of the shipment, plaintiff's husband, with whom the agreement for shipment was made, stated that, if the goods were lost, the company would have to pay him $25. The court charged, in substance, that unless it appeared that both the husband and the agent had authority to make such valuation, and actually agreed upon it, it would not be binding upon plaintiff. Held, that the jury, in ascertaining the value of the goods, might properly consider such testimony, and that the charge withdrew it from their consideration, and was erroneous. Savannah, etc., R. Co. *v.* Collins, 77 Ga. 376, 3 S. E. 416, 4 Am. St. Rep. 87.

15. **Submitting issue proved by undisputed evidence.**—Texas, etc., R. Co. *v.* Wilson Hack Line, 46 Tex. Civ. App. 38, 101 S. W. 1042.

16. **Slight technical inaccuracy.**—Where the court, in its instructions, made it clear that, if the berries shipped were damaged by the reason of their tendency to deteriorate, considering their condition, and the railroad company was not negligent in the handling of the fruit, then there would be no liability, the instruction was not rendered erroneous because the court inaccurately termed the tendency an act of God. Fockens *v.* United States Exp. Co., 109 N. W. 834, 99 Minn. 404.

ready been stated in the general charge, and also defines the duties and liabilities of common carriers substantially as given in the general charge, thus repeating in the charge these matters.[17]

Charge in Conjunctive.—Where, in an action against a carrier for damages to plaintiff's shipment of apples, plaintiff charged that through defendant's negligence the apples were heated, scalded, and decayed, he could not complain of a charge in the conjunctive, in the absence of a request that the heating, scalding, and decaying be disjunctively submitted.[18]

Waiver of Error in Charge.—In an action against a carrier for goods lost, plaintiff's failure to request a proper charge on the measure of the carrier's liability does not constitute a waiver of error in a charge given, limiting the carrier's liability to the exercise of ordinary care.[19]

Harmless Error in Instructions.—Error in an instruction is harmless where it is not prejudicial to the party complaining.[20] The plaintiff can not complain of an instruction fixing the damages at the time and place fixed by his pleadings, even if it were erroneous in this respect.[21]

§ 1089. Verdict.—In an action against a carrier for injuries to goods shipped and ordered returned, where plaintiff refused to receive them, and there was no evidence of the condition or value of the articles refused, though the rule as to measure of damages was correctly stated as the difference between the value of the articles as shipped and as offered to be returned, it could not be applied, and, if the verdict allows plaintiff for the articles not accepted, the judgment must be reversed.[22] Where the plaintiff contends that the judgment is for an insufficient sum, the burden rests upon him of showing that a verdict for a greater sum was demanded.[23]

17. **Repetition of charge.**—Galveston, etc., R. Co. *v.* Tuckett (Tex. Civ. App.), 25 S. W. 150.

18. **Charge in conjunctive.**—Cane Hill, etc., Co. *v.* San Antonio, etc., R. Co. (Tex. Civ. App.), 95 S. W. 751.

19. **Waiver of error in charge.**—Bibb *v.* Missouri, etc., R. Co., 37 Tex. Civ. App. 508, 84 S. W. 663.

20. **Harmless error in instructions.**—In an action against a carrier for the loss of goods, the evidence as to the loss being practically undisputed, a charge misleading and confusing as to the value of the goods can not avail the defendant, being detrimental, if at all, only to plaintiff. Texas, etc., R. Co. *v.* Townsend (Tex. Civ. App.), 106 S. W. 760.

In an action against a carrier for the destruction of goods in transit, plaintiff testified to the market value of the goods at their destination, while defendant's witnesses testified to their value at the point of shipment, and estimated such value at a sum far less than plaintiff's estimate. The court charged that the evidence of defendant's witness was admitted for its tendency to disprove plaintiff's testimony, and not to establish value as a basis for the verdict. Held, that as the charge was correct in so far as it stated that defendant's evidence was incompetent to establish value, and any error in permitting the evidence to be used at all was favorable to defendant, the charge was not prejudicial to defendant. Gulf, etc., R. Co. *v.* Roberts (Tex. Civ. App.), 85 S. W. 479, 480.

Where, in an action against a carrier for loss of freight by reason of its failure to furnish a suitable car, there was evidence justifying a recovery of the contract price for which the goods were sold, and, if the market value was the proper measure of damages, plaintiff would have been entitled to recover more than the verdict, defendant was not prejudiced by an instruction authorizing a recovery of the contract price. Houston, etc., R. Co. *v.* Wilkerson Bros. (Tex. Civ. App.), 82 S. W. 1069.

21. Where the petition fixed all damages claimed at the time of the arrival of the goods at their destination, plaintiff could not complain of an instruction that the measure of damages was the difference between the market value of the goods in the condition in which they arrived and their value had they arrived in proper condition, though the evidence showed that the goods arrived during the night and were not delivered until the following day. Cane Hill, etc., Co. *v.* San Antonio, etc., R. Co. (Tex. Civ. App.), 95 S. W. 751.

22. **Verdict.**—Reason *v.* Detroit, etc., R. Co., 150 Mich. 50, 113 N. W. 596.

23. High Co. *v.* Adams Exp. Co., 5 Ga. App. 863, 63 S. E. 1125.

Judgment not erroneous.—High Co. *v.* Adams Exp. Co., 63 S. E. 1125, 5 Ga. App. 863.

CHAPTER XIII.

Carrier as Warehouseman.

I. When Liability Begins or Ends, §§ 1090-1097.
  A. Goods Awaiting Transportation, § 1090.
  B. Goods Being Transported, § 1091.
  C. Goods Awaiting Delivery to Consignee, §§ 1092-1097.
    a. In General, § 1092.
    b. Express Companies and General Carriers by Water, § 1093.
    c. Railroads and Carriers by Water Having Fixed Schedule, § 1094.
    d. Necessity for Notice of Arrival of Goods, § 1095.
    e. What Is Reasonable Time, § 1096.
    f. How Long Liability Continues, § 1097.
II. Duties and Liabilities, §§ 1098-1100.
  A. In General, § 1098.
  B. Degree of Care, § 1099.
  C. Acts or Omissions Rendering Carrier Liable, § 1100.
III. Actions against Carrier as Warehouseman, §§ 1101-1104.
  A. In General—Pleading, § 1101.
  B. Evidence, § 1102.
  C. Instructions, § 1103.
  D. Finding, § 1104.

§§ 1090-1097. When Liability Begins or Ends—§ 1090. Goods Awaiting Transportation.—The liability of a carrier, as such, for goods received for transportation, does not commence until the duty to transport has completely arisen.[1] Where goods are delivered to a carrier for shipment, and received to be forwarded in the usual course of business, its liability as carrier attaches immediately upon the delivery of the goods,[2] and it is liable as such

1. **Liability as carrier—Goods awaiting transportation.**—Barron *v.* Eldredge, 100 Mass. 455, 1 Am. Rep. 126. See St. Louis, etc., R. Co. *v.* Citizens' Bank, 87 Ark. 26, 112 S. W. 154. See ante, "When Liability Commences," chapter 5.

2. **Delivery of goods to carrier.**—*Missouri.*—Gregory *v.* Wabash R. Co., 46 Mo. App. 574.

New York.—Blossom *v.* Griffin, 13 N. Y. 569, 67 Am. Dec. 75.

Ohio.—Pittsburg, etc., R. Co. *v.* Barrett, 36 O. St. 448.

Pennsylvania.—Clarke *v.* Needles, 25 Pa. 338. See ante, "When Liability Commences," chapter 5.

Under Texas statutes.—Under Rev. St., art. 283, liability as a carrier does not attach until a bill of lading is given, or until the goods have been delivered to, and received by, the carrier. Texas, etc., R. Co. *v.* Wheat, 2 Texas App. Civ. Cas., § 165.

Where one is both a forwarder and carrier, and agrees to transport merchandise during a season at a stated rate, including warehouse charges, and receives the shipment into his warehouse on a bill of lading of the goods "to be forwarded," he is responsible as a carrier, and not as a warehouseman. Blossom *v.* Griffin, 13 N. Y. 569, 67 Am. Dec. 75.

Instructions to forward goods forthwith may be inferred from an established course of dealing between the shipper and the carrier, without direct evidence of such instructions. Moses *v.* Boston, etc., Railroad, 24 N. H. 71, 55 Am. Dec. 222.

Direction for immediate shipment.—A letter to freight agent, accompanying goods sent to carrier's station, saying: "Will you * * * have these * * * marked according to the address, * * * and forwarded to N.? Will you mark them prepaid? I will be at the depot tomorrow, and get the bill of lading and pay the freight," is a direction for immediate shipment, and does not make the marking of the goods prepaid a condition precedent to shipment. Berry *v.* Southern R. Co., 30 S. E. 14, 122 N. C. 1002.

Delivery of goods with consignee's name and address marked thereon is, in the absence of directions or agreements to the contrary, equivalent to a direction for immediate shipment. Gregory *v.* Wabash R. Co., 46 Mo. App. 574.

Stock shipments.—Where cattle have been placed in defendant's pen for immediate shipment over defendant's railroad, and part of them have actually been placed on the cars, the cattle are in the custody of defendant as a carrier, and

if they are injured or destroyed while awaiting transportation.[3] The test ques-

not as a warehouseman. Gulf, etc., R. Co. *v.* Trawick, 80 Tex. 270, 15 S. W. 568, 18 S. W. 948.

Public notice that goods held at owner's risk.—Where goods are delivered at carrier's warehouse for transportation presently, the carrier is liable for the goods as common carrier, notwithstanding a public notice, of which plaintiff had knowledge, that all goods would be at the owner's risk in the company's warehouse, and that no responsibility would be admitted for any loss or injury except such as might arise by negligence of the agents of the company. Moses *v.* Boston, etc., Railroad, 24 N. H. 71, 55 Am. Dec. 222.

Condition not affecting carrier's liability as to goods awaiting transportation.—A part of a lot of wool was sent to a railroad company for transportation, and it was agreed that the rest should be sent on notice from the company that it was ready to ship the wool. After such notice, and delivery of the rest of the wool, the owner signed a shipping receipt, upon the back of which was a condition that the company would not be responsible for articles conveyed upon its road, unless the same were signed for as received, etc. Held, that this condition could not affect the company's liability for the safe-keeping of the wool while awaiting transportation, as the owner had a right to treat the condition as intended to affect only the liability in respect to the carriage of the wool. Detroit, etc., R. Co. *v.* Adams, 15 Mich. 458.

Goods "awaiting delivery" does not include goods awaiting transportation.—The section of the charter of a railroad company which provides that the company shall not be responsible for goods on deposit in any of their depots "awaiting delivery" does not include goods in such depots awaiting transportation, but refers only to such goods as have reached their final destination. Michigan Cent. R. Co. *v.* Mineral Springs Mfg. Co. (U. S.), 16 Wall. 318, 21 L. Ed. 297.

Illustrations.—One who had goods in defendant's warehouse, under a storage contract, terminated the storage agreement, paid all defendant's charges, and surrendered the contract, and thereupon directed defendant, who was also a common carrier, to deliver the goods at her residence the same day, and paid the transportation charges, and defendant accepted and entered the order. Held that, from the time of such acceptance, defendant assumed the relation of a carrier. Snelling *v.* Yetter, 49 N. Y. S. 917, 25 App. Div. 590, 27 Civ. Proc. R. 158.

Hay dealers, in accordance with a rule of defendant carrier, were accustomed to unload their hay into defendant's freight house, and then to load it on the cars. Though frequently requested, defendant failed to furnish cars sufficient to transport the hay as fast as delivered, and it accumulated until the freight house was full. The agent of plaintiff's assignors thereupon notified persons supplying them with hay not to deliver any more, but defendant's agent told them he would find room for it, and had the hay subsequently delivered placed in an open shed. Defendant had general orders to ship the hay as fast as it could be loaded on the cars. Held, that defendant's liability for the hay as soon as delivered at the freight house, was that of a common carrier, and not of a warehouseman. London, etc., Fire Ins. Co. *v.* Rome, etc., R. Co., 68 Hun 598, 23 N. Y. S. 241, 52 N. Y. St. Rep. 581, affirmed in 144 N. Y. 200, 39 N. E. 79, 43 Am. St. Rep. 752.

A railroad company employed a receiving and shipping clerk, whose duty and practice it was to correct, tally, and check goods delivered for transportation, and hand his account to the bookkeeper, who entered them on a book kept for the purpose. By this book goods were shipped, but none were shipped until receipted. C., who had been in the habit of sending receipts for the company to sign when he delivered goods to it for transportation, sent a number of barrels to the company's freight house for transportation, and directed to a person residing in a city upon the railroad. They were received by employees of the company, and the receiving clerk was present when a portion of them was delivered, and directed where to put it. The barrels were not, and C. did not ask to have them, tallied, counted, booked, or receipted. The same evening they were destroyed in the freight house by an accidental fire. Held, that the company was liable as a common carrier. Coyle *v.* Western R. Corp. (N. Y.), 47 Barb. 152.

The owner of goods about to arrive at a depot in C. wished them carried from th re to R.; and an express company, by their agent at C., undertook to remove and deposit such goods in their warehouse as soon as possible on the arrival of the goods in C., and to carry them from C. to R. within a reasonable time, for a certain sum, which was paid. The goods arrived at C., and the express company received notice of their arrival. Held, that the goods were delivered to the company as common carriers. Southern Exp. Co. *v.* McVeigh, 61 Va. (20 Gratt.) 264.

3. *New Hampshire.*—Moses *v.* Boston, etc., Railroad, 24 N. H. 71, 55 Am. Dec. 222.

Ohio.—Pittsburg, etc., R. Co. *v.* Barrett, 36 O. St. 448.

Wisconsin.—White *v.* Goodrich Transp. Co., 46 Wis. 493, 1 N. W. 75.

tion is whether the carrier holds the goods only for the purpose of transportation, without further directions.[4]

Goods Detained for Carrier's Convenience.—Where a carrier receives for transportation goods which are ready for immediate carriage, and it detains the goods in its warehouse for its convenience, it is liable as a common carrier.[5] Where goods are deposited in a carrier's warehouse to await the usual trains, while the goods remain in the warehouse the carrier is liable as a common carrier.[6]

Goods Detained for Shipper's Convenience.—Where goods are delivered to a carrier to be stored for a specified time, or until the happening of a certain event,[7] as where they are not to be shipped till other goods are delivered to be shipped with them,[8] the liability of the carrier is that merely of a warehouseman. Where goods are delivered to await further orders before shipment,[9] or are detained at the request of the consignor,[10] the liability of the carrier during such detention is that of warehouseman only.

If anything remains to be done by the consignor of goods or his agents

4. **Test question.**—Wade *v.* Wheeler (N. Y.), 3 Lans. 201, affirmed in 47 N. Y. 658.

5. **Goods detained for carrier's convenience.**—*Missouri.*—Gregory *v.* Wabash R. Co., 46 Mo. App. 574.

New Hampshire.—Barter & Co. *v.* Wheeler, 49 N. H. 9, 6 Am. Rep. 434.

Pennsylvania.—Clarke *v.* Needles, 25 Pa. 338.

The fact that the plaintiff consents that goods may wait in the warehouse because the carrier has no car ready will not relieve the carrier from liability as an insurer. Gregory *v.* Wabash R. Co., 46 Mo. App. 574.

6. Moses *v.* Boston, etc., Railroad, 24 N. H. 71, 55 Am. Dec. 222.

A carrier received freight for transportation, though it had no trains scheduled to carry it until the following day. The shipper knew the facts, and understood that the goods would be stored in the depot until the following day. Held, that the carrier while holding the goods at the depot was liable as carrier, and not as a warehouseman. Southern R. Co. *v.* Smith, 31 Ky. L. Rep. 243, 102 S. W. 232.

7. **Goods detained for shipper's convenience.**—St. Louis, etc., R. Co. *v.* Citizens' Bank, 87 Ark. 26, 112 S. W. 154.

8. Missouri Pac. R. Co. *v.* Riggs, 10 Kan. App. 578, 62 Pac. 712.

Where a part of a load of goods were delivered to a carrier for transportation, and were detained in its depot to await the balance so as to forward them in one load, and the goods were destroyed by fire before the arrival of the balance, the liability of the railroad company is that merely of a warehouseman. Watts *v.* Boston, etc., R. Corp., 106 Mass. 466. See Gregory *v.* Wabash R. Co., 46 Mo. App. 571.

That the carrier was authorized to forward goods as rapidly as delivered, does not render it liable as a common carrier for the loss of a part of the goods which were delivered for transportation, and detained in its depot, to await the balance. Watts *v.* Boston, etc., R. Corp., 106 Mass. 466.

9. **Goods detained to await orders.**—*United States.*—Louisville, etc., R. Co. *v.* United States (U. S.), 39 Ct. Cl. 405.

Arkansas.—St. Louis, etc., R. Co. *v.* Citizens' Bank, 87 Ark. 26, 112 S. W. 154.

Massachusetts.—Barron *v.* Eldredge, 100 Mass. 455, 1 Am. Rep. 126.

Michigan.—Michigan, etc., R. Co. *v.* Shurtz, 7 Mich. 515.

New York.—Wade *v.* Wheeler (N. Y.) 3 Lans. 201, affirmed in 47 N. Y. 658; O'Neill *v.* New York, etc., R. Co., 60 N. Y. 138, reversing 3 Thomp. & C. 399.

Ohio.—Pittsburg, etc., R. Co. *v.* Barrett, 36 O. St. 448.

Wisconsin.—Schmidt *v.* Chicago, etc., R. Co., 90 Wis. 504, 63 N. W. 1057.

Instances.—Where a railroad finds goods in one of its cars without bill of lading or other instructions, and removes them to a storehouse, requesting and awaiting instructions which are not furnished, its liabilities are those of a warehouseman and not of a common carrier. Louisville, etc., R. Co. *v.* United States (U. S.), 39 Ct. Cl. 405.

A carrier who has furnished a shipper with a car which the latter has loaded with lumber is liable only as a warehouseman, until notified of the readiness of the car for transportation and of the name of the consignee; and hence it is not liable as an insurer for the destruction of the lumber by fire while the car was standing on its track before it was so notified. Basnight *v.* Atlantic, etc., R. Co., 111 N. C. 592, 16 S. E. 323.

10. *Arkansas.*—Little Rock, etc., R. Co. *v.* Hunter, 42 Ark. 200.

Illinois.—St. Louis, etc., R. Co. *v.* Montgomery, 39 Ill. 335.

New Hampshire.—Moses *v.* Boston, etc., Railroad, 24 N. H. 71, 55 Am. Dec. 222.

New York.—Rogers *v.* Wheeler, 52 N. Y. 262.

after their delivery to a carrier before they are ready for transportation, the carrier is only responsible for them as a warehouseman, and not as a common carrier.[11]

§ 1091. Goods Being Transported.—Goods Awaiting Delivery to Connecting Carrier.—Where goods are delivered to a carrier to be transported to a place named, there to be delivered to a connecting carrier for further transportation, the liability as carrier remains on the first carrier until it has delivered the goods for transportation to the next one. Its liability, while the goods are in its depot, does not become that of a warehouseman,[12] even

11. **Where something remains to be done.**—Judson *v.* Western R. Corp. (Mass.), 4 Allen 520, 81 Am. Dec. 718; Stapleton *v.* Grand Trunk R. Co., 94 N. W. 739, 133 Mich. 187; Pittsburg, etc., R. Co. *v.* Barrett, 36 O. St. 448; Fisher *v.* Lake Shore, etc., R. Co., 17 O. C. C. 491, 9 O. C. D. 413; American Lead Pencil Co. *v.* Nashville, etc., Railway, 124 Tenn. 57, 134 S. W. 613, 32 L. R. A., N. S., 323. See Dunnington & Co. *v.* Louisville, etc., R. Co., 155 S. W. 750, 153 Ky. 388.

Where a carter conveys goods designed for shipment to the freight depot of a railroad company, and deposits them on the platform of such depot, where such goods are customarily delivered to and received by such company for shipment, and notifies the proper shipping agent of such company of the presence of such goods on the platform, and that they are to be shipped to a certain station on such railroad after one of the articles has been properly crated, and that a person will come and crate such article during the day, and the agent of the company expresses his assent to what is said and proposed, this amounts to the delivery of such goods to the railroad company and its acceptance of the custody thereof as warehouseman. Fisher *v.* Lake Shore, etc., R. Co., 17 O. C. C. 491, 9 O. C. D. 413.

Goods held for payment of freight.—Under Tex. Rev. St., art. 281, a carrier is liable as warehouseman only for goods consigned for shipment which are held in storage awaiting prepayment of the freight; and this, whether the storage be gratuitous or not. Texas, etc., R. Co. *v.* Morse, 1 Texas App. Civ. Cas., § 411.

12. **Goods awaiting delivery to connecting carrier.**—*United States.*—Michigan Cent. R. Co. *v.* Mineral Springs Mfg. Co. (U. S.), 16 Wall. 318, 21 L. Ed. 297.

Michigan.—Condon *v.* Marquette, etc., R. Co., 55 Mich. 218, 21 N. W. 321, 54 Am. Rep. 367.

Minnesota.—Irish *v.* Milwaukee, etc., R. Co., 19 Minn. 376, Gil. 323, 18 Am. Rep. 340; Lawrence *v.* Winona, etc., R. Co., 15 Minn. 390, Gil. 313, 2 Am. Rep. 130.

New York.—Dunson *v.* New York Cent. R. Co. (N. Y.), 3 Lans. 265; McDonald *v.* Western R. Corp., 34 N. Y. 497.

Wisconsin.—Hooper *v.* Chicago, etc., R. Co., 27 Wis. 81, 9 Am. Rep. 439; Conkey *v.* Milwaukee, etc., R. Co., 31 Wis. 619, 11 Am. Rep. 630, overruling Wood *v.* Milwaukee, etc., R. Co., 27 Wis. 541, 9 Am. Rep. 465, 2 Am. R. Rep. 342.

In the absence of special agreement or custom, an initial carrier is not relieved from its liability as insurer by simply unloading them at the end of the route, and storing them in a warehouse without delivery or notice to the connecting carrier. Irish *v.* Milwaukee, etc., R. Co., 19 Minn. 376, Gil. 323, 18 Am. Rep. 340.

In the absence of notice to remove goods, an intermediate carrier, which held them in its warehouse for thirteen days while waiting for a through line of canal boats to the destination of the consignment, remains liable as a carrier, for there was no apparent intention to devest that liability. McDonald *v.* Western R. Corp., 34 N. Y. 497.

Effect of mistake in directing goods.—Plaintiff shipped goods to be delivered to a connecting carrier, but, after shipment, discovered that the connecting carrier was erroneously named. He applied to defendant, who corrected the bill of lading, and promised to see that the goods were properly delivered to the connecting carrier, and shipped from its terminus. The goods were placed in defendant's warehouse at the terminus, and two days later were destroyed by a flood. Held, that the mistake in directing the goods was no defense to an action to recover the value of the goods. Dunson *v.* New York Cent. R. Co. (N. Y.), 3 Lans. 265.

Goods stored by connecting carrier.—A warehouseman who received from a steamer goods marked in his care for forwarding by certain lines, he being also a carrier over a part of the route, and accustomed to forward by the first boat over that route, whether it was his own or another's, was, in respect to the goods, a carrier, while he retained them in his warehouse for five days, awaiting an opportunity to ship them. Ladue *v.* Griffith, 25 N. Y. 364, 82 Am. Dec. 360.

Instances.—Defendant carrier placed goods received in its warehouse, at the termination of its line, from whence carrier by boat was to receive them. Under the custom prevailing, defendant entered their receipt on its books, which were regularly inspected by the carrier by

though the connecting carrier is not ready to receive them.[13] But it has been held that a carrier, which, pursuant to directions of the consignee to deliver the goods to a certain transfer company, places the goods in its warehouse to remain until the transfer company is ready to receive them, is liable only as an ordinary bailee for hire.[14] Where the connecting carrier refuses or neglects to receive the goods,[15] after being notified of their arrival,[16] the first carrier, after a reasonable time,[17] may store them, and thereafter its liability as carrier ceases, and is simply that of warehouseman.

boat, which was in the habit of removing such goods without further ceremony, except that of receipting for them. No special request for the removal of the goods in question was made, and they were destroyed in defendant's warehouse by an accidental fire seven days after arriving there. Held, that defendant's liability was that of a common carrier, and not that of a warehouseman. Condon *v.* Marquette, etc., R. Co., 55 Mich. 218, 21 N. W. 321, 54 Am. Rep. 367.

A carrier transported goods to its terminus, marked for a place beyond, to which there was a circuitous connection by rail, and also direct connection by a line of wagons. There was an arrangement between the carrier and the owner of the line of wagons, by which the latter hauled all freight for the destination point in question, which was not otherwise routed. It was the custom to make a trip whenever sufficient freight accumulated for a load. Held, that while the goods remained in the first carrier's warehouse awaiting transportation by wagon, the carrier's liability was not reduced to that of warehouseman. Lawrence *v.* Winona, etc., R. Co., 15 Minn. 390, Gil. 313, 2 Am. Rep. 130.

Defendant's railroad was completed only to W., but arrangements were made with one P. by which he was to carry all goods beyond that point, going to M., and not otherwise consigned or directed; P. not to charge above a certain price, and to look to consignees for his charges, the only interest defendant having in the arrangement being to thereby increase its freight business. Goods were carried to W. and stored without charge, and as often as a load accumulated were to be carried forward by P., who had no regular time for his trips. While so stored in the warehouse, waiting for a load to accumulate, certain goods, going to M., were destroyed by fire. Held, that P. was an independent carrier, defendant an intermediate carrier, and that its liability as common carrier had not terminated by the storage. Lawrence *v.* Winona, etc., R. Co., 15 Minn. 390, Gil. 313, 2 Am. Rep. 130.

13. Illinois Cent. R. Co. *v.* Mitchell, 68 Ill. 471, 18 Am. Rep. 564.

14. Hartmann *v.* Louisville, etc., R. Co., 39 Mo. App. 88.

15. **Refusal or neglect of connecting carrier to receive goods.**—Rawson *v.* Holland, 59 N. Y. 611, 17 Am. Rep. 394, affirming 5 Daly 155. See Wood *v.* Milwaukee, etc., R. Co., 27 Wis. 541, 9 Am. Rep. 465, 2 Am. R. Rep. 342.

Contract providing for liability of carrier having custody.—A carrier can not convert itself into a warehouseman by proving that it had, before the fire, tendered the goods to the connecting carrier, and that the latter neglected, although without reasonable excuse, to take them into its actual custody, where the contract of carriage provided that the carrier in whose actual custody the goods were when destroyed should alone be liable. Texas, etc., R. Co. *v.* Clayton, 173 U. S. 348, 43 L. Ed. 725, 19 S. Ct. 421.

Although a carrier requests the connecting carrier to remove the goods, where it does not specify any particular time, and does not give notice that the goods will be stored at the risk of the connecting carrier upon failure to comply with the request, the first carrier is liable as carrier and not as warehouseman. Texas, etc., R. Co. *v.* Clayton, 43 L. Ed. 725, 173 U. S. 348, 19 S. Ct. 421.

16. **Notice of arrival.**—Dunson *v.* New York Cent. R. Co. (N. Y.), 3 Lans. 265.

It seems that where a carrier of goods to be delivered to a subsequent carrier for transportation to their destination has given notice to the second carrier of the arrival of the goods, and the latter fails to receive them within a reasonable time after such notice, he may limit his liability by an act showing such intention, as by depositing in a warehouse with perhaps notice to the forwarders. Goold *v.* Chapin, 20 N. Y. 259, 75 Am. Dec. 398, affirming 10 Barb. 612.

Sufficiency of notice.—The notice need not be in writing, but will be implied from the course of dealing between the parties, or from custom and usage of the business. Wood *v.* Milwaukee, etc., R. Co., 27 Wis. 541, 9 Am. Rep. 465, 2 Am. R. Rep. 342.

Where goods are received by a carrier for transportation beyond such carrier's road, and the uniform custom between connecting carriers is for the first carrier to deposit notice, in a special box in its own depot, to which the next carrier has constant access, of the arrival of such goods, such deposit is sufficient Mills *v.* Michigan Cent. R. Co., 45 N. Y. 622, 6 Am. Rep. 152.

17. **The reasonable time** which a connecting carrier has to take from the first carrier goods which are ready for delivery is the earliest practicable time

Goods Being Delivered to Connecting Carrier.—A carrier which transports goods on a river, and unloads them on a float for delivery to connecting boats, does not become a warehouseman, for the act is part of the transportation of the goods.[18] And the carrier is liable for their loss, though notice was repeatedly given to the connecting carrier to take them.[19]

Extraordinary Interruption of Transportation.—In case of an extraordinary interruption of communication along the line of transit (as by storm, flood, earthquake, or war), necessitating a considerable delay in transportation, the carrier in whose hands the goods are may store them, and at once give notice to the consignee, and thus absolve himself from liability as carrier while such interruption continues.[20]

Goods Stopped in Transitu.—Where a shipper orders goods to be stopped in transitu, and requests the carrier to hold them for the shipper at the place of destination, after the goods arrive there, and are so held, the carrier's liability as such terminates, and his liability of warehouseman begins.[21]

Stipulations as to Reshipment.—A stipulation in a bill of lading that the carrier, in case of low water, may reship in other craft, does not vary his obligation to deliver safely. If such stipulation is resorted to his liability is not changed into that of a warehouseman.[22] Under a bill of lading reciting that goods were "to be forwarded across the isthmus," and then to be reshipped, the common carrier does not cease to be such as to the transportation across the isthmus, and become a bailee for hire, chargeable only on proof by the shipper that the loss arose from his negligence or that of his servants.[23]

§§ 1092-1097. Goods Awaiting Delivery to Consignee—§ 1092. In General.—What Law Governs.—The law of the state where the contract for transportation is made governs as to when the carrier's liability as such ceases and that as a warehouseman begins.[24]

after the first carrier is ready to deliver the goods; and this rule will not be modified by any convenience of the owner or second carrier requiring a longer time. Wood *v.* Milwaukee, etc., R. Co., 27 Wis. 541, 9 Am. Rep. 465, 2 Am. R. Rep. 342.

Question for jury.—A railroad company carried goods to its station to be forwarded by boat to the destination. The boat received shipments for that point from the railroad freight house, and made two trips daily. They arrived by rail on the 13th, and the waybills had to be copied into the railroad company's books, and the freight distributed to the proper part of the freight house for the boat, and new bills of lading made, and the freight checked, before it was ready to deliver to the boat. This was not done in time for the boat's morning trip next day, but the freight was ready for her evening trip. She did not take it aboard, and it was destroyed by fire that night, in the freight house. Held, that it was a question for the jury whether a reasonable time had elapsed for the boat to remove the goods, so as to reduce the carrier's liability to warehouseman. Wood *v.* Milwaukee, etc., R. Co., 27 Wis. 541, 9 Am. Rep. 465, 2 Am. R. Rep. 342.

18. Goods being delivered to connecting carrier.—Miller *v.* Steam Nav. Co., 10 N. Y. 431, Seld. Notes 64, affirming 13 Barb. 361; Goold *v.* Chapin (N. Y.), 10 Barb. 612.

19. Goold *v.* Chapin, 20 N. Y. 259, 75 Am. Dec. 398.

The float is not a warehouse, so as to relieve defendants from liability as carriers, on the ground that they had deposited the goods in a warehouse after giving notice. Goold *v.* Chapin (N. Y.), 10 Barb. 612.

20. Extraordinary interruption of transportation.—Conkey *v.* Milwaukee, etc., R. Co., 31 Wis. 619, 11 Am. Rep. 630. See Baltimore, etc., R. Co. *v.* Morehead, 5 W. Va. 293.

21. Goods stopped in transitu.—MacVeagh *v.* Atchison, etc., R. Co., 3 N. Mex. 327, 5 Pac. 457.

The fact that the shipper orders the carrier to ship the goods to another point does not constitute a new contract of carriage, unless the carrier undertakes to carry as ordered; and the previous acknowledgment by the carrier that he held the goods subject to the shipper's order does not constitute such undertaking, so as to make him liable as carrier rather than warehouseman while he holds the goods. MacVeagh *v.* Atchison, etc., R. Co., 3 N. Mex. 327, 5 Pac. 457.

22. Stipulations as to reshipment.—McGregor & Co. *v.* Kilgore, 6 O. 359.

23. Simmons *v.* Law, 21 N. Y. Super. Ct. 213, affirmed in 42 N. Y. (3 Keyes) 217, 4 Abb. Dec. 241.

24. What law governs.—Plaintiffs contracted in New York with the N. Co. for the transportation of certain goods by

Completion of Contract of Carriage.—A carrier is not liable as a warehouseman for the loss of goods, until the contract of carriage has been completed.[25] And as long as it has control of the goods and no one else may move them without its consent, it is liable as carrier.[26]

Delivery to Consignee.—It is held that, upon delivery to the consignee, the carrier's liability becomes that of a warehouseman.[27] And it has been held that, where the consignee has accepted a delivery of the goods and sold and removed some of it, the fact that such merchandise still remains in the carrier's cars for the convenience of the consignee does not impose any liability as warehouseman on the carrier.[28]

that company from New York to Boston, and the delivery thereof to plaintiffs who were the consignees. The goods were received by defendants, who were connecting carriers over the latter part of the route, and were residents of Massachusetts. Upon arrival of the goods at Boston, they were called for, but a delivery refused until the next day, as it was not convenient to deliver at the time. They were unloaded the same afternoon, and placed in defendant's warehouse, but too late for delivery; and during the night the warehouse, with the goods, was destroyed by fire. In an action to recover the loss, held, that defendants were liable; and this, although, under the decisions of the courts of Massachusetts, the operators of a railroad, as a matter of law, cease to be common carriers, and become warehousemen, when the duty of transportation is completed, and goods are deposited in a warehouse awaiting the orders of the owner or consignee. Faulkner *v.* Hart, 82 N. Y. 413, 37 Am. Rep. 574, reversing 44 N. Y. Super. Ct. 471.

25. Completion of contract of carriage.—Wheeler *v.* Oceanic Steam Nav. Co., 52 Hun 75, 5 N. Y. S. 101, 22 N. Y. St. Rep. 590, reversed on other points in 125 N. Y. 155, 26 N. E. 248, 21 Am. St. Rep. 729.

"As long as the defendant, in obedience to its obligations as a common carrier, was required to move the car upon the track, its liability as such common carrier did not cease." Independence Mills Co. *v.* Burlington, etc., R. Co., 72 Iowa 535, 2 Am. St. Rep. 258, 32 Am. & Eng. R. Cas. 456, 34 N. W. 320.

Goods destroyed in course of delivery.—A carrier is liable for the loss of goods, where a portion of them were transferred to a float belonging to such carrier preparatory to their delivery, and were there destroyed by fire. Miller *v.* Steam Nav. Co., 10 N. Y. 431, Seld. Notes 64, affirming 13 Barb. 361; Goold *v.* Chapin, 20 N. Y. 259, 75 Am. Dec. 398.

If a carrier is delayed a whole season by stress of weather it is still responsible for the safe-keeping of the goods as a carrier, and not as a mere warehouseman. Western Transp. Co. *v.* Newhall, 24 Ill. 466, 76 Am. Dec. 760.

Injury to vessel.—When a vessel is so disabled that she can not be repaired, if the master can not forward the goods, his obligation as common carrier still continues. Minnesota Min. Co. *v.* Chapman, 2 West. L. M. 75, 2 O. Dec. Reprint 207.

26. Huntting Elevator Co. *v.* Bosworth, 179 U. S. 415, 45 L. Ed. 256, 21 S. Ct. 183; Chicago, etc., R. Co. *v.* Bosworth, 179 U. S. 442, 45 L. Ed. 267, 21 S. Ct. 183; Rau *v.* Bosworth, 179 U. S. 443, 45 L. Ed. 268, 21 S. Ct. 194; Bosworth *v.* Carr, etc., Co., 179 U. S. 444, 45 L. Ed. 268, 21 S. Ct. 194.

27. Delivery to consignee.—The plaintiff shipped tubs of butter by the defendant's boat, and directed the captain to sell them on arrival. On arrival the captain hauled the boat to the pier, and gave her in charge to another agent of the carrier. The next day the butter was placed on deck. The captain sold part, and the rest was stolen. Held, that from the time the butter was placed on deck it was to be deemed delivered to the captain as the shipper's consignee, and that the defendant's liability thereupon became that of a warehouseman. Labar *v.* Taber (N. Y.), 35 Barb. 305.

Where a carrier permits the consignee of merchandise to open the cars containing the same after they have been placed on a spur track near the consignee's warehouse, and to remove part of the contents thereof, and exercise and retain dominion over the same, and put his own locks on the cars, the carrier's liability, as such, for the merchandise in the cars, is terminated. Vaughn *v.* New York, etc., R. Co., 61 Atl. 695, 27 R. I. 235.

Where the consignee of goods shipped by railroad receipted for them on their arrival at their destination, removed a part of them, and himself put the remainder up in one of the railroad company's buildings, although he could have removed them also, the railroad company was not liable for the goods on their subsequent destruction by fire. Stapleton *v.* Grand Trunk R. Co., 94 N. W. 739, 133 Mich. 187.

28. Vaughn *v.* New York, etc., R. Co., 27 R. I. 235, 61 Atl. 695.

Goods Held at Consignee's Request.—Where the goods are held at the request of the consignee and for his convenience, the carrier is liable only as a warehouseman.[29]

If the consignee refuse to receive the goods, the carrier's liability is that of a warehouseman.[30]

Failure or Refusal to Deliver Goods.—Where a consignee of goods called for them and was told that they were there, but could not be delivered to him until the next day, and they were destroyed by fire that night, defendant's liability was that of a carrier.[31] Where carrier refused to deliver goods unless

29. **Goods held at consignee's request.**—*Alabama.*—Southern Exp. Co. *v.* Holland, 109 Ala. 362, 19 So. 66.

Maryland.—United Fruit Co. *v.* New York, etc., Transp. Co., 104 Md. 567, 65 Atl. 415, 8 L. R. A., N. S., 240, 10 Am. & Eng. Ann. Cas. 437.

Michigan.—Hasse *v.* American Exp. Co., 94 Mich. 133, 53 N. W. 918, 34 Am. St. Rep. 328, 55 Am. & Eng. R. Cas. 635.

New York.—Fenner *v* Buffalo, etc., R. Co., 44 N. Y. 505, 4 Am. Rep. 709, reversing 46 Barb. 103.

Pennsylvania.—National Line Steamship Co. *v.* Smart, 107 Pa. 492.

Texas.—Texas, etc., R. Co. *v.* Wever, 3 Texas App. Civ. Cas., § 60; Texas, etc., R. Co. *v.* Robertson (Tex. Civ. App.), 143 S. W. 708.

West Virginia.—Hurley & Son *v.* Norfolk, etc., R. Co., 68 W. Va. 471, 69 S. E. 904. See Baltimore, etc., R. Co. *v.* Morehead, 5 W. Va. 293.

A railroad company received goods for transportation, and gave a bill of lading, which stated that, after arriving at their destination, the goods should be held under the liability of a warehouseman, when they were placed in the storeroom, or were to be taken from the car by the consignee. They were kept in a freight car for several days after reaching their destination, and were then destroyed by fire. Before the fire the owner's agent had been wrongly informed that they had been unloaded, at which he expressed regret, and requested the company to store the goods for a few days. Held, that the company was not liable as a common carrier. Draper *v.* Delaware, etc., Canal Co., 118 N. Y. 118, 23 N. E. 131, 42 Am. & Eng. R. Cas. 410.

Goods left with carrier's servant.—A railway company delivered to the owner goods which were in its warehouse, taking his receipt therefor, and by an arrangement between the owner and the baggage man a part of the goods were left in the warehouse, and subsequently lost. Held, that the company is not liable for the goods, lost, where the baggage man had no authority to make any contract for the company, his permitting part of the goods to remain in the warehouse being his private arrangement, to which the company was not a party. Mulligan *v.* Northern Pac. R. Co., 4 Dak. 315, 29 N. W. 659.

Special contract for storage.—If the defendant railroad company, in accordance with its "universal and unbroken custom," at the station to which it transported the goods, collected the freight charges from the plaintiff "on three of said shipments of freight, and then and there agreed to safely store and keep said freight in" its warehouse at that point "until such time as the same might be called for and receipted for by the petitioner," and under this arrangement "the defendant company had possession of all the" plaintiff's goods embraced in such shipments, "when the same were destroyed by fire" which consumed its warehouse, the duty which the company owed to the plaintiff, relatively to such goods, was that of a warehouseman, and not that of a carrier. Kight *v.* Wrightsville, etc., R. Co., 56 S. E. 363, 127 Ga. 204.

30. **Refusal to consignee to receive goods.**—*Georgia.*—American Sugar Refin. Co. *v.* McGhee, 96 Ga. 27, 21 S. E. 383.

New York.—Adler *v.* Weir, 96 N. Y. S. 736, 49 Misc. Rep. 134; Landsberg *v.* Dinsmore (N. Y.), 4 Daly 490.

Tennessee.—Kremer *v.* Southern Exp. Co., 46 Tenn. (6 Coldw.) 356; Rankin *v.* Memphis, etc., R. Co., 56 Tenn. (9 Heisk) 564.

Texas.—See House *v.* Soder, 36 Tex. 629.

Illustrations.—A local carrier, as agent of the purchaser of goods, received and receipted for them on their arrival at the depot of the transporting common carrier; but the purchaser refused to receive them because of inconvenient storing facilities due to a recent fire, and directed their return to the depot. Held, that the transit had terminated and that the common carrier held them at the depot merely as warehouseman. O'Neal *v.* Day, 53 Mo. App. 139; Shoninger *v.* Day, 53 Mo. App. 147.

Where goods are sent by express C. O. D., and the consignee refuses to accept them, and the shipper, on notice thereof, directs the express company to hold them until called for, it becomes liable to the consignor only as a warehouseman. Byrne *v.* Fargo, 73 N. Y. S. 943, 36 Misc. Rep. 543.

31. **Refusal to deliver goods.**—Fisher *v.* Northern Pac. R. Co., 49 Wash. 258, 94 Pac. 1073.

the consignee would accept all, which he refused to do, on account of damage to some of them, and two weeks later the goods were destroyed by the burning of the depot, the defendant was liable only as a warehouseman.[32] A carrier is not liable as such for goods stored in its warehouse because it did not know who was the consignee, though the goods bore a mark which former agents understood as one used by the consignee.[33]

Wrong Information as to Arrival of Goods.—Where goods are called for by the consignee, and he is informed that they have not arrived, which prevents their removal, the carrier's liability as such continues.[34] But it is held that if the carrier subsequently notifies the consignee that the goods have arrived it is not liable for their loss after the consignee has had a reasonable time to remove them.[35] It is also held that the carrier is liable only as a warehouseman, but that if the goods are destroyed the owner may recover on the ground that the negligence of the carrier was the proximate cause of the loss.[36]

When Consignee Unable to Remove Goods.—A common carrier's liability as such can not be prolonged by the consignee beyond such time as is usually required for the removal of goods at that place, even though the consignee's inability to remove them results from causes that the consignee did not produce, and could not avoid, if they were not the result of the carrier's procurement or negligence.[37]

§ 1093. Express Companies and General Carriers by Water.—Express Companies.—Where it is incumbent on an express company to deliver goods to the consignee personally, it can not change its common-law liability to that of a warehouseman by notifying the consignee that he can have the goods by calling for them.[38] And where the company does not deliver or attempt to deliver the goods, it will be liable for their loss by theft from its office during the night following its receipt.[39] But where an express company after diligent inquiry, can not find the place of residence of the consignee,[40] or can not make delivery because consignee, having knowledge of the arrival of the goods, is absent from home,[41] its liability as carrier is at an end. When no attempt is made to deliver goods or to notify the consignee within a reasonable time, the express company remains liable as carrier.[42] If there is a custom of giving notice, where

32. Frederick *v.* Louisville, etc., R. Co., 133 Ala. 486, 31 So. 968.

33. **Failure to deliver caused by imperfect marking.**—Great Western R. Co. *v.* Wheeler, 20 Mich. 419.

34. **Wrong information as to arrival of goods.**—Berry *v.* West Virginia, etc., R. Co., 44 W. Va. 538, 30 S. E. 143, 67 Am. St. Rep. 781.

35. **Effect of subsequent notice.**—Williams *v.* Delaware, etc., Canal Co., 53 Hun 635, 6 N. Y. S. 36, 25 N. Y. St. Rep. 518, 3 Silvernail 19.

36. East Tennessee, etc., R. Co. *v.* Kelly, 91 Tenn. (7 Pickle) 699, 20 S. W. 312, 17 L. R. A. 691, 30 Am. St. Rep. 902; S. C., 91 Tenn. (7 Pickle) 708, 20 S. W. 314.

37. **Where consignee unable to remove goods.**—Harris *v.* Louisville, etc., R. Co., 9 Ky. L. Rep. 392. See post, II, VI, X.

38. **Express companies.**—Witbeck *v.* Holland (N. Y.), 55 Barb. 443, 38 How. Prac. 273, affirmed in 45 N. Y. 13, 6 Am. Rep. 23; State *v.* Parshley, 81 Atl. 484, 108 Me. 410, 37 L. R. A., N. S., 444.

In Arkansas it is the duty of an express company to make personal delivery of packages, except where the place is so small as not to justify the employment of messengers, or the consignee does not reside within a reasonable distance of the office, and then prompt notice must be sent. American Standard Jewelry Co. *v.* Witherington, 81 Ark. 134, 98 S. W. 695.

39. American Exp. Co. *v.* Baldwin, 26 Ill. 504, 79 Am. Dec. 389.

40. American Exp. Co. *v.* Hockett, 30 Ind. 250, 95 Am. Dec. 691.

41. Adams Exp. Co. *v.* Darnell, 31 Ind. 20, 99 Am. Dec. 582.

42. **No attempt to deliver or notify consignee.**—Goods were sent by express in time to have reached their destination on Thursday, but, being carried by a circuitous route, did not arrive until Saturday evening. The consignee called at the office Saturday afternoon, and was told that they had not arrived. He lived about one hundred rods from the office, and was well known. The goods remained in the office, with no effort being made to deliver them or notify the consignee of their arrival, until Tuesday

an express company gives notice to the consignee of the arrival of the goods, and a reasonable time has elapsed within which the consignee could come and get them, the company's liability as a carrier ceases.[43] And it is held that where failure of an express company to give notice by mail of the arrival of a package, when such is the adopted mode, is not the proximate cause of delay in removing the package, and the loss would have occurred if it had been mailed, and sufficient time had elapsed for the receipt thereof if notice had been mailed, and the consignee had exercised reasonable diligence, the carrier is liable as warehouseman only.[44] Where goods are expressed C. O. D., the liability of the express company as a common carrier terminates on the safe carriage of the goods to their place of destination, notice to the consignee of their arrival, and an offer to deliver on payment of the amount charged against them.[45] Leaving an express package in the freight room of a railway station at which the express office is maintained instead of in the room in which such packages are usually placed does not continue the liability of the express company as carrier.[46]

Carriers by Water.—In the case of a carrier by water where the time of arrival is uncertain the consignee is entitled to a reasonable time after notice in which to remove the goods. Until the lapse of that time, the ship remains liable as a carrier.[47] And consignee's knowledge of the vessel's arrival does not

night, when they were destroyed by fire. Held, that the express company was liable for their loss. Union Exp. Co. *v.* Ohleman, 92 Pa. 323.

43. Reasonable time after notice.—Roberts *v.* Union Line Exp. Co., 2 O. Dec. 577; Hutchinson *v.* United States Exp. Co., 63 W. Va. 128, 59 S. E. 949, 14 L. R. A., N. S., 393.

44. Hutchinson *v.* United States Exp. Co., 63 W. Va. 128, 59 S. E. 949, 14 L. R. A., N. S., 393.

A consignee who had not called for his mail and would not have received notice of the arrival of package at express office can not hold express company liable as carrier for a package which arrived at 4:30 Saturday and remained in the office until the following Monday night, when it was stolen without negligence on the part of the carrier. Hutchinson *v.* United States Exp. Co., 63 W. Va. 128, 59 S. E. 949, 14 L. R. A., N. S., 393.

45. Goods expressed C. O. D.—Hasse *v.* American Exp. Co., 94 Mich. 133, 53 N. W. 918, 34 Am. St. Rep. 328.

Where the consignee is not ready to receive any pay for the goods, it is the duty of the company to safely store and care for them, and to hold them for a reasonable time to enable the consignee to make such payment, and to notify the consignor, and the liability of the company meanwhile is that of a warehouseman. Hasse *v.* American Exp. Co., 53 N. W. 918, 94 Mich. 133, 34 Am. St. Rep. 328.

Notice unnecessary.—Goods were received by an express company, to be delivered to the consignee in care of B. By the terms of the bill of lading the company was authorized to retain the goods for thirty days, to collect the price. B. refused to receive the goods or pay the price, because the consignee was indebted to him; but he said the consignee would be in town in a few days, and B. would inform him of the arrival of the goods. The carrier retained the goods thirty-nine days. Held, that notice to the consignee was not necessary. Landsberg *v.* Dinsmore (N. Y.), 4 Daly 490.

46. Hutchinson *v.* United States Exp. Co., 63 W. Va. 128, 59 S. E. 949, 14 L. R. A., N. S., 393.

47. Carrier by water.—*United States.*—Constable *v.* National Steamship Co., 154 U. S. 51, 38 L. Ed. 903, 14 S. Ct. 1062; The Eddy (U. S.), 5 Wall. 481, 18 L. Ed. 486; Richardson *v.* Goddard (U. S.), 23 How. 28, 39, 16 L. Ed. 412; The Nail City, 22 Fed. 537; Germania Ins. Co. *v.* LaCrosse, etc., Packet Co., Fed. Cas. No. 5,361, 3 Biss. 501; Vose *v.* Allen, Fed. Cas. No. 17,005, affirmed in Fed. Cas. No. 17,006, 3 Blachf. 289; The City of Lincoln, 25 Fed. 835; The Mary Washington, Fed. Cas. No. 9,229, 1 Abb. U. S. 1, Chase 125; The St. Laurent, Fed. Cas. No. 12,231, 7 Ben. 7.

Connecticut.—Graves *v.* Hartford, etc., Steamboat Co., 38 Conn. 143, 9 Am. Rep. 369.

Illinois.—Illinois Cent. R. Co. *v.* Carter, 62 Ill. App. 618; Crawford *v.* Clark, 15 Ill. 561.

Louisiana.—Kohn *v.* Packard, 3 La. 224, 23 Am. Dec. 453; Kennedy *v.* Roman, 19 La. Ann. 519.

Missouri.—Erskine *v.* Thames, 6 Mo. 371.

New Jersey.—Morris, etc., R. Co. *v.* Ayres, 29 N. J. L. 393, 80 Am. Dec. 215.

New York.—Miller *v.* Steam Nav. Co., 10 N. Y. 431, Seld. Notes 64, affirming 13 Barb. 361; Russell Mfg. Co. *v.* New Haven Steamboat Co., 50 N. Y. 121; S. C., 52 N. Y. 657; Solomon *v.* Philadelphia.

dispense with actual notice of the time and place the vessel would discharge her cargo.[48] But notice may be dispensed with by contract or custom.[49] After the

etc., Steamboat Co. (N. Y.), 2 Daly 104; Price *v.* Powell, 3 N. Y. 322; Rowland *v.* Miln (N. Y.), 2 Hilt. 150; Barclay *v.* Clyde (N. Y.), 2 E. D. Smith 95; McAndrew *v.* Whitlock, 32 N. Y. Super. Ct. 623, affirmed in 52 N. Y. 40, 11 Am. Rep. 657.

Tennessee.—Dean *v.* Vaccaro, 39 Tenn. (2 Head) 488, 75 Am. Dec. 744.

Wisconsin.—Parker *v.* Milwaukee, etc., R. Co., 30 Wis. 689.

Canada.—Richardson *v.* Canadian Pac. R. Co., 19 Ont. Rep. 369, 45 Am. & Eng. R. Cas. 413; Bourne *v.* Catliff, 11 Cl. & F. 45, cited in Mitchell *v.* Lancashire, etc., R. Co., L. R. 10 Q. B. 256.

Doubtful whether notice required in modern times.—The rule of the text originated prior to the era of steam navigation, when a voyage from Liverpool to New York rarely consumed less than three weeks, when the time of the arrival of the vessel could not be forecasted with any accuracy, when crews were discharged immediately upon her arrival, and the vessel was usually detained several weeks in the slow and laborious process of unloading, taking on cargo, and refitting before setting out upon another voyage and it is doubtful whether it is applicable to modern shipping. Constable *v.* National Steamship Co., 154 U. S. 51, 38 L. Ed. 903, 14 S. Ct. 1062.

Under a bill of lading requiring "the goods to be taken from alongside by the consignee immediately the vessel is ready to discharge," otherwise they will be deposited, at the risk of the consignee, in the warehouse provided for that purpose, personal notice to the consignee of the time and place of discharge is not necessary. Constable *v.* National Steamship Co., 154 U. S. 51, 14 S. Ct. 1062, 38 L. Ed. 903.

But under such a provision it has been held that, after landing, the goods remained in the carrier's custody as carrier, subject to the modified responsibility created by the contract, until after notice of arrival had been given the consignee, and a reasonable time had elapsed for their removal. Gleadell *v.* Thomson, 56 N. Y. 194, affirming 35 N. Y. Super. Ct. 232.

Consignee's store closed on holiday.—Where goods were landed on a wharf on the 4th of July, and accidentally destroyed by fire the following night, and it appeared that the store of the consignee was closed the whole of the day on which the goods arrived, and until after they had been destroyed, it was held that the carrier was excused from giving notice of the arival of the goods. Ely *v.* New Haven Steamboat Co. (N. Y.), 53 Barb. 207, 6 Abb. Prac., N. S., 72.

Where a steamer arrived on Sunday morning, and was moored to the owner's dock, and no notice of its arrival given the consignee—it being the custom not to unload until Monday or Tuesday—there was no delivery to the consignee, so as to relieve the carrier from liability for loss by fire occurring on Monday. Hill Mfg. Co. *v.* Boston, etc., R. Corp., 104 Mass. 122, 6 Am. Rep. 202.

That the consignee was obliged to receive the cargo package by package, does not dispense with the necessity of due notice to the consignee, and a reasonable opportunity to identify the goods and receive them into his custody. The Santee, Fed. Cas. No. 12,330, 17 Blatchf. 186.

That the consignee and others had submitted to a delivery to a drayman before, when no loss occurred, will not bind him to yield his legal right to notice when it is for his interest to assert it. Dean *v.* Vaccaro, 39 Tenn. (2 Head) 488, 75 Am. Dec. 744.

Where the unloading is temporarily interrupted by the crowded state of the wharf, on account of the other consignees not removing their goods, no new notice need be given on resumption of the work. Salmon Falls Mfg. Co. *v.* Tangier, Fed. Cas. No. 12,267, 3 Ware, 110; S. C., Fed. Cas. No. 12,266, 1 Cliff. 396.

Where the selection of a wharf other than the usual wharf is allowable and proper under the usages of trade or the necessities of the case, the obligation of the carrier to give notice to the consignees of the time and place of discharge is not increased or modified thereby if the consignees are not prejudiced by the change. Constable *v.* National Steamship Co., 154 U. S. 51, 14 S. Ct. 1062, 38 L. Ed. 903.

Failure to give actual notice to consignees of the time and place of discharge of cargo unloaded at a wharf, other than the vessel's usual wharf, at which the goods, before delivery to the consignees, are destroyed by fire, does not render the carrier liable for the loss, where the consignees, had they received notice, could not have removed their goods before the fire, and where they took no steps on the faith of the cargo's being discharged at the usual place. Constable *v.* National Steamship Co., 154 U. S. 51, 14 S. Ct. 1062, 38 L. Ed. 903.

48. **Knowledge of vessel's arrival.**—The Middlesex, Fed. Cas. No. 9,533; Unnevehr *v.* Hindoo, 1 Fed. 627.

Mere knowledge that ship is unloading does not impose upon the consignee the duty of waiting at the vessel till his merchandise is discharged. Robinson *v.* Chittenden (N. Y.), 7 Hun 133.

49. **Contract or custom excusing notice.**—See post, "Necessity for Notice of Arrival of Goods," § 1095.

goods are unloaded, notice to the consignee, and a reasonable time thereafter for their removal, the carrier is only liable as a warehouseman.[50] If the consignee refuses or neglects to receive the goods, the carrier is still liable as bailee, and bound to reasonable care for their safe custody, or to store them on account of the owner.[51] Where the owner of a vessel agrees, for a single price, to transport a cargo from one port to another, and allow storage thereof in the vessel during the winter following the voyage, his liability as carrier ceases on arrival at the port of destination, and he is thereafter liable as a warehouseman only.[52]

§ 1094. Railroads and Carriers by Water Having Fixed Schedule.—Massachusetts Doctrine.—As to carriers by railroad and carriers by water having a fixed time for arrival, there is a conflict in the cases as to when the carrier's liability as such ceases and its liability as warehouseman only attaches. Some courts follow what is known as the Massachusetts doctrine and hold that, where the goods have reached their destination and have been safely placed on the platform or in a warehouse for delivery to the consignee, the carrier's liability as such ceases and its liability as a warehouseman begins.[53] It is held

50. The Titania, 124 Fed. 975, affirmed 131 Fed. 229, 65 C. C. A. 215; Salmon Falls Mfg. Co. *v.* Tangier, Fed. Cas. No. 12,267, 3 Ware 110; Liverpool, etc., Co. *v.* Suitter, 17 Fed. 695; De Grau *v.* Wilson, 22 Fed. 560; The Bobolink, Fed. Cas. No. 1,588, 6 Sawy. 146; Hirsch *v.* Steamboat Quaker City, 2 Disn. 144, 13 O. Dec. Reprint 89.

Illustrations.—Where goods were shipped to New York under a bill of lading containing a clause, "Goods to be taken from alongside by the consignee immediately the vessel is ready to discharge, or otherwise they will be landed by the master and deposited at the expense of the consignee, and at the risk of fire, loss, or injury, in the warehouse provided for that purpose, or sent to the public store, as the collector of the district shall direct," and the vessel arrived on a Wednesday morning, and on Thursday the merchandise was landed in good order, and placed by itself at an accessible part of the pier, the arrival of the vessel being known to the consignees on Thursday, who on that day had the bill of lading stamped by the ship as proof that the goods had arrived, and also entered the goods at the customhouse and procured a permit to land them, but made no attempt to remove the goods till late on the following Saturday afternoon, when one truck load was taken away, and on Sunday a fire broke out on the pier and the goods were destroyed, held that, when the goods were burned, the relation of the shipowners to them as common carriers had been terminated, and they were in the custody of the shipowners as warehousemen. De Grau *v.* Wilson, 17 Fed. 698, affirmed in 22 Fed. 560.

A cargo of lemons and oranges, consigned to defendants, was delivered at a pier in the morning of a certain day along with other consignments of the same nature. All the fruit was removed on that day, except that of the defendants, who had actual notice in time to remove it. The pier was covered, and all reasonable precautions taken to protect the fruit against frost, which precautions, however, did not avail, owing to the severity of the weather. Held, that the liability of the shipowner as common carrier terminated on the day the cargo was discharged. Liverpool, etc., Co. *v.* Saitta, 22 Fed. 560, affirming 17 Fed. 695.

Where the passage to the goods was blocked by landing other freight, so that the consignee could not obtain access to it, and in this position was damaged by rain before removal, though a reasonable time had elapsed after notice of its arrival for the consignee to remove it before the rain, it is a question for the jury whether the carrier is liable. Goodwin *v.* Baltimore, etc., R. Co. (N. Y.), 58 Barb. 195.

51. Failure or refusal to receive goods.—The City of Lincoln, 25 Fed. 835; The Mary Washington, 1 Abb. U. S. 1, Chase 125, Fed. Cas. No. 9,229; Crawford *v.* Clark, 15 Ill. 561; Hathorn *v.* Ely, 28 N. Y. 78.

If the goods are injured before notice, the carrier is liable, though the consignee afterwards refuses to take them. The Mary Washington, Fed. Cas. No. 9,229, 1 Abb. U. S. 1, Chase 125.

52. Agreement to allow storage in vessel.—Norton *v.* The Richard Winslow, 67 Fed. 259.

53. Massachusetts doctrine.—*Georgia.*—The Massachusetts doctrine prevails in the absence of a different custom as to delivery. But where the goods arrive out of time, notice must be given and the consignee allowed a reasonable time to call for and remove them. See Civ. Code, § 2295; Southwestern R. Co. *v.* Felder, 46 Ga. 433, 11 Am. R. Rep. 419; Western, etc., Railroad *v.* Camp, 53 Ga.

596; Almand *v.* Georgia R., etc., Co., 95 Ga. 775, 22 S. E. 674; Georgia, etc., R. Co. *v.* Pound, 111 Ga. 6, 36 S. E. 312; Kight *v.* Wrightsville, etc., R. Co., 127 Ga. 204, 56 S. E. 363; Georgia, etc., R. Co. *v.* Pattison, 112 Ga. 468, 37 S. E. 766. See, also, Rome R. Co. *v.* Sullivan, etc., Co., 14 Ga. 277; Central R., etc., Co. *v.* Anderson, 58 Ga. 393, 16 Am. R. Rep. 85; Georgia R., etc., Co. *v.* Thompson, 86 Ga. 327, 12 S. E. 640, 45 Am. & Eng. R. Cas. 422; Richmond, etc., R. Co. *v.* White, 88 Ga. 805, 15 S. E. 802.

In order to show the existence of a custom varying the general rule, the custom consisting in the company having observed a usage of notifying consignees of the arrival of goods, it must be proved that the usage is of an established nature, and the notices given of such character as to indicate that the company intended to remain liable as a common carrier until the consignee had had reasonable time to receive his goods. Georgia, etc., R. Co. *v.* Pound, 36 S. E. 312, 111 Ga. 6.

Illinois.—Gregg *v.* Illinois Cent. R. Co., 147 Ill. 550, 35 N. E. 343, 37 Am. St. Rep. 238, affirming 47 Ill. App. 590; Porter *v.* Chicago, etc., R. Co., 20 Ill. 407, 71 Am. Dec. 286; Illinois Cent. R. Co. *v.* Alexander, 20 Ill. 23; Davis *v.* Michigan, etc., R. Co., 20 Ill. 412; Illinois Cent. R. Co. *v.* Friend, 64 Ill. 303; Richards *v.* Michigan, etc., R. Co., 20 Ill. 404; Chicago, etc., R. Co. *v.* Scott, 42 Ill. 132; Vincent *v.* Chicago, etc., R. Co., 49 Ill. 33; Illinois Cent. R. Co. *v.* Frankenberg, 54 Ill. 88, 5 Am. Rep. 92; Merchants' Dispatch Transp. Co. *v.* Hallock, 64 Ill. 284; Rothschild *v.* Michigan Cent. R. Co., 69 Ill. 164; Chicago, etc., R. Co. *v.* Sawyer, 69 Ill. 285, 18 Am. Rep. 613; Cahn *v.* Michigan Cent. R. Co., 71 Ill. 96; Merchants', etc., Transp. Co. *v.* Moore, 88 Ill. 136, 30 Am. Rep. 541; Chicago, etc., R. Co. *v.* Jenkins, 103 Ill. 588. See Schumacher *v.* Chicago, etc., R. Co., 108 Ill. App. 520, judgment affirmed, 69 N. E. 825, 207 Ill. 199; Bryan *v.* Chicago, etc., R. Co., 169 Ill. App. 181.

Indiana.—Cincinnati, etc., R. Co. *v.* McCool, 26 Ind. 140; Bansemer *v.* Toledo, etc., R. Co., 25 Ind. 434, 87 Am. Dec. 367; Pittsburgh, etc., R. Co. *v.* Nash, 43 Ind. 423; Merchants', etc., Transp. Co. *v.* Merriam, 111 Ind. 5, 11 N. E. 954. See New Albany, etc., R. Co. *v.* Campbell, 12 Ind. 55.

Iowa.—Mohr *v.* Chicago, etc., R. Co., 40 Iowa 579; Francis *v.* Dubuque, etc., R. Co., 25 Iowa 60, 95 Am. Dec. 769; Hicks *v.* Wabash R. Co., 131 Iowa 295, 108 N. W. 534, 8 L. R. A., N. S., 235.

Massachusetts.—Thomas *v.* Boston, etc., R. Corp. (Mass.), 10 Metc. 477, 43 Am. Dec. 444; Norway Plains Co. *v.* Boston, etc., Railroad (Mass.), 1 Gray 263, 61 Am. Dec. 423; Sessions *v.* Western R. Corp. (Mass.), 16 Gray 132. See also Rice *v.* Boston, etc., R. Corp., 98 Mass. 212; Barron *v.* Eldredge, 100 Mass. 455, 1 Am. Rep. 126; Lane *v.* Boston, etc., R. Co., 112 Mass. 455; Stowe *v.* New York, etc., R. Co., 113 Mass. 521; Rice *v.* Hart, 118 Mass. 201, 19 Am. Rep. 433; Hall *v.* Boston, etc., R. Corp. (Mass.), 4 Allen 439, 92 Am. Dec. 783.

Missouri.—Gashweiler *v.* Wabash, etc., R. Co., 83 Mo. 112, 25 Am. & Eng. R. Cas. 403, 53 Am. Rep. 558; Standard Milling Co. *v.* White Line Cent. Transit Co., 122 Mo. 258, 61 Am. & Eng. R. Cas. 185, 26 S. W. 704; Rankin *v.* Pacific Railroad, 55 Mo. 167; Holtzclaw *v.* Duff, 28 Mo. 392; Cramer *v.* American, etc., Exp. Co., 56 Mo. 524; Eaton *v.* St. Louis, etc., R. Co., 12 Mo. App. 386; Bergner *v.* Chicago, etc., R. Co., 13 Mo. App. 499; Kansas City Transfer Co. *v.* Neiswanger, 18 Mo. App. 103; Buddy *v.* Wabash, etc., R. Co., 20 Mo. App. 206; Hartmann *v.* Louisville, etc., R. Co., 39 Mo. App. 88; Pindell *v.* St. Louis, etc., R. Co., 41 Mo. App. 84; Hull & Co. *v.* Missouri Pac. R. Co., 60 Mo. App. 593. Compare Bell *v.* St. Louis, etc., R. Co., 6 Mo. App. 363, holding that liability as a carrier continues until the consignee has had such time to examine and receive the goods as would be necessarily required by one residing in the vicinity, and informed of the probable time of the arrival of the goods, and of the carrier's course of business.

North Carolina.—Neal & Co. *v.* Wilmington, etc., R. Co., 53 N. C. 482; Turrentine *v.* Wilmington, etc., R. Co., 100 N. C. 375, 6 Am. St. Rep. 602, 6 S. E. 116; Hilliard *v.* Wilmington, etc., R. Co., 51 N. C. 343.

Tennessee.—East Tennessee, etc., R. Co. *v.* Kelly, 91 Tenn. (7 Pickle) 699, 20 S. W. 312, 17 L. R. A. 691, 30 Am. St. Rep. 902, 55 Am. & Eng. R. Cas. 621; S. C., 91 Tenn. (7 Pickle) 708, 20 S. W. 314; Pennsylvania R. Co. *v.* Naive, 112 Tenn. 239, 79 S. W. 124, 64 L. R. A. 443; Southern Exp. Co. *v.* Kaufman, 59 Tenn. (12 Heisk.) 161; Butler *v.* East Tennessee, etc., R. Co., 76 Tenn. (8 Lea) 32, 9 Am. & Eng. R. Cas. 249. See, also, Dean *v.* Vaccaro, 39 Tenn. (2 Head) 488, 75 Am. Dec. 744; Lancaster Mills *v.* Merchants' Cotton-Press Co., 89 Tenn. 1, 24 Am. St. Rep. 586, 45 Am. & Eng. R. Cas. 423, 14 S. W. 317.

The statutory provision requiring notice to the consignee (M. & V. Code Tenn., § 2788) does not extend the liability of the carrier. Butler *v.* East Tennessee, etc., R. Co., 76 Tenn. (8 Lea) 32, 9 Am. & Eng. R. Cas. 249.

Removal of part of goods.—In Sessions *v.* Western R. Corp. (Mass.), 16 Gray 132, after a portion of the goods had been removed, the remainder were destroyed by fire while in the company's warehouse. It was held that the company could be held only as a warehouseman. See, also, Bassett *v.* Connecticut River R. Co., 145 Mass. 129, 13 N. E. 370,

that the liability as carrier ceases only after the unloading of the goods.[54] But where by custom or contract the carrier transacts its business on the cars themselves,[55] or completes its duty by placing them in a convenient place for unloading,[56] it is not necessary to unload the goods in order to terminate its liability as carrier.

New Hampshire Doctrine.—A class of cases follow what is known as the New Hampshire doctrine and hold that the liability of the carrier as such does not cease upon the arrival of the goods at their destination and their deposit in a warehouse, but continues until the lapse of a reasonable time for the removal of the goods by the consignee.[57]

1 Am. St. Rep. 443; Blaisdell *v.* Connecticut River R. Co., 145 Mass. 132, 13 N. E. 373.

Carrier of money.—A carrier who was in the habit of carrying large sums of money for hire, and keeping the same for several hours after its transportation in a desk until it is called for and taken away by the owners, is liable merely as a warehouseman, if the money is lost from the desk. Conway Bank *v.* American Exp. Co. (Mass.), 8 Allen 512.

Rule may vary with character of consignment.—Independence Mills Co. *v.* Burlington, etc., R. Co., 72 Iowa 535, 34 N. W. 320, 2 Am. St. Rep. 258, 32 Am. & Eng. R. Cas. 456. See, also, State *v.* Creeden, 78 Iowa 556, 43 N. W. 673, 7 L. R. A. 295, 40 Am. & Eng. R. Cas. 31.

Where goods are consigned "notify" a third person, if such third person fails or refuses within a reasonable time to appear with the bill of lading properly indorsed and receive the goods, the carrier's liability is that of a warehouseman. Florida, etc., R. Co. *v.* Berry, 116 Ga. 19, 42 S. E. 371.

Failure to call for goods within time limited by rule of carrier.—Where the rule of a railroad company required freight to be received and removed within twenty-four hours after reaching its destination, otherwise it would be placed in store, an unauthorized delivery of goods within the twenty-four hours to persons as agents of the consignee will not change the liability of the company from that of a carrier to that of a warehouseman, on the grounds that the persons to whom delivery was made were warehousemen, and that the goods were not called for by the consignee during the twenty-four hours. Angle *v.* Mississippi, etc., R. Co., 18 Iowa 555.

54. Necessity for unloading of goods.—Porter *v.* Chicago, etc., R. Co., 20 Ill. 407, 71 Am. Dec. 286; Vallette *v.* Bennett, 69 Ill. 632; Chicago, etc., R. Co. *v.* Bensley, 69 Ill. 630; Rice *v.* Boston, etc., R. Corp., 98 Mass. 212.

55. Where carrier transacts business on cars.—MacVeagh *v.* Atchison, etc., R. Co., 3 N. Mex. 327, 5 Pac. 457.

56. Chicago, etc., R. Co. *v.* Reyman, 166 Ind. 278, 76 N. E. 970, 73 N. E. 587. See Dixon *v.* Central, etc., R. Co., 110 Ga. 173, 35 S. E. 369.

If, by direction of the consignee, given in respect of a series of anticipated shipments, of which such goods form one, they be stored in a car, and side tracked for the convenience of the consignee, and notice thereof be given the latter, the liability of the carrier, as dependent upon the safety of the place of storage, is at an end. Pindell *v.* St. Louis, etc., R. Co., 41 Mo. App. 84.

Where it was the usage to receive delivery and unload refrigerator cars while they were standing in some convenient place, the location of a car at that point, and a readiness to permit the consignee to take possession, relieved the carrier of further obligation than that of a warehouseman, without any notification to the consignee of the arrival of the goods. Chicago, etc., R. Co. *v.* Reyman, 166 Ind. 278, 76 N. E. 970, 73 N. E. 587.

Place must be safe and convenient.—The liability, as a common carrier, of a railroad company transporting grain, commonly and most conveniently removed directly from the cars instead of through a warehouse, does not cease until the car is placed in a safe and convenient location for unloading; and the finding of a jury that a car was so placed that it could, but with difficulty, be unloaded, justifies a verdict holding the company liable as a common carrier. Independence Mills Co. *v.* Burlington, etc., R. Co., 72 Iowa 535, 34 N. W. 320, 2 Am. St. Rep. 258, 32 Am. & Eng. R. Cas. 456.

57. New Hampshire doctrine.—*Alabama.*—Bowden *v.* Atlantic Coast Line R. Co., 148 Ala. 29, 41 So. 294; Louisville, etc., R. Co. *v.* McGuire & Co., 79 Ala. 395; Collins *v.* Alabama, etc., R. Co., 104 Ala. 390, 16 So. 110, 61 Am. & Eng. R. Cas. 229; Columbus, etc., R. Co. *v.* Ludden, 89 Ala. 612, 7 So. 471, 42 Am. & Eng. R. Cas. 404; Anniston, etc., R. Co. *v.* Ledbetter, 92 Ala. 326, 9 So. 73; Alabama, etc., R. Co. *v.* Kidd, 35 Ala. 209; Central, etc., R. Co. *v.* Merrill & Co., 153 Ala. 277, 45 So. 628; Kennedy Bros. *v.* Mobile, etc., R. Co., 74 Ala. 430, 21 Am. & Eng. R. Cas. 145; Mobile, etc., R. Co. *v.* Prewitt, 46 Ala. 63, 7 Am. Rep. 586. See, also, Western R. Co. *v.* Little, 86 Ala. 159, 5 So. 563, 37 Am. & Eng. R. Cas. 659; Alabama, etc., R. Co. *v.* Grabfelder, 83 Ala. 200, 3 So. 432. Com-

The English doctrine is substantially the same as the New Hampshire doctrine. The consignee of goods shipped by railway is entitled to a reasonable

pare Southern Exp. Co. *v.* Armstead, 50 Ala. 350.

Arkansas.—The carrier is liable as insurer until a reasonable time after notice to the consignee (Missouri Pac. R. Co. *v.* Nevill, 60 Ark. 375, 30 S. W. 425, 28 L. R. A. 80, 46 Am. St. Rep. 208), and until proper delivery at destination (Arkadelphia Mill. Co. *v.* Smoker Merchandise Co., 100 Ark. 37, 139 S. W. 680.)

California.—The Massachusetts doctrine seems to have obtained originally. See Jackson *v.* Sacramento Valley R. Co., 23 Cal. 268. But the New Hampshire doctrine now prevails in consequence of the provisions of § 2120 of the Civil Code requiring notice to the consignee of the arrival of the goods. See Wilson *v.* California Cent. R. Co., 94 Cal. 166, 29 Pac. 861, 17 L. R. A. 685; Cavallaro *v.* Texas, etc., R. Co., 110 Cal. 348, 42 Pac. 918, 52 Am. St. Rep. 94. See, also, Hirshfield *v.* Central Pac. R. Co., 56 Cal. 484, 7 Am. & Eng. R. Cas. 398.

Connecticut.—Graves *v.* Hartford, etc., Steamboat Co., 38 Conn. 143, 9 Am. Rep. 369.

Delaware.—See McHenry *v.* Philadelphia, etc., R. Co. (Del.), 4 Har. 448.

Kansas.—Leavenworth, etc., R. Co. *v.* Maris, 16 Kan. 333; Missouri Pac. R. Co. *v.* Wichita Wholesale Grocery Co., 55 Kan. 525, 40 Pac. 899; Missouri Pac. R. Co. *v.* Newberger & Bro., 73 Pac. 57, 67 Kan. 846.

Kentucky.—Jeffersonville R. Co. *v.* Cleveland (Ky.), 2 Bush 468; Wald *v.* Louisville, etc., R. Co., 92 Ky. 645, 13 Ky. L. Rep. 853, 18 S. W. 850; Briant *v.* Louisville, etc., R. Co., 9 Ky. L. Rep. 47; Louisville, etc., R. Co. *v.* Jones, 10 Ky. L. Rep. 494; Adams Exp. Co. *v.* Tingle, 10 Ky. L. Rep. 358; Lewis *v.* Louisville, etc., R. Co., 135 Ky. 361, 122 S. W. 184, 25 L. R. A., N. S., 938, 21 Am. & Eng. Ann. Cas. 527.

Louisiana.—Maignan *v.* New Orleans, etc., R. Co., 24 La. Ann. 333. See Segura *v.* Reed, 3 La. Ann. 695.

Maryland.—See Baltimore, etc., R. Co. *v.* Green, 25 Md. 72.

Michigan.—In McMillan *v.* Michigan, etc., R. Co., 16 Mich. 79, 93 Am. Dec. 208, the court was equally divided, but the views of Cooley, J., that the New Hampshire rule was the true one were approved in Buckley *v.* Great Western R. Co., 18 Mich. 121.

In the absence of an express contract or one fairly inferable from the nature of the business, the known necessities under which it is carried on, and the established usage between the parties, the company can not shift its responsibility as a common carrier to that of a mere warehouseman by simply depositing the goods in the warehouse at the end of its route. Feige *v.* Michigan Cent. R. Co., 62 Mich. 1, 28 N. W. 685; Black *v.* Ashley, 80 Mich. 90, 44 N. W. 1120, 42 Am. & Eng. R. Cas. 428.

Minnesota.—Pinney *v.* First Division, etc., R. Co., 19 Minn. 251, Gil. 211, 20 Am. R. Rep. 71; Derosia *v.* Winona, etc., R. Co., 18 Minn. 133, Gil. 119; Arthur *v.* St. Paul, etc., R. Co., 38 Minn. 95, 35 N. W. 718; Kirk *v.* Chicago, etc., R. Co., 59 Minn. 161, 60 N. W. 1084, 50 Am. St. Rep. 397, 61 Am. & Eng. R. Cas. 273 (carrier held liable for goods stolen from car while it was at station). See also Armstrong *v.* Chicago, etc., R. Co., 45 Minn. 85, 47 N. W. 459, 45 Am. & Eng. R. Cas. 422, note.

Nebraska.—Burlington, etc., R. Co. *v.* Arms, 15 Neb. 69, 17 N. W. 351.

New Hampshire.—Moses *v.* Boston, etc., Railroad, 32 N. H. 523, 64 Am. Dec. 381; Welch *v.* Concord Railroad, 68 N. H. 206, 44 Atl. 304. See also, Jewell *v.* Grand Trunk Railway, 55 N. H. 84; Smith *v.* Nashua, etc., Railroad, 27 N. H. 86, 59 Am. Dec. 364.

New Jersey.—Bobbink *v.* Erie R. Co., 82 N. Y. L. 547, 82 Atl. 877; Morris, etc., R. Co. *v.* Ayers, 29 N. J. L. 393, 80 Am. Dec. 215. The latter case was regarded in 5 Am. & Eng. Enc. of Law (2nd Ed.) 264, as following the Massachusetts doctrine, but it seems to follow the New Hampshire doctrine, and is so cited in Poythress *v.* Durham, etc., R. Co., 148 N. C. 391, 62 S. E. 515, 18 L. R. A., N. S., 427; 3 Wood on Railways (Ed. 1894) 1935, and Hutchinson on Carriers, § 370.

New York.—Mills *v.* Michigan Cent. R. Co., 45 N. Y. 622, 6 Am. Rep. 152; Hedges *v.* Hudson River R. Co., 49 N. Y. 223, 3 Am. R. Rep. 346; Zinn *v.* New Jersey Steamboat Co., 49 N. Y. 442, 10 Am. Rep. 402, 3 Am. R. Rep. 340; McAndrew *v.* Whitlock, 52 N. Y. 40, 11 Am. Rep. 657; Rawson *v.* Holland, 59 N. Y. 611, 17 Am. Rep. 394; McKinney *v.* Jewett, 90 N. Y. 267, 9 Am. & Eng. R. Cas. 209; Faulkner *v.* Hart, 82 N. Y. 413, 37 Am. Rep. 574, reversing 44 N. Y. Super. Ct. 471; Draper *v.* Delaware, etc., Canal Co., 118 N. Y. 118, 23 N. E. 131, 42 Am. & Eng. R. Cas. 410; Solomon *v.* Philadelphia, etc., Steamboat Co. (N. Y.), 2 Daly 104; Pelton *v.* Rensselaer, etc., R. Co., 54 N. Y. 214, 13 Am. Rep. 568; Sprague *v.* New York Cent. R. Co., 52 N. Y. 637; Nicholas *v.* New York, etc., R. Co., 89 N. Y. 370, 9 Am. & Eng. R. Cas. 103; Miller *v.* Steam Nav. Co., 10 N. Y. 431, Seld. Notes 64, affirming 13 Barb. 361; Hedges *v.* Hudson River R. Co., 29 N. Y. Super. Ct. 119; King *v.* New Brunswick, etc., Steamboat Co., 73 N. Y. S. 999, 36 Misc. Rep. 555; Lamb *v.* Camden, etc., Transp. Co. (N. Y.), 2 Daly 454.

A provision in the contract of shipment

time, after the goods have arrived at their destination, within which to take them away, and during such time the goods are in the hands of the railway as carrier and subject it to all the liabilities which attach to that character. But when

that the goods were to be delivered at the company's depot does not affect the rule. Lamb *v.* Camden, etc., Transp. Co. (N. Y.), 2 Daly 454.

Ohio.—The carrier's liability as insurer continues until after the consignee has been notified of the arrival of his goods and has had a reasonable time in which to inspect and remove them. Lake Erie, etc., R. Co. *v.* Hatch, 6 O. C. C. 230, 3 O. C. D. 430; affirmed in 52 O. St. 408, 39 N. E. 1042, 61 Am. & Eng. R. Cas. 293. And see Gaines *v.* Union Transp., etc., Co., 28 O. St. 418.

Oregon.—See McGregor *v.* Oregon R., etc., Co., 50 Ore. 527, 93 Pac. 465.

Pennsylvania.—The New Hampshire doctrine has been followed in some cases. See Moyer *v.* Pennsylvania R. Co., 31 Pa. Super. Ct. 559; National Line Steamship Co. *v.* Smart, 107 Pa. 492; Frank Bros. & Co. *v.* Central R. Co., 9 Pa. Super. Ct. 129; Pennsylvania, etc., R. Co. *v.* Waltman (Pa.), 1 Walk. 139. But the Massachusetts doctrine was held in McCarty *v.* New York, etc., R. Co., 30 Pa. 247; Shenk *v.* Philadelphia Steam Propeller Co., 60 Pa. 109, 100 Am. Dec. 541.

South Carolina.—The New Hampshire doctrine now prevails. Knight *v.* Southern Railway, 85 S. C. 78, 67 S. E. 16; Deschamps *v.* Atlantic, etc., R. Co., 82 S. C. 26, 64 S. E. 144; Murphy *v.* Southern Railway, 77 S. C. 76, 57 S. E. 664; Brunson *v.* Atlantic, etc., R. Co., 76 S. C. 9, 56 S. E. 538, 9 L. R. A., N. S., 577. But Wardlaw *v.* South Carolina R. Co., 11 Rich. L. 337, and Hipp *v.* Southern R. Co., 50 S. C. 129, 27 S. E. 623, followed the Massachusetts doctrine. See Spears *v.* Spartansburg, etc., R. Co., 11 S. C. 158, where it is said that the carrier's liability as insurer does not extend over the whole time of the existence of its lien for freight charges.

Texas.—The rule is declared by statute to be that the carrier's liability as such continues until actual delivery to the consignee or his agent, but that "if the carrier at the point of destination shall use due diligence to notify the consignee, and the goods are not taken by the consignee, and have in consequence to be stored in the depots or warehouses of the common carriers, they shall thereafter only be liable as warehousemen." Rev. Stat. Texas, arts. 281, 282. See the statute applied in Missouri Pac. R. Co. *v.* Haynes & Co., 72 Tex. 175, 10 S. W. 398, 37 Am. & Eng. R. Cas. 645. See also, Houston, etc., R. Co. *v.* Adams, 49 Tex. 748, 30 Am. Rep. 116; Texas, etc., R. Co. *v.* Capps, 2 Texas App. Civ. Cas., § 33; Texas, etc., R. Co. *v.* Schneider, 1 Texas App. Civ. Cas., § 118; Galveston, etc., R. Co. *v.* Hunt (Tex. Civ. App.), 32 S. W. 549, 550.

Under the statute a railroad company remains liable as a common carrier for goods not discharged from its car, though a third person has agreed with the consignee to unload them, and the car is at the place of discharge; there being no agreement by the consignee to receive the goods on the car, and no notice, or diligence to give notice, of the arrival of the car. Missouri Pac. R. Co. *v.* Haynes & Co., 72 Tex. 175, 10 S. W. 398, 37 Am. & Eng. R. Cas. 645.

Vermont.—Ouimit *v.* Henshaw, 35 Vt. 605, 84 Am. Dec. 646; Blumenthal *v.* Brainerd, 38 Vt. 402, 91 Am. Dec. 350; Winslow *v.* Vermont, etc., R. Co., 42 Vt. 700, 1 Am. Rep. 365.

Virginia.—Norfolk, etc., R. Co. *v.* Stuart's Draft Mill. Co., 109 Va. 184, 63 S. E. 415.

Washington.—Fisher *v.* Northern Pac. R. Co., 49 Wash. 258, 94 Pac. 1073; Hurley & Son *v.* Norfolk, etc., R. Co., 68 W. Va. 471, 69 S. E. 904.

West Virginia.—Berry *v.* West Virginia, etc., R. Co., 44 W. Va. 538, 30 S. E. 143, 67 Am. St. Rep. 781. See Baltimore, etc., R. Co. *v.* Morehead, 5 W. Va. 293.

Wisconsin.—Wood *v.* Crocker, 18 Wis. 345, 86 Am. Dec. 773; Wood *v.* Milwaukee, etc., R. Co., 27 Wis. 541, 9 Am. Rep. 564, 2 Am. R. Rep. 342; Parker *v.* Milwaukee, etc., R. Co., 30 Wis. 689, 7 Am. R. Rep. 255; Lemke *v.* Chicago, etc., R. Co., 39 Wis. 449, 13 Am. R. Rep. 406; Backhaus *v.* Chicago, etc., R. Co., 92 Wis. 393, 66 N. W. 400. See also Milwaukee, etc., R. Co. *v.* Fairchild, 6 Wis. 403.

Reason for rule.—In Graves *v.* Hartford, etc., Steamboat Co., 38 Conn. 143, 9 Am. Rep. 369, the court said: "Whatever reasons there are for imposing a strict rule of responsibility during the transit, exist and continue in full force until the consignee has had a reasonable time to take the goods into his own care and custody. * * * In making the delivery, care is needed to avoid mistakes, and attention required to see if the goods are uninjured. During the whole process of delivery, until fully completed, the goods should remain in the care of the carrier upon the full responsibility pertaining to him as such, and he ought not to be allowed to lay aside that responsibility until the owner of the goods has had a fair and reasonable time and opportunity to receive them."

If the loss or injury results from a want of ordinary care on the part of the car-

such reasonable time has elapsed, the company becomes liable as a warehouseman merely.[58]

§ 1095. Necessity for Notice of Arrival of Goods.—Massachusetts Doctrine.—The authorities are in conflict as to whether or not, in the case of carriers by railroad and carriers by water having a fixed time for arrival, the carrier is bound to give the consignee notice of the arrival of the goods at their destination in order to terminate its liability as insurer and assume responsibility as warehouseman only.[59] Some courts follow the Massachusetts doctrine and hold that the carrier is under no obligation to give such notice.[60] But no-

rier, the question of reasonable time becomes immaterial. Lamb *v.* Camden, etc., Transp. Co. (N. Y.), 2 Daly 454.

It is the duty of the consignee to be ready at the place of destination to receive the goods when they arrive, or within a reasonable time thereafter. Alabama, etc., R. Co. *v.* Kidd, 35 Ala. 209.

Liability affected by charter.—The Michigan Central Railway Company, under its charter, is liable as warehousemen only, for goods transported over its line to Detroit, and there deposited in its warehouse awaiting delivery to an intermediate consignee. Michigan Cent. R. Co. *v.* Lantz, 32 Mich. 502. Property on deposit in depots is to be considered as awaiting delivery as soon as it is in condition to be delivered to the consignee when demanded. Michigan Cent. R. Co. *v.* Hale, 6 Mich. 243.

In case of portable boxes of merchandise, the liability of a railway company as common carrier does not terminate till the goods are placed in its freight room, ready for delivery to the consignee, and he has had a reasonable time to remove them. Kirk *v.* Chicago, etc., R. Co., 59 Minn. 161, 60 N. W. 1084, 50 Am. St. Rep. 397, 61 Am. & Eng. R. Cas. 203.

Where goods have been placed in a railway company's depot to await the owner's convenience in removing them, and they are destroyed, the company is liable only on proof of its negligence. Pennsylvania, etc., R. Co. *v.* Waltman (Pa.), 1 Walk. 139.

Illustrations.—Where defendant delivered, on the track at the consignee's warehouse, a carload of sugar on Sunday night, which was there destroyed by fire before working hours on Monday morning, defendant is liable, although it was the custom of the consignee to break the seals and unload cars so delivered without further authority. Missouri Pac. R. Co. *v.* Wichita Wholesale Grocery Co., 55 Kan. 525, 40 Pac. 899.

Five to seven days were reasonably required to transport goods from the place of shipment, and on the eighth day after their shipment plaintiff called for them at the point of destination, but they had not arrived. He called for them on each succeeding morning for five days, when he left the city, the goods arriving the day after his departure. Held, that the company was liable for the loss of the goods by fire on the night following their arrival. Jeffersonville R. Co. *v.* Cleveland (Ky.), 2 Bush 468.

In Eagle *v.* White (Pa.), 6 Whart. 505, 37 Am. Dec. 434, the goods arrived at their destination about dark on Saturday evening, and at the request of the consignee the car containing them was run on to a side track to remain until Monday morning, at which time the consignee opened the car and found that some of his goods had been stolen. The carrier was held liable.

58. English doctrine.—*England.*—Chapman *v.* Great Western R. Co., 5 Q. B. Div. 278, 49 L. J. Q. B. 420, 42 L. T. N. S., 252. See also Bradshaw *v.* Irish North-Western R. Co., 7 Ir. R. C. L. 252, 21 W. R. 581.

Canada.—In Richardson *v.* Canadian Pac. R. Co., 19 Ont. Rep. 369, 45 Am. & Eng. R. Cas. 413, the authority of Chapman *v.* Great Western R. Co., 5 Q. B. Div. 278, was recognized and followed. In earlier cases, the Massachusetts doctrine seemed to be announced. Hall *v.* Grand Trunk R. Co., 34 U. C. Q. B. 517; Bowie *v.* Buffalo, etc., R. Co., 7 U. C. C. P. 191; O'Neill *v.* Great Western R. Co., 7 U. C. C. P. 203; Inman *v.* Buffalo, etc., R Co., 7 U. C. C. P. 325.

59. Necessity for notice of arrival.—As to express companies, and carriers by water generally, see ante, "Express Companies and General Carriers by Water," § 1093.

60. Massachusetts doctrine.—*Georgia.*—No notice to the consignee is necessary, except where the goods arrive out of time, in which case notice must be given and the consignee allowed a reasonable time to call for and remove them. See Civ. Code, § 2295. Southwestern R. Co. *v.* Felder, 46 Ga. 433, 11 Am. R. Rep. 419; Western, etc., Railroad *v.* Camp, 53 Ga. 596; Almand *v.* Georgia R., etc., Co., 95 Ga. 775, 22 S. E. 674; Georgia, etc., R. Co. *v.* Pound, 111 Ga. 6, 36 S. E. 312; Kight *v.* Wrightsville, etc., R. Co., 127 Ga. 204, 56 S. E. 363; Georgia, etc., R. Co. *v.* Pattison, 112 Ga. 468, 37 S. E. 766. See, also, Central R., etc., Co. *v.* Anderson, 58 Ga. 393, 16 Am. R. Rep. 85; Georgia R., etc., Co. *v.* Thompson, 86 Ga. 327, 12 S. E. 640, 45 Am. & Eng. R. Cas. 422; Richmond, etc., R. Co. *v.* White, 88 Ga. 805, 15 S. E. 802. Compare Rome R. Co. *v.* Sullivan, etc., Co., 14 Ga. 277,

holding that the carrier must give notice.

Illinois.—Chicago, etc., R. Co. *v.* Scott, 42 Ill. 132; Chicago, etc., R. Co. *v.* Kendall, 72 Ill. App. 105; Richards *v.* Michigan, etc., R. Co., 20 Ill. 404; Porter *v.* Chicago, etc., R. Co., 20 Ill. 407, 71 Am. Dec. 286; Davis *v.* Michigan, etc., R. Co., 20 Ill. 412; Rothschild *v.* Michigan Cent. R. Co., 69 Ill. 164. Compare Chicago, etc., R. Co. *v.* Sawyer, 69 Ill. 285, 18 Am. Rep. 613 (notice of arrival of bonded goods held necessary), and Jackson & Son *v.* New York Cent. R. Co., 167 Ill. App. 461, holding that carrier must give notice.

Indiana.—Bansemer *v.* Toledo, etc., R. Co., 25 Ind. 434, 87 Am. Dec. 367; Cincinnati, etc., R. Co. *v.* McCool, 26 Ind. 140; Chicago, etc., R. Co. *v.* Reyman, 166 Ind. 278, 76 N. E. 970, 73 N. E. 587. See Pittsburg, etc., R. Co. *v.* Nash, 43 Ind. 423.

Iowa.—Mohr *v.* Chicago, etc., R. Co., 40 Iowa 579; Francis *v.* Dubuque, etc., R. Co., 25 Iowa 60, 95 Am. Dec. 769; Hicks *v.* Wabash R. Co., 131 Iowa 295, 108 N. W. 534, 8 L. R. A., N. S., 235.

Kentucky.—Jeffersonville R. Co. *v.* Cleveland (Ky.), 2 Bush 468. Compare Louisville, etc., R. Co. *v.* Stiles, 133 Ky. 786, 119 S. W. 786; Adams Exp. Co. *v.* Tingle, 7 Ky. L. Rep. 441.

Massachusetts.—Norway Plains Co. *v.* Boston, etc., Railroad (Mass.), 1 Gray 263, 61 Am. Dec. 423. See, also, Rice *v.* Boston, etc., R. Corp., 98 Mass. 212; Barron *v.* Eldredge, 100 Mass. 455, 1 Am. Rep. 126; Stowe *v.* New York, etc., R. Co., 113 Mass. 521; Rice *v.* Hart, 118 Mass. 201, 19 Am. Rep. 433.

Minnesota.—Derosia *v.* Winona, etc., R. Co., 18 Minn. 133, Gil. 119.

Where the consignee resides eighteen miles from the station the carrier need not give notice to him, but if he had an agent there, known to the carrier, such agent was entitled to notice, and reasonable time thereafter to remove them. Pinney *v.* First Division, etc., R. Co., 19 Minn. 251, Gil. 211, 20 Am. R. Rep. 71.

Missouri.—Rankin *v.* Pacific Railroad, 55 Mo. 167; Gashweiler *v.* Wabash, etc., R. Co., 83 Mo. 112, 25 Am. & Eng. R. Cas. 403, 53 Am. Rep. 558; Eaton *v.* St. Louis, etc., R. Co., 12 Mo. App. 386; Bergner *v.* Chicago, etc., R. Co., 13 Mo. App. 499; Kansas City Transfer Co. *v.* Neiswanger, 18 Mo. App. 103; Buddy *v.* Wabash, etc., R. Co., 20 Mo. App. 206; Pindell *v.* St. Louis, etc., R. Co., 34 Mo. App. 675; Herf, etc., Chemical Co. *v.* Lackawanna Line, 70 Mo. App. 274; S. C., 100 Mo. App. 164, 73 S. W. 346; Ross *v.* Chicago, etc., R. Co., 119 Mo. App. 290, 95 S. W. 977. See, also Bell *v.* St. Louis, etc., R. Co., 6 Mo. App. 363; Holtzclaw *v.* Duff, 27 Mo. 392; Cramer *v.* American, etc., Exp. Co., 56 Mo. 524. Compare Pindell *v.* St. Louis, etc., R. Co., 41 Mo. App. 84.

New Jersey.—Morris, etc., R. Co. *v.* Ayers, 29 N. J. L. 393, 80 Am. Dec. 215.

Pennsylvania.—McCarty *v.* New York etc., R. Co., 30 Pa. 247; Shenk *v.* Philadelphia Steam Propeller Co., 60 Pa. 109, 100 Am. Dec. 541; National Line Steamship Co. *v.* Smart, 107 Pa. 492. See Allan *v.* Pennsylvania R. Co., 10 Am. & Eng. R. Cas., N. S., 347. Compare Allam *v.* Pennsylvania R. Co., 5 Pa. Dist. R. 54.

South Carolina.—Layton & Sons *v.* Charleston, etc., R. Co., 90 S. C. 323, 72 S. E. 988; Knight *v.* Southern Railway, 85 S. C. 78, 67 S. E. 16; Spears *v.* Spartonburg, etc., R. Co., 11 S. C. 158. See Murphy *v.* Southern Railway, 77 S. C. 76, 57 S. E. 664.

West Virginia.—Notice is not required and the consignee must remove the goods from the warehouse within a reasonable time. Berry *v.* West Virginia, etc., R. Co., 44 W. Va. 538, 30 S. E. 143, 67 Am. St. Rep. 781. Compare Baltimore, etc., R. Co. *v.* Morehead, 5 W. Va. 293.

Reasons for doctrine.—In South, etc., Alabama R. Co. *v.* Wood, 66 Ala. 167, 9 Am. & Eng. R. Cas. 424, 41 Am. Rep. 749, the court said: "It is not unreasonable in such cases to assume that the consignee has already been advised by the consignor of the fact that the goods have been forwarded to him. It would, too, be practically impossible to require such notice to each consignee, where the arrivals of goods by this mode of transportation are so frequent and various as is the case in populous emporiums of commerce and the great centres of railway traffic." See, also, Norway Plains Co. *v.* Boston, etc., R. Co. (Mass.), 1 Gray 263, 61 Am. Dec. 423.

The custom of notifying consignees before preferring against them a charge of demurrage does not warrant the implication that the carrier thereby agreed to remain liable as a common carrier rather than a warehouseman up to the time of the notice. Georgia, etc., R. Co. *v.* Pound, 111 Ga. 6, 36 S. E. 312.

A custom that the carrier's liability as such shall continue after the transportation and storage of the goods is not sufficiently proved by evidence which shows no more than that the company had been in the habit of notifying a particular customer by postal card of the arrival of his goods and informing him that storage or demurrage would be charged thereon unless they were called for within a time specified, and that it had in this manner, and also by messages by telephone and otherwise, given similar notices to other customers, in some of which it was stated that unless the goods were removed as requested they would be "held" or "stored" at the owner's risk. Georgia, etc., R. Co. *v.* Pound, 111 Ga. 6, 36 S. E. 312; Georgia, etc., R. Co. *v.* Pattison, 112 Ga. 468, 37 S. E. 766.

The fact that a carrier gives notice of

tice should be given where the goods arrive out of time.[61] It is held that the same rule applies to other corporations using railroads as a means of conveyance, such as merchants' dispatch transportation companies where by their usage they merely undertake to deliver the goods at their depots.[62]

New Hampshire Doctrine.—In some jurisdictions by force of statute or decisions, the New Hampshire doctrine is followed and until the consignee has been notified by the carrier of the arrival of his goods the carrier remains liable as insurer; the carrier assumes the liability of a warehouseman only, after notice to the consignee and the lapse of a reasonable time thereafter in which to remove the goods.[63] But notice is excused where the goods are not properly

the arrival of a consignment, and requires its removal within twenty-four hours, does not show that the liability as carrier continues to the end of that time. Richards *v.* Michigan, etc., R. Co., 20 Ill. 404.

61. Where goods arrive out of time.—Frank *v.* Grand Tower, etc., R. Co., 57 Mo. App. 181; Southwestern R. Co. *v.* Felder, 46 Ga. 433, 11 Am. R. Rep. 419; Western, etc., Railroad *v.* Camp, 53 Ga. 596; Almand *v.* Georgia R., etc., Co., 95 Ga. 775, 22 S. E. 674; Georgia, etc., R. Co. *v.* Pound, 111 Ga. 6, 36 S. E. 312; Kight *v.* Wrightsville, etc., R. Co., 127 Ga. 204, 56 S. E. 363; Georgia, etc., R. Co. *v.* Pattison, 112 Ga. 468, 37 S. E. 766. Compare Richmond, etc., R. Co. *v.* White, 88 Ga. 805, 15 S. E. 802.

62. Merchants' Dispatch Transp. Co. *v.* Hallock, 64 Ill. 284.

63. New Hampshire doctrine.—*Alabama.*—Notice is now required by statute. Code 1907, § 5604; Greek-American Produce Co. *v.* Illinois Cent. R. Co., 4 Ala. App. 377, 58 So. 994.

But it seems that formerly the Massachusetts doctrine was held. South, etc., Alabama R. Co. *v.* Wood, 66 Ala. 167, 9 Am. & Eng. R. Cas. 419, 41 Am. Rep. 749; Louisville, etc., R. Co. *v.* McGuire & Co., 79 Ala. 395; Louisville, etc., R. Co. *v.* Oden, 80 Ala. 38; Columbus, etc., R. Co. *v.* Ludden, 89 Ala. 612, 7 So. 471, 42 Am. & Eng. R. Cas. 404. But see Alabama Mid. Ry. Co. *v.* Darby, 119 Ala. 531, 24 So. 713; Collins *v.* Alabama, etc., R. Co., 104 Ala. 390, 61 Am. & Eng. R. Cas. 229, 16 So. 140, and Kennedy Bros. *v.* Mobile, etc., R. Co., 74 Ala. 430, 21 Am. & Eng. R. Cas. 145.

Under Code 1896, § 4224, where the destination of the goods is a city of two thousand or more inhabitants, and having a daily mail, the liability of the company becomes that of a warehouseman only when, within twenty-four hours after the arrival of the goods, it has stored them in a safe warehouse and mailed a notice to the consignee. The notice may be to a third party where the consignor so directs. Collins *v.* Alabama, etc., R. Co., 104 Ala. 390, 61 Am. & Eng. R. Cas. 229, 16 So. 140; Columbus, etc., R. Co. *v.* Ludden, 89 Ala. 612, 7 So. 471, 42 Am. & Eng. R. Cas. 404. The statute did not lay upon the carrier a duty to notify the consignee, but merely determined the time of termination of the strict liability of the carrier. Central, etc., R. Co. *v.* Burton, 165 Ala. 425, 51 So. 643. The statute made no distinction between incorporated and unincorporated cities and towns; and incorporation need not be shown, to take advantage of the statute. Louisville, etc., R. Co. *v.* Johnson, 33 So. 661, 135 Ala. 232.

Arkansas.—Missouri Pac. R. Co. *v.* Nevill, 60 Ark. 375, 30 S. W. 425, 28 L. R. A. 80, 46 Am. St. Rep. 208; Kansas, etc., R. Co. *v.* Morrison (Ark.), 146 S. W. 853.

California.—Notice is now required by statute. Cal. Civ. Code, § 2120; Wilson *v.* California Cent. R. Co., 94 Cal. 166, 29 Pac. 861, 17 L. R. A. 685. See, also, Jackson *v.* Sacramento Valley R. Co., 23 Cal. 268; Hirshfield *v.* Central Pac. R. Co., 56 Cal. 484, 7 Am. & Eng. R. Cas. 398.

Kansas.—Leavenworth, etc., R. Co. *v.* Maris, 16 Kan. 333.

Louisiana.—Maignan *v.* New Orleans, etc., R. Co., 24 La. Ann. 333; Sleade *v.* Payne, 14 La. Ann. 453.

Maryland.—United Fruit Co. *v.* New York, etc., Transp. Co., 104 Md. 567, 65 Atl. 415, 8 L. R. A., N. S., 240, 10 Am. & Eng. Ann. Cas. 437.

Where a carrier charged, besides the regular freight charges, a compensation for streetage to the plaintiff's place of business, it was held that if the course of dealing between the carrier and the consignee rendered personal notice of the arrival of the cars unnecessary, the carrier was not required to give such notice to constitute delivery, notwithstanding the extra charge of streetage. Baltimore, etc., R. Co. *v.* Green, 25 Md. 72.

Michigan.—McMillan *v.* Michigan, etc., R. Co., 16 Mich. 79, 93 Am. Dec. 208; Michigan Cent. R. Co. *v.* Ward, 2 Mich. 538; Walters *v.* Detroit United R. Co., 139 Mich. 303, 102 N. W. 745. See also Buckley *v.* Great Western R. Co., 18 Mich. 121.

Mississippi.—Gulf, etc., R. Co. *v.* Fuqua, 36 So. 449, 84 Miss. 490; Yazoo, etc., R. Co. *v.* Blum, 102 Miss. 303, 59 So. 92; Gulf, etc., R. Co. *v.* Ferguson-McKinney Dry Goods Co., 97 Miss. 266, 52 So. 797.

New Hampshire.—Moses *v.* Boston, etc.,

R. Co., 32 N. H. 523, 64 Am. Dec. 381; Welch *v.* Concord Railroad, 68 N. H. 206, 44 Atl. 304; Smith *v.* Nashua, etc., Railroad, 27 N. H. 86, 59 Am. Dec. 364.

New York.—Mills *v.* Michigan Cent. R. Co., 45 N. Y. 622, 6 Am. Rep. 152; Hedges *v.* Hudson River R. Co., 49 N. Y. 223, 3 Am. R. Rep. 346; Rawson *v.* Holland, 59 N. Y. 611, 17 Am. Rep. 394; Solomon *v.* Philadelphia, etc., Steamboat Co., 2 Daly 104; McDonald *v.* Western R. Corp., 34 N. Y. 497; Sprague *v.* New York Cent. R. Co., 52 N. Y. 637; Dunham *v.* Boston, etc., R. Co., 46 Hun 245, 11 N. Y. St. Rep. 472; Sherman *v.* Hudson River R. Co., 64 N. Y. 254, affirming 5 Daly 521; Zinn *v.* New Jersey Steamboat Co., 49 N. Y. 442, 10 Am. Rep. 402, 3 Am. R. Rep. 340; Browning *v.* Long Island R. Co., 2 Daly 117; Grieve *v.* New York, etc., R. Co., 49 N. Y. S. 949, 25 App. Div. 518; Hedges *v.* Hudson River R. Co., 29 N. Y. Super Ct. 119; Becker *v.* Pennsylvania R. Co., 96 N. Y. S. 1, 109 App. Div. 230; King *v.* New Brunswick, etc., Steamboat Co., 73 N. Y. S. 999, 36 Misc. Rep. 555; Pelton *v.* Rensselaer, etc., R. Co., 54 N. Y. 214, 13 Am. Rep. 568; Weed *v.* Barney, 45 N. Y. 344, 6 Am. Rep. 96; Faulkner *v.* Hart, 82 N. Y. 413, 37 Am. Rep. 574, reversing 44 N. Y. Super. Ct. 471; Price *v.* Powell, 3 N. Y. 322.

If the consignee does not then call for the goods, liability as a common carrier ceases. Fenner *v.* Buffalo, etc., R. Co., 44 N. Y. 505, 4 Am. Rep. 709; Grieve *v.* New York, etc., R. Co., 49 N. Y. S. 949, 25 App. Div. 518.

North Carolina.—The New Hampshire doctrine now prevails. Poythress *v.* Durham, etc., R. Co., 148 N. C. 391, 62 S. E. 515, 18 L. R. A., N. S., 427; Wall-Huske Co. *v.* Southern R. Co., 147 N. C. 407, 61 S. E. 277; Citizens', etc., Bank *v.* Southern R. Co., 153 N. C. 346, 69 S. E. 261. But it seems that the Massachusetts doctrine was formerly held. See Neal & Co. *v.* Wilmington, etc., R. Co., 53 N. C. 482; Hilliard *v.* Wilmington, etc., R. Co., 51 N. C. 343 (question discussed but not decided); Chalk *v.* Charlotte, etc., R. Co., 85 N. C. 423, 9 Am. & Eng. R. Cas. 106.

Ohio.—Hirsch *v.* Steamboat Quaker City, 2 Disn. 144, 13 O. Dec. Reprint 89; Lake Erie, etc., R. Co. *v.* Hatch, 52 O. St. 408, 39 N. E. 1042, 61 Am. & Eng. R. Cas. 293; Roberts *v.* Union Line Exp. Co., 2 O. Dec. 577.

Oregon.—If the consignee is absent, on the arrival of the goods but lives in the immediate vicinity of the place of delivery, the carrier must notify him of the arrival of the goods, after which he has a reasonable time to remove them; but if he is absent, unknown, or cannot be found, the carrier may place the goods in a warehouse, and after keeping them a reasonable time, if not delivered, the carrier's liability as such ceases. McGregor *v.* Oregon R., etc., Co., 50 Ore. 527, 93 Pac. 465.

Tennessee.—See Code, § 3597, ch. 26, p. 841; Code 1884, § 2788; Pennsylvania R. Co. *v.* Naive, 112 Tenn. 239, 79 S. W. 124, 64 L. R. A. 443; Dean *v.* Vaccaro, 39 Tenn. (2 Head) 488, 75 Am. Dec. 744; Butler *v.* East Tennessee, etc., R. Co., 76 Tenn. (8 Lea) 32, 9 Am. & Eng. R. Cas. 249, holding that the statute does not appear to affect the liability of the carrier.

Texas.—The statute provides that a carrier shall remain liable as such until actual delivery to the consignee unless it has used due diligence to notify the consignee. See Rev. St., arts. 281, 282; Missouri Pac. R. Co. *v.* Haynes & Co., 72 Tex. 175, 10 S. W. 398, 37 Am. & Eng. R. Cas. 645; Houston, etc., R. Co. *v.* Adams, 49 Tex. 748, 30 Am. Rep. 116; Galveston, etc., R. Co. *v.* Hunt (Tex. Civ. App.), 32 S. W. 549.

What constitutes due diligence depends in some degree upon the facts and circumstances of each case in which it is to be shown, and upon the custom and usage of business at the place of delivery (Houston, etc., R. Co. *v.* Adams, 49 Tex. 748, 30 Am. Rep. 116), and is a question for the jury. (Texas, etc., R. Co. *v.* Gilmore (Tex. Civ. App.), 152 S. W. 1102).

Vermont.—Ouimit *v.* Henshaw, 35 Vt. 605, 84 Am. Dec. 646; Blumenthal *v.* Brainerd, 38 Vt. 402, 91 Am. Dec. 350; Winslow *v.* Vermont, etc., R. Co., 42 Vt. 700, 1 Am. Rep. 365.

Virginia.—See Norfolk, etc., R. Co. *v.* Stuart's Draft Mill. Co., 109 Va. 184, 63 S. E. 415.

Washington.—North Yakima Brewing etc., Co. *v.* Northern Pac. R. Co., 95 Pac. 486, 49 Wash. 375, 16 L. R. A., N. S., 935.

Wisconsin.—Wood *v.* Crocker, 18 Wis. 345, 86 Am. Dec. 773; Lemke *v.* Chicago, etc., R. Co., 39 Wis. 449, 13 Am. R. Rep. 406. See Hermann *v.* Goodrich, 21 Wis. 536.

Canada.—Richardson *v.* Canadian Pac. R. Co., 19 Ont. Rep. 369, 45 Am. & Eng. R. Cas. 413.

Origin of rule.—"The custom of sending notice to the consignee sprung out of the necessity of business, and is for the benefit and convenience of both parties. The railroads established this custom, the public acquiesced therein, and the law adapts itself thereto." Railroad Co. *v.* Hatch, 52 O. St. 408, 39 N. E. 1042.

Where the consignee is absent from the terminus of the carrier's route, and has no agent to whom delivery can be made or notice given, the carrier may terminate his liability as carrier by depositing the merchandise in a warehouse. Northrop *v.* Syracuse, etc., R. Co. (N. Y.), 5 Abb. Prac., N. S., 425; S. C., 3 Abb. Dec. 386.

Effect of knowledge of consignee.—Where tools were consigned to the

addressed to the consignee's usual shipping place,[64] or where his residence is unknown and the carrier fails to ascertain it after due inquiry.[65]

Effect of Contract or Custom.—It is held that the giving of notice to the consignee of the arrival of goods may be waived by contract,[66] and also by the previous course of dealings between the parties.[67] And notice may be excused

shipper at a flag station, and on arrival the consignee, in passing through the town, noticed a car containing similar goods standing on the side track, whereupon he immediately took steps to ascertain if the shipment belonged to him, no notice of arrival on the part of the carrier was required. Normile *v.* Northern Pac. R. Co., 77 Pac. 1087, 36 Wash. 21, 67 L. R. A. 271.

Where the bill of lading stipulated for notice to a third person, and provided that if the property was not removed on presentation of the bill within 48 hours after notice, the carrier was liable as a warehouseman only, the third person, on receiving notice, must within forty-eight hours present the bill if he wished to hold the carrier as such, as after that time the carrier became a warehouseman. Lyons *v.* New York, etc., R. Co., 119 N. Y. S. 703, affirmed in 120 N. Y. S. 1132, 136 App. Div. 903.

A carrier under a bill of lading requiring notice to the purchaser from the consignee is liable as carrier until it has placed the car in a proper place for examination by the purchaser. Johnson & Co. *v.* Central Vermont R. Co. (Vt.), 79 Atl. 1095.

Condition in notice.—Where after a stipulation for notice, without any agreement as to the form or conditions thereof, the carrier gives notice, with the condition written thereon, that the liability of the carrier terminates upon the arrival of the goods, and the consignee receive such notice without objection and continues his shipments over the road, such condition is binding on both parties. Leavenworth, etc., R. Co. *v.* Maris, 16 Kan. 333.

64. **Goods not properly addressed.**—American Standard Jewelry Co. *v.* Witherington, 81 Ark. 134, 98 S. W. 695.

65. Pelton *v.* Rensselaer, etc., R. Co., 54 N. Y. 214, 13 Am. Rep. 568. See Zinn *v.* New Jersey Steamboat Co., 49 N. Y. 442, 10 Am. Rep. 402, 3 Am. R. Rep. 340.

In Sherman *v.* Hudson River R. Co., 64 N. Y. 254, it was said: "When the consignee is unknown to the carrier, a due effort to find him and notify him of the arrival of the goods is a condition precedent to the right to warehouse them."

If the consignee is unknown, or absent, or cannot be found, the goods may be stored. Railroad Co. *v.* Hatch, 52 O. St. 408, 39 N. E. 1042; affirming 6 O. C. C. 230, 3 O. C. D. 430; Hirsch *v.* Steamboat Quaker City, 2 Disn. 144, 13 O. Dec. Reprint 89; Roberts *v.* Union Line Exp. Co., 2 O. Dec. 577.

Where a party has no fixed residence, and his temporary stopping place is not known to the carrier shipping his goods, and on their arrival at the point of destination the company places them in the warehouse, it is not at fault for failing to give the shipper notice of the arrival of the goods. Butler *v.* East Tennessee, etc., R. Co., 76 Tenn. (8 Lea) 32, 9 Am. & Eng. R. Cas. 249.

66. **Contract dispensing with notice.**—Gashweiler *v.* Wabash, etc., R. Co., 83 Mo. 112, 53 Am. Rep. 558; Illinois Cent. R. Co. *v.* Carter, 62 Ill. App. 618.

Where the bill of lading provides that the goods shall be taken from alongside by the consignees immediately the vessel is ready to discharge, otherwise they shall be deposited in the company's warehouse at the owner's risk notice to the consignees is not necessary. Constable *v.* National Steamship Co., 154 U. S. 51, 38 L. Ed. 903, 14 S. Ct. 1062.

67. Illinois Cent. R. Co. *v.* Carter, 62 Ill. App. 618.

Where it has been the custom of the consignee to call daily and receive goods shipped to him by a common carrier, no notice to the consignee of the arrival of any consignment is necessary; but, where the usage has been for the consignee not to receive or remove goods arriving upon a holiday, as to such goods the ordinary rule applies. The carrier, to relieve himself from liability for damages to the goods after their arrival, must give notice and a reasonable time to remove; otherwise, the liability attaches until after the time of removal upon the next day. Russell Mfg. Co. *v.* New Haven Steamboat Co., 52 N. Y. 657. See S. C., 50 N. Y. 121.

Question for jury.—In an action against a railroad company for the value of oats shipped by plaintiff directed to a military officer at the foot of Sixth street wharf, in Washington, D. C., there was evidence that a course of dealing between defendant and the consignee to the effect that the consignee's depot was the Sixth street wharf in Washington, he being the forage agent of the government; that it was his duty to report every night to another officer all cars that arrived at the foot of Sixth street; that as many as twenty cars a day were received at such depot on the government wharves, whence oats were shipped to Alexandria. The custom was to deliver all cars marked for the first officer referred to at the foot of Sixth street. Held, that the court should have left it to the jury to find whether the course of dealing between the railroad

where a usage or custom prevails which dispenses with it;[68] but such usage or custom must be so clear and notorious as to afford a presumption that all parties acted with an understanding of its character and application.[69] And notice must be given where the carrier contracts to give notice,[70] or where it is the custom of the parties for it to be given.[71]

Sufficiency of Notice.—As to sufficiency of notice of arrival of goods, see elsewhere.[72]

§ 1096. What Is Reasonable Time.—Some courts hold that the liability of a carrier as such continues until the consignee has had a reasonable opportunity to remove the goods on arrival at their destination.[73] It is held that

company and the consignee was such as to make it unreasonable to expect personal notice of the arrival of the cars, and if such course of dealing rendered such notice necessary, or dispensed with it, then the company was not imperatively required to give such notice, to constitute delivery, notwithstanding an extra charge of streetage. Baltimore, etc., R. Co. *v.* Green, 25 Md. 72.

68. Effect of usage or custom.—*Illinois.*—Illinois Cent. R. Co. *v.* Carter, 62 Ill. App. 618.

New York.—Gibson *v.* Culver (N. Y.), 17 Wend. 305, 31 Am. Dec. 297; Atlantic Nav. Co. *v.* Johnson, 27 N. Y. Super. Ct. 475. Compare Mierson *v.* Hope, 2 Sweeney 56.

Vermont.—Farmers', etc., Bank *v.* Chaplain Transp. Co., 16 Vt. 52, 42 Am. Dec. 491.

Contra.—A custom of a railroad company not to notify consignees of the arrival of goods at a station where there was no freight agent will not relieve the company from liability for injury to goods after their arrival at such station, where the consignee was not notified. Allam *v.* Pennsylvania R. Co., 5 Pa. Dist. R. 54.

The liability of a carrier does not terminate until notice of the arrival of the goods at their destination has been given the consignee, irrespective of any custom on the part of the railroad not to give such notice. Gulf, etc., R. Co. *v.* Fuqua, 36 So. 449, 84 Miss. 490.

The usage or custom of a port can not dispense with delivery, or notice of the landing of the goods. Dean *v.* Vaccaro, 39 Tenn. (2 Head) 488, 75 Am. Dec. 744.

Custom as to holiday.—Where it is a general and uniform custom at a place to which freight is consigned not to give notice of arrival on the 4th of July, negligence can not be predicated on the failure of a carrier to give notice, and one who ships goods to an agent at a place where such custom prevails is bound by such custom, though he had no actual knowledge thereof. Pennsylvania R. Co. *v.* Naive, 112 Tenn. 239, 79 S. W. 124, 64 L. R. A. 443.

69. Usage or custom must be notorious.—The Mary Washington, Fed. Cas. No. 9,229, 1 Abb. U. S. 1, Chase 125; Howe *v.* Lexington, Fed. Cas. No. 6,767a. See Gibson *v.* Culver (N. Y.), 17 Wend. 305, 31 Am. Dec. 297.

Contra.—See Turner *v.* Huff, 46 Ark. 222, 55 Am. Rep. 580.

70. Contract to give notice.—Tanner *v.* Oil Creek R. Co., 53 Pa. 411; Layton & Sons *v.* Charleston, etc., R. Co., 90 S. C. 323, 72 S. E. 988.

Where a bill of lading contains a provision and condition to the effect that, "if the word 'order' is written immediately before or after the name of the party to whose order the property is consigned, the surrender of the bill of lading, properly indorsed, shall be required before delivery of the property at destination," and the words "order notify" appear before the name of the consignee thereon, such bill of lading requires notice to the consignee. Layton & Sons *v.* Charleston, etc., R. Co., 72 S. E. 988, 90 S. C. 323.

That notice was contrary to the rules of the freight office does not excuse the carrier's failure to notify the consignee where it contracts to do so. Tanner *v.* Oil Creek R. Co., 53 Pa. 411.

71. Custom to give notice.—*Alabama.*—Such custom does not have the effect of imposing the positive duty to give such notice, but merely affects the time of termination of the liability of the carrier as such. Central, etc., R. Co. *v.* Burton, 165 Ala. 425, 51 So. 643.

Georgia.—Richmond, etc., R. Co. *v.* White, 88 Ga. 805, 15 S. E. 802.

Kentucky.—Bryant *v.* Louisville, etc., R. Co., 9 Ky. L. Rep. 47; Illinois Cent. R. Co. *v.* Hopkinsville Canning Co., 132 Ky. 578, 116 S. W. 758.

Missouri.—Frank *v.* Grand Tower, etc., R. Co., 57 Mo. App. 181; Herf, etc., Chemical Co. *v.* Lackawanna Line, 100 Mo. App. 164, 73 S. W. 346.

The usage may be dispensed with by an express stipulation to that effect in the contract of shipment; but a stipulation that the goods are to be called for on the day of their arrival does not have that effect. Herf, etc., Chemical Co. *v.* Lackawanna Line, 73 S. W. 346, 100 Mo. App. 164.

72. Sufficiency of notice.—See ante, "Duties in Making Delivery," § 845.

73. See ante, "Railroads and Carriers by Water Having Fixed Schedule," § 1094.

such reasonable time is not to have reference to the peculiar situation and circumstances of the consignee, but is such time as would give to a person residing in the vicinity of the place of delivery, and informed of the usual course of the carrier's business and of the time when the goods may be expected to arrive, suitable opportunity, within the usual business hours, to inspect the goods and take them away.[74] It is also held that what constitutes such reasonable time depends upon the circumstances of each particular case,[75] such as the character of the freight,[76] and the proximity of the consignee to the point of delivery and his knowledge of the arrival of the shipment.[77] Computation of the reasonable time in which a consignee may apply for and remove freight begins when it is at the place and ready for delivery in the usual manner.[78] It is also held that the period of reasonable time begins when the consignee knows, or, in the exercise of reasonable diligence should know, that the goods have arrived.[79]

Instances of reasonable time are set out in the notes.[80]

74. What is reasonable time.—*Maryland.*—United Fruit Co. *v.* New York, etc., Transp. Co., 104 Md. 567, 65 Atl. 415, 8 L. R. A., N. S., 240.

Minnesota.—Derosia *v.* Winona, etc., R. Co., 18 Minn. 133, Gil. 119; Pinney *v.* First Division, etc., R. Co., 19 Minn. 251, Gil. 211, 20 Am. R. Rep. 71.

New Hampshire.—Moses *v.* Boston, etc., Railroad, 32 N. H. 523, 64 Am. Dec. 381.

Wisconsin.—See Wood *v.* Crocker, 18 Wis. 345, 86 Am. Dec. 773.

75. Central, etc., R. Co. *v.* Merrill & Co., 153 Ala. 277, 45 So. 628; Poythress *v.* Durham, etc., R. Co., 148 N. C. 391, 62 S. E. 515, 18 L. R. A., N. S., 427; North Yakima Brewing, etc., Co. *v.* Northern Pac. R. Co., 49 Wash. 375, 95 Pac. 486, 16 L. R. A., N. S., 935.

76. Briant *v.* Louisville, etc., R. Co., 9 Ky. L. Rep. 47.

77. Central, etc., R. Co. *v.* Merrill & Co., 153 Ala. 277, 45 So. 628; Briant *v.* Louisville, etc., R. Co., 9 Ky. L. Rep. 47. Contra, Berry *v.* West Virginia, etc., R. Co., 44 W. Va. 538, 30 S. E. 143, 67 Am. St. Rep. 781.

78. Southern R. Co. *v.* Adams Mach. Co., 165 Ala. 436, 51 So. 779.

79. Lewis *v.* Louisville, etc., R. Co., 135 Ky. 361, 122 S. W. 184, 25 L. R. A., N. S., 938, 21 Am. & Eng. Ann. Cas. 527.

80. Instances of reasonable time.—Plaintiff consigned goods to himself at Waseca. They arrived, a portion on March 8th and part on March 10th, and were unloaded ready for delivery on the morning following their arrival. He first called for them March 16th, and, no one being present to deliver them to him, he went away, and March 17th they were destroyed by fire. Held, that a reasonable time in which to remove them had elapsed. Derosia *v.* Winona, etc., R. Co., 18 Minn. 133, Gil. 119.

Where the consignee, after being notified on Saturday afternoon of the delivery of the shipment on the dock, allows part of it to remain there until the following Wednesday afternoon, when it is destroyed by fire, the carrier is not liable as a carrier for its loss. Wynantskill Knitting Co. *v.* Murray, 90 Hun 554, 36 N. Y. S. 26, 71 N. Y. St. Rep. 33.

Notice of arrival on November 25, was given the owners the same day; the goods were discharged on the 27th; and the owners had three full days in which to remove them before December 1st, when it was discovered that part of the goods had been lost since the 29th. Held, that the owners had had sufficient time by the exercise of due diligence to remove them. Tarbell *v.* Royal Exch. Shipping Co., 53 N. Y. Super. Ct. 190; S. C., 110 N. Y. 170, 17 N. E. 721, 6 Am. St. Rep. 350.

Goods arrived Thursday, and were discharged on dock Friday. Notice was mailed Thursday evening, but did not reach the plaintiff till Saturday forenoon. Saturday was very stormy, and the goods were not called for until Monday, when they were found to be greatly injured by rain. Held, that Monday was a reasonable time to remove the goods. Solomon *v.* Philadelphia, etc., Steamboat Co. (N. Y.), 2 Daly 104.

After the arrival of goods they were placed on a platform at the depot for the convenience of delivery to consignees, and remained there for nearly two days. Notice of their arrival was given to plaintiff, who paid the freight charges with full knowledge of the place of deposit; and in the afternoon of the second day they were destroyed by fire. Held, that defendant's liability as carrier had ceased. Chalk *v.* Charlotte, etc., R. Co., 85 N. C. 423, 9 Am. & Eng. R. Cas. 106.

The consignee of a package of money, who lived one mile from the station, received notice Monday evening that the package had arrived, but did not call for it until Wednesday noon. The package was lost in the meanwhile. Held, that the consignee did not call for the package within a reasonable time, and hence the carrier was not liable. Adams Exp. Co. *v.* Tingle, 7 Ky. L. Rep. 441.

The consignee of money, who learned, by meeting the station agent at another place than the destination point, that the money had arrived, and who proceeded

Where the goods did not arrive on time, and when the consignee ex-

to his home, 14 miles from the destination point, and was about sending for the money the next day, when it was destroyed, had had a reasonable time to remove it. Roberts *v.* Union Line Exp. Co., 2 O. Dec. 577.

Where the only reason why goods ready for delivery by a carrier were not removed before destroyed by fire was because the consignee wished to have the bill of lading when he paid the freight, and had not received it from the consignor although he had written for it several times, a reasonable time for removal had elapsed where the goods had remained in the depot some weeks after arrival, and the consignee, about a week before the fire, had knowledge of their arrival, and the carrier's only liability was that of a warehouseman. Knight *v.* Southern Railway, 67 S. E. 16, 85 S. C. 78.

Where a box lay in a railroad company's freight house from the 17th of September to the 24th, the consignee knowing the fact, and on the night of the 24th was stolen, it was held that a reasonable time had elapsed. Blumenthal *v.* Brainerd, 38 Vt. 402, 91 Am. Dec. 350.

Where goods were held at destination three and one-half months after arrival when they were sold for freight charges, the carrier's liability as a carrier had ceased, and had become that of a warehouseman when the goods were sold. Norfolk, etc., R. Co. *v.* Stuart's Draft Mill. Co., 109 Va. 184, 63 S. E. 415.

Plaintiff called at defendant's freight office and said that he desired to pay the freight bills and remove the shipment. He was informed that the freight bills would be ready at any time after noon on that day; but plaintiff did not call for the containers in the afternoon, and they were destroyed the following night by fire, without negligence on defendant's part. Plaintiff's place of business was but 400 feet from the warehouse where the containers were stored, and the only reason why they were not taken away, during the afternoon of May 5th, before the fire, was that it did not suit plaintiff's convenience. Held, that defendant's relation as carrier had been terminated, and that it was not responsible for the loss of the containers. North Yakima Brewing, etc., Co. *v.* Northern Pac. R. Co., 95 Pac. 486, 49 Wash. 375, 16 L. R. A., N. S., 935.

Plaintiff shipped goods by defendant's road to W., where they were received at the depot at 5:30 p. m. on Saturday, and were destroyed by fire about noon on the following Tuesday. Held that, plaintiff had a reasonable time in which to remove the goods. Lemke *v.* Chicago, etc., R. Co., 39 Wis. 449, 13 Am. R. Rep. 406.

One day is a reasonable time to unload, and remove to a distance of one mile 63 bales of hops, so as to change the carrier's liability to that of a warehouseman, where the consignee has sufficient drays available to effect the removal. Brand *v.* New Jersey Steamboat Co., 10 Misc. Rep. 128, 30 N. Y. S. 903, 62 N. Y. St. Rep. 470.

Three days after notice held reasonable time. Anniston, etc., R. Co. *v.* Ledbetter, 92 Ala. 326, 9 So. 73; Backhaus *v.* Chicago, etc., R. Co., 92 Wis. 393, 66 N. W. 400.

Where a piano, which could have been removed from the carrier's depot in about an hour, is allowed to remain three days after its arrival, the carrier will be held liable only as a warehouseman, notwithstanding consignee lived twenty-eight miles away. Columbus, etc., R. Co. *v.* Ludden, 89 Ala. 612, 7 So. 471, 42 Am. & Eng. R. Cas. 404.

Where a cart shipped to the shipper, as consignee, was received at the delivery point on September 27th, and the consignee notified thereof, the carrier was only liable as a warehouseman for its loss by fire on October 1st, even though the consignee did not arrive at the place of delivery, or have an agent there, till after such time. Denver, etc., R. Co. *v.* Peterson, 69 Pac. 578, 30 Colo. 77, 97 Am. St. Rep. 76.

Six days held reasonable time. Welch *v.* Concord Railroad, 68 N. H. 206, 44 Atl. 304.

Plaintiff received four hundred and thirty-seven bales of cotton, which had been shipped over defendant's road. Plaintiff immediately began to haul the cotton in wagons to its factory, which was six miles distant. The station platform would only hold about one hundred bales, and the rest were allowed to remain in the cars until room was made for them on the platform. Six days after its arrival one hundred and three bales on the platform and twenty-five bales in a car were destroyed by fire. Held, that such six days was a reasonable time within which the cotton might have been removed, as a matter of law, and hence the liability of the defendant as a common carrier had ceased, under the bill of lading, providing that liability as a carrier ceased on the arrival of the goods at their destination. Tallassee Falls Mfg. Co. *v.* Western Railway, 29 So. 203, 128 Ala. 167.

Eight days held more than a reasonable time. Leavenworth, etc., R. Co. *v.* Maris, 16 Kan. 333.

Nine days.—Where goods shipped to a consignee under a contract providing that, if not removed in twelve working hours, they should remain stored in the freight station at the owner's risk, were stolen nine days after arrival having been

pected them, that fact is to be considered in determining whether a consignee

meanwhile seized on attachment against the consignee, who failed to claim them, it was held, that the carrier had become a warehouseman. Frank Bros. & Co. *v.* Central R. Co., 9 Pa. Super. Ct. 129.

Eighteen days between the mailing of notice of the arrival of goods at their destination and their destruction by fire is more than a reasonable time for their removal by the consignee. Southern R. Co. *v.* Adams Mach. Co., 165 Ala. 436, 51 So. 779.

Instances of what is not reasonable time.—A shipment was ready for delivery at about noon and was burned that night. It did not appear where the consignee resided or was engaged in business, or that he knew of its arrival or readiness for delivery. Held that, it was not a reasonable time within which the company's liability should be changed from that of a carrier to that of a warehouseman. Central, etc., R. Co. *v.* Merrill & Co., 153 Ala. 277, 45 So. 628.

In the absence of statute or custom, from the arrival of goods at destination on Friday at 3 p. m. to Monday at 1:45 a. m. was not a reasonable time for their removal by the consignee so as to terminate the liability of the carrier as such. Central, etc., R. Co. *v.* Burton, 165 Ala. 425, 51 So. 643.

A steamboat discharged a shipment of twenty-six bales of cotton Saturday afternoon, about sunset. The consignor, who was then present, received notice, but was able to remove twenty bales only. On Monday following, the consignee was required to remove another shipment, which had previously arrived, and did not call for the remaining six bales until about 2 o'clock p. m. Five bales had then disappeared. There was evidence that it was customary for the consignee to have at least forty-eight hours within which to remove goods from the wharf. Held, that the consignee was not guilty of any negligence, and that the carrier's liability did not end when the cotton was first demanded by the consignee. Sleade *v.* Payne, 14 La. Ann. 453.

Goods arrived at the carrier's freight house between 1 and 3 o'clock in the afternoon. In the usual course of business, from two to three hours were required to unload the freight from the cars into the warehouse, and no goods could be removed therefrom after 5 o'clock until the next morning. During the night the goods were consumed by fire. Held, that upon these facts the jury were warranted in finding that the consignee had not a reasonable opportunity to take the wool into his possession before the fire. Moses *v.* Boston, etc., Railroad, 32 N. H. 523, 64 Am. Dec. 381.

A railroad company is liable for goods destroyed in its cars by fire on the night after their arrival, if the consignee, immediately on notice of their arrival, begins to remove them, using a reasonable number of teams, and discontinues his labors only at the end of the usual working hours of the day. Dunham *v.* Boston, etc., R. Co., 46 Hun 245, 11 N. Y. St. Rep. 472.

Notice of arrival of the goods received by the consignee after dark, in the month of February, would not require him to call for them before business hours the next day, and the carrier is liable if the goods are burned that night in its warehouse. Lake Erie, etc., R. Co. *v.* Hatch, 6 O. C. C. 230, 3 O. C. D. 430.

Plaintiff's agent learned of the arrival of the goods in question between 4 and 5 o'clock p. m., which was a few hours after the car in which the goods were transported reached destination. The shipping receipt had not arrived, and it was customary for the carrier's office to close at 6 p. m. Plaintiff did not remove the goods that night, during which they were destroyed by fire. Held, that the loss occurred before the expiration of a reasonable time for the removal of the goods as a matter of law. McGregor *v.* Oregon R., etc., Co., 50 Ore. 527, 93 Pac. 465.

Goods which arrived at their destination at 11 o'clock a. m. were unloaded in defendant's depot between 1 and 3 p. m., and were probably ready for delivery to the consignee about 4 o'clock p. m. The depot was closed, as usual, at 6 p. m., and the goods were destroyed by fire the next morning, before business hours. Held, that a reasonable time for the consignee to take the goods away had not elapsed before their destruction, and defendant continued liable for them as a common carrier. Parker *v.* Milwaukee, etc., R. Co., 30 Wis. 689, 7 Am. R. Rep. 255.

Goods for the plaintiffs, transported over the defendant's railroad, reached the station at the place of their destination near sundown, and were taken from the cars and placed in the warehouse of the company about dark on Sunday night, and a few minutes afterwards the warehouse was closed for the night. The warehouse was three-quarters of a mile from the plaintiffs' place of business. Their cartman had called for the goods on Saturday afternoon about 3 o'clock, and was told by the freight agent that he need not come again that day, as it would be late before the freight train would arrive. He was, however, informed about dusk that the goods had come, but made no effort to get them, as it was nearly time for the warehouse to close. Before Monday morning the goods were destroyed, together with the

had such reasonable opportunity to remove the goods as would terminate the liability of a railroad as a common carrier.[81]

The consignee's distance from the depot or means or removal is not to be considered in determining what is a reasonable time.[82]

Where there is a stipulation for notice, without limitations or conditions, of the arrival of goods, the reasonable time for removal commences with the date of the notice.[83]

When Question for Court or Jury.—The question whether a consignee has had a reasonable time in which to remove goods after their arrival at the place of destination is a question for the jury, if there be a conflict of evidence as to the material facts, or when the facts are doubtful;[84] but if the evidence is undisputed,[85] or the facts few and simple,[86] the question is one for the court.

warehouse, without fault of the defendant. Held, that the defendant was liable for the goods as a common carrier. Wood *v.* Crocker, 18 Wis. 345, 86 Am. Dec. 773.

The consignee of flour sent by rail demanded the flour at the freight depot the morning after its arrival which was late in the afternoon, and it was not to be found. The railroad company was held liable. Milwaukee, etc., R. Co. *v.* Fairchild, 6 Wis. 403.

81. **Goods arriving out of time.**—Jeffersonville R. Co. *v.* Cleveland (Ky.), 2 Bush. 468.

82. **Distance from depot.**—Berry *v.* West Virginia, etc., R. Co., 44 W. Va. 538, 30 S. E. 143, 67 Am. St. Rep. 781; Gulf, etc., R. Co. *v.* Ferguson-McKinney Dry Goods Co., 97 Miss. 266, 52 So. 797. But see Central, etc., R. Co. *v.* Merrill & Co., 153 Ala. 277, 45 So. 628.

That the consignee lives twenty-eight miles from the place to which the goods are consigned will not be considered in determining what is a reasonable time after the arrival of the goods within which he should have called for them. Columbus, etc., R. Co. *v.* Ludden, 89 Ala. 612, 7 So. 471, 42 Am. & Eng. R. Cas. 404. See Southern R. Co. *v.* Aldredge, 38 So. 805, 142 Ala. 368.

83. **Stipulation for notice.**—Leavenworth, etc., R. Co. *v.* Maris, 16 Kan. 333.

84. **Question for jury.**—*United States.*—Broadwell *v.* Butler, Fed. Cas. No. 1910, 6 McLean 296.

Massachusetts.—Sessions *v.* Western R. Corp. (Mass.), 16 Gray 132.

Minnesota.—Derosia *v.* Winona, etc., R. Co., 18 Minn. 133, Gil. 119, 8 Am. R. Rep. 363.

Missouri.—Frank *v.* Grand Tower, etc., R. Co., 57 Mo. App. 181.

New York.—Roth *v.* Buffalo, etc., R. Co., 34 N. Y. 548, 90 Am. Dec. 736; Hedges *v.* Hudson River R. Co., 49 N. Y. 223, 3 Am. R. Rep. 346; reversing 6 Robt. N. Y. 119. See Lamb *v.* Camden, etc., Transp. Co. (N. Y.), 2 Daly 454.

North Carolina.—Poythress *v.* Durham, etc., R. Co., 148 N. C. 391, 62 S. E. 515, 18 L. R. A., N. S., 427.

South Carolina.—Knight *v.* Southern Railway, 85 S. C. 78, 67 S. E. 16.

West Virginia.—Berry *v.* West Virginia, etc., R. Co., 44 W. Va. 538, 30 S. E. 143, 67 Am. St. Rep. 781.

Wisconsin.—Lemke *v.* Chicago, etc., R. Co., 39 Wis. 449, 13 Am. R. Rep. 406; Wood *v.* Milwaukee, etc., R. Co., 27 Wis. 541, 9 Am. Rep. 465, 2 Am. R. Rep. 312.

England.—Coxon *v.* North Eastern R. Co., 4 Ry. & C. T. Cas. 284.

Where the passage to the wharf was so blocked by landing other freight that the carts of the consignee could not obtain access to his goods, which were damaged by rain before removal, held, that it was a question for the jury to determine whether under circumstances a reasonable time had elapsed after notice of its arrival for the consignees to remove it, before its injury by the rain. Goodwin *v.* Baltimore, etc., R. Co. (N. Y.), 58 Barb. 193.

85. **Question for court.**—*Alabama.*—Columbus, etc., R. Co. *v.* Ludden, 89 Ala. 612, 7 So. 471, 42 Am. & Eng. R. Cas. 404.

Colorado.—Denver, etc., R. Co. *v.* Peterson, 30 Colo. 77, 69 Pac. 578, 97 Am. St. Rep. 76.

Kentucky.—Adams Exp. Co. *v.* Tingle, 7 Ky. L. Rep. 441.

Missouri.—Frank *v.* Grand Tower, etc., R. Co., 57 Mo. App. 181.

New York.—Laporte *v.* Wells Fargo & Co.'s Exp., 48 N. Y. S. 292, 23 App. Div. 267; Hedges *v.* Hudson River R. Co., 49 N. Y. 223, 3 Am. R. Rep. 346.

North Carolina.—Poythress *v.* Durham, etc., R. Co., 148 N. C. 391, 62 S. E. 515, 18 L. R. A., N. S., 427.

South Carolina.—Knight *v.* Southern Railway, 85 S. C. 78, 67 S. E. 16.

West Virginia.—Berry *v.* West Virginia, etc., R. Co., 44 W. Va. 538, 30 S. E. 143, 67 Am. St. Rep. 781.

Wisconsin.—Lemke *v.* Chicago, etc., R. Co., 39 Wis. 449, 13 Am. R. Rep. 406.

86. Frank *v.* Grand Tower, etc., R. Co., 57 Mo. App. 181; Lemke *v.* Chicago, etc., R. Co., 39 Wis. 449, 13 Am. R. Rep. 406.

§ 1097. How Long Liability Continues.—A carrier's liability as warehouseman continues so long as it keeps the goods in its warehouse,[87] or until it notifies the consignee that it will not insist on storage charges.[88]

§§ 1098-1100. Duties and Liabilities—§ 1098. In General.—Duty to Store in Safe Place.—A carrier must provide a reasonably safe place where freight can be stored;[89] or, as was stated in another case, it is bound to use ordinary care and prudence in providing a depository.[90] It is not bound to provide a place that is fireproof.[91] Where a carrier has no depot or warehouse at the place of destination for the storage of such freight as corn, it has a right to warehouse the corn in cars on side tracks.[92]

Duty to Keep Watch.—A carrier liable as a warehouseman need not employ a watchman to guard the goods transported by it, where they are awaiting delivery to the consignee at the proper place.[93] A railroad company is not re-

87. **How long liability continues.**—The City of Lincoln, 25 Fed. 835; Lane *v.* Boston, etc., R. Co., 112 Mass. 455.

88. Brunson *v.* Atlantic, etc., R. Co., 76 S. C. 9, 56 S. E. 538, 9 L. R. A., N. S., 577.

89. **Duty to store in safe place.**—Merchants', etc., Transp. Co. *v.* Merriam, 111 Ind. 5, 11 N. E. 954; American Exp. Co. *v.* Hockett, 30 Ind. 250, 95 Am. Dec. 691; Whitney *v.* Chicago, etc., R. Co., 27 Wis. 327; Bates *v.* Chicago, etc., R. Co., 140 Wis. 235, 122 N. W. 745.

For the selection of a wharf which is known to be weak for the discharge of its cargo, a vessel is liable. The City of Lincoln, 25 Fed. 835.

In an action against an express company to recover damages for the failure to deliver a package of money, an answer alleging that it placed the package in a safe owned by defendants, where they usually kept money packages, and safely locked the same; that the package, remaining thus securely locked up for several days, and no one calling for it, was stolen by burglars, who, in the nighttime, broke into the office of the defendants and broke open the safe, and stole the package of money, without any fault or neglect of the defendants, was not sufficient to show a good defense. It did not show that either the building or the safe was of such a character and construction as to render them a safe place for the deposit of money unguarded. American Exp. Co. *v.* Hockett, 30 Ind. 250, 95 Am. Dec. 691.

The fact that a carrier took adequate precautions against fire on its own premises does not exonerate it from liability as a matter of law for the destruction of goods from a fire originating on adjoining premises which it did not own nor control, although such fire was so violent that it was impossible to prevent it from spreading to its own building, where it had full knowledge of the manifest danger to its own premises arising from the specially hazardous condition of those adjoining, and took no means to guard against it. Under such circumstances it may have been culpable negligence, and a breach of duty as a bailee for hire, to place the goods in such warehouse. Judd *v.* New York, etc., Steamship Co., 117 Fed. 206, 54 C. C. A. 238, affirmed 128 Fed. 7, 62 C. C. A. 515.

Wooden warehouses, roofed with shingles, and managed and controlled by prudent agents, are lawful depositories for the storage of goods at railway depots by the carrier. Lewis, etc., Co. *v.* Louisville, etc., R. Co., 13 Ky. L. Rep. 144.

In a town of 800 inhabitants, a burglar pried up a window that was nailed down in a wooden building inclosed with boards, and whose door was locked, and stole goods stored by an express company. Held, that the company was not negligent in storing in such a building. Grossman *v.* Fargo (N. Y.), 6 Hun 310.

In villages the same degree of security can not be required of a warehouseman or a common carrier, either as to fire or burglary, as in cities. If there is no better or safer place, he may properly leave a box of jewelry overnight in his express office, used for such purposes. Laporte *v.* Wells Fargo & Co.'s Exp., 48 N. Y. S. 292, 23 App. Div. 267.

90. Louisville, etc., R. Co. *v.* Brownlee (Ky.), 14 Bush. 590.

91. **Warehouse need not be fireproof.**—Adix *v.* Chicago, etc., R. Co., 150 Iowa 379, 130 N. W. 162.

92. **Using car as warehouse.**—Gratiot St. Warehouse Co. *v.* St. Louis, etc., R. Co., 221 Ill. 418, 77 N. E. 675, affirming judgment 122 Ill. App. 405.

93. **Duty to keep watch.**—Texas Cent. R. Co. *v.* Flanary (Tex. Civ. App.), 50 S. W. 726.

A carrier is not required to keep a sufficient watch to preserve goods stored in its depot from loss by fire, where it is only liable for the exercise of reasonable care and diligence. Louisville, etc., R. Co. *v.* Gidley, 119 Ala. 523, 24 So. 753.

Where a car containing plaintiff's merry-go-round was placed on a side track four miles from town, near an amusement park, and while standing there the car and contents were destroyed at

quired to keep a continuous watch during the night in its depots at small places,[94] or where the value of goods stored is small;[95] and the mere fact that a depot had, on several occasions, been broken open, and articles of small value taken, does not impose such a duty on the company.[96]

Duty to Give Notice.—It is not required of the warehousemen at a railroad station to notify consignees living at a distance of the arrival of their goods, either through the mails or otherwise.[97] Although a carrier, as warehouseman, fails to notify the consignor of the consignee's refusal to accept the goods, it is not liable for the subsequent loss of the goods by theft from it, in the absence of proof of negligence as a bailee.[98]

Duties with Regard to Perishable Goods.—The carrier as warehouseman is bound to exercise common and ordinary prudence in the storing of perishable goods.[99] But a carrier is not negligent in failing to unload semiperishable freight after notifying the consignee of their arrival at destination, in the absence of evidence that it knew, or in the exercise of reasonable diligence should have known, that the freight would have been in better condition if unloaded.[1]

Sale of Property to Prevent Loss.—A carrier liable as a warehouseman may sell property to prevent loss by decay. Any kind of imminent danger of loss or destruction will justify a sale in such case.[2]

Statutes Making Railroad Companies Liable for Damage by Fire.—A railroad corporation is not liable, under statutes which provide that a railroad company shall be liable for damages sustained by fire from its engines,[3] or originating in operating its road,[4] for goods destroyed by fire while in its possession as warehouseman or depository.

night by fire, the railroad company was not negligent in failing to keep a watchman at the car to protect its contents from possible danger from fire. Adix *v.* Chicago, etc., R. Co., 150 Iowa 379, 130 N. W. 162.

94. Lewis, etc., Co. *v.* Louisville, etc., R. Co., 13 Ky. L. Rep. 144; Merchants' Dispatch Transp. Co. *v.* Hoskins, 14 Ky. L. Rep. 927.

95. Where the daily average of goods stored in a railroad warehouse does not exceed $500, ordinary care does not require the company to keep a night watch about such warehouse or to have some one sleep therein. Kronshage *v.* Chicago, etc., R. Co., 40 Wis. 587; Pike *v.* Chicago, etc., R. Co., 40 Wis. 583.

96. Merchants' Dispatch Transp. Co. *v.* Hoskins, 14 Ky. L. Rep. 927.

97. **Duty to notify consignee.**—Neal & Co. *v.* Wilmington, etc., R. Co., 53 N. C. 482.

98. **Duty to notify consignor.**—Adler *v.* Weir, 96 N. Y. S. 736, 49 Misc. Rep. 134.

99. **Duties with regard to perishable goods.**—Burroughs *v.* Grand Trunk R. Co., 67 Mich. 351, 34 N. W. 875.

The defendant placed eggs received by freight in its warehouse on December 11th. While there the temperature from December 17th to December 22d was from zero to 7 deg. above. Eggs would freeze in this warehouse with the thermometer at 8 deg. above zero. The eggs were frozen when examined after the 22d. Held, that the defendant was liable for damages. Burroughs *v.* Grand Trunk R. Co., 67 Mich. 351, 34 N. W. 875.

Effect of custom.—In a suit against a connecting carrier for injury to perishable goods by freezing while stored in its warehouse at Buffalo, N. Y., it was immaterial that railroad companies both in Buffalo and Michigan generally have and use warehouses which are not protection to perishable goods against freezing, and that they do not undertake to give such protection to property in their warehouses. Burroughs *v.* Grand Trunk R. Co., 34 N. W. 875, 67 Mich. 351. (By divided court.)

1. Becker *v.* Pennsylvania R. Co., 96 N. Y. S. 1, 109 App. Div. 230.

Where a contract for the shipment of evaporated fruit provided that property not removed by the consignee within twenty-four hours after its arrival at destination might be kept in the car at the sole risk of the owner, the carrier, after notifying the consignee of the arrival of the fruit, was not bound to unload the fruit, and put it in cold storage, to await the consignee's pleasure and convenience, and was not negligent in leaving the fruit in the cars for several days. Becker *v.* Pennsylvania R. Co., 96 N. Y. S. 1, 109 App. Div. 230.

2. **Sale to prevent loss.**—Dudley *v.* Chicago, etc., R. Co., 58 W. Va. 604, 52 S. E. 718, 3 L. R. A., N. S., 1135, 112 Am. St. Rep. 1027.

3. **New Hampshire statute.**—Gen. Laws, c. 162, §§ 8, 9; Welch *v.* Concord Railroad, 68 N. H. 206, 44 Atl. 304.

4. **Oklahoma statute.**—St. 1893, c. 37; Walker *v.* Eikleberry, 7 Okla. 599, 54 Pac. 553.

§ 1099. Degree of Care.—Bailee for Hire—Ordinary Care.—It is held that a carrier which has carried property for hire and is keeping it for a reasonable time in its own warehouse, at the point of destination, until it shall be called for, is a bailee for hire.[5] As such it is liable only for the want of ordinary care in the custody of the goods;[6] and the care exercised should be in

5. **Bailee for hire.**—Hardman *v.* Montana Union R. Co., 83 Fed. 88, 27 C. C. A. 407, 39 L. R. A. 300.

That goods were stored in cars instead of a warehouse did not change the railway company's position as a depository for hire. Dixon *v.* Central, etc., R. Co., 110 Ga. 173, 35 S. E. 369.

Necessity for knowledge of notice of storage charges.—In an action to recover from a railway company, as a bailee for hire, the value of goods alleged to be lost from its warehouse through its negligence, it was not error for the court to refuse to instruct the jury that a certain printed notice posted in defendant's depot, relating to the rates charged for the storage of goods not removed within two days after being unloaded from the cars, and limiting to defendant's liability for property remaining in the freight depot, could not be considered as creating a contract between the plaintiff and defendant for the storage of the goods, unless it should appear that the plaintiff knew of said notice, and acquiesced in its terms. Dimmick *v.* Milwaukee, etc., R. Co., 18 Wis. 471.

6. **Ordinary care.**—*United States.*—White *v.* Colorado Cent. R. Co., Fed. Cas. No. 17,543, 5 Dill. 428, 3 McCrary 559; The Titania, 124 Fed. 975, affirmed in 131 Fed. 229, 65 C. C. A. 215.

Alabama.—Southern R. Co. *v.* Aldredge, 142 Ala. 368, 38 So. 805.

California.—Jackson *v.* Sacramento Valley R. Co., 23 Cal. 268.

Delaware.—McHenry *v.* Philadelphia, etc., R. Co. (Del.), 4 Har. 448.

Georgia.—Kight *v.* Wrightsville, etc., R. Co., 127 Ga. 204, 56 S. E. 363. See Civ. Code, 1895, §§ 2928, 2930. Western, etc., Railroad *v.* Camp, 53 Ga. 596.

Illinois.—Chicago, etc., R. Co. *v.* Scott, 42 Ill. 132; Bryan *v.* Chicago, etc., R. Co., 169 Ill. App. 181.

Indiana.—Merchants', etc., Transp. Co. *v.* Merriam, 111 Ind. 5, 11 N. E. 954; Cincinnati, etc., R. Co. *v.* McCool, 26 Ind. 140.

Iowa.—Leland *v.* Chicago, etc., R. Co. (Iowa), 23 N. W. 390; Adix *v.* Chicago, etc., R. Co., 150 Iowa 379, 130 N. W. 162.

Kansas.—Leavenworth, etc., R. Co. *v.* Maris, 16 Kan. 333.

Kentucky.—Louisville, etc., R. Co. *v.* Brownlee (Ky.), 14 Bush 590; Adams Exp. Co. *v.* Tingle, 10 Ky. L. Rep. 358.

Maryland.—Baltimore, etc., R. Co. *v.* Schumacher, 29 Md. 168, 96 Am. Dec. 510.

Massachusetts.—Lane *v.* Boston, etc., R. Co., 112 Mass. 455; Thomas *v.* Boston, etc., R. Corp. (Mass.), 10 Metc. 477, 43 Am. Dec. 444;; Norway Plains Co. *v.* Boston, etc., Railroad (Mass.), 1 Gray 263, 61 Am. Dec. 423.

Minnesota.—Derosia *v.* Winona, etc., R. Co., 18 Minn. 133, Gil. 119, 8 Am. R. Rep. 363.

Missouri.—Bush *v.* St. Louis, etc., R. Co., 3 Mo. App. 62; Hull & Co. *v.* Missouri Pac. R. Co., 60 Mo. App. 593.

New Hampshire.—Brown *v.* Grand Trunk Railway, 54 N. H. 535.

New York.—Grieve *v.* New York, etc., R. Co., 49 N. Y. S. 949, 25 App. Div. 518; Hathorn *v.* Ely, 28 N. Y. 78.

Ohio.—Hirsch *v.* Steamboat Quaker City, 2 Disn. 144, 13 O. Dec. Reprint 89.

Pennsylvania.—Moyer *v.* Pennsylvania R. Co., 31 Pa. Super. Ct. 559; Allam *v.* Pennsylvania R. Co., 3 Pa. Super. Ct. 325.

South Carolina.—Brunson *v.* Atlantic, etc., R. Co., 76 S. C. 9, 56 S. E. 538, 9 L. R. A., N. S., 577.

Texas.—Texas Cent. R. Co. *v.* Flanary (Tex. Civ. App.), 50 S. W. 726; Texas, etc., R. Co. *v.* Morse, 1 Texas App. Civ. Cas., § 411; Texas, etc., R. Co. *v.* Schneider, 1 Texas App. Civ. Cas., § 118.

West Virginia.—Baltimore, etc., R. Co. *v.* Morehead, 5 W. Va. 293; Berry *v.* West Virginia, etc., R. Co., 44 W. Va. 538, 30 S. E. 143, 67 Am. St. Rep. 781; Hutchinson *v.* United States Exp. Co., 63 W. Va. 128, 59 S. E. 949, 14 L. R. A., N. S., 393; Hurley & Son *v.* Norfolk, etc., R. Co., 68 W. Va. 471, 473, 69 S. E. 904.

Wisconsin.—Dimmick *v.* Milwaukee, etc., R. Co., 18 Wis. 471; Pike *v.* Chicago, etc., R. Co., 40 Wis. 583; Kronshage *v.* Chicago, etc., R. Co., 40 Wis. 587; Whitney *v.* Chicago, etc., R. Co., 27 Wis. 327.

Care demanded of other warehousemen.—Leland *v.* Chicago, etc., R. Co. (Iowa), 23 N. W. 390.

Diligence used as to own property.—Standard Milling Co. *v.* White Line Cent. Transit Co., 122 Mo. 258, 26 S. W. 704, 61 Am. & Eng. R. Cas. 185.

Evidence that the care used was such as carriers usually exercise about similar freight, is competent, but is not controlling evidence upon the question of due care. Cass *v.* Boston, etc., R. Co. (Mass.), 14 Allen 448; Lane *v.* Boston, etc., R. Co., 112 Mass. 455.

A stipulation in a bill of lading that goods be forwarded to "depot only" does not authorize the carrier to unload the goods at such depot, and give them no further attention, but it is responsible therefor as a warehouseman. Mer-

proportion to the loss likely to be sustained by want of such care.[7] A carrier as warehouseman is liable for the loss or destruction of goods caused by its negligence.[8] In the absence of negligence on its part a carrier is not liable for damages caused to the goods by storm,[9] or for their loss by theft [10] or fire.[11] A

chants', etc., Transp. Co. *v.* Merriam, 111 Ind. 5, 11 N. E. 954.

A bill of lading provided that freight, unless removed on the day of its discharge, was "liable to be stored at the risk and expense of the owner; all merchandise at owner's risk while on the wharf." The goods in question, while stored on the wharf, were damaged by an unusually high tide. Held, that the company was bound to use reasonable care in storing the goods, and was liable as a warehouseman for ordinary neglect. Merchants', etc., Transp. Co. *v.* Story, 50 Md. 4, 33 Am. Rep. 293.

Illustrations.—A cargo of lemons and oranges, consigned to defendants, was delivered at a pier in the morning of a certain day along with other consignments of the same nature. All the fruit was removed on that day, except that of the defendants, who had actual notice in time to remove it. The pier was covered, and all reasonable precautions taken to protect the fruit against frost, which precautions, however, did not avail, owing to the severity of the weather. Held, that the carrier's duties as warehouseman were fulfilled. Liverpool, etc., Co. *v.* Saitta, 22 Fed. 560, affirming 17 Fed. 695.

In an action against an express company to recover the value of a package of bonds, an answer setting up that defendants deposited the package in a good and secure iron safe of a respectable and responsible merchant of the village, and caused the safe to be securely locked, said safe being the most secure place of deposit in the village, showed that the defendants exercised reasonable care as bailees. Adams Exp. Co. *v.* Darnell, 31 Ind. 20, 99 Am. Dec. 582.

Where goods were in a lighter, awaiting removal by the consignee, who repeatedly informed the captain of the lighter that he would remove them during the day, but late in the afternoon sent word that he would not remove them that day, whereupon the captain covered them with tarpaulins, instead of putting them in a warehouse, he used reasonable care as a warehouseman. Brand *v.* New Jersey Steamboat Co., 10 Misc. Rep. 128, 30 N. Y. S. 903, 62 N. Y. St. Rep. 470.

If a carrier who is in the habit of carrying large sums of money for hire, and keeping the same for several hours after its transportation, and until it is taken away by the owner, deposits money, which has been so carried, in a wooden desk, under lock and key, in his office, to which another person has access, and which is situated in a railroad station, which is open to all comers, and then leaves the building for several hours in the middle of the day, with no person in charge of it, the judge cannot rule, as a matter of law, in an action against the carrier for a loss of the money, that the evidence fails to show such want of care as to render him liable. Conway Bank *v.* American Exp. Co. (Mass.), 8 Allen 512.

Where a railroad agent received goods into the company's warehouse at a country station, which was an ordinary wooden building kept fastened by locks and bolts day and night, and situated but two hundred yards from the agent's dwelling, it was held that ordinary care of the goods was exercised, so that the company was not liable for their loss by theft. Neal & Co. *v.* Wilmington, etc., R. Co., 53 N. C. 482.

7. Chicago, etc., R. Co. *v.* Scott, 42 Ill. 132; Baltimore, etc., R. Co. *v.* Schumacher, 29 Md. 168, 96 Am. Dec. 510.

8. *Illinois.*—American Exp. Co. *v.* Baldwin, 26 Ill. 504, 79 Am. Dec. 389.

Indiana.—Merchants', etc., Transp. Co. *v.* Merriam, 111 Ind. 5, 11 N. E. 954.

Mississippi.—Yazoo, etc., R. Co. *v.* Blum, 102 Miss. 303, 59 So. 92.

New York.—Grieve *v.* New York, etc., R. Co., 49 N. Y. S. 919, 25 App. Div. 518, Becker *v.* Pennsylvania R. Co., 96 N. Y. S. 1, 109 App. Div. 230.

Though the carrier has no freight depot, but adopts that of a railroad company, it is liable for goods destroyed through its negligence as a warehouseman. Merchants', etc., Transp. Co. *v.* Merriam, 111 Ind. 5, 11 N. E. 954.

9. **Damage caused by storm.**—Gulf, etc., R. Co. *v.* North Texas Grain Co., 32 Tex. Civ. App. 93, 74 S. W. 567.

A buyer of certain grain shipped by rail refused to receive it, and the railroad company requested the parties in interest to direct the disposition of the grain, which they refused to do, and, there being no proper storage facilities at the place to which the grain was consigned, the railroad took it to another town, 14 miles away, where it was properly stored. Held, that the railroad company was not liable for damages to the grain caused by an unprecedented storm. Gulf, etc., R. Co. *v.* North Texas Grain Co., 74 S. W. 567, 32 Tex. Civ. App. 93.

10. **Loss by theft.**—King *v.* New Brunswick, etc., Steamboat Co., 73 N. Y. S. 999, 36 Misc. Rep. 555, Byrne *v.* Fargo, 73 N. Y. S. 943, 36 Misc. Rep. 543.

11. **Loss by fire.**—Murphy *v.* Southern Railway, 57 S. E. 664, 77 S. C. 76.

carrier, as warehouseman, is not liable for the destruction of goods, caused by the negligence of its employee, who was an independent contractor.[12]

Where Goods Held Gratuitously.—Where a carrier holds goods gratuitously in its warehouse after their arrival at their destination, for the benefit of the consignee, it is liable only for losses caused by gross negligence.[13] But it has been held that the extension of time within which goods might be removed without additional charges did not change the rule of liability on the carrier to use ordinary diligence.[14] Where the owner requests agents of the carrier to keep the goods, which they refuse to do, and the owner leaves the goods at the depot, he does not thereby make the agents his own, so as to be chargeable with their acts.[15]

Compulsory Bailee.—Where goods arrive in a damaged and perishing condition, from causes for which the carrier is not responsible, and the consignees decline to receive them, the carrier becomes a compulsory bailee, bound only to such reasonable care as a prudent man would take of property of which he has become the involuntary custodian.[16]

Questions for Court or Jury.—The question whether the carrier, as a warehouseman, exercised ordinary care is generally for the jury.[17] But where

12. Brunswick Grocery Co. *v.* Brunswick, etc., R. Co., 32 S. E. 92, 106 Ga. 270, 71 Am. St. Rep. 249.

13. **Goods held gratuitously.**—*Georgia.*—Kenny Co. *v.* Atlanta, etc., R. Co., 122 Ga. 365, 50 S. E. 132.

Maine.—Knowles *v.* Atlantic, etc., R. Co., 38 Me. 55, 61 Am. Dec. 234.

Missouri.—Hapgood Plow Co. *v.* Wabash R. Co., 61 Mo. App. 372.

New Hampshire.—Brown *v.* Grand Trunk Railway, 54 N. H. 535.

North Carolina.—McCombs *v.* North Carolina R. Co., 67 N. C. 193.

Ohio.—Roberts *v.* Union Line Exp Co., 2 O. Dec. 577.

South Carolina.—Brunson *v.* Atlantic, etc., R. Co., 76 S. C. 9, 56 S. E. 538, 9 L. R. A., N. S., 577.

Tennessee.—Kremer *v.* Southern Exp Co., 46 Tenn. (6 Coldw.) 356.

West Virginia.—Baltimore, etc., R. Co. *v.* Morehead, 5 W. Va. 293.

Where a carrier is prohibited by its charter from charging for storage, it is liable only as a gratuitous bailee for property deposited with it in its warehouse to await orders from the owner for its transportation. Michigan, etc., R. Co. *v.* Shurtz, 7 Mich. 515.

Illustrations.—Where the agent of a consignee removes most of the goods from a car, but leaves some in it on account of approaching night, and the car is broken open after having been locked by the agent of the railroad company and the goods are stolen, the railroad company is only liable for gross negligence as a gratuitous bailee. Kenny Co. *v.* Atlanta, etc., R. Co., 50 S. E. 132, 122 Ga. 365.

Plaintiff shipped some hay by defendant's road, and on its arrival plaintiff requested that it might remain in the cars until he was ready to remove it to a boat. The track on which the cars stood and the one on defendant's wharf being the only one from which freight could be shipped, defendant moved the cars onto the track on the wharf, which was then, and had been for several months, overloaded with iron, and gave way, precipitating the hay into the water. Held, that defendant was a gratuitous bailee and not liable. Knowles *v.* Atlantic, etc., R. Co., 38 Me. 55, 61 Am. Dec. 234.

Where the owner of goods is present at their arrival at the place of destination, and is then notified that the carrier will not store them, and still leaves them, if the carrier does store such goods, it will be liable, as a depositary, for gross negligence in the care of them. Smith *v.* Nashua, etc., Railroad, 27 N. H. 86, 59 Am. Dec. 364

Where goods are stored in the car of a railroad company without its knowledge or consent, and it, needing the car, stores the goods in its warehouse, as a matter of accommodation to the owner, it is not responsible for the burning thereof, unless it is the result of its gross negligence. Texas Cent. R. Co. *v.* Flanary (Tex. Civ. App.), 45 S. W. 214.

A railroad company which permits a person to store his wool in a car, merely as a matter of accommodation, without any agreement on his part to ship the wool over such road or to pay any sum as freight or storage, is liable for the loss of the wool by fire only in case of gross negligence. Texas Cent. R. Co. *v.* Flanary (Tex. Civ. App.), 50 S. W. 726.

14. Western, etc., Railroad *v.* Camp, 53 Ga. 596.

15. Smith *v.* Nashua, etc., Railroad, 27 N. H. 86, 59 Am. Dec. 364.

16. **Compulsory bailee.**—The Bobolink, Fed. Cas. No. 1,588, 6 Sawy. 146.

17. **Question for jury.**—*United States.*—Judd *v.* New York, etc., Steamship Co.,

there is no dispute as to the facts, the question may become one for the court.[18] Where the consignee was notified of the arrival of goods, but failed to take them away for more than two days after their arrival, and a regulation of the company, publicly posted, directed a charge to be levied for storage of goods under such circumstances, it was proper to leave to the jury the question whether the carrier was a bailee for hire or performing a gratuitous service.[19]

§ 1100. Acts or Omissions Rendering Carrier Liable.—Proximate Cause of Loss.—A carrier in its capacity as warehouseman is liable only for the ordinary and proximate consequence of its faults.[20]

117 Fed. 206, 54 C. C. A. 238, affirmed in 128 Fed. 7, 62 C. C. A. 515.

Alabama.—Southern R. Co. v. Aldredge, 142 Ala. 368, 38 So. 805.

Arkansas.—St. Louis, etc., R. Co. v. Dodd, 59 Ark. 317, 27 S. W. 227.

Massachusetts.—See Barron v. Eldredge, 100 Mass. 455, 1 Am. Rep. 126.

Illustrations.—Where a carrier's agent testified that the depot in which the goods sued for were kept was a safe place, and that it was kept locked at night, and also in the day, whenever defendant's employees were not present, which was all the evidence on that subject, in an action for failure to deliver the goods whether or not there was a want of ordinary care was for the jury. Southern R. Co. v. Aldredge, 38 So. 805, 142 Ala. 368.

In an action against a carrier liable as warehouseman for goods destroyed, it appeared that the goods were stored in a warehouse near which was piled a large quantity of cotton, the cotton being very near the railroad tracks. About fifteen minutes after a train passed, the cotton caught fire, which extended to the warehouse in which plaintiffs' goods were stored. Held, that it was a question for the jury whether defendant, as a warehouseman, exercised ordinary care in protecting the goods. St. Louis, etc., R. Co. v. Dodd, 59 Ark. 317, 27 S. W. 227.

A steamship company received from a connecting carrier a consignment of wool, which it placed in its shed adjoining the dock to await shipment, and while there the shed and its contents were destroyed by fire, which originated in an adjoining shed owned by others. Both sheds were of wood, and very dry, and the one in which the fire originated contained a large quantity of jute, which was very inflammable, and particularly exposed to danger from fire. In an action by the owner to recover the value of the wool, there was evidence tending to show that the company had knowledge of the condition of the adjoining shed, and that it had no watchman, and little, if any, fire protection; also that while defendant employed a watchman its shed was not as well constructed to withstand a fire from the outside as others along the docks, and that there were no fire hydrants within easy reach, as there were in the case of other sheds. Held, that the question whether defendant exercised due care for the protection of plaintiff's goods was one for the jury. Judd v. New York, etc., Steamship Co., 117 Fed. 206, 54 C. C. A. 238, rehearing granted 118 Fed. 826, 55 C. C. A. 448, affirmed in 128 Fed. 7, 62 C. C. A. 515.

18. Question for court.—Laporte v. Wells Fargo & Co.'s Exp., 48 N. Y. S. 292, 23 App. Div. 267.

19. Dimmick v. Milwaukee, etc., R. Co., 18 Wis. 471.

20. Proximate cause of loss—Instances when defendant liable.—A railroad company holding property in its warehouse as a bailee for hire allowed a car marked "Powder," which was in fact empty, but locked, to be placed in close proximity thereto. The warehouse caught fire, and the property was destroyed solely because the firemen were prevented, through reasonable fear of the powder car, from extinguishing the fire. Held, that the company was liable for the loss. Hardman v. Montana Union R. Co., 83 Fed. 88, 27 C. C. A. 407, 39 L. R. A. 500.

Where goods are placed by a carrier in its warehouse, and the consignee inquires for them a number of times, but is told each time they are not there, the carrier is liable as a warehouseman for their destruction by fire, notwithstanding the fire may have occurred without any negligence on its part, as the failure to deliver was the proximate cause. East Tennessee, etc., R. Co. v. Kelly, 91 Tenn. (7 Pickle) 708, 20 S. W. 314, following Deming v. Merchants', etc., Storage Co., 90 Tenn. 306, 17 S. W. 89, 13 L. R. A. 518.

Instances where defendant not liable.—Barrels containing oil were carelessly handled by the employee of defendant, and, while leaking, were delivered to another carrier in an adjoining warehouse, where, through negligence of the other carrier, the oil took fire, and both warehouses were consumed. Held, that the first carrier was not liable for the destruction of the goods stored with it, under a bill of lading exempting defendant from liability by fire, since defendant's negligence was not the proximate cause of the loss. McMillan v. Michigan, etc., R. Co., 16 Mich. 79, 93 Am. Dec. 208.

In an action against a carrier for the

Delivery to Unauthorized Person.—A carrier whose liability has been reduced to that of a warehouseman is liable if it delivers the goods to an unauthorized person.[21]

Delivery Prevented Through Carrier's Negligence.—A carrier, when liable only as a warehouseman, is bound to deliver the goods on demand and payment of charges; and if, through its negligence delivery can not be procured, and goods are destroyed by fire, the carrier is liable.[22]

loss of lumber loaded in a car, it appeared that the car was furnished by the carrier and loaded with lumber, and that defendant was not notified that it was ready for shipment, nor of the name of the consignee. Held, that the fact that the carrier permitted the car, after it was loaded, to stand near a dry kiln, in which the fire originated, is not such negligence as will render it liable as a warehouseman, since it was merely a gratuitous bailee, and the destruction of the car would not be the actual and proximate consequence of the act complained of. Basnight *v.* Atlantic, etc., R. Co., 111 N. C. 592, 16 S. E. 323.

When grain stored in a carrier's elevator is destroyed by a fire not caused by its negligence, its delay in not removing the grain as speedily as it should have done does not render it liable for the loss; the fire, and not the delay, being the proximate cause of the loss. Davis *v.* Central Vermont R. Co., 66 Vt. 290, 29 Atl. 313, 45 Am. St. Rep. 852.

21. Delivery to unauthorized person.—*Alabama.*—Alabama, etc., R. Co. *v.* Kidd, 35 Ala. 209.

California.—Cavallaro *v.* Texas, etc., R. Co., 110 Cal. 348, 42 Pac. 918, 52 Am. St. Rep. 94.

Illinois.—Diamond Joe Line *v.* Carter, 76 Ill. App. 470.

Indiana.—Merchants,' etc., Transp. Co. *v.* Merriam, 111 Ind. 5, 11 N. E. 954.

The plaintiffs bought fifty barrels of flour, which were on deposit, at the time of the purchase, in the freight depot of a railroad company, taking from the vendor an order upon the company for their delivery, and presented the same at the depot. The defendants' clerk, in accordance with their usual practice, took the order, delivering a "flour check" in return, which was duly delivered by the plaintiffs to another clerk, who was authorized to deliver flour upon such checks, and take receipts on the backs of the checks, for the amounts delivered from time to time, until the checks were filled. Upon this check twenty-two barrels of flour were delivered to the plaintiffs, and twenty-eight to persons not authorized to receive them. Held, that the defendants were liable for the value of the twenty-eight barrels, irrespective of the degree of negligence of which they were guilty. Hall *v.* Boston, etc., R. Corp. (Mass.), 14 Allen 439, 92 Am. Dec. 783.

Plaintiff, in pursuance of an agreement with defendants, advanced money to purchase wheat at Toledo, Ohio, and the same was consigned to it at Oswego, on defendants' vessel, to be held by it as security for the advances, and to remain on board the vessel until sold. The bill of lading provided for the delivery to plaintiff, and was indorsed over and delivered to it. A portion of the wheat was sold and delivered on plaintiff's order, but the rest was removed and disposed of, without its consent, by the defendants. Held, that defendants were liable therefor as warehousemen, if not as carriers. Bank *v.* Doyle, 91 N. Y. 32, 43 Am. Rep. 634.

In an action against the owners of a steamer for nondelivery of goods transported by defendants, it appeared that on the arrival of the steamer the consignees were notified of her readiness to discharge the goods; that they obtained and furnished the necessary permit for the landing of the goods, but did not remove them, and they were placed by defendant upon the wharf, which was inclosed, and was the warehouse designated in the bill of lading; that the warehouse was under control of defendants, and at the gate was stationed a delivery clerk, who took receipts for the goods, and without whose consent the goods could not be removed; and that the goods were called for by a cartman not authorized to receive them, but who receipted for, and was allowed to remove, them. Held, that defendants were liable as warehousemen for the goods. Collins *v.* Burns, 63 N. Y. 1.

22. Delivery prevented through carrier's negligence.—Derosia *v.* Winona, etc., R. Co., 18 Minn. 133, Gil. 119, 8 Am. R. Rep. 363.

Illustrations.—Where the carrier has become liable only as a warehouseman, and the goods are demanded by the owner, and he is informed by its agent that the goods have not arrived, and afterwards the depot, together with the goods, is burned, the failure to deliver the goods on demand of the owner is such negligence as will render the company liable. Union Pac. R. Co. *v.* Moyer, 40 Kan. 184, 19 Pac. 639, 10 Am. St. Rep. 183.

Plaintiff, after the lapse of a reasonable time from the arrival of goods by defendant's railroad at their destination to take them away, about 4 o'clock in the afternoon went for them, found defend-

Storing Explosives with Goods.—It is negligence on the part of a carrier to place explosives in its warehouse, along with goods of a combustible nature, and it is liable for their destruction resulting from the presence of the explosives.[23]

That the floor of a warehouse was saturated with oil, and that the carrier permitted combustible material to be collected there, where there is nothing to show the cause of the fire that destroyed the warehouse and its contents, does not show negligence so as to authorize a recovery by one whose goods were burned.[24]

Particular Instances.—Allowing a drunken person to sleep in the warehouse,[25] or a wood fire to be made in a traction engine forty feet from a wooden depot roofed with shingles, where there is no reasonable grounds to apprehend danger,[26] is held not to be negligence. But allowing an engine to pass a platform, on which cotton is stored, at a high rate of speed, throwing sparks, shows negligence.[27] Further instances of negligence are set out in the notes.[28]

ant's warehouse open, but no one about, and after waiting fifteen or twenty minutes, and no one coming, went away, and did not return that day. The morning of the following day the warehouse, with the goods, was destroyed by fire. Held that, unless the absence of all persons from the warehouse at that time would have been permitted by a warehouseman of ordinary prudence and care, defendant was guilty of negligence, for which it might be liable; and if an ordinarily prudent man, after waiting as plaintiff did, might reasonably conclude that to wait longer, or call again that afternoon, within the usual business hours, would have been useless to enable him to procure the delivery of the goods, he would be justified in doing neither, and the loss occurring thereby might be attributed to the negligence of defendant. Derosia *v.* Winona, etc., R. Co., 18 Minn. 133, Gil. 119, 8 Am. R. Rep. 363.

23. **Storing explosives with goods.**—White *v.* Colorado Cent. R. Co., Fed. Cas. No. 17,543, 5 Dill. 428, 3 McCrary 559.

While plaintiff's goods were lying in the freight depot of the defendant railway company, which was responsible for them as warehouseman, a drayman brought a carboy of sulphuric acid to the depot, and left it inside. The defendant's rules forbade receiving acid into the depot, but all the defendant's employees were engaged elsewhere, and there was no one to enforce the rule, or see where the acid was placed. In consequence of a leak in the carboy, an explosion was caused, which set fire to the depot, and plaintiff's goods were destroyed. Held, that defendant was negligent. Farmers' Loan, etc., Co. *v.* Oregon R., etc., Co., 73 Fed. 1003.

24. Texas Cent. R. Co. *v.* Flanary (Tex. Civ. App.), 50 S. W. 726.

25. **Drunken person sleeping in warehouse.**—Young *v.* Wilmington, etc., R. Co., 116 N. C. 932, 21 S. E. 177.

26. **Allowing fire near warehouse.**—Lewis, etc., Co. *v.* Louisville, etc., R. Co., 13 Ky. L. Rep. 144.

27. **Allowing engine to pass throwing sparks.**—Texas, etc., R. Co. *v.* Wever, 3 Texas App. Civ. Cas., § 60.

28. **Damage from flood.**—In an action against a carrier for damages to goods consisting of books, it appeared that the goods were unloaded upon the wharf, and notice of their arrival sent to the consignee. The wharf was well covered, and, save for its proximity to the water, a secure place for storage. The damage was caused by the wharf becoming flooded, due to a violent rainstorm. It appeared that this was the first time the part of the wharf on which the goods were stored had been flooded within twenty years. Both a day and a night watchman were employed at the wharf. The rainstorm began about 12 p. m., and the wharf became flooded about 2 p. m., when the watchman attempted, without success, to remove the goods. Held a finding that the carrier, as a warehouseman, was negligent in caring for the goods, would not be disturbed. Merchants', etc., Transp. Co. *v.* Story, 50 Md. 1, 33 Am. Rep. 293.

Failure to take receipt.—Certain goods were discharged from defendant's steamer on its private wharf, to which only defendant, and those permitted by it, had access; the owner had constructive possession, but delayed removing them, and left them in charge of defendant, during which time they were lost. It was defendant's rule that no goods should be taken from the wharf without a receipt, but no receipt was taken for the missing goods. Held, that defendant was negligent in not taking a receipt, as the property could not have been removed without its consent, tacit or otherwise. Tarbell *v.* Royal Exch. Shipping Co., 110 N. Y. 170, 17 N. E. 721, 6 Am. St. Rep. 350, reversing 53 N. Y. Super. Ct. 190.

Express companies. — Property was locked up in a safe, and the key was put in the coat pocket of the expressman,

§§ 1101-1104. Actions against Carrier as Warehouseman—§ 1101. In General—Pleading.—There is no distinction between the right of a consignor to sue a carrier and his right to sue a warehouseman, either in tort or on contract.[29] The storage of the goods does not create a new contract, which must be pleaded and distinguished from the original contract of transportation in order to recover the goods or their value.[30] And an objection that a carrier was sued as such, whereas the evidence showed its liability to be that of a warehouseman, is untenable, where answer in confession and avoidance presented issue of liability as a warehouseman.[31]

§ 1102. Evidence.—Presumption and Burden of Proof.—Where the relation of common carrier is once shown to have existed if the carrier seeks to escape liability on the ground that its responsibility for the safety of the freight, at the time the loss or injury complained of occurred, was that of a warehouseman only, it has the burden of producing evidence in support of such contention.[32] It is held that in an action against a carrier as warehouseman, the burden of proving negligence is upon the plaintiff.[33] But it is also held that where

which was left hanging near an open window of a room on the ground floor of a house in the city, where the expressman, who was a sound sleeper, slept, and the key was stolen, the safe opened, and the property stolen. The company was held liable. American Exp. Co. *v.* Baldwin, 26 Ill. 504, 79 Am. Dec. 389.

In an action against an express company, as warehouseman, to recover a package of money, it appeared that defendant's agent, on retiring, placed the money on his dresser, and that he did not miss it till the consignee called for it on the following day, at which time, instead of going to the dresser, he looked for it in his express case and other places, and stated that he must have sent the money away that morning by mistake. It did not appear that the door of the agent's sleeping room was locked, and there was no evidence of a theft or loss of the money, other than the fact that it was missing. Held, that a verdict for plaintiff was warranted. Bagley Elevator Co. *v.* American Exp. Co., 63 Minn. 142, 65 N. W. 264.

An express clerk attempted to deliver a package at the office of the owner, which he found closed. He left a notice, which was received by an employee of the owner, who went to the express office for the package, but was told that the clerk had not returned yet. On the return of the clerk, the package was placed in a fireproof safe. No demand was made for it afterwards. A fire occurred, and the package was lost by the watchman taking it, with other packages, from the safe to send it to a place of safety. Held, that there was not sufficient evidence of negligence on the part of the company or its agents to render it liable for the loss. Howard Exp. Co. *v.* Wile, 64 Pa. 201.

Failure to notify consignee of fire.—Where a freight car containing plaintiff's merry-go-round was burned at night before it was unloaded, and there was no evidence that the carrier's night dispatcher knew where plaintiff resided or his telephone call, and plaintiff could not have reached the fire in time to have saved any of his property if he had been notified promptly, the railroad company was not negligent in failing to do so. Adix *v.* Chicago, etc., R. Co., 150 Iowa 379, 130 N. W. 162.

29. Action against carrier as warehouseman.—Edgerton *v.* Chicago, etc., R. Co., 240 Ill. 311, 88 N. E. 808.

30. Pleading.—Wilson *v.* California Cent. R. Co., 94 Cal. 166, 29 Pac. 861, 17 L. R. A. 685; Hoyt *v.* Nevada County, etc., R. Co., 68 Cal. 644, 10 Pac. 187.

31. See Texas, etc., R. Co. *v.* Morse, 1 Texas App. Civ. Cas., § 411.

32. Responsibility as warehouseman only.—Peoria, etc., R. Co. *v.* United States Rolling Stock Co., 136 Ill. 643, 27 N. E. 59, 29 Am. St. Rep. 348; Chicago, etc., R. Co. *v.* Warren, 16 Ill. 502.

33. Burden of proving negligence.—*United States.*—De Grau *v.* Wilson, 17 Fed. 698, affirmed in 22 Fed. 560; Strauss *v.* Wilson, 17 Fed. 701.

Illinois.—Chicago, etc., R. Co. *v.* Kendall, 72 Ill. App. 105.

Kentucky.—See Adams Exp. Co. *v.* Tingle, 10 Ky. L. Rep. 358.

Mississippi.—Gulf, etc., R. Co. *v.* Ferguson-McKinney Dry Goods Co., 97 Miss. 266, 52 So. 797.

Missouri.—Standard Mill. Co. *v.* White Line Cent. Transit Co., 122 Mo. 258, 26 S. W. 704, 61 Am. & Eng. R. Cas. 185.

New York.—Grieve *v.* New York, etc., R. Co., 49 N. Y. S. 949, 25 App. Div. 518; Lyons *v.* New York, etc., R. Co., 119 N. Y. S. 703, affirmed in 120 N. Y. S. 1132, 136 App. Div. 903.

New Jersey.—Frank Bros. & Co. *v.* Central R. Co., 9 Pa. Super. Ct. 129.

North Carolina.—Young *v.* Wilmington, etc., R. Co., 116 N. C. 932, 21 S. E. 177.

Pennsylvania.—Moyer *v.* Pennsylvania

a carrier, liable as a warehouseman, fails to deliver on demand goods intrusted to it, or does not account for such failure, prima facie negligence will be imputed to it,[34] and it has the burden of showing that the loss was not occasioned by its negligence.[35] And it can not rebut this presumption by mere proof that the goods can not be found, without any affirmative explanation for their disappearance.[36] Where the nature of the accident itself affords prima facie proof of negligence, the failure of the carrier to furnish proof that it took proper precautions may subject it to the inference that such precautions were omitted.[37] So where it is shown that the fire causing the loss was set by sparks from defendant carrier's engine,[38] or occasioned by the carelessness of its employees,[39] it has the burden of proving that the loss was not due to its negligence.

Admissibility of Evidence.—Generally evidence relevant and material to the issues raised by the pleadings is admissible to show the carrier's negligence or freedom from negligence and the care used by it in the custody of the goods in an action against it as a warehouseman.[40] Accordingly evidence as to the existence of labor disturbances,[41] the character and location of the warehouse,[42]

R. Co., 31 Pa. Super. Ct. 559; Frank Bros. & Co. v. Central R. Co., 9 Pa. Super. Ct. 129.

Under a bill of lading exempting carrier from loss by fire in an action against it for goods destroyed by fire in its warehouse, where they were awaiting reshipment to the point of their destination, plaintiff can not recover, unless he proves negligence. Hornthal v. Roanoke, etc., Steamboat Co., 107 N. C. 76, 11 S. E. 1049.

Defense not implicating bailee in negligence.—It is a sufficient defense if the bailee accounts for a loss in a way not implicating himself in negligence unless the bailor proves negligence. Farnham v. Camden, etc., R. Co., 55 Pa. 53.

34. Failure to deliver on demand.—Southern R. Co. v. Aldredge, 142 Ala. 368, 38 So. 805, 25 Am. & Eng. R. Cas., N. S., 519; Wilson v. Southern Pac. R. Co., 62 Cal. 164; Aaronson v. Pennsylvania R. Co., 23 Misc. Rep. 666, 52 N. Y. S. 95.

The disappearance of goods in the possession of a carrier holding them as warehouseman only raises a presumption of negligence on its part in the care of the goods. Lyons v. New York, etc., R. Co., 120 N. Y. S. 1132, 136 App. Div. 903, affirming 119 N. Y. S. 703.

35. *Alabama.*—Southern R. Co. v. Aldredge, 142 Ala. 368, 38 So. 805, 25 Am. & Eng. R. Cas., N. S., 519. But see Frederick v. Louisville, etc., R. Co., 133 Ala. 486, 31 So. 968. Compare Collins v. Alabama, etc., R. Co., 104 Ala. 390, 16 So. 140, 61 Am. & Eng. R. Cas. 229, holding that plaintiff must prove negligence.

California.—Wilson v. California Cent. R. Co., 94 Cal. 166, 29 Pac. 861, 17 L. R. A. 685; Jackson v. Sacramento Valley R. Co., 23 Cal. 268.

Connecticut.—Boies v. Hartford, etc., R. Co., 37 Conn. 272, 9 Am. Rep. 347.

Georgia.—Almand v. Georgia R., etc., Co., 95 Ga. 775, 22 S. E. 674.

Massachusetts.—Cass v. Boston, etc., R. Co. (Mass.), 14 Allen 448. Compare Lamb v. Western R. Corp. (Mass.), 7 Allen 98, holding that if the plaintiff proves simply that the goods were stolen from the depot, and fails to offer any evidence of a want of ordinary care on the part of the carrier, the judge may properly rule that the evidence is insufficient to maintain the action.

South Carolina.—Wardlaw v. South Carolina R. Co., 11 Rich. L. 337.

South Dakota.—Farmen v. United States Exp. Co., 25 S. Dak. 96, 125 N. W. 575.

36. Aaronson v. Pennsylvania R. Co., 52 N. Y. S. 95, 23 Misc. Rep. 666.

37. Where accident shows prima facie negligence.—Russell Mfg. Co. v. New Haven Steamboat Co., 50 N. Y. 121.

38. Fire from engine.—Leland v. Chicago, etc., R. Co. (Iowa), 23 N. W. 390.

39. Carelessness of employees.—St. Louis, etc., R. Co. v. Martin (Tex. Civ. App.), 35 S. W. 28.

40. Admissibility of evidence.—In an action against a railroad company for damage to merchandise after it had been unloaded from the cars, and after the consignee had been notified that it was exposed and could not be stored, evidence for the defendants that the consignee was usually notified, upon the arrival of merchandise for him, that it could not be stored and must be immediately removed, is admissible, as bearing both upon the defendants' negligence and upon the reasonableness of a delay on the part of the consignee in removing the goods. Stowe v. New York, etc., R. Co., 113 Mass. 521.

41. Existence of labor disturbances.—Upon the issue as to the negligence of a railroad company in failing to employ a sufficient number of watchmen to guard a large quantity of cotton piled upon its wharf against fire, evidence as to the existence at the time of labor disturbances relating to men employed on ships loading at such wharf was competent. Texas, etc., R. Co. v. Contourie, 135 Fed. 465, 68 C. C. A. 177.

42. Character and location of depot.—In an action against a railroad company

that defendant had negligently stored inflammable materials therein,[43] the custom of other carriers as to keeping night watch, etc.,[44] that the defendant used the care usually exercised in the vicinity by other carriers,[45] that on account of an accumulation of freight in the warehouse which could not be moved because of the low stage of water, the plaintiff's goods were detained until destroyed by fire,[46] is held admissible. One of the issues being as to the negligence of defendant, goods in its depot having been destroyed by fire set by lightning, testimony of an expert as to the test of the lightning arrester some time before the fire is competent.[47] Defendant, being sued as a common carrier, and claiming that it held the goods destroyed as a warehouseman only, may show that they were not left for immediate shipment, but were to be held till the rest were brought the next morning.[48]

Evidence Inadmissible.—In an action against a carrier as warehouseman for the loss of goods, evidence by the defendant that other goods of the same kind were always cared for in the same manner, and that none had been lost before, is immaterial;[49] and a contract limiting liability as carrier is also immaterial.[50] In such an action evidence as to the carrier's custom of storing goods of its employees,[51] and as to how far plaintiff lived from the depot,[52] has been held inadmissible.

Instances of sufficiency of evidence as to ordinary care,[53] and to show

to recover the value of goods destroyed by fire alleged to have been due to defendant's negligence while they were in its hands as carrier, and stored in its depot, plaintiff may show the character and location of the depot, the materials of which it was composed, its liability to take fire on exposure, etc., to show defendant's negligence in failing to store the goods in a reasonably safe warehouse. Whitney *v.* Chicago, etc., R. Co., 27 Wis. 327; Bates *v.* Chicago, etc., R. Co., 140 Wis. 235, 122 N. W. 745.

In an action against a carrier to recover for goods lost by fire while stored in a warehouse, through the alleged negligence of defendant in storing them in an unsafe place, evidence is admissible showing the condition of surrounding buildings, or that smoking in the locality had been prohibited by a city ordinance, as bearing on the issue as to such negligence. Judd *v.* New York, etc., Steamship Co., 130 Fed. 991.

Evidence as to the sufficiency of the freight house for the business usually done and as to its contents at the time of the damage, is admissible upon the question of the care used by the carrier in the custody of the merchandise. Stowe *v.* New York, etc., R. Co., 113 Mass. 521.

43. Negligence storing of inflammable materials.—In an action against the receivers of a railroad company for the loss of a lot of wool by fire while in the freight house, evidence that oil had been stored therein, and leaked out upon the floor, and that other inflammable materials were in the end near the wool, and that the adjacent windows were broken, within 30 feet of which a locomotive had passed 15 minutes before the fire was discovered, is proper for the jury on the issue of a want of ordinary care as warehouseman. Nichols *v.* Smith, 115 Mass. 332.

44. Evidence as to custom.—Evidence that it was customary for a railroad company, in that part of the country, to keep a night watch about its freight depot, a light burning in the office, etc., is not conclusive upon the point whether a company, whose general practice was in accordance with such custom, had exercised ordinary care as to goods stored therein, but is evidence for the jury to consider in that connection. Derosia *v.* Winona, etc., R. Co., 18 Minn. 133, Gil. 119, 8 Am. R. Rep. 363.

45. That defendant exercised usual care.—Cass *v.* Boston, etc., R. Co. (Mass.), 14 Allen 448; Lane *v.* Boston, etc., R. Co., 112 Mass. 455.

46. Accumulation of freight in warehouse.—Hornthal *v.* Roanoke, etc., Steamboat Co., 107 N. C. 76, 11 S. E. 1049.

47. Expert testimony.—Missouri Pac. R. Co. *v.* Riggs, 10 Kan. App. 578, 62 Pac. 712.

48. Missouri Pac. R. Co. *v.* Riggs, 10 Kan. App. 578, 62 Pac. 712.

49. Evidence held immaterial.—Lane *v.* Boston, etc., R. Co., 112 Mass. 455.

50. Contract limiting liability.—Union Pac. R. Co. *v.* Moyer, 40 Kan. 184, 19 Pac. 639, 10 Am. St. Rep. 183.

51. Evidence of custom.—Merchants', etc., Transp. Co. *v.* Story, 50 Md. 4, 33 Am. Rep. 293.

52. Southern R. Co. *v.* Aldredge, 142 Ala. 368, 38 So. 805.

53. Sufficiency of evidence as to ordinary care.—Defendant undertook to carry a package of money consigned to plaintiff. The package arrived at its destination on Monday evening, of which fact the consignee, who lived about a mile from the station, was informed on the

custom,[54] are set out in the notes.

§ 1103. Instructions.—Where the only issue is as to defendant's liability as a carrier, it is error to charge the jury upon any theory of liability as warehouseman.[55] And where the only issue is whether defendant is guilty of negligence in burning goods, it is error to give an instruction based on a hypothetical delivery to defendant for shipment.[56] A charge that if the defendant failed to deliver the property and undertook to deposit it in its warehouse, its liability would be that of a warehouseman, correctly submits to the jury the question whether defendant delivered the property to its agent to be deposited in its warehouse or to plaintiff.[57] It is proper to refuse a requested charge, requiring too high a degree of proof,[58] or one not supported by the evidence.[59] Where

same day. Defendant's agent testified that he saw the package in the drawer, where valuables were kept, Tuesday evening; that next morning, when he went to the office, he discovered that the storeroom in which the office was kept had been entered in the night, but that he did not look after the money in question until noon, when for the first time he discovered that it was gone. Defendant moved the court to instruct the jury, as a matter of law, that defendant had exercised ordinary care for the safety of the money. Held that, since defendant assumed the burden and therefore necessarily undertook to show that it had exercised ordinary care in the keeping of the money, the court could not say that its own evidence was conclusive on plaintiff. Adams Exp. Co. v. Tingle, 10 Ky. L. Rep. 358.

Plaintiff's goods, after being transported by defendant, a common carrier, were upon the latter's wharf, and were destroyed by fire occurring in the nighttime, originating on the wharf. A large quantity of other freight was on the wharf, and was also destroyed. Evidence was given tending to show that no apparatus or means for extinguishing fires were kept there. A private watchman was left in charge with some colored men, but neither of them were produced as witnesses, nor did it appear that he was at his post, or that any person was on the wharf when the fire broke out. Held, that the evidence was such as to require the submission of the question of negligence to the jury. Russell Mfg. Co. v. New Haven Steamboat Co., 50 N. Y. 121.

Evidence that a railroad company, which has in its custody as warehouseman a valise containing property of value, placed it upon the floor of its dock, which was guarded by watchmen, who checked off everything that went out, is not in itself sufficient to establish conclusively that the disappearance of the contents of the valise in question was not due to want of proper care. Aaronson v. Pennsylvania R. Co., 52 N. Y. S. 95, 23 Misc. Rep. 666.

54. Evidence insufficient to show custom.—Evidence that the carrier had been in the habit of notifying a particular customer by postal card of the arrival of his goods, and informing him that storage or demurrage would be charged thereon unless they were called for within the time specified, and had also given messages by telephone and otherwise to other customers, in some of which it was stated that unless the goods were removed as requested they would be held or stored at the owner's risk, is insufficient to show a custom varying the general rule that after the arrival of the goods at their destination the carrier is only liable as a warehouseman. Georgia, etc., R. Co. v. Pound, 111 Ga. 6, 36 S. E. 312.

55. Instructions.—St. Louis, etc., R. Co. v. Knight, 122 U. S. 79, 7 S. Ct. 1152, 30 L. Ed. 1077.

56. Gulf, etc., R. Co. v. Courtney (Tex. Civ. App.), 23 S. W. 226.

57. Georgia R., etc., Co. v. Thompson, 86 Ga. 327, 12 S. E. 640, 45 Am. & Eng. R. Cas. 422.

58. Charge requiring too high degree of proof.—Southern R. Co. v. Aldredge, 14 Ala. 368, 38 So. 805, where the court refused a requested instruction that, if the jury were not satisfied to a reasonable certainty whether the goods were left with defendant at defendant's risk or at plaintiff's risk, the jury could not find a verdict for plaintiff.

59. Charge unsupported by evidence.—Galveston, etc., R. Co. v. Smith, 81 Tex. 479, 17 S. W. 133.

Illustrations.—Where in an action for value of goods destroyed by fire while in a railway depot, the testimony showed that employees of the railway company in charge of the depot were engaged in saving the property during the fire, in the discharge of their duties, it was proper to refuse an instruction that the railway company would not as a warehouseman be responsible for the negligence of its servants about matters not in line of their duty. Galveston, etc., R. Co. v. Smith, 81 Tex. 479, 17 S. W. 133.

Where, in an action against a carrier for loss of goods stored, there was no evidence that A. received the goods from the carrier's agent, but the evidence was clear that the goods never went out of the possession of defendant's agent until they were lost, a requested instruction

improper evidence has been admitted over objection, it is error for the court to refuse to charge that such evidence could not be considered for any purpose.[60] Error in charging[61] or refusing to charge[62] may be cured by instructions.

§ 1104. Finding.—In an action against carrier for loss of goods by fire, where the issue presented by the pleadings was whether defendant negligently allowed the goods to remain in the depot without notice to the consignee, a finding that the consignee did not have reasonable time to inspect and remove the goods in the usual course of business after they were received, and before they were destroyed, is outside the issue.[63]

that if defendant received the goods from the carrier's agent, and asked him to allow them to remain until he could send back for them, and when he sent back for them they were not there, such facts did not establish defendant's negligence, was properly refused. Southern R. Co. *v.* Aldredge, 38 So. 805, 142 Ala. 368.

60. Where improper evidence admitted.—Southern R. Co. *v.* Aldredge, 142 Ala. 368, 38 So. 805 (fact that plaintiff lived 27 miles from depot).

61. Instructions curing error.—In an action against a railroad company, as warehousemen, for a failure to deliver property received by them, the judge's instruction, "that if the property was taken by mistake from the defendants' depot, and they exercised ordinary care in the matter, they would not be liable," when taken in connection with the instruction, "but if the defendants' agent delivered it by mistake to a wrong person they would be answerable," is no cause for a new trial. Lichtenhein *v.* Boston, etc., R. Co. (Mass.), 11 Cush. 70.

62. A charge that the burden was on plaintiff to prove to a reasonable certainty that the goods were lost on account of defendant's negligence, and if the evidence as to negligence was so equally balanced that the jury were not convinced to a reasonable certainty that the goods were lost on account of negligence, and if the goods were kept in defendant's depot with reasonable care, plaintiff could not recover, cured error in refusing to charge that if the jury were reasonably satisfied that the defendant kept the goods in its depot with reasonable care, and that some one stayed in the depot in the day, and kept it locked at night, plaintiff could not recover. Southern R. Co. *v.* Aldredge, 38 So. 805, 142 Ala. 368.

63. Finding outside of issue.—Missouri Pac. R. Co. *v.* Newberger, 63 Kan. 884, 65 Pac. 655.

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